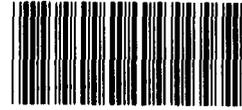


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Product Liability: The Tort System In Five States

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Before the
Subcommittee on Consumer
Committee on Commerce, Science, and Transportation
United States Senate



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Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to present our findings on how the tort system works with regard to product liability. Important changes have been occurring in this area over the past few decades. Juries have increased the size of awards and the extent of the increase and its causes have been matters of considerable debate. Largely through case law, liability has been expanded by varying degrees in different states, creating greater variation among state laws.

There has been a continuing, sometimes heated, debate on whether these changes are symptoms of a malfunctioning tort system. Some have argued that awards are excessive and defendants are being held liable in unreasonable situations. They believe that the courts have deemphasized the goal of deterrence in favor of compensating victims regardless of whether the defendants caused the injury. Others have defended the changes as redressing prior restrictions on plaintiffs' ability to recover damages. Both sides have valid and reasonable points but tend to adopt extreme positions when making their arguments, perhaps mirroring the adversarial nature of litigation.

Between the mid-1970s and the mid-1980s, the number of product liability lawsuits filed in federal court grew dramatically. In

1986, we reported that the so-called "litigation explosion" was, in fact, largely accounted for by a sharp rise in federal filings on one product--asbestos. According to data provided by the Administrative Office of the U.S. Courts, the number of product liability filings increased from about 1,600 in 1974 to over 13,000 in 1986. When asbestos and cases related to two other products were eliminated, however, the increase was much more gradual.¹ A recent article indicates that product liability filings unrelated to asbestos have declined in the last few years.²

Between 1986 and 1988, 41 states responded to concerns about the tort system by passing some type of reform that would affect product liability cases. Most reforms affected the tort system in general; a few have specifically targeted perceived problems concerning product liability standards. Enacted reforms would tend to reverse the trends toward larger awards and expanded liability standards by limiting the size of defendants' payments and the circumstances under which they are held liable.

¹The two products were the Dalkon Shield, an intrauterine birth control device, and Bendectin, a drug to reduce morning sickness.

²Henderson, J.A. and Eisenberg, T. "The Quiet Revolution in Product Liability: An Empirical Study of Legal Change," UCLA Law Review, Vol. 37, (1990), p. 158.

My testimony is based primarily on our recent report on verdicts and case resolution in five states: Arizona, Massachusetts, Missouri, North Dakota, and South Carolina.³

Our objectives were to determine

- . the percentage of cases in which defendants were found liable and the amounts of compensatory and punitive damage awards,
- . the incidence of posttrial activities and actual payments made to plaintiffs after verdict,
- . the size of awards and payments relative to plaintiffs' economic losses,
- . the extent to which the standards of negligence and strict liability were used to determine liability,
- . the time and cost of litigation, and

³Product Liability: Verdicts and Case Resolution in Five States (GAO/HRD-89-99, Sept. 29, 1989). I also rely on supplemental analyses of the data we collected and our earlier report on the growth in product liability filings, Product Liability: Extent of "Litigation Explosion" in Federal Courts Questioned (GAO/HRD-88-36BR, Jan. 28, 1988).

- . the possible impact of proposed federal product liability legislation on (1) the outcomes of court cases and (2) the variations in laws across states.

The five states were selected from among states and large urban areas where product liability cases could be readily identified. We collected data on over 300 cases that were resolved through a judge or jury trial in federal and state courts between 1983 and 1985--a time period during which problems were alleged to exist. Because the cases are not a statistically representative sample, our findings cannot be generalized to other states. Attachment I identifies the state courts covered and sources used to identify product liability cases.

AWARDS STRONGLY ASSOCIATED WITH INJURY SEVERITY

The compensatory damage component of awards was strongly associated with the severity of the injury and, presumably, the plaintiff's underlying economic losses (see attachment II). Million-dollar awards were given only when the injury had resulted in either permanent disability or death. Moreover, closed-claim studies have consistently found that individuals with the most severe injuries are undercompensated for their economic losses.

Punitive damage awards were highly correlated with the size of compensatory damages. Some states have enacted caps (ranging from 1 to 4 times the compensatory damages) to limit the size of punitive damage awards, but few punitive damage awards in the cases we studied would have exceeded those caps had they been applicable.

When used, appeals and posttrial settlement negotiations reduced the size of most extremely large awards and eliminated many punitive damage awards. Across all cases, payments were 43 percent less than the total amount awarded. In 71 percent of the cases with million-dollar awards, posttrial processes resulted in final payments less than the initial verdict.

Appellate courts appear to have found many of the punitive damage awards they reviewed to be unjustified. The courts ruled on 12 of the 23 punitive damage awards made in the cases studied, reversing 9 and vacating and remanding 3 for retrial. All million-dollar punitive damage awards were eliminated or reduced dramatically. Of the 9 cases in which the punitive damage awards were reversed, in only 1 case was the compensatory damage award also reversed. These reversals primarily reflect lower court errors in awarding punitive damages, not in their liability decisions.

LIABILITY BASED ON DEFENDANTS ACTIONS

Some have alleged that juries award damages without considering the defendants' conduct. Although liability standards have been changing, in most cases we reviewed, liability was based on the traditional standard of negligence. In about 27 percent of cases, defendants were held liable under strict liability.⁴ Even in those cases, defendants would have been allowed to present evidence to show that their actions were consistent with state-of-the-art technology; and juries could have then taken this evidence into account when determining whether defendants were liable. Some cases outside the scope of our study have been noted, however, where appellate courts held defendants liable even though their actions were in accord with the state-of-the-art at the time of product manufacture.

TIME AND COSTS SUBSTANTIAL

Our findings were consistent with previous studies showing that it took considerable cost and time to resolve civil claims that go to trial.⁵ Because the benefits of the judicial process are

⁴Under strict liability, defendants are liable if the product was defective and this defect made the product unreasonably dangerous and caused the injury. The plaintiff in a strict liability action need not prove that the defendant was negligent.

⁵Product liability is a type of civil case.

difficult to quantify, however, we cannot determine the degree to which these benefits balance its substantial administrative costs.

In the cases we reviewed, more than half of total payments by defendants went toward plaintiffs' attorneys fees and defense costs. And defense costs in appealed cases were double those in cases that were not appealed.

Average time to verdict varied from 1-1/4 years in South Carolina to over 3-1/2 years in Massachusetts. Appeals added 10 months on average to case resolution. Across states, plaintiffs had to wait 2-1/2 years, on the average, for a verdict and even longer to receive compensation.

The time required to resolve cases not only delays compensation but also can result in defendants paying substantial prejudgment interest. In Massachusetts, for instance, where payment of prejudgment interest is statutorily required, such interest accounted for 32 percent of all moneys awarded.⁶

⁶Among the five states, only Massachusetts and North Dakota provide that prejudgment interest, which accrues from the date of filing the claim, be added to the final judgment.

OBSERVATIONS ON REFORM AT THE FEDERAL LEVEL

- Even with considerable state reform activity, tort reform proponents have continued to call for federal reform, contending that problems with the tort system persist. They argue that state reforms have resulted in more variation in state laws.

The pros and cons of federal tort reforms will, of course, depend on the specifics of various legislative proposals. Because of data unavailability and measurement problems, the effects of enacted reforms are likely to be difficult to measure.

The primary rationale for federal tort reform is to introduce uniform standards across states. In the states we reviewed, about 70 percent of defendants were from outside the state in which their case was tried. We found that federal reforms, if sufficiently clear, would undoubtedly reduce variation across states (see attachment III). The value of reforms that do not promote uniformity in the bases used to determine liability, however, would be questionable.

Over the years, plaintiffs have made significant gains in compensation through the tort system. Deliberations that focus on burdens that defendants may face should seek to strike the difficult balance between providing sufficient incentive to

prevent injury and provide fair compensation for those who are injured through the fault of another.

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Mr. Chairman, this concludes my statement. I would be happy to answer any questions you might have.

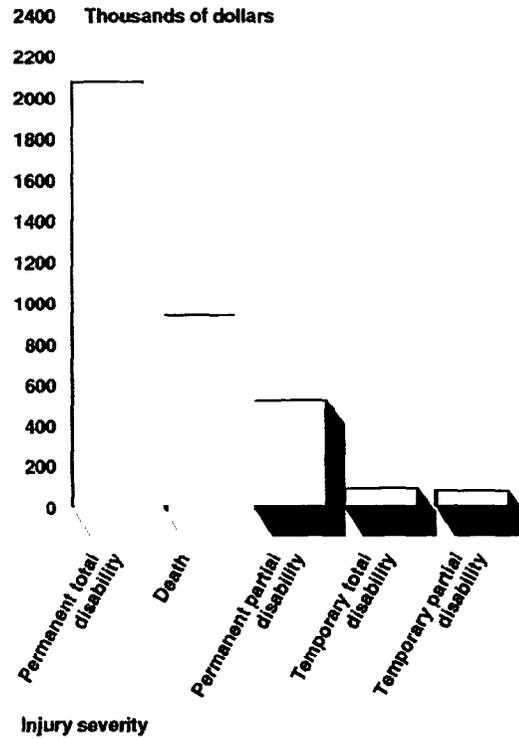
Cases Covered and Sources Used in State Courts

State	Number of cases		Extent of state coverage	Percentage of state population	Sources used to identify cases	Cases tried in courts not included in this study ^a
	Federal courts	State courts	Number of Courts			
AZ	3	56	9 of 15 Circuit Courts	88	Jury verdict reporters	All claims under \$500; any claims between \$500 and \$2,500 ^b tried by Justice of the Peace
MA	44	22	All 14 Superior Courts	100	Records of the Office of the Chief Administrative Justice and the Court of Appeals	All claims under \$7,500, which are tried in District Court, Municipal Court, or Housing Court
MO	52	56	All 44 Judicial Circuits	100	Jury verdict reporters; records of the Office of State Courts Administrator; "Missouri Appellate Court Opinion Summary"	None
ND	3	13	All 53 District Courts	100	Private study	Any claims under \$10,000 ^b tried in County Court
SC	37	19	26 of 46 Circuit	78	Private study	Any claims under \$1,000 ^b tried in

^aIn all states but Missouri, product liability cases with small claims could be heard in courts other than the trial courts we examined. Our sources did not cover these courts with small claims.

^bCases with claims of \$2,000 or more could also be tried in the courts we studied.

Average Compensatory Award Varies with Injury Severity



Number of cases in each category are: Permanent total = 9; Death = 17; Permanent partial = 70; Temporary total = 4; and Temporary partial = 15.

Product Liability Laws: 1988
Reforms for Five States Studied Versus S. 1400 and H.R. 1115

<u>Aspect of the law</u>	<u>AZ</u>	<u>MA</u>	<u>MD</u>	<u>ND</u>	<u>SC</u>	<u>S. 1400 as introduced</u>	<u>H.R. 1115 cleared by Committee^b</u>
State-of-the art evidence allowed in strict liability cases	Yes (all actions)	a	Yes (warning cases)	No	Yes (design & warning cases)	*	Yes (all actions)
Rule of joint & several liability modified	Yes	No	Yes	Yes	No	Yes	*
Comparative negligence made available under negligence theory	Yes	Yes	Yes	Yes	No	*	*
Comparative negligence made available under strict liability theory	No	a	Yes	Yes	No	*	*
Caps on awards set	No	No	No	No	No	*	*
Clear & convincing evidence required for punitive damages	Yes	No	No	Yes	Yes	Yes	Yes
Collateral source rule modified	No	No	Yes	Yes	No	Yes	Yes
Statute of limitations for most actions (in years) ^c	2	3	5	6	3	2	2

Legend

Yes = areas in which state has enacted a reform or S.1400 and H.R.1115 would reform
 No = areas in which state has not enacted a reform. Traditional law or rule prevails.
 * = bill does not address this issue; state law would control

^aNot applicable

^bAs cleared by the House Commerce Committee in June 1988.

^cOnly state law in South Carolina was modified by recent reforms.