Chapter 6

Web Note 6.1 (p. 198)

There is some recent evidence of a discernible trend away from strict products liability—what some authors have described as a “quiet revolution” in products liability. On our website (and briefly in the next chapter) we discuss this evidence.

In this note we summarize two articles that use empirical evidence on how courts decided cases in the late 1980s and early 1990s to try to defuse the fear that products liability had become inefficient.


In this article, Henderson and Eisenberg argue that there is a “quiet revolution” regarding the products liability arena. This quiet revolution is a significant turn in the direction of judicial decisions 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.

The main goal of the paper is to show that changes in judicial decision-making are occurring and that the current trends favor defendants. According to Henderson and Eisenberg, their study shows that since the early to mid-1980s policymakers and industry leaders have operating from questionable, if not false, premises. A trend of doctrinal change favoring defendants – showed by an increasing percentage of published opinions, both routine and groundbreaking, favoring defendants. Also, at the trial court level the plaintiffs’ likelihood of success in product cases has been decreasing. They also argue that using national empirical studies of both appellate and trial cases.
court activity to support the assertion of changing legal doctrine (they study the legal change itself, it means that the quiet revolution is, in fact, taking place).

The body of case law from the mid-1960s to the mid-1980s reflects an attitude, widely shared among judges, that our products liability system plays an important social insurance role in making America a safer, better place in which to live and work.

Sometime in the early to mid-1980s courts began to publish decisions that, taken in aggregate, clearly signal of significant change in the direction of judicial lawmaking in products liability. Recently judicial opinions in products liability cases depart from the prior trends because the courts exhibit a reluctance to expand established products doctrine to benefit plaintiffs. An example is a decision by the Ohio Supreme Court in State Farm Fire & Casualty Co. v. Chrysler Corp. The Court held that “it is the plaintiff’s burden to respond with evidence which will permit a jury to go beyond speculation and render a judgment in accordance with law. Manufactures are not insurers of their products.” Occurred several similar decision imposing tougher standards on plaintiffs’ circumstantial proof of manufacturing defects. We can also notice changes in cases of liability for harm caused by prescription drugs, and cases of successor liability, several courts had moved toward pro-plaintiff approaches. In addition, there is a shift in judicial attitude regarding other areas such as product-related workplace injuries. Henderson and Eisenberg argue that courts continue to break new ground and discard doctrine in ways that favor plaintiffs, but they are increasingly apt to change the law to preclude liability rather than to promote it. In conclusion, since at least the mid-1980s, published opinions have moved towards benefiting defendant over plaintiffs, have increasingly demanded dismissal of plaintiffs’ claims as a matter of law, and have tended increasingly to break new legal ground for defendants.

Henderson and Eisenberg present a systematic and quantitative look at what has occurred in published, predominantly appellate, products liability decisions in recent years. The analysis relies on data collected by one of the authors in the course of a two-year search through thousands of published court decisions preparatory to writing a products liability treatise. They argue that this analysis is called “quasi-empirical” because the data are arranged and classified according to admittedly subjective standards.

Also, Henderson and Eisenberg present an empirical study of recent products liability decisions at the trial court level. Their hypothesis regarding legal change finds strong support. They also show, relying on data gathered by the Administrative Office of the United States Courts, that several hypothesis derived from their premise of legal change are borne out in products liability cases brought in federal district courts from 1979 through 1987. Products liability defendants have enjoyed increasingly favorable results during this time period in ways that are consistent with the view that judicial decision making trends have turned in defendants’ favor. Thus, the combination of published opinions self-consciously designed to assist products defendants, accompanied by a decline in plaintiff success rates, is powerful evidence of a changing legal climate. Also the plaintiffs’ declining expected returns shows the change in this area in defendants’ favor.

In addition, Henderson and Eisenberg argue that the legal change identified by them generates two parallel effects: doctrine at once has become not only less favorable to plaintiffs but also less clear in the areas still open to claims. So, they expect not only decreased filings but also an increase in the trial rate of products cases that are filed.

How can this persistence of a pro-plaintiff bias be explained in the face of the generally pro-defendant trends, and how can observers believed that judge-made products law was heading in the opposite direction?
In conclusion, Henderson and Eisenberg argue that accepting the existence of the quiet revolution is important to question whether the change is for the better, and whether reform statutes are needed any longer now that judicial change has occurred. Then, they suggest that legislators should consider change more inclined to observe the reality of the legal products climate in which they operate.

In this second article by the same authors, Professors Eisenberg and Henderson attempt to respond the critiques of their conclusions in the previous article.


This article substantially augments Eisenberg and Henderson’s earlier sketch of national products liability trends in the 1980s. The additional data confirm the earlier findings of declining plaintiff success rates, and evidence of recent declining real-dollar awards. Combining success rate trends and award trends shows products liability in decline since 1985. They also examine the sources of defendants’ increasing success. A widespread, independent shift in judicial attitudes continues to be the likely major source of the declining the success rate of products cases. However, legislative reforms appear to have contributed as well.

The *Quiet Revolution* article was against the idea that product liability was booming for plaintiffs in all respects. Eisenberg and Henderson argue that in light of the declining trends they reported for plaintiffs’ successes, the accepting wisdom of a continuing pro-plaintiff products liability boom had to be reconsidered, if not rejected. Then, they address two issues: first, whether we in fact observed a decline in plaintiffs’ success in court; second, whether a steady decline in plaintiffs’ success in court necessarily indicates a decline overall in how well products claimants are doing in and out of court.

The *Quiet Revolution*’s main goal was to establish an important counter-intuitive trend in products liability law. To do so, it was essential not only to establish the trend but also to ask whether the trend was merely a reflection of larger developments unrelated to products liability law. Thus, the authors offered comparisons of the products trend they detected with trends in other areas of law. They also eliminated movement across areas of law as the dominant source of declining products liability plaintiffs’ success.

In this article, Eisenberg and Henderson show a wider range of products case measures, and discuss trends in national success and filing rates. This provides the basic data and interpretation suggesting their implications for settled cases and for disputes that never reach court. Also, they examine the size of the products awards, including means, medians, expected returns, and the sums of awards to buttress their earlier conclusions. In addition, they explore the possible sources of the national success rate and awards trends.

Finally, Eisenberg and Henderson argue that their data supply the most reliable evidence of a truly national pro-defendant shift in trial and pretrial awards, expected returns, and the sums of awards in products litigation.