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The Use of OSHA in Products Liability Suits Against the Manufacturers of Industrial Machinery

NOTES

THE USE OF OSHA IN PRODUCTS LIABILITY SUITS AGAINST THE MANUFACTURERS OF INDUSTRIAL MACHINERY

INTRODUCTION

Until recently, the sole action of an industrial worker injured by machinery has been against his employer. Workmen's compensation acts, in effect in all states, impose upon many employers a form of strict liability for factory injuries.[1] These statutes make recovery for the worker considerably easier than it was at the common law, since the employer cannot raise defenses relating to the employee's contributory negligence or assumption of risk.[2] In return for the facility of this compensation, the employee is barred from asserting any further claims against his employer based on non-statutory grounds.[3] In addition, the amount of recovery is usually more limited than that which a jury might award.[4] While lost wages are recoverable by the worker, damages relating to the permanent nature of the injury are limited by statutory ceilings which may be inadequate. Furthermore, pain and suffering often must remain uncompensated under workmen's compensation.[5]

Although there has been no reform in many states' workmen's compensation laws, the growing body of products liability law has opened a new route to the compensation of factory workers.[6] If a dangerous machine caused the injury, and such danger can be traced to the machinery's manufacturer, the worker may now sue this "third-party" manufacturer directly in tort.[7] Such suits have

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1. *See generally* IND. CODE §§ 22-3-2-1 et seq. (1971).
2. *Id.* § 22-3-2-10.
3. *Id.* § 22-3-2-6.
4. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 531 (4th ed. 1972) [hereinafter cited as PROSSER]. The scope and limits of remedies for particular injuries available under Indiana law may be found in IND. CODE §§ 22-3-3-1 et seq. (1971).
5. *See generally* Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident*, 14 DUQ. L. REV. 349 (1976). This article reviews the history of industrial accident compensation and discusses workmen's compensation ceilings, the subrogation of the employer to employee's claim against the third-party manufacturer after a successful products suit, and some of the key problems of policy involved here.
6. An excellent practice manual for this developing area of law is L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY (1970) [hereinafter cited as FRUMER & FRIEDMAN].
7. "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a

become very prevalent in recent years, especially since the Restatement of Torts has recognized the strict liability of the sellers of unreasonably dangerous products to ultimate consumers.[8] Under

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defect that causes injury to a human being." Greenman v. Yuba Power Products, 59 Cal. 2d 57, 62, 377 P.2d 897, 900 (1962). The purpose of this doctrine is to "insure that the costs of injuries resulting from defective products" are passed on to the manufacturers of such products. 59 Cal. 2d at 63, 377 P.2d at 901.

See also Liberty Mutual Ins. Co. v. Williams Machine & Tool Co., 62 Ill. 2d 77, 338 N.E.2d 857, 860 (1975):

> The major purpose of strict liability is to place the loss caused by defective products on those who create risk and reap the profit by placing a defective product in the stream of commerce, regardless of whether the defect resulted from the "negligence" of the manufacturer. We believe that this purpose is best accomplished by eliminating negligence as an element of any strict liability action . . . .

8. RESTATEMENT (SECOND) OF TORTS § 402A (1965):

Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his product is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
   (a) the seller is engaged in the business of selling such a product, and
   (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
   (a) the seller has exercised all possible care in the preparation and sale of his product, and
   (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

This note has been written in the midst of an important controversy about the meaning of the term "unreasonably dangerous" as embodied in the Restatement. In *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972), the Supreme Court of California held that it was most consistent with the policy of strict liability as stated in *Greenman v. Yuba*, *supra* note 7, to eliminate all concepts which "ring in negligence" from strict liability. It was felt that the term "unreasonably dangerous" injected "reasonable man" considerations into strict liability cases, and thus the court returned to the defect focus of *Greenman*.

In light of *Ault v. International Harvester Co.*, 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1975), *vacating* 10 Cal.2d 337, 515 P.2d 313, 110 Cal. Rptr. 369 (1973), discussed at notes 186-88 *infra* and accompanying text, the present note uses *"Greenman* strict liability" rather than "Restatement strict liability" for the purpose of analysis. This attitude runs throughout this note and is especially important in the concluding section on "OSHA and the Expanding Duties of Product Manufacturers." It was necessary to adopt this approach because, although the Restatement sets a "rule," the opinions of Chief Justice Traynor in *Greenman* and *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436, 440 (1944) (Traynor, J., concurring), best articulate the *reasons* for the rule. However it succeeds or fails, the *Ault* decision attempts to face and develop the underlying policy considerations of strict liability in a way that most cases do not. Such policy considerations are central to any attempt to analyze the possible introduction of OSHA regulations as evidence in third-party suits. An excellent review of California strict liability may be found in Note, *Reasonable Product*

this theory, the plaintiff-employee need no longer prove a negligent act or omission of the manufacturer. Strict liability attaches without regard to fault and despite the fact that the manufacturer may have exercised all possible care.[9] Thus, it is now much more feasible for the worker to be compensated to the full extent of his injuries. The portion of damages he cannot recover from his factory-employer may yet be recovered from the manufacturer in a products liability suit.

Whether the plaintiff's theory of products liability recovery is strict liability, negligence[10] or implied warranty,[11] his burden of

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Safety: Giving Content to the Defectiveness Standard in California Strict Liability Cases, 10 U.S.F.L. REV. 492 (1976).

In *Berkebile v. Brantley Helicopter Corp.*, 337 A.2d 893, 900 (Pa. 1975), Pennsylvania Chief Justice Jones adopted the *Cronin* approach, stating:

> The "reasonable man" standard in any form has no place in a strict liability case. The salutary purpose of the "unreasonably dangerous" qualification is to preclude the seller's liability where it cannot be said that the product is defective; this purpose can be met by requiring proof of a defect.
>
> To charge the jury or permit argument concerning the reasonableness of a consumer's or seller's actions and knowledge, even if merely to define "defective condition" undermines the policy considerations that have led us to hold in *Salvador* [*v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 319 A.2d 903] that the manufacturer is effectively the guarantor of his product's safety. The plaintiff must still prove that there was a defect in the product and that the defect caused his injury, but if he sustains this burden, he will have proved that as to him the product was unreasonably dangerous. It is therefore unnecessary and improper to charge the jury on "reasonableness."

A similar result was reached in *Pyatt v. Engel Equip., Inc.*, 17 Ill. App. 3d 1070, 309 N.E.2d 225 (1974), which held that jury instructions defining the term "unreasonably dangerous" were not necessary.

Because a majority of the Pennsylvania Supreme Court concurred in only the result of the *Berkebile* case, rather than the Chief Justice's reasoning, the case has not been followed as binding Pennsylvania precedent. Beron v. Kramer-Trenton Co., 402 F. Supp. 1268 (E.D. Pa. 1975); Bair v. American Motors Corp., 535 F.2d 249 (3d Cir. 1976). The *Beron* judge made this comment:

> *Berkebile*, purporting to "clarify the concepts of strict liability under Pennsylvania law," 337 A.2d at 897, threatens instead to disrupt the orderly administration of justice in this litigation prone area of the law so long as these important questions remained unanswered.

Beron at 1269. Whatever the practical merits of this characterization of *Berkebile*, it is submitted that there may be cases for which the "confusing" description is more apt. *See* note 189 *infra*.

In the context of the present note, it must be stressed that the definition of "unreasonable danger" does not affect the general admissibility of OSHA regulations in products cases. In *Bunn v. Caterpillar Tractor Co.*, 415 F. Supp. 286 (W.D. Pa. 1976), the court held OSHA regulations admissible in products liability cases while declining to follow the *Berkebile* rationale.

9. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

10. RESTATEMENT (SECOND) OF TORTS § 395 (1965):

Negligent Manufacture of Chattel Dangerous Unless Carefully Made

proof with regard to the character of the machinery is essentially the same.[12] In strict liability, for example, the plaintiff must demonstrate that he was injured by a machine which left the manufacturer's hands in an "unreasonably dangerous" condition.[13] Such dangers may be shown by a manufacturing flaw peculiar to the machine in question[14] or by a design deficiency in all such machines sold by the manufacturer.[15]

Safety codes and standards may be useful to the plaintiff in defining the dangerous character of the particular machine. Past industrial safety codes have included those published by private standards organizations[16] and those enforced by certain states upon

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A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is applied.

See also MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

11. *See* U.C.C. § 2-314(l):

Implied Warranty: Merchantability: Usage of Trade . . . .[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .

Privity of contract may not be necessary for the invocation of this warranty, according to UNIFORM COMMERCIAL CODE § 2-318:

Third Party Beneficiaries of Warranties Express or Implied. A Seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

See also Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

12. PROSSER, *supra* note 4, at 671-72.

13. *See* note 8 *supra*.

14. A flaw in a product is a dangerous condition which occurs in only one of an entire line of products marketed and sold. Such product was thus not manufactured as designed. *See* Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 33-34 (1973) [hereinafter cited as Keeton]. *See, e.g.*, Findlay v. Copeland Lumber Co., 265 Ore. 300, 509 P.2d 28 (1973).

15. The term "design deficiency" refers to a dangerous condition common to an entire line of marketed products. The problem thus originated in the product's design. *See* Keeton, *supra* note 14. *See, e.g.*, Dorsey v. Yoder Co., 331 F.Supp. 753 (E.D.Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973).

16. A private industrial safety code is one which is sponsored by a private organization for the purpose of encouraging safety within particular manufacturing industries. Many such codes are sponsored by the American National Standards Institute, which is discussed in FRUMER & FRIEDMAN, *supra* note 6, at § 5.04.

factories.[17] Recently, however, the federal government has entered the field of industrial safety and promulgated a safety code more comprehensive than anything previously existing.

The Occupational Safety and Health Act of 1970[18] (OSHA) represents a major federal effort to ensure industrial safety. The Act's purpose is to prevent accidents before they happen[19] by enforcing safety standards on the factory-employer.[20] OSHA requires the employer to provide a safe workplace for all employees[21] and to comply with all regulations promulgated pursuant to the Act.[22] Employees must also obey OSHA regulations, whenever applicable to their conduct.[23] OSHA does not discuss the duties of manufacturers who may have sold the factory industrial machinery. Neither does OSHA expand the civil liability of employers[24] or others[25] to the employee in case of injury.

Although OSHA cannot expand the manufacturer's duty or liability, regulations enacted pursuant to OSHA may yet be used for evidentiary purposes in third-party suits.[26] These regulations

17. An example of a state industrial code which has given rise to important case law in the area of admission of standards for evidentiary purposes is PA. STAT. ANN. tit. 43, §§ 25-1 *et. seq.* (1964).

18. 29 U.S.C. §§ 651-78 (1970).

19. *Id.* § 651 (b).

20. *Id.* § 658(a).

21. *Id.* § 654(a)(1).

22. *Id.* § 654(a)(2).

23. *Id.* § 654(b).

24. *Id.* § 653(b)(4). A series of cases has denied the employer's civil liability, based on OSHA violations, pursuant to this section's directive. The first of these cases was *Skidmore v. Traveler's Ins. Co.*, 356 F. Supp. 670 (E.D. La.), *aff'd*, 483 F.2d 67 (5th Cir. 1973). Obviously, if the civil liability policy were otherwise, the disruption of existing employer liability programs such as workmen's compensation acts would have been great.

25. Jeter v. St. Regis Paper Co., 507 F.2d 973 (5th Cir. 1975) (denying civil liability based on OSHA of those not "employers"); Russell v. Bartley, 494 F.2d 334 (6th Cir. 1974) (denying civil liability based on OSHA of an engineer who designed a work project in which plaintiff-employee was injured); Fawvor v. Texaco, Inc., 387 F. Supp. 626 (E.D. Tex. 1975) (denying civil liability based on OSHA of the employer's independent contractors); Hare v. Federal Compress and Warehouse Co., 359 F. Supp. 214 (N.D. Miss. 1973) (denying OSHA cause of action against independent contractor).

26. In a case following *Skidmore v. Traveler's Ins. Co.*, 356 F. Supp. 670 (E.D. La.), *aff'd*, 483 F.2d 67 (5th Cir. 1973), on the absence of OSHA civil liabilities it was noted:

> The plaintiff may, of course, use OSHA standards and evidence that they have been violated as evidence of negligence at trial, to the extent they would be admissible for that purpose under the rules of evidence.

Buhler v. Marriott Hotels, Inc., 390 F. Supp. 999 (E.D. La. 1974). Thus, the same court which handed down the *Skidmore* decision has recognized that *evidentiary* uses of OSHA do not conflict with OSHA's legislative intent and purpose.

The position that OSHA regulations may be relevant evidentially in third-party suits has also been noted by Hollis and Howell, *The Occupational Safety and Health Act: Potential Civil Remedies*, 10 FORUM 999, 1012 (1975), and Miller, *The Occupational Safety and Health Act of 1970 and the Law of Torts*, 38 LAW & CONTEMP. PROB. 612, 637-38 (1974).

This note proceeds on the thesis that the threshold problem of OSHA competency in third-party suits is surmountable. The language in *Buhler* and the above-cited commentators support this argument directly, though there are at this time few cases directly on point. A synthesis of all applicable materials on the subject, however, should demonstrate that courts which have pondered analogous questions most seriously have reached the admissibility rule. Admissibility is the result of a more completely reasoned analysis, as it looks behind the mere fact that a safety code may "apply" to employers rather than manufacturers. *Compare* Pyatt v. Engel Equip., Inc., 17 Ill. App. 3d 1070, 309 N.E.2d 225 (1974) (state industrial safety rules held admissible as evidence in products suit), *with* Heichel v. Lima-Hamilton Corp., 98 F. Supp. 232 (N.D. Ohio 1951) (state safety statute held inapplicable to third parties where it was apparently argued as conclusive).

The view is buttressed by two very recent state supreme court decisions, *Knight v. Burns, Kirkley & Williams Const. Co.*, ___ Ala. ___, 331 So.2d 651 (1976), and *Dunn v. Brimer*, ___ Ark. ___, 537 S.W.2d 164 (1976). Both cases involved negligence suits against third-parties who were not "employers" of the plaintiffs within OSHA's definitions. Thus, OSHA could not "apply" or be binding upon these third parties as a matter of law. These were not negligence per se situations. Still, the regulations were admissible for the limited evidentiary purpose of helping to determine the standard of due care that defendant had a duty to follow. The defendant in *Knight* argued that OSHA created "no duty" on third parties, citing *Skidmore*, *supra* note 24, and *Russell*, *supra* note 25. The court did not deny this, but was careful enough to recognize that this was not plaintiff's argument:

> The plaintiffs have not directed this court's attention to any case which holds that OSHA establishes a new private civil remedy against anyone for damages suffered by an employee because of a violation of the Act. In its own independent research, this court has found no such cases. This court holds that the plaintiff does not have a private civil remedy in this case because of a violation of the Occupational Safety and Health Act of 1970 or the regulations promulgated thereunder. However, this does not mean that appropriate and relevant standards and safety requirements established by OSHA or accompanying regulations are completely and totally irrelevant. . . . . These safety rules were promulgated by an agency of the United States Government. Under proper circumstances Occupational Safety and Health Act provisions and regulations may be admissible for a jury to consider in determining the standard of care that a defendant should have followed, if properly introduced. . . .

331 So.2d at 645, *following* City of Dothan v. Hardy, 237 Ala. 603, 188 So. 264 (1939).

In the *Dunn* case, the plaintiff was an employee of a general contractor. While working on a roofing project he was injured by the actions of a subcontractor's employees. OSHA regulations applicable to the safety of portable ladders were admitted as evidence of negligence against this subcontractor-defendant, to be

include many provisions defining minimum standards of safety for industrial machinery.[27] Other sections define minimum safety procedures to be followed by factory workers.[28] The entire regulatory scheme has been called the broadest grant of executive lawmaking authority in federal history.[29]

The possible evidentiary use of OSHA in an injured worker's suit against a machine manufacturer is the subject of this note. It is

considered along with other facts and circumstances. The Supreme Court of Arkansas advanced a rationale to support admission somewhat more conventional than that used in the *Knight* case:

> In that situation the jury might consider, without regard to any employer-employee relationship, whether Dunn's violation of the regulations was negligence. Prosser points out that "where the statute does set up precautions, although only for the protection of a different class of persons, or the prevention of a distinct risk, this may be a relevant fact, having proper bearing upon the conduct of a reasonable man under the circumstances, which the jury should be permitted to consider." Prosser, Torts, p. 202 (4th ed. 1971). A case on point is *Marshall v. Isthmian Lines*, 5th Cir., 334 F.2d 131 (1964), where the court held that a violation of a regulation that was designed to prevent fires could also be considered as evidence of negligence in a personal injury case.

537 S.W.2d at 166.

See also Bunn v. Caterpillar Tractor Co., 415 F. Supp. 286 (W.D. Pa. 1976). This case has held OSHA regulations admissible as evidence of "unreasonable danger" in a strict liability context. Language from the case may be found in notes 71 and 72 *infra*.

A seemingly contra view is taken by *Otto v. Specialties, Inc.*, 386 F. Supp. 1240 (N.D. Miss. 1974). A close reading of that case, however, should demonstrate some confusion between negligence per se and admission as *evidence* of negligence. Because of this problem, the court's discussion of the civil liability policy of OSHA is neither necessary nor on point. It is not clear whether this confusion emanated from the court or from the way the case was argued by plaintiff's attorney. It is possible, though, that the real problem behind the status of OSHA regulations in third-party suits is the way that many of the early cases, such as *Skidmore*, *supra* note 24, and the others cited in note 25 *supra*, were argued by plaintiff's attorneys. So many have tried to find either a new federal tort or a negligence per se situation in OSHA that questions of *duty* and *evidence* have been blurred. The problem should be seen, as addressed directly by *Buhler*, *Knight*, *Dunn* and *Bunn*, as one of evidence.

For additional cases implying permissible OSHA use in a third party context, *see* Spangler v. Krano, Inc., 481 F.2d 373 (4th Cir. 1973) (implying that existence of OSHA regulations would have reflected on manufacturer's reasonable conduct); Scott v. Dreis & Krump Mfg. Co., 26 Ill. App. 3d 971, 326 N.E.2d 74 (1975) (suggesting that OSHA would be admissible to evidence machine design and quality); Bell v. Buddies Super-Market, 516 S.W.2d 447 (Tex. Civ. App. 1974) (implication that OSHA regulations would have been admissible at time of ramp construction). *But see* Jasper v. Skyhook Corp., ___ N.M. App. ___ , 547 P.2d 1140 (1976) (holding that OSHA regulations irrelevant and inadmissible for any purpose in products liability).

27. *See* 29 C.F.R. § 1910 (1975).

28. *See, e.g., id.* at § 1910.133.

29. Moran, *Occupational Safety and Health Standards as Federal Law: The Hazards of Haste*, 15 WM. & MARY L. REV. 777 (1974).

suggested that a plaintiff may be able to use the regulations as a basis of expert testimony, as evidence of the defendant's negligence on the negligence theory, and as evidence of machine defectiveness or "unreasonable danger." Possible uses of OSHA by the defendant to show compliance with OSHA standards or to evidence plaintiff's contributing conduct to injury will also be investigated. In reference to all possible evidentiary uses of OSHA, questions of the efficacy and weight to be accorded the regulations will be raised.

A corollary purpose of this note is to examine the policy implications of these evidentiary uses of OSHA in the third-party context. Products liability suits following an industrial accident are allowed in order to compensate injured workers fully.[30] OSHA, on the other hand, was not promulgated with compensation in mind but rather for prevention of the industrial accident.[31] The question which will be raised is whether a technically evidentiary use of OSHA by plaintiff, in light of certain recent strict liability decisions, may in effect impose an expanded liability for accidents upon the manufacturer. The thesis is that despite OSHA's non-binding effect on manufacturers, a plaintiff's successful use of the OSHA regulations, as evidence in conjunction with strict liability, could push a manufacturer's tort liability to its theoretical limits. This effect is seen, however, as a result of the policy of strict liability and a result consistent with that policy. It is not because of any inherent prejudicial problems in OSHA. Any other new evidentiary tool injected into a strict liability context, such as post-accident design changes, may have the same effect on liability.

To more fully appreciate both the practical and theoretical problems which are raised by OSHA admission in third-party suits, a hypothetical industrial accident should be considered.

A Hypothetical Industrial Accident Case

The following hypothetical comprises a common factual setting which will be used for purposes of illustration throughout this note. The plaintiff, an industrial worker, was injured during the normal course of his employment. His injury is causally related to a defect or a design deficiency in a punch press, the industrial machine which he operated. The punch press's specific defect or design deficiency is the absence of safety guards at the point of machine

30. *Cf.* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 379, 161 A.2d 69, 81 (1960).

31. Brennan v. Occupational Safety and Health Rev. Com'n., 513 F.2d 1032, 1039 (2d Cir. 1975); Lee Way Motor Freight, Inc. v. Secretary of Labor, 511 F.2d 864, 870 (10th Cir. 1975).

operation. This inadequacy is recognized as a danger in the OSHA regulations.[32] The plaintiff's injury is partial loss of a hand. Since he has received partial recovery from his employer through workmen's compensation, further actions against the employer are barred notwithstanding the employer's violation of OSHA regulations.

The inadequacies in punch press guarding did not originate in the factory where plaintiff was employed. The factory-employer had neither improved the machine nor allowed it to become more dangerous during its tenure there. A products liability suit is subsequently brought by the worker against the third-party manufacturer of the punch press. The purpose of this lawsuit is the recovery of damages more comprehensive in nature than those workmen's compensation has provided. The plaintiff pleads the grounds of negligence, implied warranty, and strict liability.

Assuming that this case is set for trial, each party to the suit, the plaintiff-employee and the defendant-manufacturer, may have possible evidentiary uses of OSHA regulations. Since the plaintiff's interest in the punch press standards is most apparent in this hypothetical, his interests will be outlined first.

The plaintiff may desire to introduce the OSHA punch press regulation for at least three purposes. First, the plaintiff might use the regulation as a basis of his expert witness's opinion that the press was improperly manufactured. The regulation would add a degree of credibility and objectivity to the expert's opinion by showing that his definition of the problem is shared by another neutral authority. Beyond this consideration, the second and third possible uses of the OSHA regulations by the plaintiff would involve

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32. 29 C.F.R. § 1910.217 (1975). This regulation contains specifications for the safety of several types of "mechanical power presses." It is assumed that the dangers associated with the punch press in the present hypothetical could be correlated with an applicable part of this regulation.

The punch press is used for the hypothetical here not only because applicable regulations may be found, but also because it is a machine which may be cross-referenced easily into many of the central concerns of this note. *AFL-CIO v. Brennan*, 530 F.2d 109 (3d Cir. 1975), discusses the current debate about the technological feasibility of portions of the above press regulation. Practical problems in the litigation of punch press products liability cases are analyzed in *Trial of a Punch Press Case*, 19 TRIAL LAWYER'S GUIDE 249 (1975). Finally, some of the most important cases discussed in this note deal with presses. *See* Capasso v. Minister Mach. Co., Inc., 532 F.2d 952 (3d Cir. 1976); Scott v. Dreis & Krump Mfg. Co., 26 Ill. App. 3d 971, 326 N.E.2d 74 (1975); Pyatt v. Engel Equip., Inc., 17 Ill. App. 3d 1070, 309 N.E.2d 225 (1974); Gelsumino v. E.W. Bliss Co., 10 Ill. App. 3d 604, 295 N.E.2d 110 (1973); Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972).

their admission as independent evidence. It could be argued that the existence of the standard is evidence of the defendant's negligence. The plaintiff would claim that the reasonable manufacturer should have had knowledge of safety codes such as OSHA and implemented their guidelines into his product. Similarly, OSHA may be used as evidence of an unreasonably dangerous machine under the strict liability theory. Here, the claim would be that the OSHA regulation provides an objective definition of such dangers which the jury should consider. Assuming that any or all these affirmative uses of OSHA by plaintiff are likely to succeed, the defendant must be prepared before trial to attack the efficacy and weight of the applicable regulations.

There may also, however, be three possible affirmative uses of OSHA by the defendant-manufacturer in the products liability suit. First, the defendant might attempt to shift the ultimate fault for the accident upon the factory-employer. For this purpose, defendant would admit his responsibility but claim that the factory-employer's violation of OSHA should be considered an intervening and superseding cause of plaintiff's injury. The argument would be that OSHA evidences a public policy that employers have the primary responsibility for industrial safety. The second and third affirmative uses of OSHA by the defendant would occur in cases varying from the original hypothetical. If there were no machine defect at all under the OSHA definitions in force at the time of manufacture, the defendant might claim that this shows compliance with OSHA. The defendant would argue that such compliance should relieve him of liability or at least be evidence of the punch press's safety. In a final possible affirmative use of OSHA by defendant, the case would have to involve some injury-causing conduct on the plaintiff's part. If such conduct can be pinpointed in an OSHA regulation applicable to employees, the defendant could use OSHA to evidence plaintiff's contributory negligence or assumption of risk. It could be contended that the danger actively encountered by the plaintiff can be objectively defined and that such regulation should thus be admitted as evidence.

This note is devoted to examining each of the possible uses of OSHA regulations, as outlined above, in a third-party suit. All of the plaintiff-initiated and the defendant-initiated uses of the Act, with the exception of the use of OSHA by defendant to shift the safety duty upon the factory, are essentially evidentiary uses of the regulations. Accordingly, all evidentiary uses of OSHA will be discussed before the broader, concluding discussion of duty and policy questions. The first set of evidentiary problems to be examined concerns plaintiff-initiated uses of the regulations.

PLAINTIFF'S USE OF OSHA

Plaintiffs injured by industrial machinery may attempt to introduce evidence of OSHA guidelines against manufacturers for three purposes: first, as a basis of expert testimony; second, as evidence of the defendant's negligence; and third, as evidence in defining the machine's unreasonable danger. An analogy to safety codes similar to OSHA which have been received into evidence in proper cases will suggest that these uses are permissible. All affirmative evidentiary uses of OSHA by the plaintiff, however, must be closely scrutinized with reference to the weight and relevancy to be accorded specific regulations. Problems with the vagueness and generality of certain regulations have arisen in OSHA's primary context, the employer-employee relationship. These same problems could occur when the regulations are used in products liability suits and would thus reduce the relevancy of specific standards there.

As a Basis of Expert Testimony

The use of OSHA regulations as a basis for the plaintiff's expert testimony should be the most universally acceptable of all OSHA uses in third-party suits. As a basis of expert opinion, a regulation is not being offered for the truth of matters asserted. This use of OSHA regulations is beneficial not only to plaintiffs but also to the trier of fact. Judges and juries must be able to probe the expert's knowledge and experience in complex products liability litigation.

Any discussion of industrial safety today is likely to be heavily influenced by OSHA. OSHA attempts to regulate nearly every conceivable aspect of the industrial environment.[33] Thus, any knowlegeable expert employed by plaintiff will know about the regulations and will probably use them often as a convenient yardstick in making professional judgments. With so much of the current dialogue about industrial safety phrased in terms of OSHA standards and duties,[34] it is unreasonable to suppose that such dialogue can be checked at the point of third-party suits.

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33. *See generally* 29 C.F.R. § 1910 (1975).

34. Among the best and most comprehensive of the general law review articles on OSHA are: Hollis & Howell, *Occupational Safety and Health Act: Potential Civil Remedies*, 10 FORUM 999 (1975); Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 988 (1973); Symposium, *The Developing Law of Occupational Safety and Health*, 9 GONZAGA L. REV. 333 (1974); Symposium, *The Occupational Safety and Health Act of 1970*, 20 WAYNE L. REV. 987 (1974).

A good overall knowledge of OSHA can be gleaned from the several articles of Robert Moran, former Chairman and present Commissioner of the OSHA Review

Just as this use of OSHA dialogue by experts seems inevitable, so also is the advantage of this development to plaintiffs apparent, since the credibility of their experts can thereby be strengthened. The issue might first arise, in the hypothetical punch press case, as to whether the plaintiff's expert report made reference to a condition in the machine that was dangerous by OSHA standards. Such a report would be favorable to plaintiff's case not only because of the expert's professional opinion, but also because of the invocation of OSHA as an additional outside authority. Plaintiff's attorney will obviously desire to retain this emphasis at trial. An expert is always personally impeachable on the obvious basis that he is paid and employed by the plaintiff.[35] An expert opinion based upon a knowledge of federal regulations, however, may add a degree of credence and objectivity to the testimony. OSHA standards, established in view of a pre-existing public interest neutral to either party in the lawsuit, are not impeachable on the basis of financial alliance to the plaintiff.

The danger to defendant in such a situation is that the regulation is being brought before the jury without being admitted as independent probative evidence. Association of safety codes with expert testimony has been termed a "covert admissibility,"[36] since it may be that for various reasons the OSHA regulation is inadmissible independently.[37] A traditional objection to overall safety code admission is hearsay.[38] It has been said, for instance, that such

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Commission: *A Court in the Executive Branch of Government: The Strange Case of the Occupational Safety and Health Review Commission*, 20 WAYNE L. REV. 979 (1974); *Critique of the Occupational Safety and Health Act of 1970*, 67 NW. U.L. REV. 260 (1972); *Discretionary Review by the Occupational Safety and Health Review Commission: Is It Necessary?*, 46 U. COLO. L. REV. 139 (1974); *How to Obtain Job Safety Justice*, 24 LABOR L.J. REV. 387 (1973); *Occupational Safety and Health Standards as Federal Law: The Hazards of Haste*, 15 WM. & MARY L. REV. 777 (1974); *Oversight of Penalty Increases and Adjudicatory Functions Under the Occupational Safety and Health Act of 1970*, 33 FEDERAL BAR J. 138 (1974); *Parties to Proceedings in the Court of Appeals Under the Occupational Safety and Health Act of 1970*, 15 B.C. INDUS. & COM. L. REV. 1089 (1974); *The Legal Process for Enforcement of the Occupational Safety and Health Act of 1970*, 9 GONZAGA L. REV. 349 (1974); *The Impact of the Job Safety Act*, 6 GEORGIA L. REV. 489 (1972).

35. C. MCCORMICK, EVIDENCE 78-81 (2d ed. 1974).

36. Note, *Admissibility of Safety Codes, Rules and Standards in Negligence Cases*, 37 TENN. L. REV. 581, 590-92 (1970). The general idea presented is that safety codes often come before the jury, without regard to the controlling law, through the testing of experts and in other instances where the defendant fails to object.

37. *Id.* at 581-87. *See also* Annot., 75 A.L.R.2d 778 (1961), which states that at one time the rule of independent inadmissibility was the "majority" rule. A superseding annotation, 58 A.L.R.3d 148 (1974), says there is no longer a "majority" or "minority" view here.

38. *See* notes 36 and 37 *supra*.

standards are only the opinion of the authors.[39] There is also the danger that the data relied upon was written primarily for the use of experts and will be difficult for the trier of fact to understand.[40] The expert could thus use the code out of its specific context too freely or could misapply it, without the laymen in court being able to recognize such misapplication.[41] Finally, the authors of a safety code such as OSHA are not present for cross-examination.[42] If such dangers appear present in independent admission of the code, the defendant might argue that these dangers are only compounded by allowing the code to be repeated by a private expert. Since OSHA has the force of law in another context, the defendant could argue that its repetition by a private party intensifies the hearsay dangers because such a party is not qualified to interpret law.

Allowing the expert to refer to OSHA as the basis of opinion, however, is advantageous to the trier of fact as well as the plaintiff.[43] It has been suggested that laymen in court are experiencing much difficulty in evaluating the various technical problems associated with products liability litigation, a stumbling block most crucial in "design" cases.[44] Much of the basic terminology needed to discuss the character of industrial machinery, though, can be found in OSHA.[45] It is best for all concerned to know where this terminology

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39. Mississippi Power & Light Co., v. Whitescarver, 68 F.2d 928 (5th Cir. 1934); Milner Enterprises, Inc. v. Jacobs, 207 So. 2d 85 (Miss. 1968).

40. Milner Enterprises, Inc. v. Jacobs, 207 So. 2d 85 (Miss. 1968).

41. 6 J. WIGMORE, EVIDENCE § 1690 (3d ed. 1940).

42. *See* note 39 *supra.*

43. Pyatt v. Engel Equip., Inc., 17 Ill. App. 3d 1070, 309 N.E.2d 225 (1974). In this case concerning the design of a press brake, the plaintiff's expert was allowed to describe design standards of such machinery but was prohibited from identifying the source of the standards. This source was a code promulgated by the state Industrial Commission, which was without force of law in the case at hand. The manufacturer argued that allowing the plaintiff's expert to discuss the standards was enough to cure the error, but the court disagreed:

> We do not share this view, since it would be of substantial relevance in evaluating a standard to know the source of the standard as distinguished from the opinion of a single expert. That the expert did describe the standard without identification of its source without claim of error would seem to establish the relevancy of the standards as described in the rules as applied to the design of the machine.

Id. at 1072-73, 309 N.E.2d at 227.

44. *See* Henderson, *Judicial Review of Manufacturer's Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973); Weinstein, Twerski, Piehler and Donaher, *Products Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425 (1974).

45. *See, e.g*, 29 C.F.R. § 1910.211(d)(46) (1975), which contains definitions basic to the description of the power press which is the subject of this hypothetical:

> "Press" means a mechanically powered machine that shears, punchs, forms

comes from and if that source is in fact the basis of the expert's opinion. OSHA definitions could thus serve the purposes of rendering objective the dialogue and solving basic semantic problems in technically complex litigation.

Probative dangers to defendant, such as hearsay problems, can be overcome if the plaintiff is careful to point out that the regulation is not being offered by the expert to prove the truth of the matters asserted. The OSHA regulations, if cited by the expert in defining what he considers defective, are at this point merely the basis of his opinion.[46] It is this expert testimony itself that is being offered for the truth of the matters asserted. Thus this basis is not the critical testimony but is rather a tool with which the jury can weigh and measure the expert.[47] This being the case, it is unnecessary to consider whether the safety regulation itself creates the standard by which to judge the defendant's conduct or the design of his machine.[48]

Finally, there are many methods short of prohibiting the expert's use of OSHA by which the defendant can protect himself from any prejudicial impact. Cautionary instructions could be elicited from the judge to keep the distinction between the privately affiliated expert and the basis of his testimony clear in the jury's mind. Moreover, the defendant can cross-examine the expert extensively about the basis of his testimony and whether the expert has, in fact, as extensive a knowledge of OSHA as he claims. The efficacy of the particular regulations cited by the expert could be attacked.[49] Even if the expert has testified without reference to OSHA, the defendant

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or assembles metal or other material by means of cutting, shaping, or combination dies attached to slides. A press consists of a stationary bed or anvil, and a slide (or slides) having a controlled reciprocating motion toward and away from the bed surface, the slide being guided in a definite path by the frame of the press.

46. Sweargin v. Sears Roebuck & Co., 376 F.2d 637 (10th Cir. 1967). Part of the expert's testimony, reprinted in the record, provides a good blueprint for establishing a safety code as the basis of expert opinion:

> As an engineer I am familiar with the American Standards Safety Specifications generally. . . . They haven't the force of law. But they are standards which I as an engineer and others in my field have the need to be acquainted with. . . . In order to acquaint myself with a subject or with standards, I have to go to material like this.

Id. at 641.

A good case analyzing the guidelines for expert use in industrial products liability is *Moren v. Samuel Langston Co.*, 96 Ill. App. 2d 133, 237 N.E.2d 759 (1968).

47. Pyatt v. Engel Equip., Inc., 17 Ill. App. 3d 1070, 309 N.E.2d 225 (1974).

48. Sweargin v. Sears Roebuck & Co., 376 F.2d 637, 641 (10th Cir. 1967).

49. *See* notes 96-115 *infra* and accompanying text.

should still be able to discover on cross-examination the true basis of his opinion if this would be desirable.[50]

Many recent products liability cases allow the expert to discuss a safety code as a basis of his testimony, even if the code does not have the force of law in the case at hand or may be independently inadmissible.[51] OSHA regulations should be similarly regarded, especially in light of the technical complexity of many industrial machinery cases. The best position is that the jury is entitled to have such a basis of opinion before them, as it is of substantial relevance to their evaluations.[52] It is probable that this view is already widely accepted, and that where it is not, such evidence inevitably and covertly still comes before the jury.[53]

A more crucial battleground of safety code admission by plaintiffs has already been suggested and will now be discussed: use of a code as independent evidence of negligence or of the dangerous character of the machinery.

Safety Code as Evidence of Negligence or Dangerous Machine Character

Beyond the use of OSHA regulations as a basis of plaintiff's expert testimony, two other possible uses of the regulations are to evidence defendant's negligence and the dangerous character of the machinery in question. These additional uses involve the admission of the regulations as independent evidence and will be discussed together here. Two arguments against OSHA admission are that the regulations are hearsay and that they lack the force of law when taken out of context. Similar arguments have been overcome in recent cases in which safety codes similar to OSHA have been admitted into evidence. A plaintiff's invocation of federal safety law, however, may increase the difficulties faced by third-party defen-

50. *See, e.g.*, FED. R. EVID. 705. Defendant might want the OSHA basis disclosed as a foundation to a later attack on the efficacy of safety standards. *See* notes 95-114 *infra* and accompanying text.

51. Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178 (5th Cir. 1975); Sweargin v. Sears Roebuck & Co., 376 F.2d 637 (10th Cir. 1967); Dorsey v. Yoder, 331 F.Supp. 753 (E.D. Pa. 1971); Wenzell v. MTD Prod., Inc., 32 Ill. App. 3d 279, 336 N.E.2d 125 (1975); Pyatt v. Engel Equip., Inc., 17 Ill. App. 3d 1070, 309 N.E.2d 225 (1974).

See also the line of cases that seems to limit the plaintiff's use of safety codes to their basis as expert testimony and would thus disallow the uses discussed in the next subsection of this note: Hercules Power Co. v. DiSibatino, 55 Del. 516, 188 A.2d 529 (1963); Coger v. Mackinaw Prod. Co., 48 Mich. App. 113, 210 N.W.2d 124 (1973); Lemery v. O'Shea Dennis Inc., 291 A.2d 616 (N.H. 1972).

52. *See* note 43 *supra*.

53. *See* note 36 *supra*.

dants. Defendants will be forced to attack the efficacy of federal standards, which may subtly impeach the credibility of their case. The degree of such impeachment will depend on the efficacy of the OSHA regulations in question, discussed later in this note.

As suggested by the hypothetical punch press case, there are particular burdens of proof which the products liability plaintiff carries and which OSHA can facilitate. Under the negligence theory, the plaintiff must prove some conduct of the defendant-manufacturer, such as an act or omission in disregard of a dangerous condition.[54] Under the theory of negligence or strict liability, something objectively dangerous in the character of the punch press itself must be shown.[55] This machine character is usually referred to as "defectiveness" in negligence cases,[56] and "unreasonable danger" in strict liability cases,[57] but what must be shown in either theory is basically the same.[58]

If the punch press as manufactured was lacking in certain safety characteristics as defined by OSHA, the regulations' value to the plaintiff in overcoming his burden of proof is readily apparent. Safety codes and standards can show that certain safeguards are practical, feasible, and generally used in the custom and practice of the particular manufacturing industry in question.[59] If such standards were in existence at the time of manufacture,[60] it could be advanced that the defendant's failure to know and implement them indicates that he did not act reasonably and was thus negligent.[61]

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54. PROSSER, *supra* note 4, at 644.

55. *Id.* at 671-72.

56. *See, e.g., id.* at 643: "The rule that has finally emerged is that the seller is liable for negligence in the manufacture or sale of any product which may reasonably be expected to be capable of inflicting substantial harm if it is defective."

57. *See, e.g., id.* at 659: "There must . . . be something wrong with the product which makes it unreasonably dangerous to those who come in contact with it." The term is adopted from the second Restatement of Torts. *See* note 8 *supra.*

58. *Id.* at 671-72.

59. *See, e.g.,* McComish v. DeSoi, 42 N.J. 274, 281, 200 A.2d 116, 121 (1964), characterizing a safety code introduced into a products liability case as "illustrative evidence of safety practices or rules generally prevailing in the industry."

60. The traditional rule is that the relevancy of safety codes is determined by their existence at the time of manufacture. *See* notes 169-76 *infra* and accompanying text. Even if an OSHA regulation is inadmissible for this reason, such regulation may have been adopted from a pre-existing private code which did exist at manufacture. *See* note 66 *infra.* The value of OSHA regulations in many negligence cases, then, may be as an index for the attorney preparing litigation.

61. The idea here is that once a duty of reasonable care exists, general customs and practices are relevant as an evidentiary guide toward the definition of that duty in a particular situation. Safety codes are thus admitted as part of that custom and

Likewise, the burden of showing a particular machine characteristic "defective" or "unreasonably dangerous" can be directly evidenced by reference to OSHA regulations. OSHA contains an elaborate section on power press specifications which points out several machine characteristics and dangers to be guarded against.[62] An absence of any one of these safeguards could thus be proof that the machine in question fails to measure up to an objective standard of minimal safety.[63]

A defense argument that OSHA is legally binding within the employer-employee relationship, and not upon third-party manufacturers, may be of no avail to the defendant in trying to exclude the regulations. Past safety codes similar to OSHA, both public[64]

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practice, not as a fixed rule the violation of which automatically makes defendant negligent. This was articulated in *McComish v. DeSoi*, 42 N.J. 274, 281, 200 A.2d 116, 121 (1964):

> The basic test as to the responsibility of Beloit here is whether reasonable care was exercised in the construction and assembly of the A sling. That is the standard to be used and departure or deviation therefrom is negligence. In applying the standard reasonable men recognize that what is usually done may be evidence of what ought to be done. And so the law permits the methods, practices or rules experienced men generally accept and follow to be shown as an aid to the jury in comparing the conduct of the alleged tortfeasor with the required norm of reasonable prudence. It is not suggested that the safety practices are of themselves the absolute measure of due care. They are simply evidence of "how to" assemble the sling as commonly practiced by those who have experience in doing it. It is important that their limited function and probative force be appreciated.

Similar rationale was applied by the court in *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975), which held F.A.A. advisory materials admissible as evidence of negligence even though they were not dispositive of the applicable standard of care. Another case is *Butler v. Sonneborn Sons, Inc.*, 296 F.2d 623 (2d Cir. 1961), which admitted I.C.C. regulations as evidence of negligence, even though such regulations had the force of law in contexts other than the case at hand.

Finally, two recent third-party suits have allowed the admission of OSHA regulations as evidence of negligence. In both of these cases the duty owed by the defendant was the common law duty of reasonable care, not the duty of obeying OSHA. The admission of OSHA in these cases is thus directly analogous to the admission of OSHA in the third-party negligent products design context. *See* Knight v. Burns, Kirkley & Williams Constr. Co., ___ Ala. ___ , 331 So. 2d 651 (1976); Dunn v. Brimer, ___ Ark. ___ , 537 S.W.2d 164 (1976). The rationale of these cases is discussed in note 26 *supra*.

62. 29 C.F.R. § 1910.217 (1975).

63. Safety codes are generally only considered *minimal* standards since it may be necessary to demand more of manufacturers then mere compliance. *See* notes 118 -21 *infra*.

64. Butler v. Sonneborn Sons, Inc., 296 F.2d 623 (2d Cir. 1961); Green v. Sanitary Scale, 296 F. Supp. 625 (E.D. Pa. 1969), *rev'd on other grounds*, 431 F.2d 371 (3d Cir. 1970); Smith v. Hobart Mfg. Co., 194 F. Supp. 530 (E.D. Pa. 1961), *rev'd on*

and private,[65] have been held admissible in contexts where they lacked the force of law. Since OSHA is basically only a more comprehensive version of prior similar industrial codes, and in fact incorporates many of these prior codes directly,[66] recent precedents favoring admission should control. The plaintiff cannot claim that OSHA is binding upon the manufacturer[67] or creates civil liabilities.[68] As long as plaintiff keeps the more limited evidentiary purpose of admitting the regulations clear, the defendant's claim that OSHA is not binding does not meet plaintiff's argument.[69] The plaintiff is not arguing that the regulations are conclusive on defendant's legal duty, but only that they are some evidence of defendant's failure to meet that duty. Few cases have dealt directly with OSHA regulations or suggested that they would be admissible

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other grounds, 301 F.2d 570 (3d Cir. 1962); Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178 (5th Cir. 1975); Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973); Pyatt v. Engel Equip., Inc., 17 Ill. App. 3d 1070, 309 N.E.2d 225 (1974). Of the above cases, *Butler*, *Green*, *Smith* and *Muncie* were specifically negligence decisions. *See also* notes 36 and 37 *supra*.

65. Wallner v. Kitchens of Sara Lee, 419 F.2d 1028 (7th Cir. 1970); Stanley v. United States, 347 F. Supp. 1088 (D.C. Me. 1972), *vacated on other grounds* 476 F.2d 606 (1st Cir. 1973); Brandon v. Yale & Towne Mfg. Co., 220 F. Supp. 855 (E.D. Pa. 1963); Wenzell v. MTD Prod., Inc., 32 Ill. App. 3d 279, 336 N.E.2d 125 (1975); Reil v. Lowell Gas Co., 353 Mass. 120, 228 N.E.2d 707 (1967); Ward v. City Ntl. Bank & Trust Co., 379 S.W.2d 614 (Mo. 1964); Wilson v. Lowe's Asheboro Hardware, Inc., 259 N.C. 660, 131 S.E.2d 501 (1963); McComish v. DeSoi, 42 N.J. 274, 200 A.2d 116 (1964). *But see* Hackley v. Waldorf-Hoener Paper Prod., Co., 149 Mont. 286, 425 P.2d 712 (1967). *See also* notes 36 and 37 *supra*.

66. *See* 29 U.S.C. § 655(a) (1970). This section gives the Secretary of Labor power to promulgate an OSHA standard without formal rulemaking procedures if it is found to be a "national consensus standard." National concensus standards include those promulgated by private standards producing organizations. 29 U.S.C. § 652(9). OSHA's adoption of several such private standards from the American National Standards Institute is discussed by the Chairman of the Occupational Safety and Health Review Commission in Moran, *Occupational Safety and Health Standards as Federal Law: The Hazards of Haste*, 15 WM. & MARY L. REV. 777, 785-92 (1974). An attorney can determine whether an OSHA standard has been adopted from a pre-existing private code by a reference in the Federal Register to the end of the subpart containing the regulation in question.

67. *See* notes 18-25 *supra* and accompanying text.

68. *Id.*

69. *See, e.g.*, Smith v. Hobart Mfg. Co., 194 F. Supp. 530 (E.D. Pa. 1961), *rev'd on other grounds*, 302 F.2d 570 (3d Cir. 1962), where a state general safety law binding on the employer-factory was offered as evidence against a manufacturer. The jury was told that they could consider these safety laws and regulations as a factor in their deliberations on whether machine design was safe and manufacturer was negligent. They were not told that violation of these regulations would make defendant liable. On appeal defendant claimed that this evidence should not have been admitted since it did not "apply" to him. The court disagreed:

as evidence of negligence or machine dangerousness.[70] Three recent cases, however, have held OSHA regulations relevant and admissible as evidence in a third-party context, over general objections that OSHA creates no duty and does not apply to such parties.[71] These cases correctly saw the problem as an evidentiary one and not one of duty and liability based on OSHA. To keep this distinction clear before the jury, cautionary instructions are possible and may be granted.[72]

> We think counsel for defendant misunderstands the function that the statute served in this case. This was not a proceeding under the statute: nor was the rule of negligence *per se* involved. Rather, this was an ordinary negligence action in which . . . the Regulations were before the jury as evidence . . . as to the safety features of design necessary to make . . . a reasonably safe machine.

Id. at 522.

70. *See* note 26 *supra.*

71. Knight v. Burns, Kirkley & Williams Const. Co., ___ Ala. ___, 331 So. 2d 651 (1976); Dunn v. Brimer, ___ Ark. ___, 537 S.W.2d 164 (1976). These cases are quoted and analyzed in note 26 *supra.*

See also Bunn v. Caterpillar Tractor Co., 415 F. Supp. 286 (W.D. Pa. 1976). In this strict liability case, plaintiff was allowed to read both portions of a manual of the Army Corps of Engineers and applicable OSHA regulations into the record as evidence of unreasonable danger. The Court held that whether the cause of action was negligence or strict liability, the jury,

> could consider Regulations which set forth safety standards for people other than defendants. The juries in both cases had to reach a conclusion as to whether the machines in their respective cases were "reasonably safe" or "unreasonable dangerous." In both cases, they were allowed to use the Regulations *as a factor* in their ultimate decisions.

Id. at 292 (emphasis in original).

The Court cited the cases of *Smith* and *Green*, note 64 *supra*, as support of the above proposition, and concluded:

> The Regulations in both the *Smith* and *Green* cases were used to determine an "acceptable standard of design" and to use this standard to decide either "lack of due care" or "unreasonably dangerous" is a distinction without a difference.

Id. at 293.

Finally, the *Bunn* court approved certain cautionary jury instructions that could be used when OSHA regulations were put before a jury. *See* note 72 *infra.*

72. *See, e.g.*, Bunn v. Caterpillar Tractor Co., 415 F.Supp. 286 (W.D. Pa. 1976), which held OSHA regulations admissible as evidence of unreasonable danger. The judge charged the jury:

> You are particularly cautioned to recall that the Court instructed you with respect to various rules and regulations requiring back-up mirrors and audible signaling devices. These rules and regulations were not to be considered as imposing a legislative standard of conduct upon any one other than the user or consumer, which in this case is Ace.
>
> Within the facts of this case, the plaintiff contends that the product, the 988 Caterpillar, was unreasonably dangerous when it left the hands of

Even if it is unsound to attack the admissibility of OSHA regulations on the ground they do not have the force of law in the third-party context, the regulations may yet be vulnerable as hearsay. Unlike the situation in which the expert refers to the regulations as a basis of his testimony, the attempt here is to offer them for the truth of the matters asserted. The regulations are being advanced as direct proof that defendant was negligent and that his product was dangerous. Until recently, the majority of cases supported hearsay objections against safety code admission.[73] Typically it was asserted that such codes were only the opinion of

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> Caterpillar, and this is a question of fact for you to determine as to Caterpillar without regard to these safety rules and regulations except as you may decide they determine a standard of conduct and which you would then apply to the manufacturer. They do not apply to the manufacturer under the persons to whom the rules and regulations were issued. And as I said, I think you realize when I talk about the consumer or user I am referring to Ace Drilling Company and its employees, including Mr. Bunn.

Id. at 291-92.

Consistent with this, the Court approved the following point for charge submitted by the defendant:

> You have heard the testimony in this case about OSHA and MESA regulations. I instruct you that those regulations do not apply to Caterpillar Tractor Company and Caterpillar Tractor Company was not under any obligation to obey those regulations.

Id. at 291-92.

The *Bunn* court cited *Green v. Sanitary Scale Co.*, 296 F. Supp. 625 (E.D. Pa. 1969), *rev'd on other grounds*, 431 F.2d 371 (3d Cir. 1970), as precedent in favor of the rule of admissibility. The instructions in *Green* were these:

> Rule 4 dealt specifically with the safety standard for meat grinding. The failure to measure up to the standards cannot be considered conclusive evidence that the manufacturer was negligent, for the focus of these regulations is toward the conduct of persons or employers who run businesses within the state, and not toward manufacturers of chattels.
>
> . . . .
>
> However, you may consider these regulations as a factor in determining whether the defendant negligently designed its meat grinder; that is, you may consider whether the defendant should have followed these standards or ones similar to them when they designed their meat grinder, and whether failure to follow such standards was a lack of due care.

Green, *supra*, 296 F. Supp. at 628. *Green* was a negligence case, involving admission of state safety regulations binding on the employer as evidence against the machine manufacturer. The *Bunn* court, which declined to accept the definition of "unreasonable danger" espoused by Pennsylvania Chief Justice Jones in *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975), felt that the fact that *Green* was a negligence case as opposed to the strict liability defect issue in *Bunn* was "a distinction without a difference." *Bunn* at 293.

73. Note, *Admissibility of Safety Codes, Rules, and Standards in Negligence Cases*, 37 TENN. L. REV. 581, 590-92 (1970). *See also* ANNOT., 75 A.L.R.2d 778 (1961), *superceded by* Annot., 58 A.L.R.3d 148 (1974).

out-of-court persons[74] who were not present for cross-examination.[75] The substance of the safety guidelines themselves were said to be descriptive of an inexact and changing science,[76] upon which the opinions of the writers may have changed.[77] Hence, courts generally were comparing safety codes to "learned treatises,"[78] excludable because of their lack of trustworthiness[79] and the lack of necessity for them.[80]

The recent trend, given impetus by the growth of products liability law, has been to find indications of necessity and trustworthiness in safety codes sufficient to withstand hearsay objections.[81] Such codes have been recognized as statements of a general consensus about particular industries and thus distinct from "learned treatises," which are normally the opinion of only one writer.[82] Trustworthiness has been found both in the consensus aspect of the codes and in the idea that they were presumably compiled by knowledgeable persons[83] with no conceivable intent to

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74. Mississippi Power & Light Co. v. Whitescarver, 68 F.2d 928 (5th Cir. 1934); Milner Enterprises v. Jacobs, 207 So. 2d 85 (Miss. 1968).

75. *Id. See also* Dechert v. Municipal Elec. Light Co., 39 App. Div. 490, 57 N.Y.S. 225 (1899).

76. Milner Enterprises v. Jacobs, 207 So. 2d 85 (Miss. 1968).

77. Mississippi Power & Light Co. v. Whitescarver, 68 F.2d 928 (5th Cir. 1934).

78. 6 J. WIGMORE, EVIDENCE § 1698 (Supp. 1964). *See also* FED. R. EVID. 803 (18), making an express exception to the hearsay rule for learned treatises. The new rule is discussed in the context of strict products liability in Comment, 27 S.C.L. REV. 766 (1966), where it is argued that it should not be too restrictively applied. The author believes that this rule can make needed and reliable sources of evidence available to plaintiffs efficiently and inexpensively.

79. Standard Life Ins. Co. of the South v. Strong, 19 Tenn. App. 404, 424, 89 S.W.2d 367, 379 (1935).

80. *Id.*

81. McComish v. DeSoi, 42 N.J. 274, 200 A.2d 116 (1964); Nordstrom v. White Metal Rolling & Stamping Corp., 75 Wash. 2d 629, 453 P.2d 619 (1969).

82. *See, e.g.*, McComish v. DeSoi, 42 N.J. 274, 281, 200 A.2d 116, 121 (1964):

> In this case, however, the manuals were not received as learned treatises. They were introduced as safety codes, as objective standards of safe construction, generally recognized and accepted as such in the type of construction industry involved. A treatise is usually no more than one expert's opinion regarding a particular factual complex. On the other hand, a safety code ordinarily represents a consensus of opinion carrying the approval of a significant segment of an industry. Such a code is not introduced as substantive law, as proof of regulations or absolute standards having the force of law or of scientific truth.

83. *See, e.g.*, Nordstrom v. White Metal Rolling & Stamping Corp., 75 Wash. 2d 629, 633, 453 P.2d 619, 623 (1969):

> If a publication is produced by persons or groups having special knowledge regarding the subject under discussion, and having no motive to falsify, but having rather every reason to state the facts as they are known to

falsify.[84] The necessity for admitting the codes without calling the authors to testify personally is also present, especially in view of the extreme impracticality of undertaking to call such witnesses.[85] Both private[86] and public[87] safety codes have thus been admitted against manufacturers in industrial accident cases on the issue of defendant's negligence. Admission of safety codes on the issue of the unreasonably dangerous character of the product has likewise been held permissible.[88]

Grounds for hearsay objections to OSHA should be even weaker than those for hearsay objections to former codes. Not only would it be ludicrous to compel the plaintiff to locate and subpoena the particular federal officials who adopt and enforce the various OSHA

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the author or authors, subjecting them to cross-examination would be a superfluous activity.

The trustworthiness . . . was established beyond any reasonable cavil. It was published after thorough research by a special committee assigned to study appropriate standards for construction, care and use of ladders, a subcommittee of which did the research on metal ladders. The personnel of the committee represented interested manufacturers, consumers. . . . A total of 23 organizations was represented. If objectivity was not established by this representation of interested parties, the lack of such objectivity could presumably be demonstrated by the plaintiff. He did not seriously challenge it, however, and the trial court should have had no difficulty in deciding that the code was trustworthy.

84.

A motive to falsify could hardly survive in such a diversified group; and the pertinent facts on which to base a code of standards were within the knowledge of the participants. This code was promulgated before the facts giving rise to this litigation occurred; and it was not drawn with a view to favoring the position of a manufacturer in this or any other litigation.

Id.

85.

The participants are too many in number and too widely scattered. It would be highly impractical, if not impossible, to gather them together to testify at the trial, and it is doubtful if their testimony would add anything to the trustworthiness which is imported by the circumstances under which it was prepared.

Id.

86. *See* note 65 *supra.*

87. *See* note 64 *supra.*

88. Balido v. Improved Mach., Inc., 29 Cal.App. 3d 633, 105 Cal. Rptr. 890 (1973) (non-compliance with standard, from industrial safety order directed to employers, as evidence of manufacturer's deficient design where strict liability was in issue); Pyatt v. Engel Equip., Inc., 17 Ill. App. 3d 1070, 309 N.E.2d 225 (1974) (state health and safety code, directed toward factory, admissible to show standards of design in strict liability case); Price v. Buckingham Mfg. Co., 110 N.J. Super. 462, 266 A.2d 140 (1970) (admissibility of industry practices on strict liability issue). *See also* Brandon v. Yale & Towne Mfg. Co., 220 F. Supp. 855 (E.D. Pa. 1963).

regulations, but partisan testimony by OSHA officials is expressly forbidden.[89] The element of necessity is therefore clearer than with pre-existing codes. An added element of trustworthiness is also present in many of the regulations. Where OSHA had adopted pre-existing "consensus" standards from private codes, there is the consensus not only of the particular industrial organizations but also of the federal government that such measures are necessary and effective in furthering occupational safety.[90] In effect, it may be said that the very existence of OSHA demonstrates that industrial safety is no longer the "inexact and changing" science it once may have been.

The disadvantage to third-party manufacturers in this development of the law is a subtle one. Manufacturers would apparently be no more disadvantaged by the plaintiff's use of OSHA regulations than by plaintiff's use of former codes. Since OSHA regulations are precisely the same kind of standards which have often been held admissible, it cannot seriously be contended that these precedents do not apply. The only difference between OSHA and the former industrial codes is one of degree. The OSHA regulations are promulgated by the federal government, a body with wider authority than any previous body which undertook to prescribe industrial safety standards. The regulations themselves are more comprehensive in scope than any former codes which attempted to standardize industrial machinery and practices. Even if this regulatory scheme often involves the adoption of pre-existing codes, these various standards are still consolidated in one place, the Federal Register, and hence become more accessible to all plaintiff's attorneys.

It has been suggested that OSHA may further benefit the injured worker by making his case less dependent upon expert testimony than it was in the past.[91] In cases of glaring disparity between the safety condition of the machine in question and OSHA regulations,

89. *See* 29 C.F.R. § 1906 (1975). This regulation discusses calling OSHA administration employees as witnesses in private litigation. Only facts within the personal knowledge of the OSHA employee may be testified to, and such employee may not give expert opinions. The policy is both to protect the official intergrity of OSHA from confusion with an employee's personal opinions about standards, and to avoid spending federal time and money for private purposes.

90. 29 U.S.C. § 652(9) (1970). National consensus standards, adopted as OSHA regulations pursuant to this section, carry the additional consensus of both the Secretary of Labor and "other appropriate Federal agencies" that the standard should be adopted. *See also* 29 U.S.C. § 652(8) (1970), which sets "reasonably necessary or appropriate to provide safe and healthful employment" as the Secretary's guideline for adopting standards.

91. Stramondon, *Litigation Impact*, 9 TRIAL 29 (July/Aug. 1973).

the trier of fact may hardly need an expert at all from the plaintiff's point of view.[92] The dangerous character of the punch press, for example, could be seen as a fact objectively recognized.[93] The defendant's need for expert opinion could then become correspondingly greater. The purpose of such expert help for the defendant would obviously be to explain away the disparity either by showing that OSHA does not apply or by attacking the federal standard's efficacy. The very implication that a federal regulation and federal concern is involved may in itself carry weighty implications to a jury, and a defendant's attack upon such standards may thus subtly impeach the credibility of his entire case. Because the OSHA standard should be admissible to show negligence or dangerousness, however, the defendant will have little choice. These dangers to defendant must be balanced against possibly worse damage to his case when the regulations slip before the jury covertly, as in the testimony of plaintiff's expert. In such situations, plaintiff gets in a reference to federal standards, but defendant does not have a fair and adequate chance to attack the efficacy of such standards.

Beyond the evidentiary use of OSHA regulations to define negligence or dangerousness, plaintiffs may want to expand the jury's perception of the defendant's duty of safe product manufacture in light of OSHA disparities. This problem will arise in cases where the particular machinery is old or was manufactured before OSHA was created. The fact that standards were promulgated after manufacture may be a good defense against their use in negligence cases.[94] The duty therein is to be aware of what a reasonable manufacturer would know at the time of the product's sale and to incorporate such knowledge into the product. Where strict liability is involved, however, the limits of defendant's safety duty are not as clear. The problem of the "time of standards promulgation" will be left as a variable in the hypothetical accident for now, since it is basically a question of duty and policy to be discussed later.[95]

In summary, the three possible evidentiary uses of OSHA by plaintiff are: first, as a basis of expert testimony; second, as indepenent evidence of defendant's negligence in failing to incorporate recognized safeguards; and third, as independent evidence of recognized

92. *Id.*

93. 29 C.F.R. § 1910.217 (1975). *See also* notes 97 and 98 *infra*. In these sources, containing administrative litigation on specific OSHA regulations, the attorney can find additional evidence concerning the recognition of specific punch press dangers.

94. *See, e.g.*, Bell v. Buddies Super-Market, 516 S.W.2d 447 (Tex. Civ. App. 1974).

95. *See* notes 169-95 *infra* and accompanying text.

dangerous qualities in the machinery in question. A further question grows out of these plaintiff-initiated uses of OSHA: what can the defendant do to attack the OSHA regulations once they have been offered against him?

Efficacy of Particular OSHA Regulations

When a plaintiff has offered an OSHA regulation into evidence, defendant may reduce the weight to be given the standard by directly challenging the efficacy of the particular standard. Although rebuttal evidence against the standard is an alternative tactic,[96] only direct attacks on efficacy are dealt with here, since such attacks are more particularly related to the value of the regulations in themselves. A reference to OSHA's primary context, the employer-employee relationship, demonstrates that there have sometimes been problems with the application of certain regulations there. Such problems of efficacy could arise not only within OSHA's primary context, but also where OSHA is introduced in products liability suits. Where a regulation's introduction carries too many dangers of vagueness and inapplicability, it should be excluded on the ground of irrelevance.

In order to study the evidentiary value of the regulations promulgated under OSHA, the attorney must look to sources outside the general body of appellate court reporters. There are as yet no reported cases discussing particular problems of OSHA regulation efficacy in the third-party context. In its primary context, however, OSHA has been in effect for five years. There has been a considerable amount of administrative litigation in this area, mainly as a result of factories appealing the reasonableness and applicability of various regulations. Both official[97] and private[98] reporting services make these administrative cases accessible to the defense lawyer. If it becomes evident from these sources that a regulation has been of little value in effectuating its primary purpose, it is then doubtful

96. Rebuttal evidence could presumably be in the form of contrary safety codes or industry customs. Its use should be permissible since OSHA is not conclusive on defendant's duty and can at best be used for evidentiary purposes. *Cf.* Smith v. Aaron, ___ Ark. ___ , 508 S.W.2d 320 (1974) (negligence *per se* situation).

97. The Occupational Safety and Health Review Commission Reports (OSAHRC) are the official reports.

98. The Bureau of National Affairs, Inc. publishes the Occupational Safety & Health Reporter (OCC. SAF. & HEALTH REP.). The publication is a looseleaf service which is later bound as Occupational Safety & Health Cases (Occ. Saf. & Health Cas.). Commerce Clearing House, Inc. publishes Occupational Saf. and Health Decisions (OSHD).

whether such regulation could be of any help when put to other uses against third-party manufacturers.

Administrative case law on OSHA demonstrates several issues concerning safety standards which are relevant to industrial products liability. Certain standards may be too vague for application in novel situations.[99] Other standards may not have enough relevance to safety to be enforceable.[100] Some regulations, while relevant to safety, may not suggest any feasible curative measures.[101] It has been

99. *See, e.g.*, Sante Fe Trail Trans. Co., 5 OSAHRC 840 (1973), in which the Review Commission held a standard unenforceably vague. Separate opinions by each commissioner, however, betray the difficulty of formulating a satisfactory standard for the definition of vagueness. Commissioner VanNamee felt that a standard written in broad terms should not be declared unenforcealby vague so long as "employers of common intelligence are appraised of the conduct required of them." However, VanNamee felt the standards which are "unlimited in spectrum, unlimited in scope and application and which can be applied according to the whim of an area director must fall." *Id.* at 842. Chairman Moran additionally felt that only specific, not vague, standards furthered the purpose of OSHA in preventing accidents. Only regulations clearly specifying certain required conditions or practices necessary for implementation of these practices could qualify as valid OSHA standards. *Id.* at 845. Commissioner Cleary dissented. He felt that standards cannot often be expected to prescribe required conduct in precise detail. Standards should have sufficient latitude to encompass various employers with peculiar locations and circumstances. *Id.* at 848.

100. *See, e.g.*, Associated Indus. of N.Y. State, Inc. v. United States Dept. of Labor, 487 F.2d 342 (2d Cir. 1973). Here, an OSHA regulation setting a minimum number of lavatories required for industries was attacked. The court affirmed the purpose of Congress in 29 U.S.C. § 652(8), to limit the Secretary of Labor's discretion in promulgating standards to those reasonably necessary for safety purposes.

101. *See, e.g.*, Sheet Metal Specialty Co., 17 OSAHRC 212 (1975). A factory, cited for failure to provide point of operation guards on a press brake, argued that such guarding would be possible but inconvenient. As with the "vagueness" problem, *see* note 99 *supra*, the commissioners disagreed about the proper guidelines for finding unfeasibility as an excuse for compliance. Van Namee believed that there should be a violation as long as guarding of a machine was possible. Impossibility of compliance might be a defense, but mere inconvenience would not be. *Id.* at 213-14. Commissioner Clearly stated that, at most, impossibility of OSHA compliance was an affirmative defense. *Id.* Moran dissented. Since a court below had concluded that compliance in this case would virtually halt operations by disrupting production, compliance was not mandatory. *Id.* at 214-15.

On the relevance of industry custom and practice generally to OSHA standards, see Brennan v. Smoke-Craft, Inc., 530 F.2d 843 (9th Cir. 1976). Compare these considerations to the relevance of industry custom and practice in an industrial products liability case, Rivera v. Rockford Mach. & Tool Co., 1 Ill. App. 3d 641, 274 N.E.2d 828 (1971). Close reading of these and other cases suggests that the duty of manufacturers to eliminate dangers, under strict liability, is stricter than the duty of factories to eliminate the same dangers in the same machinery under OSHA. The technological feasibility of making improvements may be more of an excuse for the factory's non-compliance than it is for the machine manufacturer. *Compare* AFL - CIO v. Brennan, 530 F.2d 109 (3d Cir. 1975) (OSHA case), *with* Capasso v. Minister Mach. Co., 532 F.2d 952 (3d Cir. 1976) (strict liability case). Furthermore, while the

suggested that these problems arise out of the haste with which the regulatory scheme was adopted.[102] Thus, certain standards may not be reasonably necessary or bear enough relation to safety to merit introduction as plaintiff's evidence in a third-party suit. Even if a regulation is relevant to the safety of the machine in question, efficacy and weight may be open to attack because of regulation vagueness or unfeasibility.[103] This can be illustrated by the hypothetical punch press case. The punch press would probably be subject to a detailed standard of safety dealing with "mechanical power presses,"[104] which includes many guarding requirements more specific than those found in another general machine guarding regulation.[105] Even so, the specific standard includes some general terminology such as "point of operation" which might be too broad to

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cost of making safety improvements is clearly a factor to be considered under OSHA "feasibility" as discussed by the *AFL - CIO* case, such economic considerations may receive sharp disapproval in the products liability context. *See, e.g.*, Brandon v. Yale & Towne Mfg. Co., 220 F. Supp. 855, 861 (E.D. Pa. 1963), stating that "The plaintiff was the unfortunate victim of an economic bargain which sacrificed his safety to the more expedient needs of closing a sale to make a profit."

102. Moran, *Occupational Safety and Health Standards as Federal Law: The Hazards of Haste*, 15 WM. & MARY L. REV. 777 (1974). This article by OSHA Review Commission Chairman Moran contains an excellent analysis of all problems of OSHA efficacy as they relate to enforcement in OSHA's primary context.

Two recent developments may further affect the ultimate worth and efficacy of OSHA standards for any purpose. First, bitter in-fighting among members of the OSHA Review Commission has seriously damaged the integrity of that body's opinions. *See, e.g.*, Leone Constr. Co., 3 BNA Occ. Saf. & Health Cas. 1979 (Rev. Comm'n 1976); D. Federico Co., 3 BNA Occ. Saf. & Health Cas. 1970 (Rev. Comm'n 1976). The background of the dispute may be gleaned from Fransisco Tower Services, Inc., 3 BNA Occ. Saf. & Health Cas. 1952 (Rev. Comm'n 1976). To compound this problem, the OSHA Review Commission has announced that it is not bound to follow decisions of the circuit courts of appeals and will thus continue to follow its own precedents. *See* Grossman Steel & Aluminum Corp., 4 BNA Occ. Saf. & Health Cas. 1185 (Rev. Comm'n 1976).

The other development is the granting of certiorari by the Supreme Court of the United States in two cases, both involving the constitutionality of OSHA penalty provisions. *See* Frank Irey Jr. Inc. v. OSAHRC, No. 75-748 (March 22, 1976); Atlas Roofing Co., Inc. v. OSAHRC, No. 75-746 (March 22, 1976).

103. *See* note 101 *supra*. *See also* the discussion of feasibility concerns in the strict liability context in note 192 *infra*.

104. 29 C.F.R. § 1910.217 (1975).

105. *Id.* § 1910.212. This general requirement cannot be applied to mechanical power presses, such as the hypothetical punch press, because the more specific standard controls. *See* Queen City Sheet Metal & Roofing, Inc., OSAHRC Docket No. 4322, 3 BNA Occ. Saf. & Health Cas. 1696 (Rev. Comm'n 1975). Conversely, when there is no specific requirement for certain industrial machinery, the general requirements apply. *See* Production Control Units, Inc., 2 BNA Occ. Saf. & Health Cas. 3294 (Rev. Comm'n 1975).

encompass a specific problem.[106] There is also current debate about the necessity and technological feasibility of certain parts of the standard which outlaw presses that allow an operator to place his hands into the die areas.[107] Thus, there may be serious questions about whether certain regulations offer practical solutions to the machine dangers alleged by plaintiff. Pointing out such questions of vagueness and feasibility would aid defendant since the superficial force and weight of the standard's face value would thereby be reduced.

The applicability of the mechanical power press regulation to the hypothetical punch press case is much clearer than many other conceivable attempts to invoke OSHA in industrial machinery cases. There is enough specificity in the requirements of the OSHA power press standard to insure that many punch press injuries will be provided for directly. A large degree of unquestionable OSHA relevance is thus a "given" in the hypothetical problem. This would not be the case if the machine in question fell outside the sanctions of a specific standard such as the power press regulation. The plaintiff would then be forced to rely on the regulation setting out general requirements for all machines. A new hypothetical must be advanced to understand these special problems of efficacy, weigh and relevance..

Consider, for example, a large automatic printing machine, with all in-going rollers adequately shielded and electronically interlocked to prevent their operation while the guards are open. On occasion it may be normal and necessary for the operator to open the guards and clean the rollers. The interlocking should prevent the rollers from moving at this time. Suppose, however, that either from failure of the

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106. The definitions generally applicable to 29 C.F.R. § 1910.217 are found at 29 C.F.R. § 1910.211(d). Language such as the following could easily be construed as vague in particular instances:

> "Point of Operation" means the area of the press where material is actually positioned and work is being performed during any process such as shearing, punching, forming or assembling.

Id. at § (45).

> "Guard" means a barrier that prevents entry of the operator's hands or fingers into the point of operation.

Id. at § (32).

107. *See, e.g.*, AFL-CIO v. Brennan, 530 F.2d 109 (3d Cir. 1975). This litigation arises from the Secretary of Labor's revocation of a strict standard which prohibited machines which offered any possibility of press operators inadvertently placing their hands into dies. There were questions about the original standard's feasibility and technological possibility.

complicated interlocking system or from some unexplainable cause the rollers begin moving again and the operator's hand is injured.[108]

If the plaintiff attempted to introduce the OSHA regulation on general machine guarding requirements as evidence of defectiveness, questions of vagueness would arise. The regulation requires "point of operation guarding" at "the area where work is actually performed upon the material being processed."[109] The operator's body is to be prevented from having any possible contact with "the danger zone during the operating cycle."[110] While it may be admitted that this regulation is applicable generally to printing presses, there is a danger that it may greatly oversimplify the real issue in the problem at hand. First of all, since the machine was adequately guarded while it actually printed, it is at least arguable that there were no unguarded "points of operation" involved. The operation of the machine was automatic, and this automatic operation could not even begin until the plaintiff was entirely removed from all "points of operation." The plaintiff, on the other hand, would argue that his servicing and cleaning of the machine, after the guard was open, was a normal part of the machine's overall "operating cycle," carried on at a definable "point of operation." The fact that the paper was normally printed or "processed" through the roller forms the basis of plaintiff's "point of operation" definition.

The word "operation" is thus the center of the controversy here, since it leads to two divergent interpretations, both of which can be supported by reference to the general regulation. Defendant would contend that the machine was not performing its primary operating purpose of printing at the time of the injury. It was shut off for cleaning. Plaintiff would offer a definition of the word "operation" based on his subjective sense of what he was doing. He was servicing the machine, an "operation" necessary as part of his total job to keep the machine in working order. This job was performed at the place which would have been defined as the "point of operation" if the machine were turned on.

The general OSHA regulation on machine guarding provides no conclusive definition of the word "operate" in respect to this problem. The total context of the regulation seems to imply that guarding is necessary against certain obvious and recognized *mechanical* dan-

108. This hypothetical does not involve any question of the operator being in an area of work outside of the primary work station. *Cf.* printing press hypothetical in another article, *supra* note 44. *See also* Cepeda v. Cumberland Eng. Co., 138 N.J. Super. 344, 351 A.2d 22 (1976) (products liability case involving interlocking).

109. 29 C.F.R. § 1910.212(a)(3)(i) (1975).

110. *Id.* § 1910.212(a)(3)(ii).

gers.[111] The printing press in question had none of these mechanical dangers from moving parts while it was printing; these were *electrically* guarded against. The failure then, if any, may have been *electrical* in nature. Thus, the regulation is silent in two ways as to the specific accident in issue. It is not clear, first of all, whether this OSHA regulation contemplates the sort of electrical problem that may be involved. Secondly, even if it could be said that the regulation contemplates similar problems, it is not clear whether or not the "guarding" requirement would provide any solution here.[112] Since the machine was adequately shielded while turned on, the cause of the accident was seemingly more subtle than lack of guarding.

What must be seen is that there is a continuum between the point where an OSHA regulation is clearly relevant as to the problem in question and the point where it is clearly inapplicable to the particular machine and thus excludable. An example of the first point would be the punch press which lacked guarding on moving mechanical parts. An example of the latter would be the attempted application of the general OSHA regulation on machine guarding to an unguarded nozzle of an industrial drinking fountain, which involves a different type of guarding covered in another regulation.[113] In cases falling in the middle of this continuum, as in the printing press example, OSHA regulations may sometimes be admitted as evidence of defectiveness since they are often ambiguous enough to be at least superficially applicable. The danger of confusion and prejudice to defendant's case increases here as the distance between the complexity of the machine and the generality of the regulation widens. At the extreme end of this continuum, relevancy objections may be appropriate at the outset and call for complete exclusion of the evidence.[114]

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111. *See id.* §§ 1910.212(a)(1), (4). It is recognized that "electronic safety devices" are one method of guarding employees from hazards. Also recognized is the necessity of interlocking "revolving drums" with the drive mechanism so that no revolution is possible "unless the guard enclosure is in place." No details of electronic guarding within the enclosure, however, are provided. Thus, it seems that the presence of such an interlocking system, in conjunction with a mechanical guard, is enough to satisfy this section's requirement. "Invisible" failures beyond this are not contemplated.

112. *See, e.g.*, Production Control Units, Inc. 2 BNA Occ. Saf. & Health Cas. 3294, 3295 (Rev. Comm'n 1975), where citations against a factory were vacated because "none of the methods of compliance established by the Secretary would enhance the safety of employees using the machine." *Cf.* Jones v. Hittle Serv. Inc., ___ Kan. ___, 549 P.2d 1383 (1976) (violation of standard must cause injury to be probative in products liability context).

113. 29 C.F.R. § 1910.141(b)(ii) (1975).

114. Compare the relevancy standard used in OSHA's normal context, as stated in National Ticket Co., 3 BNA Occ. Saf. & Health Cas. 1608 (Rev. Comm'n 1975), which

If the defendant cannot have a regulation excluded from evidence on the ground of irrelevancy, he may have two options for keeping alive the issue of the standard's direct value. First, he may be able to convince the judge that admission should only be conditional.[115] If plaintiff failed to connect the relevance of the regulation to the accident with further evidence, the regulation could then be excluded. In the printing press hypothetical, for instance, defendant could stress at a latter point that the plaintiff had failed to make clear the element of causation. Compliance with the guarding requirements may not have prevented plaintiff's injury. The defendant's second option would be to concede relevancy and direct all his arguments toward diminishing the regulation's weight. Here, the vagueness and generality of the regulation could be stressed. It might also be shown that the original source of the code which OSHA incorporated did not contemplate the precise type of machinery or the degree of technological complexity in issue.

In summary, it may be said that a plaintiff's introduction of OSHA into a third-party suit, whether as a basis of expert testimony or as independent evidence, should not end discussion of the regulations' efficacy. There are problems with both the vagueness of certain standards and the irrelevance to safety. The defendant faced with OSHA disparities should be prepared to study the history of specific regulations closely in their primary context. Beyond the interest in attacking the efficacy of OSHA when raised for plaintiff's evidentiary purposes, however, there may be reasons for which the defendant would affirmatively introduce OSHA evidence.

DEFENDANT'S USE OF OSHA

A defendant in an industrial accident case might want to introduce evidence of OSHA regulations for three purposes. First, the defendant could show that the manufacture and design of his product complies with the federal standard. This should be permissible as long as defendant does not claim that OSHA compliance is conclusive on his safety duty. Secondly, regulations dealing with employee conduct might be introduced to evidence the plaintiff's contributory negligence or assumption of risk. Although a

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states that in order to sustain a factory's OSHA violation it must be shown that:

> the employee was exposed to *hazards which the standards were intended to prevent.* In other words, it must be shown that it was reasonably foreseeable that an injury might result from the employer's failure to comply with the standard.

Id. at 1609 (emphasis added). *See also* Diamond Roofing Co. v. OSAHRC, 528 F.2d 645 (5th Cir. 1976).

115. C. MCCORMICK, EVIDENCE 133-35 (2d ed. 1974).

novel use of safety regulations, this purpose too may be permissible as long as defendant's purpose is only evidentiary. Finally, defendant may argue that the existence of OSHA's sanctions on the factory-employer has shifted the duty of correcting machine defects to the factory. Although this argument invokes the basic purpose of OSHA's existence, similar arguments based on past industrial safety codes have failed.

To Show Compliance

A possible use of OSHA by defendant would be to show compliance. Such compliance with OSHA cannot be conclusive on defendant's safety duty since it is without the force of law in the case at hand. A more limited purpose in admitting the safety regulation, to evidence the defendant's due care toward the safety of his machine, should nevertheless be permissible. The regulations may be as probative of machine character and safety here as where the plaintiff offers the regulations to evidence machine danger.[116] There may, however, be special hearsay dangers in admitting OSHA regulations to evidence defendant's compliance. Certain regulations may be unreliable from plaintiff's viewpoint if adopted from prior codes considered favorable to industrial interests.

Whatever the cause of plaintiff's injury, OSHA compliance on the part of the manufacturer cannot be an absolute defense to either the negligence or strict liability claims. Just as the plaintiff in the third-party suit cannot claim that the regulations are conclusive on defendant's duty,[117] the defendant cannot make them conclusive on his duty of reasonable care. A reasonable manufacturer, depending on the facts before him, might have to exercise even more care than mere compliance with existing regulations.[118] A similar rationale is applicable to the strict liability issue. "Unreasonable danger" is a judicial standard which must be freely adaptable to particular fact situations. It cannot be limited to any set of regulations. Furthermore, the rule of strict liability applies even though the seller has exercised all possible care in the preparation and sale of his product.[119] This clearly forecloses the invocation of OSHA compliance as an absolute defense.

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116. *See* notes 59-63 *supra* and accompanying text.
117. *See* note 25 *supra.*
118. RESTATEMENT (SECOND) OF TORTS § 288C (1965):
Compliance With Legislation or Regulation
Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.
119. *See* note 8 *supra.*

The view generally taken is that legislative safety regulations are only "minimal" standards.[120] That courts often go beyond them and fasten liability on defendants who have complied to the letter is illustrated by recent cases under a number of federal regulations.[121] Of course compliance, though not conclusive, may be at least some evidence that the manufacturer has exercised reasonable care[122] or that his product does not contain a particular unreasonable danger. The burden of proof is on the plaintiff to suggest what the defendant should have done beyond compliance. Absent such proof, compliance could sometimes be evidence powerful enough upon which to base a dismissal of plaintiff's case.[123] In no case, though, can the defendant claim that the mere absence of an appropriate OSHA regulation evidences performance of his legal duty.[124]

There may be some situations in which hearsay objections raised by the plaintiff against any evidentiary use of OSHA compliance will be appropriate. This is especially true when the regulations in question were adopted directly from a private safety code which may have been originally promulgated by interests favorable to the defendant's industry.[125] The source of OSHA regulations thus has a somewhat more critical bearing when raised to show compliance than when raised for the plaintiff's evidentiary purposes. This is because in the compliance context, it can be claimed that the regulations, at least as originally promulgated, are inherently self-serving. Even if not

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120. *See, e.g.*, Stevens v. Parke, Davis & Co., 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973), wherein the court commented on compliance with warning standards approved by the Food and Drug Administration:

> Mere compliance with regulations or directives as to warnings . . . may not be sufficient to immunize the manufacturer or supplier of the drug from liability. The warnings required by such agencies may be only minimal in nature and when the manufacturer or supplier knows of, or has reason to know of, greater dangers not included in the warning, its duty to warn may not be fulfilled.

Id. at 66, 507 P.2d at 661, 107 Cal. Rptr. at 53. *See also* the excellent analysis of the compliance issue in Jones v. Hittle Serv. Inc., ___ Kan. ___, 549 P.2d 1383 (1976).

121. Raymond v. Riegel Textile Corp., 484 F.2d 1025 (1st Cir. 1973); Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402 (5th Cir. 1965); Stevens v. Parke Davis, & Co., 9 Cal. 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973); Arcata v. Tonegato, 152 Cal. App. 2d 837, 314 P.2d 130 (1957). *Contra*, Lewis v. Baker, 243 Ore. 317, 413 P.2d 400 (1966).

122. Arcata v. Tonegato, 152 Cal. App. 2d 837, 314 P.2d 130 (1957). *See also* RESTATEMENT (SECOND) OF TORTS § 288B2 (1965):

> The unexcused violation of an enactment or regulation which is not so adopted (as defining the standard of conduct of a reasonable man) may be relevant evidence bearing on the issue of negligent conduct.

123. Spangler v. Kranco, Inc., 481 F.2d 373 (4th Cir. 1973).

124. Jones v. Bucyrus-Erie Co., 323 So. 2d 633 (Fla. App. 1976).

125. *See* note 66 *supra*.

originally founded in such a private safety code, certain regulations may have been watered down by interest group lobbying to the point of meaninglessness.[126] A Washington case which admitted a private safety code as showing some evidence of the manufacturer's conforming conduct inspired one of the strongest dissents ever written in this entire area of safety code admission.[127] Plaintiffs should thus be prepared to investigate the background and applicability of OSHA regulations when offered against them and to undermine their efficacy as demonstrated in the preceding section.

The use of OSHA regulations in the compliance area, then, will probably follow current precedent holding them sometimes probative but never conclusive. A more novel affirmative use of OSHA by defendants is discussed in the following section: to evidence plaintiff's negligence or assumption of risk.

As Evidence of Contributory Negligence or Assumption of Risk

A good argument can be made that if OSHA regulations are to be admissible evidence against the defendant, the spirit of objectivity would be insured if applicable regulations bearing on employee conduct are admissible on behalf of the defendant. Unlike almost all previously existing safety codes, private or governmental, OSHA explicitly creates duties for the employees as well as the employer.[128] Applicable regulations further articulating this duty may suggest a course of conduct which, if it had been undertaken by plaintiff, might have prevented his injury. Such regulations should be admissible when clearly relevant, although it is doubtful that defendant could claim that a plaintiff's breach is conclusive and an absolute defense to liability. Even under OSHA employee-conduct regulations, primary safety duties are often left upon the factory-employer.

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126. *See* AFL-CIO v. Brennan, 530 F.2d 109 (3d Cir. 1975). This case, concerning the controversy over the OSHA standard disallowing hands in press dies, makes it clear that both industrial groups and organized labor are very interested in the strictness with which regulations are defined and enforced.

127. Nordstrom v. White Metal Rolling & Stamping Corp., 75 Wash. 2d 629, 453 P.2d 619 (1969) (Hale, J., dissenting):

> In my opinion, the ASA code amounted to little more than an endorsement of the ladder manufacturing industry, ladder merchants and representatives from selected groups presuming to speak for users of the product. Although providing useful information, this kind of sponsorship in commerce did not, in my judgement, impart such a degree of reliability to the ASA safety standards code as to warrant its admission over objection. As evidence, it was and is palpable hearsay, and I see nothing in the majority opinion to remove it from that category.

Id. at 639, 453 P.2d at 629. Compare the majority opinion at notes 83-85 *supra.*

128. 29 U.S.C. § 654(b) (1970).

Before extending this argument further, it is appropriate to consider a typical OSHA regulation related to both employer and employee conduct and its possible ramifications in a third-party suit. The OSHA regulation on occupational eye and face protection provides and adequate example.[129] This regulation provides that such eye and face protection shall be required where there is a "reasonable probability" that its use will prevent injury.[130] In such situations, employers shall make suitable protective equipment conveniently available to employees, who then shall use the protectors.[131] Eye protectors, for instance, shall be provided where there are hazards of flying objects, glare, liquids, injurious radiation, or a combination of these dangers.[132] The language of this regulation clearly puts the primary duty of making the equipment available on the factory-employer. Once provided, however, the language of both the OSHA statute and the regulations creates a duty on the part of the employee to use the equipment.

The possible use of the eye and face protection regulation can be illustrated by a hypothetical somewhat different from the punch press problem. Here, the machine in question may have a flywheel or other rapidly spinning apparatus. Such device throws a piece of foreign matter into the plaintiff's eye. In plaintiff's subsequent suit against the manufacturer, defendant might claim that plaintiff had not been using a pair of safety glasses provided by the employer. Defendant could argue that the recognized hazard as defined in the OSHA regulations is some evidence of plaintiff's contributory negligence or assumption of risk.

Although case authority in this area is sparse, evidentiary value has been given to safety statutes similar to OSHA in their applicability to employee conduct.[133] Where employees have proceeded in violation of provisions binding upon their conduct, such violation has been held admissible as evidence of plaintiff's contributory negligence.[134] This should be the result in the hypothetical flywheel case, since the employer had provided the glasses but the employee chose not to use them.[135] In relation to an assumption of risk defense, the

129. 29 C.F.R. § 1910.133 (1975).
130. *Id.* § 1910.133(a).
131. *Id.*
132. *Id.*
133. Walsh v. Miehle-Goss-Dexter, Inc., 378 F.2d 409 (3d Cir. 1967); Bellefeuille v. City & County Savings Bank, 374 N.Y.S.2d 781 (1975). *Cf.* Jasper v. Skyhook Corp., ___ N.M. App. ___ , 547 P.2d 1140 (1976).
134. Walsh v. Miehle-Goss-Dexter, Inc., 378 F.2d 409 (3d Cir. 1967); Bellefeuille v. City & County Savings Bank, 374 N.Y.S.2d 781 (1975).
135. *See, e.g.*, Brennan v. OSAHRC, 511 F.2d 1139 (9th Cir. 1975). Although this is an action involving a citation of a factory for OSHA violations and not a civil action, it

regulation could be evidence that the employee's conduct, whatever its cause or justification, can be objectively viewed as involving a recognized risk. This admission as "evidence of the risk" would be similar to plaintiff's use of a machine guarding regulation as evidence of dangerous machine character.[136] In either case, OSHA regulations define risks and dangers which experience has shown preventable.

Although the eye protection regulation might be used evidentially, several factors would work against its being conclusive on employee conduct. First, since the regulation puts the primary duty of providing glasses on the employer, the degree with which this initial duty has been executed might mitigate the employee's duty. This would especially be the case if the employer never provided safety glasses at all. Even where the employer has provided the glasses, the duty under OSHA could conceivably extend to forcing employees to wear them.[137] The use of the safety glass regulation as an absolute defense could also be foreclosed by an employee's lack of actual knowledge of the danger. Even if plaintiff had safety glasses and chose not to use them, he may not have known the actual danger of the flywheel. Such knowledge of actual danger is central to the assumption of risk defense to strict products liability.[138] The mere existence of a regulation does not demonstrate this important element of proof. Finally, it might generally be argued that the employee's duty under OSHA is within the context of the employer-employee relationship. Since it is thus not a duty owed to the third-party manufacturer, the employee's non-compliance with OSHA can be evidential but not conclusive in the products suit.

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demonstrates that courts recognize employee duties under OSHA. The employer's alleged violations arose from "individual employee choices of conduct." They were not wearing the personal protective equipment provided them by the employer. The court thus held that employer's OSHA violation must be vacated.

136. *See* note 88 *supra.*

137. As with many issues concerning the force of OSHA duties, this position has been met with division of opinion among the Review Commissioners. *See* Weyerhaeuser Co., 17 OSAHRC 362 (1975). The Commission ruled here, Chairman Moran dissenting, that even though an employer had provided protective equipment, the employer's duty had not been fulfilled. The employer's duty extended to "forcing" employees to use such equipment.

138. PROSSER, *supra* note 4, at 447. *See also* the detailed analysis in Johnson v. Clark Equip. Co., ___ Ore. ___, 547 P.2d 132 (1976).

The importance of the actual awareness element in the industrial accident context may be leading to the erosion of the "patent defect rule," often the bane of plaintiffs in products cases. The rule generally holds that the manufacturer may not be liable for "open and obvious," in other words, "patent," dangers. *See* Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571 (1976), *overruling* Cambo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950).

A defendant who intends to raise the issue of OSHA regulations bearing on employee conduct should also be aware that some courts have subtly eroded employee conduct-related defenses. An employee's violation of a safety regulation, for instance, may be excusable if the plaintiff proceeded in the face of the danger because of a command from his employer.[139] The employee's "obligation to do his job" may thus be as relevant as safety considerations.[140] In a case bearing some resemblance to the safety glasses hypothetical, it has been suggested that an employee's "economic complusion" might make the running of known risks reasonable for him.[141] Obviously, if such language were ever widely followed, there would for all practical purposes no longer be an assumption of risk defense in industrial accident cases. Though such expressions are unusual, they are offered to illustrate what could be an undercurrent of judicial feeling in this area of liability.[142] "Economic compulsion" arguments are what defense lawyers might face if they begin pressing OSHA's employee conduct provisions as absolute defenses.

At best, then, the defendant will probably be able to evidence employee conduct only narrowly with OSHA regulations. Any question of the efficacy, vagueness, or direct applicability of a particular regulation to employee conduct will probably call for its complete exclusion.[143] Within the limits discussed, however, defendant should be allowed to use directly applicable regulations against plaintiff where the limited evidentiary purpose is made clear. Allowing defendants to do this could help balance the overall effect of OSHA introduction into third-party suits. It would be rather inconsistent for a jurisdiction recognizing plaintiff-oriented safety code evidence to disallow the defendant's use outlined here.

Summarizing, at least two possible uses of OSHA regulations should be open to third-party industrial defendants: first, as some

139. Walsh v. Miehle-Goss-Dexter, Inc., 378 F.2d 409 (3d Cir. 1967). *Contra*, Bellefeuille v. City & County Savings Bank, 374 N.Y.S.2d 781 (1975).

140. Walsh v. Miehle-Goss-Dexter, Inc., 378 F.2d 409 (3d Cir. 1967); Independent Nail and Packing Co. v. Mitchell, 343 F.2d 819 (5th Cir. 1965).

141. Independent Nail & Packing Co., v. Mitchell, 343 F.2d 819, 823 (5th Cir. 1965) (Aldrich, C.J., concurring). While building a barn for his employer, a worker was blinded when a nail fragmented and struck his eye. There was evidence that employees were not wearing safety glasses, even though they knew that 5% of the nails used were breaking. *See also* Deem v. Woodbine Mfg. Co., 89 N.M. 50, 546 P.2d 1207 (1976); Johnson v. Clark Equip. Co., ___ Ore. ___, 547 P.2d 132 (1976).

142. The assumption of risk defense may suggest the harsh defenses employees faced at common law when trying to recover for industrial injuries from their employers. *See* PROSSER, *supra* note 4, at 450-53, 525-30.

143. Mitchell v. Mach. Center, Inc., 297 F.2d 883 (10th Cir. 1961).

evidence of compliance with existing standards, and second, in clear cases of regulation applicability, as evidence regarding plaintiff's contributory negligence or assumption of risk. Both of these affirmative uses of OSHA by defendant and the previously discussed affirmative uses of OSHA by plaintiff are evidentiary. A third possible use of OSHA by defendant, however, would involve basic questions of the policies and duties implied by OSHA's existence as a whole. This third and final purpose of OSHA invocation by defendant would be the claim that OSHA has, in certain cases, shifted the ultimate safety duty from the machine manufacturer to the factory-employer.

Attempts to Shift Ultimate Safety Duty upon the Factory-Employer

Up to this point, the concern of this note has been with evidentiary uses of OSHA regulations. The plaintiff will probably be able to use them as a basis of expert testimony and possibility as evidence of negligence or machine dangerousness. The defendant may be able to evidence compliance to some extent short of making such compliance conclusive on his duty. Defendant's use of the regulations to show plaintiff's contributory negligence or assumption of risk will also be purely evidentiary.

If OSHA represents anything, however, it stands as a broad affirmation of the safety duty within the industrial environment. This duty, to provide a safe workplace and follow all regulations pertinent thereto, is set solidly on the shoulders of the factory-employer.[144] OSHA was not promulgated for the purpose of being an evidentiary tool, even though evidentiary side effects may be permissible. Since duties of third-party manufacturers were left unstated in OSHA, it is arguable that Congress sensed that the primary responsibility for industrial safety was best placed elsewhere.

The question is whether defendant in a third-party suit can raise these overall safety policies and duties implied by OSHA to shift the duty of repairing defects from himself. This problem may often arise where the litigation concerns machinery older than OSHA itself. In the punch press hypothetical, for instance, the absence of proper safety guards evidences not only the fault of the manufacturer but also the direct violation of OSHA by the factory-employer. If the machine had been in the factory's control for a long time, the factory's violation may seem to be a cause of injury which has intervened and superseded the earlier culpability of the manufacturer. However,

144. 29 U.S.C. § 654(a)(i) (1970).

courts have rejected this argument with other safety codes; it should likewise fail with OSHA. A manufacturer's safety duty is considered non-delegable. Dangerous instrumentalities, once injected into the flow of commerce, continue as possible causes of injury despite the "negative acts" of factories.

The position that a safety statute shifts the ultimate safety duty upon the factory-employer was adopted by the New Jersey Court of Appeals in 1971. In *Bexiga v. Havir Manufacturing Corporation*,[145] a statute in force at the time a power press was manufactured placed a duty upon the factory to provide safety guards.[146] Thus, the statute was similar to OSHA's sections on employer-related duties. The court held that the manufacturer could rely on this statutory "custom" within the industry and was relieved of strict liability.[147] This decision was criticized as undermining the policy of strict liability, since the statute was read to limit the worker's recovery to workmen's compensation benefits and to place sole responsibility on the factory.[148] The Supreme Court of New Jersey ultimately reversed for the reason that public policy requires manufacturers to take responsibility for the safety of their products.[149] Custom could at best be evidentiary, not conclusive, and the statute did not give the manufacturer the right to rely on the factory-employer's compliance as a matter of law.[150] In essence, this means that the manufacturer is held to the foreseeability of his purchasers breaking the law.[151]

One of the few reported cases dealing with the admissibility of OSHA regulations is in accord with *Bexiga*. In *Scott v. Dreis and Krump Manufacturing Co.*,[152] a 1975 Illinois case, a defendant's attempt to introduce an OSHA regulation on press guarding[153] for the purpose of delegating the duty of installation upon the factory-employer was held properly refused.[154] The court held that the manufacturer's duty to incorporate safety devices in a design that is

145. 114 N.J. Super. 397, 276 A.2d 590 (1971), *rev'd*, 60 N.J. 402, 290 A.2d 881 (1972).

146. Law of 1904, ch. 64, § 13, p. 156, [C.S. p. 3026, § 28], *as amended* Law of 1912, ch. 6, § 1, p. 21, [1924 Supp. § 107-28], Law of 1904, ch. 64, § 30, p. 61, [C.S. p. 3030 § 45], *repealed and superseded*, N.J. STAT. ANN. § 34: 6A-3.

147. 114 N.J. Super. at 403-04, 276 A.2d at 593.

148. Comment, 25 RUT. L. REV. 733 (1971).

149. Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972).

150. *Id.* at 410, 290 A.2d at 285-86.

151. *Id. See also* Rhoads v. Service Mach. Co., 329 F. Supp. 367 (E.D. Ark. 1971).

152. 26 Ill. App. 3d 971, 326 N.E.2d 74 (1975).

153. 29 C.F.R. § 1910.217(c)(1) (1975).

154. 26 Ill. App. 3d at 988, 326 N.E.2d at 85.

not "unreasonably dangerous" is non-delegable.[155] Where appropriate safety devices had never been provided the factory, the court noted, the defendant's attempt to delegate its safety duty to the factory would inject an improper conclusion of law on the strict liability issue.[156]

On the surface, the "non-delegable duty" concept does not seem very revolutionary. It is closely related to familiar concepts of causation.[157] A later failure of the factory-employer to install devices does not interrupt the negligence and strict liability of the manufacturer. The earlier "wrong" of the manufacturer is simply allowed to continue unchecked as a possible cause of injury. In the context of both strict liability and the generally long life span of industrial machinery, however, the application of this concept can produce startling results.

Balido v. Improved Machinery, Inc.,[158] a 1973 California appellate court decision, is one of the most far-reaching of all third-party industrial accident cases. It incorporates most of the evidentiary issues discussed up to this point and suggests the ultimate questions of duty and policy. The *Balido* plaintiff was injured when a plastic injection molding press closed on her hand while she was making an adjustment. The machine had been manufactured in 1950 and the injury occurred in 1965. At the time of manufacture, a California industrial safety order was in effect. It was binding on factories which used machinery and not on manufacturers. The safety order required more guarding devices on the machine than the defendant had originally installed.

The defendant-manufacturer apparently learned of the relevance of the industrial order after the machine was already sold. Significantly, on three separate occasions, the defendant undertook to warn the factory-employer of the machine's non-compliance with state safety standards. At one point, the defendant offered the required machine guarding for sale to the factory.[159] The factory, however, never purchased the necessary machine guarding from anyone, and thus the machine was substantially the same the day of injury as it was when sold fifteen years earlier. The plaintiff sued the manufacturer on the theories of negligence, warranty, and strict

155. *Id.*

156. *Id.* Although the court would not allow use of the OSHA regulation by defendant to delegate duty, it recognized that the same regulation might be admitted for plaintiff's evidentiary purposes.

157. *See, e.g.*, PROSSER, *supra* note 4, at 177.

158. 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973).

159. *Id.* at 639, 105 Cal. Rptr. at 893.

liability. Defendant conceded negligent design for the purposes of nonsuit, which the trial court granted.

The appellate court reversed. First, the industrial safety order was held to be probative evidence of deficient design, even though it was directed to the factory and not the manufacturer.[160] Second, the factory's notice of both the danger and the safety statute did not create a superseding negligence which relieved the third-party from liability as a matter of law. Relying on *Bexiga*, the court held that whether or not the manufacturer should have foreseen the factory's disregard of law was a question of fact.[161] Finally, the "lapse of time" of over fifteen years since the machine's manufacture did not make an absolute defense and was also a question of fact.[162]

It does not seem that the manufacturer in *Balido* could have avoided liability in any way except by giving away the safety devices free to the factory. Such was the result, even though it was the factory's primary responsibility to install, and presumably to pay for, such devices under the statute. In light of an earlier case presenting an almost identical situation, it is even questionable whether giving the device away free would have absolved the manufacturer of responsibility.[163] He might even have been required to personally install it.[164] One can only speculate as to the result if the manufacturer had in fact come personally to the factory with the machine guarding but had been refused entrance. Under the principles of responsibility and causation that these cases rely on, the manufacturer's liability presumably would have continued. Such a result could be no more unfair to the third-party defendant than the result in *Balido*.

The role the safety regulation plays here is subtle. Seemingly, the greatest force it can have for whatever reason it is offered in the third-party suit is evidentiary. Thus, when defendant attempts to invoke it for something more he must fail. All uses of safety

160. *Id.* at 642, 105 Cal. Rptr. at 896.

161. *Id.* at 646-47, 105 Cal. Rptr. at 899.

162. *Id.* at 645, 105 Cal. Rptr. at 898.

163. Heichel v. Lima-Hamilton Corp., 98 F. Supp. 232 (N.D. Ohio 1951).

164. *Id.* In this extraordinary case, a state statute similar to both OSHA and the industrial safety order in *Balido* required the factory to install certain machine guards. A manufacturer, sued on a negligence theory for failing to provide such guards, claimed that the factory's violation of statute was an intervening cause of injury. This claim was even stronger than the defendant's in *Balido*. The *Heichel* manufacturer actually provided the necessary guards to the factory, which the factory refused to install. It was held that the manufacturer's liability continued; his duty extended to installing the guard. The case relied on the same theories of causation discussed at note 157 *supra*. The original injury-causing "force" put in operation by defendant had merely continued unchecked. 98 F. Supp. at 240.

standards in third-party suits examined here stop short of giving the standard a conclusive effect. Since it is without the force of law in the suit at hand, plaintiff cannot claim that defendant has a duty to comply with the statute. The safety code may thus give plaintiff an evidentiary tool, but not a cause of action. Conversely, the defendant is foreclosed from invoking the standard as conclusive either on his compliance or plaintiff's conduct.

The central problem, however, is that the safety code was promulgated to be more than an evidentiary tool. Defendant's argument that the safety duty has shifted, though inconsistent with metaphysical concepts of causation, goes to the heart of the standard's purpose. OSHA's basic purpose is the improvement of industrial safety at the point the legislature presumably felt such problems could most directly be met: within the employer-employee relationship.[165] Before the advent of products liability law, a common defense to the privity barrier against third-party suits was that safety codes, as opposed to random litigation, were the best method for effectuating safety policies.[166] At that time, of course, safety thinking was still primitive and strict products liability had not yet been conceived. Now, both comprehensive safety codes and third-party litigation have become commonplace. When safety codes are used evidentially within the context of third-party litigation, however, the code's basic purpose is not in issue.

The possibility that there might be a conflict between existing policies is not often discussed directly by the courts. The decisions may be best explained, although the courts do not mention it, by recognizing that to agree with the defendant that the statute shifts the duty to the factory-employer would leave plaintiff a limited compensation. Plaintiff would be held to whatever remedies workmen's compensation provides. This was suggested by the dissent in *Balido*.[167] It was the opinion of the dissenter that the court was, in effect, fashioning a new policy of workmen's compensation in opposition to the dictates of the legislature.[168]

In summary, a defendant's attempt to invoke OSHA to shift the safety duty upon the factory-employer will probably be disallowed on

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165. *See* notes 19 and 31 *supra*.

166. *See, e.g.*, Valeri v. Pullman Co., 218 F. 519 (S.D.N.Y. 1914).

167. Balido v. Improved Mach. Inc., 29 Cal. App. 3d 633, 650, 105 Cal. Rptr. 890, 901 (1973) (Compton, J., dissenting).

168. *Id.* Concluding a discussion of *Balido*, another writer states: "The manufacturer finds himself in an unenviable position rather like that of a drowning man whose neighbor owes him no legal duty to do an affirmative act which would save his life." Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident*, 14 DUQ. L. REV. 349, 376 (1976).

the basis of similar decisions. Strict liability holds the manufacturer to a non-delegable duty of selling a product which is not unreasonably dangerous. While this concept must overlook the basic focus of the safety code, it is at least consistent with the non-conclusive force the statute has when introduced for other purposes. It is possible, however, that recent developments in strict products liability law are expanding the scope of defendant's safety duty. In conjunction with safety code use, these developments could in some jurisdictions imply an almost conclusive effect of the standard on defendant's duty by its mere admission into evidence by plaintiff.

OSHA AND THE EXPANDING DUTIES OF PRODUCT MANUFACTURERS

Recent developments in products liability are expanding the conception of a manufacturer's safety duty. In some instances, evidence of technological improvements may be admissible to set standards for machinery manufactured prior to such advances. This development could have a great impact on the uses of OSHA regulations in third-party suits. A regulation, admitted for plaintiff's purely "evidentiary" purposes, might by its very existence imply a duty of manufacturers to improve machinery previously sold. Thus, though defendant may be barred from discussing the overall safety duties and policies which are the focus of the statute, plaintiff's reference to the same code may automatically imply an expanded duty of defendant. Such an effect was formerly not possible with safety code admission, since a prerequisite to their relevancy was their existence at the time of manufacture. This limitation, however, may be applicable only to negligence cases and not to the modern theory of strict liability.

Time of Standard Promulgation

As a prerequisite to the relevance of a safety code offered into evidence, the plaintiff may first have to demonstrate that the standards were in existence at the time of manufacture and not promulgated later.[169] The "time of standards promulgation" has thus been left a variable in the punch press hypothetical. If the punch

169. Muncie Aviation Corp. v. Party Doll Fleet, Inc., 518 F.2d 1178 (5th Cir. 1975); Mahoney v. Roper-Wright Mfg., 490 F.2d 229 (7th Cir. 1973); Vroman v. Sears Roebuck & Co., 387 F.2d 732 (7th Cir. 1967); Wenzell v. M.T.D. Prod., Inc., 32 Ill. App. 3d 279, 336 N.E.2d 125 (1975); Dominick v. Brockton-Tauton Gas Co., 356 Mass. 669, 255 N.E.2d 370 (1970); Lemery v. O'Shea Dennis, Inc., 112 N.H. 199, 291 A.2d 616 (1972); Rodrigues v. Elizabethtown Gas Co., 104 N.J. Super. 436, 250 A.2d 408 (1969).

press was manufactured after the specific OSHA regulation was in existence, in 1975 for instance, there is no such problem presented. If manufactured in 1960, however, the regulation may not be admissible at all under the traditional operation of the rule.

The rationale for the limitation is that any other result would be "totally unreasonable" because the standard would thus be retroactive in effect.[170] This rationale is probably consistent with the concept of negligence, and when products liability cases rest solely on that ground the limitation will undoubtedly continue. It would be unfair to give retroactive effect to a standard in negligence cases because of the reasonable man standard. A reasonable manufacturer is judged by what knowledge he should have had and incorporated into products at the time of manufacture.[171] In rare cases, entire industries may have lagged behind necessary safety developments and be required to implement them.[172] Even so, the requirement is to be aware of what improvements are necessary and not of specific codes not yet in existence.[173]

Even the most far-reaching industrial accident cases examined here, *Bexiga* and *Balido*, have not gone beyond this limitation. In both cases, the specific regulations discussed as evidence of negligence or defectiveness were in effect at the time of manufacture. The defendant was thus held only to what he knew or should have known at that time. The traditional limitation is thus inherent in *Bexiga* and *Balido*, and only few cases have suggested that the limitation no longer applies.[174] This "time of standards promulgation" limitation has been recognized in a negligence case involving the attempted admission of an OSHA regulation.[175]

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170. Bell v. Buddies Super-Market, 516 S.W.2d 447, 449 (Tex. Civ. App. 1974).

171. Vroman v. Sears Roebuck & Co., 387 F.2d 732, 737 (7th Cir. 1967); Bell v. Buddies Super-Market, 516 S.W.2d 447 (Tex. Civ. App. 1974).

172. *See, e.g.*, The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).

173. Defendants are charged with knowledge of existing customs, practices, and developments within industry at the time of manufacture. Safety codes, if relevant, are considered evidence of such general knowledge. Thus, if not yet existent, they could not logically evidence such knowledge. *See* Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178, 1181 (5th Cir. 1975); Vroman v. Sears Roebuck & Co., 387 F.2d 732, 737 (9th Cir. 1967).

174. One of the few recent cases suggesting the real weakness of the time of standards promulgation limitation is *Simms v. Southwest Texas Methodist Hosp.* 535 S.W.2d 192 (Tex. Civ. App. 1976). This court's reasons for excluding a subsequent safety regulation are not convincing. It ties the policy reasons for exclusion to the same policy reasons which, when used to exclude subsequent design changes in strict liability, are beginning to fall by the wayside. *See* notes 186-90 *infra* and accompanying text.

175. Bell v. Buddies Super-Market, 516 S.W.2d 447 (Tex. Civ. App. 1974).

In two situations, however, ultimate questions of safety code admissibility will be reached. First, some OSHA regulations already in existence or yet to be promulgated may create technological requirements that are new. Second, in cases of certain older machines, not even the pre-existing code which OSHA restates may have been in existence at the time of manufacture. In either case, attempts may be made to hold the manufacturer to a codified technological standard not available to him when the allegedly dangerous machine was designed and sold.

Although the traditional approach from existing case law indicates that plaintiffs will be unsuccessful in admitting new OSHA regulations or any other new standards, it is nevertheless possible that the standards may yet be admissible. The theory of strict liability may not contain the same limitations on legal responsibility which are inherent in negligence. The concept is very new to the products field, and the temptation has often been to apply it in ways closely analagous to the negligence concept which the judges already knew.[176] For a while, certain "time-related" defenses available to defendants in negligence suits were also made available to strict liability defendants. A "time-related" defense in this context means one which allows the defendant to limit the discussion to the custom, practice and technological capability of his industry at the time of manufacture. Recent strict liability decisions which strike these defenses down may ultimately open the door to evidence of safety codes promulgated after manufacture and thus accordingly allow a new evidentiary basis of liability.

The Disappearance of Time-Related Strict Liability Defenses

The admission of safety codes promulgated after product manufacture, though inconsistent with negligence, may be consistent with the policy of strict liability. This conclusion is reached by analogy to recent decisions in the strict liability context which hold negligence-related defenses and exclusionary rules inapplicable to the new theory. Defenses based on the custom or state of the art at the time of manufacture, if given effect in strict liability, have been said to emasculate the doctrine in effect. Such defenses would hold the manufacturer only to what he could have known at the time of sale. The "unreasonably dangerous" standard may carry no such inherent limitation. Further, post-accident design changes in a product may become admissible evidentially against the defendant. Strict liability may thus imply a continuing duty upon the manufacturer to

176. *See* note 189 *infra.*

update previously sold machinery. With the rationale excluding the admission of new technology in strict liability cases thus undermined, there should no longer be a bar to the admissibility of safety codes promulgated after manufacture.

The rule of strict liability may not inherently foreclose the consideration of new technology. A basic limitation of the rule is that it applies only where the product is unreasonably dangerous when it leaves the manufacturer's hands.[177] This, however, leaves open the question of whether "unreasonable danger" is *defined* by the standards and knowledge available at the time of sale or later on. In the hypothetical punch press case, for instance, a condition may be present at the time it leaves the seller's hands. This condition may not be generally considered "unreasonably dangerous" until fifteen years later. Present standards, including OSHA regulations, would be useful to the plaintiff in defining the unreasonable danger in light of present technology. Obviously, if old customs and "states of the art" were a defense to the strict liability question, these latest standards would be completely irrelevant and prejudicial. The plaintiff will be bound to discuss the machine in terms of what a well-informed manufacturer would have known at the earlier time, not what he would know later. A negligence basis of a custom or "state of the art" defense is implicit. Strict liability, however, applies even though the manufacturer exercised all possible care.[178]

Although some courts have held the state of the art defense viable in strict liability suits,[179] other decisions have recognized that to allow the defense would be to "emasculate" the doctrine of strict liability and in effect to return to a pure negligence theory.[180] In a 1970 strict liability case involving an allegedly dangerous blood serum, it was conceded that there were absolutely no means by which the existence of a dangerous virus could be detected in the serum under the present state of medical science.[181] This technological impossibility was held to be of "absolutely no moment" to the liability of the hospital which administered the serum.[182] The same rationale was adopted in an

177. *See* note 8 *supra.*

178. *Id.*

179. Larson v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969); Ellithorpe v. Ford Motor Corp., 503 S.W.2d 516 (Tenn. 1973).

180. *See, e.g.*, Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

181. *Id.*

182. *Id.* at 455, 266 N.E.2d at 903. Any other ruling, the court felt, would have been entirely inconsistent with the policy of strict liability. For an excellent discussion of the far-reaching ramifications *Cunningham* may have on the industrial manu-

industrial accident context three years later. In *Gelsumino v. E.W. Bliss Co.*,[183] the fact that an allegedly dangerous punch press foot pedal might have been in complete conformity with the state of the art at time of manufacture was held completely irrelevant to the strict liability issue.[184] With regard to negligence, it was relevant but not conclusive.[185]

Strict liability may also open the way for consideration of subsequent repairs or design improvements in products. In a recent case involving the design of an International Scout jeep, *Ault v. International Harvester Co.*,[186] the California Supreme Court held post-accident design improvements relevant to a strict liability suit. Social policies in favor of excluding such evidence, such as the encouragement of the manufacturer to actually improve his design, were thought relevant to negligence actions only.[187] What this means, in effect, is that the court which first formulated strict products liability has now admitted that the doctrine does not have the furtherance of products safety as its primary goal.[188] It is a tool for

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facturer, see Patterson, *Products Liability: The Manufacturer's Continuing Duty to Improve His Product or Warn of Defects After Sale*, 62 ILL. B.J. 92 (Oct. 1973).

183. 10 Ill. App. 3d 604, 295 N.E.2d 110 (1973).

184. *Id.* at 609, 295 N.E.2d at 113.

185. *Id.*

186. 13 Cal. 3d 113, 528 P.2d 1148, Cal. Rptr. 812 (1975), *vacating* 10 Cal.3d 337, 515 P.2d 313, 110 Cal. Rptr. 369 (1973).

187. The court in *Ault* indicated:

> [C]ourts and legislatures have frequently retained the exclusionary rule in negligence cases as a matter of "public policy," reasoning that the exclusion of such evidence may be necessary to avoid deterring individuals from making improvements or repairs after an accident has occurred. . . .
>
> When the context is transformed from a typical negligence setting to the modern products liability field, however, the "public policy" assumptions justifying this evidentiary rule are no longer valid. The contemporary mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement. . . . [T]he exclusionary rule . . . does not affect the conduct of the mass producer of goods, *but merely serves as a shield against potential liability.*

13 Cal. 3d at 119-20, 528 P.2d at 1152-52, 117 Cal. Rptr. at 815-16 (emphasis added).

188. *Id.* It should be seen here that the encouragement of product improvement does not weigh as heavily with the court as the policy of making the manufacturer pay. In the next paragraph, however, the court says that the exclusionary rule may be inconsistent with the public policy "of encouraging the distributor of mass-produced goods to market safer products." 528 P.2d at 1152. The only way to understand this

fastening liability and distributing losses, first and foremost, and other considerations are only side effects. This analysis is perhaps best illustrated by the confusion of courts that adopt strict liability yet try to keep old defenses and limitations of it alive.[189]

Ultimately, the disappearance of time-related defenses to strict liability adds support to the developing concept of a product manufacturer's "continuing duty."[190] This continuing duty is to be aware of dangerous propensities in previously manufactured products and to correct such deficiencies.[191] The concept goes beyond what is generally required under negligence since the defendant may now be held to technological standards unknown and unknowable at the time of manufacture.[192]

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seeming paradox is to see the encouragement policy as secondary to the primary policy of spreading losses. The loss-spreading policy obviously operates in every successful strict liability suit. The safety encouragement policy is considered a side effect which will hopefully follow. In particular cases, however, the secondary effect will not result. Some product manufacturers may be driven out of business if forced to bear interim economic burdens too crippling to pass on. At this point, they can no longer market safer products since they are out of business. The policy of "not shielding them from liability," however, will then have been served.

189. *See, e.g.*, Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66 (Ky. App. 1973). The *Jones* case is criticized in Comment, *Is 402A Strict Liability Really Strict in Kentucky?*, 62 KY. L. REV. 866 (1973), the writer taking issue with the intrusion of negligence concepts in strict liability. *See* note 8 *supra*.

190. *See* Noel v. United Aircraft Corp., 219 F. Supp. 556 (D. Del. 1963). In this case, concerning the design of a propeller system, the "continuing duty" concept was first formulated. *See also* Recent Developments, *A Manufacturer's Continuing Duty to Improve Product*, 27 OHIO L. J. 746 (1966).

191. *See* note 182 *supra*.

192. *See* note 173 *supra*.

Questions of the "feasibility" of arguments made by products liability plaintiffs often underscore some aspect of the technological possibility problem. In concluding a discussion of the *Cronin* case, note 8 *supra*, Dean Keeton stated:

> Whether or not the scientific unknowability of the risk should be a roadblock to recovery is another question. If it is, then as the Supreme Court of California suggests, strict liability as to design defects is virtually a myth. This is not to say that negligence should be a prerequisite to recovery when the claim is based on the ground that the product was improperly designed. It is only to say that the courts must face the issue squarely and decide whether or not negligence is or is not to be a prerequisite to recovery.

Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 39 (1973).

The "facing up" to the ramifications of strict liability may be a goal yet to be realized, even in jurisdictions where appellate forums have attempted to lead the way. *See* Baker v. Chrysler Corp., 55 Cal. App. 3d 710, 127 Cal. Rptr. 745 (1976) (holding that plaintiff must show the "reasonableness" of alternative designs where a design defect is claimed); Buccery v. General Motors Corp., 132 Cal. Rptr. 605, 614 (Cal. App. 1976) (stating that the design defect in issue was "readily

Gelsumino, *Ault*, and the concept of continuing duty should have far-reaching effects on the admission of OSHA regulations by plaintiff to evidence unreasonable danger. First of all, if the state of the art defense is irrelevant and later design changes are admissible, there is obviously no longer any barrier to the admission of evidence concerning new technology generally to define "unreasonable danger." This means that regulations such as OSHA should be admissible whenever promulgated, before or after manufacture. Such a result is consistent with the strict liability policy of *Gelsumino* and *Ault*. Indeed, it would be strange to distinguish the admission of later design changes from the admission of later safety regulations. Both may reflect technologies and sources of comparison unknowable by defendant at the time of manufacture.

Second, not only is an evidentiary barrier to admission of certain safety codes gone, but also new duties are placed upon manufacturers of industrial machinery. The very definitions provided by OSHA and other regulations imply an expanded duty of accident prevention upon the manufacturer by the very fact of their existence. That duty, in short, is to be aware of current standards of safety as applicable to previously manufactured machinery. Nothing short of this, together with bringing the previously manufactured machinery up to date by providing and installing currently required safety features, will relieve the manufacturer from his "continuing duty." Not even this may relieve his liability for, as we have seen, compliance can at best be evidential, not conclusive.[193]

This "duty," of course, is completely unrealistic and would be impossibly burdensome for the manufacturer to meet, because the duty does not have as its primary rationale the encouraging of the safe manufacture of products. The *Ault* decision strongly implies this. Only negligence, which invokes ideas about the distribution of fault and responsibility in society, is concerned with a duty which

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preventable through the employment of existing technology" at economical costs). The question is whether or not these decisions have faced up to *Ault*. *See also* McClellan v. Chicago Transit Authority, 34 Ill. App. 3d 151, 340 N.E.2d 61, 63 (1975) (stating that the factors of "cost, practicality, and technological possibility" must be shown in strict liability design cases to show that alternative designs are feasible). The question is whether or not this decision has faced up to *Cunningham*.

Where negligence concepts enter into strict liability and "feasibility" is thus a factor in the relevance of profferred evidence, it is probable that OSHA regulations, though generally admissible, will not be allowed where they set technological requirements unknown at the time of manufacture. This result seems implicit in *Bunn v. Caterpillar Tractor Co.*, 415 F. Supp. 286 (W.D. Pa. 1976).

193. *See* notes 116-27 *supra* and accompanying text.

really exists.[194] The "continuing duty" in strict liability cases is an artificial concept imposed for the purpose of making somebody else pay.[195] It is concerned not with the distribution of fault and duty but with distributing losses.

In summary, absent a chance of establishing the assumption of risk defense in a particular case, an industrial products manufacturer's liability is absolute if new doctrines are straightforwardly applied. Strict liability simplifies the route to the manufacturer's liability. Negligence or fault need not be proved. The central burden of proof remaining to plaintiff, proof of the machine's unreasonable danger, may then be greatly simplified by OSHA regulations and similar codes. With the disappearance of negligence and its related defenses, the very existence of safety codes may imply expanding duties of third-party manufacturers. At the same time, such manufacturers are foreclosed from invoking the basic focus of OSHA as a shield to liability. Manufacturers may thus be liable for injuries caused by old machines which do not meet present definitions of safety. Ironically the employer, who carries the primary OSHA safety duty, cannot be so liable. The defendant-manufacturer's problem, however, must not be seen as one having to do with evidentiary rules which may permit admission of OSHA or similar codes. The still developing concept of strict liability, as a course of recovery in the industrial context, is the real problem for defendant.

CONCLUSION

The growing use of OSHA regulations by both the plaintiff-employee and the defendant-manufacturer in third-party industrial suits seems inevitable. OSHA represents a terminology and manner of dialogue about the industrial workplace which cannot practically be excised. Further, the current dialogue in OSHA administrative decisions follows some of the same general lines present in industrial products litigation. Plaintiff should be able to introduce applicable regulations as a basis of expert testimony and to evidence defendant's negligence and dangerous machine character. Defendant's use of certain regulations to evidence compliance and plaintiff's contributing conduct may also be permissible.

Whenever regulations are offered into evidence, the efficacy of such standards should be closely scrutinized by the opposing party.

194. *See* Donnelly, *After the Fall of the Citadel: Exploitation of the Victory or Consideration of All Interests?*, 19 SYRACUSE L. REV. 1 (1967).

195. *Id.* at 30. *But see* the pointed defense of the use of products suits by industrial workers in Wagner, *Eliminate Industrial Worker's Products Suits?—ATLA's Response*, 19 A.T.L.A. NEWS L. 97 (April 1976).

OSHA, in its primary context of enforcing safety measures on the factory-employer, has been vulnerable to challenges of regulation vagueness and feasibility. Even where regulations are relevant, these problems could be pointed out in an effort to reduce the weight accorded to them. As the distance between the generality of the regulation applied and the complexity of the machine in issue increases, so also do problems of efficacy and relevance.

Although OSHA represents an affirmation of the safety duty of the factory-employer, the third-party defendant will probably be foreclosed from relying on this. He is considered, under products liability, to have a non-delegable duty to correct defects which cannot be shifted upon the factory. This result seems consistent with the fact that all other possible uses of OSHA in third-party suits are evidentiary only, not conclusive. Plaintiff, however, may be able to imply questions of duty based on the mere fact of OSHA's existence where the doctrine of strict liability is straightforwardly applied.

With strict liability in issue, the mere introduction of safety codes such as OSHA may expand the perception of a manufacturer's safety duty. Safety codes, as a statement of new safety thinking, can provide the standard for defining a machine's defectiveness or "unreasonable danger" even if promulgated after manufacture. The absence of "state of the art" or similar defenses and exclusionary rules, coupled with a plaintiff's evidentiary use of OSHA regulations, may in effect hold the manufacturer to a continuing duty of improving previously manufactured machines. Any doubt about the far-reaching consequences of OSHA use in this context can be resolved by a close look at the latest industrial litigation in the light of *Ault v. International Harvester.*[196]

OSHA may thus have a greater impact on the civil liability of product manufacturers than it may have on the employer-factory's liability. This anomalous result has not come about through a conscious choice about which segment of society is best able to cure

196. *See, e.g.*, Woltman v. Essick Mfg. Co., No. 236648 (Super. Ct. Calif., filed July 24, 1975) (18 A.T.L.A. NEWS L. 425, Nov. 1975). This was a strict liability suit against a manufacturer of a mortar mixer allegedly without proper safety guards. Later models of this mixer had such guards. Defendant claimed that addition of the guards in later models was undertaken because of an attempted compliance with OSHA regulations. Defendant's attempt to so improve his product, however, became evidence supporting his liability. Following *Ault*, the court held for plaintiff, stating that this post-accident design improvement was evidence of the unreasonable danger of the mortar mixer, which pre-dated OSHA. In light of *Ault*, it thus becomes obvious that any distinction between the admission of subsequent design improvements and subsequent safety codes would only be overly technical and illogical.

industrial hazards and bear the losses resulting therefrom. Rather, it has come because several creative developments in law occur at a time when a major policy determinant is in a state of stagnation. The creative developments include the fall of hearsay rationale as a bar to safety code admission, the crossing of the privity barrier which makes third-party suits possible, and the recognition that courts, not industries, are the final judges of how far safety technologies will be required to advance with relation to particular dangerous manufacturing arts. OSHA itself is a major creative development in the field of industrial safety. Despite its flaws, it has the potential of being molded into an effective tool for combatting industrial dangers at the point an employee most directly can seek redress: within the employer-employee relationship. At a time of several major legal developments, the single overall policy determinant which has often remained unchanged in this area is the law of workmen's compensation. Arbitrary statutory ceilings on recovery leave many injured workers the third-party suit as the only means to full recovery.

The use of OSHA regulations can only make the changes and clashes within current industrial policies more clear. A complex regulatory scheme designed to prevent accidents may be used to facilitate accident compensation in another context. Until there is a major change in the public policy of industrial accident compensation,[197] however, the third-party suit will progressively become a more difficult proposition for the manufacturers of industrial machinery. Strict liability, which provides a streamlined route to the manufacturer's legal responsibility, can now be coupled to the definitions of machine dangers provided by OSHA and similar codes.

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197. One proposal for reform may be found in Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident*, 14 DUQ. L. REV. 349 (1976). In addition to discussing the inadequacy of present compensation schemes, the author argues that a possible remedy for *Balido*-type dangers to the manufacturer is an expanded right of contribution against a negligent employer. The problem with this feature of the plan is that perhaps the best way to evidence the employer's fault would be to demonstrate his OSHA violations. If this were done, the employer's civil liability would in a very real way be increased by OSHA. Such result seems an indirect but a clear violation of 29 U.S.C. § 653(b)(4) (1970).

Another idea is that of O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501 (1976). An underlying argument of this article is that most seriously injured persons are primarily concerned with payment for out-of-pocket losses, not for pain and suffering. *Id.* at 510.

Finally, the balanced appraisal offered by Chief Justice Traynor may be of some value in considering reform proposals:

> Any system of enterprise liability or social insurance designed to replace existing tort law as the means for compensating injured parties should provide adequate but not undue compensation. Only if reasonably adequate compensation is assured can the law justify closing traditional avenues of tort recovery. On the other hand, once adequate compensation for economic loss is assured, consideration might well be given to establishing curbs on such potentially inflationary damages as those for pain and suffering. Otherwise the cost of assured compensation could become prohibitive.
>
> If in time the accident problem is solved through some compensation scheme that covers the basic economic losses of accident victims, it will remain to be seen whether the law of negligence as we know it today in this area will atrophy or will survive in a diminished role to afford additional compensation to victims whose injuries are caused by actual fault on the part of others. Money damages, of course, can never really compensate for the noneconomic losses resulting from personal injuries. Although it is therefore reasonable to exclude such losses from coverage in any purely compensatory system, inherent justice between the person injured and the person who caused the injury may demand compensation for such losses when the latter was actually at fault.

Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 376 (1965).