SUMMARY OF RESEARCH RESULTS ON PRODUCT LIABILITY

Deborah R. Hensler

October 1986
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The RAND Corporation
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This Paper is an edited transcript of written testimony delivered in October 1986 by Deborah R. Hensler to the United States Senate Judiciary Committee.

The author summarizes the results of empirical research conducted by the Institute for Civil Justice on four topics relevant to the discussion of the product liability system, including trends in litigation, expenditures for liability cases, the effects of product liability lawsuits on corporate behavior, and the special problems of mass toxic torts.
I. SUMMARY OF RESEARCH RESULTS ON PRODUCT LIABILITY

Statement Prepared by Deborah R. Hensler  
Institute for Civil Justice

Mr. Chairman and Members of the Judiciary Committee. My name is Deborah Hensler; I am the research director of The Institute for Civil Justice (ICJ) at The RAND Corporation. RAND is a private nonprofit corporation that conducts public policy research. The Institute was established at RAND in 1979 to conduct policy analytic research on the civil justice system. Its research is supported primarily by corporate and foundation grants.

The purpose of my testimony is to summarize the results of our research that are most relevant to a consideration of the current product liability system. My testimony will touch on four topics, each of which has been the subject of empirical research at the ICJ:

1. Trends in product liability litigation;
2. Expenditures for liability cases closed in 1985;
3. Effects of product liability lawsuits on corporate behavior; and
4. Special problems posed by mass toxic lawsuits.

TRENDS IN PRODUCT LIABILITY LITIGATION

There has been considerable dissension over the past several months about how much, if at all, the U.S. tort liability system is changing. Much of this dissension stems from the misinterpretation of civil justice system statistical indicators. Judicial and legal policymakers have long operated as if they were dealing with a single homogeneous tort liability system. Indicators of aggregate change in the system—for example, civil filing rates—are assumed to reflect equivalent changes in all its components. But there is increasing evidence that
this picture of the tort liability system is no longer accurate, if
indeed it ever was. Each category of tort cases--automobile accidents,
product defect suits, professional malpractice, and so forth--appears to
have its own social and economic dynamics. This is not surprising once
we consider the difference among these different case categories in
substantive and procedural laws, party characteristics, litigation
practices, and financial and social stakes. In describing trends in
product liability, then, it is important to distinguish those
statistical indicators that apply specifically to this kind of lawsuit
from those that apply to tort suits more generally.

With regard to product liability litigation, we can ask the
following questions:

1. Is the amount of litigation increasing, decreasing, or remaining
   roughly the same?
2. Has there been any change in the proportion of suits that are
decided in the plaintiff's favor?
3. Have the amounts juries award to plaintiffs increased,
decreased, or remained roughly the same?
4. What has been the role of punitive damage awards?
5. Is there any evidence that juries apply different standards
   in deciding product liability suits than they apply in other
   sorts of tort litigation?
6. Have the amounts insurers can expect to pay out increased,
decreased, or remained roughly the same?

Unfortunately, our ability to answer these key questions for
liability specifically is severely constrained due to the unavailability
of basic data on the civil justice system.

**Amount of Product Liability Litigation**

From data reported by the federal district trial courts, we know
that the number of product liability lawsuits filed in the federal
system has increased five-fold from 1975-1985 (from about 2400 suits to
about 12,500 suits); because other types of tort filings in the federal
system have not increased at a similar rate, product liability cases now
account for about 30 percent of all federal tort filings, compared to 9 percent in 1975. But we don't know whether this trend was matched in state trial court systems, where an estimated 95 percent of all tort cases are filed, because most state court systems do not tabulate cases by type.

Over the past half dozen years, the ICJ has assembled a statistical data base that tracks the results of all civil jury trials held in trial courts of general jurisdiction (state and federal) in Cook County, Illinois and San Francisco, California from 1960 to 1985 (Shanley and Peterson, 1983; Peterson, 1984). These data indicate that the number of product liability lawsuits that were tried in San Francisco in the early 1980s was about the same as the number tried twenty years previously. At the beginning of the period 54 product liability cases were tried to verdict. By the early 1970s the number had more than doubled to 127, but in the succeeding period it diminished again; only 49 product liability cases were tried from 1980-84. Throughout this period, product liability cases constituted 5 to 10 percent of the total number of civil cases tried. In contrast, in Cook County (a much larger jurisdiction) the number of product liability cases increased steadily from 60 at the beginning of the twenty-year period to 227 at the end, an increase of almost three hundred percent. Because the civil trial caseload is much larger in Cook County than it is in San Francisco, product liability cases never accounted for more than 6 percent of the total number of civil cases tried. As these numbers indicate, there is considerable fluctuation in the number of trials over time and across jurisdictions. Perhaps more important, because the number of cases going to trial can rise and fall for a number of different reasons (for example, changes in lower court jurisdictional limits, or changes in settlement practices), we cannot tell from these data whether the underlying product litigation rate (i.e., number of filings) in either jurisdiction was increasing or decreasing.
Plaintiffs' Success Rate in Product Liability Trials

Data from the jury verdict statistical database can be used to describe trends in jury trial outcomes, at least from these two major metropolitan areas. Our analyses of these data indicate that the proportion of product liability trials resulting in awards for the plaintiff increased from about 30 percent in the early 1960s to about 50 percent by the early 1980s in Cook County, but decreased somewhat from 57 percent in the early 1960s to 52 percent in the 1980s in San Francisco. In both jurisdictions, by the end of the period, plaintiffs in product liability cases (once viewed as "long-shot" cases) had an equivalent or better chance of winning than plaintiffs in most other tort liability suits.

Trends in Jury Awards

There are several different statistical indicators of trends in monetary awards. The median, the point dividing the top and bottom halves of the award distribution, is often used as an indicator of the "typical" jury award, since its value is not affected by extremely large or extremely small verdicts. The mean, or statistical average, takes the full range of jury awards (not including awards for the defense) into account. By reporting median and mean awards in constant 1984 dollars we can factor out the effect of inflation over the 25 year period. Median awards for product liability cases in San Francisco increased more than seven-fold, from $27,000 in the early 1960s to $200,000 in the early 1980s (in 1984 $). In Cook County, the increase was not so dramatic, going from $69,000 in the early 1960s to $187,000 in the early 1980s (in 1984 $). Similar sharp increases in median awards occurred in the professional malpractice area, but in other areas, such as suits arising out of auto accidents, the median remained stable or actually declined.

Mean awards, which are affected by a small number of very large verdicts, increased across the board in both jurisdictions over the 25 year period, even after the effects of inflation are taken into account. But the rate of increase in mean product liability awards was greater than for tort suits generally. The mean product liability award went
from $51,000 in the early 1960s to $1,105,000 in the early 1980s in San Francisco and from $202,000 to $718,000 in Cook County.

The obvious inference from these data is that juries have become increasingly generous in their awards to plaintiffs in product liability suits. But there are a number of reasons to be cautious about drawing such an inference. First, there is some indication in the San Francisco data that the jury award average increased there, at least in part, because cases involving smaller amounts began to be filed in the lower court and in the court's arbitration program. Second, it is possible that attorneys in both jurisdictions have become increasingly willing to settle smaller value cases before trial. Without data on settled cases, which are not currently available, we cannot reject this possibility. Third, there may be changes in the nature of the injuries involved in cases going to trial, or changes in the nature of medical treatment, that we would expect to lead to increases in jury awards. Our previous analyses suggest that changes in injuries do not adequately explain the trend in verdicts that we have observed, but this issue should be subjected to further analysis.

Punitive Damage Awards

In both the jurisdictions we have studied, the number of punitive damage awards has increased substantially over the 25 year period. There were 49 punitive damage awards in San Francisco in the early 1980s, compared to 13 such awards in the early 1960s, and 65 in Cook County in the most recent period, compared to only 5 in the early 1960s. But almost all of the punitive damage awards occurred either in contractual disputes or intentional tort cases (mainly involving civil rights issues). Across the entire period, there were only 4 punitive damage awards in product liability cases in San Francisco and 3 such awards in Cook County. The percentage of product liability trials in which punitive damages were awarded increased over the period in both jurisdictions (from less than 1 percent through 1979 to 6 percent in 1980-84 in San Francisco and from 0 through 1979 to 1 percent in 1980-84 in Cook County) but because the absolute numbers are so small, these percentage changes are probably not meaningful. Punitive damage awards against business defendants were larger, on average, than awards against
individuals, but such awards occurred most frequently in contract cases, not in personal injury cases. Punitive damage awards in contract cases were often far larger than compensatory awards, but in 75 percent of the personal injury trials in which punitive damages were awarded, the ratio of punitive to compensatory damages was 1.5 or less. Nevertheless there were a few product liability cases where punitive damage awards far outstripped compensatory damages.

Do Juries Apply Different Standards in Product Liability Suits?

Our multivariate analyses of the jury verdict data through 1979 suggest that juries may put a "premium" on product liability cases (Shanley and Peterson, 1983; Chin and Peterson, 1985). As reported above, over the 25 year interval, the average amounts awarded by juries increased more in product liability cases than in more routine types of personal injury suits. Some of the difference between product liability awards and other awards is explained by the fact that product cases more frequently involve serious injuries. But in both jurisdictions, juries awarded more to plaintiffs in professional malpractice, product liability cases and street hazard cases than to plaintiffs who had similar injuries but other causes of action. This tendency seemed to increase during the 1970s. In San Francisco, in the 1970s, a plaintiff in a product liability case received twice the amount received by a plaintiff with a similar injury from an accident on property. Juries also awarded more to plaintiffs who sued corporate defendants than to those who sued individuals. In Cook County, when plaintiffs sustained serious injuries, corporate defendants on average could expect to pay 2.5 times the amounts paid by individual defendants. Corporate defendants were also more likely to be found liable than individual defendants. The ICJ is currently conducting additional analyses that attempt to explain these differences, using new statistical techniques and the data base updated through 1984.
Trends in Expected Awards

Despite the constraints on our ability to explain why jury awards in product liability cases have changed, it seems incontrovertible that they have changed in these two major jurisdictions. Thus, insurers and product manufacturers operating in these jurisdictions have substantial reason to expect fewer victories and higher verdicts in product liability lawsuits that go to trial than were seen in the past. Expected awards (which take into account the chance of not having to pay anything, if the defendant wins, and the average amount awarded when the defendant loses) have increased twenty-fold in San Francisco since the 1960s (from $29,000 to $575,000 in 1984 $) and six-fold in Cook County over the same period (from $59,000 to $373,000). How these expected award values affect settlement values has not been subjected to empirical analysis, but most practitioners assume that higher expected awards lead to higher settlements.

TRANSACTION COSTS FOR PRODUCT LIABILITY CASES

How much does the tort litigation system cost? A recently completed ICJ study estimates that the total expenditure nationwide for tort litigation terminated in state and federal courts of general jurisdiction in 1985 was between $27 and $34 billion (Kakalik, 1986). These expenditures include compensation paid to plaintiffs, defendants' and plaintiffs' legal fees and expenses and the value of their time, insurance claims processing costs and the costs of operating the court system. Plaintiffs received about 46 percent of the total in net compensation.

Lawsuits arising out of automobile accidents, which accounted for about half of all tort filings in courts of general jurisdiction in 1985, accounted for about 43 percent of the total expenditures. The remaining 57 percent was spent on professional malpractice suits, product liability suits, and other forms of liability litigation. The data do not permit us to estimate the fraction of expenditures attributable to product liability alone.
Many practitioners believe that product liability and professional malpractice suits are more complex than the typical automobile accident suit and hence, more expensive to resolve. The ICJ data comparing transaction costs in automobile and non-automobile litigation seem to bear this out. Plaintiffs in automobile lawsuits terminated in 1985 received about 52 percent of total expenditures. Plaintiffs in non-automobile cases (which include product liability) received only 41 percent in net compensation. The difference in transaction costs between automobile and non-automobile litigation primarily reflects higher defense litigation costs for non-auto torts. Defense costs for non-auto claims have also been rising at a faster rate over the past five years, about 15 percent annually, compared to 6 percent annually for auto claims.

Because we cannot separate costs for product liability cases from the costs of other non-auto cases we do not know whether the 41 percent net compensation figure applies to product liability cases; transaction costs for these cases could be higher or lower than the average for all non-auto cases. But it should be noted that in an earlier study, the ICJ estimated that plaintiffs in asbestos litigation lawsuits—which are a special class of product liability cases—received 39 percent of expenditures in net compensation.

In sum, although we cannot perform precise calculations for product liability claims and lawsuits, the estimates reported here are consistent with the picture of increasingly costly product liability litigation that emerges from our earlier description of trends in jury verdicts.

Corporate Responses to Product Liability Litigation

A key question for those considering changes in the product liability system is how the current system affects corporate behavior. Although much rhetorical attention has been devoted to the issue of the deterrent effects of the tort liability system, there is virtually no empirical analysis that would allow us to estimate the magnitude of these effects. Recent articles in the leading law reviews include some that argue for the likelihood of strong effects, and others that argue
against this. But each side can only call on anecdotal evidence to support its position.

In 1982 the ICJ conducted a study directed at shedding some light on this issue (Eads and Reuter, 1983). The study involved interviews with corporate product safety officials in nine large manufacturing firms that were generally recognized as leaders in the safety field; it was intended to determine how innovative corporations had responded to changes in their environment. While those interviewed had much to say about the behavior of other firms, as well as their own, the study did not constitute a broad survey of corporate behavior.

The researchers drew the following conclusions:¹

It is clear from these interviews that, except for firms subject to the maximally intrusive regulation of such agencies as the Food and Drug and the Federal Aviation administrations, product liability is the most significant influence in product safety efforts. Product liability, however, conveys an indistinct signal. The long lags between the design decision and the final judgment on product liability claims (frequently five or more years), the inconsistent behavior of juries, and the rapid change in judicial doctrine in the area, all tended to muffle the signal.

That is to say, firms learned little from the results of particular litigation about either specific design decisions or the process of design decisionmaking. The frequency of suits and the level of awards provide some idea of the costs of failing to design a safe product and hence the level of effort that should be devoted to assuring a safe design. Nevertheless, considerable uncertainty remains about the most appropriate method of assuring safety in product design.

The ICJ researchers found that firms' response to product safety pressures varied depending on the inherent seriousness of the safety problems faced by the firms (e.g., how hazardous the products manufactured were), the underlying organization of the firm and the philosophy and management style of the CEO. Two of the firms the ICJ studied produced inherently hazardous products. According to the ICJ researchers, recognition of the hazardous nature of the products "permeated the[se] organization[s]" making it difficult to pin down the

¹The researchers also reviewed the results of two industry surveys conducted, respectively, by the Machinery and Allied Products Institute and the Conference Board, and two case studies of product safety activities in half a dozen companies.
organizational response to product safety. Both of these firms had
"experienced a substantial volume of product liability litigation," both
"considered this an inevitable cost of producing the particular products
they specialized in--not a sign of design or manufacturing failure," and
both attempted to separate their product liability problems from their
ongoing operating decisions. One firm treated product liability costs
as an overhead expense, the other charged the costs to the product but
only for pricing purposes. But "the fact that suits arose and judgments
were paid out was not considered to impugn the product or anyone
connected with its development or manufacture."

Two of the firms the ICJ studied produced what the researchers
termed low-hazard products. Both of these firms had extremely active
product-safety programs, although the researchers questioned the
effectiveness of one of these. The researchers attributed the concern
about safety at both these firms to the "missionary" zeal of specific
corporate officials, rather than to any concrete product liability
experience.

In the remaining firms, said to manufacture moderately hazardous
products, concerns about the response to product safety issues were
mixed. In some firms the response was primarily legalistic and
defensive, in others it was more operational and emphasized hazard
reduction.

Special Problems Posed By Mass Toxic Tort Litigation

Many observers of the civil justice system believe that tort cases
arising out of mass exposure to toxic substances constitute a special
category of product liability claim that warrant particular
consideration in a review of the product liability system. Over the
past few years, the ICJ has conducted a series of studies of asbestos
personal injury litigation that highlight the special problems posed for
the civil justice system by mass toxic torts. These studies have shown
that:

1. Asbestos cases pose a significant problem for the courts in

2 The conclusions discussed here are drawn from Kakalik et al., 1983
and 1984; and Hensler et al., 1985.
which they are concentrated. In some courts, the number of pending asbestos claims constitutes as much as 12 to 20 percent of the active civil caseload. Despite the considerable efforts and success of procedures for streamlining pretrial preparation, most of these courts have had serious problems disposing of cases. In a few jurisdictions with large asbestos caseloads, few or no cases are said to be ready for disposition. In those jurisdictions that have attempted to use traditional approaches to disposing of the cases, at the current rate of disposition, courts will not have disposed of their current caseloads until well into the next century. Regardless of disposition approach, most plaintiffs must wait a minimum of three years and as long as five or more years until their cases are resolved. Some plaintiffs may benefit from such delays if their injuries become more evident as time elapses; others, however, may die before their cases are resolved.

2. The costs to litigate asbestos cases are higher than for any other kind of personal injury case for which transaction costs have been estimated. Through 1982, plaintiffs received on average 39 cents of every dollar expended for asbestos claims processing, while attorneys on both sides received most of the remainder. In all, about $1 billion was paid to compensate and litigate asbestos claims between 1970 and 1982.

3. The long time to resolution and high transaction costs are a consequence of the interaction between the special characteristics of asbestos cases—characteristics that they share with other mass toxic claims—and the substantive and procedural rules that govern the civil justice system. The latent nature of asbestos-related diseases and the manufacturing context in which they occurred raise issues with regard to the timing of filing claims, determining causation, determining liability and apportioning damages that have been dealt
with inconsistently, if at all, by the various state appellate courts and local trial courts. This has resulted in increased uncertainty with regard to case value, delays in case processing, increased transaction costs, and inconsistent outcomes. The large numbers of claims that arose within a relatively short period of time (in part because of decisions related to timing of claims filing) have made it difficult to process cases using traditional individualized procedures. But until recently lawyers on both sides and trial and appellate judges have rejected the use of such collective mechanisms as the class action and multidistricting as well as the use of collateral estoppel and other issue-preclusion devices for these cases. Instead, what has emerged is a patchwork of *ad hoc* procedures for grouping cases and establishing settlement formulae that have generally not been subject to public debate and may, in some situations, raise serious issues of conflict of interest between the attorneys and their clients. The available alternative compensation systems, particularly the workers' compensation system, do not appear to have resolved the problems observed for the tort system regarding timing of claims, standards for proving causation and issues arising out of the involvement of multiple defendants.
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