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## Discussion following the Presentations of Bruce A. Thomas, QC and Michael J. Wagner

Discussion

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keeper roles for judges in federal court, to the state courts. Very few states have adopted *Daubert*.<sup>80</sup> Second is to make cost shifting really meaningful. In this country, in most states, the cost of litigation is never shifted in traditional product liability cases. When I sat on an ABA Task Force on civil justice reform, we actually –

DR. KING: You better wind up pretty soon.

MR. ROBINSON: I am going to overrule the timekeeper, Henry. We have lots of time.

DR. KING: You are not going to overrule anyone.

MR. ROBINSON: It is only 4:17. We started a bit early, and I think this is very important what Michael is telling us, so let's let him finish, please.

MR. WAGNER: Well, I will make it quick. The bottom line is that we proposed a cost-shifting mechanism that would put expert witness fees into that process and make it so that when an offer was made and rejected by plaintiffs, then plaintiffs who did not get a good result, a better result than the offer, will be required to pay the expert costs. We actually persuaded plaintiffs' lawyers to go along with this in committee, but when the ABA House of Delegates dominated by plaintiffs' lawyers got their hands on it, it was basically dead on arrival. I would like to see that revisited some time.

To wrap up, I think to borrow a term from the warranty language, product liability laws, Michael, are not fit for their intended purpose here in the states and comprehensive reform is required. If there is reform, hopefully, we won't have these things looking at us on our tombstone.

So thank you.

#### DISCUSSION FOLLOWING THE PRESENTATIONS OF BRUCE A. THOMAS, QC AND MICHAEL J. WAGNER

MR. ROBINSON: Thank you very much. That was excellent. I am going to set another precedent, partial precedent and not let Henry ask the first question only because I already put this question out to Michael earlier – sorry – to Bruce earlier. I would be very interested to hear, Bruce, your views, if any, on the fact that we now have contingent fees permitted in certain circumstances in class actions and what certain circumstances might do to product liability litigation in Ontario and Canada in the near future?

MR. THOMAS: Let me answer it in this way. First, the largest punitive damage award in Canada is \$1 million dollars. Secondly, in terms of personal injuries, our Supreme Court of Canada in 1978 capped the general damages, that's the pain and suffering damages at \$100,000, and with inflation, that

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<sup>80</sup> See Stephen Mahle, *The Impact of Daubert v. Merrell Dow Pharmaceuticals, Inc., on Expert Testimony with Applications to*, THE FLORIDA BAR JOURNAL, March, 1999, at 36 (discussing how nineteen states had adopted *Daubert*).

figure is now \$311,000. Third, with respect to litigation, generally the costs follow the event. The defense makes an offer, and if the plaintiff doesn't better the offer at trial, the costs from the day of the offer are charged to the plaintiff. Costs can be very substantial. You include the lawyers' fees plus the experts' fees. They can be enormous and they will be awarded against the plaintiff from the day of the offer. Those are three points I wanted to make.

MR. ROBINSON: And on the contingent fee question, I think your plaintiff's counsel in your case study is probably on a contingent fee, right?

MR. THOMAS: Contingent fees are alive and well in Canada. We have learned from the Americans

MR. ROBINSON: I recognize the chair.

DR. KING: On the case that my friend Bruce Thomas has described, I am wondering whether there shouldn't be some fund in the National Science Foundation to try to anticipate these liabilities so that the burden is not on your friend who is an innocent victim of this whole litigation. I am just wondering, isn't it the wise thing to plan for it ahead of time?

MR. THOMAS: I think you answered – that's what they did with the DPT.

MR. WAGNER: With DPT, it was not through the NSF. It was a separate Congressional mechanism now administered through a separate arm of HHS, and Department of Justice lawyers are the ones who pursued the defense of that fund from plaintiffs' lawyers who seek funds under it. So manufacturers' counsel on the outside had been replaced by Department of Justice lawyers in an effort to keep the damages claims under control within that fund, Henry.

MR. THOMAS: Good idea. I don't think we have seen it in Canada, but I certainly think it would be a great idea.

DR. KING: The other thing is it looks as though in the case of Wyeth, which was formerly American Home Products and Dow Corning, it looks as though their product liability responsibility is potentially a real deterrent to any innovation. They won't be able to afford it, will they?

MR. WAGNER: That's when the ratio of reserve to R & D is ten to one. That speaks for itself.

MR. ROBINSON: Next question. Dan has a question up in the back.

MR. UJCZO: I have a question on the U.S. side. The strategy in products liability cases and even class actions in general, from the defense bar, has been to get these out of the state court on the one hand and get them into federal court where there are some prescribed procedures. And then, also, when you are not talking in the non-class action but in products liability, of course, we have the judicial panel on multidistrict litigation, where essentially any case that is filed gets sent to one transferee judge in the country. I am curious. That's almost a winner take's all strategy because the cases aren't consolidated in the JPMDL. They remain separate. So factual distinctions become important, but as a defense lawyer, what is your view you are going to

have one judge? The transferee judge is the judge. They are going to make the calls on summary judgments. Those will be uniform across, but if somebody hits in one case and it is a big number, then that's going to flow to every other case – I think Vioxx – you had the numbers up there, but I know from our court we transferred over 300 cases. So it is almost a winner take's all strategy now.

MR. WAGNER: There is a lot of risk associated with that. It is a good question. We saw this in latex glove litigation, for example, where there were quite a few claims kicked back to the county courts in Illinois after having been transferred out to the MDL.

I look at those more as mechanisms to cost effectively trying to defend your client than I do for resolution on the merits. That has been my experience. Now, granted, there are different ways to skin that cat. We have a judge right now in Philadelphia who has decided that he will decide everything except evidentiary rulings at trial, taking on summary judgment and everything else, whether experts are going to meet Daubert. It is great if he is a great judge. He is a beginner, and he is working through this. He is brand new to the bench without experience in this field.

So I hear you. I have found that if you can consolidate cases in front of a good judge who has got experience – and what happened in Cook County is not different from a lot of counties around the country, very high exposure county, many multimillion-dollar awards, but the chief judge is an excellent judge and someone I have been before many times. He knows who is good and who is not good and who is effective and who is not. He made sure, for example, that the asbestos cases were in front of a first rate judge with plenty of experience. So we really are dependent on the good judgment of judges like that to steer these in the right direction. Otherwise, it becomes unwieldy. To go in front of a thousand different judges for a thousand different cases is just counter productive.

MR. ROBINSON: Tom Brzustowski has a question.

MR. BRZUSTOWSKI: First a comment.

MR. ROBINSON: All right.

MR. BRZUSTOWSKI: Well, first, a comment: I would like to thank the panel for a very clear, and to somebody who is a novice in this area, very disturbing presentation. And now an observation: The point was made that the cost – tort cost 2.2 percent of GDP in a country where the total spending on R & D of the public and private sector is not much above 2.5 percent of GDP. Let's underline that.

MR. WAGNER: Excellent point. It is scary.

MR. ROBINSON: Next question. Yes.

DR. BARBER: I agree with Tom. This is a really scary presentation in a lot of respects, and I guess my question is about justice. I get the sense that the legal parties on both sides of the case are not bound with any responsibil-

ity for justice. They were only in there to win or lose, and the poor old judge has really got the whole saddle for whatever justice is. And when I hear some of these stories, I think, whoa, how long does it take to get a sense of what's right and what's good? Why is it so pricey?

MR. THOMAS: Well, we have an adversarial process in our civil litigation system in Canada. The Americans and Canadians operate the same way. The parties hire a lawyer, and each lawyer represents the interests of his client or her client, and the judge is the referee or gatekeeper if it is a jury trial or is the Trier of fact.

In Canada, we routinely dismiss the juries where the facts or the law is complex. So, therefore, we generally have trials by judges who are appointed for life. So we have an excellent system of justice, but litigation has become so expensive that you have to be extremely wealthy to have access to justice. Accordingly, we now have contingency fees.

What happened to our researcher in the case study I provided, is that the action against her has had a chilling effect upon other doctors who have volunteered to do research. This is especially so for researchers whose only purpose is to advance medical science and are not in it for profit.

MR. ROBINSON: It is always refreshing in a group of lawyers to have somebody like Doug ask a question on a subject that lawyers usually have no interest in that is justice in the sort of platonic sense of what is justice, what is right, what is equitable? It is very refreshing.

MR. GELFAND: Just a follow-up on Mr. Barber's question. We heard from two great defense lawyers, but what would – if there were a plaintiff's lawyer on the panel who has faced a situation of someone who is severely hurt due to malpractice or bad product, given – I mean, what would they say on this panel right now?

What would that lawyer say on this panel about these or other meritorious cases?

MR. THOMAS: If I were a plaintiff's lawyer suing our client and the other doctors in the case study, I would pray I win because it could bankrupt a lawyer if he loses the case. This litigation against the researcher we represent is without merit. I am saying that to you because it will be tried by a judge alone. If somehow we lose at trial, we would go to the court of appeal. Should we lose at that level, we would go to the Supreme Court of Canada. Bear in mind that the parents of this infant plaintiff have put all their assets at risk when they commenced the action. So if I were the plaintiff's lawyer in the lawsuit, which is the case study, I would be concerned that if I did not establish liability against one of the defendants, I am going to be engaged in a very serious case without any fee recovery and my client's assets are at risk.

MR. WAGNER: Well, it is a fair question, and I have organized a few panels where I brought plaintiffs' lawyers in, where I have had balance like

that, and what we hear year in and year out and see in the ads they take out when legislation is introduced to change tort laws in given states – and what we hear from the American Trial Lawyers Association fall into probably two or three categories of comments.

One is for meritorious claims. There needs to be appropriate compensation, and if you have these reforms in place, especially damages caps, there is nothing that is more seen as being more empathetic to plaintiffs' lawyers objectives, especially when they are on a contingency fee basis, than caps on damages, to which I would say how much is enough, and where do you stop? Will you have the sky as the limit as is now the case in so many states?

The second point that many plaintiffs' lawyers make is that the system is the way it is. It has worked. It is not broken, and while these numbers are significant, we have the best products, most innovative R & D with infrastructure in the world, and if it is not broke, don't fix it. I think the data I presented to you today is just the tip of the iceberg for the counter point to that, but that's what they would say.

The third thing is – and this is a comment made by Phil Corboy, who is probably the dean of plaintiff lawyers in Chicago, he said it is always very interesting to hear defense lawyers and company counsel talk about tort reform and the importance of caps and everything else. And then when somebody in their family gets catastrophically hurt and they hire me as their lawyer, they forget about that cap thing altogether. So there is an emotional component here, and let's not kid ourselves. That's a driver of what these legislators are thinking about, so I happen to disagree with him on one front, and I have had people close to me who have been in injury claim situations, there has to be a limit at some point. And I am not saying that we don't give fair compensation for pain and suffering. There are some claims that have very little economic loss and very high pain and suffering claims, but there has to be some balance, and that's where I think I part company with most of those folks.

MR. ROBINSON: Since the subject of punitive damages did come up, let me just throw out something for the trade lawyers in the room to bring the subject into that realm as well. Many of you know that a company called Lowen in the funeral home business was totally destroyed and bankrupted because in a jury case in the United States a \$500 million-dollar punitive damage award was made against it based on a commercial dispute about the price paid for a funeral home that I think was in the range of \$10 million dollars or something. In order to appeal that award, the Canadian company, being a foreigner, had to post a bond equal to \$500 million-dollar.

MR. POTTER: I'm sorry. It was three times the amount.

MR. ROBINSON: Oh, sorry, three times the amount, Simon, one and a half billion. It, of course, could not find anybody who would issue a bond for

something that it could afford. This was quite a substantial company. It went bankrupt.

MR. CAMERON: I think the actual amount was three times the amount of the judgment.

MR. ROBINSON: Yeah. Simon just corrected me, three times the \$500 million.

MR. CAMERON: No. Three times \$200 million, so it would be \$600 million.

MR. ROBINSON: Oh, it was enough to bankrupt the company anyway. It was a heck of a lot of money, and it was real money, U.S. dollars, not Canadian dollars. So this whole punitive damage thing seems to be a curse in the United States. It resulted in a messy Chapter 11 claim under NAFTA, which the trade lawyers know all about, but I think it is worthwhile to appreciate it was the punitive damage award that was the root of this evil.

Next question. Everybody is scared of hearing all this stuff. We don't have any more questions?

MR. ROBINSON: Well, I think we should thank our panelists. We are breaking very early, Henry, I want you to notice. Nobody has gone overtime.

DR. KING: Yeah.

MR. ROBINSON: We are 24 minutes early.

DR. KING: That was a good session.

(Session concluded.)