

# Products Liability, Fall Semester 2007

Excerpt 1

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"GOOD" WARNINGS, BAD PRODUCTS, AND COGNITIVE LIMITATIONS

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## INTRODUCTION

When manufacturers choose to minimize product risks by using warnings rather than safer product designs, consumers must protect themselves against hazards that might feasibly have been eliminated. In effect, warnings impose the ultimate responsibility for accident prevention on product users. The precise legal issue examined in this Article is whether "good" warnings should be treated as acceptable substitutes, or only as supplements, for safe product designs and marketing practices. On a broader plane, the Article examines numerous information processing and decisionmaking problems that reduce the efficacy of any legally-mandated disclosure requirement. Product warnings and other disclosure mechanisms can be effective only when intended recipients are able to receive, comprehend, and act upon the information imparted. These conditions raise difficult empirical questions that must be resolved through careful behavioral assessments, not through ideological convictions or wishful thinking.

Current tort doctrines allow and may encourage manufacturers to market unsafe products accompanied by "good" warnings of the dangers. In *Skyhook Corp. v. Jasper*, for example, a crane could have been insulated against electric shock at modest cost; instead, the manufacturer simply warned users never to bring the device within 10 feet of a high-voltage power line. Because the operators accidentally positioned it closer to electric wires than the "good" warning directed, the court refused to decide whether the crane's design was unreasonably dangerous. In *Sherk v. Daisy-Heddon*, the court refused to determine whether a "toy" BB-gun with lethal power was unreasonably dangerous because the child user failed to read the "good" warning against pointing the gun at any person. In *Dugan v. Sears, Roebuck & Co.*, the court refused to assess whether a lawnmower with inadequate protective skirts was unreasonably dangerous because the user failed to obey this ostensibly "good" warning: Do not allow anyone in the area while cutting. Keep children and pets in the backyard while mowing the front yard. Keep a wary eye out for children or passersby. Stop the engine while they are in the vicinity of your mower.... [ [A]lthough the area mowed should be completely cleared of foreign objects, a small object could be accidentally thrown by the mower.

These cases reflect the manufacturer's capacity to choose between safer product designs and "good" warnings that require consumers to protect themselves and other people whenever they use the product. The legal exculpatory effect when manufacturers put "good" warnings on bad products should, at the very least, depend on the propensity of users to read, understand, and follow the

warnings. Yet, courts ordinarily presume as a matter of law that people will obey all "good" warnings. This unrealistic behavioral presumption is clearly and influentially incorporated in the Restatement (Second) of Torts section 402A comment j, which concludes: "Where [adequate] warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."

Once a court finds that the given warning is legally adequate, the comment j presumption and similar exculpatory doctrines preclude judicial evaluation of the product's overall safety if the user fails to comply with the "good" warning. These legal treatments truncate the court's liability analysis by excluding consideration of better product designs, product substitutes, marketing practices, or better warnings that could reduce accident risks. Courts in "good" warning cases have typically been unwilling to determine whether manufacturers provided "the maximum of protection" or even a reasonable level of protection on the ground that users could have avoided the injuries if they had heeded the product warnings.

The legal treatment of "good" warnings raises, in perhaps its most striking form, the fundamental question whether manufacturers or consumers should bear the primary responsibility for accident prevention in product-use settings. If a warning is deemed "good," users theoretically could prevent injuries by recognizing and avoiding product hazards. On the other hand, manufacturers can prevent many injuries that occur when consumers do not follow warnings and instructions. Manufacturers can employ risk-assessment specialists to compile actuarial histories of accident causes and experts to develop cost-effective safety measures. These capabilities may enable manufacturers to determine whether people are likely to ignore particular warnings, whether consumers have often been injured despite warnings, and whether accidents can feasibly be prevented by improved product designs or marketing. Yet, without regard to the incidence of inattentive consumer behavior or the feasibility of better preventive measures, the comment j presumption imposes losses on accident victims whenever users do not obey "good" warnings.

Excerpt 2.

**BAD DESIGNS, LETHAL PROFITS: THE DUTY TO PROTECT OTHER  
MOTORISTS AGAINST SUV COLLISION RISKS**

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INTRODUCTION

In this era of active products liability litigation and frequent media coverage of product safety issues, it is surprising that one kind of product-related accident has caused thousands of avoidable deaths and injuries but has received virtually no legal attention. This Article focuses on a major public safety issue that can only be described as a products liability mystery: Sport Utility Vehicles (“SUVs”) are probably the most dangerous products (other than tobacco and alcohol) in widespread use in the United States. Many design defect suits have been brought against SUV manufacturers for selling unreasonably dangerous vehicles that failed to protect their own occupants from harm. Yet, there has been almost no legal attention devoted to the dangers of defective SUV designs for the occupants of other vehicles in collisions with SUVs.

High collision fatality risks for other motorists arising from crashes between SUVs and passenger cars have been thoroughly documented: One statistical study by the National Highway Traffic and Safety Administration (“NHTSA”) derived from 1999 data concluded that SUV designs were causing nearly 1000 “unnecessary deaths a year in other vehicles.” Another NHTSA study found that midsize SUVs, such as the Chevrolet Blazer and Nissan Pathfinder, were three times as likely to kill other motorists in a collision as large passenger cars of approximately the same weight. A study by a prominent traffic-safety statistician commissioned by NHTSA concluded that Ford Explorers killed ten passenger car occupants for every 1,000 crashes reported to police between 1991 and 1997, while competing midsize SUVs, such as the Jeep Grand Cherokee, Toyota 4Runner, and Chevy Blazer, killed five to seven car occupants for every 1,000 collisions between these SUVs and passenger cars. In comparison, the fatality rate for multi-vehicle crashes among passenger cars was six-tenths of a death per 1,000 collisions. In other words, the Ford Explorer was more than a dozen times more likely to kill the occupants of other vehicles in collisions during this seven-year period compared to the fatality rate in crashes among passenger cars.

With regard to side-impact crashes, research conducted by the Insurance Institute for Highway Safety (“IIHS”) found that when a large SUV, such as a Chevrolet Suburban, hits the side of an average-size car, the car driver is 48 times more likely to die than the driver of the SUV. The IIHS concluded that the occupants of a car hit in the side by another passenger car were approximately seven times more likely to die than occupants in the encroaching auto, but the fatality rate was 26 times higher when a car was broadsided by an SUV or pickup truck. Based on IIHS and NHTSA evidence of striking disparities in SUV collision risks for occupants of other vehicles, some of the nation’s largest auto insurance companies have begun to raise their liability insurance premiums for SUVs.

Despite the thousands of motorists in other vehicles killed or injured each year as a result of arguably defective SUV designs, we have not found a single law review article or treatise focusing on this serious public safety problem, and we have identified only one case holding that SUV manufacturers have “no duty” to protect the passengers in other vehicles. The absence of legal attention to high SUV collision risks is especially puzzling because, as explained in Part II, the judicially-determined defective design characteristics that caused many fatal rollover accidents for occupants of SUVs have also been primarily responsible for many unnecessary deaths and injuries of people in other vehicles. For every additional SUV on American roads, the collision fatality risk for other motorists increases by more than if any other kind of passenger vehicle had been purchased instead.

Despite ample evidence that SUVs are much more dangerous than passenger cars in crashes with other vehicles, we have found no judicial or academic assessments of the specific design attributes that make SUVs more lethal. Perhaps one reason for the legal vacuum surrounding SUV collision hazards is that many people may believe these risks result from the inherent characteristics of SUV designs, specifically their large size and weight, which cannot be eliminated without losing the main attractions of SUV ownership. If this view were correct, the excess deaths associated with SUV collisions might be regarded as effectively “unavoidable.”

However, this Article demonstrates that the inherent characteristics of SUVs are not the primary reason for their disproportionate collision risks. IIHS statistics, for example, show that for every million registered cars weighing between 3,500 and 3,999 pounds, the collision fatality rate for motorists in other passenger cars is 45 deaths; but in collisions between cars and SUVs of the same sub-two-ton weight class, the fatality rate among motorists in other vehicles rises to 76 deaths per million. At an auto industry conference in 1999, a General Motors safety engineer acknowledged that when passenger vehicles are struck in the side, the stiffness, height, width, and curvature of the striking vehicle’s front end are each more important than the striking vehicle’s weight. Although SUV size and weight are important risk factors, we believe safer SUVs could have been produced at any time during the past two decades and these safer SUV designs could have avoided many multi-vehicle collision fatalities with little or no reduction in product utility. The SUV design history discussed below suggests that the SUV manufacturers simply did not care and did not try, until recently, to reduce collision dangers for drivers in other vehicles.