Duquesne Law Review

Volume 12 | Number 3 Article 8

1974

Commentary

R. David Pittle

Robert S. Adler

Commentary

by

*R. David Pittle** and *Robert S. Adler***

With the full, rich wisdom of hindsight, the authors have conducted a critical in-depth analysis of five product liability lawsuits. Their conclusion: despite competent, well-prepared counsel, highly qualified experts and a skilled, perceptive trial judge, it is not only possible, but likely, that a typical product liability trial will be more a parody than a paradigm of justice.

What exactly is the problem? According to the authors, there are at least six major areas of concern: (a) inadequate and disjointed product descriptions presented to juries; (b) the early, excessive and dominant emphasis placed on plaintiffs' injuries which tends to obscure and/or supplant other equally basic elements of the cause of action; (c) inadequate or obscured identification of product defects; (d) bypassing proof of the essential elements of causation; (e) poor procedures for evidence gathering, control and preservation; and (f) misuse of expert witnesses by both sides of lawsuits.

Although we have no effective way to evaluate the authors' conclusions about the problems associated with product liability lawsuits short of examining cases as closely as the authors have done, we are, nevertheless, reasonably convinced by their study that they have accurately pinpointed some very real problems.

The authors believe that this unfortunate state of affairs stems, *inter alia,* from certain basic weaknesses of procedures of product liability lawsuits. They note that plaintiff's counsel realizes that the jury is going to be faced with two nearly incomprehensible technological explanations about the alleged injury-producing product defect that will be diametrically opposed and dogmatically stated by the conflicting expert witnesses. Plaintiff's counsel also knows that he is required, as an indispensable part of proving a cause of action, to present evidence about the nature and extent of the plaintiff's injury. Juries are always attentive to this type of evidence and the more shocked or outraged they become about the plaintiff's injuries the higher the award of damages is likely to be. Small wonder then that intelligent counsel will focus

* Commissioner, Consumer Product Safety Commission.
** Special Assistant to R. David Pittle, Consumer Product Safety Commission.

attention and dwell endlessly on proof of plaintiff's injuries while minimizing other, more technical, points of the case. Certainly, he must keep in mind the possibility that his case may be dismissed by the trial judge or may be reversed by an appellate court should he totally disregard proof of these other elements of the case. As a practical matter, the authors suggest these dangers are more apparent than real.

In spite of their conclusion that even well-run product liability lawsuits do not really function as they ought to, the authors do not believe that we should abandon such lawsuits as a determinant forum for legal liability and economic responsibility for injuries resulting from dangerous products. Quite the contrary. They firmly state that private litigation of product liability claims is and will remain a central testing area of societal needs. They reject the notion that new federal agencies such as the Consumer Product Safety Commission and the Occupational Safety and Health Administration will become the predominant societal solution to the problem of dangerous products. They argue that the function of these agencies is to develop new levels of manufacture awareness and consumer acceptability. Furthermore, the validity of safety standards set by these agencies, according to the authors, will be ultimately determined, not by the agencies, but by the courts of law and, more specifically, by private products liability litigation. They state that:

> When agency standards are brought to the courts in the context of a product liability suit, the courts will be forced to pass on the adequacy of governmental standards in deciding the issue of unreasonable danger. Thus, in passing on the adequacy of product design a court is free, in a civil suit, to establish a standard either more exacting or less onerous than the governmental standard.
>
> This power exercised by the courts in a civil lawsuit can provide to society independent and objective evaluations of the quality of the standards and ultimately the overall direction of government regulation. The product will be exposed in its actual use and environment and be subjected to the evaluation of experts in the context of a real controversy. Consequently, it appears certain that the legal system will be presented with early and insistent opportunities to employ the criteria for product safety as crucial elements in the adjudicating process.[1]

Given their feelings about the utility and desirability of the private

1. Weistein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 463 (1974).

product liability litigation system, the authors, not surprisingly, have attempted to formulate solutions to salvage it from its misdirected course. They present a moderate, carefully reasoned set of proposals designed to minimize (hopefully, to eliminate) problems with the system. Among the reforms suggested: (a) seriated trials, such that the *product* is tried before a jury on the question of whether that product is unreasonably dangerous prior to the consideration of questions of causation (did the defect cause harm to the plaintiff) and plaintiff's injuries; (b) fuller participation by experts in all phases of the lawsuit as well as greater flexibility in the introduction of expert testimony; (c) insistence upon more carefully preserved physical evidence; and (d) expansion of pre-trial procedures to more fully and precisely formulate descriptions of the product and its defects.

Before discussing proposals set forth by the authors which especially interest us, we feel obligated to address ourselves to their assessment, previously summarized, of the role played by an agency such as the Consumer Product Safety Commission (CPSC) in dealing with many societal problems associated with the existence of unreasonably dangerous products.

It is our impression that the authors, in an effort to stress the importance of the private product liability litigation system, have unwittingly relegated governmental agencies such as CPSC to an unwarranted subordinate position. We believe that society has at least two important needs arising from product-related injuries: (1) *compensation*: the victim of an injury should be reimbursed for the economic cost of his injury, and (2) *prevention*: reasonable steps should be taken to insure that future product-related injuries will not occur. Few would dispute the proposition that product liability litigation (or the threat of it) is the single most important mechanism for serving the first function. It is far from clear, however, that product liability litigation is adequate to serve the second and, to society, the more important, function.

In 1970, the President's National Commission on Product Safety, which was set up by Congress to study the problem of unreasonable risks of injury associated with products, concluded that 20 million Americans were injured each year as a result of incidents connected with consumer products. Of that total, it found that 110,000 persons were permanently disabled and 30,000 were killed, at an annual cost to the Nation in excess of 5.5 billion dollars. In its final report to the President and the Congress, the National Commission found that a

significant number of these accidents could have been spared if more attention had been paid to hazard reduction:

> Despite its humanitarian adaptations to meet the challenge of product-caused injuries, the common law puts no reliable restraint upon product hazards.[2]

We believe that there are several reasons why private product liability litigation can never be the predominant societal mechanism for reducing unreasonable risks of injury in the marketplace. (1) Product liability litigation is a *post*-injury mechanism. It is not triggered until someone is injured. In many cases, it will not serve a preventive function until many persons have filed or successfully conducted lawsuits. Thus, there may be an inexcusable delay between the time a dangerous product enters the marketplace and the time when it is either removed or rendered less dangerous. (2) In certain instances, manufacturers may find it less costly to pay damages to victims of products than to produce safer products. (3) The impact of product liability litigation on industry is far too haphazard. Companies cannot predict beforehand the number and extent of injuries that will be caused by their products, nor can they predict the number of successful lawsuits that will be brought against them. Accordingly, they may well gamble by producing products that, although cheaper to produce, post high degrees of hazard. (4) It is often exceedingly difficult to make a reasoned, dispassionate analysis of the risks associated with a product in the context of a lawsuit (even a seriated one as urged by the authors). Product liability lawsuits deal mainly with the interaction of one person with a product at one certain point in time. Even with the reforms suggested by the authors, lawsuits will continue to be "win-lose" propositions. Thus, they do not permit the participants (or the jury) to effectively decide the degree of blame attributable to the victim and to the product. (5) Litigants in lawsuits generally cannot muster the resources available to a large governmental agency such as CPSC to properly conduct in-depth studies of product-related injuries and determine rational solutions to them. (6) The parties to a lawsuit are concerned with the particular factual nuances of their case and not with the more general aspects of risks associated with the product at issue. It is consequently difficult, if not impossible, to generalize about the safety of a product simply by examining the proceedings of one lawsuit. (7)

2. NATIONAL COMMISSION ON PRODUCT SAFETY, FINAL REPORT 3 (1970).

There is no systematic procedural followup from a lawsuit to determine whether the defect which caused the plaintiff's injury has been corrected.

In contrast to product liability litigation, an agency such as CPSC has, as its main goal, the mandate, to prevent unreasonable risks of injury in the marketplace. To accomplish this goal, Congress gave CPSC the authority to: (1) issue public warnings about product hazards; (2) to require companies to meet mandatory safety standards including: (a) requirements as to the performance composition, contents, design, construction, finish or packaging of consumer products *or* (b) requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions; (3) to administratively ban products from the marketplace where no safety standard would adequately protect the public; or (4) to declare products to be imminent hazards and seek injunctions in United States district courts without the necessity of administrative proceedings.

In addition, the Consumer Product Safety Act requires every manufacturer of a consumer product and every distributor and retailer of such product who obtains information which reasonably supports the conclusion that such product contains a defect, which could create a substantial product hazard, to immediately inform CPSC of such defect.

A final preventive measure of the Consumer Product Safety Act authorizes CPSC to prescribe procedures to insure that the manufacturer of any new consumer product furnishes notice and a description of such product to the Commission before its distribution in commerce.

This legislative authority, coupled with a computerized injury collection system which allows CPSC to determine the relative degree of hazards associated with most consumer products, enables CPSC to attack the problem of unreasonably dangerous products in an organized and systematic fashion.

In summary it is our feeling that despite the impact which product liability litigation has had in promoting safety consciousness among companies, it is not structured to *prevent* accidents in the manner that a governmental agency such as CPSC is.

We do not, of course, intend our remarks to be construed as indicating that product liability litigation is inconsistent or competitive with governmental regulation. The Consumer Product Safety Act specifically authorizes lawsuits by persons who sustain injury by reason

of any knowing violation of a consumer product safety rule (*i.e.*, a safety standard or product ban), or any other rule or order issued by the Commission, for damages sustained and the cost of the suit, including a reasonable attorney's fee. The Act specifically states that this cause of action is in addition to and not in lieu of any other remedies provided by common law or under federal or state law.

Insofar as the authors have been tentative in suggesting proposals for reform of the product liability system, it is difficult for us to do other than raise questions for them to consider as they continue with their analysis:

a) *Seriated Trials*: The authors suggest that it may be prejudicial to permit an injured plaintiff even to be present during the first segment of a trial in which the question of whether the product is or is not unreasonably defective is being presented to the jury. Their reasoning is as follows: if the jury views a severely injured plaintiff, it may be moved, out of feelings of sympathy, to award damages to him even where the product clearly was not at fault. We question the propriety and practicality of such a proposal. The plaintiff is certainly one of the persons most seriously affected by the outcome of the trial. To bar him from the proceedings while any other member of the public is permitted to attend strikes us as demeaning and unfair. Query: if the plaintiff's injuries are not visible, may he then attend the first stage of the trial? If so, must a determination be made of whether or not plaintiff's injuries are sufficiently gruesome to prevent him from attending the first stage of trial? What arrangements will be made to insure that the plaintiff can at least listen to the proceedings? Should the plaintiff be able to view the trial? What would the authors suggest where testimony from the plaintiff is held necessary—that a severely injured plaintiff testify during the first stage of a seriated trial to a blindfolded jury so that the plaintiff's injuries could not be viewed?

On the other hand, if a severely injured plaintiff is permitted to attend the first stage of a seriated trial, does his presence render nugatory the effectiveness of seriation?

We also question whether the seriation of a trial will truly result in a more relevant dispassionate inquiry about the defectiveness of a product. Is it not equally likely that, instead of injury gamesmanship by plaintiff's counsel, we will now have technical gamesmanship by defendant's counsel? That is, the defendant may well deliberately introduce endless technical evidence into the trial to confuse the jury

sufficiently to the extent that their determination is simply problematical.

Further, the net effect of seriated trials, as we view the situation, may well be to reduce the number of instances in which plaintiffs are successful in lawsuits. Even assuming that greater justice to defendants rather than less justice to plaintiffs is the result, we wonder about the impact on society of this situation. Will this be a significant reduction in incentive for companies to promote safety?

Additionally, we note that, for good or ill, seriated trials will likely tend to negate the "deep pocket" approach (*i.e.*, let those most able to pay for injuries, such as corporate defendants, be the ones to pay) sometimes taken by juries. This, of course, is what the authors would hope to have happen. The net effect of this situation may be to shift the costs of an injury in many marginal liability situations from a large corporation to the injured individuals or to society at large (if plaintiffs are rendered bankrupt and must seek publicly financed medical benefits). Instead of higher prices for products we may then be paying higher taxes to support more public medical facilities.

Finally, we note the failure of the authors to pursue alternative solutions to the injury gamesmanship played by plaintiff's counsel. If juries are so easily swayed from proper consideration of the elements of a product liability lawsuit, might it not be expedient to abolish them and set up panels of experts trained in product liability law to judge complex cases? Or might it not be preferable to have product liability courts in which a judge (or panel of judges) would decide these cases in a more academic, less emotional manner?

These are all questions which we hope the authors will address in further analysis of their thoughts.

b) *Expert Witnesses*: We do not question the wisdom of the authors' reform proposals for revamping the use of experts at trials. We do, however, question the practicality of certain such proposals. The authors, for example, suggest that experts be present during pre-trial discussions. They correctly state that experts can significantly aid in the identification and analysis of product defects at this stage of litigation. They also correctly point out that the relevance of experts' qualifications can be decided during those pre-trial phases. It is difficult to criticize such proposals as unwise. However, the authors have not explained how it will be possible to get experts willing to spend time in all of the many phases of a trial without being paid extremely large

sums of money. Should it be required that experts be available during all phases of a trial, it is likely that the party most harmed by this requirement will be the indigent plaintiff.

The authors also suggest a restructuring of the method of presenting testimony by experts. They suggest that experts testify in the form of narrative rather than in response to hypothetical questions. It is difficult to assess such a proposal absent practical experience. It strikes us as somewhat unrealistic to expect that lawyers, who will be counseling experts on how to testify, will allow their experts the latitude which the authors urge for expert testimony. After all, there is a reason for the posture that most experts take in presenting testimony. Lawyers know that the slightest amount of doubt or hesitancy on the part of an expert will be fully exploited by counsel for the other side to show lack of knowledge or conviction by the expert. It remains to be seen whether a change in the form of expert testimony will, in fact, result in more helpful expert testimony.

A further point which the authors might consider in this area would be the use of experts appointed and paid for by the court, should the court determine that such is necessary. An expert responsible only to the court would be able to assess testimony of the party's expert witnesses and give his own evaluation which need not be presented in as dogmatic a manner as the testimony from experts hired by one or the other side (perhaps the fee paid to the court's expert would be assessed against the losing party).

c) *Preservation of Evidence*: We believe that the authors' suggestions for reforms in this area constitute more a hope than a realistic proposal. Certainly, no one could dispute the fact that it is essential to have carefully preserved physical evidence in a products liability case. It is a relatively easy matter to rule that cases in which it is impossible to properly evaluate physical evidence should not be tried. Our problem with such a rule is that, as applied, it could be used to penalize poor, uneducated persons who did not realize that care should have been taken to preserve evidence of a product that injured them. To deny these persons a day in court because they have not taken steps, which from hindsight seem reasonable, is to make the judicial system less responsive to very serious problems than we would like. Unfortunately, the world is not structured so that accidents involving products (or any other thing for that matter) occur in a clearly reproducible, easily provable, manner. At the risk of sounding dogmatic, we should state as a

general rule that the legal system should adapt to the needs of litigants and not vice versa. Obviously, this is not a problem which lends itself to generalized solutions.

Our overall assessment of the authors' article is that they have done a remarkable job of precipitating out a set of factors to characterize a very complex interaction of law and technology. We applaud their efforts although we have mild misgivings about the possible ramifications of their proposed solutions. The plaintiff's case, which is already a difficult matter to prove, may well become even more difficult to prove utilizing such proposals, thereby reducing the social effectiveness of such trials. We hope the authors will consider these aspects in their future research the results of which we need and eagerly await.