

CASE-BY-CASE TORT REFORM

Firms Push
to Challenge
Common Law
Before New,
Business-
Friendly
Judges

TERRY CARTER

LAWRENCE A. SUTTER KNOWS THE AUTOMOBILE MANUFACTURERS and other companies he represents in product liability cases don't want to pay good money for him to make bad plays. But the former small-college running back also knows when to cut back and run through an opening in the line.

So, while several years ago Sutter wouldn't have bothered challenging certain evidentiary rulings, the Cleveland attorney now sees daylight with the addition of more business-friendly justices on the Ohio Supreme Court.

During a recent pretrial hearing, Sutter challenged the admissibility of evidence concerning remedial measures his client made to a product after manufacturing the one the plaintiff blamed for injury. He knew what the judge would say next: There is an Ohio Supreme Court case precisely on point saying it is admissible.

Sutter's reply: Ohio is among a minority of about two states on the issue, and changeover on the state's high court makes it ripe for revisiting and revision.

The judge agreed to preserve the matter, as well as another direct challenge to state high court precedent, for appeal.

"A lot of people don't realize it, but the quickest and easiest way to change the

law is through the courts,” Sutter says. “All you need are a couple of good rulings from an appellate court, and suddenly you have something to talk about in other jurisdictions and in your own.”

What Sutter is doing is not by happenstance. His is one of the go-to law firms for DaimlerChrysler AG, which is asking its outside defense lawyers to go on the offensive. Sutter has an early, lead role in this effort, being pushed throughout the corporate community by Steven B. Hantler, assistant general counsel and head of the company’s consumer litigation and legal reform efforts.

NATIONAL PUSH

THEY’RE TRYING TO ORGANIZE A NATIONWIDE EFFORT TO push for tort reform in the courts by changing the organic and morphing common law governing torts. They say judges have created most of the tort law in the United States through appellate opinions, often persuaded by enterprising plaintiffs lawyers. They believe it’s time for corporate counsel to try the same tack.

Hantler and other critics complain that legislative efforts have had mixed results, especially when, in their estimation, state supreme courts overturn tort-reform legislation like Lucy in *Peanuts* pulling the football back just as Charlie Brown tries to kick it.

These critics are targeting rules of law they believe are anachronistic and arbitrary, serving to keep useful information from juries. They say jurors should decide fair compensation based on all the relevant evidence. The list may expand, but for now they’re going after:

- Collateral source rules barring the jury from learning the plaintiff received compensation from sources other than the defendant and from reducing damage awards based on the information.

- Rules that bar jurors from learning the impact of joint and several liability, a rule in some states that permits a plaintiff to recover all damages from a single negligent defendant no matter the defendant’s share of liability. These rules don’t allow jurors to consider this information when deciding whether to apportion blame to a defendant that is minimally at fault.

- Bars on allowing jurors to consider a plaintiff’s failure to wear a seat belt in auto accident cases and to lower damages or assess contributory negligence as a result.

- In product defect cases, bans on allowing jurors to consider that the plaintiff was under the influence of drugs or alcohol, speeding, or asleep at the wheel. These rules bar jurors from using this information to determine comparative fault.

- Bars on disclosing to jurors considering the source of an injury in toxic tort cases that the plaintiff was exposed to the hazardous material from sources other than the defendant, such as other defendants that previously settled.

This is yet another front in the battle over tort law. On one side are those who believe tort law’s expansion in helping make injured people whole is needed to hold greedy corporations accountable for their deeds and for their attempts to keep doing those deeds. On the other side are those who believe tort law today encourages plaintiffs lawyers to sue indiscriminately, playing the odds and turning courthouses into casinos.

Says one critic of this new wrinkle in the tort-reform



movement, Richard W. Wright, a professor at the Chicago-Kent College of Law: “They’re frustrated that their arguments are not seen as valid by legislatures and courts. So now they’re going after juries. They’re asking courts to ‘let juries hear this,’ but they’re really saying, ‘Let’s let juries change common law.’”

“Of course, it’s very easy to flimflam a jury on something complicated like joint/several liability or the collateral source rule.”

Wright has served as an adviser for the apportionment-of-liability section of the American Law Institute’s Restatement of the Law (Third) on Torts. Joining Wright in his criticism of the effort to achieve tort reform through common law, at least in part, is the libertarian tort scholar Michael I. Krauss, who teaches at the George Mason University School of Law in Arlington, Va.

“I agree with a lot of what they have to say about the problems,” Krauss says. “But I disagree with their strategy. They’re asking juries to hijack the law. They want to allow a jury to nullify the law, in a way, by giving them certain information.

“The judge is supposed to decide the law, and a jury decides the facts. So my fear in these matters is that they’ll be throwing common law out with the bathwater.”

DaimlerChrysler’s Hantler, of course, disagrees.

STEVEN HANTLER

We’re going to reward “lawyers who go out there and correct these discriminatory rules of evidence.”

"There should be fairness and predictability, and we're going to incentivize, or reward, lawyers who go out there and correct these discriminatory rules of evidence," he says. "We want lawyers competing with one another to prove to this client that they'll follow the client's instructions."

The organized effort to do that sprang from a talk Hantler gave two years ago at a gathering of the National Association of Manufacturers. One audience member, noted tort-reform lawyer-lobbyist Victor E. Schwartz, approached him afterward.

Schwartz recommended Hantler do something he does a lot himself: Write a law review article about the issue. Hantler went on to do just that, co-authoring it with Schwartz and two lawyers who work with him in the Washington, D.C., office of Shook, Hardy & Bacon.

The article, "Moving Toward the Fully Informed Jury," was published in the *Georgetown Journal of Law & Public Policy*, Winter 2005. The journal's Web site notes that "the bulk of our content will either advocate or critique conservative, libertarian or natural law positions."

The tort-reform-in-the-courts effort is being run through the American Justice Partnership, launched in January 2005 by the National Association of Manufacturers to push for legal reform favorable to business. The law review article is available at the group's Web site at www.americanjusticepartnership.org.

Copies of the article went out with other materials to more than 500 general counsel around the country on Jan. 20, with a cover letter from Theodore Olson, the former solicitor general. Olson is in the Washington, D.C., office of Gibson, Dunn & Crutcher, which handles much of DaimlerChrysler's appellate work.

"We hope you will join a growing number of companies that are institutionalizing this litigation strategy," Olson wrote. "If enough companies join this initiative, it will take hold in the courts."

To the chagrin of plaintiffs lawyers, that may come to pass. Tort reformers have been on a roll in recent years, especially with the help of the Bush administration.

Back when he was running for governor of Texas in 1994, George W. Bush adopted a tort-reform theme sug-

gested by adviser Karl Rove. Bush took up the same sword in his presidential run, especially for his second term. On the stump, he went after John Kerry's choice of John Edwards as his running mate: "You have to choose. My opponent made a choice, and he put a personal-injury lawyer on the ticket."

REFORM GAINS MOMENTUM

SINCE GAINING A REPUBLICAN LOCK ON BOTH HOUSES OF Congress in 2002, Bush has been true to his word. While sweeping tort-reform legislation on the federal level has always seemed beyond the pale—tort law is considered primarily the province of the states—he stunned plaintiffs lawyers with enactment of the Class Action Fairness Act of 2005. The legislation moves many class actions from state courts into federal ones, limiting both their scope and the ability to file them in jurisdictions friendly to plaintiffs.

And during Bush's term, federal agencies have begun inserting clauses into rules to pre-empt certain state laws used by consumers for legal recourse, provided that a manufacturer complies with new regulations.

For example, the Food and Drug Administration recently added wording in a regulation that will limit lawsuits against pharmaceutical companies that comply with a new drug-labeling rule. The Consumer Product Safety Commission recently did something similar to help mattress manufacturers that face lawsuits for mattress fires. The National Highway Traffic Safety Administration did the same in a proposal regarding automobile roof-strength standards in rollover cases.

The National Conference of State Legislatures has complained about these measures. For example, in a Jan. 13 letter to Michael O. Leavitt, secretary of the Department of Health and Human Services, the conference described the drug label rule change as "a thinly veiled attempt on the part of FDA to confer upon itself authority it does not have by statute and does not have by way of judicial rulings."

And several Democratic leaders in Congress complained, too. "It's a typical abuse by the Bush administration to take a regulation to improve the information that doctors and patients receive about prescription drugs and turn it into a protection against liability for the drug industry," Sen. Edward Kennedy, D-Mass., said in a prepared statement.

To some others, the new federal measures simply provide consistency and predictability for companies marketing nationwide.

"The irony is that the Democrats who pushed for the expanded federal regulatory state are now defending states' rights, while the Republicans who fought most regulations now see how to use them to defuse the torts crisis," says Krauss, the George Mason law professor who likes tort reform but doesn't like the idea of doing it through jury nullification.

Critics may complain that turnabout isn't necessarily fair play, but in the move to change the common law, Hantler, Schwartz, et al., say they're simply adopting the playbook used by plaintiffs lawyers. After years of complaining about "regulation through litigation," the corporations want to try it themselves.

ABA TORT POLICY

The ABA House of Delegates has approved several recommendations regarding tort liability. Adopted in 1987, they include:

- The doctrine of joint and several liability should be modified to recognize that defendants whose responsibility is significantly less than that of other defendants should be liable only for their equitable share of the plaintiff's economic loss.
- There should be no ceilings on pain and suffering damages. Instead, trial and appellate courts should use their powers to modify inadequate or excessive verdicts.
- Punitive damages should not be abolished, but courts should give them close scrutiny. The scope of such awards should also be narrowed, partly through a standard of proof that requires "clear and convincing" evidence.

Schwartz, co-author of the definitive casebook *Prosser, Wade and Schwartz's Torts*, points to an obscure case from the Hawaii Supreme Court in 1986 as an example of how to chip away at some of the common law and leverage the result. The issue concerned joint and several liability.

A passenger in a drunken driving accident sued the driver, who crashed into a utility pole, but also sued the city of Honolulu for failing to maintain a safe roadway. The trial judge refused to allow an instruction to the jury that, if it found the city so much as 1 percent liable, it could end

thing that would effect important changes at the trial level without a whole lot of what would pass for substantive reform.”

Then again, some tort scholars disagree with the premises and goals of such efforts. “The underlying problem of that argument and this entire movement is it’s trying to restore a vision that tort law is only about correcting wrongs between individuals,” says Jay M. Feinman, a professor at Rutgers University School of Law-Camden. Tort law, he explains, exists to deter dangerous conduct and provide incentives for reasonable conduct.

“So in those terms it is a system,” says Feinman, author of *Un-Making Law: The Conservative Campaign to Roll Back the Common Law*. He argues the law of contracts, property and personal injury evolved during the 20th century to provide needed protections for consumers, workers and the vulnerable.

“This movement is an attempt to go back to the 19th century notion that nobody is liable for anything,” Feinman says. “We thought it was dead and buried.”

Some question just how fully informed the corporations really want juries to be. The Hantler-Schwartz playbook doesn’t bring up the possibility of telling jurors:

- About caps on noneconomic damages, which probably would influence their factoring in judgments.

- That defendants are insured, which might ease jurors’ concerns about hurting a company.

- That several proportionate liability might let a defendant get by with paying only a

small part of a judgment despite the fact that the injury would not have occurred but for that defendant’s conduct.

“Do the defendants really want a fully informed jury?” asks Wright, the Chicago-Kent professor. Wright and others fear this movement will gain traction because it is easier to distill complex concepts into advocacy messages than to explain them fully.

“Intellectually, there is good basis for arguing that blindfolds for juries are troubling, but you need empirical data before you start making a lot of changes,” says Stephan Landsman, a professor at DePaul University College of Law in Chicago who specializes in the civil jury system as well as torts.

On the defense side of the equation, the empirical data that gets noticed is in the lawsuits. “This will pick up steam after we get a couple of successes,” Hantler says. “That may take three to five years working through appellate courts.”

He says he’ll be sending updates to as many general counsel as possible, letting them know which lawyers are getting the changes they want and suggesting they be given work by other companies.

“We want to incentivize it,” Hantler says. “The more of this they get done, the more work they get.” ■



up paying all of the judgment.

The city was found 1 percent liable, but the Hawaii Supreme Court overturned that ruling and remanded the case. A second jury, hearing the explanation of the consequences should the city have any liability, let Honolulu off the hook. *Kaao v. Davis*, 719 P.2d 387.

Schwartz believes such a ruling can be used in similar challenges elsewhere. The law review article he co-wrote with Hantler points out that it was cited and took hold in rulings in a few other states. About two-thirds of the states have abolished joint and several liability or restricted it, with most going to comparative or proportionate liability. Those that haven’t likely will be targeted by defense lawyers following the Hantler-Schwartz playbook.

“The lawyer who made that motion and appeal in Hawaii probably never realized how big this could be,” Schwartz says. But he has persuaded at least one prominent scholar.

“I think this is a ‘sauce for the goose, sauce for the gander’ sort of thing,” says James A. Henderson Jr., a professor at Cornell University Law School and a co-reporter of the products liability section of the Restatement of the Law (Third) on Torts. “It will certainly be interesting to see how the courts react. This sounds like the kind of

RICHARD WRIGHT

Tort-reform advocates “are frustrated that their arguments are not seen as valid by legislatures and courts.”

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