Tort Rules Versus Tort Practice: The Products Liability Controversy That Wasn't

Author : Ellen Bublick

Date : June 18, 2020

Aaron D. Twerski, *An Essay on the Quieting of Products Liability Law,* 105 **Cornell L. Rev.** 101 (forthcoming, 2020), available at SSRN.

Over and over, legal scholars have revealed situations in which different legal rules do not produce the different legal outcomes they portend. When states limit juries' power to award punitive damages, juries instead award increased damages under a compensatory damage head. Catherine M. Sharkey, Crossing the Punitive-Compensatory Divide, in *Civil Juries and Civil Justice* 79, (Bornstein, Wiener, Schopp & Willborn eds. 2008). When states require juries to apportion responsibility between intentional and negligent tortfeasors, jurors may preserve negligence liability by apportioning more civil responsibility to a negligent party than an intentional one. Ellen M. Bublick, *Upside Down – Terrorist, Proprietors, and Civil Responsibility for Crime Prevention in the Post – 9/11 Tort-Reform World*, 41 **Loy. L.A. L. Rev.** 1483 (2008). Legal rules matter, but not as much as we may think. Other normative values intercede.

In *An Essay on the Quieting of Product Liability Law,* Restatement (Third) of Torts: Products Liability Reporter Aaron Twerski examines one of the most fevered controversies of recent products liability law— "whether liability for defective product design should be covered by risk-utility balancing or the consumer expectation test." (P. 102.) Twenty years after the debate, Professor Twerski examines the difference between the risk-utility test applied in most states and the consumer expectations test followed in 17 jurisdictions. After much case analysis, Twerski concludes that the answer to the difference question in the two sets of jurisdictions is: not much. In 15 of the 17 jurisdictions that retain a consumer expectations test, Twerski could not find a single case in which the plaintiff did not introduce evidence of a reasonable alternative design. (P. 101, Pp. 111-120.) California and Florida are the outliers. (P. 120.) In California, reasonable alternative design (RAD) evidence is barred completely. (P. 121.)

What happened to the foretold split in practice? Twerski theorizes that "four significant reasons support the ubiquitous presence of a RAD in design litigation." (P. 108.) The four reasons are that the RAD test: 1) tells "a far more compelling story" than consumer expectations; 2) relates to fault which, in turn, augers higher damage awards; 3) may be needed as a substitute if a judge denies a "consumer expectations" instruction, and 4) supports the claim that a product disappoints consumer expectations. (Pp. 109-110.) Thus, the choice of "reasonable alternative design" or "consumer expectation" standard, which seems important at first blush, turns out to be a non-starter in the realm of practice, in which RAD is ubiquitous.

The strength of the article is Twerski's willingness to travel deep into the caselaw, and to mark the trails he takes. Twerski makes the time to really look at what courts are doing—state by state—despite the slow and laborious nature of the work. Because he does, and footnotes his findings extensively, readers understand that they can trust the guide. Moreover, Twerski lets readers know where he has searched and where he has not, as well as the limitations of his choices. (P. 107.)

Through this transparency, a reader can decide if additional journeys are necessary. For example, the focus of this piece is on the 17 minority consumer-expectation jurisdictions. It would be nice to see a review of the majority jurisdictions as well. Could it also be that consumer-expectations language pervades reasonable-alternative-design jurisdictions? If the reasonable-alternative-design test speaks to consumer expectations, could we just as easily make consumer expectations rather than risk-utility the reigning test and still employ RAD? Perhaps most importantly, even if evidence of the RAD test is used in both risk-utility and consumer-expectations jurisdictions, could the manner of use,

or nature of outcomes in the two sets of jurisdictions differ?

Specifically, evidence of other designs and products under RAD might perform different roles in the jurisdictions. In risk-utility jurisdictions the RAD test focuses on product engineering from the perspective of someone putting the product on the market. In consumer-expectation jurisdictions, the RAD test may speak to product performance from the perspective of a user or consumer. Even when using evidence of reasonable alternative designs, the questions asked, and outcomes reached may not be the same.

Still, Twerski's article and its conclusion should be the focal point of any future analysis. Twerski claims: "[W]hether courts demand a RAD or not is of minor importance, for whatever theory a court adopts, the case will be decided on whether there was a reasonable alternative design available." (P. 124.) The care Twerski takes to sift through the many state cases reveals again why there are few voices as powerful on the subject of products liability as Professor Twerski's. As Twerski documents in his article, in recent years there have been fewer voices on the subject of products liability at all. (P. 102 n.7.) Perhaps as cases accumulate under the recent standards, some newer voices will join the search—whether to expand on Professor Twerski's findings, or to debate them.

Cite as: Ellen Bublick, *Tort Rules Versus Tort Practice: The Products Liability Controversy That Wasn't*, JOTWELL (June 18, 2020) (reviewing Aaron D. Twerski, *An Essay on the Quieting of Products Liability Law,* 105 **Cornell L. Rev.** 101 (forthcoming, 2020), available at SSRN), https://torts.jotwell.com/tort-rules-versus-tort-practice-the-products-liability-controversy-that-wasnt/.