SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Canada-United States Law Journal

Volume 21 | Issue

Article 43

January 1995

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Discussion

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QUESTION, *Mr. Barrett*: To what extent do you think that the American tort system is driven by a lack of social insurance or a poorer safety net, which we may have here compared to Canada?

ANSWER, *Mr. Hermann*: I honestly do not know. I mean I have never lived in Canada, and I do not know the exact extent of that social safety net. I know that in the work place, in many instances, the people who are injured and get Workers' Compensation certainly net, when you take in the tax implications, about as much as they did when they were working, which is a disincentive to return to work for many people. For example, you hear stories of football players who are making a lot of money having slipped disks and knee operations and whatever, and they are back at work playing a very rough game within a matter of months. The injured worker with the same disability never works again. He is on permanent total disability for life, being treated by the same physician. There is a compensation incentive here that seems to take place. And, of course, if he can further enrich himself by suing some third party, all the better. He cannot sue his employer in most states unless he can demonstrate an intentional injury. In Ohio, in order to recover general damages, you have to prove that the employer intentionally injured you. But you can certainly do that against a third party, for instance, the manufacturer of the machine in the plant. So that is just gravy.

In most states, as in Ohio, there is no collateral source rule. The manufacturer of the machine who is held responsible does not get a deduction for the Workers' Compensation benefits that the injured man is receiving. So that if the man lost, let us say a salary of $500.00 a week, and he is getting Workers' Compensation benefits of $300.00 a week, which are taxed much differently, he is netting about the same amount. Yet, in the tort case, when they prove the $500.00 a week lost earnings against the manufacturer, the manufacturer pays the $500.00. So the guy is actually getting $800.00 a week now. It is counter intuitive, but that is the American system.

QUESTION, *Mr. Fay*: Mr. Hermann, fiberglass is somewhat like asbestos. Is it going to be an absolute liability problem?

ANSWER, *Mr. Hermann*: No, because it is not somewhat like asbestos. The fibers of fiberglass are so much thicker. What they have learned about asbestos is that its morphology, that is the shape of it, is largely responsible for its injury potential. The aspect ratio in asbestos fiber is very thin, very long, and very sharp; whereas, a fiberglass fiber is much thicker and blunter because of the way it is made and, there-

fore, is much more easily handled by the body.

Furthermore, a lot of the fiberglass is so long that it simply is not inspired. You cannot breathe it in in the same way that you can breathe in asbestos. The dangerous forms of asbestos are said to be in excess of five microns in length, and we are talking five to twenty microns for a particular asbestos fiber. For most glass fibers you are talking about multiples of that, large multiples. So it really is not the same thing.

QUESTION, *Professor King*: What is this liability legislation going to look like after the Senate gets through with it, and will the president sign it? What is going to be modified in the Senate?

ANSWER, *Mr. Hermann*: Well, I believe that there will be a standard of clear and convincing evidence to support punitive damages. I think that will pass both House and Senate, and I think the President would sign such a provision. That is, in fact, what is happening in most states. There are many states that have this provision in their law already, and it is a growing phenomenon. So it is a form of reform that has some popular and general acceptance, so I think clear and convincing evidence to support punitive damages is something that will, in fact, occur.

I think that the bill will be limited to products, and it may be limited to consumer products, as opposed to products in the work place. That is, products sold over-the-counter to people generally as consumers. I think that the provisions relating to distributors and sellers will probably pass. This is also a form of reform that has been approved in many states as part of their law already. The distributor can only be held responsible for, in strict liability in tort, for a defective product where the manufacturer is not amenable to suit: it is out of business, it is defunct, it is out of the country and cannot be reached, that kind of thing. This is a social program that was started sixty years, seventy years ago, and we are not going to lose that. We are still going to spread the risk, and it is the manufacturers and their insurers who are best able to absorb and spread that risk, and that system is going to remain in effect.

I, frankly, do not see pure comparative negligence, that is pure contributory negligence passing. I do not think you are going to find that where a plaintiff is fifty-one percent negligent that his claim is absolutely barred. I do not think that will get through. Either it will be disregarded or it will be comparative negligence. If the employee or the injured party is ninety percent negligent, he still recovers ten percent of his damages. I think the exceptions in the bill will stand. The exceptions like human blood and organs and so forth, they will stand. I do not think you are going to see a cap on punitive damages. I cannot see any way that this could be considered constitutional that you can cap punitive damages at $250,000.00 or three times the compensatory dam-

ages, whichever is the greater or whichever is the least, actually. I do not think you are going to see that.

Ohio's Supreme Court, for example, has declared that unconstitutional when the Ohio legislature passed a similar statute. They just said "no way" because it flows from the common law.

What I would like to see in this bill that is not in there, is a cap on a multiplicity of punitive damages awards for past conduct. Take Bendectin as an example. Here is a product that is no longer being marketed. The company has voluntarily withdrawn it from the marketplace, and yet it stands accused of punitive conduct, conduct permitting punitive damages in almost all of its cases. If a jury in California finds Bendectin responsible for an injury and awards punitive damages, it is supposed to do so to punish the defendant and to deter that conduct in the future. But the conduct has already occurred in the past and is not being repeated now, so there is no deterrent effect anymore, and yet they can be sued again in Alabama and again be punished for the same past and completed conduct. It is the same lot of goods and again a jury seeks to "deter" them and so forth, and there is no end to it. It was really these punitive damages awards that put all the other major asbestos companies out of business. It is the repetitiveness of awards for conduct that they are no longer engaged in. They are not selling asbestos anymore, and yet they are being punished over and over again. So that, I would like to see stopped. There has to be some limit.

The concept of punitive damages is fine. If the company's conduct was so egregious, if it acted with total disregard, consciously, for the rights and safety of the consumer or the user of the product, it ought to be punished — but not over and over again for past conduct.

QUESTION, *Mr. Barrett*: Let me ask a question of either one of our Canadian guests. To the extent Canadians are aware of the American tort system, is there any sense that this should be brought across the border? Is there any way that Canada is in some way suffering from a similar situation, not having as aggressive a system of liability as the United States has?

ANSWER, *Mr. Thomas*: I think the focus of your concerns should be in the area of your hobbling your industries here. You are putting them at a competitive disadvantage when you get into a situation where a corporation has to put these kinds of human and financial resources to work to deal with this kind of litigation. It is this that you are dealing with here.

A punitive damage award once is fine, but to be punished over and over and over again is not sensible, it is not fair. I think the Americans put themselves at a competitive disadvantage, at some significant disadvantages with this kind of out of control litigation. That is my view.

It does not pertain to inhibiting innovation. I suggest to you that Americans are still the most innovative people in the world, but the

fact is, I see it as putting you at a disadvantage in the marketplace.

COMMENT, *Mr. Thomas*: There is a fellow in the United States that made an award of eleven billion dollars in front of a Texas jury. He settled for three billion dollars and his fee was eight hundred million dollars, I was told. That is eight hundred million dollars. By the way, that is American dollars, you have to understand.

When you go to Japan now, you know what it feels like to be a Canadian. Going there gives you a good look at what is happening. The fact is, you can keep your system, unless I can come back with a brush cut, and I am going to come back and I am going to practice plaintiff's bar in Texas.

QUESTION, *Mr. Fay*: We do not produce small jets in the United States. Are we ever going to produce them again? Are there going to be any changes?

ANSWER, *Mr. Hermann*: Well, you know Congress did pass a law last year to attempt to protect the American general aviation industry. It is not just jets. It is single-engine and twin-engine props, Cessnas. Piper is in bankruptcy.

I defend airplane crash cases, mostly in the electronics area; the controls, the autopilots, gyroscopes, radio navigation equipment, and so forth. But we really need, I think, a clear signal from somewhere that the FAA's certification of aircraft has preempted the field.

There have been isolated court rulings along those lines elsewhere, but it is certainly not the general trend. Where a manufacturer of an aircraft meets FAA specifications and flight tests, and the plane is certified as safe as designed and built, then no defective design claim ought to be able to be brought.

I know of a case involving a twenty-four-year-old aircraft. The manufacturer of that aircraft is being sued because it did not have shoulder belts in it. Twenty-four years ago who thought of that? But now it is a crashworthiness case, a so-called enhanced injury case. And the pilot, the person injured, took no steps to install a shoulder belt when he saw everybody else using one. Yet now he claims it is the manufacturer's fault for defective design. That case is going to trial.

QUESTION, *Mr. Fay*: Did I not read there is a twelve-year limit now?

ANSWER, *Mr. Hermann*: Yes. They tried to impose a statute of repose, but the problem is that unless the state is willing to say that this legislation has preempted the field, they are going to imply their own law.

For example, there is a seat belt law, a national seat belt law. The Department of Transportation has published regulations relating to seat belts or so-called passive and active safety devices, and most states ignore it.

The manufacturer at the time he built the car was allowed to use a

certain kind of seat belt system, and it was perfectly legal under the federal regulations. He had a choice of different systems, and he chose one of them, and it was approved. There is no problem except that most states are saying, well, that does not preempt the field, and if our standards are more rigorous, that is fine. Just meeting these minimum federal standards is not enough. If a jury finds that the product was defective because it was not safe enough, liability may be found in our state.

QUESTION, *Ms. Moore*: I wondered if there is any role of alternative review resolution in the settlement of product liability claims.

ANSWER, *Mr. Thomas*: Let me tell you what I was given this week. One of our lawyers was up at the courthouse, and we have been advised that as of May 1st, all actions in the Toronto district are going to be dealt with this way.

First of all, you must initiate a claim by filing a statement of claim, and thereafter thirty days later, a statement of defense is filed by the defendant. Immediately thereafter the ADR center is to be notified and an appointment for a meeting will be arranged. In other words, the filing of the statement of the defense calls upon the court to arrange an ADR session to attempt to settle that action before it goes anywhere.

It does not apply to family law, and we do not have any motor vehicle law anymore in the province, but the fact is, all other cases are now being referred to a center which has been set up as a pilot project to determine whether or not these things can be dealt with by ADR right off the bat. After that, we have another procedure. After you have gone through the examinations for discovery — you call them depositions I believe — and you have exchanged your documents, you have got examinations. Then, before trial we have a mandatory pretrial conference before a judge other than the judge who will hear the case, and that is the second opportunity to avoid the litigation, to avoid a trial.

So the answer to your question is definitely yes, and I can assure you that from what I can see here, when they require an ADR immediately after the filing of the pleadings, that certainly is getting aggressive on that subject.

COMMENT, *Mr. Theall*: You might be interested to know statistically as well when they reported that, I believe they were saying fifty percent of all cases going to ADR were being settled at the ADR session, and that of the remaining fifty percent, seventy-five percent of those settle within thirty days after the ADR, which means that you have got roughly eighty-seven percent of all cases settling about sixty to ninety days into the action.

And they are using it in products liability. We have one case in the office, a medical implant case, where there is a number of actions start-

ing to gather, and those cases are being referred to an ADR session. They have a preliminary meeting, and they will go onto ADR next month.

QUESTION, *Mr. Hermann*: Is this ADR a mediation thing, nonbinding?

ANSWER, *Mr. Theall*: Yes.

COMMENT, *Mr. Thomas*: When I come back five years from now I will be coming back doing some other form of work. There will not be any litigation left. You are going to have to get another context for me to come here. There will not be anymore product liability work.

QUESTION, *Mr. Robinson*: Mr. Thomas, you will be on the bench in five years anyway.

Lest our American colleagues think that their plaintiffs have no rights at all, and we have not done anything in Canada to try and advance the cause, perhaps you should describe briefly our two relatively new things: the limited contingent fee responsibility and our class action statute, because they do exist.

ANSWER, *Mr. Thomas*: I dealt with that in the Article, and I am sorry I did not deal with the class action context; but in fact, I did indicate that in the past five years, we have had the enactment of a class action legislation, and this was the result of an extensive consultation between consumer groups and major manufacturing groups as well. And while this legislation has increased the exposure of certain companies to large groups of claims, in my view, it has a number of positive benefits because where there are a number of claims which are substantial in size, they can reduce the total legal fees, and allow for the claims to be efficiently managed.

Bob Montgomery, one of our toughest judges, took on the task of certifying these cases at the outset, and there were very few that got started. We had the Canadian tire thing, and we were able to have it dismissed on summary judgement because it just did not have all the necessary ingredients for certification. And where you have an awful lot of small claims, little claims that come out of some kind of incident, it may be that that is where people may not have sued in the past. If you can get a number of those together, the company may have to face the liability issues where they would not have had to do it before.

Michael is correct. We do have class action legislation now. I do not hear the rumblings in the manufacturers' association nor do the insurers seem concerned about it. It is there, and clearly there is a potential for contingency in that area, but I find it closely monitored by the court.

The judges are looking at what the charges are going to be on those fees so that we do not have contingency fees yet in Ontario. There are contingency fees elsewhere, and that is one of the reasons that we do not have quite as much plaintiff's litigation yet because

bringing a product liability case is a pretty big job, and you have got to get your experts in place. There are some law firms, but not all, that will fund the disbursements. If you had a very worthy case where you said this widow or this child was wronged and somebody has to do it pro bono, I think most good law firms would do it if they could afford it. But most law firms, including ours, will not speculate on disbursements, nor will we speculate on lawsuits because, frankly, we do not find that it is worth it because if the plaintiff does not like your looks, he can go down the street and leave you high and dry and does not pay your fee. He does not have to.

So, therefore, contingency fees are still not in place, but I have heard them being talked about often. I do not think that this jurisdiction does not have access to justice, but those costs awards against you are a real sanction that you look at if you have assets. If you have got nothing, then I guess what the sanction will cost you does not mean anything.

COMMENT, *Mr. Theall*: One of the major sponsors of the bill was the general counsel at one of the major automobile manufacturers. I recall that in meetings he was very actively pushing it as a social compromise and that the legislation actually was quite reasonable. It was seen as inevitable that you were going to have some form of legislation.

For instance, there has been the reference to contingency fees. There is a special provision in the Class Action Act which allows for, certainly not what you would consider a contingency fee, but a form of it, where a lawyer would be entitled at the end of the day to agree to take the action and if they are successful, their fees would be subject to a multiplier. It is so new that there is no decision on it, and it is subject to court approval.

So you can go through all of this and you can get your client to agree that the multiplier will be ten, so you will get ten times your hourly rate. But the judge may at the end of the case say, I think it is worth two. There is really no jurisprudence at this point to know how judges will decide.

I have seen some agreements where lawyers are really struggling with that, and I think commonly they are looking. Canadian lawyers think, well, if I can get a multiplier of three or four, that would be fantastic, and they then do take on the action; but again, very few have been certified.

One case I am aware of took on one of the large public utilities on interest rates, similar to the Canadian tire case that our firm did. The lawyers invested a huge, huge number of hours on the plaintiff's side at a large Toronto firm, and they were dismissed on summary judgement and ate it. I think it is a disincentive that the mood or the attitude to the big firms in Toronto is not to encourage that sort of work. One of

the big problems is, it is usually your clients who you would be going after. Firms are not designed as risk-takers. They are not geared that way. They do not have a pipeline, so there are a lot of other factors to discourage class action.

QUESTION, *Mr. Hermann*: In the United States you, the plaintiffs' lawyer, do not have a client in a class action. You are the real client. You just say, "I represent everybody who ever breathed lead in the Boston area." You have a neighbor who lived in the Boston area. You say to him, "Be my representative and say that you breathed lead," and that is it. You do not know who the rest of your clients are.

ANSWER, *Mr. Thomas*: That is exactly what they did in a case against a Canadian retailer. These guys went around and drummed up some business. The judge whacked the lawyers personally with the cost. The judge got upset about it because it was not advertised, and it ended up that the lawyers paid the legal fees. They are going to be good-sized legal fees.

QUESTION, *Mr. Fay*: Is this compulsory arbitration or voluntary? That is, we have two kinds. Ten federal districts have compulsory arbitration. You have got to go. But with voluntary arbitration you can opt out. What is your system?

ANSWER, *Mr. Thomas*: It is what I would call compulsory. If you are assigned to the ADR center and you are told to go there by the judge, I guess nothing is compulsory, but you go there. It is compulsory in two events, one you go to after the filing of the defense, and then you go to the pretrial conference which is a mandatory step before you can get to trial. So therefore, I would say it would be compulsory.

COMMENT, *Mr. Fay*: It is successful in the United States. Compulsory arbitration is doing well in those ten districts.

COMMENT, *Mr. Thomas*: It is not an arbitration in the sense that the judge gives a decision. The judge gives a recommendation, and he tries to resolve the matter or narrow the issues.

QUESTION, *Mr. Delay*: Perhaps Mr. Hermann is aware of the order in the *Kurczi v. Eli Lilly* class action certification order where Judge Aldrich denied class certification finding that the proposed lawsuit was entirely frivolous and sanctioned the plaintiff's attorney personally for all of the defense costs in excess of one hundred defendants that he had sued. The sum was believed to be in excess of $500,000.00. The judge ordered them to submit a net worth statement. He went into court with a white collar criminal defense lawyer as his personal counsel on it. Do you not think that might have a discouraging effect?

ANSWER, *Mr. Thomas*: I certainly do.

QUESTION, *Mr. Hermann*: I certainly do too, but how often have you heard that?

Remember the lawyer in San Diego who got hooked up with the United Rubber Workers International Union? He created a van in

which he had a portable x-ray machine. He hired a doctor from Mexico to take free x-rays. He fronted the money. You have got to give him credit. He fronted a lot of money to get this van equipped. And he went from local to local, from the west coast to the east coast, and gave a screening x-ray to every one of the United Rubber workers present or retired who would show up at the union hall. He also gave them a pulmonary function test, a spirometry test where you breathe in a tube, and then had all of these things interpreted by the doctors that he hired. He filed 18,000 lawsuits around the country claiming that everybody was sick from their exposure to asbestos as used in the rubber plants.

NIOSH, the investigative scientific arm of OSHA of the federal government headquartered in Cincinnati, went to Iowa and got 900 of these screening x-ray films. They hired B Readers who are specialists, radiologists specializing in reading pulmonary disease on chest x-rays. They got a specialist from Miami; they got one from Johns Hopkins, they got one from the University of California at Berkeley, and they took them to West Virginia where they showed them these 700 or 800 or 900 x-rays and did not tell them where they were from or give them anything clinical. They just asked, what do you see in terms of lung disease on these x-rays? They found about five undiagnosed cancers that the doctors that the lawyer hired did not see, and they found two possible asbestos cases. And then on the basis of a claim against Raymark in St. Louis Federal Court, these lawyers arranged for a nineteen million dollar settlement from Raymark. The representation was that we will provide you with the medical evidence that substantiates our claims that these people really have asbestos-related diseases and you agree to pay us the nineteen million dollars. They said fine. After they apparently paid some two or three million dollars down on the deal, they then got the evidence and found there was absolutely no disease in these people. So they went to Federal Judge Kelly there who wrote a scathing opinion about these lawyers and their tactics, but in the long haul nothing ever happened to them.

I had three clients sued in 3,000 Ohio tire worker cases because Akron was the rubber capital of the world, and we got all three clients out of all 3,000 cases for no pay. We never paid a dime on any one of those cases, but it took two-and-a-half years, and it cost the three clients jointly a million dollars.