Duquesne Law Review

Volume 12 | Number 3 Article 3

1974

Product Liability: An Interaction of Law and Technology [commentary]

Max Rosenn

Commentaries

on

"Product Liability: An Interaction of Law and Technology"

Commentary

by

*Max Rosenn**

Products liability has clearly emerged as one of the most litigated areas of the law. Many students and practitioners in the field, however, have the uncomfortable feeling that the complex facts usually involved in this type of litigation are seldom presented to the fact finding tribunal adequately and meaningfully. The principal article, based upon probing studies of actual products liability trials, substitutes substance for mere emotion. The authors argue persuasively that serious problems do exist in the form and substance of products liability litigation, arising largely from the attempt to fit this new theory within the old framework of negligence law. Since the principal consideration in a products liability case is whether or not the product "behavior" was somehow improper, the authors justifiably suggest a new conceptual approach to products liability cases which focuses on the product.

This approach, I believe, is legally desirable because it would aid the fact finder, be it jury or judge, in making the legally significant factual determinations. In addition, it will help avoid unreasoned determinations that a product design is defective, a result which may unnecessarily and unwisely consign the product to complete oblivion. Furthermore, if we slavishly adhere to the present system, absolute liability may replace restricted liability, a result which may have devastating economic and societal consequences.

The article rejects as legally and socially unsound the characteristic approach in products liability cases which involves focusing entirely on

* Judge, United States Court of Appeals for the Third Circuit.

the issue of whether or not the particular injury might have been averted had the product been designed differently. Such an approach may well have a ready appeal to a jury. It is superficial, however, since it ignores considerations, including cost, which might have justified the original decision to design the product as it was.

The authors' proposals, premised upon the thesis that a products liability trial is first and foremost a trial of the product, deserve careful consideration because they are creative, objective, and plausible. They are thoughtfully intended to give the legal system continued relevance in a rapidly developing area of the law, and to give it greater capability in meeting evolving technical and social problems. In my opinion, several of the authors' proposals would enhance the fact finding process, improve the quality and relevance of the evidence, and relieve jurors from the agony of fact conjectures. The result will be a trial with greater integrity, efficiency, and fairness.

The major solution offered is that the trial itself be restructured to focus on the product. The evidence should relate to the social and economic use of the product, as well as the considerations that went into its design to meet industrial or consumer requirements, including the deliberate trade-off of risk against economic usefulness. The point is well taken that a comprehensive understanding of the product and its uses is necessary when considering the critical issue of whether the manufacturer's balance of risk against efficiency is justified. Comprehensive product liability description then becomes "the cornerstone of the products liability trial."

Once this view is accepted, I agree with the authors' proposed "seriated trial" which would require that evidence relating to the product itself be marshalled in the early stages of the trial, rather than interspersed in a fragmentary manner throughout the trial. The article is not clear as to the full format of a seriated trial, but as I interpret the proposal the trial would consist essentially of four phases:

PHASE I would be an expanded pre-trial process which would immediately involve the parties' expert witnesses.

PHASE II would open the case to the jury, but would limit the evidence to a comprehensive description of the product, including its design, function, and purpose, and its overall environmental and economic use. The alleged defect would also be indicated at this stage. This stage would be the major change from present trials.

PHASE III would be confined to evidence of the injury-producing incident and to the issue of causation.

PHASE IV would be devoted to evidence of the extent of damages, if liability were established at the conclusion of phase III.

The concept of a seriated trial in this type of litigation may well be commended. The difficult problem as I see it, and at this point the article is a bit vague, is whether phase II is practical under our adversarial system. For example, can the jury be expected to determine at the conclusion of phase II whether the product or its design is defective without evidence of the injury-producing incident? It seems to me that it may be necessary to reach an accommodation here after some trial experience.

I believe that a seriated trial deserves the serious consideration of the bench and bar. Of course, the success of the procedure would depend largely upon the attitudes and skills of trial judges, and would depend upon strong guidance by the trial judges. I see no reason why the bench could not meet this challenge; it has demonstrated the ability to adapt to numerous other changes such as the bifurcated trial, expanded discovery, and new systems for alternate jurors.

I find possible and desirable the proposal to make the pre-trial procedures broader and more substantive. Time spent in flexible and informal pre-trial procedures should provide manifold returns. It should lead to the presentation of evidence to the jury in a coherent and logical sequence, rather than in a haphazard and fragmentary manner over the length of a trial and often under conflicting and inconsistent theories of liability. Because of the enlarged substantive function of pre-trial procedures, I believe that a transcript or electronic recording of the proceedings would be desirable.

The benefits of this pre-trial procedure arise largely from the expanded use of experts at the early stage. The relevancy and appropriateness of the experts' testimony can be quickly evaluated before the jury enters the case. The judge will have a unique opportunity to understand the nature of the product and its environment, as well as the respective technical theories of counsel. The experts, once their qualifications are established at this early stage, can act as the technical arm of the court in defining and analyzing the precise, technical issues, and could assist in establishing minimal levels of evidence, both theoretical and physical. The judge, as the authors state, will consequently

have greater control over "the integrity of the real evidence." This is certainly a functional and more positive use of experts in a trial, although, of course, it may be more costly to the parties.

I believe that the suggested pre-trial procedures would be improved if counsel for both sides were at that time required to present the court and opposing counsel with a written statement of their experts' qualifications and a full statement of the experts' direct testimony which will be later presented to the jury. This would of course be subject to subsequent cross-examination during the trial. This procedure is similar to that frequently followed when technical testimony is to be presented before administrative or regulatory bodies.

Furthermore, under the expanded pre-trial procedure, I agree that plaintiff's counsel should generally be required to elect his theory of liability, be it products liability or negligence. This should reduce the presentation of unnecessary and often conflicting evidence to the jury under inconsistent and sometimes contradictory theories of liability. It will facilitate the ultimate presentation of essential evidence to the jury with dispatch, coherence, and proper sequence. The time required of lawyers, juries, and judges will be substantially reduced.

The implementation of phase II of the seriated trial will be more difficult and more challenging. I believe, however, that the effort would be well worth the while. As pointed out above, the judge and the jury will be given a far more objective and comprehensive presentation concerning the economic and non-economic considerations involved in the design and production of the product. The alleged defect would then be identified, and the product design or defect could be tested against the accepted legal criteria to determine whether it was unreasonably dangerous. Extraneous factors relating to the injury would not be raised. Interrogatories to the jury in this aspect of the case would be useful and highly desirable.

I have doubts, however, that the trier of fact could determine whether the product was unreasonably dangerous without a fairly detailed description of the manner in which the accident happened, as well as some indication of the extent of the injury. These considerations are of course relevant in determining the danger created by the product and the likely harm from an accident. Furthermore, products liability law has expanded to the point where in some states a malfunction may itself, in the absence of abnormal use and reasonable secondary causes, be sufficient evidence of a defect for the injured plaintiff to take his

case to the jury. In some circumstances, therefore, the nature of the accident will be vital in determining the existence of a defect. On the other hand, it may be desirable and possible to confine evidence as to the extent of the injury to phase III of the trial.

The proposals of the authors are analytical, thoughtful, and constructive. I believe the bench and bar should make a determined effort to implement as many of the proposals as possible in order that products liability litigation continues to meet the tests of fairness and substantial justice. Congress has imposed upon federal agencies new responsibilities for products and occupational safety. The legal system must also demonstrate the capacity to develop new techniques and procedures to adequately adjudicate the factual and technological issues in products liability cases.