



Canada-United States Law Journal

Volume 21 | Issue

Article 41

January 1995

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Recommended Citation

Thomas Hermann, *Product Liability and Tort Reform*, 21 Can.-U.S. L.J. 307 (1995)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol21/iss/41>

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Product Liability and Tort Reform

*Thomas Hermann**

I do not want to waste your time by rereading the tort reform bill, but I do want to talk about it a little because it is not going to be passed by the Joint House-Senate Conference Committee, and it is not going to get signed by President Clinton in its present House-passed form. It is going to change, so I think we ought to talk about my perceptions of what those changes will be.

I think you recognize the tension that exists between the theories of the judicial system, especially in the United States, and the theories of the free market or the free enterprise system. The tension is that we have this tradition in the United States of open courthouses. Anybody who wants to do so can walk into a courthouse and, for a nominal fee, file the most frivolous of lawsuits with very little to hurt him for doing it. There are no real sanctions for doing that except wasting his own time and money.

A client can hire a lawyer on a contingency basis who is hungry enough to take a case with very little merit and who is willing to settle the case for two hundred dollars or in that range. What has happened in large measure in this country is that we have gotten into this era of mass toxic torts or mass torts, like the breast implant litigation or the Dalcon shield litigation, where few were really hurt seriously by it, but where a lawyer can make himself a lot of money, if he has got 5,000 clients and even if he accepts a measly five hundred dollars per case. People are filing class actions in asbestos litigation. They are filing class actions in breast implant litigation. Class actions are a synonym for corporate extortion, because who can afford to defend them?

There are very few lawyers in this country who have actually ever tried a class action in front of a jury. It is just too dangerous. I was stupid enough to have tried it and lost. Fortunately, in terms of damages, it was a win, but I lost on the liability issue because where there is that much smoke, a jury is going to find some fire. You just cannot have 2,000 or 5,000 plaintiffs all claiming the same thing without the jury believing that those claims have some validity. So all someone has to do is file a class action against you and you are in big trouble.

Fortunately, some of the damages theories that plaintiffs' lawyers have come up with in recent years, like market share liability or enter-

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The following text was compiled from the transcript of the remarks made by Mr. Hermann at the Conference.

prise liability, have not found wide acceptance. These theories do exist in California and some other states, but fortunately not in all states. That, I believe, is the thinking behind the House, or Republican, approach to the reform bill. That is, "Hey, let us get some uniformity here." If you try a case in east Texas, in Beaumont, Texas, there is just no such thing as a defense verdict. If you try a case in West Virginia, you do not even have an effective right of appeal.

I am going to start a trial in July where there are no plaintiffs. It is a bifurcated trial on product hazardousness. There are no plaintiffs. There is no testimony regarding work place exposures, except in the most general terms. What is going to happen is the jury is going to be asked to determine whether or not my client's product was defective in a vacuum, not defective in this setting, not defective when used in a particular manner, but just defective period. And the same jury is going to be asked whether my client is responsible for punitive damages. In West Virginia to obtain punitive damages, even though some of the plaintiffs never worked in West Virginia and were never exposed to my client's product in West Virginia, the standard is gross negligence. The only appeal is to the West Virginia Supreme Court. They have no intermediate appellate courts. A chief justice of that court has said that it is their responsibility as a Supreme Court to support the litigation industry, the asbestos litigation industry, because it gives so much employment to lawyers and their secretaries and to court reporters and everyone else, and it is funded by taking money from out-of-state corporations and delivering it to the citizens of that state. That is their job as they see it.

So hopefully this product liability reform will work. However, the House went a little overboard in some respects. The House bill asserts federal preemption over the field. It has to because most lawsuits for product liability are brought under state common law or, in some states, statutory enactments of former common law. The Restatement of Torts regarding strict liability in tort has been widely adopted by judges, therefore it becomes part of the common law of the state.

For the Federal Government to reach in and preempt an area of common law, it has to demonstrate that there is an interstate commerce interest present that is sufficiently great that it has the right to preempt the field. In the preamble to the bill, Congress has found that these products in interstate commerce do create liability of various kinds in various places, and that it is required to regulate state activity in lawsuits in order to assure uniformity. But then they go beyond that, and they start talking about general civil cases, and I do not think that the Senate is going to let them get away with that. I do not think the U.S. Supreme Court would let them get away with it either, because I do not necessarily see any interstate commerce implications in, for example, a slander case. So why try to regulate whether or not punitive

damages can be awarded or if they should be capped in all civil cases?

In products liability cases, on the other hand, they may get away with federal preemption. We will have to wait and see what is going to happen in the Senate and in the Joint Conference Committee, but there is a good chance that even this product liability law will be declared unconstitutional by some state supreme courts, and then it will go to the U.S. Supreme Court. For example, let us say my product is principally designed to go into the occupational environment. My product is a machine used in factories. A worker in some factory is injured because my machine has no guards, has no safety devices, has no automatic shut-offs, does not have the two-handed buttons, and so forth. I, the manufacturer of that product, say, "Well, under the federal tort reform bill, and thus under the new law, the worker's own negligence figures in the case, and if he was more than half negligent I do not pay anything." This bill reinstates pure contributory negligence which had, up until now, been abandoned by virtually all states in favor of some form of comparative negligence.

Thus, in the example I am painting, blades are whirling in my machine while it is running and the worker gets his hand into that open and obvious danger, so that his negligence has got to exceed mine. I believe I can prove he should not have put his hands in there. So I am going to take the risk and not put guards on my machine because without them, my machine is a lot less expensive and has the potential to be more profitable. I can sell it cheaper, with a big competitive advantage.

Does not the State of Ohio, for example, or the State of Illinois have the right to regulate safety in the work place? Is that not a paramount state interest? We have state Workers' Compensation boards. We have state OSHA boards. I think a State Supreme Court might say that this new law is an unconstitutional deprivation of the state's right to promote safety in the work place.

As to consumer goods, I think maybe the Congress has the right to preempt the field, but I am wondering about that right in the occupational setting.

Another huge problem with product liability law in the United States is that every time you try to develop a standard, very innovative plaintiffs' lawyers come along and find a way around it. There are a lot of lawyers out there who have been depending on bringing personal injury litigation both in products and in services, like medical malpractice, for too long, and it has become too big an industry to be easily overturned. It is an industry, and it is supported by the judicial infrastructure.

Who are our judges in most states? Our Canadian speaker will speak to you about the Canadian system where judges are in for life. They are probably very carefully chosen, and they do not have to depend on donations of money in order to run for election. But that is not

the case, in most instances, in the United States. So the side with the money owns the judges, and the side with the money is the plaintiffs' bar. Defense lawyers, in the first place, do not have a real incentive to pay a lot of money to judicial races. They earn only so much, as they can work for X number of dollars per hour less overhead. But plaintiffs' lawyers have no limit to what they can earn, and many of them are multimillionaires.

Ron Motley, a guy who started as a young man with asbestos litigation, owns a jet, has an island, and has a mansion. The man is almost unimaginably wealthy, and it is all from representing many thousands of asbestos litigants around the country. So a good plaintiff's lawyer not only can afford to contribute, but if he wants to contribute to these campaigns he can own as much as he can of the judiciary. Plaintiff's lawyers do own the judiciary in some states.

The insurance companies and manufacturers, both of which have a major interest in this area of law and our society, have shown very little actual interest or effort to try to buck the trend. Neither the insurance industry, nor the manufacturing sector has attempted to improve the wages paid to our judges so as to attract people with intelligence and people with honor.

Really, we have a lot of judges who are not very bright. They are failed lawyers. That is not true of all of them obviously. I have many friends who are judges and they are excellent, intelligent people and they are fair. But there are a lot in some jurisdictions who are just as dumb as posts, and the reason they are judges is because they cannot do anything else. It is just amazing how dumb they are.

So it is not just laws that make the difference. It is the attitude of society in my view. Furthermore, I think another issue is risk taking. In the United States we have become a nation that has decided that it is wrong to take a risk. It is wrong to expose yourself to any risk whatsoever. If the EPA determines, for example, that there is a risk of one in a million, that risk is controlled. The risk has got to be less than one in a million for them to say that it is an acceptable risk. That is just not the way this country was founded, but that is the way our juries think. So all you have to do as a plaintiff's lawyer is show the product to the jury and say there is a one in 100,000 risk this product can cause an injury, and that product is ipso facto defective. That product will produce damages. You have made a hundred thousand of them. One of them will hurt somebody. You should have done a better job.

In terms of innovation, which is the theme of this conference, how can you, while being innovative, determine in advance that the risk of that product is less than one in a million?

I think that it is virtually impossible in most instances. I counsel someone who may decide to make man-made ceramic fibers. It was supposed to be the great substitute for asbestos. Is it? It gives rats dis-

ease, it gives hamsters disease, and now they are finding that workers in European factories where these man-made ceramic fibers are being made in quantity exhibit radiographic changes in their chest after two to six years of exposure. But the problem is that in asbestos you really do not see much on x-ray until you have got ten years of extensive exposure. So who knows? We will see when we get ten, twenty years down the line, whether these products are not just as damaging as asbestos was or even more so, and yet they are supposed to be the savior, the safe replacement.

Is all that R&D going for naught? Are these companies going to be placed in bankruptcy just as fifteen major corporations in the United States were placed in bankruptcy because they made products that contained asbestos?

I represent a client who has asbestos in his product, but it is completely encapsulated, and there is no evidence that it will ever hurt anybody. But he has spent eight, ten million dollars in defending himself, and has never lost a case yet, in thousands of suits all over the country. That is because most people will not admit that they are responsible for anything that happens to them. They want absolute assurance that no matter how stupid they are, somebody else will pay for their mistake, like the guy who takes his lawn mower and tries to trim hedges with it and hurts himself. Now you cannot buy a ladder, a ladder for crying out loud, in this country that is not so plastered with labels and warnings that you cannot see the ladder. All you see is lots of labels. It is ridiculous.

