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The Changing World of Products Liability Law

By Kenneth W. Clarkson¹ and Francisco O. Loriga²

Abstract

The chart on the reverse side of this paper highlights both similarities and differences in products liability law, including the liability standard, parties protected, damages recoverable and limitations, aids to prove defect and statutory provisions among the fifty states. During the past decade, there have been significant changes in the total number of products liability suits for a number of different industries although the pattern differs among the states.

Introduction

The 1980s have witnessed significant changes in the law of products liability and this issue of the *Triodyne Safety Brief* focuses on some of these major changes. On the reverse side of this issue is a full-size reproduction of the Law and Economics Center at the University of Miami's *Products Liability at a Glance—1990*. This chart delineates the diverse actions taken by state legislators and courts and permits comparisons among the fifty states and the District of Columbia.³ The law controlling suits to recover for harm caused by defective products is found in legislative enactments and in court opinions.

Recently, the trend has been to concentrate products liability law in legislative enactments; however, due to the constant evolving nature of products liability law, the legislative acts rarely cover the full spectrum of issues that must be dealt with in these types of suits. To facilitate an understanding of the chart, Connecticut is examined for each of the characteristics listed on the chart. This state will also be used to illustrate the types of issues covered in a legislative regime of products liability law.

Additional Copies of this *Triodyne Safety Brief* may be obtained for \$20.00 each. A full color poster chart, suitable for framing, *Products Liability at a Glance-1990* (24.5" x 34.74") is available for \$29.95. To receive this discounted price, be sure to mention the *Triodyne Safety Brief* when ordering the chart from: Products Liability Chart, Law and Economics Center, P.O. Box 248000, University of Miami, Coral Gables, FL 33124 (305) 284-6174. All proceeds from the sale of this *Triodyne Safety Brief* and the Products Liability Chart will be donated to the University of Miami.

Products Liability Cases, 1980-89 Airplanes

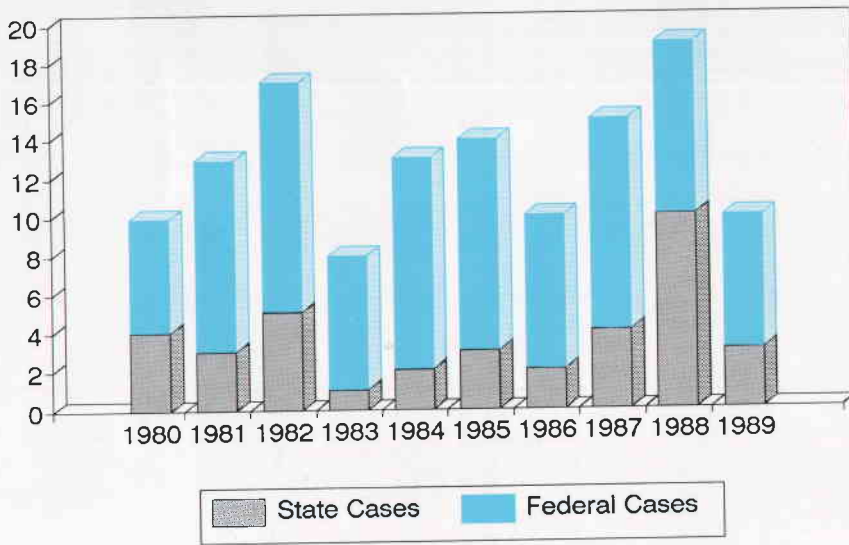


Figure 4

computed for comparing the relative frequency of various states listed on the chart.

Airplanes. Most of the products liability cases involving airplanes are found in the federal courts as shown in Figure 4. Beginning with a low of six cases in 1980, the number of cases rose to twelve in 1982, followed by a decline in 1983 and a subsequent rise to eleven cases in 1984. In recent years, 1986, 1988 and 1989, the num-

ber of federal cases has generally fallen below levels experienced in the first half of the decade. The number of state products liability cases involving airplanes has also fluctuated over the past decade. While most states have had no cases since 1980, Alaska and California have had five cases each, followed by Illinois and Louisiana with four cases each during the past decade. Texas had three federal cases involving airplane products liability with Alabama, Arizona, Florida, Michigan,

Products Liability Cases, 1980-89 Asbestos

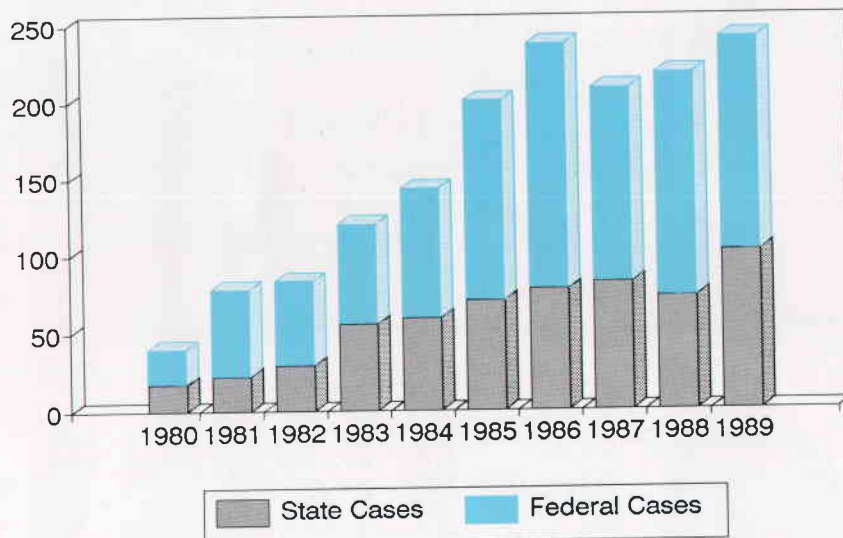


Figure 5

New York and Oregon each recording two federal cases since 1980. Delaware, Missouri, Pennsylvania and Washington account for the remaining cases from 1980 to 1989. A mean of 0.3 was computed for comparing the relative frequency of various states listed on the chart.

Asbestos. The most significant growth in both state and federal products liability cases involves asbestos products. In 1980 there were only seventeen asbestos cases at the state level and twenty-three at the federal level. Throughout the decade the number of products liability cases involving asbestos grew nearly uniformly, rising to a level more than five times (241 federal and state cases in 1989) that experienced at the beginning of the decade. Figure 5 charts the dramatic changes in the number of asbestos cases since 1980. A review of the states reveals variation in the frequency of cases involving asbestos during this decade. Illinois leads the nation in the number of cases—eighty-eight since 1980—more than forty percent above Pennsylvania's sixty-two cases since 1980. Yet some states, such as Idaho, Nevada, North Dakota and South Dakota, have had no major cases this decade. In general, asbestos cases in the federal courts follow patterns similar to those found in the state courts. A mean of 3.5 was computed for comparing the relative frequency of various states listed on the chart.

Pharmaceuticals. The final category covers the frequency of products liability cases for pharmaceuticals. The first half of the past decade reflected a steadily increasing number of both state and federal pharmaceutical products liability cases as demonstrated in Figure 6. In 1980 there were 267 cases in state courts and 145 cases in federal courts. Differences in the growth rates in state and federal courts were minimal, resulting in 479 state court and 277 federal court cases for the year ending December 1989. As with other products liability categories, a few states represent a major portion of the total for the United States. California, Florida, Illinois, Louisiana, Michigan, New Jersey, New York, Ohio, Pennsylvania and Texas account for a large percentage of the decade's total cases. A mean of 19.9 was computed for

Products Liability Cases, 1980-89
Pharmaceuticals

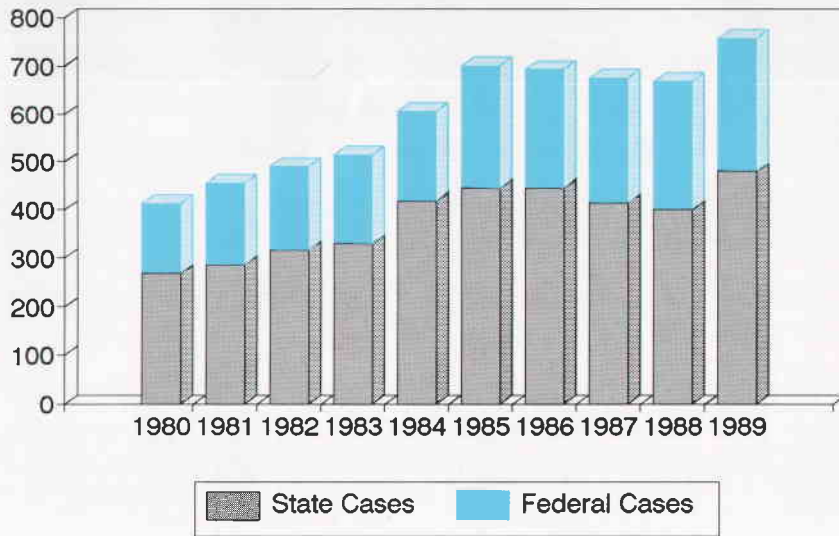


Figure 6

comparing the relative frequency of various states listed on the chart.

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Endnotes

1. Director, Law and Economics Center, University of Miami.
2. Research Associate, Law and Economics Center, University of Miami.
3. Case law at the state level is restricted to appellate cases.
4. Connecticut has enacted a modified version of the Uniform Product Liability Act. Codified at Conn. Gen. Stat. §§ 52-5721 *et seq.*, the Act became effective on October 1, 1979.
5. This standard was adopted in *Garthwait v. Burgio* (1965) 153 Conn. 284, 216 A.2d 189, where the plaintiff allegedly suffered injury after receiving the defendant's hair-tinting treatment at a beauty parlor operated by the manufacturer's codefendant.
6. See Conn. Gen. Stat. § 52-572m(c).
7. See Conn. Gen. Stat. § 52-572m(a).
8. See *Marko v. Stop & Shop, Inc.*, 169 Conn. 550, 364 A.2d 217 (1975).
9. See *De Jesus v. Craftman Machinery Co.*, 16 Conn. App. 558, 548 A.2d 736 (1988).
10. See Conn. Gen. Stat. § 52-572m.
11. See Conn. Gen. Stat. § 52-240b.
12. See Conn. Gen. Stat. § 52-572p.
13. See 57 Conn. Bar. Journ. 441, 446.
14. See Conn. Gen. Stat. § 52-572o.
15. See 205 Conn. 694, 535 A.2d 357 (1988).
16. See Conn. Gen. Stat. § 52-572m(b) and 56 Conn. Bar Journ. 269, 270.
17. See 35 Conn. 687, 406 A.2d 1254 (1979).
18. The number of law suits reported here is from appellate court decisions only.
19. Unless otherwise stated, the number of cases includes all automobile, truck, automobile-enhanced injury, airplane, asbestos and pharmaceutical cases from the period beginning January 1980 through December 1989.
20. Relative frequency is obtained by multiplying the number of reported cases by 1,000,000 and dividing by the state's population. The average is computed using all 51 jurisdictions, thus including those geographic areas that had no reported cases.

Standards, Protected Parties, Liability and Damages

The authority upon which the symbols on the chart for the state of Connecticut are based will be discussed, with emphasis on the state's Products Liability Act (hereinafter "the Act").⁴ Those symbols based on statutes outside of the Act will be identified but discussed in less detail.

Since the Connecticut Act does not contain a standard of strict liability, Connecticut courts follow § 402A of the Restatement of Torts (1965) as the strict liability standard. Section 402A states that "one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer or his property...."⁵

The Act protects "any person asserting a product liability claim for damages incurred by the claimant or one for whom the claimant is acting in a representative capacity."⁶ Cases have been found protecting all parties delineated in this section except *Foreseeable Bystanders*.

The Act imposes liability on "products sellers," a term broadly defined to include "any person or entity, including a manufacturer, wholesaler, distributor or retailer who is engaged in the business of selling."⁷ "Products sellers" also include lessors or bailors of products. Furthermore, the Act expands the meaning of "manufacturer" to encompass component parts manufacturers. According to the wording of the Act, liability is imposed on almost the entire manufacturing and distribution chain and includes *Component Parts Manufacturers, Manufacturers, Wholesalers, Suppliers, Jobbers, Distributors, Retailers, Lessors, and Bailors*. Additionally, case law has extended liability to *Successor Corporations*⁸ and *Sellers of Used Goods*.⁹ A dot in the respective columns of the chart indicates those groups upon which liability has been imposed. Because *Sellers of Sealed Packages, Building Contractors, Developers, and Suppliers of Services* have not been held liable, there are no entries in these columns of the chart.

The Act allows recovery of "damage to property, including the product itself, and personal injuries including wrongful death."¹⁰ A dot in the *Personal Injury, Property Damage with Personal Injury, Property Damage, Product, and Commercial or Economic Loss* columns represents the clear legislative desire that these damages be recoverable under the Act. Punitive damages are allowed in Connecticut as authorized in a statute¹¹ outside of the Act. Hence, all columns in the Damages Recoverable category are marked by a dot.

Defenses and Limitations

Under the Act the defenses of *Misuse and Alteration of the Product* are permitted,¹² and a statute outside of the Act allows the defense of *Assumption of Risk*; therefore, dots are entered for these columns of the chart. Since no provision in either the Act or court opinions allows the defenses of *Contributory Negligence, State of the Art, or Useful Life*, no entries have been made in these columns. It should be noted that evidence of alteration or modification cuts across many legal theories and may be used to: (i) negate the duty of the defendant; (ii) prove that the product is not defective; (iii) prove contributory or comparative negligence; (iv) prove assumption of risk; (v) prove misuse; or (vi) negate the plaintiff's proof of causation.¹³

The *Statute of Limitations*, the law governing the time frame in which litigation must be commenced in defective product suits, is found outside of the Act. While the *Written Contracts* limitation is six years, suits based on *Oral Contracts, Wrongful Death, Personal Injury—Negligence, Property Damages—Negligence, General Products Liability, and General Personal Injury* are limited to a three-year span in which to start legal proceedings.

Connecticut has enacted a special statute of limitations known as a "Statute of Repose." Statutes of Repose establish ascertainable time periods within which a products liability suit must be brought. These statutes begin to run upon the date of manufacture, delivery, sale or lease of a product and not upon the occurrence of an injury. The Connecticut Statute of Repose

grants a 10-year period within which action must be initiated based on the *Date of First Sale to Consumer* or *Date of Manufacturer's Parting of Control*. Because the *Date of Manufacture* has not been included in the Statute of Repose no entry appears on the chart.

In addition to Statutes of Repose, some states also have enacted *Borrowing Statutes*. *Borrowing Statutes* are aimed at preventing an injured person from filing suit in a state other than where the injury occurred simply to take advantage of a longer period in which to commence the suit. Connecticut, however, has not enacted such a statute and therefore an asterisk is entered in this column to indicate that no statute addresses this point.

Shifting Liability and Additional Theories

Turning now to the defendant's ability to shift liability or loss to another party, the Act expressly provides for *Comparative Negligence* and *Contribution Among Joint Tortfeasors*,¹⁴ but does not address *Indemnification by Supplier Against Manufacturer*. However, the Connecticut Supreme Court in *Kyrtatas v. Stop & Shop, Inc.*,¹⁵ a products liability action brought by a purchaser of an allegedly defective can of aerosol window cleaner, noted that "the common law doctrine of indemnification is inconsistent with provisions of the products liability act concerning comparative responsibility, award of damages, and contribution under Conn. Gen. Stat. § 52-572o." The court held that the products liability act has abrogated common law indemnification principles in areas of comparative responsibility, award of damages, and contribution. The opinion clearly notes, however, that indemnification may still be viable in other contexts. Since the court did not specifically disallow indemnification by supplier against a manufacturer, the chart has a dot in this column. No statute or case was found allowing or disallowing the use of *No Cancellation Statute* and therefore this column was left blank.

Under the Act, additional theories of liability are allowed. Specifically, the Act mentions strict liability, negligence, breach of warranty (express or implied), breach of or failure to discharge a duty

to warn or instruct (whether negligent or innocent), and/or misrepresentation or nondisclosure (whether negligent or innocent) as theories of recovery.¹⁶ The Act's language is clear in allowing *Negligence* and *Breach of Express and Implied Warranties* as valid theories of recovery; this is reflected by dots in these two columns. On the other hand, *Restatement § 402B—Misrepresentation, Alternative Liability, Market Share Liability, Industry Wide Liability, and Concert of Action* have not been allowed as valid theories of recovery by either court opinions or statutes; therefore, these columns on the chart have been left blank.

Aids to Prove Defect

Due to the difficulty of proving that a defect existed in a product when the product left the manufacturer's control, two devices have been allowed in products liability suits to reduce the plaintiff's burden of proof. These two devices are (1) *Circumstantial Evidence—Res Ipsa Loquitur*, under which the plaintiff is deemed to have met the burden of proof if he or she demonstrates that all other possible causes of his or her injury are unlikely except for the defective nature of the product and (2) *Deviation From State of the Art*, under which the plaintiff is allowed to use an industry standard to demonstrate that the injury-causing product fell below the industrial norm. In *Liberty Mut. Ins. Co. v. Sears, Roebuck & Co.* (Conn. Super. Ct. 1979), a suit to recover for fire damages to real and personal property allegedly caused by a color television set, the court specifically held that "[i]n product liability action, [the] jury may rely on circumstantial evidence."¹⁷ Hence, a dot is entered for *Circumstantial Evidence—Res Ipsa Loquitur*. No case or statute is reported allowing the use of *Deviation from State of the Art* and therefore no entry has been made for this column on the chart.

Plaintiff's Prima Facie Case

This category lists what a plaintiff must prove in order to recover damages. Although not an exhaustive list, the items which normally must be proven in order to justify recovery include *When Defect Occurred, No Change Since Time of Manufacture, Proximate Cause, "Unreasonably Dangerous" Condition, No*

Products Liability Cases, 1980-89 Autos, Trucks, Planes, Asbestos, & Drugs

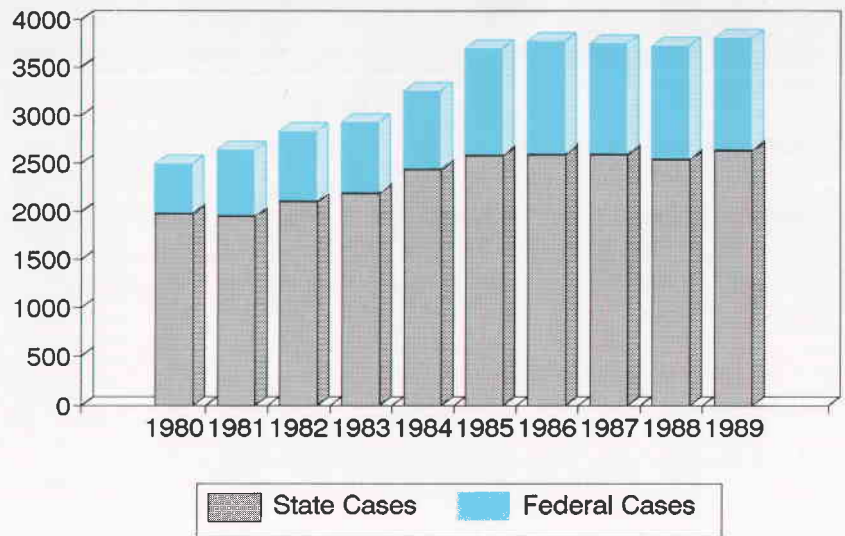


Figure 1

Misuse Occurred, Inadequacy of Warning and No Intervening Cause. The Act itself does not delineate the elements that must be proven to recover damages in Connecticut. Case law, however, has established that the plaintiff must prove all of the elements listed above except for the *No Misuse Occurred* element; therefore, all of the elements except *No Misuse Occurred* reflect a dot on the chart.

Balancing Test

This is a mutually exclusive category which allows the jury to balance the risk versus the utility of an allegedly defective product. The balancing test is predicated on the notion that certain products, although dangerous by their very nature, are nonetheless of such great social utility that liability should not be imposed on the manufacturer. Neither the Act nor case law has dealt with this issue; thus, no entry has been made for this category.

Product: Frequency of Suits

This category of the chart reports the relative number of law suits¹⁸ involving five products which are the recurring focus of litigation. Between 1986 and 1988, the frequency of suits based on allegedly defective *Automobiles and Trucks* in Connecticut was 30.8. This figure is close to the national average of 29.9. *Automobiles—Enhancement*

of Injuries has a frequency of 0.3, falling below the national average of 0.7. The frequency of suits involving allegedly defective *Pharmaceuticals* is 5.0, again falling short of the national average of 6.6. For *Airplanes* (national average of 0.1) and *Asbestos* (national average of 1.4) no entries have been made because there are no reported cases.

Research Aid: Statutory Regulation

This section indicates whether there are statutes controlling the various areas of products liability law. The Act provides for *Who is Liable, Defenses, Damages Recoverable, and Ability of Defendant to Shift Loss*. Outside of the Act there are numerous statutes controlling defective product cases; therefore, the *Other* column contains a dot. The only column for which no statute is found in Connecticut is *Standard of Strict Liability*.

Products Liability in the 1980s

We now turn our attention to some overall changes in the number of products liability cases in both state and federal courts. Since 1980 the total number of cases covering automobiles, trucks, enhancement of automobile injuries, airplanes, asbestos, and pharmaceutical products (hereinafter referred to as products liability cases, or cases) in state courts has increased

Products Liability Cases, 1980-89 Automobiles and Trucks

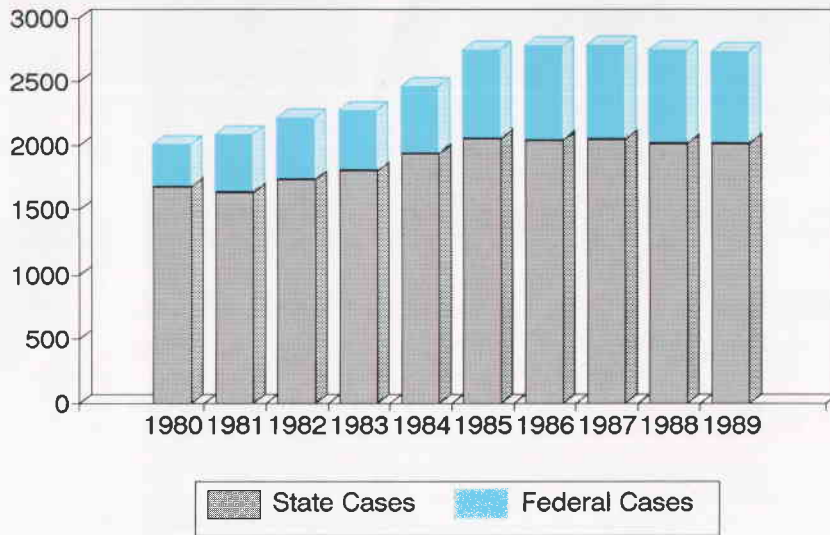


Figure 2

from 1,979 to 2,632, a 33.0 percent rise.¹⁹ The number of products liability cases in federal courts rose 127.8 percent from a level of 510 in 1980. As can be seen in Figure 1, the major changes in both federal and state courts, however, occurred during the first half of the decade (a 30.6 percent increase in state court cases from 1980 to 1985 and a 117.5 percent increase in federal court cases during the same period).

During this period, not all product categories were subject to the same growth patterns. While state court cases involving asbestos rose over 500 percent, from seventeen in 1980 to 102 in 1989, the number of airplane cases remained flat at four in both periods. State cases involving automobiles and trucks have risen about twenty percent (2,015 in 1989 versus 1,679 in 1980) since 1980, but products liability cases involving the enhancement of injuries from automobiles increased

by 175 percent (thirty-three cases in 1989 versus twelve in 1980) during the same period.

The number of state cases involving pharmaceutical products also rose during this period. In 1980 there were approximately 267 cases, increasing to 479 for the year ending in 1989. In federal courts the number of cases involving autos and trucks increased from 324 in 1980 to 722 in 1989 (from twelve to seventeen for automobile-enhanced injuries). Federal airplane cases remained unchanged, but asbestos cases multiplied from twenty-three per year in 1980 to 139 in 1989. Cases involving pharmaceutical products expanded from 145 to 277 during the same period.

Automobiles and Trucks. Figure 2 shows the changing distribution of automobile and truck products liability cases between state and federal courts since 1980. During this period, not all product categories and jurisdictions were subject to the same growth patterns. Several states, particularly those with smaller populations such as Delaware, Idaho, Tennessee and Vermont, experienced growth in the number of automobile and truck cases, exceeding 150 percent. Similar cases in states such as Hawaii, New Hampshire, New Mexico and Wisconsin declined over fifty percent from 1980 to 1989, while other states, including Florida and Illinois, had declines exceeding ten percent. A mean of 93.5 was computed for comparing the relative frequency of various states listed on the chart.²⁰

Products Liability Cases, 1980-89 Automobiles - Enhancement of Injuries

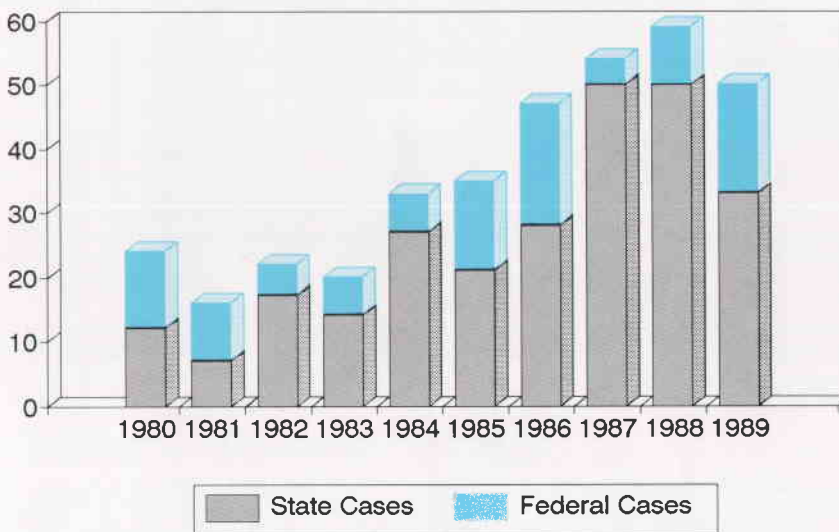


Figure 3

Enhancement of Injuries. During the same period, the pattern of products liability cases involving the enhancement of injuries from automobiles remained relatively stable across states, except for a significant rise in 1986 and 1987 in Arizona. This aberration in 1986-87 can be seen in the totals for the entire United States shown in Figure 3. This figure also highlights significant changes in the number of federal cases involving enhancement of injuries from automobiles. In 1984 only six federal cases, or half the number in 1980, were found in this category, but by 1989 there were seventeen cases, or nearly fifty percent more than in 1980 (about 200 percent more than in 1984). A mean of 1.4 was

