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DUTY, SUFFICIENCY, AND UNDERLYING RHYTHMS IN LAW

*Joseph Sanders**

IN a seminal article in 1990, Professors Henderson and Eisenberg described a “quiet revolution” underway in products liability law. The revolution they described was “a significant turn in the direction of judicial decision making away from extending the boundaries of products liability and toward placing significant limitations on plaintiffs’ rights to recover in tort for product-related injuries.”¹ The change was quite recent, perhaps beginning in the mid-1980s. At the time they wrote, they opined that some followers of product liability would find their conclusion so contrary to shared wisdom as to warrant summary rejection.² Shared wisdom does change. Few among us today would disagree with the proposition that plaintiffs win less than they did in the past.

For present purposes, the most important aspect of the Henderson and Eisenberg paper was its observation that the primary source of defendants’ increased winning percentage was not greater success at trial,³ but rather greater success in pretrial motion practice.

The revolution reflected in our data is not simply one of juries rebelling against the perceived excesses of the products liability system. The change we hypothesize consists largely of courts articulating new law; it is a revolution primarily of lawmaking, not fact-finding. . . . The defendants’ success rate at the pretrial motion stage is by far the biggest factor in describing the decline in plaintiffs’ overall success rate.⁴

The greater pretrial defense success rate was due to two simultaneous trends. First, courts were more willing to develop and use bright-line, no-

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1. James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 480 (1990). Henderson and Eisenberg were soon joined by others noting a more pro-defendant tort law. See Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992); David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703 (1992).

2. Henderson & Eisenberg, *supra* note 1, at 480.

3. Other studies suggest there has been some movement toward greater defense success at trial in products and some other tort litigation. See JOSEPH SANDERS, *BENEDICTIN ON TRIAL: A STUDY OF MASS TORT LITIGATION* 119 (1998).

4. Henderson & Eisenberg, *supra* note 1, at 530-31, 532. Published opinions reflected this trend of refusing to allow plaintiffs to reach the jury. In 1983, 14% of published products opinions in their database found for the defendant as a matter of law. By 1988, this rate was nearly 27%. See *id.* at 509.

duty rules. Second, courts were more willing to conclude that plaintiffs failed to provide sufficient proof to prevail.⁵

In a second paper, Eisenberg and Henderson suggest a number of reasons for these changes, including a more conservative judiciary, a more pro-defendant public opinion climate following legislative efforts at tort reform, and something they call the "underlying rhythms in the substantive law."⁶ Judicial retrenchment occurred as courts came fully to grips with liability for defective designs and warnings and refused to eliminate the requirement that the plaintiff must prove the product contains a defect in order to recover.⁷

Changes such as those documented by Henderson and Eisenberg are nothing new to products liability or to tort law in general. The question as to whether tort law should consist of many bright-line rules that empower judges or few general reasonableness rules that empower juries goes back at least to the early part of the last century. It is reflected in a pair of famous railroad crossing cases decided by Justices Holmes and Cardozo. Judges who in recent years have restricted the jury's role are heirs to Judge Oliver Wendell Holmes, Jr.'s view of the jury and the judge-jury relationship. In an 1899 article Holmes commented:

I do not believe that the jury have any historic or *a priori* right to decide any standard of conduct. I confess that in my experience I have not found juries specially inspired for the discovery of truth. I have not noticed that they could see further into things or form a saner judgment than a sensible and well trained judge. I have not found them freer from prejudice than an ordinary judge would be.⁸

And in *The Common Law*, he expressed his hope regarding the ultimate allocation of duties between judge and jury as follows:

When a case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men taken from the practical part of the community can aid its judgment. Therefore it aids its conscience by taking the opinion of the jury.

But supposing a state of facts often repeated in practice, is it to be imagined that the court is to go on leaving the standard to the jury forever?⁹

The answer for Holmes was no. In the well known case of *Baltimore &*

5. See *id.* at 509-10.

6. Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731, 790-94 (1992).

7. See *id.* at 794.

8. Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 459 (1899).

9. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 123 (1881).

Ohio Railroad v. Goodman,¹⁰ he had an opportunity to turn his thoughts into law in the context of a railroad crossing case:

When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle It is true . . . that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts.¹¹

As students of tort law know, Holmes' effort to limit the role of juries in this way ultimately failed. The "once for all" rule of stop, look, and listen lasted less than a decade, dismantled by Justice Benjamin Cardozo in *Pokora v. Wabash Railway Company*¹² In a roughly similar case on the facts, Justice Cardozo declared:

Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. To get out of a vehicle and reconnoitre is an uncommon precaution, as everyday experience informs us. Besides being uncommon, it is very likely to be futile, and sometimes even dangerous. If the driver leaves his vehicle when he nears a cut or curve, he will learn nothing by getting out about the perils that lurk beyond. By the time he regains his seat and sets his car in motion, the hidden train may be upon him Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged.¹³

If Holmes had somehow hoped that eventually each fact situation would have its own pigeonhole and that eventually judges, having considered each, would determine whether it was a "liability" hole or a "nonliability" hole, *Pokora* suggests that there are too many pigeonholes to make this a practicable enterprise for all of the law of torts. This does not mean, however, that the courts cannot limit the ambit of the jury by establishing discrete rules. Some such rules are of very long standing, such as the rules surrounding landowner duties to trespassers and licensees. Others are more recent, such as the position taken in the *Restatement (Third) of Torts: Products Liability*, section 2(b) that the plaintiff must produce a reasonable alternative design in order to prevail in a products liability design defect case.

The balance between judge and jury may be shifted in other ways as well. As William Powers, Jr. notes, Leon Green and Page Keeton contested this issue when they debated whether it was preferable to analyze the scope of defendants' liability as a proximate cause question or a duty

10. 275 U.S. 66 (1927).

11. *Id.* at 69-70 (citations omitted).

12. 292 U.S. 98 (1934).

13. *Id.* at 104-05 (citations omitted).

question.¹⁴ Keeton supported broad duty rules with mixed questions of law and fact (e.g., was the defendant behaving as a reasonable person under the circumstances, which would put more work in the hands of juries). Conversely, Green supported the idea of specific duty rules that tended to separate questions of law from questions of fact which would put more power in the hands of judges. While Keeton's position has generally prevailed in Texas, Dean Powers argues that in recent years the Texas Supreme Court has moved toward Green's position by reinvigorating the concept of duty.¹⁵ Powers cites products liability,¹⁶ insurance bad faith,¹⁷ and negligence cases¹⁸ for this proposition. Professor Dorsaneo's article in this volume agrees that the supreme court has revised its treatment of duty and causation issues in tort cases.¹⁹ But he argues, contrary to Dean Powers,²⁰ that the court also shifted power between judge and jury by changing the application of the "no-evidence" standard of review traditionally applied by Texas courts in assessing the sufficiency of the evidence supporting a jury verdict.²¹

Not only do Professor Dorsaneo and Dean Powers disagree about what is occurring with respect to the no-evidence standard, they also disagree about the wisdom of shifting power from jury to judge. Powers generally approves of the movement to give more power to judges,²² while Dorsaneo would prefer not to move in this direction.²³ It is not surprising, therefore, that Professor Dorsaneo takes exception to a set of procedural developments that appear to have changed no-evidence review. These include a rearticulation of the "scintilla rule," the extension of the principle that "undisputed evidence" cannot be disregarded, and the fact that the relevance and reliability of expert testimony has become a question for the court, not the factfinder.²⁴

Professor Dorsaneo makes a persuasive case that in some areas the court is more willing to question jury verdicts than in the past. To give but one example from an area with which I am familiar, the court is more open to questioning the reliability and, therefore, the sufficiency of expert testimony essential to the plaintiff's case. In *E.I. du Pont de Nemours & Co. v. Robinson*,²⁵ the court followed the United States Supreme Court's lead in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,²⁶ and ruled that

14. See William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEXAS L. REV. 1669, 1703-04 (1997).

15. See *id.* at 1704.

16. See *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379 (Tex. 1995).

17. See *Lyons v. Millers Cas. Ins. Co.*, 866 S.W.2d 597 (Tex. 1993).

18. See *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347 (Tex. 1995).

19. See William V. Dorsaneo, III, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. 1497, 1527, 1531 (2000).

20. See Powers, *supra* note 14.

21. See Dorsaneo, *supra* note 19, at 1518.

22. See Powers, *supra* note 14, at 1715.

23. See Dorsaneo, *supra* note 19, at 1521.

24. See *id.* at 1507.

25. 923 S.W.2d 549 (Tex. 1995).

26. 509 U.S. 579 (1993).

expert testimony must be reliable and relevant to be admitted. The *Robinson* opinion sets forth six non-exclusive factors that courts should consider in assessing an expert's evidence: (1) whether the expert's theory or technique has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has undergone peer review and publication; (4) the technique's potential error rate; (5) whether the validity of the underlying theory or technique has achieved general acceptance in the relevant scientific community; and (6) the non-judicial uses that have been made of the theory or technique.²⁷

The first major test of the *Robinson* test came in *Merrell Dow Pharmaceuticals, Inc. v. Havner*.²⁸ *Havner*, like *Daubert*, involved a claim that the drug Bendectin, prescribed for pregnant women to control morning sickness, caused limb reduction birth defects in their unborn children. The *Havner* case was tried in Corpus Christi in 1991. Over the defendant's objection, the trial judge admitted into evidence all of the plaintiff's expert testimony. The jury found in favor of the plaintiff and awarded \$3.75 million in compensatory damages and \$30 million in punitive damages.²⁹ A panel of the appellate court reversed and rendered but on rehearing en banc, a divided court disagreed. It affirmed the compensatory damage award, while reversing and rendering the award of punitive damages.³⁰ The court concluded that the trial judge did not abuse his discretion in admitting the evidence³¹ and that the evidence was legally³² and factually³³ sufficient to support the verdict. The tone of the opinion is strongly supportive of the primacy of juries even when it appears their verdict might be in error. In a revealing passage the court said:

It is critical to distinguish the search for truth in law and in science. The purpose of any legal inquiry is to resolve a dispute between the parties. The law is a body of rules that are applied to settle the issue, whether they be rules of substantive or procedural law. The rules may well impede evidence of the truth . . . [b]ut these shortcomings and compromises have been accepted when put in balance with other considerations.

We try to achieve justice through the application of the law. In the quest for justice, we say we are engaged in a search for truth, and we accept the jury's verdict as true except in very limited circumstances. This determination by citizens of the crucial facts of the case is the bedrock of our jurisprudence, however wrong its conclusion is in the eye of God or objective reality. . . . What the jury finds may not be

27. See *Robinson*, 923 S.W.2d at 557.

28. 953 S.W.2d 706 (Tex. 1997).

29. See *id.* at 709.

30. See *Merrell Dow Pharms., Inc. v. Havner*, 907 S.W.2d 535 (Tex. App.—Corpus Christi 1994, writ granted).

31. See *id.* at 554.

32. See *id.* at 557.

33. See *id.* at 559.

really true, but we will accept it as true in order to resolve the dispute.

That one jury finds that a component of an automobile was negligently designed or manufactured is not a universal declaration that all of those same components were negligently designed or manufactured. Other plaintiffs with the same complaint will be put to their proof before different juries which may reach contrary results. Our jurisprudence accepts inconsistent results and restricts the law of the case to that particular case with those plaintiffs and defendants.³⁴

The Texas Supreme Court granted a writ of error and in turn reversed the en banc appellate court. In an 8-0 opinion, it found the scientific evidence to be unreliable, and therefore insufficient to support a verdict for the plaintiff.³⁵ After reciting the traditional formula for assessing a no-evidence appeal,³⁶ the court reviewed the testimony of several plaintiff experts who had testified that Bendectin can cause limb reduction birth defects and one plaintiff expert, Dr. John Palmer, who testified that to a reasonable degree of medical certainty the plaintiff's defect was caused by the drug. The court held that an expert's bare opinion is, by itself, insufficient. The court must consider the substance of the testimony.³⁷ The supreme court found that the *Robinson* criteria for assessing the admissibility of evidence was also useful in assessing whether an expert's testimony is sufficiently reliable to constitute some evidence supporting a causal relationship between the drug and the injury.³⁸ Specifically, the court stated the following:

If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable. Further, an expert's testimony is unreliable even when the underlying data are sound if the expert draws conclusions from that data based on flawed methodology. A flaw in the expert's reasoning from the data may render reliance on a study unreasonable and render the inferences drawn therefrom dubious. Under that circumstance, the expert's scientific testimony is unreliable and, legally, no evidence.³⁹

The supreme court then employed the above criteria to analyze the testimony of the plaintiff's experts. The overall tone of the analysis is captured in the court's comments concerning the testimony of Dr. Palmer:

Dr. Palmer testified that there is a critical period during gestation when the limbs of a fetus are forming. Marilyn Havner took Bendectin somewhere between the 32nd and 42nd day of gestation, depending on how the date of conception is calculated, which was within the period for the development of Kelly Havner's hand and arm. Palmer

34. *Id.*

35. *See Havner*, 953 S.W.2d at 730.

36. *See id.* at 711.

37. *See id.*

38. *See id.* at 714.

39. *Id.*

explained that the molecular structure of doxylamine succinate, one of the two components of Bendectin, permits it to cross the placenta from the mother's body and reach the fetus. Based on this fact and on in vitro animal studies, intact animal studies, and epidemiological information, he concluded that doxylamine succinate is a teratogen in humans. Relying on this same information . . . Dr. Palmer concluded that to a reasonable degree of medical certainty, Bendectin caused the birth defect seen in Kelly Havner's hand. However, Dr. Palmer's testimony is based on epidemiological studies that conclude just the opposite. To the extent that he relied on the opinions of Drs. Swan, Glasser, Newman, or Gross, there is no scientifically reliable evidence to support their opinions, as we have seen. Dr. Palmer identified no other study or body of knowledge that would support his opinion, other than the chemical structure of doxylamine succinate and a study done on antihistamines, not Bendectin. The Sixth Circuit captured the essence of [his] testimony when it said, . . . [p]ersonal opinion, not science, is testifying here."⁴⁰ That court further observed that Dr. Palmer's conclusions so overstated their predicate that it could not legitimately form the basis for a jury verdict. We agree with that observation based on the record in this case.⁴¹

In the *Havner* case, the Texas Supreme Court used Rule of Evidence 702, as interpreted in *Robinson*, to overrule a jury verdict that in earlier years would very likely have been permitted to stand. Because he prefers a balance of power that gives greater decision making to the jury, Professor Dorsaneo views the trend reflected in *Havner* and a number of other cases with some disfavor. He perceives that the judges on the Texas Supreme Court are busy un-making or re-interpreting already established no-evidence rules in order to shift the balance.⁴² I suspect he is correct.

Interestingly, both Professor Dorsaneo and Dean Powers seem to believe that it is more legitimate for a court that does wish to move in this direction to do so through the device of no-duty rules rather than no-evidence rules. On this point, I am somewhat more agnostic. Law is neither love nor war. All is not fair. But the boundaries of fairness in this context are not easy to define. For me, the central context is not between judge and jury at a given point in time. Rather, it is between judges across time. The current court is altering both no-duty and no-evidence precedent because it disagrees with the balance imposed by earlier courts. The earlier courts, in turn, attempted to alter rules to escape the precedent straitjacket imposed by even earlier courts.

Stephen Sugarman makes this point well in a recent article about changes in tort law in California.⁴³ He traces the process by which the current California Supreme Court has rejected some basic outlooks held

40. *Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1360 (6th Cir. 1992).

41. *Havner*, 953 S.W.2d at 730 (citations omitted).

42. See Dorsaneo, *supra* note 19.

43. See Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455 (1999).

by the Bird Era Court⁴⁴ and its predecessors. The central observation of his article is a demonstration of:

an ironic sense in which the new court is creating some “new” torts. The old court tended to eliminate law, in the sense of overturning defense-oriented “rules” and separate legal “doctrines.” The new court, at least in several areas, is doing the opposite by embracing “new” (or older) rules. Hence, in some important respects, it is re-establishing a tort “law” that removes power from juries and returns it to judges (and also tilts in favor of defendants). In light of this shift, one may read my title quite differently: it was the old court that un-made law and the new one that is making it.⁴⁵

Liberal predecessors to the Bird Court “unmade” law in cases such as *Greenman v. Yuba Power Products, Inc.*⁴⁶ and *Rowland v. Christian*.⁴⁷ The Bird court continued this tradition in a number of areas, including “key in the ignition” cases,⁴⁸ and the negligent infliction of emotional distress.⁴⁹ The post-Bird court in turn “unmade” these rules by once again creating a more complex body of law not unlike what we have observed in Texas. For example, in *Brown v. Superior Court*,⁵⁰ it created a no-duty rule with respect to design defect claims for prescription drugs, and in *Thing v. La Chusa*,⁵¹ it undid the Bird Court’s efforts to abolish the specific rules that govern liability in negligent infliction of emotional distress bystander cases.

The point of my digressions into the past and into California law is to suggest that what is occurring goes well beyond the boundaries of the Texas Supreme Court’s tort jurisprudence over the last decade or so. Changes such as those observed by Professor Dorsaneo and Dean Powers are best understood as part of a broader change in attitudes and values. For example, *Havner* and other recent Texas Supreme Court opinions concerning expert testimony are part of a larger trend. At the federal level and in many states, courts have employed the new post-*Daubert* admissibility rules to limit what expert evidence the jury is allowed to hear and what conclusions they are permitted to draw from that evidence.⁵²

44. Named after the Chief Justice at the time, Rose Bird. Judge Bird and two other judges appointed by Governor Jerry Brown were rejected by the voters in a 1986 retention election, primarily because of their decisions concerning the death penalty. This caused a dramatic shift in the ideological orientation of the court. See *id.* at 471.

45. *Id.* at 455-56 (footnote omitted).

46. 377 P.2d 897 (Cal. 1963) (establishing strict liability for defective products).

47. 443 P.2d 561 (Cal. 1968) (abolishing the common law regime that based liability for injuries incurred by those coming onto one’s property upon the legal status of the victim).

48. See *Palma v. U.S. Indus. Fasteners, Inc.*, 681 P.2d 893 (Cal. 1984); *Ballard v. Uribe*, 715 P.2d 624 (Cal. 1986).

49. See *Ochoa v. Superior Ct.*, 703 P.2d 1 (Cal. 1985) (expanding the earlier liberalizing rule of *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968)).

50. 751 P.2d 470 (Cal. 1988).

51. 771 P.2d 814 (Cal. 1989).

52. A number of recent law review articles have addressed various facets of this issue. See Richard Collin Mangrum, Kumho Tire Company: *The Expansion of the Court’s Role in Screening Every Aspect of Every Expert’s Testimony at Every Stage of the Proceedings*, 33 CREIGHTON L. REV. 525 (2000); Lucinda M. Finley, *Guarding the Gate to the Courthouse*:

If the judiciary has lost some faith in the abilities of civil juries, it is no different than our society at large.⁵³ If judges have become more defense oriented, they do not seem to be out of step with the general population. Indeed, there is some empirical support for the position that when they do get to trial, plaintiffs do better in products and medical malpractice cases tried to a judge rather than a jury.⁵⁴ Moreover, we should not lose sight of the fact that in the broader scheme of things we are talking about small changes. American adversarial legal culture⁵⁵ removes more radical changes from legitimate discourse. Abolishing the civil jury, something that has occurred in almost every other developed country, is not an alternative.

In sum, it is not surprising that judges turn to the legal devices at hand to adjust the law to changing attitudes about juries and parties. What would be surprising is if this is the last turn of the wheel. It is much more probable that in twenty or thirty years we will have another round of articles discussing, dissecting, and sometimes disagreeing with a judicial trend to strengthen no-evidence rules and abolish no-duty rules. Such are the underlying rhythms in law.

How Trial Judges are Using Their Evidentiary Screening Role to Remake Tort Causation Rules, 49 DEPAUL L. REV. 335 (1999); Harvey Brown, *Procedural Issues Under Daubert*, 36 HOUS. L. REV. 1133 (1999); Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DEPAUL L. REV. 355 (1998).

53. See VALERIE P. HANS, ATTITUDES TOWARD THE CIVIL JURY: A CRISIS OF CONFIDENCE? VERDICT: ASSESSING THE CIVIL JURY SYSTEM 248 (Robert E. Litan ed., 1993).

54. See Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992).

55. See ROBERT A. KAGAN & LEE AXELRAD, ADVERSARIAL LEGALISM: AN INTERNATIONAL PERSPECTIVE, IN COMPARATIVE DISADVANTAGES? SOCIAL REGULATIONS AND THE GLOBAL ECONOMY 146 (Pietro S. Nivola ed., 1997).

Comments

