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# Through the Mists: ADR and Product Liability Claims in the Twenty-first Century

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## THROUGH THE MISTS: ADR AND PRODUCT LIABILITY CLAIMS IN THE TWENTY-FIRST CENTURY

Michael A. Landrum<sup>†</sup>

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### I. INTRODUCTION

This article will explore the extent to which various alternative dispute resolution (ADR) processes – with an emphasis on mediation – are likely to be used in product liability cases in the first decade of the new century, how that usage will compare to current levels, and the factors that will influence when parties are likely to prefer mediation, arbitration or other alternatives to court litigation. These opinions are based on my own 16 years as a mediator of commercial disputes, including many product liability cases, on information obtained in interviews with lawyers representing both plaintiffs and defendants in product liability litigation and on cited works.

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## II. FACTORS INFLUENCING THE USE OF ADR IN PRODUCTS LIABILITY CASES

### A. *Transaction Cost Containment*

In 1998, the CPR Institute for Dispute Resolution<sup>1</sup> published *Systematic Early Settlement of Individual Product Disputes* (the CPR Handbook).<sup>2</sup> The CPR Handbook relates the case histories of several companies that have developed product liability ADR programs.<sup>3</sup> Although the programs differ in the details, the unifying theme is an overwhelming support for mediation, and a universal conclusion that the process serves the surveyed companies' interests. According to the CPR Handbook, a 1997 study of Fortune 1000 Companies concluded:

[T]he results indicate that ADR processes are well established in corporate America, widespread in all industries and for nearly all types of disputes that we considered. Moreover, ADR practice is not haphazard or incidental but rather seems to be integral to a systemic, long-term change in the way corporations resolve disputes. Many corporations see it as a strategic tool for use in all conflicts...

It is clear that virtually all who use ADR expect to save time and money and report that they do so, by comparison with litigation and administrative agency processes. Interestingly, for some corporations, control over the process is as important as cost and time reasons for turning to ADR...

Policies favoring ADR practice greatly affect the level of ADR use within that firm, and we predict that many corporate policies will change to favor ADR over judicial processes, causing ADR to grow substantially.<sup>4</sup>

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1. The CPR INSTITUTE is a nonprofit initiative of 500 general counsel of major corporations, leading law firms and prominent legal academics whose mission is to instill alternative dispute resolution (ADR) into the mainstream of legal practice.

2. CPR Institute for Dispute Resolution (1998) [hereinafter CPR Handbook].

3. *Id.* at 30-50 (Appendices A-H). These appendices summarize ADR programs used by Deere & Company, Electric Insurance Company, Georgia-Pacific Corporation, Motorola, PPG, The Toro Company, TRW, and Whirlpool Corporation.

4. *Id.* at 26.

The study listed 13 reasons given by surveyed companies for using mediation, including that mediation (i) saves time, (ii) saves money, (iii) uses the expertise of neutral, (iv) preserves good relationships, (v) may be required by contract, (vi) provides a more durable resolution, (vii) preserves confidentiality, (viii) avoids legal precedents, (ix) leads to more satisfactory settlements, (x) is a more satisfactory process, (xi) may be court mandated (xii) may be used for disputes involving international parties, and (xiii) allows parties to resolve disputes themselves.<sup>5</sup>

The single most cited reason for using mediation (cited by more than eighty nine percent of the companies surveyed) is that it saves money.<sup>6</sup> Although a few other reasons also garnered positive responses by more than eighty percent of the firms,<sup>7</sup> the financial advantages were the most important consideration.<sup>8</sup> For example, the Toro Company's combined savings in claim settlements, verdicts, defense costs and insurance premium reductions in the first three years of its program were more than \$9,000,000.<sup>9</sup>

Transaction costs associated with product liability cases will most assuredly continue to escalate in the years ahead, especially in light of technological advances in computerized record keeping, document management and imaging capabilities.

Lindsay G. Arthur, Jr., an experienced Minneapolis defense litigator, laments the explosion in discovery costs wrought by the digital revolution.<sup>10</sup> Reflecting in particular on his work of three decades for one pharmaceutical manufacturer, and recalling a recently litigated matter, he compares what document discovery

5. *Id.* at 27. It should be noted that these considerations relate to the use of mediation in general and are not specific to product liability disputes. Presumably, not all the reasons nor the percentage of respondents listing them would be identical if the study were specifically focused on product liability claims, but it is not unreasonable to assume that the reasons most often given would be the same. *Id.*

6. *Id.*

7. *Id.* 80.1% agreed mediation "saves time," 81.1% agreed mediation is a "more satisfactory process," and 82.9% agreed it "allows parties to resolve disputes themselves." *Id.*

8. *Id.* Based on the author's experience, many business litigants and their counsel articulate as an additional important reason for using mediation the predictability of the outcome – either a settlement that is satisfactory, or no settlement.

9. *Id.* at 51.

10. Interview with Lindsay G. Arthur, Jr., Arthur Chapman Kettering Smetak & Pikala, Minneapolis, Minn. (April 29, 2000).

meant thirty years ago and what it means now.<sup>11</sup> In 1970, Arthur says, three or four legal assistants were dispatched to the opponent's camp to find whatever they could find.<sup>12</sup> They photocopied documents on the premises and returned to their firms' offices with the photocopies.<sup>13</sup>

Today, huge teams with computers arrange to image virtually everything in a company's files.<sup>14</sup> In a big case, this may be *millions* of pages.<sup>15</sup> Computerized document management permits organization and access that would have been impossible to undertake in days gone by.<sup>16</sup> All of this material must now be abstracted and analyzed before depositions.<sup>17</sup> Mr. Arthur estimates that document discovery alone takes an average of nine months. Moreover, that nine month average does not contemplate the periodic interruptions and delays occasioned by disputes over issues such as work product and trade secrets.<sup>18</sup>

Some very interesting work on discovery costs has been performed by Professor George B. Shepherd and the Emory University School of Law.<sup>19</sup> Professor Shepherd's work is an empirical study of the pretrial discovery process that develops new insights into the long-running debate about "whether the litigation and discovery processes are wasteful and inefficient."<sup>20</sup>

Using a simultaneous-equations bivariate tobit econometric model, his underlying data are from a 1962-63 Columbia University survey of attorneys involved in 369 federal civil cases.<sup>21</sup> The purpose of that project was to study the effect on litigation costs and the efficiency of the discovery provisions of the Federal Rules of Civil Procedure.<sup>22</sup>

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. George B. Shepherd, *An Empirical Study of the Economics of Pretrial Discovery*, 19 INT'L REV. L. & ECON. 245 (1999).

20. *Id.* at 250.

21. *Id.*

22. *Id.* Shepherd asserts that "[d]espite their age, the data remain relevant. The federal discovery rules changed little from before the survey until 1993, when the rules changed moderately in approximately one-third of federal districts...In addition, the data reveal a litigation process that is similar to the process seen in more recent studies." *Id.* (citations omitted).

Using numerous dependent and independent variables, both exogenous and endogenous, Professor Shepherd concluded that in conducting discovery, plaintiffs and defendants not only behave differently, but the amount of discovery conducted by each is interdependent with the other.<sup>23</sup> He identified four central patterns:

First, plaintiffs conduct fundamentals discovery. A plaintiff chooses an amount of discovery by examining a case's underlying fundamentals, such as the amount at stake or the number of factual issues. The plaintiff does not counterpunch. The plaintiff does not increase her discovery in response to increased discovery by the defendant.

Second, the defendant chooses an amount of discovery differently. Unlike the plaintiff, the defendant ignores fundamentals. Instead, the defendant observes the plaintiff's discovery level and then counterpunches, seeking a discovery amount that mirrors the plaintiff's level.

Third, plaintiffs and defendants respond to apparent discovery aggression differently. If the plaintiff seems to have conducted excessive discovery, then the defendant retaliates, conducting more discovery than she otherwise would have. Indeed, the defendant's retaliation is almost exactly tit-for-tat, with one unit of defendant's discovery for every unit from the plaintiff. In contrast, if the defendant seems to be conducting excessive discovery, then the plaintiff retreats, conducting substantially less discovery than otherwise.

Fourth, the nature of the attorney's fee arrangement influences the attorney's discovery behavior substantially. For example, plaintiff's attorneys who are paid by the hour conduct in excess of 5 more days of discovery than plaintiff's attorneys who are paid on contingency. This may be due to differing principal-agent incentives between attorney and client. Similarly, each litigant's discovery responds to the other client characteristics, such as the client's wealth or whether the client is a business, as well as to characteristics of the adversary.<sup>24</sup>

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23. *Id.* at 263.

24. *Id.* Query whether different conclusions might be drawn from a study limited to product liability cases. *E.g.*, Daniel E. Libbey, *Avoiding A "Civil Action" Mandatory Summary Jury Trial in the Settlement of Products Liability Design Defect Cases in Light of the Restatement (Third) of Torts*, 15 OHIO ST. J. ON DISP. RESOL. 285, 296 (1999). Attorney Libbey asserts:

This study reinforces the notion that much of the cost of discovery is simply a function of adversarial litigation tactics, and not the need to obtain critical information or to establish facts and witness testimony essential for trial preparation. Accordingly, ADR processes, which focus on agreement instead of winning, remove peripheral, and perhaps even subconscious psychological incentives for running up discovery costs.

Mediation and its kin can help contain the escalating transaction costs of twenty-first century product liability litigation by providing a methodology for settlement that by its very nature can minimize the waste and inefficiency produced by some of the dynamics identified by Professor Shepherd.

### B. *Liability Risk Management*

Another reason why, at least in the near term, plaintiff's attorneys increasingly will be interested in using non-adjudicatory ADR processes was identified by William R. Sieben, a Minneapolis plaintiff's attorney, who has represented many injured plaintiffs in product liability litigation.<sup>25</sup> Mr. Sieben feels that for the next four or five years he will continue to encounter the hurdles in advancing his clients' interests erected by the 1993 decision of the United

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Under the risk-utility and consumer expectations tests, discovery basically must be completed in order to obtain evidence sufficient to establish liability. In the risk utility analysis, complete discovery of the manufacturer's design process must be explored to determine if a safer alternative design could have been chosen. In the consumer expectations analysis, complete discovery of the manufacturer's advertising and marketing techniques must be explored to determine whether consumers likely would be deceived into believing a product is safer than it actually is. For these reasons, settlement prior to the completion of discovery is unlikely because the plaintiff has little bargaining power and risks conveying the perception of a weak case.

*Id.*

However, Libbey notes, "if the defendant wishes to settle prior to plaintiff obtaining sufficient evidence to establish liability, settlement prior to completion of discovery is much more likely." *Id.* (citing RICHARD J. HEAFEY & DON M. KENNEDY, *PRODUCT LIABILITY: WINNING STRATEGIES AND TECHNIQUES* § 13.05 (1996)).

I suggest that since one of the principal reasons for any settlement is the *uncertainty* of both parties about what a jury might conclude regarding liability, Professor Shepherd's thesis is as likely or perhaps even more valid in product liability cases than any other treatise in the field.

25. Telephone interview with William R. Sieben, of Schwebel, Goetz & Sieben P.A., Minneapolis, Minn. (June 7, 2000).

States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>26</sup>

The *Daubert* Court held the seventy year old *Frye*<sup>27</sup> rule regarding the admissibility of scientific evidence was superseded by the adoption of Rule 702 of the Federal Rules of Evidence<sup>28</sup> which, when read together with Rule 402,<sup>29</sup> adopted a new stricter standard.<sup>30</sup> Under *Frye*, an expert opinion based on a scientific technique was inadmissible unless the technique was "generally accepted" as reliable in the relevant scientific community.<sup>31</sup> Judge Kozinski of the Ninth Circuit Court of Appeals, after the Supreme Court's remand of *Daubert* to his court, summarized the new standard as follows:

[Federal judges] must engage in a difficult, two-part analysis. First, we must determine nothing less than whether the expert's testimony reflects "scientific knowledge", whether their findings are "derived by the scientific method," and whether their work product amounts to "good science." Second, we must ensure that the proposed expert testimony is "relevant to the task at hand," *i.e.*, that it logically advances a material aspect of the proposing party's case.<sup>32</sup>

By the middle of this new decade, Mr. Sieben opines, courts will return to the admission of testimony regarding "generic safety principles."<sup>33</sup>

In my experience as a mediator, product liability defendants have often favored the use of mediation for similar reasons. Where the plaintiff's liability case is difficult to prove, but damages will be extremely high if the jury finds liability, mediation offers the defense an opportunity to strike a managed bargain that limits the risk.

26. 509 U.S. 579 (1993).

27. *Frye v. United States*, 293 F. 1013 (1923).

28. FED. R. EVID. 702. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.*

29. FED. R. EVID. 402. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." *Id.*

30. *Daubert*, 509 U.S. at 579.

31. *Frye*, 293 F. at 1014.

32. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) (internal citations omitted).

33. Sieben, *supra* note 25.



### C. *Societal Trends*

In addition to transaction cost containment and proactively managed liability risk, the expanded use of mediation would seem to be consistent with another societal trend. That trend is movement toward self-reliance, empowerment of individuals and the assumption of greater individual responsibility. This trend has manifested itself in a wide range of contexts. Self-help books occupy many feet of shelf space at Barnes & Noble. So-called "welfare reform" schemes in many states are founded in part on this premise. There is a plethora of web sites and self-health care booklets distributed by managed care organizations urging people to take charge of their own health by paying close attention to diet, exercise, and healthy lifestyle. Family Group Decision-Making<sup>34</sup> processes have been introduced in many jurisdictions as alternatives to traditional interventions by child protective services and foster home placements.

## III. RESPONSES TO INFLUENCES

### A. *Dispute Resolution Process Design*

Lawyers, corporate clients and dispute resolution consultants will continue to experiment with ways to design processes to maximize the potential benefits of ADR.

Daniel Libbey suggests that mandatory summary jury trials (SJT) in product liability cases would be particularly useful in light of a significant change in products liability law in the Restatement (Third) of Torts.<sup>35</sup> The division of product defect cases into three

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34. *E.g.*, MINN. STAT. § 626.556 (1998). This statute authorizes local social service agencies, upon assessment of a report of neglect or physical or sexual abuse (which does not rise to the level of "imminent danger") and a determination that child protective services are needed, to arrange for a facilitated "relative care conference" ("RCC") in an appropriate case. *Id.* A relative care conference is designed to give the family (and extended family) of the child at risk an opportunity to reach an *agreement* among the parents and interested relatives of the child regarding the care of the child. *Id.*

35. Libbey, *supra* note 24, at 295. According to Libbey:

'The summary jury trial (SJT) is a flexible, nonbinding ADR process designed to promote settlement in trial-ready cases headed for protracted jury trials.' In the SJT, jurors are chosen from the regular pool of jurors, and the attorneys for each party present a brief version of their case. The SJT usually lasts one day, but flexibility in length is allowed to achieve a result most equivalent to an actual jury verdict. The jury deliberates and returns a nonbinding verdict, which the par-

categories – manufacturing defects, design defects and warning defects – retains strict liability for manufacturing defects, but applies a negligence standard to design and warning defects.<sup>36</sup> Libbey posits three reasons why this change will make summary jury trials appropriate for design defect cases in particular.<sup>37</sup>

First, because liability in design defect cases is based on negligence and proof of a reasonable alternative design under the Restatement (Third),<sup>38</sup> the critical issues are for the jury to determine.<sup>39</sup> The SJT therefore provides a timely and cost-effective way to assess the "reasonable person's" perception and assessment of the evidence.<sup>40</sup>

Second, says Libbey, U.S. district court Judge Thomas Lambros - the "inventor" of the SJT - observed, for an SJT to have the optimal probability of success, discovery should be completed and there should be no pending motions.<sup>41</sup> The parties will be unable to marshal the evidence necessary for a jury determination of negligence or alternative design without full discovery. Therefore, a case ready for trial is ready for an SJT.<sup>42</sup>

Libbey's third reason why design defect cases are particularly suitable for the SJT relates to the role of expert witnesses.<sup>43</sup> Much of the expense of a trial in design defect cases is related to the number of experts and the extent of their testimony.<sup>44</sup> Because one of the hallmarks of SJTs is the time limitation, expert testimony, which Libbey believes remains critical in an SJT, can be "packaged" in a more efficient and less expensive way.<sup>45</sup>

Libbey has two other observations that echo Professor Shepherd's findings.<sup>46</sup> He says that settlement negotiations in product liability cases are "often frustrated" because they are characterized

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ties can use to discuss settlement negotiations at a post-SJT conference conducted by the court.

*Id.* (footnotes omitted).

36. *Id.* at 287-288 (discussing RESTATEMENT (THIRD) OF TORTS § 2 (Tenative Draft No. 2, 1995)).

37. *Id.* at 303-307.

38. RESTATEMENT (THIRD) OF TORTS § 2 (Tenative Draft No. 2, 1995).

39. Libbey, *supra* note 24, at 303-307.

40. *Id.*

41. *Id.* (citing THOMAS D. LAMBROS, THE SUMMARY JURY TRIAL AND OTHER ALTERNATIVE METHODS OF DISPUTE RESOLUTION 16 (1984)).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 285.

by the parties' mutual search for deterrence.<sup>47</sup> Plaintiffs want to deter the production and distribution of poor products, and defendants want to deter the bringing of repetitive suits over the same products.<sup>48</sup> In addition, he thinks each side is usually reluctant to broach settlement because "a stigma attaches to the party who first suggests" it.<sup>49</sup> These are two additional reasons why the courts, especially the U.S. district courts, should consider the use of mandatory SJTs in product liability cases.<sup>50</sup>

My interview with Lindsay G. Arthur, Jr. also dealt with the subject of SJTs, but with a variation on the theme.<sup>51</sup> Mr. Arthur recently experimented with a way to streamline the litigation process all the way through resolution to the satisfaction of both plaintiff and defense counsel and clients.<sup>52</sup> With opposing counsel, he collaboratively designed and participated in two *binding* SJTs, including a small products liability case.<sup>53</sup>

After reaching specific understandings on cooperative informal document exchanges, each side was given one-half day to present its evidence in any form it wanted.<sup>54</sup> The parties agreed to permit the live testimony of one witness with cross-examination, and very limited plaintiff rebuttal testimony.<sup>55</sup>

One variation on the SJT theme was the incorporation of a confidential "high-low agreement" on damages.<sup>56</sup>

In another case damages were stipulated in confidence between the parties.<sup>57</sup> Notwithstanding the stipulation, the summary jury heard the entire case and was charged with findings on both

47. *Id.*

48. *Id.*

49. *Id.*

50. A full discussion of federal authority to implement mandatory SJTs is beyond the scope of this article. Authority is found in several provisions of the Federal Rules of Civil Procedure. *E.g.*, FED. R. CIV. P. 1, 16(a), 16(c)(7), 16(c)(11) and 39(c); *see also* Libbey, *supra* note 24, at 298-99 n.90-91. In addition, the Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (2000), requires the federal courts to implement a plan to reduce the expense and delay of civil justice. Section 473 specifically mentions the use of SJTs as a dispute resolution process option. 28 U.S.C. § 473 (2)(6)(B) (1993).

51. Arthur, *supra* note 10.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

liability and damages.<sup>58</sup> Another agreement limited the jury's deliberation time to three days.<sup>59</sup>

Mr. Arthur felt these custom-tailored processes worked to the advantage of all parties by providing a "day in court" but greatly reducing the costs involved.<sup>60</sup> He noted that a critical element to the success of such experiments is mutual trust between the lawyers – that is, confidence that neither will try to abuse the process.<sup>61</sup> He was convinced that SJT outcomes will be "reasonably close" to the results of a full-blown trial.<sup>62</sup>

Deere & Company, publisher of the CPR Handbook, is an enthusiastic user of mediation to resolve product liability matters.<sup>63</sup> Steven V. Frankel, Assistant General Counsel and Director of Deere & Company's Early Resolution Program, told me his company views mediation as a way to *manage litigation*, and not simply as a settlement tool.<sup>64</sup> In the future, he expects Deere to continue to push for mediations as early as feasible.<sup>65</sup> Setting a date for the mediation is particularly important.<sup>66</sup> This helps the lawyers and parties prioritize their matters, and it creates a focus on the particular case that might otherwise languish.<sup>67</sup>

Mr. Frankel likes to use mediation as a feedback mechanism to "reality test" his own early case evaluations and those of outside counsel.<sup>68</sup> For this reason, he prefers mediators who use a more "facilitative" approach over those who are more "evaluative."<sup>69</sup> In Frankel's opinion, many retired judges-turned-mediators typify "evaluative" mediators.<sup>70</sup>

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. CPR Handbook, *supra* note 2, at 30-32.

64. Telephone Interview with Steven V. Frankel, Assistant General Counsel of Deere & Company (May 10, 2000).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*; see also, Leonard L. Riskin, *Understanding Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1998). A thorough discussion of the continuum of mediator behavior ranging from "facilitative" to "evaluative" is beyond the scope of this article, but professor Riskin summarizes as follows:

At one end of this continuum are strategies and techniques that *evaluate* issues important to the dispute. . . . At the extreme end of this

Mr. Frankel believes there is no such thing as a "bad mediation."<sup>71</sup> Instead, any coming together between opposing litigants and counsel will help clarify what is separating them and help them to test their own strengths and weaknesses.<sup>72</sup>

Neither he nor Mr. Arthur favor binding arbitration as a process for resolving product liability disputes.<sup>73</sup> Arbitration's key attributes – an adjudicatory, adversarial process with no appeal and no or very limited discovery and motion practice – do not meet the objectives these defense lawyers have set for their clients.<sup>74</sup>

Mr. Frankel also predicts the greater use in product liability cases of separate "settlement counsel,"<sup>75</sup> an idea thoroughly and thoughtfully explored by Boston attorney and mediator William F. Coyne, Jr. in a 1999 article.<sup>76</sup> The concept is that clients hire a lawyer – someone other than their trial counsel – to focus exclusively on achieving a fair settlement.<sup>77</sup> If settlement fails, the settlement counsel's role is ended, and trial counsel takes over, with a full briefing from her predecessor on the case.<sup>78</sup> Ideally, the strategy is employed early in the life of the dispute.<sup>79</sup> This permits the settle-

evaluative end of the continuum fall behaviors intended to direct some or all of the outcomes of the mediation. At the other end of the continuum are beliefs and behaviors that *facilitate* the parties' negotiation. At the extreme end of this facilitative end is conduct intended simply to allow the parties to communicate with and understand one another.

The mediator who evaluates assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement – based on law, industry practice or technology – and that she is qualified to give such guidance by virtue of her training, experience, and objectivity.

The mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can develop better solutions than any the mediator might create. Thus the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.

LEONARD L. RISKIN, *DISPUTE RESOLUTION AND LAWYERS* 150 (2nd ed. 1998).

71. Frankel, *supra* note 64.

72. *Id.*

73. *Id.*; see also Arthur, *supra* note 10.

74. Frankel, *supra* note 64, Arthur, *supra* note 10.

75. Frankel, *supra* note 64.

76. William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367 (1999) (advocating for the use of attorneys in dispute resolution).

77. *Id.*

78. *Id.*

79. *Id.*

ment counsel and client to look at the dispute in the overall context of how the company runs, and not simply at the legal analysis, to define an optimal business solution.<sup>80</sup>

A detailed review of the "settlement counsel" process is beyond the scope of this article, but Mr. Coyne addresses a multitude of issues, including various models of lawyers' roles in dispute resolution, a lawyer's ethical duty to explore settlement, why cases do not settle (or settlement is substantially delayed beyond the optimal time), how to structure relationships between settlement and trial counsel, and how to establish a fee system that maximizes the acceptability and utility of the strategy.<sup>81</sup>

### *B. Settlement Methodology And Techniques*

In addition to the evolution of dispute resolution process design, the methodology and techniques utilized in already familiar processes such as mediation will continue to become more sophisticated and effective. At the actual point of settlement agreement closure, product liability cases have much in common with other kinds of litigated matters. They often involve multiple defendants, often with cross-claims or third party actions against each other. My own experience mediating construction disputes suggests that litigation and dispute resolution are often similarly structured.

Pittsburgh Attorney and ADR neutral Robert Creo has devised a highly effective technique to help multiple parties in a construction case reach agreement on the allocation of respective shares of a settlement offer.<sup>82</sup> For example, where multiple defendants in a mediation have agreed to put together a joint offer of settlement, but disagree over their respective responsibilities and are concerned that none pays more than its fair share, Creo utilizes this approach.<sup>83</sup>

First, each defendant is requested to submit, in confidence to the mediator, a circular pie chart showing its view of the share of responsibility that should be borne by the individual parties.<sup>84</sup> Only the mediator knows these analyses.<sup>85</sup> When the proposed percent-

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80. *Id.*

81. *Id.*

82. See generally Robert Creo, *A Pie Chart Tool to Resolve Multiparty, Multi-Issue Conflicts*, 18 ALTERNATIVES TO HIGH COST LITIG. 89 (2000).

83. *Id.* at 98.

84. *Id.*

85. *Id.*

ages are applied to the amount of the target offer, they usually come up short.<sup>86</sup>

Creo then asks the parties to re-evaluate their pie charts and resubmit them to him, or he visits in private caucus with each party in an effort to achieve a package of contributions that reflects what only the mediator now knows is an emerging consensus.<sup>87</sup> The idea is that this confidential approach "avoids parties' jockeying for position and low-balling based on relative liability concerns."<sup>88</sup>

In this article, Creo goes on to describe the mediation in detail and offers suggestions on how to use the pie chart technique in other contexts.<sup>89</sup> Product liability cases would be excellent candidates for this closure technique.

Innovative closure techniques have also made it to the World Wide Web. Sites of companies like Cybersettle.Com<sup>90</sup> and Click-and-Settle.Com<sup>91</sup> conduct what are essentially legal claim "auctions" between opposing parties. Using slightly different formats, these firms receive a limited number of "monetary bids" from each party to settle their case. The parties have agreed in advance that if at any point in the bidding, their proposals are within thirty percent of each other, the case will settle at the midpoint of the proposals. If they overlap, the case settles either for the plaintiff's demand or at the midpoint of the overlap. Only the website knows the bids, and after each round of bidding the parties are advised by computer only that they have reached a settlement or have failed to do so.

This methodology is not especially participatory or empathetic for clients, or validating of the lawyers' respective theories of recovery or defense and evidence in support of their positions. Rather, it is the opposite of a well conducted mediation. Nevertheless, in a case where both sides really want to avoid trial, but in which settlement efforts are made ineffective by tactical posturing and lack of trust, this approach is likely to form a part of the spectrum of product liability settlement methods in the twenty-first century.

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. <<http://www.cybersettle.com>>.

91. <<http://www.clickandsettle.com>>.

#### IV. CONCLUSION

The benefits experienced with ADR in product liability cases since the beginning of the late 1970s and early 1980s, especially the assisted-negotiation, non-adjudicatory models, will create an intensified interest in the use of ADR in the first decade of the twenty-first century. Both sides of the ideological product liability divide will believe the increased use of ADR is their interests, albeit for different reasons.

The leading reason for the use of ADR—transaction cost containment - will continue to grow and will become even more important as technological advances in information management make the cost of full discovery prohibitive.

*Daubert* and its progeny will cause plaintiffs to seek to settle cases before having to prove liability because of the challenges of admitting scientific evidence. Plaintiffs will seek to avoid drawn out disputes over scientific evidence that they may characterize as "cutting edge," but that defendants will continue to challenge as "junk science."

Finally, the societal trends toward personal empowerment and accountability, coupled with the aspect that life is moving with continually escalating velocity, generating impatience with ponderous decision-making processes, militates toward a greater public acceptance of ADR processes in product liability cases. The result will be earlier settlement effort interventions.

I suggest there is another societal "good" that can emerge from the use of assisted-negotiation settlement processes like mediation in product liability cases - especially those involving catastrophic personal injury or death. Professor Gerald R. Williams of Brigham Young University has written a fascinating article on negotiation.<sup>92</sup> He observes that once parties are in conflict, they are then faced with the task of getting out of it.<sup>93</sup> Yet people with intense feelings are locked into the same place and time with their opponent.<sup>94</sup> Even when the *lawsuit* is resolved, the *conflict* may not be, and the parties may be left with residual feelings of "helplessness, victimization, distrust and alienation."<sup>95</sup> Professor Williams asserts that negotiation is a "healing ritual," a process that may unlock the "poten-

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92. Gerald R. Williams, *Negotiation As a Healing Process*, 1996 J. DISP. RESOL. 1 (1996).

93. *Id.* at 6-7.

94. *Id.*

95. *Id.* at 66.



tial for the disputants (and even their lawyers) themselves to be transformed...not only to settle the conflict, but to resolve the underlying issues and be reconciled to one another. This realization lends meaning and purpose to the daily work of lawyers."<sup>96</sup>

In mediating many serious product liability cases, I have seen Professor Williams' concepts come to life. When an injured plaintiff and the representative of the company that manufactured the "agent of injury" spend one or two days searching for a mutual solution, something amazing happens. This is especially true where the lawyers are comfortable with a classic mediation process that allows the plaintiff to "tell her story" in her own words to the people across the table. It is also especially true when someone on behalf of the defendant—quite often both defense counsel and the insurance claims representative—articulates real feelings of empathy for what happened to the plaintiff and validates the changes in her life that were wrought by the injury and the lawsuit. The mediated negotiation process *does* heal. I think there will—and should—be more of it in the twenty-first century.

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96. *Id.*



