1974

Commentary

James P. Markle

Follow this and additional works at: https://dsc.duq.edu/dlr

Part of the Law Commons

Recommended Citation
Available at: https://dsc.duq.edu/dlr/vol12/iss3/7

This Commentary is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.
Commentary
by
James P. Markle*

Initial reading of the authors' proposals prompts recollection of the damsel who when asked as to the circumstances which resulted in her having become ensnared into the world's oldest profession responded, "Just lucky, I guess." The deficiencies described are accurate, albeit understated, and yet trial counsel when asked for an explanation of such a state of affairs might with equal candor respond, "Just lucky, I guess."

Few advocates would fail to display a grievously injured client and dwell upon the grisly details of the injury to create an inference "... difficult, if not impossible, to overcome in a jury's mind ... that the product whose use led to this injury must indeed be reasonably dangerous." The shotgun approach to allegations is decried by the authors but what worthy pleader would deign to leave unturned the stone which might provide the foundation for avoiding summary judgment, the flexibility for the presentation of a subsequently discovered or developed theory of the case, or an unanticipated but ultimately successful basis for sustaining upon appeal the verdict for his client. In fairness, the authors do not totally condemn shotgun pleading—they merely propose that the extraneous and irrelevant be eliminated at pre-trial and that the technical issues be narrowed to those germane to the product and issues on trial. However, do the authors truly believe that busy trial attorneys (and their technical experts), juggling sufficient cases to fulfill their own economic requirements, can reach at pre-trial the degree of preparation permitting the true designation and separation of the extraneous from the relevant? Even if such be practicably attainable, what will be the effect upon settlement possibilities if those fringe defendants—dragged in our tenuous theory at best—will no longer be willing to add their contribution to avoid the expense, inconvenience, and the remote possibility of liability involved in litigation?

In one of their more extreme proposals, the authors espouse severe sanctions when a party "has treated evidence in so cavalier a manner

* General Attorney (Commercial), United States Steel Corporation; Member of the Pennsylvania Bar.
Commentaries on "Product Liability"

as to destroy his opponent's opportunity to conduct his own critical evaluations . . . ." Such a revolutionary proposal would threaten to deprive American jurisprudence of memorable advocacy such as the following:

Take a look at the size of the piece that is missing. It is half the size of an old three-cent stamp, and that piece was sectioned in several pieces so it could be cross-photographed in a microscope.

Do you know what we are dealing with in our office? Specks. I can't tell you where it is, if I could I wish to God I would. I don't know where it is. I never . . . .

The court is going to charge you that if we intentionally lost that piece so as to prevent you or them from seeing it, you may draw the greatest of inference from that, and I tell you right now I want you to go further than the court charges you against me if you feel that I or anybody from my office intentionally lost that piece . . . .

I say throw us out of court, if its my fault or anybody's fault, regardless, throw us . . . .1

The authors would attempt to establish criteria for the qualification of "experts" to testify in regard to a given product and defect therein. This would pose obvious difficulties to those broad based "scientists" who, possessing a Bachelor of Science degree from some congenial college, are ready and most willing to testify on the entire spectrum of issues involved in that elusive discipline described as "failure analysis." Would the authors also advocate that a party be required to identify all those "experts" to whom the facts had been exposed in a "hypothetical manner" before one was discovered whose "opinion" coincided with the party's theory of the case? Finally, it is notable that the authors assert that the technical expert should become a "co-equal partner" to the advocate. A legitimate question may be posed as to whether this describes a situation as it is and should not be or as it is not and yet should become.

However, assuming the basic validity of the authors' contentions, one must ask: is the present so bad? What is really wrong with considerable flexibility which, while it may force a defendant occasionally to play a reluctant "lady bountiful," may also serve to compensate a victim who has suffered grievous harm? Finally, even though corrective measures may be desirable, are not the authors truly naive in implying, as a realistic possibility, that such change may come to fruition?

It is suggested that the authors are not naive, that the present system does not serve the societal goods commonly attributed to the product liability concept, and that unless those operating within the system effectuate change, change may be forced upon them in a manner much to their detriment.

Product liability litigation suffers conceptually when viewed solely as a compensatory vehicle. All human misfortune—barring perhaps the intentionally self-destructive—however incurred, should elicit a humanitarian urge to soften the sacrifice, to render the unbearable tolerable. The injured and the dependants of decedents formerly gainfully employed require sustenance regardless of whether death or disability is related to a tort, breach of warranty, unreasonably defective product, or some “natural phenomena” to which no causal relationship to the act or omission of a human agency can be attributed.

Moreover, from a mechanical standpoint, product liability recovery is inefficient: delay is lengthy; costs and contingency fees commonly absorb in excess of 40 per cent of recovery; and the extent of the victim's recovery may be determined not on the basis of true need and entitlement but upon such extraneous factors as the regional proclivity to evaluate injury or death in inflated or deflated terms, the preconceptions of the particular judge, and the abilities of counsel for the respective parties.

However, it may be argued that, assuming the inefficiencies, the product liability suit does little harm as it spreads the risk where it is best absorbed. This phenomena was forcefully condemned by Judge O'Sullivan, Senior United States Circuit Judge, dissenting in Laird v. United States Steel Corp.²

Why should we not have the sophistication and courage to boldly recognize that no such verdict would likely have been entered here except for the circumstance that the United States Steel Corporation is the defendant? In a day of much talk about equal protection of the law, should not the courts carefully consider whether a particular verdict came about from the apparent ability of the involved defendant to pay, rather than from a fair measuring of liability and damages?³

It is submitted that only simplistic economic analysis can support such a thesis. Manufacturers may be intangible legal entities but their

---

2. 449 F.2d 216 (5th Cir. 1971), cert. denied, 405 U.S. 955 (1972).
3. Id. at 221 (O'Sullivan, J., dissenting).
costs are absorbed by real people. Where the competitive structure is such that costs may be passed on directly to the consumers, they bear the burden. Where competitive forces render this impossible, the employees and the stockholders may bear the burden, and if the cost is of sufficient magnitude to result in liquidation, bankruptcy, or severe business dislocation, it is imposed upon society at large in the form of lost tax revenue and increased welfare expenditures. Recent visible conflicts between admittedly socially desirable aims such as ecology v. energy production; a high standard of living v. international competitiveness and resultant balance of trade considerations; and full employment v. inflation have all illustrated the truth of the axiom that "there is no free lunch." No pocket possesses unlimited depth and to dispense "justice" upon a casual assumption that the loss will be born by those best equipped to pay is to obfuscate the extent of the societal cost, avoid examination of the efficiency of the mechanism in fulfilling its purpose, and becloud the basic equity of the result.

Despite these deficiencies, proponents of the product liability institution justify it from a conceptual standpoint based upon its correlation with fault, resultant deterrence to the manufacture of a defective product, and inducement to product improvement. Some product improvement has no doubt resulted from those cases where counsel and his experts, operating from a 20-20 hindsight perspective, have established with technical accuracy the existence of an unreasonably dangerous defect. It is doubtful that this function could completely be supplanted by even the best intentioned and highly informed bureaucratic a priori judgment as to product safety. The conundrum remains: given the nature of institutional decisionmaking, how many saved by a product such as penicillin would have perished before an individual or bureau, saddled with the burden of omniscience, would have been satisfied that all relevant parameters of that product's safety had been explored, warranting its release for public consumption? It is submitted that despite its obvious deficiencies, the liability concept can serve a valid social purpose in exposing human fallability in the design or manufacture of a product and motivating corrective action. However, for this effect to occur, the defendant must be convinced from a purely subjective technical viewpoint that his product has been credibly determined to have contained a defect which caused the injury. To the extent that an adverse judgment can be attributed to legal and technical legerdemain, unrelated to the realities of his product
as honestly perceived by defendant, the result will be counterproduc-
tive, with the response directed not to product improvement, but to
improvement in trial preparation and defense. Technical personnel will
be diverted from advancement of the manufacturing art to the produc-
tion of demonstrative evidence sufficient to rebut the possible distor-
tions practiced by opposing counsel and its stable of professional ex-
perts. Discovery will be extended ad nauseum to expose the technical
weakness of plaintiff's case, trial will be prolonged and settlement
attitude will harden. In short, righteous indignation rather than honest
contrition will occur. Thus, the unscientific free-wheeling roulette type
of product liability suit is counterproductive when measured in rela-
tionship to the realization of one of its essential purposes and justifica-
tions.

This is the authors' message, the institution of product liability
litigation can exist only so long as it serves, to the full extent of human
potential, to accurately adjudge the existence of an unreasonably
dangerous defect in a product and its causative relationship to the
injury suffered by the plaintiff. In its present state, it does not ade-
quately meet this criterion and if not reformed may face the same "no
fault” extinction as analagous institutions.