Canada-United States Law Journal

Volume 15 | Issue

Article 21

January 1989

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QUESTION, Professor King: Johnson & Johnson is a worldwide company. It operates in many countries of the world. Is there any tendency for companies, such as your own, to try new products overseas first, because of fewer legal consequences? Are we being denied any products because of our legal system here?

ANSWER, Mr. Frazza: I think it is a fact that around the world there are many health products being sold that are not sold in the United States. The major reason, though, is not product liability. It is the regulatory system. The FDA takes an enormous amount of time to approve products and is so tied up with the political process, that they are very timid in approving new products. As a result, there is a drug lag of anywhere from twelve to eighteen months. Now, it is not universal, there are some products which come out here first.

But again, the regulatory agencies may reflect the mentality of the country, and in our effort to eliminate risk, we sometimes keep very valuable life-saving products off the market.

COMMENT, Mr. Stayin: One of the problems that a U.S. manufacturer has is that his product liability costs do not decrease when he exports products. Even though he is selling to foreign markets, the insurance companies charge him for the insurance on those products at the same rate they charge in the U.S. market. The reason for this is the fear that the manufacturer will be sued in the United States for accidents that happen in other countries.

I was talking to a group of Swiss manufacturers two weeks ago, and they agreed with my assessment of the problem and that it is a competitive advantage for a foreign producer vis-a-vis U.S. firms. They said that one of the impacts on Swiss companies who opened manufacturing facilities in the United States was that lawsuits were being filed against them in the United States for injuries in other parts of the world caused by products sold and manufactured by their facilities outside the United States. All these cases are coming here because we have this system with big rewards.

COMMENT, Mr. Frazza: I agree with Mr. Thomas' earlier remarks about the difference in the litigious mentality and the quality of state judges. I do not entirely agree with him concerning the nexus between social welfare and lawsuits.

Our studies indicate that most of the lawsuits do not come from the lower-strata, uninsured part of the population. They normally come

from people who are insured. In fact, in a U.S. court you cannot even introduce the fact that the plaintiff has insurance. You can try a whole case without the jury ever knowing that.

I see no correlation between the lack of insurance and the lawsuit. I see upper-middle class claimants more than people from the South Bronx. I think anybody who operates in drug product liability will confirm that. This is probably because upper-middle class claimants are more informed. They may have a cousin who is a lawyer and they talk at cocktail parties. Maybe we should have better social welfare systems. I am not arguing with that, I am just arguing with the nexus between the two.

QUESTION, Mr. Reifsnyder: Bruce Thomas mentioned the possibilities in Canada for recovering costs in various kinds of cases, but what are the standard fee arrangements for attorney's fees in Canada? Are there contingency fees?

ANSWER, Mr. Thomas: Well, not if it is the well-heeled client that we have just heard about, it sure isn't. You are not going to act on a contingency basis for somebody who has plenty of dollars. You are going to act for him on the basis of time, and our fees in Canada are far lower than they should be.

It is not unusual, if you have an unsophisticated litigant, to finish the claim, collect your quarter million dollars for that person, and send him a bill for $50,000, to which he responds, "Fifty thousand dollars for that? That is far too much." So he goes down to a court officer and has the bill either taxed or assessed. You have to justify that bill and it is then assessed. The normal considerations are the amount of time involved, the complexity of the matter, the results in the case, the amount recovered for the client and various considerations that would be common sense to any person. The bill is looked at in that light. If the client is not happy, you must justify your bill. You may take half a day to do it, but that is our procedure.

QUESTION, Mr. Mackey: I have two questions. First, is there an EC regulation on product liability? Possibly our guest from the Commission would care to comment on that. Second, what is the assessment of the strength of consumer lobbies and other lobbies that would be opposed to a national regulation on product liability and national law on product liability?

ANSWER, Mr. Stayin: A product liability directive was passed in the European Community. Each of the countries then had a few items on which they could vote, such as whether to allow the state-of-the-art defense. I understand that has been adopted in one way or the other, and that they have met their deadline.

With respect to the strength of the consumer lobby in Washington, I think they hurt themselves badly by lobbying their own consumer sup-

porters over this bill, because they lied to them. They manipulated them and they lost a lot of support there.

The consumer lobby is strong, but it is the trial lawyers that are the most well-funded. They spend about $1.5 million each election cycle on their political action committee funding for Members of Congress who support their positions and they are very well organized. They are the biggest problem.

Labor is playing a kind of a game with us. They say "We would like to have some improvements. Let's have a national workers' compensation system. Let's do something with occupational disease. You can't do product liability reform and ignore all these other problems in the workplace." They are playing a bargaining game, trying to get a compromise deal from the business community. I do not think they really care that much about product liability. They are sometimes for it, sometimes against it.

It is difficult. Product liability reform is perceived by consumer groups and trial lawyers as taking rights away from consumers. They are worried that they are not going to be able to bring lawsuits and that all these injured parties will not be compensated and will have no way to take care of themselves. It is not true.

We are trying to bring the balance back. We are not even going as far as Canada in having a negligence standard. Overall the bill is much more balanced than our current system. It falls somewhere on a continuum between strict liability and the negligence standard.

QUESTION, Mr. Delay: In light of the *Bankers Life v. Crenshaw* decision, which touched upon punitive damages, and the fact that the U.S. Supreme Court has accepted a number of cases in this term on punitive damages, do you think it is likely that the U.S. Supreme Court will strike down punitive damages as unconstitutional?

ANSWER, Mr. Frazza: I do not think they will strike them in their entirety. I do think that they will restrict them in some way. In other words, should there be a proportionality between the compensatory damages and punitive damages or are there certain types of conduct that never should be subject to punitive damages? I think there will be a number of Supreme Court cases in the next five or six years that address specific issues, but I very much doubt that punitive damages will be abolished.

What we are really talking about is the quality of decision-making. In other words, even if the jury is instructed that they must find the conduct to be willful, wanton or malicious, the jury still can find virtually any conduct which they consider negligent to be willful, wanton or malicious. Somehow the Court will have to rein in the ability of juries to just indiscriminately determine what is malicious conduct. However, I do not think that they will abolish punitive damages as being unconstitutional.

QUESTION, Mr. Thomas: If you have 3500 people who have all been injured as a result of something, how can you get that defendant punished 3500 times with punitive damages? Can somebody explain the rationale of that to me?

ANSWER, Mr. Frazza: That was just addressed in a case involving asbestos in New Jersey. Judge Sarokin said that punitive damages were meant to punish, not to execute. The National Tort Commission of the ABA is proposing that in mass tort cases there be only one punitive damage award. The ABA will vote on that in August in the form of a statute to be proposed. I do not know whether it will ever get anywhere. If the ABA approves it, it will be significant that the lawyers group is saying "We only want one punitive damage award."

COMMENT, Professor King: Those proposals have had trouble in the ABA because of the diverse interests of the lawyers for plaintiffs and defendants.

COMMENT, Mr. Allen: There are a few additional differences between the two systems. One is the very limited availability in Canada of class actions, whereas many U.S. actions are class actions. The other is the very reduced legal process in Canada, which is particularly limited with respect to pre-trial depositions. So the result is not necessarily to reduce the number of cases, but to substantially reduce the expense and the exercise.

COMMENT, Dr. Strub: Going back to the question on the EC product liability regulations, it should be added that the regulations of the Common Market have moved in the direction of more protection of the consumer. It is enhancing innovation rather than blocking it. The real effect is not in the legislation, but in the decision-making and in the legal procedures. One should not confuse somewhat more consumer-friendly legislation with a totally inadequate system of justice. In Europe only the first one has been addressed.

COMMENT, Professor Shanker: I think there is something unreal about what is being said here. Twenty-five years ago we did not have this situation. The two countries were basically the same in terms of product liability.

I think we are overlooking the fact that U.S. society is not so much for a riskless society, but rather against risks that you have to pay for yourself. It is really the idea that there has to be a payment for every injury. The judges created that situation. We blame the jury, we blame the trial lawyers. The judges have been the real innovators in this product liability situation.

Even with all the new statutes we forget the ingenuity of the judges. We have had statutes before that tried controlling that area, for example, the Uniform Commercial Code, a complete product liability statute. U.S. lawyers know how innovative judges can be in this area. So what really has to happen is not these structural changes that are being pro-

posed. A message must get across to the judges who make the decisions that they went off in their own direction. I think they need to come back a little bit.

Much of products liability is saying that people get hurt by living, by being exposed to products. Somebody will pay for it. It can be the people themselves, their families or the welfare system. Recently in the United States, the trend has become to say, let the company pay for it. But you have to ask yourself, how do you best compensate the victim? Can you just simply cut back the liability of the business person? People are going to get hurt in society. What is the best way to compensate for these injuries?

The present product liability system in the United States is probably the most cost ineffective system for compensating injured people. Is there some better, more sensible way of compensating people? If so, how do you do it?

COMMENT, Mr. Frazza: I could not agree more. I think the issue is that the present system does not compensate fairly. It is uneven. It does not compensate in a principled or predictable way. It gives the manufacturer no guidance at all as to what conduct is undesirable and it gives the participant in the system no guarantee of anything. Whether there is another way to do it is the subject here tonight.

QUESTION, Mr. Thomas: Are we prepared to pay for a social welfare system?

ANSWER, Mr. Frazza: I reject the fact that a "social welfare system" is necessarily the way to compensate people. For example, in the pharmaceutical industry, you could put a penny a pill in a pot, and everyone that gets hurt from whatever pharmaceutical would be able to, for example, open a book and see how much they will get for a deformed arm at a certain age. That sounds very simple. We have done it with vaccine. But 3-7% percent of the population are born with birth defects of some sort, and a mother might have taken twenty-six different drugs during her life. Eighteen of these drugs may cause chromosomal damage, then you get down to who pays, and how much, and whether or not that is the way you want to do it. The problems seem simple.

I agree that people in a complicated industrial society are going to be injured. We have to find a way to meet that need. There is no question about it. Until we meet it, we are going to have trouble.

COMMENT, Mr. Stayin: If we cannot resolve this through some sort of a federal product liability reform, and if the system continues to get worse, we may ultimately have to adopt some sort of a national compensation system.

If you think about it, we are already paying $32 billion to $80 billion out of our GNP, and that is not productive. We are already paying a tax for this system, but we are paying a tax for a very inefficient means of compensating individuals. There is plenty of room for dealing with com-

pensation if you eliminate all these transaction costs. That may ultimately be where we will end up.

COMMENT, Professor King: We have not found the solution yet, but at least we have food for thought.