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## Commentary

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## Commentary

by

*Bernard S. Meyer\**

One cannot read "Product Liability: An Interaction of Law and Technology" without a great deal of interest and admiration, for its basic concept—that since strict liability views the cost of injury as a cost of the product, it is the product itself rather than the manufacturer's conduct that should be tried—is seminal. As with most such proposals, however, it is bound to travel a rocky road before it finally, because of its sheer common sense, becomes an accepted part of our practice.

Part of the resistance will come from the trial bar, especially the plaintiff's bar, which is bound to react even more strongly to this proposal than it did to bifurcation of the liability and injury issues, since this proposal not only *excludes* injury evidence but *includes* evidence concerning the economics of the product. Part of the resistance will also result from the greatly increased burdens that will be imposed on the courts, which will not only be trying the action in several steps, but also will be holding pre-trial conferences of a widely different nature than presently do most state courts.

To one who thinks the matter through, the need for an election of remedies at the pre-trial stage, for pre-trial qualification of experts, and for trial as a separate issue of the question whether the product is defective and unreasonably dangerous is apparent, yet all three seem strongly defense oriented. It will be important, therefore, if the proposal is ultimately to be accepted, that the plaintiff's interests be balanced by discovery rules assuring plaintiff broad access to defense evidence, expert reports and the like.

Thus, though the jury can reach a more logical result concerning the existence of a defect without the appeal to sympathy involved in evidence concerning plaintiff's injury and without the prejudice that testimony concerning the manufacturer's conduct may generate, exclusion of such evidence is fair only if plaintiff is given pre-trial access to all the data that defendant will offer concerning product economics in order to be able to meet defendant's risk-utility evidence when pre-

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sented. Likewise, requiring plaintiff to elect prior to trial which theory of liability the case will be tried on can be justified as reducing jury confusion, but is fair to plaintiff only if, at the time he is called upon to make his election, he has as much knowledge of defendant's evidence countering each of plaintiff's theories of liability as he would have under existing rules under which election would be made, if required, at the end of the whole case.

Especially intriguing to a former trial judge is the suggestion that the project expects ultimately to develop standards concerning the appropriateness of expertise. Since that is a matter within the trial judge's discretion, and since the trial judge's rulings are normally made from the bench during the course of the trial, there is little law available on the subject. One has the impression, however, that few experts are ever found not qualified, and that qualification of an expert on sometimes sketchy background data is probably a function of the time the issue is presented, and the disruption into which the trial will be thrown (if, indeed, it does not end in dismissal) if he is found not qualified.

Pre-trial qualification, when coupled with standards on expertise, should reduce the risk of minimally qualified experts that now exists, but in a matter as complex as some products liability cases will it be possible for the judge to pass upon the expert's qualifications in a pre-trial hearing without getting fairly deeply involved in what the trial evidence will be? In other words, may we not be creating just another minitrial? The answer probably lies in the expertise standards which may, therefore, play an important part in the acceptance or rejection of the pre-trial qualification concept.

Not entirely clear is the study's reference to the myth of absolute scientific certainty in the expert's having reached his conclusion. An engineering expert, for example, presents his conclusions on the basis of "reasonable engineering certainty" and the jury is told that it is at liberty to accept or reject, in whole or in part, the expert opinion given, as they find they should on the basis of a review of all of the evidence, expert and other, and of the expert's qualifications in his field. Clearly then, present practice presents the expert's view as what it is—an educated but not incontrovertible judgment.

Indeed, in proposing that the jury be required to evaluate opposing opinions and choose between them, rather than be permitted to conjure up its own scientific theory within the range of the opposing

opinions, the study is giving greater absoluteness to opinion evidence than presently it is given. Yet in matters as complex as most product liability cases turn out to be, it seems clear that any other rule than that suggested can lead to jury verdicts without a true scientific basis, for which the only possible corrective will be a cumbersome and ineffective motion to set the verdict aside as against the weight of the evidence.

Finally, serious question exists whether the courts should become involved in the preservation of evidence as the study suggests. Aside from questions concerning liability for evidence lost or damaged while in the custody of the court, the expense involved in the establishment of conveniently located agencies to receive and maintain such evidence should be imposed not on the taxpayers but on the litigants. It seems much more sensible to rely on the self-interest of the adversaries, for one side need only show that there is reasonable question concerning how the evidence is being maintained by the other to get an order directing where and by whom evidence shall be held until trial. Generally, such evidence will be retained by the testing laboratory from which comes the expert who will testify. Probably there should be, in addition, an expansion of the rule permitting an adverse inference to be drawn against a party who fails to produce documents within his control. Under the expanded rule a similar inference should be permissible if the jury finds that either through gross negligence or intentional conduct product liability evidence has been permitted so to deteriorate as not to furnish a basis upon trial for the statement of an expert opinion.

The points that have been made are but minor modifications in an unusual and unusually well thought out proposal. Adoption of its concepts will constitute a giant forward step in the trial of product liability cases.