

STATUS AND TRENDS IN STATE PRODUCT LIABILITY LAW: COST-CONTAINMENT EFFORTS, ALTERNATIVE DISPUTE RESOLUTION, EXPERT TESTIMONY AND CONTINGENT FEES

INTRODUCTION

Because of the increased number and complexity of modern product liability cases, legislators have been forced to seek ways to reduce the number of cases that go to trial. Limiting the use of expert witnesses by parties, capping attorneys fees, and providing alternative methods to traditional litigation are ways in which U.S. jurisdictions have attempted to deal with this problem.

This section will look at the burgeoning area of alternative dispute resolution and how states are using new means to circumvent old problems with traditional tort litigation. It then will discuss recent state experimentation aimed at streamlining expert testimony in an attempt to save time and cut adjudication costs. Finally, the section will look at state efforts to reduce product liability action costs by limiting contingent fee recovery.

THE EXPANDING ROLE OF ALTERNATIVE DISPUTE RESOLUTION

In order to deal with the combination of a larger number of cases being litigated in the court system and the high cost of such litigation, a variety of alternatives to litigation have been proposed and enacted. These alternatives include arbitration, mediation, court-annexed arbitration, summary jury trial and private adjudication.

Arbitration

Arbitration is a contractual process by which parties to a controversy or dispute refer the dispute to an impartial third person, selected by them, who will make a determination in the case based on the evidence and arguments submitted by the parties.¹ The decision of this third person is final and binding upon the parties.² An arbitration award may be vacated or modified, however, and the decision may be changed or appealed through an adjudicatory process.³

The cost advantage to arbitration is that, in most cases, decisions reached through the arbitration process are final. An arbitration hearing

1. G. WILNER, *DOMKE ON COMMERCIAL ARBITRATION* § 1:01 (rev. ed. 1984 & Supp. 1986). See generally Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982) (an annual report on the state of the judiciary, given by Chief Justice Burger to the 1982 midyear meeting of the American Bar Association).

2. See G. WILNER, *supra* note 1, at § 1:01.

3. See generally *id.*

thus acts as an alternative to trial. A disadvantage to arbitration is the procedural requirements, which must be agreed upon by the parties.

The Uniform Arbitration Act⁴ has been adopted completely or with modifications by a majority of states⁵ and integrated, with some changes, into the statutes of other jurisdictions.⁶ A number of these statutes specifically exclude certain subjects, such as tort, insurance, sales and consumer claims, from their scope of application.⁷

Mediation

Mediation involves a neutral third party who is authorized to meet with the parties and their representatives.⁸ The mediator's role is to encourage the parties to analyze and discuss issues, exchange views, and resolve their problems without going to trial.⁹ The mediator has no authority to make decisions for the parties.¹⁰ In contrast to arbitration, which is contractual, mediation is consensual.¹¹ The emphasis in arbitration is on persuading the arbitrator to decide in one's favor, whereas the emphasis in mediation is on coming to an agreement between the parties.

When arbitration and mediation are not binding, they may not be a cost-efficient alternative to litigation. If the parties do not enter the process with a sincere desire to come to an agreement, however, arbitration or mediation merely adds another step and additional cost to the litigation.

-
4. UNIFORM ARBITRATION ACT, 7 U.L.A. 1 (1955).
 5. See ALASKA STAT. § 09.43.010 (Supp. 1983); ARIZ. REV. STAT. ANN. § 12-1501 (Supp. 1982); ARK. STAT. ANN. § 34-511 (Supp. 1985); COLO. REV. STAT. § 13-22-201 (Supp. 1986); DEL. CODE ANN. tit. 10, § 5701 (1975); D.C. CODE ANN. § 16-4301 (Supp. 1979); HAW. REV. STAT. § 658-1 (1985); IDAHO CODE § 7-901 (1979); ILL. REV. STAT. ch. 10, para. 101 (1975); IND. CODE ANN. § 34-4-2-1 (Burns 1986); IOWA CODE ANN. § 679A.1 (West Supp. 1987); KAN. STAT. ANN. § 5-401 (1982); LA. REV. STAT. ANN. § 9:4201 (West 1983); ME. REV. STAT. ANN. tit. 14, § 5927 (1980). MD. CTS. & JUD. PROC. CODE ANN. § 3-201 (1984); MASS. ANN. LAWS ch. 251, § 1 (1980); MINN. STAT. ANN. § 572.08 (West Supp. 1987); MO. ANN. STAT. § 435.350 (Vernon Supp. 1987); NEV. REV. STAT. ANN. § 38.015 (Supp. 1985); N.M. STAT. ANN. § 44-7-1 (1978); N.C. GEN. STAT. § 1-567.1 (1983); OKLA. STAT. ANN. tit. 15, § 801 (West Supp. 1987); PA. STAT. ANN. tit. 42, § 7301 (Purdon 1982); S.C. CODE ANN. § 15-48-10 (Law. Co-op. Supp. 1986); S.D. CODIFIED LAWS ANN. § 21-25A-1 (1979); TENN. CODE ANN. § 29-5-302 (Supp. 1986); TEX. REV. CIV. STAT. ANN. art. 224 (Vernon Supp. 1987); VA. CODE ANN. § 8.01-581.01 (Supp. 1986); WYO. STAT. § 1-36-101 (1986).
 6. See CAL. CIV. PROC. CODE § 1280 (West 1982); CONN. GEN. STAT. ANN. § 52-408 (West 1960); FLA. STAT. ANN. § 682.01 (West Supp. 1987); MICH. COMP. LAWS ANN. § 600.5001 (West 1987); N.H. REV. STAT. ANN. § 542:1 (1974); N.J. STAT. ANN. § 2A:24-1 (West 1952); N.Y. CIV. PRAC. L. & R. 7501 (1980); OHIO REV. CODE ANN. § 2711.01 (Anderson 1981); OR. REV. STAT. § 33.210 (1983); R.I. GEN. LAWS § 10-3-1 (1985); UTAH CODE ANN. § 78-31-1 (1977); WASH. REV. CODE ANN. § 7.04.010 (1961); WIS. STAT. ANN. § 788.01 (West 1981); P.R. LAWS ANN. tit. 32, § 3201 (Supp. 1985).
 7. See *supra* notes 5-6 and accompanying text.
 8. See Coulson, *Alternative Dispute Resolution*, TRIAL, Oct. 1985, at 21, 21-22; Bedikian, *Overview of Alternative Dispute Resolution Techniques*, 65 MICH. B.J. 876 (1986) (discussing the major methods of alternative dispute resolution, their implementation and some of their advantages and disadvantages).
 9. See Coulson, *supra* note 8, at 22.
 10. See *id.*
 11. See Bedikian, *supra* note 8, at 879-80.

Court-annexed Arbitration

Court-annexed arbitration involves the court's mandating, administering and supervising an arbitration process for civil cases that are at or below an established dollar amount.¹² The proceedings resemble arbitration, though they are held before a court-appointed body.¹³ Unlike arbitration, the awards are advisory in nature, although disincentives are built into the system to encourage acceptance of the award.¹⁴ The cost efficiency of such a system depends on the number of cases that are resolved by the court-annexed arbitration and do not go to trial.¹⁵

Summary Jury Trial

The summary jury trial is the creation of the Honorable Thomas J. Lambros, U.S. District Judge for the Northern District of Ohio.¹⁶ It involves a non-binding jury trial, generally lasting one day.¹⁷ The introduction of evidence in such proceedings is limited, and witnesses are excluded from the proceeding.¹⁸ This format has been used in certain federal district courts on an experimental basis in product liability and personal injury cases, as well as in other areas of dispute.¹⁹ This system allows the advocates to present their cases to a six-member jury and illustrates some of the realities of trial to the parties.²⁰ Though the jury verdict is not binding, it may encourage settlement before a full trial is required.²¹

12. *See id.* at 880. Jurisdictional amounts vary from a low of \$3,000 in Alaska to \$50,000 in Minnesota and New Hampshire state courts. Some federal districts have even higher jurisdictional limits. Michigan has no jurisdictional limits.

13. *See id.* at 880.

14. The disincentives may include assignment of arbitrator's fees (Arizona, Nevada and Pennsylvania), or assignment of the costs of arbitration and/or trial costs if the trial results are not more favorable to the party requesting trial (California, Michigan, New Jersey, Ohio and Washington). *Id.* at 880-81.

15. "If a large number of cases on the arbitration track go to trial, there is no substantial reduction in the courts' caseload, and, correspondingly, no cost savings to justify arbitration." *Id.* at 881.

16. *See* Brenneman & Wesoloski, *Blueprint for a Summary Jury Trial*, 65 MICH. B.J. 888, 888-91 (1986).

17. *See id.* at 888.

18. *See* Coulson, *supra* note 8, at 21, 23.

19. Other areas of dispute using the summary jury trial method are employment discrimination and civil rights violations, and contract and securities fraud cases. *See* Brenneman & Wesoloski, *supra* note 16, at 888.

20. To ensure that this procedure fulfills its role in the settlement procedure, certain steps should be taken: (1) the trial should be conducted with observance of certain formalities; (2) the clients must attend the trial; and (3) after the jury's return of its advisory verdict, the members of the jury should be made available to discuss the evidence and merits of the case with the respective attorneys and parties. *See* Readey, *Alternative Dispute Resolution—A Trial Lawyer's Primer*, 53 INS. COUNS. J. 300, 311 (1986).

21. *See id.* The summary jury trial may contribute to the settlement of a case, because it may offer the parties a realistic appraisal of the merits and value of their case, by receiving the jury's advisory verdict. The verdict is based solely upon the evidence presented. This may stimulate serious and realistic settlement negotiations.

Private Adjudication

The private adjudication system provides an alternative to the public court system.²² The new forum will be presided over and decided by a neutral party, often a retired judge.²³ The system, sometimes referred to as "rent-a-judge," has been codified in several states.²⁴

Private adjudication offers advantages over a public court, such as less public scrutiny, convenience to the parties in arranging the hearing, ability to alter the rules of procedure, discovery and evidence, and promptness of decision.²⁵ Potential problem areas, such as rules and finality of the verdict, may be resolved in a binding agreement between the parties and the judge.²⁶

TAKING CONTROL OF EXPERT WITNESSES

There were two traditional requirements for admissibility of expert opinion at common law.²⁷ The expertise had to encompass matters sufficiently complex to be beyond the knowledge of the ordinary lay person,²⁸ and the expertise could not be so novel or speculative that it was not generally accepted within its recognized scientific or professional sphere.²⁹ Modern codifications of the use of expert witness testimony have relaxed these limitations on the scope of expert testimony.³⁰

Federal court standards for the use of expert opinion testimony are found in the Federal Rules of Evidence³¹ and in the Federal Rules of Civil Procedure.³² Many states have adopted these rules, or similar guidelines, to assist the parties involved in dealing with expert testimony.³³ Such guidelines are necessary, because of the increased use of expert witnesses at trial, and the potential importance of their testimony in today's complex and highly technical product liability litigation.

Federal Rules of Evidence Jurisdictions

The Federal Rules of Evidence allow testimony by a witness qualified as an expert if his or her knowledge will assist the trier of facts to

22. *See id.* at 309.

23. *See id.* at 309.

24. *Id.* at 303 n.20. *See, e.g.,* Cal. Civ. Proc. Code §§ 638-45 (West Supp. 1987).

25. *Id.* at 309.

26. *Id.* at 309, 310.

27. Rossi, *Modern Evidence and the Expert Witness*, LITIGATION, Fall 1985, at 19.

28. *Id.*

29. *Id.*

30. *Id.*; *see also* Pratt, *A Judicial Perspective on Opinion Evidence*, 39 WASH. & LEE L. REV. 313, 316-19 (1982) (focusing on the practical aspects of opinion evidence under Article VII of the Federal Rules of Evidence).

31. FED. R. EVID. 702-706.

32. Rule 16 provides the court discretion to schedule a pre-trial conference to consider certain procedural matters, including the limitation of the number of expert witnesses. FED. R. CIV. P. 16(a)(4). Rule 26 describes the general principles governing discovery and limits discovery of the opposing party's expert witnesses and the expected subject matter of their testimony to witnesses whom that party expects to call at trial. FED. R. CIV. P. 26(b)(4)(A)(1).

33. *See* Rossi, *supra* note 27, at 18.

understand the evidence or to determine a fact in issue.³⁴ Twenty-five³⁵ U.S. jurisdictions³⁶ have adopted Rule 702 verbatim, and six additional jurisdictions have adopted substantially similar rules.³⁷

Federal Rule 703 lists the sources from which facts or data upon which expert opinions are based may be derived.³⁸ The facts or data need not be admissible in evidence if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject"³⁹

Rule 704 allows opinion or inference testimony that embraces an ultimate issue to be decided by the trier of fact, if the testimony is otherwise admissible.⁴⁰ Rule 705 allows an expert to testify in terms of

34. FED. R. EVID. 702. The Advisory Committee's Notes to Rule 702 indicate that it is permissible for the expert not only to give a dissertation or exposition of principles relevant to the case, but the expert may also suggest the inference drawn from applying his or her specialized knowledge to the facts. The scope of Rule 702 encompasses not only experts in the strictest sense of the word, such as physicians or engineers, but also "skilled" witnesses, such as a landowner testifying on land values. See generally 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 702 (1981 & Supp. 1986).

35. The rules of the District of Columbia and Puerto Rico are evaluated along with the rules of the 50 states.

36. See ARIZ. R. EVID. 702; ARK. REV. STAT. ANN. § 28-1001, R. 702 (1979); COLO. R. EVID. 702; DEL. UNIF. R. EVID., R. 702; IDAHO R. EVID. 702; IOWA R. EVID. 702; ME. REV. STAT. ANN., ME. R. EVID., R. 702 (1978); MINN. R. EVID. 702; MISS. R. EVID. 702; MONT. R. EVID. 702; NEB. REV. STAT. § 27-702 (1985); N.H. R. EVID. 702; N.M. STAT. ANN. § 11-702 (1986); N.D. R. EVID. 703; OHIO R. EVID. 702; OKLA. STAT. ANN. tit. 12, § 2702 (West 1980); OR. REV. STAT. § 40-410 (1985); S.D. COMP. LAWS ANN. § 19-15-2 (1979); TEX. R. EVID., R. 702; UTAH R. EVID. 702; VT. R. EVID. 702; WASH. R. EVID. 702; W. VA. R. EVID. 702; WIS. STAT. ANN. § 907.02 (West 1975); WYO. R. EVID. 702.

37. See FLA. STAT. ANN. § 90.702 (West 1979); HAW. R. EVID. 702; MICH. R. EVID. 702; NEV. REV. STAT. tit. 4, § 50.275 (1985); N.C. R. EVID. 702; P.R. R. EVID., R. 52-55.

38. FED. R. EVID. 703. The three possible sources for such facts or data are opinions based upon first hand observation of the witness, opinions based upon hypothetical questions or upon hearing facts as presented at trial, and opinions based upon data presented to the expert outside of court and by means other than his or her own perception.

39. FED. R. EVID. 703. Twenty-five jurisdictions have adopted Rule 703 without change: ARIZ. R. EVID. 703; ARK. REV. STAT. ANN. § 28-1001, R. 703 (1979); COLO. R. EVID. 703; DEL. UNIF. R. EVID., R. 703; IDAHO R. EVID. 703; ME. REV. STAT. ANN., ME. R. EVID. 703 (1978); MINN. R. EVID. 703; MISS. R. EVID. 703; MONT. R. EVID. 703; NEB. REV. STAT. § 27-703 (1985); NEV. REV. STAT. tit. 4, § 50.285 (1985); N.H. R. EVID. 703; N.M. STAT. ANN. § 11-703 (1986); N.C. R. EVID. 703; N.D. R. EVID. 703; OKLA. STAT. ANN. tit. 12, § 2703 (West 1980); OR. REV. STAT. § 40-415 (1985); S.D. COMP. LAWS ANN. § 19-15-3 (1979); TEX. R. EVID., R. 703; UTAH R. EVID. 703; VT. R. EVID. 703; WASH. R. EVID. 703; W. VA. R. EVID. 703; WIS. STAT. ANN. § 907.03 (West 1975); WYO. R. EVID. 703.86

Five additional jurisdictions have adopted rules similar in nature to Rule 703: HAW. R. EVID. 703; IOWA R. EVID. 703; MICH. R. EVID. 703; FLA. STAT. ANN. § 90.703 (West 1979); P.R. R. EVID. 52-55.

40. FED. R. EVID. 704. This rule abolishes the former tendency to preclude witnesses from expressing opinions upon ultimate issues. Most Federal Rules of Evidence jurisdictions have adopted a pre-1984 version of Rule 704. These jurisdictions include: ARIZ. R. EVID. 704; ARK. REV. STAT. ANN. § 28-1001, R. 704 (1979); COLO. R. EVID. 704; HAW. R. EVID. 704; IOWA R. EVID. 704; ME. REV. STAT. ANN., ME. R. EVID., R. 704 (1978); MICH. R. EVID. 704; MINN. R. EVID. 704; MISS. R. EVID. 704; MONT. R. EVID. 704; NEB. REV. STAT. § 27-704 (1985); NEV. REV. STAT. tit. 4, § 50.295 (1985); N.H. R. EVID. 704; N.M. STAT. ANN. § 11-704 (1986); N.C. R. EVID. 704; N.D. R. EVID. 704; OKLA. STAT. ANN. tit. 12, § 2704 (West 1980); OR. REV. STAT. § 40-420 (1985); TEX. R. EVID. 704; UTAH R. EVID. 704; VT. R. EVID. 704; WASH. R. EVID. 704;

opinion or inference and give reasons therefor without prior disclosure of the facts or data underlying the opinion or inference. The court may require otherwise, and in any event, the expert may be required to disclose the facts or data underlying the opinion on cross-examination.⁴¹

Under Rule 706, the court may appoint expert witnesses of its own selection, as well as any expert witnesses agreed upon by the parties.⁴² Rule 706 also provides guidance concerning compensation of such witnesses. This rule, allowing the option of court-appointed witnesses reflects concern about the use of experts in modern litigation. By permitting the court to appoint its experts, there may be a "sobering effect on the expert witness of a party and upon the person utilizing his services."⁴³ This could, in turn, decrease the need for the court to appoint its own witnesses.⁴⁴ The failure by many states to enact Rule 706, in whole or part, may reflect legislative desire to discourage court appointment of experts.⁴⁵

Expert opinion testimony as codified in the Federal Rules of Evidence is often used in product liability litigation.⁴⁶ Courts generally rule that if

WIS. STAT. ANN. § 907.04 (West 1975); WYO. R. EVID. 704.

Six jurisdictions have adopted similar rules: DEL. UNIF. R. EVID., R. 704; FLA. STAT. ANN. § 90.704 (West 1979); IDAHO R. EVID. 704; N.H. R. EVID. 704; OHIO R. EVID. 704; P.R. R. EVID. 52-55.

The 1984 version of F.R.E. 704 added a subsection that deals with expert witnesses testifying with respect to the mental state of a criminal defendant.

41. FED. R. EVID. 705. Seventeen states have adopted F.R.E. 705 verbatim: ARIZ. R. EVID. 705; ARK. REV. STAT. ANN. § 28-1001, R. 705 (1979); COLO. R. EVID. 705; IOWA R. EVID. 705; MICH. R. EVID. 705; MINN. R. EVID. 705; MISS. R. EVID. 705; MONT. R. EVID. 705; N.H. R. EVID. 705; N.D. R. EVID. 705; OKLA. STAT. ANN. tit. 12, § 2705 (West 1980); OR. REV. STAT. § 40-425 (1985); UTAH R. EVID. 705; VT. R. EVID. 705; WASH. R. EVID. 705; W. VA. R. EVID. 705; WYO. R. EVID. 705. Nine jurisdictions have adopted rules similar to F.R.E. 705: DEL. UNIF. R. EVID., R. 705; FLA. STAT. ANN. § 90.705 (West 1979); ME. REV. STAT. ANN., ME. R. EVID., R. 705 (1978); NEB. REV. STAT. § 27-705 (1985); NEV. REV. STAT. tit. 4, § 50.305 (1985); N.M. STAT. ANN. § 11-705 (1986); TEX. R. EVID. 705; WIS. STAT. ANN. § 907.05 (West 1975); P.R. R. EVID. 52-55.

Several states have rules that differ substantially from the federal rule. *See, e.g.*, HAW. R. EVID. 705; IDAHO R. EVID. 705; N.C. R. EVID. 705; OHIO R. EVID. 705.

42. FED. R. EVID. 706. According to Rule 706, the court, on its own motion or on the motion of any party, may enter an order to show cause why expert witnesses should not be appointed and may request that the parties submit nominations. The rule explains an appointed witness' options and allows for the expert's compensation. This rule also allows the court to authorize disclosure to the jury that the expert is court-appointed. The rule specifically states that it in no way limits the right of parties to call expert witnesses of their own selection.
43. FED. R. EVID. 706 advisory committee's note.
44. *See id.*
45. *See* J. WEINSTEIN & M. BERGER, *supra* note 34, at 706-28 (Supp. 1986). Only Arkansas adopted the 1974 Uniform Rules of Evidence, Rule 706 verbatim: ARK. REV. STAT. ANN. § 28-1001, R. 706 (1979). Five jurisdictions—Colorado, Michigan, Minnesota, Mississippi and Utah—adopted FED. R. EVID. 706 verbatim: COLO. R. EVID. 706; MICH. R. EVID. 706; MINN. R. EVID. 706; MISS. R. EVID. 706; UTAH R. EVID. 706. Sixteen jurisdictions adopted rules similar to the Federal Rule: ARIZ. R. EVID. 706; HAW. R. EVID. 706; IDAHO R. EVID. 706; IOWA R. EVID. 706; ME. REV. STAT. ANN., ME. R. EVID. 706; NEB. REV. STAT. § 27-706 (1985); N.M. STAT. ANN. § 11-706 (1986); N.C. R. EVID. 706; N.D. R. EVID. 706; S.D. COMP. LAWS ANN. § 19-15-2 (1978); VT. R. EVID. 706; WASH. R. EVID. 706; W. VA. R. EVID. 706; WIS. STAT. ANN. § 907.06 (West 1975 & Supp. 1986); WYO. R. EVID. 706; P.R. R. EVID. 52-55.
46. *See, e.g.*, *Dildine v. Clark Equip. Co.*, 282 Ark. 130, 666 S.W.2d 692 (1984), in which the

there exists "some reasonable basis" from which it can be said that a witness has knowledge of a subject beyond that of ordinary persons, his or her evidence shall be admissible as expert testimony.⁴⁷

Federal Rules of Civil Procedure Jurisdictions

Jurisdictions that have not adopted the Federal Rules of Evidence concerning expert witness testimony have taken a variety of approaches to the codification of the use of such testimony.⁴⁸ Many states, including some that use the Federal Rules of Evidence guidelines, follow the guidance of the Federal Rules of Civil Procedure Rule 16, regarding the use of pre-trial conferences to limit the number of expert witnesses at trial,⁴⁹ and Federal Rule 26, pertaining to discovery.⁵⁰ For example, Alabama follows the Federal Rule guidance and has very general laws pertaining to the appearance of expert witnesses⁵¹ and their testimony.⁵² In contrast, California has very detailed provisions for discovery,⁵³ as well as for the appearance of experts and the nature of their testimony.⁵⁴

Supreme Court of Arkansas held that, under Rule 702 and Arkansas case law, a witness who was academically qualified, who professed to have general and working knowledge of agricultural machinery, and who had investigated and performed tests on similar machinery, was qualified as an expert. 666 S.W.2d. at 693, 694. The witness could, therefore, give an opinion in a product liability action against the manufacturer and distributor of a front-end loader that had tipped and thrown its operator. *Id.* at 693, 694. The witness had a Ph.D. degree, a master's degree in machinery design and was chairman of the engineering department at a state university with which he had been associated for nearly 20 years. *Id.* at 693.

For further discussion, see generally Annotation, *Products Liability: Admissibility of Expert or Opinion Evidence that Product is or is not Defective, Dangerous, or Unreasonably Dangerous*, 4 A.L.R. 4th 651 (1981 & Supp. 1986). For a specialized application of the use of experts in product liability cases, see Messina, *The Human Factors Expert in Tort Litigation*, TRIAL, Jan., 1984, at 38.

47. See, e.g., *Dildine v. Clark Equip. Co.*, 282 Ark. 130, 666 S.W.2d at 694 (1984).
48. Georgia has codified the common law approach to expert testimony. This rule has been applied in product liability case law. In *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984), a wrongful death action was brought by the parents of a minor child who died as the result of a fiery blaze after a rear-end automobile collision. The Georgia Court of Appeals affirmed the trial court in allowing into evidence expert testimony concerning the design and placement of the fuel system in the vehicle the child was in at the time of the accident. 391 S.E.2d at 474, 475. The court admitted such opinion evidence on the ultimate issue of negligence because the issue would have been "beyond the ken of average layman," as codified under Georgia law. *Id.* at 475.
49. See, e.g., GA. CODE ANN. § 81A-116(b)(4) (1984); ILL. REV. STAT. ch. 110A, para. 218(a)(4) (1984); KAN. STAT. ANN. § 60-216(5) (1983); MO. REV. STAT. § 510.010(4) (1952); N.Y. CIV. PRAC. LAW § 3036(5)(d) (1974).
50. See, e.g., GA. CODE ANN. § 81A-126(b)(4) (1984); KAN. STAT. ANN. § 60-226(b)(4) (1983); LA. CODE CIV. P. ANN. art. 1425 (West 1984); MO. REV. STAT. § 510.010 (1952); N.Y. CIV. PRAC. LAW § 3101(d)(1) (Supp. 1986); PA. STAT. ANN. tit. 42, § 4003.5(a) (Purdon Supp. 1986). See generally Maurer, *Compelling the Expert Witness: Fairness and Utility Under the Federal Rules of Civil Procedure*, 19 GA. L. REV. 71 (1984) (discussing the F.R.E. approach to the question of judicial compulsion of expert witness testimony at trial).
51. ALA. CODE § 12-21-181 (1975).
52. ALA. CODE § 12-21-160 (1975). Several other states have similar provisions: GA. CODE ANN. § 38-1710 (1981); ILL. REV. STAT. ch. 110A, para. 220(d) (1984); N.J. REV. STAT. ANN. § 2A:84A, Rule 19 (West 1960); VA. CODE § 8.01-401.1 (1982).
53. CAL. CIV. PROC. CODE § 2037-2037.9 (West 1978).
54. For rules dealing with expert testimony, see CAL. EVID. CODE §§ 720-723, 730-733 (1965).

Two areas of special concern in product liability litigation are expert witness qualification and competing expert testimony. Two of the primary policy goals of product liability litigation—compensation of the injured party and deterrence of further misconduct by the defendant—are not served when counsel and the courts allow an unmerited expert opinion into the record.⁵⁵ Court decisions in product liability cases now provide guidelines for attorneys who desire to introduce expert witnesses, in order that the goals of the litigation may be best served.⁵⁶

CUTTING INTO CONTINGENT FEES

The contingent fee system has been hailed because it “makes it possible for anyone in our society to get the best lawyer.”⁵⁷ It has been criticized for being a cause of higher insurance premiums because the lure of contingent fees may encourage attorneys to initiate unjustified litigation and cause juries to inflate judgments in order to adequately compensate victims.⁵⁸

Much of the discussion about rules limiting contingent fees today centers on medical malpractice litigation.⁵⁹ Some states, however, have rules governing contingent fees in all personal injury litigation.⁶⁰ New Jersey imposes a sliding fee scale on attorney fees.⁶¹ This rule is intended

55. See Hoenig, *Drawing the Line on Expert Opinions*, 8 J. PROD. LIAB. 335, 338 (1985).

56. See *id.* at 345.

57. See Note, *Medical Malpractice and Contingency Fee Controls: Is the Prescription Curing the Crisis or Killing the Patient?*, 19 LOYOLA L.A. L. REV. 623 n.10 (1985) (citing Kreindler, *The Contingent Fee: Whose Interests Are Actually Being Served?*, 14 FORUM 406 (1979)). See generally Annotation, *Validity of Statute Establishing Contingent Fee Scale for Attorneys Representing Parties in Medical Malpractice Actions*, 12 A.L.R.4th 23 (1982 & Supp. 1986).

58. See Note, *supra* note 57, at 626.

59. See *id.* at 626 n.20.

60. New York and New Jersey have rules governing contingency fees in all personal injury litigation. See N.Y. Ct. R. § 603.7(e) (McKinney 1986); N.J. Ct. R. 1:21-7 (West 1986). Both of these rules have been held constitutional. A similar sliding scale fee proposed for all personal injury litigation in Florida was held unconstitutional. *In re Florida Bar*, 349 So. 2d 630, 631 n.2 (1977).

See also ARIZ. REV. STAT. ANN. § 12-568 (1982); CAL. BUS. & PROF. CODE § 6146 (West Supp. 1984); DEL. CODE ANN. tit. 18, § 6865 (Supp. 1984); HAW. REV. STAT. § 671-2 (1985) (applies only to medical torts); IDAHO CODE § 39-4213 (1976); ILL. REV. STAT. ch. 110, para. 2-1114 (Supp. 1986) (limited to medical malpractice actions); IOWA CODE ANN. § 147.138 (West Supp. 1987) (limited to medical malpractice actions); KAN. STAT. ANN. § 7-121b (1982) (limited to actions against health care providers); NEB. REV. STAT. § 44-2834 (1978); OR. REV. STAT. § 752.150 (Supp. 1977) (limited to medical, surgical and dental treatment); TENN. CODE ANN. § 29-26-120 (1980) (medical malpractice).

61. New Jersey court rules provide:

In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims, and the client is not a subrogee, an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:

- (1) 33 1/3% on the first \$250,000 recovered;
- (2) 25% on the next \$250,000 recovered;
- (3) 20% on the next \$500,000 recovered; and
- (4) on all amounts recovered in excess of the above by application for reasonable

to fix maximum permissible fees,⁶² although it does not preclude an attorney from charging or collecting a fee below the rule's limit.⁶³

The New York rule provides two "reasonable" fee schedules, either one of which may be elected by attorneys and their clients in personal injury or wrongful death cases.⁶⁴ Schedule A is a sliding fee scale; an attorney who believes in good faith that he or she was inadequately compensated by the amount allowed by Schedule A may request additional compensation through a hearing process.⁶⁵ Schedule B provides for a capped, fixed percentage fee; the contracted-upon fixed percentage awarded to the attorney cannot be appealed.⁶⁶

CONCLUSION

Increasingly complex product liability litigation requires increasingly innovative alternative methods to the traditional jury trial. Alternative dispute resolution methods provide cost-effective ways of resolving disputes and are more efficient than jury trials. The trend is toward increasing experimentation with, and adoption of, these alternative methods. Continued innovation will be necessary, unless more drastic curbs on product liability litigation are enacted.

*Robyn Harmon Marley**

fee in accordance with the provisions of paragraph (f) hereof; and

(5) where the amount recovered is for the benefit of a client who was an infant or incompetent when the contingent fee arrangement was made, the foregoing limits shall apply, except that the fee on any amount recovered by settlement without trial shall not exceed 25%.

N.J. Ct. R. 1:21-7(c). Paragraph (f) explains the procedure an attorney must follow in order to appeal a contingent fee award. *Id.*

62. N.J. Ct. R. 1:21-7(e).

63. *Id.*

64. N.Y. Ct. R. § 603.7(e)1.

65. N.Y. Ct. R. § 603.3.7(e)(2) (i)-(iii).

66. N.Y. Ct. R. § 603.7(e)(2). The fixed percentage fee (not to exceed 33 1/3%) is computed on the net sum recovered after deducting enumerated expenses.

* A.B., Wesleyan College, 1977; A.M., Duke University, 1978; J.D. Candidate, Notre Dame Law School, 1988.