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Commentary

by

*Gilbert J. Helwig**

In response to the request of the authors of the study "Products Liability: A Study of the Interaction of Law and Technology" that I offer a critique from the litigation firing line, I would suggest that certain facets of the proposed alterations in products liability trials merit further consideration. Trial counsel's stake in a responsive trial system is obvious; their sense of responsibility to the judicial system compels their receptive and critical evaluation of possible modifications. I hope these following observations will afford additional insight to the reader.

I. IMPLEMENTATION OF THE STUDY'S RECOMMENDATIONS

From my reading of the study, I do not understand that the authors have yet reached the point that they have proposed any particular mode of assuring compliance with the recommendations contained in the study, as by amendment to rules of civil procedure, adoption of pre-trial rules, or other possible alternatives. It is my suggestion that no such broad based rule or procedure be sought, which would require the use of these procedures in all product liability cases, at least for the present. I think a better mode of implementation would be to try to encourage the use of the method they suggest either by the voluntary action of attorneys who are interested in the approach through seminars or personal contact, or by the use of an individual pre-trial order in a particular case by some able and innovative judge. In this way, some empirical data could be gathered which could be later used either to re-evaluate the proposals or as an aid to getting a broader adoption of the proposed procedures. I think that most of the precedures which are proposed could be required or used in such a trial without any rules change or any change in the laws of evidence. This would at least be true in federal court actions if the proposed Federal Rules of Evidence are approved by the Congress, as I believe is very probable.

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II. PROBLEMS ARISING OUT OF THE DEGREE OF CERTAINTY
WITH WHICH EXPERTS EXPRESS THEIR OPINIONS

Many courts, of course, still feel compelled to require an expert to express his opinion to an absolute certainty, rejecting the alternative of his expressing an opinion in terms of "probabilities" or "possibilities." Sometimes this difficulty, especially in the case of medical experts, is surmounted by permitting the expert to express his opinion in terms of "reasonable medical certainty." I suspect the same flexibility could be obtained in most courts which countenance this by permitting any expert to testify on the basis of "reasonable professional certainty." In my dealings with the physicians who are disturbed about the apparent absolutism which they believe the law requires of them in expressing medical opinions, I have developed the practice of instructing the physicians that I do not believe the law requires them to have formed an opinion to an "absolute" degree of certainty, but only to that degree of certainty which they feel would justify their undertaking some reasonably serious or extensive medical procedure. I have never seen any case which discussed this kind of pragmatic test, but it seems to me that it is a good measure of the professional judgment if the medical expert would be convinced to that degree. It is somewhat analogous to the instruction given juries with respect to reasonable doubt. I feel no compunction about advising a medical witness that if he has this degree of certainty he may honestly state in court that, in his professional opinion, that fact is so without being concerned about the semantics of the apparent absolute certitude of that expression.

Happily, more and more courts are recognizing the appropriateness of permitting an expert to express his opinion in terms of "best judgment" or "more probable than not," although generally speaking there is a tendency to exclude expressions of opinions in terms of "possibilities" only. I think that, here again, reform is probably needed, either by more liberal judicial interpretation or by the adoption of explicit rules or codes of evidence.

I suspect that the dogmatic assertions of experts, to which the authors refer in their study, are the product of this evidentiary requirement, rather than of the natural tendency of the experts themselves. I think this is an area somewhat analogous to the problems which psychiatrists have in adapting their testimony to the inappropriate semantic re-

quirements of the law and that if the law were changed the problem would disappear.

On the other hand, I have serious misgivings about the proposal contained in the study that experts be *required* to express their evaluations of probabilities in qualitative form. I doubt if, in most cases, there is a truly scientific basis for such qualitative measurements and I suspect we would merely be imposing another bit of legal mumbo jumbo on the expert by insisting that he state his opinion of probabilities in percentage forms.

III. HOW THE EXPERT EXPRESSES HIS OPINION

The concern expressed in the study in this area centers on two distinct problems: (a) the requirement that a hypothetical question be addressed to the expert (except where he is testifying on the basis of personal knowledge); and (b) the related assumption that the expert is required to accept the 100 per cent probability of the truth of the facts stated in the hypothetical question.

Many courts are moving away from the requirement that the hypothetical question be used. The new Federal Rules of Evidence will permit the trial judge, in his discretion, to allow the expert to express his opinion without showing the foundation, leaving that to be developed as part of his further examination or cross-examination. I suspect this will become the normal procedure and will do much to alleviate the stilted and awkward form in which the expert is required to testify at the present time. However, I think that if the trial is not merely to become a battle of prestigious experts, where the jury is pretty much to decide on the basis of apparent qualification which opinion to accept where there is a dispute, I think due regard must be had for permitting a reasonable opportunity to explore the facts which the expert has assumed to be true or more probably true than not and on which his judgment rests. Thus, the jury, if it forms a different opinion on the probable existence of such facts, can take that into consideration in determining whether to accept or reject the opinion of the expert.

In addition, I question whether the form of the normal hypothetical question ("assuming that so and so and so and so occur . . .") technically requires that either the expert or the jury assume there is a "100 per cent certainty" of the existence of that fact. I think the logical foundation is only that the matter be assumed to be true conditionally

or concessively for purposes of permitting the opinion to be expressed. This leaves both the expert and the jury free to discuss and to evaluate, in terms of the usual burden of proof that is whether a given proposition is more probably true than not, in evaluating the merits of the whole issue. Perhaps the concerns expressed in the study could be met by a procedure under which the expert would be given some reasonable opportunity to express his inability to accept as being more nearly true than not certain of the facts set forth in the hypothetical which is addressed to him. Perhaps the matter could also be addressed in terms of ethical responsibility of requiring both the expert and the attorney not to incorporate into a hypothetical question facts assumed to be true where the expert cannot, in conscience, accept, on the basis of the evidentiary facts, that such assumed fact is probably true.

IV. THE EXPERT'S QUALIFICATIONS

Perhaps there is a personal bias of my own against permitting the legal system to become too much subject to elitist control. I am opposed to permitting a group of experts in any field to lay down absolute requirements limiting the right of any person to testify as an expert. I think the formulation of criteria by such experts and the communication of this information as a guide to permit the judge to decide whether to allow the expert to testify and to permit the jury to evaluate his testimony is desirable. I hope, however, that the study does not mean to recommend that any particular field of experts should have the absolute ability to regulate who may testify in their field of expertise. Even conceding that such power, or something approaching it, may exist in the areas of professional licensure and related fields, I see no reason in logic to permit it to spill over into the field of litigation and I would be pragmatically opposed to it. However, the formulation of such criteria would certainly be a benefit to the practicing lawyer and I am sure, as a matter of actual practice, more and more they would come to select as experts persons who have the qualifications which are recommended.

V. THE SERIATED TRIAL

In general, I agree that the use of the seriated trial is desirable. It would certainly have many obvious advantages in that it would tend to eliminate the inappropriate influence of sympathy or prejudice which

may result from the presentation of testimony on the issue of damages. It would shorten some trials in that a decision favorable to the defendant after the liability stage of the trial would make the damage stage trial unnecessary. It would also probably make it unnecessary in many cases where the plaintiff prevails, because the defendant's attitude toward settlement would be substantially changed by the loss of the liability question. In addition, a seriated trial would probably make it easier for the parties to schedule the appearance of their various experts and have many other possible advantages. However, I have one or two misgivings about the suggestion which I would like to call to the reader's attention.

(a) In any event, I do not think the seriated trial requires that an election be made between dual theories of negligence and strict liability at the pre-trial stage. Why would it not be possible to have the liability stage further segmented, so that the issues could be tried first on the theory of strict liability and, after that is submitted to the jury, if necessary, permit the issue of negligence then to be submitted? If the problem of jury bias is a specter, I see no reason why these issues could not be tried to separate juries. It does not seem to me that the concept of a jury trial requires, in seriated trials, that the same group of jurors hear evidence on all the issues, any more than this is required where a case is remanded for trial after verdict on liability for new trial on the issue of damages.

(b) We should also be at least sensitive to the possibility that the present mode of trial may have offsetting advantages which would be lost in the seriated trial. I raise the possibility that the testimony relating to damages and injuries may have certain beneficial effects in the trial process which would be lost in the seriated trial. One such benefit would be the fact that the jurors obviously pay more attention in a serious case than in one which they regard as not serious. The seriousness of the injuries would have some tendency to alert them to the need to follow the liability testimony more carefully. Another benefit from the ordinary mode of trial may lie in the fact that the jurors get some respite from the necessary educational process which the presentation of technical evidence very often requires. Any one of us who has listened to a long lecture in class about a technical subject knows that there is a fatigue point reached which must be broken by a recess or some other device. A significant device used by many educators and some of our greatest authors is to interlard the presentation

so that different matters are presented at different times. The attention span is thus not overworked, since the human mind can, with some degree of facility, go from one subject to another without having lost what was absorbed. Indeed, the subconscious process of absorption of the material previously presented may be enhanced by the device. In other words, I am not convinced that the jurors will be more understanding of the technical evidence if it is presented to them in a highly concentrated form at one stage of the trial. At the very least, I think some effort should be made to test this theory empirically before the possibility is wholly overlooked.

Finally, I would suggest that our legal system retains vitality to the degree that it accommodates to altered conditions. A serious perusal of the proposed changes is warranted; when a new and far reaching rule of law is adopted, the trial bar must ask itself whether the traditional format will suffice. Whether the instant program finds a favorable reception is perhaps less important than the receptivity of the bar to such modifications as may be dictated by the requirements of an altered premise of liability.

What was said by the noted anthropological expert Paul Bohaunan, in commenting on the ability of our institutions to survive, may contain a message to the legal profession: ". . . change is not doom; it is the very antithesis of doom. Doom is to be found in the struggle to resist change—salvation comes with understanding it."¹

1. Bohaunan, *Beyond Civilization*, 80 NATURAL HISTORY MAGAZINE No. 2 (Special Supp. Feb. 1971).