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No Clear Victory In Air Bag Verdict

Both the National Highway Traffic Safety Administration and auto makers see elements of victory in the court decision that sent the government's controversial passive restraint rule back to NHTSA for revision.

Following the long-awaited verdict of the U.S. Court of Appeals for the Sixth Circuit, the three domestic auto makers that were plaintiffs – Ford, Chrysler and American Motors – issued statements indicating satisfaction with the court's decision. Officials at NHTSA have also indicated a general satisfaction with the court's 58-page decision. One official told *Status Report* that the court's ruling "clearly supports us" in requiring passive restraints.

In response to auto maker suits, the court, in its two-to-one decision, sent the passive restraint standard back to the safety administration with two specific instructions:

- The agency must revise the test specifications that will be used to determine whether a vehicle meets the injury reduction criteria of the standard.

- NHTSA must amend its rule "so that it does not in fact serve to eliminate convertibles and sports cars from the United States new car market."

Although most news accounts stressed the delay in passive protection that could result from the court ordered amendments, potentially the most far reaching aspect of the court's decision comes in one of its interpretations of the National Traffic and Motor Vehicle Safety Act of 1966.

The court held that, "The explicit purpose of the Act. . .is to enable the federal government to impel automobile manufacturers to develop and apply new technology to the task of improving the safety design of automobiles as readily as possible." In court, the manufacturers had argued that the "Congress clearly meant to require that safety standards be based on technology known as of the date of issuance of the standard" – a situation that did not exist in the case of passive restraints, they claimed.

The court rejected the auto makers' interpretation of the law. "Under their

Inside

- AAA Air Bag Report Called Distorted . . . page 4
- Court Overthrows NHTSA Retreaded Tire Standard . . . page 5
- Advisory Panel Urges DOT Sharpen Focus on Boobytraps . . . page 6
- Safety Group Claims Colorado Has No Boobytrap Problem . . . page 6

proposed interpretation, the agency would be unable to require technological improvements of any kind unless manufacturers voluntarily made these improvements themselves. This is precisely the situation that existed prior to the passage of the Act, and we decline to eviscerate this important legislation by the adoption of this proposed interpretation," the court said.

Furthermore, the court added, "the record indicates [that] many of the development problems" that auto makers complained of "in their briefs (such as noise, sensor reliability, danger to out of position occupants and effectiveness in certain nonfrontal impact modes), have been eliminated or are presently the subject of continuing development efforts."

Although the court said it was not advocating "belts over air bags or vice versa," it pointed out that "air bags spread crash deceleration forces over most of the whole body, while belts concentrate them on the narrow area of the rigid belt. Air bags restrain the body evenly over a greater distance and a longer period of time by permitting occupants who are thrown forward in the crash to ride down the deceleration forces more gradually over a distance of two or three feet. An air bag system, being passive, removes the elements of the occupants' will, memory and skill from the consideration of reliability. Furthermore, many people cannot properly use belt systems. . .and among those who can, there is an inevitable percentage who will not wear them properly." An NHTSA official said that this aspect of the court's decision supports "in no uncertain terms" the agency's decision to require passive restraints.

Several courses of action are open to the agency under the decision. It can ask for a review of the decision by the three judges who considered the case initially, by the full nine-member Sixth Circuit Court of Appeals or by the Supreme Court. Or, it can accept the court's rulings and revise the rule.

NHTSA 'KEEPING OPTIONS OPEN'

The agency is "still keeping the options open," an NHTSA official said. He added that one factor that is "complicating things considerably" is uncertainty over future leadership in the agency. (See *Cabinet Changes Reach DOT* below.)

Although NHTSA officials say they are satisfied with most of the court's decision, they think the court overstepped its authority in the breadth of its review. The government had argued that the role of the

Cabinet Changes Reach DOT

President Nixon's seond term executive reshuffling has reached the Department of Transportation. Claude S. Brinegar, senior vice president of Union Oil Co. of California, has been nominated to replace Transportation Secretary John A. Volpe. Volpe will be nominated Ambassador to Italy.

Safety Administrator Douglas Toms and his assistant, Dr. Charles Hartman, have also said they are leaving the department. According to an agency spokesman, Toms will "remain until a successor is confirmed." Replacements for Toms and Hartman have not been named.

Toms told United Press International, "I'm keeping my options open" as to future plans. However, he is reported as saying, "I'm leaning toward going into private industry."

court is to determine only "whether the agency complied with applicable procedural requirements [such as providing notice and an opportunity to comment on any proposal] and whether the agency's ruling reflects the rational consideration of the relevant matters presented by interested parties." The court rejected that argument, saying that such a limited scope of review "is virtually no review at all."

TEST DEVICES

The court noted that the passive restraint standard "requires that compliance be determined by specified tests using an anthropomorphic dummy" built to certain Society of Automotive Engineers specifications. It upheld auto maker claims that "this test device will not produce consistent, reliable, or repeatable test results." In its decision the court held that "it seems axiomatic that a manufacturer cannot be required to develop an effective restraint device in the absence of an effective testing device which will assure uniform, repeatable and consistent test results." (Earlier this year NHTSA announced it was sponsoring research to develop "improved test dummies.")

The court said that the test device specified in the passive restraint standard "will not produce consistent reliable, or repeatable test results" because the specifications:

- Permit the neck of the test device "to be very stiff, or very flexible, or somewhere in between."
- Allow "considerable latitude" in the "force deflection characteristics" of the test device's chest.
- Lack "specific" details "for construction of the dummy's head."

The court emphasized that, "While we have concluded that automobile manufacturers can (and should) be compelled by automobile safety standards to develop new safety devices, we hold that the performance goals which they must meet must be clearly delineated by the agency. That is to say, while they can be required to develop a new device not presently existing, we do not think that they can (or should) simultaneously be required to develop a testing device by which a safety device is to be measured."

The court ordered NHTSA to redraw the compliance test specifications "in objective terms which will assure comparable results among testing agencies, and that the effective date for the implementation of passive restraints be delayed until a reasonable time after such test specifications are issued."

In the dissenting opinion, one of the judges differed from the majority on the issue of the test devices. He said that the agency "has no duty" to develop compliance test devices.

An NHTSA official told *Status Report* that "there are strong indications" that the requirement for passive restraints on 1976 model cars will be delayed for one model year as a result of the court's instructions, even though the court did not explicitly specify such a delay.

SPORTS CARS AND CONVERTIBLES

Safety administration officials are "puzzled" over how to handle the court's insistence that the rule is to be altered so as not "to eliminate convertibles and sports cars." One official said that "it is clear" that rollover requirements will have to be removed from cars classified as convertibles. However, the agency has no rule making definition of sports cars and therefore would not be able to exempt them as a class, he said.

The court dismissed auto maker arguments that the passive restraint rule should be held invalid because NHTSA had "constantly" shifted requirements of the rule. The court held "that almost all of the changes in the requirements" of which the auto makers complained "were made as a result of comments or petitions for reconsideration submitted to the agency by the petitioners themselves."

The following article, reprinted with permission, appeared in *Automotive News*, Nov. 27, 1972.

AAA Air Bag Stance Called As One-Sided As NHTSA's

By Helen Kahn

An anti-air bag report by the American Automobile Assn. is an attack on the "selling of the air bag" by Naderites and some officials of the National Highway Traffic Safety Administration.

Unfortunately, the AAA report itself is as guilty of picking out all the anti-air bag ammunition as it charges government officials have been in enthusiastically promoting air bags before the technology was there.

Somewhere between the early and over-optimistic projections by the government and Nader before any field-testing was done, and the biased AAA report, which cites all the horror stories without fair explanation, lies the truth.

One of the AAA's conclusions is that a "full study of the subject by an objective body concerned only for the motorist should be carried out with full disclosure of the findings made to the American public." Both proponents and opponents of air bags can agree with AAA on that.

It is a pity that AAA did not do that instead of writing a report that totally ignores the most recent report of field testing of Ford Motor Co. and General Motors air-bag cars which showed no inadvertent firings.

• While citing Ford's super-cautious warning on its air bag cars, AAA ignores GM's entirely different approach. AAA also cites the failure of air bags in the Fairchild experimental safety vehicle and the only explanation given is "human error" and the conclusion that such "human errors" would be found in the assembly line production.

Ignored is the engineer's explanation that a deliberate design decision was made on the ESV that would never have been permitted in a production vehicle.

Also cited is Wayne State University's fiasco under Larry Patrick, although nothing is said about the objections raised by both Rocket Research and Eaton over use of obsolete equipment.

Nothing is said about the GM ESV test just conducted which AAA might have in fairness inserted or at least waited until the injury criteria are available.

In the AMF ESV crash, AAA points to the "deaths" of the dummies in the 50-MPH barrier crash, yet there is no evidence whatsoever that belt systems would have permitted survival in that kind of crash. Further, there is the assumption made by AAA throughout that belts so long as they are used are the equal of air bags.

An unbiased look at the evidence shows that belts cannot protect at the high speeds bags can.

In honesty AAA should have given the facts on both sides – that is, while air bags can cause injuries, so can belts and further added that the rebound problems and out-of-position problems have been in large part solved by new designs.

• The AAA recommends the government "immediately and indefinitely suspend" the passive restraint standard and two pages later recommends the government and industry "expedite research" to provide a convenient, safe, effective and fully tested passive restraint system for automobiles as soon as possible.

AAA wants the vehicle safety law changed to prevent NHTSA from endorsing products, but the fact is that NHTSA has bent over backwards to keep all doors open and to encourage competition and has never endorsed any passive restraint system.

AAA calls on makers to improve belt systems, but so has NHTSA, a fact not mentioned by AAA.

Lest this be misread as merely an attack upon AAA for its slipshod work, it should be said in fairness that AAA's point that much misleading and one-sided information has been given out about airbags is valid. But it is no service to public education to produce yet another misleading and one-sided report.

Court Overthrows Retreaded Tire Rule

In a unanimous decision, the U.S. Court of Appeals for the Seventh Circuit has overturned portions of the National Highway Traffic Safety Administration's standard on retreaded tires. The court said that NHTSA failed to prove, before issuing its standard, that retreaded tires pose a significant safety hazard.

According to the court, the agency did not adequately study the economic impact that the standard might have on the retreading industry and the consumer. The court noted that retreaded tires account for "approximately one out of every four tires" made in the U.S.

Throughout its opinion, the court stressed the need for NHTSA to analyze potential costs and benefits of a proposal before it issues a standard. One possible implication of the court's decision is that a safety standard issued without such an analysis could be held void. The only existing standards on which NHTSA has made public a cost-benefit analysis are the agency's rules on passive restraints (FMVSS 208) and bumpers (FMVSS 215).

However, NHTSA apparently does not expect the court's language to be used against any existing safety standards. NHTSA chief counsel Lawrence Schneider told *Status Report* that he sees "no implications" in the Court's decision beyond its specific effect on the retreaded tire standard. NHTSA is "seriously considering" appealing the decision, but no final decision has been made, Schneider said.

The suit against the agency, brought by the H&H Tire Company, charged that the retreaded tire standard (FMVSS 117) was not "practicable" nor did it "meet the need for motor vehicle safety" – two requirements of the National Traffic and Motor Vehicle Safety Act of 1966 that all safety standards must meet.

In arguing against the standard, the retreader attacked the requirement that would force retreaded tires to measure up to the same high speed and endurance levels new tires have had to reach since January, 1968. The company claimed in its suit that many retreaded tires are not capable of meeting those requirements. The court noted that most tests of retreaded tires have produced "substantial rates of failure" under those requirements.

NHTSA initiated its retreaded tire rulemaking in October, 1967. It issued its proposal on retreaded tires in March, 1970. According to the court, responses to that proposal were divided on the approach the final rule should take. Some comments suggested that NHTSA should issue specific *performance* requirements that retreaded tires would have to meet regardless of their method of manufacture. Other comments urged NHTSA to specify only the *processing* method by which retreaded tires would have to be made. The final rule issued in April, 1971, adopted the performance requirements approach. The 1966 safety act has commonly been interpreted to prohibit standards specifying a design or method of manufacturer for motor vehicles or their equipment. (The rule was to have become effective Jan. 1, 1972. However, prompted by the H&H Co. suit, the court ordered NHTSA not to enforce its rule pending settlement of the case.)

The court said that NHTSA had not adequately evaluated either the cost or time required for retreaders to meet the standard. Based on evidence presented by the retreaders, the court said that even the "industry's best efforts might be insufficient to insure compliance" with the standard. The court noted that the civil penalties for non-compliance which could be levied against retreaders, most of whom are "small, independent operators," could "possibly destroy a well-established industry." The 1966 safety act provides a fine of $4,000, up to a maximum of $400,000, for each non-complying item of motor vehicle equipment.

The court said that it is permissible for a safety standard to impose an "economic hardship" on industry, but only if it can be proved that the standard will correct a major safety hazard. According to the court, NHTSA failed to prove either that current retreaded tires pose a significant safety problem or that its proposed standard would improve the on-the-road safety of retreaded tires.

Advisory Panel Urges DOT Sharpen Focus On Boobytraps

The National Highway Safety Advisory Committee has urged the Secretary of Transportation to initiate a "systematic" nationwide program to identify, inventory and correct roadside boobytraps and highway design hazards.

The committee suggested that the secretary establish, within the Federal Highway Administration, a "single point of responsibility" to "guarantee national leadership" for the program. It asked for "at least semi-annual reports as to the progress made in implementing these recommendations."

The resolution, which received the unanimous support of the 35-member advisory panel, was sponsored by Thomas C. Morrill, vice president of State Farm Mutual Automobile Insurance Co.

Earlier this year, the government's General Accounting Office criticized FHWA's present boobytrap identification and removal program as a "fragmented approach to the problem." (See *Status Report*, Vol. 7, No. 12, July 3, 1972.)

Before passing the resolution, the advisory committee was told by an FHWA official that responsibility for boobytrap removal is currently "disbursed" among various offices in the agency "to eliminate duplication of staff" effort. Another FHWA official previously told *Status Report* that all of FHWA's offices "overlap" in responsibility for eliminating roadside hazards.(See *Status Report*, Vol. 7, No. 19, Oct. 16, 1972.)

The advisory committee said that one objective of establishing a "single point of responsibility" for the program should be "the optimum use of federal monies." FHWA has estimated that boobytrap removal along existing interstate highways can be accomplished for about one billion dollars.

A recent news release from the National Highway Traffic Safety Administration said that reports from multi-disciplinary accident investigation teams indicate that a major factor contributing to the severity of crashes is the "presence of unprotected fixed objects" close to the roadway.

Boobytrap Problem?

Colorado Hasn't Got One, Safety Group Claims

They've got the roadside boobytrap problem licked in Colorado. Or at least, that's what the Colorado Safety Association has been telling people.

A statement being distributed by the association boasts that the state is "fortunate" because "the Colorado Highway Department has long recognized the problems of the boobytrap and has taken active steps to counter these hangovers from earlier highway design."

In fact, claims the statement, "over the past four years the highway department has spent more on safety improvement projects than on new highway construction . . . about one-quarter of its annual

operating budget is spent on this (boobytrap removal) type of safety improvement project. These corrective measures are performed, and many of them have been completed, throughout the state in an active and continuing program."

The association says it is using the circular to counter the impression left by the recently released Insurance Institute for Highway Safety film, "Boobytrap!", that "very little has been done to correct highway boobytrap hazards."

It has asked "users and sponsors of the film" in Colorado to read or "put into their own words" its claim that the Colorado Highway Department is spending "about one-quarter of its annual operating budget" on roadside hazard correction and that the problem by and large has been eliminated in the state. It asks that the statement be made at the conclusion of each showing of the film.

A spokesman for the Colorado Safety Association told *Status Report* that the statement was "based on information from the Colorado Highway Department." However, he was unable to supply actual dollar amounts spent by the state on boobytrap correction "because we didn't ask for them."

At *Status Report's* request, he contacted the highway department and learned that Colorado actually spends less than four per cent of its annual highway budget on safety improvements. Of its total annual budget of $141 million, the state is spending about $5 million on "new projects and corrective actions" relating to safety. As to the claim that it is spending more on safety improvement projects than on new highway construction, the association spokesman admitted that the state is spending upwards of $100 million a year on new road construction, as against the $5 million for safety projects. (The figures were confirmed by a Colorado highway department official.)

The figures mean that Colorado is spending money for boobytrap removal at about the same low level as was criticized for all states in a General Accounting Office investigative report issued earlier this year. (See *Status Report,* Vol. 7, No. 12, July 3, 1972, and Vol. 7, No. 19, Oct. 16, 1972.)

Asked whether the safety association plans to withdraw the statement in light of its new knowledge of the state's boobytrap removal spending, the association spokesman said the group will continue to distribute the statement deleting only the claims that Colorado is spending one-quarter of its annual budget, and "more . . . than on new highway construction," for roadside hazard correction.

Smith To Manage Distribution

Dolores Smith has been appointed to manage distribution activities for the communications staff of the Insurance Institute for Highway Safety. She will be responsible for distribution of the Institute's film and print documents and maintenance of its mail list and internal film library.

She has been with the Institute since August, 1969, as part of its support staff. Ms. Smith has done course work at the University of Texas, Montgomery College and The American University. Prior to joining the Institute, she worked for a weekly newspaper in Austin, Texas.

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