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QUESTION, *Mr. Stayin*: The United States has a product liability system that has gone totally awry, as evidenced by the increase in the amount of damage awards and the large volume of suits brought in federal courts. One estimate shows that U.S. businesses spend $80 million a year for product liability costs.

Clearly, ADR is not the answer to this explosion in product liability litigation, because the key to product liability is the trial in order to get the jury's sympathy. In addition, punitive damages provide the extra lever to obtain a large settlement prior to a jury trial. ADR approaches would get rid of these options. So what is the answer for dealing with the increase of product liability litigation in the United States?

ANSWER, *Mr. Wheeler*: There are almost as many answers as there are lawyers. One answer is to impose caps on awards. A number of jurisdictions have tried this approach. Another method, of course, is to cap attorney fees. The point is, one can cap amounts and fees, thereby making it more difficult to get the big verdicts by litigating.

Plaintiffs' lawyers, however, would answer that product liability litigation has not gone awry. They maintain that what we are finally seeing is fair and just compensation for people who are injured. They also believe that there should be more compensation for intangible harms, more people should recover, and that the law should be liberalized.

The reason I say to you that there are as many answers as there are lawyers is that you have to realize that half the bar disagrees with the premise that we have gone too far. There are attempts to reduce product liability litigation through procedural mechanisms, evidentiary mechanisms, substantive law mechanisms, and forms of ADR in isolated pockets. But as a general rule, I think that what we are seeing is a lot of tinkering with the system.

The American Law Institute has been undertaking for at least three or four years, a complete revisitation of the Restatement of Torts in the product and process related injury area. There have been some very heated debates concerning some of the drafts that have been written. At the ALI meeting in San Francisco in May, we will be reviewing the current form of those drafts. They call for some truly dramatic changes in the law by some of my friends in academia. But whether they accomplish what they had hoped to is a different question.

So the answer is that there are a broad variety of things being done. Whether any of them really cuts to the core or is desirous is a whole different question.

COMMENT, *Mr. Thomas*: People who sell products in the United States, as Canadians do, are concerned about the same thing that you have just outlined. I wonder why, with the Free Trade Agreement, we do not have a harmonizing of the laws relating to product liability so that a level playing field is created. If a Canadian sells a product in the United States, Canadian insurers go crazy because of the danger of these huge United States awards. Insurance, as a result, is tough to get. Maybe some laws concerning this can be created under the Free Trade Agreement.

COMMENT, *Mr. Wheeler*: That forces the answer because there really is a fundamental difference in approach as to what is an appropriate, traditional approach to the condition.

QUESTION, *Mr. Shanker*: I have a question for our Canadian colleague. Do the dynamics change at all in Canada if the losses are essentially inter-business sales of products?

ANSWER, *Mr. Thomas*: If you are asking me about economic loss, there is a tremendous dichotomy in our courts right now as to whether or not economic losses are recoverable in negligence. The courts are now taking a look at how far they want to allow the damages to be recoverable. In other words, the remoteness is a question of whether the damage was foreseeable and whether or not a duty was impaired. This issue concerning how much of the economic loss should be recoverable is an issue that will be revisited in an upcoming Canadian Supreme Court case.

COMMENT, *Mr. Wheeler*: I wanted to make one comment in response to Mr. Thomas' question from earlier because I think it really does show a fundamental difference in the entire climate between the United States and Canada. It was noted that in Canada, the plaintiff is entitled to costs if he prevails, but in the United States, of course excluding attorney fees, the plaintiff is also entitled to costs. And if the defendant prevails, he is also entitled to costs.

But interestingly, I do not know of a single case, certainly none that I have tried to a defense verdict, in which the defendant asked the court to enforce a cost order against the plaintiff. The reason for that is really quite simple - the defendant could not stand the political heat if it did that. If a corporate manufacturer went to a person who has suffered a horrible injury, regardless of whether it was the plaintiff's own fault, and said, "I want your last dime. I want that $5,500 or that $10,500, for deposition costs," that corporation would essentially loose so much goodwill in this country that it is just not done.

COMMENT, *Mr. Evans*: I heard the first questioner say that there is an $80 million effect on the economy caused by product liability costs. I would maintain or estimate a much greater effect than that because one of the indirect costs to product liability litigation in the United States is that it deters innovation. Speaking as a technology and intellectual prop-

erty lawyer, I know of a lot of companies that do not undertake innovative ideas, because of the possibility of product liability litigation and damages. Therefore, I believe that it is a much greater cost than $80 million to the economy.

I think the only answer is legislation. The lawyers are always blamed, but I do not think too many people understand the duty the lawyer has to his clients. Legislation is the answer.

COMMENT, *Mr. Wheeler*: Remembering Bismarks' famous comment, the only problem with the legislative route is, "If you do not like watching sausage being made, you are not going to like watching legislation being made." For example, look what is happening in the legislation process in California. As of January 1 of this year, work place safety in environmental actions has been criminalized. If you are negligent in failing to identify a work-place, property, or an environmental hazard and fail to notify the appropriate authorities, you can be prosecuted for a felony as an individual and incarcerated for three years.

That is the direction legislation is going, not the direction that you are suggesting. Once the legislation process is begun, the risk is that something has been started that cannot be controlled.