Commentary

by

John W. Wade*

The study on products liability litigation undertaken by a joint group of lawyers and engineers makes a very valuable study. It carefully analyzes several trials and draws measured conclusions as to what is wrong with the way in which products liability trials are presently conducted in most cases. It then presents innovative and provocative recommendations as to how to rectify these problems. The study is entitled to serious consideration.

Greatly over-simplifying the authors' treatment, I would suggest that the troubles with litigation which they find can be reduced to two: (1) the trial, laying emphasis on the injury to the plaintiff, often seems to turn entirely on the issue of whether the product could have been made safer and thus avoid the injury; (2) the expert may not be qualified, may not have prepared adequately, and may do no more than express his conclusion, without disclosing to the jury the reasoning by which he reached it.

The authors' solution for the first difficulty is to insist that the product be evaluated as unreasonably dangerous or not in the light of the total environment in which it finds itself. To do this, they suggest, there should be a "seriated trial," with the jury determining first whether the product was unreasonably dangerous before any evidence is allowed regarding the injury. There is question as to whether this is practicable. Bifurcated trials, separating the issues of liability and damages, are now used in some areas, though they have been subjected to heavy criticism. To separate entirely two issues of liability is much less likely to be tried. I feel sure that it will not become the customary way of trying products cases. But I would like to see it tried in a complicated design case. It just might become a useful device despite the overtones of deodand and the treatment in Exodus of the ox which gored a man. In any event, the authors are correct in saying that the issue is whether the product was unreasonably dangerous, not whether it could conceivably have been made safer. One has only to think of the automobile to realize this. Every automobile today could be made safer—but at the cost of important features which the public

* Distinguished Professor, Vanderbilt University School of Law.
demands. An automobile would be much safer, for example, if its maximum speed was 10 miles per hour, or, perhaps, if it had a design like a tank. My impression is that it is the responsibility of the defendant to keep the right focus on the principal issue, and that with the assistance of the trial judge he can do it, whether the trial is seriated or not. In a sense, therefore, the authors are offering "How To . . . ." instructions to the attorneys.

As to the treatment in the study of the utilization of experts, there is much which is very valuable. The plan to develop standards for qualifying the expert is good. So, too, the suggestions for using the expert in planning the case. But, as the authors themselves indicate, experts are expensive, and it is only in a case involving a lot of money that the necessary time of a fully-qualified expert can be purchased. Procedural rules which would make it impossible for a plaintiff to recover if his injury does not run into substantial figures are normally to be avoided. The charge that the expert often does no more than express his conclusion, without giving the circumstances and reasoning on which he bases his conclusion, does present a serious problem which should be rectified. But in an adversary system that should normally be taken care of by the attorney on the other side. In a negligence action, an expert is ordinarily not permitted to testify—if objection is made—as to whether the defendant was negligent or not. That is the conclusion which the jury is to reach. The expert provides information on which the jurors can base that conclusion. The same attitude should be adopted with regard to the question of whether a product is unreasonably dangerous or not. Against objection, the expert should not be allowed to express his conclusion. The analogy to negligence is close and can be made closer. One way to express the test of whether a product is unreasonably dangerous or not is to ask the question of whether a reasonably prudent manufacturer, if he knew of all the dangers involved for this particular product, would put it on the market. It is like negligence per se, with no need to prove knowledge of the dangerous condition or negligence in failing to ascertain it.

The discussion of the relative function of judge and jury, and the use of pre-trial techniques is most helpful.

Two topics might be expressly treated in the report. (1) The use to which the product was put. Does liability extend to expected use (expected by whom?), to normal use or to foreseeable use? Is this a part
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of the "environment in which the product finds itself"? (2) The absence of warnings or instructions for use. How far does it make a product unreasonably dangerous?

The study deserves wide attention and consideration.