Litigating to prevent injuries: a strategy for consideration

Shannon Frattaroli[1], Stephen P. Teret[1,2], Jon S. Vernick[1,2]

[1]Center for Injury Research and Policy, Department of Health Policy and Management The Johns Hopkins Bloomberg School of Public Health, Baltimore, USA; [2]Center for Law and the Public' s Health, Department of Health Policy and Management, The Johns Hopkins Bloomberg School of Public Health, Baltimore, USA

Correspondence to: Shannon Frattaroli, The Johns Hopkins Bloomberg School of Public Health, 624 North Broadway, Baltimore, MD 21205 USA. E-mail: sfrattar@jhsph.edu

Abstract

The effectiveness of legislation and regulation as tools for injury prevention is well recognized in Europe. There is another tool that has been used effectively in the United States, but which is not substantially discussed in the European injury prevention literature. Litigation against the makers of unsafe products has been used in the US to create an incentive for manufacturers to invest in safer product design rather than risk a lawsuit and pay a penalty for neglect. This commentary discusses the use of litigation in the US as a tool for preventing injuries, and speculates on whether such an intervention might be feasible and desirable in Europe.

Key words: injury prevention, litigation, product safety

Introduction

The field of injury prevention presents challenges that differ substantially from other areas of public health. Unlike infectious and chronic disease control, for which the establishment of the diseases= etiology often poses a difficult scientific challenge, the etiology of an injury is most often quite apparent. A pedestrian is struck by a car and suffers a fractured limb; an individual is stabbed with a knife and has a penetrating injury to an organ - no obscure biochemical pathways need be discovered in order to understand how the damage occurred. The great challenge of injury prevention is in formulating and implementing effective policy interventions that are economically, culturally, politically, ethically, and technologically feasible.

Many injury interventions have a behavioral change component to them (e.g., getting individuals to wear a bicycle helmet or to install a smoke alarm). Convincing individuals to behave sensibly is an admirable goal that has yielded some successes in reducing the incidence of injuries. But producing behavioral change is often difficult, and by itself is sometimes less effective on a sustained basis than what we hope for. Therefore, interventions that alter the environment and the design of products are often needed for the adequate control of injuries. These interventions can be expressed through legislation and regulation. Some of the greatest success stories for injury prevention involve legislative and regulatory mandates, such as changes to the design of automobiles or the redesign of children's products like cribs or sleepwear.[1]

The effectiveness of legislation and regulation as tools for injury prevention is well recognized in European efforts. For example, the European Child Safety Alliance, in its document entitled "What do we know about good practice approaches to preventing unintentional injuries to children," states that "legislation has proven to be the most powerful tool in the prevention of injury." [2] The regulatory system within the European Commission is impressive with regard to fostering product safety.

There is another tool that has been used effectively in the United States, but which is not substantially discussed in the European literature on injury prevention. Litigation against the makers of unsafe products has been used in the US to transfer the costs of preventable injuries back to the manufacturers of injury-producing products, thereby creating a strong incentive for manufacturers to invest in the design of safer products rather than risk a lawsuit and pay a penalty for neglect. This commentary discusses the use of litigation in the US as a tool for preventing injuries, and speculates on

whether such an intervention might be feasible and desirable in Europe.

The United States experience

About thirty years ago, articles in the US public health literature began to appear that suggested the use of lawsuits as a means for reducing the incidence and severity of injuries.[3-7] Examples of successful litigation were given, such as a lawsuit against the maker of a dangerous hot water vaporizer that had a history of causing serious scald injuries to children. When courts imposed liability and monetary judgments against the manufacturer, the manufacturer's insurer refused to continue covering this dangerous product. As a result, the manufacturer redesigned the product to make it safer. Injury control advocates and plaintiffs' trial lawyers were urged to work together to accomplish product-design reform.

In 1982, an article was published in TRIAL magazine, the journal of an organization of plaintiffs' trial lawyers, suggesting that lawsuits could and should be brought against car makers for their failure to offer air bags as a safety option in their vehicles.[8] Legislative and regulatory efforts to get air bags into cars had been stalemated by politics, and it was suggested that product liability litigation might succeed where other efforts had failed. In 1984, a lawsuit against Ford Motor Company was brought by a young woman who incurred terrible injuries in a frontal collision, alleging that the injuries would have been prevented or mitigated had Ford provided an air bag in the vehicle. Ten days into the trial, Ford settled the case with a payment of $1.8 million. In 1985, Ford declared to the US Securities and Exchange Commission that it had $1.1 billion in air bag litigation claims pending against it. That was the year that Ford first began to offer air bags as an option in its cars.[4]

Litigation not only can impose costs on the maker of an unreasonably dangerous product, but it can also, through the discovery process, uncover valuable information on safer design alternatives and the epidemiology of injuries involving the product.[7] Tobacco litigation uncovered highly damaging information on the conduct of cigarette makers, ultimately resulting in large verdicts and changes in the marketing of their products.

Product litigation in Europe

We are unaware of a body of literature in Europe discussing the use of product liability litigation as a deliberate injury prevention strategy for removing dangerous products from the market or forcing their redesign. There are important differences between the US and European legal systems that govern product liability which have been discussed elsewhere. [9,10] Comparisons between the two systems can give rise to strong opinions on the appropriate balance that different governments strike based on their respective cultures, priorities, and traditions.[11] Our purpose in this commentary is not to restate the differences between US and European product liability law, but rather to suggest that, in spite of the differences between these two approaches, injury prevention may offer a shared framework for using product litigation to advance consumer safety in both regions of the world. Furthermore, given the evolving nature of European product liability law, such consideration may be timely.

In 1985 the European Community moved to harmonize product liability laws among Member States with the Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products.[12] Importantly, this Product Liability Directive established that "a producer shall be liable for damage caused by a defect in his product."(Article 1) Member states implemented this concept of "liability without fault" over time; in May 1998, France was the final Community member to introduce implementing legislation in accordance with the Directive.[13] Since 1985, the European Commission published three reports [14-16], a green paper, [11] and commissioned two studies from outside agencies detailing the Directive's implementation and impact.[13, 17] These six documents offer insight into the attention given to the evolution of product liability under the Directive, and suggest that the Commission is carefully monitoring the implementation of the Directive and its ability to achieve a "balanced framework of liability governing relations between firms and consumers."[11,13,15,16]

Data from one of the reports suggest that product liability claims and settlements are increasing in Europe (based on the perceptions of a non-representative sample of consumer representatives; manufacturers, retailers, and trade association representatives; insurance industry representatives; practicing lawyers; government representatives; and legal academics from throughout the European Union) [13], and respondents report that the Directive contributed to a slight increase in product safety. [13] However, while two-thirds of respondents described the Directive as striking an appropriate

balance between protections for consumers and protections for producers, a striking 80% of consumer representatives responded that the Directive does not adequately protect consumers. [13] While these findings are based on a small sample, they do offer some insight into the perceptions of consumers affected by the Directive.

The Directive, the subsequent monitoring of its implementation by the Commission, and the voices of consumers may offer an opportunity for injury prevention professionals in Europe to assess (or reassess) whether consumer product litigation represents an opportunity for the field. Current attention to the Directive and its impact on consumers and producers may be thought of as part of the larger European approach to injury prevention that includes an extensive regulatory structure, surveillance, and policy and behavioral interventions. Judicious application of product liability may offer an opportunity to bolster the existing injury prevention infrastructure with one more tool to address the persistent and real threat posed by injuries. If consumers would benefit from the extra protection that can be afforded through the courts, then tort law, which has always had prevention as one of its purposes, might be explored by the European injury prevention community as a possible tool to be used in addition to legislation and regulation.

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