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The Canadian Experience With Alternative Dispute Resolution in Products Liability Cases

Bruce A. Thomas*

INTRODUCTION

Parties involved in products liability disputes in Canada are much more likely to have their day in court than to use alternative dispute resolution (ADR). The only significant departure from traditional litigation has occurred in those products liability cases which are commercial contractual disputes. This results, in part, from the obvious difference between claims made by injured consumers, who are more interested in a traditional finding of fault, and disputes between commercial interests which may be more concerned with solving problems in order to preserve business relationships.

Yet Canadian consumers are less likely to commence an action, and if they do, are certainly less likely to recover a large damage award than are Americans. A Canadian products liability claimant must proceed through a court system in which settlement is emphasized through the open disclosure of all documentation relevant to the claim, costs, sanctions associated with settlement offers, and mandatory pretrial conferences. The Canadian claimant has to prove his case based on fault because Canadian courts generally have not applied strict liability in product cases to date. Damages are lower in Canada than in the United States due to differing approaches to the manner of assessment. Jury trials are rare in Canadian products liability cases. In any event, the courts have imposed a cap on general damages and rarely award punitive damages. The perception that Canadians are less litigious may also be explained by looking beyond the courtroom at differences between Canadian and American culture and the social systems of each country.

Paradoxically, Canadians would seem to be more inclined to utilize ADR, which generally is thought to be less risky in terms of resolving a claim, than a traditional lawsuit. Why that has not been the case for ADR to date, and what its future potential will be, can both be assessed by examining the Canadian judicial process in the context of Canadian social programs and current ADR procedures available to resolve a products liability dispute.†

* Partner and Chairman of the Insurance Section of Cassels, Brock & Blackwell, Toronto, Canada. The author wishes to express his appreciation to Glenn M. Zakaib, Robin Moodie and Jeffrey Lloyd for their assistance in preparing this article.

† While this paper deals generally with the Canadian experience, it specifically refers to both...
The Canadian Social Safety Net

In Canada, injured victims of allegedly defective products can afford to be indifferent to litigation because of the wide variety of social services and compensation schemes which are offered by various levels of government. These compensation schemes, which are designed to provide a safety net of social security, eliminate the absolute need to litigate. Therefore, coincidentally there is a reduced impetus to develop alternative methods to the litigation of products liability disputes.

Perhaps the most widely available schemes are the provincial health insurance programs, such as the Ontario Health Insurance Plan (OHIP), which is primarily funded by a payroll tax levied on employers in the province. Other provinces have similar programs which are funded by monthly contributions from provincial residents, or general taxes. The general population has universal access to first class medical health care and need not initiate litigation to pay medical bills which arise as a result of an allegedly defective product.

A disabled person is not forced to litigate in order to obtain the basic necessities of life. Social assistance programs are offered by all levels of government to provide a basic level of income to disabled persons regardless of the reason for their disability. Short term unemployment benefits are available for those who cannot work due to sickness, including disability from injury. Other programs provide for subsidized drug benefits, housing, and education.

If a person is injured on the job, he may not be allowed to sue if the alleged tortfeasor falls under a certain class of employers or employees. The victim's only recourse in such a situation is to apply to a Workers' Compensation Board for disability and rehabilitation benefits. Workers' Compensation is a provincial agency which operates generally on yearly levies on employers. The Workers' Compensation Board insures that anyone disabled in the course of his employment will receive a significant portion of his wages, and the cost of rehabilitation assistance where appropriate. There is no risk of losing a civil suit, although in exchange the worker has given up his right to sue to recover damages for pain and suffering. Since its introduction in Canada in 1911, Workers' Compensation has resulted in the elimination of the right to litigate most work-related injuries, including those stemming from allegedly defective machinery and equipment or from unsafe working conditions.

Additionally, many companies and organizations offer protection to individuals through group insurance schemes which provide additional benefits, including supplementary health insurance, life insurance, dental care, and entitlement to short and long term replacement plans for lost income, in some cases, on a tax free basis. One recent Canadian study

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2 Workers' Compensation Act, ONT. REV. STAT. ch. 539, § 8(9) (1980).
Thomas—PRODUCTS LIABILITY ADR

found that ninety percent of employers participating in the survey provided such benefits to their salaried full time employees. Many lenders in Canada also provide insurance to borrowers to indemnify mortgage and loan payments in the event a person’s income earning capacity is diminished or eliminated.

Similarly, the right to pursue a remedy in the courts has now been limited if the defective product falls under the automobile insurance scheme in Ontario. Accident victims are now bound by a system of “no fault” insurance which has severely restricted the right to sue the tortfeasor. There are significant levels of no fault compensation provided under the “No Faults Benefits Schedule” which includes payment of lost income of up to $600 per week in Ontario, and all reasonable medical and rehabilitation expenses, thereby compensating a large degree of the pecuniary losses of all injured persons covered by automobile insurance.

Thus, as a result of the myriad of social and insurance programs available, Canadians do not need to be aggressive in their use of the civil justice system in order to receive compensation for losses resulting from a personal injury. This is exemplified by the experience of a foreign automotive manufacturer which faces in excess of twenty-five hundred active lawsuits involving the use of a particular product in the United States, yet, in all of Canada, faces only fourteen claims involving the use of the same product. Differences in the number of units available, the population base or the hours of use do not explain the significantly fewer claims in Canada. Indeed, there are Canadians who have been injured while using the product who simply accept as a fact that their own conduct, and not the product’s design or manufacture, was the root cause of their injuries. In one study conducted in Quebec, Ontario, there were in excess of five hundred injuries reportedly caused by a product, and yet, to date, not one product liability claim has arisen in connection with the product. This example suggests that Canadians are more reluctant than Americans to make use of the judicial system to seek damages for defective products. There may be a similar reluctance to seek redress for personal injuries through the use of ADR procedures.

Procedural Differences Between U.S. and Canadian Legal Systems

In addition to all the social and insurance programs which exist in Canada, there are significant differences between the Canadian judicial system and that in the United States which affect an injured victim’s decision to proceed with a lawsuit and his conduct thereafter, in a products liability dispute.

Products liability cases in the United States often are tried before a

4 No fault schemes are found in varying forms in some other provinces. The current Ontario Motorist Protection Plan, which was introduced in June 1990, is undergoing review by the provincial government and may be changed in 1991.
judge and jury. In Ontario, while a party has the prima facie right to request a jury,\textsuperscript{5} there is no constitutional guarantee to trial by jury in civil matters.\textsuperscript{6} Any party can move before, at the commencement of, or during a trial, to have a jury dispensed with\textsuperscript{7} on the grounds that the evidence and legal issues will be too complex for a jury of laypersons to understand. Since most products liability actions involve complex issues of design or manufacture, Canadian trial judges routinely dismiss the jury in such cases and go on to hear the evidence and render judgment. With fewer cases heard by a jury, the "sympathy factor" plays a less important role in products liability litigation.

American attorneys, in the course of jury selection, are entitled to voir dire the jury. They can describe the case and ask jurors pointed questions about their biases. There are no restrictions regarding who can sit on a jury. In one case against an auto manufacturer, one juror was an engineer from another auto manufacturer. Jury selection in the United States becomes a lengthy and expensive process and it is not uncommon for it to take two or more weeks in a serious case. In Canada, prospective jurors cannot be questioned except in very limited circumstances and then only by the presiding judge. Counsel can exercise only a limited number of peremptory challenges to remove a juror. Counsel assess prospective jurors based on their appearance, and information regarding only their name, place of residence, and occupation.

Another major difference occurs at the end of the trial. U.S. attorneys are permitted to poll the jurors after the verdict has been rendered. The impressions of the jurors can be assessed for future cases. Such polling also assists in determining strategies for appeal. This right does not exist in Canada in a civil damages action.\textsuperscript{8}

Another area of procedural differences arises in the pretrial production of information rules. Canadian rules of civil procedure impose upon each party a positive obligation to produce all documentation and information relevant to the case.\textsuperscript{9} The relevance is judged by the allegations in the statement of the claim. In the United States, the parties must know their case and seek documents and information. However, pretrial examination of witnesses is more restrictive in Canada where, other than by a judge's order, only the parties named in the litigation may be examined.\textsuperscript{10} Written interrogatories of the parties are permitted, but usually in lieu of oral examination.\textsuperscript{11} In the United States, virtually anyone with relevant information, whether a party or not, can be deposed. Prior

\textsuperscript{5} Courts of Justice Act, Ont. Stat. ch. 11, § 121 (1984); eliminate the space RULES OF CIV. PROC. 47.01.
\textsuperscript{7} RULES OF CIV. PROC. 47.02.
\textsuperscript{8} Juries Act, ONT. REV. STAT. ch. 226, § 44 (1980).
\textsuperscript{9} RULES OF CIV. PROC. 30.
\textsuperscript{10} Id. 30.
\textsuperscript{11} Id. 35.
to the depositions taking place, parties also usually exchange written in-
terrogatories which must be answered within thirty days. Experts are
routinely deposed, as are witnesses.

Ontario has developed a mandatory pre-trial system in accordance
with the Rules of Civil Procedure. This system has many elements in
common with the “Early Neutral Evaluation” process which has been
implemented in the U.S. District Courts for the Northern District of Cal-
ifornia and the District of Columbia. The pre-trial conference is an
informal procedure which compels the opposing lawyers to file a memo-
randum of the facts and legal issues before meeting with a judge to deter-
mine whether a case may be settled or the issues narrowed prior to trial.
While the pretrial judge generally only makes recommendations, the con-
ference can be a very effective settlement tool depending on the aggres-
siveness of the judge. At the very least, it can highlight the issues to be
litigated and provide a forewarning of the type of expert evidence to be
called and an estimate of the duration and expense of the trial. By com-
pelling counsel to grapple with these issues weeks or even months before
the scheduled trial, the parties have the opportunity to focus on the an-
ticipated trial ahead of time; therefore, the parties can consider the possi-
bility of settling some issues or perhaps the entire action.

Canadians are encouraged by cost sanctions to make early assess-
ment of their cases and to offer to settle their disputes prior to going to
court. There can be very serious cost consequences for failure to accept
an offer where a judgment provides the party making the offer with an
equal or better result than the terms of the proposed settlement. The
settlement offer is revealed after judgment when the judge hears submis-
sions as to costs. If the judgment is at least as favorable as a party's offer
to settle, then the opposing party may be ordered to pay costs from the
date the offer was served. A plaintiff, in not accepting an offer, may be
titled to party and party costs only until the date of service and no
costs thereafter. The defendant would be awarded party and party costs
from the date its offer was served. This rule is subject to the discretion of
the court, but generally judges apply it hard and fast so long as the offer
was made in writing seven days prior to trial. If a plaintiff’s offer is not
accepted, and the judgment is as favorable or more favorable, then the
defendant will have to pay party and party costs to the date of service,
and also solicitor and client costs, which theoretically provide complete

12 Id. 50.
13 For a discussion of the Early Neutral Evaluation process see Sherry, Unique Form of ADR
15 Party and party costs have been defined as “all that is necessary to enable the adverse party
to conduct the litigation and no more. Any charges merely for conducting litigation more conve-
niently may be called ‘luxuries’ and must be paid by the party incurring them.” (Smith v. Buller,
(1875) L.R. 19 Eq. 473, 475.) In Canada, party and party costs are assessed in accordance with a
Tariff set out for that purpose.
indemnification of legal fees thereafter. In either scenario, a party who does not "beat" an offer is exposed to the major portion of costs in a lawsuit; those which result from the preparation for and conduct of the trial. With rules such as this in place, it is no wonder that most actions are settled.

While cost sanctions are available in the United States, they are generally more severe in Canada. Ontario justice is modelled on the English system, where costs awarded by a court seek to indemnify the successful litigant for as much as sixty percent of his actual legal expenses. However, the courts can impose and assess costs against an unsuccessful party which result in complete recovery of the legal expenses by the winner. Plaintiffs in Canada and their counsel are compelled by the prospect of cost sanctions to consider very carefully whether they actually should file suit and, thereafter, whether to continue with it. Although they may well be introduced in Ontario sometime in the future, contingency fee arrangements have not been permitted to date. 16 When faced with the very real prospect of paying an opponent's legal costs as well as their own, many Canadians opt for the safety net of social programs rather than the pursuit of risky litigation.

Damage Issues

Until recently, claims for punitive damages for defective products have not been allowed to stand in Canada. 17 There has never been an award of punitive damages following trial of a product liability case. This fact alone may remove much of the upside potential that drives some Americans to pursue products liability litigation.

In 1978, the Supreme Court of Canada, in a trilogy of decisions, placed a "cap" of $100,000 on non-pecuniary general damages. 18 That cap has risen by inflation to approximately $225,000 at the present time. While similar types of caps have been enacted in some American states, Canadian consumers do not stand to gain substantial seven-figure awards for pain and suffering.

These limitations on damages may discourage ADR in Canada since parties can assess in the early stages of a lawsuit the potential damages within a range, and thus the risk involved.


**Substantive Law**

While some judges have imposed a "heavy onus" resembling strict liability upon manufacturers of certain products (i.e. those which are inherently dangerous), Canadian courts have been careful to emphasize that the finding of liability is not based on the theory of strict liability, but rather on traditional negligence standards. \(^{(19)}\) Courts attempt to determine if a product was defectively designed, or defectively manufactured, or whether a product, if potentially hazardous, is accompanied by the necessary and appropriate warnings.

One theory of liability advanced today in product cases is the failure to warn. \(^{(20)}\) Most cases contain a plea that the manufacturer or distributor failed to adequately warn of the potential for harm of the product in question.

There have been comparatively few products liability cases which have succeeded based on the allegation of design defect. Such cases are of necessity, difficult and expensive to establish. Inevitably, they become expensive battles between experts, which few Canadians have demonstrated a willingness to undertake.

The conduct of a plaintiff in any products liability case is rigorously scrutinized in Canada for contributory negligence. \(^{(21)}\) Accordingly, the expense and uncertainty of a design defect case, combined with the potential for significant contributory negligence, tends to discourage products liability litigation in Canada.

Notwithstanding the difference between Canadian and American court procedures and substantive law with respect to products liability claims, it remains evident that Canadians are generally less aggressive in this area. As a result, there is little or no perceived need for ADR procedures to deal with an injured victim's claims. Products liability cases are not overcrowding the courts in Canada which offer, in effect, a free hearing through the taxpayers funding of the judicial system. Without any overwhelming benefit associated with ADR, consumers see no need to pay a private arbitrator. The courts provide an adequate mechanism to resolve those disputes that do arise.

**Application of Present ADR Procedures to Products Liability**

Canadians have available alternatives to judicial dispute resolution which may be divided into binding and non-binding categories. The key feature of a non-binding process is that it is up to the parties themselves to review the merits of the dispute and to decide whether or not to settle. The focus in a non-binding procedure tends to be on problem solving rather than fault finding. On the other hand, a binding procedure in-

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\(^{(21)}\) The Negligence Act, ONT. REV. STAT. ch. 315, § 4 (1980) provides for apportionment of the damages according to the degree of the plaintiff's negligence.
volves the use of a neutral third party who has full authority to decide the issue and impose a binding result on the parties. The binding process is similar to a form of expedited litigation, where finding fault and assessing liability remain a primary concern.

A notable difference arises between defective products disputes arising out of torts and those arising out of contractual relations. In the latter context, the parties can agree, as a term of the contract, to utilize ADR procedures (binding or otherwise) prior to any dispute arising. On the other hand, the injured user of a defective product must agree to these procedures after the nature of the dispute is known. Invariably, one side or the other in a tort action will perceive themselves at a disadvantage at this point in proceeding with ADR.

Even though a procedure is non-binding, it can be effective where it is in the interests of the parties to settle. Conciliation involves the use of a third party who is charged with the task of bringing the parties to the bargaining table. The conciliator deals with each party separately, defuses animosities, and identifies common ground. Although similar, a conciliator is not as involved in the process as a mediator (mediation may be either binding or non-binding). A problem with applying this method to a personal injury claimant in a products liability dispute results from the perceived difference in bargaining power between the parties. It seems inherently unfair to have an injured consumer negotiate, even with the assistance of a conciliator, with an executive of a manufacturing company. Even with the involvement of lawyers, there seems to be an inequality of bargaining power.

Such cannot be said in a dispute between two companies, particularly where there is an ongoing commercial relationship and a need to resolve a dispute over an allegedly defective product. This situation can be dealt with in a mini-trial. In a mini-trial, lawyers present their cases to executives of the companies involved in the dispute. The executives must have full authority to settle on behalf of their respective companies. After hearing the presentations of the lawyers, the two executives work together (usually with a neutral third party) to try to find an acceptable solution. This works best where the executives are not involved directly in the original dispute. The idea is to have an objective, partial, observer evaluate the dispute in the best interest of the company. This approach seems specifically well suited to inter-corporate disputes, but appears somewhat out of place in the context of products liability.

A similar procedure is neutral case evaluation, which is a procedure involving the presentation of arguments to a neutral third party. The third party analyzes the arguments and provides an opinion as to the likely outcome of the dispute should it go to trial. Armed with this information, the parties have further incentive to settle, as both have the benefit of having a neutral observer evaluate the relative merits of their positions in the dispute. This method of dispute resolution is probably the best of the non-binding procedures in terms of its suitability to the
products liability area, and its similarity to the Ontario pretrial procedure is obvious. However, where consumers feel strongly enough to undertake a challenge against a manufacturer, they will likely want their day in court.

Although non-binding procedures are quite often successful in assisting the resolution of disputes, there is still a need for a process which guarantees that a resolution will be reached. Perhaps the best known of the binding procedures is arbitration.

Arbitration varies in its style and application from dispute to dispute. An interesting variation, often called “med-arb,” involves the use of mediation in the preliminary stages with an effort to reach a mutually agreeable solution. Should this fail, the parties agree that the dispute will be subject to binding arbitration.

Most civil disputes are capable of being arbitrated. Parties often desire to arbitrate because of the perception that it is a less expensive and more efficient way to resolve their dispute than the traditional litigation process. However, where the issues are complex or where the parties are continuously seeking the intervention of a court on procedural or evidentiary matters, arbitration can be as expensive and time-consuming as litigation. Further, arbitration may not be available where a third party is involved.

In the specific context of products liability arbitration, there is something of a David and Goliath air about the proceedings, and a fundamental problem may arise in convincing the plaintiff to arbitrate. Most consumers simply feel more comfortable in a courtroom setting. They feel that the judicial system provides the forum and protection which best approximates a level playing field. Nevertheless, in an appropriate products liability dispute, arbitration may be the best resort.

Arbitral decisions should not be directed toward a compromise. A decision made by an arbitrator should be treated like a judgment in that it is based on the merits of the dispute. Many parties are interested in reaching an efficient decision, but it must also be the correct result.

One of the purposes of arbitrating instead of litigating is the efficiency of the system. This advantage will be lost if the losing party is permitted to argue its case again before a judge on the pretense that the arbitrator’s decision did not conform with the law. Accordingly, there are only limited grounds of appeal from an arbitral award.22

It should be noted that the Arbitrations Act23 permits the parties to negotiate (and often they do negotiate) arbitration procedures which include matters such as pleadings, discoveries, the format of the arbitra-

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22 Arbitrations Act (Ontario), 1990 Compendium. It should be noted that despite the provisions of the Arbitrations Act the parties may draft their own rules which would be used to govern the arbitration. Accordingly, it is perfectly possible to structure an arbitration procedure which involves one, or even more than one, levels of appeal.

23 Arbitrations Act, ONT. REV. STAT. ch. 25 (1980).
tion, the identity of the arbitrator (or panel of arbitrators), the sharing of any expenses in relation to the arbitration, and the awarding of costs. There is usually intensive negotiation so that the procedure to be adopted is often tailor-made. This is both a strength and a weakness of the process: a strength because it allows parties to be flexible and to choose the procedures which best suit their case; a weakness because if parties are intransigent with respect to the procedure, the arbitration process is stalled before it has a chance of getting underway.

One method of alternative dispute resolution which has increased in use recently is the Private Judge. Under the private judging system, litigants, by mutual agreement, bypass the long wait associated with a public trial and appear before a private judge. These hearings are often held in a corporate style boardroom before a retired judge who, for an hourly fee, rules on cases, runs settlement conferences, or provides an opinion as required by the parties. If an appeal is required, the parties may go to an appellate court, often well ahead of those waiting for a hearing of their dispute before a public judge.\(^{24}\)

The private judging system is not universally approved. The critics argue that given the high fees involved, some of the brightest members of the bar and candidates for the appellate bench will be lured away from positions on the bench. Others argue that this creates a separate legal system for the rich in which delays may be avoided and judges selected by the parties. Additionally, the benefit of public scrutiny is lost as these proceedings are held in private and may remain confidential. Apart from expediency, this system provides no incentive whatsoever for the consumer who wants not only a favorable judgment, but public vindication at the lowest cost. Private judges offer privacy for a price.

These various processes of ADR appear to be gaining support, at least academically, in both Canada and the United States. It has been noted by those with practical experience in using these measures, that the biggest savings is time, and not money. In many cases, an injured consumer using ADR is short of both, but particularly money, because the procedures require considerable time to be spent by retired judges and expensive arbitrators. The cost savings over using regular judicial channels may be negligible if they exist at all. Thus, most consumers will opt for the longer judicial process because of its lower cost. Another disadvantage in the consumer's eyes is that ADR is designed for manufacturers to avoid litigation's hidden costs.\(^{25}\) Companies are able to avoid the negative publicity that is associated with a trial and the resulting harm to the company's reputation. Additionally, as the life span of a dispute is lessened, so is the amount of time spent by middle and upper management in preparing for and worrying about the dispute. Further, in order


to maintain their viability, ADR specialists will have to satisfy the needs of their customers, or there will be no repeat business. It is unlikely that both parties will be consistently satisfied where the dispute relates to products liability.

Given the variety of alternatives open to a person who chooses to utilize ADR, it is somewhat surprising that ADR procedures have not been adopted to a greater extent. There are several potential reasons explaining why these procedures have not been welcomed with open arms. Counsel who do not fully understand the role that they are to play in such a process, or who lack formal training in the relevant procedures, may see ADR as an invasion of their turf. It is also possible that the people directly involved in a dispute are the same people who retain and instruct counsel. These people have already adopted a confrontational approach as evidenced by their inability to resolve the dispute and their retention of counsel. Suggesting the use of an ADR procedure may be perceived as an admission of weakness. Thus, parties are hesitant to suggest the use of ADR for fear that they will impair their ability to negotiate a favorable settlement. Some may feel that the alternative processes are rigid and expensive, and provide little advantage over the traditional judicial approach. ADR does not have a long history, and the procedures are relatively unknown. Many lawyers feel that settlement discussions, whatever the process being used, should not be undertaken until after discovery. Few of the ADR procedures allow for the considerable time required to perform traditional discovery.

Another drawback to ADR is that many of the procedures require client participation. Often the client is afraid of participating, or the lawyer feels that the client would not make a good spokesperson. Concern also arises over the qualifications of the person acting as the third party neutral. Additionally, there are worries about confidentiality with respect to non-binding procedures.

The Future of ADR in Canada

While interest in ADR continues to develop, there is nothing to suggest that it will come close to replacing the judicial process.

In addition to the development of private firms which offer ADR services, the government of Ontario is updating the Arbitrations Act\textsuperscript{26} to conform with four stated objectives. The first of these objectives is the recognition that people should be bound by the arbitration agreements they sign. Second, it should be up to the parties to design the process to suit their specific needs. Third, the process should be fair, and finally, the awards must be enforceable, subject to limited rights of review.

Further implementation of ADR procedures in Canada will have to be developed through the efforts of the private sector, government, and

\textsuperscript{26} Arbitrations Act, \textit{supra} note 23.
In favor of the private sector undertaking this task, it can be argued that the general public already provides a dispute resolution forum in the public courts. The government should not be responsible for undertaking a program which may take years before it makes a profit (if in fact it ever becomes profitable). Additionally, the primary users of these facilities are likely to be corporations who are able to afford the services, and who will be saving money by using them. On the other hand, it may be argued that private enterprise is unable to carry the initial financial burden of creating an entire ADR infrastructure, and that to do it properly will require government resources.

Another issue, which probably indicates that the government should provide the infrastructure, is the question of who has the required skill to create an ADR environment. Lawyers appear to be the most likely professional group to undertake this kind of activity, but in actuality, they simply do not have the skills required. Most law schools have traditional curricula which include civil procedure and trial advocacy, but there are very few law schools that offer courses in ADR. While some schools do offer courses in arbitration or negotiation, these courses tend to either gloss over the extensive concepts which constitute ADR, or they tend to focus on only one particular aspect, such as labor arbitration. The problem is compounded by the fact that after law school, most law students go on to work for practicing lawyers who themselves have had little or no training in ADR procedures. The occasional continuing education programs on the topic reach relatively few people, and time necessarily restricts the amount of training that may be provided at such seminars. In the final analysis, it seems that there are currently very few people equipped to use, much less develop, an ADR framework.

It will require more than continuing legal education programs to facilitate greater acceptance of ADR. The groundwork will have to be laid in law schools where the introduction to ADR should be presented on the same terms as civil procedure so that students are equally comfortable with both approaches. With the combined efforts of the various interest groups involved, ADR may gain wider use. The government's continued pressure to relieve the courts of large case loads, the arbitrator's associations continued efforts toward business development, and the continued marketing of private services, like the Private Court, will combine to advance the cause of ADR advocates.

CONCLUSION

At present, ADR is not a fundamental tool in the resolution of products liability disputes in Canada. Canadians tend to rely on the

27 The Private Court is a private entity which has been set up to establish a practical ADR system in Ontario; it operates on a two-step system. The first step is a moderated settlement conference at which an adjudicator attempts to resolve the dispute. If that is unsuccessful, the second step is a private trial.
myriad of social and insurance programs already in place, rather than pursuing a confrontation with a product manufacturer. Additionally, the reluctance to pursue a dispute is reinforced by the many inducements to settle and the more extensive discovery procedures which are inherent in the Canadian judicial process. Accordingly, because there is not an unbearable delay, and no extraordinary problem with using the judicial channels when required, there has not been sufficient demand to require the development of ADR as an alternative to traditional litigation when dealing with products liability disputes. Furthermore, a party who has been injured by a product usually wants the moral vindication offered by a judicial decision rather than the secrecy and efficiency provided by ADR.

In addition to these factors, the present ADR procedures do not easily lend themselves to products liability disputes. The ADR procedures currently in use, almost without exception, are designed to deal with inter-corporate commercial disputes. Furthermore, there is a general perception among injured victims that using ADR would be tantamount to meeting the manufacturer on its own turf. The courts, on the other hand, are perceived as taking a patriarchal approach providing substantial protection for the “underdog.” There is little incentive for any one player in the ADR process to coordinate the development of an ADR infrastructure which would be sufficient to suit the needs of both parties to a products liability dispute. For the reasons indicated, it is unlikely that ADR will play a significant role in the resolution of products liability disputes in the foreseeable future, and parties, particularly consumers in a product liability dispute in Canada, will continue to seek “their day in Her Majesty’s Court.”