**Products Liability Perspectives**

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**Note From the Editors**

Welcome to the Spring/Summer Edition of PLP. The Editorial Staff had such an outstanding and diverse group of articles that we decided to give them all to you before the summer in order for you to enjoy this double-edition while on vacation.

We’d like to thank this Edition’s contributors, who include both attorneys and experts in their respective fields around the globe.

For the Fall Edition we are considering focusing on one distinct product liability issue, product recalls, and are looking for contributions related to that topic for publication. We are excited about the initial interest in this topic and look forward to receiving articles, case summaries and war stories about your experiences in this area. If you would like to contribute to the Fall Edition, please contact us or one of the regional editors.

We welcome your comments, feedback and suggestions for the next edition.

Dennis Keene & Krsto Mijanovic.

**Use of Computer-Generated Animations and Simulations in the Courtroom**

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Over the last decade, many of America’s courtrooms have become high-tech by embracing computer based audio/visual technologies. Jury boxes have been equipped with monitors, while expert witnesses have been given access to projectors that broadcast video images and graphics of charts and tables.

Computers have introduced the possibility of using computer-generated animations and simulations as courtroom exhibits. In general, an animation becomes a versatile exhibit as compared to a poster board or a scaled mockup. Using an animation, one can help the jury observe an event from different angles. Often, these angles are not seen in a photograph or with a conventional video camera. Parts can be made to be transparent or the animation camera can be placed inside an object or scene to get a better view. Animations also add the dimension of time, unobtainable by otherwise still photographs and/or static data. Unlike scaled mockups, animations constitute robust exhibits that cannot be rearranged or degraded when handled by an opposing party.

**Animation In Accident Reconstruction**

Accident reconstruction is one field of litigation that has benefited significantly from the utilization of animation technology. Animations allow the viewer...
to “see” the accident and/or how injuries happened. Animations are used to help visualize accident events as governed by the laws of physics, which are often too complex to be effectively explained using traditional techniques. Animations can also be used to show how certain conclusions were reached. For example, animating the alignment of damage patterns of two vehicles can show their overlap and their angle of impact.

“Animation can be a double-edged sword. When used ethically, it can explain complex physical laws and make difficult concepts much easier to understand.”

3-D animations of a scene and the dynamics of the collision can help the jury to visualize both the physical evidence as well as the events that led up to the accident. The jury can see the events from different angles, and also see the events from the vantage points of the drivers and of the witnesses. For example, in the case of a “T-bone” accident, what the driver could or should have seen can be in dispute. Reenacting the accident to determine what the driver could see is not possible without creating another accident and/or additional injuries. While explaining the effect of a vision obstruction such as a windshield pillar is difficult, a 3-D animation of a driver’s view can easily and effectively demonstrate this phenomenon.

There are a number of computer software programs that perform calculations derived from the laws of physics in order to reconstruct motions and impacts of vehicles. These software programs often have animation capabilities as well. The animations produced by such programs are referred to as “simulations,” distinguishing them from “demonstrations.” As with any new technology, the issue of admissibility of an animation is an evolving matter, as discussed later.

Animations can effectively demonstrate evidence, opinions and concepts to the jury and the court. Examples of this are:

- Plan view (overhead view) of the physical evidence and events
- Vehicle trajectory analysis
- Sequences of events
- Timing of events
- Matching evidence of impact between striking vehicles and other objects
- Aligning the vehicle to physical evidence on the road, sidewalk, ground, and other objects
- Aligning occupant injury and occupant contact evidence found within the vehicle interior
- Corroborating or disputing testimony
- Line of sight, field of view and visibility
- Showing events from multiple vantage points
- Demonstrating physical laws, principles and concepts necessary for understanding more complex issues
- Occupant kinematics
- Showing the components of a product
- Demonstrating how a product functions or is assembled
- Demonstrating the mechanism of an injury or injuries
- Graphical data vs. time

Credibility and Admissibility of Animations

Animations are frequently presented to a jury in two different ways, as a “reconstruction” or as a “demonstration.”

A reconstruction, sometimes termed a “simulation,” is subject to particularly high standards for admissibility. As a reconstruction, the animation is supposed to be “substantially similar to the subject accident.” This opens large areas for the opposing counsel to attack the input data and scientific validity of the animation or reconstruction program. Citing of a single article critical of the computer program could be sufficient to get the program and the animation thrown out. To counter this, the expert must prove why the program is valid and why the article is either invalid or irrelevant to the issues in dispute.

An animation used to demonstrate expert’s opinions or to demonstrate physical principles can be admitted as “demonstrative” evidence. The jury gets to see it, but it does not go into the jury room. This can be either an advantage or a disadvantage depending on the attorney’s trial strategy. As a demonstrative exhibit, the jury gets the intended message, but cannot study the animation in the jury room.

An expert witness can also use demonstrative animation to show the jury how he or she arrived at the stated opinions through a step-by-step display of scientific principles.

Animation technology does not reduce the need for a qualified expert witness. Rather, it enhances the expert’s ability to demonstrate the relationships between the laws of physics and the opinions and evidentiary facts of an accident. Animation technology has made it easier to dispute the inaccurate opinions of experts who mainly rely on their power of persuasion and personal charisma, as opposed to utilizing sound science.

Animation can be a double-edged sword. When used ethically, it can explain complex physical laws and make difficult concepts much easier to understand. However, if an opposing expert uses an animation to create a convincing “cartoon,” which is not based on science, it can be very misleading to the jury. The adage “seeing is believing” can confuse the facts when a believable but inaccurate cartoon is introduced. The good news is that the digital record of an animation exists and can be used to prove that the physical laws are inconsistent with the events depicted in a cartoon. This is where retaining a qualified expert can greatly aid counsel in getting the animation thrown out or rebutted.

An opposing counsel may also choose to criticize an animation in an inaccurate, but effective way. This can cast doubt over the admissibility of an otherwise valid reconstruction. Therefore, it is essential that good communication exist between the attorney and the expert before trial. The attorney needs to be sufficiently aware of the issues and the science involved and needs to be prepared to present the right information during arguments on admissibility and to ask the right questions of the opposing expert(s) during trial.

In some courts, the expert can rely on information not formally admitted into evidence in preparing the animation. In other courts, however, the attorney needs to make sure all of the evidence upon which the animation is based is introduced into evidence before the animation can be used. It is important to know and understand the rules applicable in the jurisdiction the case is being tried.

Building An Animation

In addition to expertise and adequate computer software, creating an effective and scientifically credible animation involves the
following:

- Awareness of what input data is needed for building an effective animation
- Knowledge of realistic motions occurring as a result of vehicle collisions
- Close and frequent interaction between the reconstructionist and the animator

The list above is meant to emphasize a point: A science-based and effective animation is a product of close interaction between the reconstructionist and the animator. The reconstructionist should have sufficient knowledge of the animation process to properly direct the animator. Often, this will require the reconstructionist to determine more about the accident than in a typical reconstruction to ensure the animation is accurate and credible. The animator also needs to ask the right questions of the reconstructionist. Not having an appreciation of realistic accident movements can produce cartoon-like motions that may impair the credibility of the animation and the reconstruction.

Communication is the key to assuring that the quality of the animation is not compromised. The animator must work under the direction of the reconstructionist to avoid errors. Limiting the number of iterations taken to produce the animation will also lower the overall cost.

An effective animation is the end result of a two-phase process. First, there is the “Pre-animation Phase” in which all of the relevant facts and data are gathered and analyzed in order to produce a reconstruction of the events. In the second phase, the “Animation Phase,” data from the reconstruction is utilized to produce a factual simulation that can be used to present the expert’s findings and opinions to the audience.

Pre-animation Phase - Physical evidence is a crucial building block of an expert’s opinion, so it is important to collect the physical evidence as close to the time of the accident as possible. In many instances, a reconstructionist may be asked to examine a case years after the accident has taken place. Then he or she must rely upon photographs and measurements made by other individuals. These individuals are sometimes unfamiliar with or inadequately trained in the proper techniques of accident investigation and reconstruction. When there is a reasonable likelihood of litigation in a given accident, it is advisable to immediately contact an experienced investigation team to collect physical and witness evidence. This ensures that crucial information will not be overlooked and will ultimately reduce the cost of the reconstruction and the animation.

"the experience and knowledge of the reconstructionist remains an important factor in the quality of the animation."

Certainly, the most important step in the pre-animation phase is the collection and documentation of physical evidence in the form of high-quality photographs and accurate measurements. Regardless of whether or not an animation will ultimately be produced, the following steps of evidence gathering are important to both the reconstructionist and the animator:

- Surveying or measuring the scene
- Measuring tire marks and gouges
- Inspecting, measuring and photographing the vehicles involved
- Retrieving data from on-board Crash Data Recorders
- Reconciling testimony and other "soft" evidence
- Applying the laws of Physics and accepted scientific calculations and techniques

A scene survey is essentially a collection of data points with coordinates that are a known distance and elevation relative to a point of reference. Therefore, a survey is three-dimensional and can be visualized in a 3-D program after those points are connected and surfaced. Along with the obvious elements of the scene, (e.g. roadways, adjacent terrain, accident vehicles, tire marks, gouges and debris), the locations of other important elements may be assigned points as well. Buildings, signs, trees, poles, and vehicles not directly involved in the accident are all relevant objects to be included in the animation. Not only will these objects lend to the realism of the animation, but they may also reveal issues that may have contributed to the accident. Adverse weather conditions that create limited sight-distance can also be simulated in 3-D animation programs. This is why the reconstructionist obtains detailed information on weather and visibility conditions present at the time of the accident. Likewise, adequate lighting or lack thereof may be important to resolving the cause of an accident. Because of this, the locations of light poles, signage, and windows should be documented and photographed. In the event that physical measurements are not taken, the process of photogrammetry, performed on photographs of the scene or vehicles, makes it possible to determine the size and location of relevant objects at the scene.

Vehicles involved in an accident are examined and photographed with great attention to detail. Crush measurements of the vehicles are taken or determined. Damage sustained at the initial impact and in any subsequent events is discerned. Measurements of seat positions, seatback angles, steering wheel tilt, seatbelt anchor points, and interior dimensions are taken. Through a process known commonly as digitizing, vehicles are sometimes measured inside and out with specialized equipment and software. This is the equivalent of a 3-D survey in that the resulting data points can be connected in a 3-D program to construct an accurate three-dimensional model of the vehicle. Information, such as the make, model, color, and manufacturer specifications of any vehicles relevant to the animation is compiled by the reconstructionist and passed on to the animator.

Another important component of the reconstruction/animation is the collection of information about the occupants, pedestrians, etc. Attributes such as height and weight can sometimes have considerable bearing on the details of a simulation. For instance, the weight of the driver of a recreational vehicle (ATV) can significantly affect the vehicle’s center of gravity and therefore, its dynamic performance. Detailed medical reports of injuries are used to reconstruct occupant contacts and movements to determine the cause of injuries. Details seemingly as trivial as the clothes worn by the occupants are relevant to the reconstructionist and help the animator achieve a heightened level of realism.

While thorough preparation can be time-consuming and sometimes seem somewhat costly, the initial cost is low compared to the potential cost of backtracking to find necessary data, making major revisions to the animation when important information is untimely revealed or worse, not getting valuable information that could influence the outcome of a trial.

Animation Phase - In the animation phase, the animator constructs wire-frames of the scene, occupants, buildings, signs,
etc. using accident reconstruction or animation software. Evidence is then superimposed. Frequently, computer simulation data is directly transferred from the reconstruction simulation software to the animation software. The animation or movement of an object is accomplished by moving it to a specific location at a discrete point in time and then moving it to different specific location at another discrete point in time and so on until the object’s path is defined. In a computer animation, it is not necessary to move the vehicle or object in each frame. The “key frames” control the movement. The animator or reconstructionist assigns a position to an object in each key frame and the computer calculates the object’s position in the frames between the key frames. This results in a 3-D dynamic model of the accident. The end product is a series of pictures much like the frames on a piece of movie film. When the series of pictures is played back, the vehicle or object movements versus time can be observed in the animation program.

Next the occupant kinematics are added. This is where the reconstructionist should also have an adequate background in occupant kinematics. Most people who have only accident reconstruction experience are not proficient in occupant kinematics. The occupant kinematics are dependent on many factors including crash pulse, belt restraint use, airbag deployment, initial impact conditions and vehicle movements during the collision.

Applying Newton’s Laws of Motion aids in reconstructing the occupant’s motion. Utilizing occupant motions observed in controlled crash tests also aids the reconstructionist.

Occasionally, using a computer to simulate occupant kinematics is appropriate. However, considerable input data is necessary for these programs to accurately simulate the occupant kinematics, belt loads and injury numbers. Unfortunately, this type of input data is not always readily available. Therefore, the experience and knowledge of the reconstructionist remains an important factor in the quality of the animation.

Once the kinematics are established, the wire frames of the vehicle, the scene and the occupants are surfaced and the surfaces are given properties such as texture, color, transparency, etc. Images can be “pasted” onto the wire-frames. Lighting, fog and precipitation can be added. After the animation is constructed, virtual cameras are located and placed at appropriate angles. The animation is then rendered and compiled followed by editing and fine-tuning. Editing determines the “flow” of the presentation and is an important step. The order of the scenes, their length and titling can greatly affect the clarity and impact of the animation.

There are additional benefits of building an animation. The process of building an animation often gives the expert additional insight into the events of an accident. An animation often leads to an even more detailed understanding of the nuances of an accident. As a result, several iterations of the animation may evolve. However, this can significantly improve the expert’s reconstruction thereby resulting in more effective testimony. That is why building an animation before your expert’s deposition is often recommended.

**Conclusion**

The process of accident reconstruction often needs to be carried out to a greater level of detail in order to prepare for a credible animation. The animation can then be used as an effective tool in demonstrating complex events and physical laws and concepts to the jury. Good communication between the attorney, the expert and the animator is crucial to achieving the best result in this process.

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Product Liability Class Actions in Australia – Why Manufacturers Come Out on Top in the Land Down Under
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In 1992, major amendments were made to the Australian Trade Practices Act 1974 and to the Federal Court of Australia Act 1976. The amendments to the Trade Practices Act created new statutory rights for plaintiffs injured by defective products while the amendments to the Federal Court legislation enabled representative actions (or class actions as they are more commonly known) to be more easily brought in the Court. Commentators at the time that the amendments were enacted suggested that the amendments to the Federal Court legislation would facilitate the bringing of representative actions regarding defective products in which breaches of the Trade Practices Act were claimed. However, the predicted flood of class action litigation never occurred. This article suggests reasons why the Australian experience is so different to the experience in the United States.

Product liability regime in Australia
Plaintiffs have traditional common law rights as well as their Trade Practices Act rights, and the statutory regime set out in the Act makes it difficult for anyone responsible for the distribution of products to disclaim responsibility for them. In short, if a corporation supplies goods which it manufactures and a defect in those goods causes injuries to an individual, then the corporation is liable to compensate the individual.1 Essentially, all a plaintiff has to do is to prove a causal link between the supply of defective goods and the plaintiff’s loss or injury.

To make life even simpler for the plaintiff, a corporation is deemed to have ‘manufactured’ goods even where it only applies its name or brand to the goods or where it imports the goods.2 Similarly, it is not hard to prove that goods are defective – all a plaintiff needs to show is that the safety of the goods is not such as people are generally entitled to expect.3

Unsurprisingly, defences are available to manufacturers – particularly if they can establish that the defects did not exist at the time of supply or if the state of scientific knowledge at the time the goods were supplied would not have been such as to enable the defect to be detected.4

="the predicted flood of class action litigation [from the Australian Trade Practices Act] never occurred.”

Representative actions in Australia
Part VA of the Federal Court of Australia Act adopts a derivative of class action procedures used in the United States. As in the United States, one person can commence a single proceeding on behalf of a wider group of persons identified either by name or by a personal characteristic. The primary criteria which have to be satisfied are:

(a) 7 or more people have claims against the same person;
(b) The claims of all those people are in respect of or arise out of the same, similar or related circumstances; and
(c) All claims give rise to a substantial common issue of law or fact.5

Whilst these provisions all seem simple enough, they have been narrowly interpreted. Most importantly, the Courts have interpreted the legislation to mean that all class members must have a claim against all named respondents – it is not enough that some class members have an action against one respondent while other class members have an action against other respondents.6 This interpretation has had a substantial effect on many potentially large pieces of product liability litigation and has prevented many of them from continuing as class actions. However, it is not the only factor that has limited the number of product liability class actions in Australia.

Limiting factors on representative actions
The main reasons why the Australian experience is so different to the experience in the United States are:

(1) Unsuccessful plaintiffs are liable to pay the costs of defendants in most litigation in Australia. This has an inhibiting effect upon the bringing of speculative actions;
(2) Australian cases are not heard by juries. This reduces the level of damages paid and further discourages speculative actions;
(3) The requirement that all plaintiffs have an action against all respondents (as discussed above);
(4) The need for there to be at least 7 plaintiffs with a common cause of action;
(5) Australian judicial conservatism. Australian judges have shown an unwillingness to accept ‘fringe’ scientific views and have been willing to accept evidence put forward by manufacturers which show that there was no detectable defect in the goods at the time that they were supplied.7
(6) The interventionist attitude taken by Australian regulatory authorities. These authorities are comparatively well-funded and decidedly pro-active. American corporations carrying out business in Australia often express surprise at the speed and aggressiveness with which regulatory authorities act in Australia. What this often leads to is early recalls of defective products – preventing a class of plaintiffs from building up.

One result of the above-listed matters is that respondents often bring applications to strike out these sorts of proceedings as representative actions or bring applications seeking to limit the size of the class of ap-
applicants. If those applications are successful (even in part), substantial costs orders may be made against the applicants – sometimes causing them to be unable to continue to afford to run the litigation.

Summary

At the moment, respondents hold the whip hand in Australia when it comes to product liability claims which are brought, or proposed to be brought, as representative actions. Consequently, claims of this sort are not particularly common. The introduction of legislation which enabled such actions to be brought coincided with a time when consumer protection authorities in Australia have been well-funded, meaning that problems caused by unsafe products are tackled before a class of affected people can build up. Add to this Australian judicial conservatism in regard to the establishment of representative actions and to the scientific issues thrown up by product liability cases and it is possible to understand why the Australian and American experiences in this area are so different.

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Overview of the Class Action Fairness Act of 2005

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Congress has passed and the President has signed the Class Action Fairness Act of 2005 (“the Act”), which contains important amendments of the statutory law governing class actions. The stated purposes of the Act are to assure fair and prompt recoveries for class members with legitimate claims, to provide for Federal court consideration of interstate cases of national importance under diversity jurisdiction, and to benefit society by encouraging innovation and lowering consumer prices.

What follows is a discussion of certain key provisions of the Act that are likely to affect class action practice in cases filed on or after Feb. 18, 2005. Because the Act is new, it must be consulted in every case, and the availability and desirability of removal under the Act must be evaluated in the context of the particular case. Further, because a number of these provisions vest discretion in the district court, and others provide for appeal of rulings under the Act, the litigation that is certain to ensue will further clarify the effects of the Act.

Expanded Jurisdiction over Class Actions

Section 4 of the Act amends 28 U.S.C. §1332 and expands diversity jurisdiction over certain class actions. Under the Act, federal district courts have jurisdiction over any class action in which there are at least 100 class members, the aggregate amount in controversy exceeds $5 million, and (a) any member of the plaintiff class is a citizen of a State different from any defendant; (b) any member of the plaintiff class is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or (c) any member of the plaintiff class is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state. These amendments are not applicable to class actions in which the primary defendants are States, State officials, or other governmental entities over which the district court may be foreclosed from ordering relief.

“Home State Exceptions” to Expanded Jurisdiction

According to what have been called the “home state exceptions” to the rules expanding federal jurisdiction over class actions, (a) under certain circumstances a district court must decline to exercise jurisdiction and (b) under other circumstances the district court may decline to exercise jurisdiction.
jurisdiction. The analysis focuses first on the

citizenship of the parties.

If two-thirds or more of the plaintiff class
members and the primary defendants are
citizens of the State in which the action was
originally filed, the district court must decline to
exercise jurisdiction under the Act.

If two-thirds or more of the plaintiff class
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exercise jurisdiction under the Act.

If between one-third and two-thirds of the
plaintiff class members and the primary defen-
dants are citizens of the State in which the action
was originally filed, the district court may
decide to exercise jurisdiction. In determining
whether to decline to exercise jurisdiction, the
district court must consider the following fac-
tors: (a) whether the claims asserted involve
matters of national or interstate interest; (b)
whether the claims asserted will be governed
by the laws of the State in which the action
was originally filed; (c) whether the class action
has been pleaded so as to avoid federal jurisdic-
tion; (d) whether the action was brought in a
State with a distinct nexus with the class mem-
ers, the alleged harm, or the defendants; (e)
whether plaintiff class members from one
State substantially outnumber those of an-
other State, and the citizenship of class mem-
bers is widely dispersed among the States; and
(f) whether similar class actions have been
filed within the three-year period prior to com-
mencement of the action.

"Local Controversy Exception" to
Expanded Jurisdiction

The Act also includes what has been called the
"local controversy exception" to the rules
expanding the district courts' jurisdiction over
class actions. The district court must decline to
exercise jurisdiction if (a) greater than two-
thirds of the plaintiff class members are citi-
zens of the State in which the action was filed;
(b) the plaintiffs' principle injuries occurred in
the State in which the class action was origi-
nally filed; (c) no similar class actions have
been filed against any of the defendants within

the three-year period prior to commence-
ment of the action; and (d) there is at least
one defendant from whom the plaintiff class
seeks significant relief, whose alleged con-
duct forms a significant basis for the claims
in the action, and who is a citizen of the
State in which the action was originally filed.

Certain Types of Cases Excluded

The provisions of the Act related to juris-
diction and removal do not apply to securi-
ties-related class actions, state-law-based
class actions regarding the internal affairs of
a business enterprise, or class actions in
which the primary defendants are States,
State officials, or other governmental enti-
ties against whom the district court may be
foreclosed from ordering relief.

Mass Actions

The Act also applies to "mass actions,"
which are defined as civil actions "in which
monetary relief claims of 100 or more per-
sons are proposed to be tried jointly on the
ground that the plaintiffs' claims involve
common questions of law or fact." A "mass
action" would be removable as a class ac-
tion under the Act, with some exceptions.
Perhaps most importantly, the district court
would have jurisdiction over only the plain-
tiffs whose claims placed more than
$75,000 in controversy. Further, a mass
action would not be removable if the claims
arise from an event or occurrence in the
State in which the action was filed and the
alleged injuries occurred either in that State
or a contiguous State; the claims are joined
upon motion of the defendant; the claims
are asserted on behalf of the general public
pursuant to a State statute; or the claims
are consolidated solely for pretrial purposes.

A mass action removed to federal court
under the Act may not be transferred to
another federal court under the multidistrict
litigation statute, unless a majority of the
plaintiffs request such transfer.

Amendments Affecting
Removal And Remand Removal

Section 5 of the Act amends Title 28, Chapter 89 of United States Code by adding

§ 1453. New § 1453 alters critical proce-
dural rules affecting removal and remand.
First, the one-year limitation on removal
contained in § 1446(b) does not apply to
class actions. Second, the consent of all
defendants is not required for removal of a
class action. Third, removal of a class ac-
tion may occur regardless of the fact that
any defendant is a citizen of the State in
which the action is brought.

Remand Orders Subject to Appeal

New § 1453 also permits discretionary
appeals of orders on remand motions. A
court of appeals may accept an appeal
from an order of a district court granting or
denying a motion to remand a class action
to the State court from which it was re-
moved if application is made to the court of
appeals not less than seven days after
entry of the order.

If the court of appeals accepts such an
appeal, however, it must complete all ac-
tion on the appeal, including rendering
judgment, not later than 60 days after the
date on which the appeal was filed, unless
an extension is granted. Extensions for any
period of time may be granted if all parties
agree to the extension. Extensions of up to
10 days may be granted for good cause
shown and in the interests of justice. If a
final judgment on appeal is not issued
before the end of the period described
above, the appeal shall be denied.

Consumer Class Action Bill of Rights

Citing, among other things, class action
settlement abuses where class members
received little if any benefit but class coun-
sel were awarded substantial fees, Con-
gress has included class member protec-
tions in the Act that are subtitled the Con-
sumer Class Action Bill of Rights. Section 3
of the Act amends Title 28 of the United
States Code by adding Chapter 114, sec-
tions 1711 through 1715. Section 1711
contains definitions and the remaining
sections are designed to correct certain
perceived abuses in prior class action prac-
tice.
Section 1712 addresses attorney fee awards in cases where the proposed settlement involves coupons being awarded to the class members. This section provides that contingency fees are to be based upon the value of the coupons actually redeemed, as opposed to the face value of all coupons awarded. Previously, contingency fees were often based upon the total value of the coupons issued, even though class members typically redeemed only a small percentage of coupons. Alternatively, fees may be based upon the amount of time counsel worked on the case. The Act does not prohibit application of a Lodestar with a multiplier method of determining attorneys’ fees. Further, the court may also approve reasonable fees based upon counsel’s obtaining valuable equitable relief, including an injunction. Finally, Section 1712 provides that the court may in its discretion take expert testimony on the value of the proposed coupon settlement.

Section 1713 prohibits federal courts from approving class action settlements in which the class members would be required to pay attorneys’ fees that would result in a net loss to the class member, unless the judge makes a written finding that the nonmonetary benefits to the class members “substantially outweigh” the monetary loss.

Section 1714 prohibits federal courts from approving proposed settlements that pay greater sums to some class members solely on the basis that some of the class members to whom the greater sums are paid are located in closer geographically to the court.

Section 1715 provides that defendants participating in a proposed class action settlement must provide specific advance notice of the terms of the settlement to certain identified state and federal officials. The purpose of this notice is to allow these officials opportunity to object to the settlement. Failure to comply with these notice requirements will in some cases permit a class member to escape being bound by the terms of the settlement.

**Key Changes Affecting Diversity Jurisdiction and Removal**

- Aggregation: Absent class members’ claims must be aggregated to determine whether the amount in controversy exceeds $5 million.
- Minimal Diversity: Diversity exists if any class member is a citizen of a State different from any defendant.
- No one-year limitation: The one-year limitation on removal contained in 28 U.S. C. §1446(b) does not apply to class actions removable under the Act.
- Consent of codefendants not necessary: A class action may be removed without the consent of all defendants.
- Review of remand orders: An order granting or denying a motion to remand is subject to discretionary appeal.

*Local Controversy Exception* to Expanded Jurisdiction

- Greater than two-thirds of the plaintiff class members are citizens of the State in which the action was filed;
- There is at least one defendant from whom the plaintiff class seeks significant relief, whose alleged conduct forms a significant basis for the claims in the action, and who is a citizen of the State in which the action was originally filed;
- The plaintiffs’ principle injuries occurred in the State in which the class action was originally filed; and
- No similar class actions have been filed against any of the defendants within the three-year period prior to commencement of the action.

**Home State Exception to Expanded Jurisdiction**

**Mandatory Remand:**
- Two-thirds or more of the plaintiff class members are citizens of the State in which the action was originally filed; and
- The primary defendants are citizens of the State in which the action was originally filed.

**Discretionary Remand:**
- Between one-third and two-thirds of the plaintiff class members are citizens of the State in which the action was originally filed;
- The primary defendants are citizens of the State in which the action was originally filed.
- Factors that the district court must consider:
  - whether the claims asserted involve matters of national or interstate interest;
  - whether the claims asserted will be governed by the laws of the State in which the action was originally filed;
  - whether the class action has been pleaded so as to avoid federal jurisdiction;
  - whether the action was brought in a State with a distinct nexus with the class members, the alleged harm, or the defendants;
  - whether plaintiff class members from one State substantially outnumber those of another State, and the citizenship of class members is widely dispersed among the States;
  - whether similar class actions have been filed within the three-year period prior to commencement of the action.

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THE DUTY TO PROVIDE INFORMATION ON THE SIDE EFFECTS OF DRUGS IN FRANCE: “THE CAT AMONG THE PIGEONS”

Alain Gorny and Julie Gottenberg
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By ruling that a failure to provide information in the notice about drug side effects, even of an exceptional nature, may be likened to a product defect, and is therefore a breach of the duty to ensure safety, according to a recent judgment of the Paris Appeal Court.

All drugs are capable of causing serious side-effects. This unpleasant reality derives from the very nature of drugs and the inevitable benefit/risk relationship that their use entails. Recent instances attracting media attention have confirmed that pre-marketing clinical trials reveal only some of the long-term risks.

Modern society will settle - at least as far as health products are concerned - for nothing less than so-called zero risk and believes itself entitled to demand the most comprehensive information possible in advance. It is difficult to reconcile these observations with the duty of manufacturers and distributors of pharmaceutical specialties to provide accurate, well-founded information. Pharmaceutical companies are increasingly being held liable for any discrepancy between "reasonably expected" risks – which they have disclosed – and actual risks, in other words, for providing inadequate warnings about potential risks.

A product defect can be said to exist when a manufacturer fails “to provide the safety that a person is reasonably entitled to expect.” The failure to do so establishes a prima facie case against the manufacturer. Reasonably expected safety is assessed according to the quality and the quantity of the information provided, particularly as it relates to possible side effects of drugs. Offering full information may therefore be an effective way of avoiding liability, as the increasing length of the "undesirable effects" sections of drug notices and SPCs tends to prove.

This is the context in which the surprising judgment was handed down by the 1st Division B of the Paris Court of Appeal in Ferring v. Mauduit. It rules in principle that "a failure to provide information may be likened to a product defect and is therefore a breach of the duty to ensure safety, an accusation that could be made against Company F." If this judgment were interpreted literally, it would mean that a drug would be deemed defective and the pharmaceutical company held liable whenever a side-effect was suffered, even if it were not serious or only occurred in the rarest of cases, if the pharmaceutical company had not included a warning in the drug notice or SPC.

In light of this recent court decision, this article clarifies the duty of pharmaceutical companies distributing drugs in France to provide information about the side effects of those drugs. Companies are not only duty-bound to select the information carefully in terms of its content, but also to tailor that information according to the intended recipient, as well as monitor and update that information.

Content

In the most recent definition of "undesirable effects" (Article R. 5121-153 of the Public Health Code (“PHC”) of France (previously Article R. 5144-4)), the legislation covers both the side effects that may result from use of the drug according to the recommendations set out in the SPC and the risks of improper use. It has long been accepted that a pharmaceutical company should make both benign and serious side effects public as soon as they are known, and that it is deemed to have the most advanced scientific knowledge. The manufacturer is even duty-bound not only to specify the foreseeable risks that exist in relation to the product itself but also “those likely to arise in abnormal but reasonably foreseeable conditions of usage.”

The courts require the information provided to be clearly explained, sufficiently precise, but also comprehensive. Current case law is divided into two schools of thought as regards this "full information" requirement: the first realistic, or relativistic, school only requires disclosure of reasonably foreseeable risks according to available scientific data whereas the second, maximalistic school, requires total transparency on the part of pharmaceutical companies, which, in practical terms, means excessive, and therefore inapposite, information.

The judgment in Ferring v. Mauduit, follows the maximalistic school of thought. The Ferring court exonerates the pharmaceutical company of all liability on the grounds that "knowledge of the undesirable effects and side effects (...), at the time the injury was sustained, was (...) limited; "the totally unforeseeable immunological complications (...) were little known (...);" "at that time, there was no international consensus on warning medical practitioners of this immunological risk (...)." and Ferring had filed a request for the modification of the medical information with the Agency as early as November 5, 1996 but the Agency had not yet reached a decision at the date of the injury.

However, after finding that "it is not contested that neither the notice nor the SPC warned the user of this drug (or the prescribing doctor) of the existence of side effects, even of an exceptional nature (...), the Court ruled in principle that "this failure to provide information may be likened to a product defect and is therefore a breach of the duty to ensure safety, an accusation that could be made against Company F."

The Court has therefore set the cat among the pigeons by requiring that "the notice or the summary of the product’s characteristics" contain a warning to the user or the prescribing doctor "of the existence of side effects, even of an exceptional nature ...”. The wide formulation of this ground of the judgment also shows that the gravity of the risk is of little importance: notice of all known exceptional side effects must be given.

The judgment goes against a literal interpretation of Article 1386 (4) of the Civil Code which, in referring to the notion of "safety that a person is reasonably
entitled to expect, implies a duty to provide information suitable for the average person. It also goes against previous case law which distinguishes between an exceptional and serious risk for which a warning should be given13 and a "rare, only slightly serious risk, reversible at the end of the treatment" which, if not mentioned in the notice, does not incur the liability of the pharmaceutical company14.

The Ferring judgment, in our opinion, has a number of unfortunate consequences. First, the judgment will detract from the clarity of information, which is in itself a legal requirement: it stands to reason that providing too much information has the same effect as providing poor information or no information at all. Second, it will prevent proper adherence to the treatment, especially among more impressionable patients. Finally, it disregards the benefit/risk relationship on which the appraisal of all drugs depends.

Information, yes, but for whom?

The information provided by a pharmaceutical company is directed at various recipients. The information media are tailored according to whom they are addressed: the notice is for patients, and the SPC and the label are for the health authorities, prescribing doctors, pharmacists and hospital doctors and nurses.15 It will be up to the court to decide whether the information provided is comprehensive and comprehensible depending on the category of persons primarily intended to read that information medium.17

The balance in the chain of information is being disrupted by self-medication and the increase in sales via the Internet. A recent judgment of the ECJ18 confirms that it is lawful to sell health products by "mail order" (including the Internet), provided they are properly licensed and may be purchased without a doctor’s prescription in the country to which they are to be sent.19

In spite of this, the quality and fullness of the information made available are now an effective means for pharmaceutical companies to limit, or even wholly exonerate themselves from, liability.20

The failure to notify/ warn does not in itself trigger liability. The patient is also required to prove that there is a direct and unquestionable causal link between such failure and the injury suffered.21 The manufacturer may also escape liability if a patient is particularly sensitive,22 if combinations of drugs are being administered,23 if the victim24 or a person for whom he or she is responsible25 is at fault.

"Pharmaceutical companies are increasingly being held liable for...inadequate warnings about potential risks."

The different sources or means of supplying information

The SPC is the primary source of information about the product; it is drafted by the manufacturer or distributor in consultation with the health authorities. The notice26 and the label must be "clearly legible, comprehensible and indelible,"27 and should be revised regularly according to changes in available scientific data.28 It must also be in conformity with the SPC – which does not mean that it has to be reproduced. Accordingly, the regulations themselves authorize distributors to express the information differently – meaning, in practice, less specifically – in the notice placed in the product packaging.

Specific rules also apply to labeling.29 The need for clear labeling has been highlighted by the confusion that led to the death of a child who was injected with ten times the prescribed dose of morphine. The original label in that case stated the amount of the product’s active ingredient as a percentage per millilitre. That label was substituted with another label expressing the dosage in milligrams of the active ingredient per millilitre. The two labels were on the market at the same time and this was undoubtedly the source of the confusion. The product batches labeled as a percentage were immediately withdrawn from the market.30

Advertising is also a source of information about drugs. It is highly regulated by legislation,32 regulations33 and the recommendations of the Commission for the Regulation of Advertising. It is the cause of numerous disputes, undoubtedly because advertising marks the boundary between scientific information and considerations of another order.

Also, medical visits are the means whereby pharmaceutical company representatives provide health practitioners with information. The purpose of the Medical Visit Charter is to increase the information-supplying role of visiting medical representatives.34 The charter reiterates most of the existing regulations governing the advertising of pharmaceuticals and, by abolishing the practice of giving free samples, tries to remove some of the commercial element from the relationship between visiting medical representatives and prescribing doctors.

The mass mailing of DDLs ("Dear Doctor Letters") is increasingly being used to warn prescribing doctors individually of any newly-discovered change in the benefit/risk relationship for a specific drug. They are generally issued, prior to the amendment of the official product information (SPC, notice), to notify doctors of a higher incidence of the side effects already known and notified or the discovery of a side effect which was, until recently, undetected.

Finally, databases concerning clinical trials, set up by some international pharmaceutical companies, the European Agency for the Evaluation of Medicinal Products35 or the US National Institute of Health,36 supplement the side effect information already available from other sources. On January 6, 2005, various associations of international pharmaceutical companies called upon their members to release not only registers concerning current clinical trials but also the results of previous trials of drugs already on the market. In a press release dated January 13, 2005, the LEEM invited its members to take similar measures.

"Postmarketing surveillance", monitoring and updating information

The French Supreme Court ruled that the duty to provide information means disclosing "what is known at the time the product is released onto the market and what has come to the attention of the pharmaceutical company since that date."37 The trial courts apply this rule.38

The risks associated with medicinal products are mainly monitored via the "postmarketing surveillance," or pharmacovigilance scheme,39 which operates on the basis of immediate notification of any observed side effects. The purpose of
this scheme is to assess the benefit/risk relationship of all drugs on an ongoing basis. Accordingly, prescribing doctors are required to notify one of the 31 Centres Régionaux de Pharmacovigilance ("Regional Centers for Postmarketing Surveillance") ("CRPV"), or the relevant department of the distributing pharmaceutical company, of any incident attributable to a health product. At the initiative of the Commission nationale de pharmacovigilance ("National Commission for postmarketing surveillance"), such notifications may trigger an investigation, the conclusions of which may result in the product being withdrawn from the market.

Pharmaceutical companies also have a duty to file regular "periodic update reports" recording all of the side effects notified internationally over a given period.

Finally, some judges go as far as ordering pharmaceutical companies to conduct spontaneous additional trials to obtain a better understanding of the risks.

The duty to keep abreast of scientific knowledge goes hand in hand with a duty to revise notices rapidly. In practice, the efforts of pharmaceutical companies are sometimes hindered by considerable investigative delays on the part of the AFSSaPS. Moreover, there is an express reference to this issue in the Ferring judgment. In the circumstances, it would not be unwarranted for a pharmaceutical company, punished by the court for being slow in notifying a side effect, to implicate the liability of the State in causing that delay.

In conclusion, the judgment handed down in Ferring by the Paris Court of Appeal opens "Pandora's Box;" if all undesirable effects, even non-serious or rare ones, must now be notified, manufacturers will have no alternative other than to supply increasingly long and dispassionate lists of side effects. Even supposing that the AFSSaPS accepts them, a growing number of patients will be discouraged from taking, or correctly adhering to, their prescribed treatment. This will obviously be detrimental to public health.

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1 Article 1386-4 Civil Code, Article L. 221-1 Consumer Code, Articles 1 and 6 of Council Directive 85/374/EEC of July 25, 1985 concerning liability for defective products (or in the "light" of them if the case precedes the effective date of the Act of May 19, 1998 enacting these provisions under domestic law), but also the original rules governing liability set out, alone or in combination, in Articles 1147, 1165, 1382 and 1384 (1) of the Civil Code.

2 -SPC: "summary of the product's characteristics": an integral part of the marketing authorization. (AMM in French). The notice included in the drug's packaging sets out the drug's main therapeutic applications and useful information from the SPC.


4 -How improper use affects the respective liabilities of the manufacturer and the "victim": A. Gornay, "From Negligence to the Liability of the Victim" Gaz. Pal., October 31, 2004, p. 2.


9 -Ajaccio District Court, September 8, 2003 - Gianelli v GSK, Docket No. 01/201 (General Roll); CA Pau, March 12, 1958, D. 1958 p. 397, obs. F. Gollety.


12 -Injury occurring in March 1997 as a consequence of a treatment initiated in 1994.

13 -CA Rennes December 5, 2001, as aforementioned.


15 -We wonder whether patients will be given the opportunity to read the notice in public or private hospitals where all the information given to patients depends on doctors and nurses.


18 -ECJ, December 11, 2003, Deutscher Apothekerverband v DochMorriss NV and Jacques Waterval, Case C-322/01.


24 -See the article cited in footnote 5.

25 -Article 1386-13 Civil Code

26 -Article R. 5121-148 PHC (previously Article R. 5143-4).

27 -Article R. 5121-138 (1) PHC

28 -CA Versailles, June 25, 1992, as aforementioned.

29 -Article R. 5121-149 PHC (previously Article R. 5143-5): "The notice should be drawn up in conformity with the summary of the product's characteristics. It should set out the following information in order (...)."

30 -Article R. 5121-138 PHC (previously Article R. 5143).

31 -Source: online press release issued by the AFSSaPS (Agence Française de Sécurité Sanitaire des Produits de Santé, the equivalent of the FDA) on September 30, 2004 and health alerts issued on September 30 and October 6, 2004.
32 Articles L. 5122-1 to L. 5122-16 PHC
33 Articles R. 5122-1 to R. 5122-47 PHC (previously Articles R. 5045 to R. 5055-6).
34 Signed on December 22, 2004 by the Comité Econornique des Produits de Santé ("CEPS")
(Economic Committee for Health Products) and the LEEM (French Pharmaceutical Industry
Association).
35 EudraCT: http://eudract.emea.eu.int/
36 ClinicalTrials.gov
38 Paris District Court Docket No. 01/07515
(General Roll), February 10, 2003, Lambert v-
Pharmacia; CA Versailles, June 25, 1992, as
aforementioned.
39 Decree No. 2004-99 of January 29, 2004 relat-
ing to the monitoring of pharmaceuticals postmar-
teting surveillance, codified in Articles R. 5121-
150 et seq. PHC.
40 or by any health practitioner: Article R. 5121-
170 PHC (previously Article R. 5144-19).
41 Article R. 5121-173 PHC (previously Article R.
5144-20 III).
42 CA Pau, January 16, 2002, Jurisdata 171372.
184, obs. J. Penneau.
44 More than two years in the case considered in
the judgment reviewed in this article.
45 CE March 3, 2004 – Ministry for Employment
and Solidarity v- Bourdignon et al., 4 rulings - D.
2004, jur. p. 973 found the State liable for its
negligent failure to prevent the risks to workers,
herent in their exposure to asbestos dust. Al-
ough not specifically mentioned, reading be-
tween the lines, this issue is raised in several
recent rulings (CA Montpellier 1st Div. B. Septem-
ber 23, 2003 – Institut Pasteur v- Fachin et al.,
Docket No. 02/03600 (General Roll); CA Ver-
sailles April 30, 2004, as aforesaid).
PLAINTIFF’S COMPARATIVE FAULT IN ENHANCED-INJURY CASES
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Introduction
While driving his two-door hatchback on a rural state highway, plaintiff Smith falls asleep at the wheel. His vehicle drifts onto the shoulder of the road, and then off an embankment. As it rolls over going 48-52 miles per hour, the roof of the vehicle strikes a tree with sufficient force to collapse the A-pillar. Smith suffers fractured cervical vertebrae and a severed spinal cord, which leaves him a permanent quadriplegic. Smith sues the manufacturer, alleging that the vehicle is defectively designed in that it provides insufficient occupant protection during rollover accidents. The manufacturer defends the vehicle’s design and alleges as an affirmative defense the plaintiff’s own contributory negligence in losing control of the vehicle and allowing it to leave the roadway.

Virtually all U.S. jurisdictions recognize a duty on the part of the manufacturer to provide reasonable occupant protection in the event of a crash, and a cause of action based upon the vehicle’s “crashworthiness.” The doctrine has also been called “second collision”, referring to the impact of the occupant to the inside of the vehicle, and “enhanced injury.” An issue that has not yet been addressed in many states is whether a plaintiff’s fault in causing the primary accident, whether by speeding, intoxication, reckless driving or the like, should be allowed to reduce their recovery in a suit based upon enhanced injury theory. Those jurisdictions that have decided the issue have reached conflicting conclusions.

Conceptual Approaches & Case Law
The majority position among states that have considered the issue is that a plaintiff’s fault in causing the primary accident should be compared to any fault found on the part of the manufacturer in “enhancing” the plaintiff’s injuries, and the former is allowed to reduce plaintiff’s recovery. Moreover, after some initial back-and-forth on the issue, it is also the position adopted by Restatement (Third) of Torts: Products Liability (1998). Three law review articles which address the issue as a central topic and review applicable case law across the country are: Ryan P. Harkins, Holding Tortfeasors Accountable: Apportionment of Enhanced Injuries Under Washington’s Comparative Fault Scheme, 76 Wash. L. Rev. 1185 (2001), Robert H. Brunson, Comparing First Collision Fault With Second Collision Defect, 11-AUG S.C. Law 39 (1999) and Heather Vickles and Michael Oldham, Enhanced Injury Should Not Equal Enhanced Liability, 36 S. Tex. L. Rev. 417 (1995).

Harkins argues in his Comment that a plaintiff’s primary fault should not be compared against a manufacturer’s injury-enhancing fault. However, laying out the contrary view, he divides cases that compare plaintiff’s primary fault with enhanced-injury fault into different conceptual categories.

First, courts treat plaintiff’s enhanced injuries and primary injuries as inseparable. Id. at 1199. Courts do this for conceptual reasons or simply for the practical reason that it is often difficult to distinguish between collision-causing and injury-causing fault. Ignoring a plaintiff’s primary fault can make it difficult to instruct a jury on apportionment, and jurors can be mystified when aspects of how the accident occurred are pointedly absent from a case. Cases in this category include:

- Kettnner v. Ford Motor Co., 748 F.2d 1265, 1267-68 (8th Cir. 1984)

Second, courts have treated a plaintiff’s fault for the primary accident as a proximate cause of the enhanced injuries. Typical cases include:

- Meekins v. Ford Motor Co., 699 A. 2d 339, 346 (Del. 1997). Plaintiff ran a stop sign and got into an accident in which airbags deployed and allegedly crushed plaintiff’s fingers against the steering wheel. “It is obvious that the negligence of a plaintiff who causes the initial collision is one of the proximate causes of all of the injuries sustained.”
- Whitehead v. Toyota Motor Co., 897 S.W. 2d 684, 694 (Tenn. 1995) (“Any claim for ‘enhanced injuries’ is nothing more than a claim for injuries that were actually and proximately caused by the defective product… it merely represents the portion of the total damages for which the manufacturer is potentially liable; it is the ‘products liability’ component of the suit… therefore it is illogical to hold that comparative fault applies to products liability actions generally, but does not apply to ‘enhanced injury’ claims. The questions are, in reality, the same.”)

Third, courts analogize the comparative fault issues with the doctrine of subsequent tortfeasors. The common example is a defendant causing an accident and being held liable for subsequent injuries caused by medical malpractice. It has long been the rule in Washington that “a tortfeasor is liable for the exacerbation, or augmentation in severity, of a plaintiff’s injuries resulting from later medical treatment where the tortfeasor’s negligence arguably created the need for that treatment.” Lindquist v. Dengel, 92 Wn.2d 257, 259, 595 P.2d 934 (1979)(emphasis added).
Cases applying this principle include:


Finally, in a catch-all category, some courts allow a plaintiff’s comparative negligence to reduce his recovery for enhanced injuries for reasons of policy, fairness, or common sense.

- *Daly v. General Motors Corp.*, 20 Cal.3d 725, 575 P.2d 1162, 1172 (Cal. 1978)

- *Day v. General Motors Corp.*, 345 NW 2d 349, 357 (N.D. 1984)


**Arguments Based on Washington Law**

No Washington state appellate decision has explicitly resolved the issue. However, the strong case that can be made for allowing apportionment of plaintiff’s fault in causing the primary accident under Washington law is based on principles that should apply in other states that have not addressed the issue.

Washington adopted the enhanced-injury doctrine in *Baumgardner v. American Motors Corp.*, 83 Wn.2d 751, 758, 522 P.2d 829 (1974). In *Baumgardner*, the court held that a manufacturer can be liable under general negligence principles for product defects that proximately cause enhanced injuries even though the defects did not cause the accident. *Id* at 758. The manufacturer is liable only for the enhanced injury caused by its product, not the injuries that would have occurred if the manufacturer had exercised reasonable care. *Id*.


Washington statutory law, RCW 4.22.015, defines “fault” as any “acts or omissions . . . that are in any measure negligent or reckless . . . or that subject a person to strict tort liability or liability on a product liability claim.” Those “acts or omissions” include, among other things, “unreasonable failure to avoid an injury or to mitigate damages.” *Id*. A person’s fault is a proximate cause of an injury if but for that fault, the injury “would not have happened.” Washington Pattern Instruction (“WPI”) 15.01. “There may be more than one proximate cause of an [injury] [event].” *Id*.

Proximate cause consists of two elements: cause in fact and legal causation. *Christen v. Lee*, 113 Wn.2d 479, 507, 780 P.2d 1307 (1989). A plaintiff’s primary fault clearly satisfies the “but for” cause in fact requirement of both the primary injuries and the enhanced injuries. Legal causation “involves a determination of whether liability should attach as a matter of law giving the existence of cause and fact.” Comment to WPI 15.01. Legal causation depends on “whether, as a matter of policy, the connection between the ultimate result and the act of a defendant is too remote or insubstantial to impose liability.” *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 478-79, 951 P.2d 749 (1998). This inquiry depends on “mixed considerations of logic, common sense, justice, policy, and precedent.” *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985).

There is no statutory exception to these comparative negligence principles for enhanced-injury cases. In enhanced-injury cases, a plaintiff’s primary fault is not “remote or insubstantial” enough to take the issue away from a jury. It is illogical and unjust to saddle a car manufacturer with undiminished liability for injuries that would not have occurred but for a plaintiff’s comparative negligence. A jury should be given the opportunity to use its common sense and sense of justice to compare the plaintiff’s primary fault with the injury-enhancing fault. See *Brown v. Yamaha Motor Corp.*, 38 Wn.App. 914, 920, 691 P.2d 577 (1984) (“[O]nly in rare cases may contributory negligence be taken from a jury”).

**Restatement (Third) of Torts: Products Liability**

In 1998, the American Law Institute released the Restatement (Third) of Torts: Products Liability. Section 16 addresses enhanced-injury cases. Comparing a plaintiff’s primary fault with injury-enhancing fault was a source of debate during the drafting of the Restatement. In initial drafts, the Reporters adopted the majority view allowing comparative fault. However, a subsequent draft advocated the opposite view, “arguing that a plaintiff’s negligence in causing the initial accident should not be considered in apportioning liability between the plaintiff and the product sellers unless proof did not support apportionment of the injuries and the product sellers were held jointly and severally liable for all injuries.” *Vicklies & Oldham*, 36 S. Tex. L Rev. 417, n. 196. After further debate and analysis, the majority view allowing comparative fault was adopted. *Id*.

Section 16 of the Restatement provides:

Increased Harm Due to Product Defect

(a) When a product is defective at the time of commercial sale or other distribution and the defect is a substantial factor in increasing the plaintiff’s harm beyond that which would have resulted from other causes, the product seller is subject to liability for the increased harm.

(b) If proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect, the product seller’s liability is limited to the increased harm attributable solely to the product defect.

(c) If proof does not support a determination under Subsection (b) of the harm that would have resulted in the absence of the product defect, the product seller is liable for all of the plaintiff’s
harm attributable to the defect and other causes.

(d) A seller of a defective product that is held liable for part of the harm suffered by the plaintiff under Subsection (b), or all of the harm suffered by the plaintiff under Subsection (c), is jointly and severally liable or severally liable with other parties who bear legal responsibility for causing the harm, determined by applicable rules of joint and several liability.

Comment f to Section 16 provides:

(f) Plaintiff’s fault in cases of increased harm. Section 17 sets forth the general rules governing plaintiff’s fault in products liability litigation. It provides that plaintiff’s fault is relevant in apportioning liability between the plaintiff and the product seller. The seriousness of the plaintiff’s fault and the nature of the product defect are relevant in apportioning the appropriate percentages of responsibility between the plaintiff and the product seller. See § 17, Comment d. Accordingly, the contributory fault of the plaintiff in causing an accident that results in defect-related increased harm is relevant in apportioning responsibility between or among the parties, according to applicable apportionment law. In apportioning responsibility in such cases, it may be important that requiring a product to be designed reasonably to prevent increased harm aims to protect persons in circumstances in which they are unable to protect themselves.

The Reporters Note for Comment f observes that this is a “difficult issue.” In the final analysis, “[a] majority of courts, however, allows the introduction of plaintiff’s conduct as comparative fault in a crashworthiness context.” Id.

Section 17 of the Restatement (Third) provides the following affirmative defense:

Apportionment of Responsibility Between or Among Plaintiff, Sellers and Distributors of Defective Products, and Others

(a) A plaintiff’s recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff’s conduct fails to conform to generally applicable rules establishing appropriate standards of care.

(b) The manner and extent of the reduction under Subsection (a) and the apportionment of plaintiff’s recovery among multiple defendants are governed by generally applicable rules apportioning responsibility.

Comment d to Section 17 observes in part:

The majority position is that all forms of plaintiff’s failure to conform to applicable standards of care are to be considered for the purpose of apportioning responsibility between the plaintiff and the product seller or distributor . . . The seriousness of the plaintiff’s fault and the nature of the product defect are relevant in apportioning the appropriate percentages of responsibility between the plaintiff and the product seller.

Conclusion

Under fundamental principles of tort law, negligence, or more broadly “fault” (which includes assumption of the risk, product misuse, and the like) on the part of the plaintiff apply to reduce or bar a plaintiff’s recovery when the conduct causes or contributes, i.e. “proximately causes”, the plaintiff’s harm. The plaintiff’s negligence in causing the primary accident is a proximate cause of their own “enhanced” injuries, which are foreseeable and direct cause of their negligence. The majority of the courts that have addressed the issue, and the Restatement, follow, as they should, these fundamental principles and allow plaintiff’s primary negligence to be applied in enhanced injury cases.

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1 Although usually treated as a negligence claim, an enhanced-injury claim may also be established under strict liability. Baumgardner, 83 Wn.2d at 759 (decided before the adoption of Washington’s Products Liability Act, RCW 7.72, et seq.).
Case and Statute Analyses

Manufacturers of non-defective products still liable in negligence, or are they?

In Phillips v. Cricket Lighters,1 the Pennsylvania Supreme Court affirmed the Superior Court’s order reinstating the plaintiff’s design defect claim sounding in negligence and at the same time reversed the Superior Court’s reinstatement of the strict liability design defect claim, finding the product at issue to be safe for its intended users. In Phillips, a minor-child apparently started a fire with a Cricket cigarette lighter that was not equipped with child resistant features, and this fire resulted in the death of his mother and siblings. The guardian of the minor-child and the Administratrix of the estate of the minor-child’s deceased siblings filed a lawsuit against the manufacturer and distributors of the lighter, asserting various claims including design defect claims under both negligence and strict liability theories.

The Supreme Court in Phillips held that the strict liability claim was properly dismissed on summary judgment because the lighter was safe for its intended users. However, the Court held that the Superior Court erred in granting summary judgment as to the negligent design claim simply because the strict liability claim had been dismissed. The Phillips Court ruled that a finding of “no defect” does not “perforce” require dismissal of the negligence claim, without first analyzing the elements of negligence. The Court reasoned that the focus under a strict liability theory is the product itself, whereas for a negligence cause of action the inquiry is concerned with the reasonableness of a defendant’s conduct:

Were we to dispose of a negligence claim merely by an examination of the product, without inquiring into the reasonableness of the manufacturer’s conduct in creating and distributing such a product, we would be divorcing our analysis from the elements of the tort. Thus, as the elements of the causes of action are quite distinct, it would be illogical for us to dispose of [plaintiff’s] negligence claim based solely on our disposition of her strict liability claim. Instead, we must examine the law of negligence and determine whether the trial court erroneously determined that [plaintiff’s] negligence claim failed as a matter of law.

Phillips, 841 A.2d at 1008. After weighing the necessary factors tending to establish the elements of the plaintiff’s negligence claim, the Court concluded that a jury question existed as to whether the manufacturers were negligent in designing a butane lighter that lacked a child safety device. On these grounds, the Court affirmed the Superior Court’s reinstatement of the negligence claim.

Justice Saylor wrote a separate, concurring opinion, which was joined by Justices Castille and Eakin, in which he joined the majority disposition of the strict liability and negligence claims “under present law.” Id. at 1012. The thrust of Justice Saylor’s concurrence was devoted to an analysis of alternatives and “readily accessible, corrective measures” to Pennsylvania’s strict products liability jurisprudence, which under its present state divorces negligence concepts from consideration in a strict liability action. Id. Justice Saylor opined that the Restatement (Third) of Torts, which utilizes the negligence concept of risk-utility balancing in design defect litigation, “illuminates the most viable route to providing essential clarification and remediation” to Pennsylvania law in this area. Id. at 1019.

Justice Newman wrote separately and concurred with the majority’s ruling that concepts of negligence have no place in a strict products liability case and that the strict liability claim must fail because the lighter was safe for its intended users. Id. at 1023. However, Justice Newman dissented from the majority that the plaintiff’s negligence causes of action be allowed to remain, opining that under the law of negligence a defendant cannot be liable in damages “for placing into the stream of commerce an object that was reasonably safe for its intended use and, in fact, operated as intended.” Id. at 1023-24.

Although the rationale behind the holding in Phillips is anything but clear, the outcome of this case is especially significant to product manufacturers, as well as to those engaged in litigation in the field of Pennsylvania products liability law. The immediate result of Phillips is an understanding that a plaintiff’s products liability claim based in negligence can still remain even after a product is found to be not defective and the strict liability claim is dismissed.

The pronouncement in Phillips has immediately impacted products liability litigation in Pennsylvania. In Moroney v. General Motors Corp.,2 a case decided only a few months after Phillips, Maureen Moroney was attacked in her vehicle after having parked in a Kmart parking lot. While driving through the Kmart lot prior to parking, she noticed a potentially dangerous man some distance from the entrance of the store. Ms. Moroney thereafter parked her vehicle close to the entrance of the Kmart to avoid him but was attacked before she was able to exit her vehicle. Ms. Moroney filed suit against her assailant for assault and battery, against Kmart for negligence, and against GMC for both negligence and strict liability.

The plaintiffs in Moroney alleged that a built-in feature of their automobile which caused the doors to unlock automatically when the ignition was turned off facilitated the assault. The Superior Court in Moroney held that the trial court properly concluded that the design and function of the door locking mechanism was not defective. It nevertheless found that the lower court erred by refusing to permit the jury to consider the negligence claim, notwithstanding its disposition of the strict liability claim. The Superior Court cited Phillips and prior cases which have previously ruled on the issue. Consistent with the holding in Phillips, and utilizing the same rationale as that stated only by Justice Cappy in Phillips, the Court in Moroney held that consideration of a negligence claim shall not be dependent upon the disposition of a strict liability claim. “The absence of success of Appellants’ strict liability claim should not have foreclosed this question [of General Motors’ negligence] from being presented to the jury.” Moroney, 850 A.2d at 635. The Superior Court remanded the case for a new trial on the negligence claim and, by doing so, it appears to have bolstered the plurality opinion in Phillips.
The Superior Court in Straub accepted the manufacturer’s argument that it could not be liable under a negligence theory of product liability when its product was non-defective. Although the court in Straub acknowledged that a majority of the justices in Phillips agreed in that case that the negligence claim survived the dismissal of her strict liability claim, it refused to reach the same result as in Phillips. Rather, the Superior Court in Straub opined that because the justices in Phillips did not reach a majority opinion, the analysis by Chief Justice Cappy in Phillips is not binding precedent. The Superior Court in Straub instead looked to two cases it had decided prior to Phillips in which it held that “in a negligence case the plaintiff must prove, not only that the product was defective and that the defect caused his injury, but in addition, that in manufacturing or supplying the product the defendant failed to exercise due care.” Reasoning the negligence claim must fail because he failed to prove the existence of a defect, the court in Straub held that the trial court erred in refusing to enter judgment n.o.v. in favor of the defendant.

However, with the decision of the Phillips case, and the subsequent decision in Moroney, it appears that negligence claims in Pennsylvania courts will not be dismissed as a matter of course where a plaintiff is unable to prove a strict liability claim. Signaled by Justice Saylor’s alluding to the Restatement (Third) of Torts and its framework for analyzing strict liability claims in Phillips, and the Superior Court’s opposing opinions in Moroney and Straub, Pennsylvania is sure to undergo additional important developments in the field of strict products liability in the near future with regard to the relationship between the doctrines of negligence doctrine and strict products liability.

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2The lead opinion in Phillips was Justice Cappy’s alone, with Justice Saylor filing a concurring opinion which was joined by Justices Castille and Eakin. Justice Nigro concurring in the result, Justice Newman filing a concurring and dissenting opinion, and Chief Justice Zappala not participating in the decision. Due to the different rationales contained in the separate opinions of the Justices concurring in the result, the lead opinion in Phillips is a plurality rather than a majority opinion. For purposes of this case summary, the other holdings in Phillips need not, and will not be addressed.


4Cherne is an unpublished memorandum opinion and therefore non-precedential.

5Straub v. Cherne Industries, slip op. at 7-8.


7Ibid., slip op. at 10-11.

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**THE END OF “MASS TORTS”?**

Mississippi is one of the few states with no class action provision in its civil procedure. That had not stopped, indeed it probably encouraged, the bringing of “mass tort” suits with wildly misjointed claimants. Now in a series of products liability cases, the Mississippi Supreme Court has made clear it will enforce revised Miss. R. Civ. P. 20, after an amendment done in early 2004 to require that conjoined plaintiffs demonstrate the existence of a “distinct litigable event”; this is very different from Fed. R. Civ. P. 20 which only requires that claims by different plaintiffs be “logically related.”

Starting in February 2004, with Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092 (Miss. 2004) (there have been six like Janssen decisions since, all involving Propulsid), the Court has made plain its rule-making intent: “We hold today that the prescribing of the drug Propulsid by 42 different physicians to 56 different patients did not arise out of the same transaction, occurrence, or series of transactions or occurrences, and that joinder in this case unfairly prejudices the defendants.” Armond, at 1095. In Scott v. Janssen Pharmaceutical, Inc., 876 So. 2d 306, the Court added: “There is an innate danger in asking jurors to assimilate vast amounts of information against a variety of defendants and then sort through that information to find what bits of it apply to which defendant.”

In the asbestos case Harold’s Auto Parts, Inc. v. Mangilardi, 889 So. 2d 493 (Miss. 2004), the Court pointedly criticized the misjoinder of 264 plaintiffs allegedly exposed over 75 years: “This complaint comes to us from plaintiffs, who, more than three years ago, filed suit against 137 defendants, who have amended their complaint six times; and who are apparently unable to explain to trial court, this Court or to the defendants, exactly who each plaintiff has sued, and why. The trial court is hereby directed to dismiss, without prejudice, the complaint of each plaintiff who fails, within 45 days . . . to provide the defendants and trial court. . . at a minimum, the name of the defendant or defendants against whom each plaintiff makes a claim, and the time period and location of exposure.” Id. at 495.

In yet another asbestos exposure case involving shipyard workers, the court summed up in a sentence what is not a “distinct litigable event”: “There are too many differences between
the [9] plaintiffs, and there is not a distinct litigable event linking the parties together, except that they all at one time in their life [sic] worked at Ingalls Shipyard." Crossfield Products Corp v. Irby, No. 2003-IA-02378-SCT (Feb. 3, 2005).

Using the Armond doctrine to quell the notion that Mississippi courts are a dumping ground for mass torts, the Court has now said: “Our state has absolutely no local interest in trying the out-of-state plaintiffs’ claims.” State Farm Mut. Auto. Insurance Co. v. Murriel, No. 2003-IA-00745-SCT (Nov. 4, 2004).

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VACCINE MANUFACTURERS AND THE POSSIBLE LINK TO AUTISM: THE NEXT FRONTIER IN PRODUCTS LIABILITY?

In recent years, a number of medical studies have analyzed whether mercury-containing vaccines play a role in triggering autism, a severe developmental disorder with no definitive cause and no known cure. During the 1990’s, many childhood vaccines contained thimerosal, a preservative/biocide that is 49.6% ethyl mercury by weight. The vaccine manufacturers used thimerosal to prevent fungal and bacterial contamination of multi-dose vials. In 1999, the American Academy of Pediatrics and the U.S. Public Health Services urged drug makers to remove thimerosal from children’s vaccines.

Currently, most childhood vaccines contain only trace amounts of thimerosal. The substance is nevertheless still present in most of these vaccines. Other than the traditional childhood vaccines, the substance is also found in the flu shot, which is sometimes available without this preservative.

Most recently, Dr. Jill James, a biochemist at the University of Arkansas for Medical Sciences, published a peer-reviewed study in the American Journal of Clinical Nutrition. Dr. James’ study found that some autistic children have a weakened ability to protect themselves from toxic metals in their bodies. These children were found to have a severe deficiency of glutathione, the body’s most important tool for detoxifying and excreting heavy metals, such as mercury and lead. The number of children diagnosed with autism has jumped dramatically in recent years. Dr. James’ findings may support the suspicions of a growing number of scientists, physicians, and parents that mercury-containing vaccines play a part in triggering autism in genetically vulnerable children.

As scientists search for causes and cures, vaccine manufacturers may find themselves increasingly at risk for product liability litigation. In Cheskiewicz v. Aventis Pasteur, Inc.,1 the Superior Court of Pennsylvania affirmed the dismissal of a case that had been brought by parents on behalf of their autistic son. The parents sued a number of vaccine manufacturers and suppliers alleging strict products liability for defective design and failure to warn, and negligence in the manufacturing, marketing, and selling of the product, breach of implied warranty of merchantability, breach of an express warranty, and fraud. The Superior Court, however, agreed with the trial court that the parents had failed to exhaust their administrative remedies pursuant to the National Childhood Vaccine Act, 42 U.S.C. §§ 300aa-1 to 300aa-34 (1986) (the “Vaccine Act”).

Congress enacted the Vaccine Act as a streamlined program for establishing standards of proof under which claimants would benefit from a presumption that a vaccine listed in the act’s “vaccine injury table” caused the alleged injuries. 42 U.S.C. §§ 14, 11(c)(1)(C)(i), 13(a)(1). (Emphasis added). The Vaccine Act requires that a person with a vaccine-related injury first file a petition in what is known as “Vaccine Court,” which is a special tribunal of the Federal Court of Claims. 42 U.S.C. § 11(a)(2)(A). If an action has been filed in state or federal court before filing in Vaccine Court, then that state or federal court must dismiss the action. 42 U.S.C. § 11(a)(2)(B). A claim under the Vaccine Act must be filed within 36 months “after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such [vaccine-related] injury.” 42 U.S.C. § 16(a)(2). If an individual prevails in Vaccine Court but is nevertheless dissatisfied with the outcome, the award may be rejected and a traditional tort action pursued. 42 U.S.C. § 300(a). Nevertheless, a person need not file in Vaccine Court when a contaminant or adulterant had been intentionally added to the vaccine. 42 U.S.C. § 33(5).

In Cheskiewicz, the minor was administered certain vaccines between May 1994 and December 1995. At eighteen months of age, the child began losing language and motor skills and became withdrawn and non-interactive. In May 2001, seven years after having been administered his first vaccine, the child was diagnosed as suffering from disintegrative autism resulting from mercury toxicity. The mercury poisoning allegedly resulted from exposure to cumulative doses of thimerosal, a preservative/biocide present in the vaccines he had received.

The trial court dismissed the parents’ action for not filing with Vaccine Court. Among other things, the court rejected the parents’ claim that they would not qualify as litigants under the Vaccine Act because they were not able to file their action within thirty-six months from the onset of their child’s symptoms. In addition, the court determined that thimerosal was not an adulterant or a contaminant that would otherwise exempt the parents from first filing in Vaccine Court.

With regard to the thirty-six month statute of limitations claim, the Superior Court cited to the “plain language” of 42 U.S.C. § 16(a), which explicitly states that “no petition may be filed for compensation under the Program for such injury before the expiration of thirty-six months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.” The parents, however, argued that there was a latent discovery of the causal connection between autism and mercury toxicity. In other words, the parents maintained that while the minor’s symptoms occurred more than thirty-six months before they had filed their action in state court, they were not aware, until after the expiration of the thirty-six months, that there was a possible causal connection between the childhood vaccines containing thimerosal and disintegrative autism. The Superior Court noted, however, that equitable tolling does not apply in the Vaccine Program.2 Accordingly, the court held that the parents were to await a determination from the Vaccine Court as to the timeliness of their filing. The parents, the court stated, should not have anticipated a possible adverse ruling on this issue from the Vaccine Court by proceeding prematurely to state court.
Lastly, the Superior Court rejected the parents’ arguments that thimerosal was an adulterant that had been intentionally added to vaccines, which would thereby exempt them from the requirement of proceeding under the Vaccine Act. The court cited to various federal decisions indicating that vaccines containing thimerosal are in fact vaccine-related under the meaning of the act.

While Cheskiewicz does not significantly contribute to vaccine-related products liability law in Pennsylvania, it does signal what will likely be a growing trend in products liability law, here and in other jurisdictions. This is especially true if Congress amends the limitation of actions section of the Vaccine Act to allow for equitable tolling and/or more scientists, and therefore more experts, conclude that there is a causal link between the thimerosal contained in childhood vaccines and autism. While there are other environmental factors that could trigger autism in genetically vulnerable children (i.e., mercury from fish, amalgam in dental fillings, arsenic and chromium in pressure-treated wood, lead in paint, and metals in soil and drinking water), thimerosal in vaccines may well prove the next frontier in products liability law.

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2.1There are currently proposals pending before Congress to redefine the period for timely filing a petition under the Act.

**Georgia Takes Stab at Tort Reform and Ends Up Reforming Major Provisions of Civil Practice Act**

Senate Bill 3 (SB3) was signed into law in February 2005. Although the legislation was touted as tort reform and strongly advertised as having a large impact on medical malpractice lawsuits, many of SB3’s provisions have a far-reaching impact on all civil lawsuits in Georgia. The law turned Georgia into a Daubert state, did away with joint and several liability in certain cases, instituted a new offer of judgment rule, and refined the state’s comparative negligence law. Here is a summary of the major provisions:

**O.C.G.A. § 9-11-9.1 Expert affidavit required to bring malpractice action against licensed professional**

In a malpractice action against a professional licensed by the State of Georgia (or a licensed health care facility based on action or inaction of a licensed health professional), a plaintiff must file with the complaint an affidavit of an expert competent to testify, setting forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim - applies to architects, attorneys, accountants, chiropractors, social workers, dentists, dietitians, land surveyors, medical doctors, marriage and family therapists, nurses, occupational therapists, optometrists, osteopathic physicians, pharmacists, physical therapists, physicians’ assistants, professional counselors, engineers, podiatrists, psychologists, radiological technicians, respiratory therapists, and veterinarians.

**O.C.G.A. § 9-11-9.2 Medical authorization form**

A medical malpractice plaintiff must file a medical authorization form along with complaint, authorizing defense attorney to obtain and disclose protected health information to facilitate investigation of claims set forth in complaint.

**O.C.G.A. § 9-11-68 Offer of settlement**

Between 30 days after service of summons and complaint and 30 days before trial, either party may serve on the other party a written offer to settle a claim for the money, property, or relief specified in the offer and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly. If the claim is for money, an offer is made and rejected, and the judgment ultimately obtained was not at least 25% more favorable than the last offer, then the party who rejected the offer must pay the attorney’s fees of the party who made the offer, as well as the costs incurred by the party who made the offer since the rejection of the last offer. If the claim is for nonmonetary relief, an offer is made and rejected, and the ultimate judgment is not more favorable than last offer, then the party who rejected the offer must pay the attorney’s fees for the party who made the offer, as well as the costs incurred by the party who made the offer since the rejection of the last offer.

**O.C.G.A. § 24-3-37.1 Statements by health care providers not admissible as admissions**

Statements or conduct expressing benevolence, regret, apologology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence by health care providers or their agents or employees, relating to outcomes of medical treatments or procedures that are not expected or intended as a result of such treatments or procedures, are not admissible as admissions of liability or admissions against interest in civil actions.

**O.C.G.A. § 24-9-67 Expert testimony standards**

The new rule mirrors the Federal Rules of Evidence on the admissibility of expert testimony. It sets higher standards (Daubert) for reliability of expert testimony. The rules expressly require the court to hold a preliminary hearing to determine if an expert witness satisfies this standard.

**O.C.G.A. § 51-1-29.5 Emergency department standard of care**

When hospital or health care provider renders care or assistance to an individual who comes to a dedicated emergency department for treatment, the hospital or health care provider may only be held liable for damages if it failed to meet the standard of care for treatment of such patients or conditions or both in an emergency department setting under similar conditions and like surrounding circumstances, which standard is to be determined by the trier of fact.

**O.C.G.A. §§ 51-12-31 and 51-12-33 Allocation of liability for damages in tort**

When a plaintiff brings an action against one or more persons for injury to person or property and plaintiff is to some degree responsible, the trier of fact must determine the percentage of fault allocable to the plaintiff and the judge will reduce the amount of damages by such percentage.

When a plaintiff brings an action against more than one person for injury to person or property, the trier of fact shall apportion
the award of damages among the liable defendants according to the percentage of fault of each, after reducing damages for the liability of plaintiff, if any.

Damages are the liability of each person against whom they are awarded, in the proportion in which they are awarded; there is no joint liability, and no right of contribution. A plaintiff cannot recover if he or she is 50% or more responsible for the injury or damages claimed.

O.C.G.A. § 51-13-1 Limiting recovery of noneconomic damages in medical malpractice actions

Noneconomic damages recoverable in a medical malpractice action against one or more health care providers are limited to $250,000, regardless of the number of health care providers against whom the claim is asserted.

Noneconomic damages recoverable in a medical malpractice action against a single medical facility, including all persons and entities for which vicarious liability theories may apply, are limited to $250,000.

Noneconomic damages recoverable in a medical malpractice action against multiple medical facilities, including all persons and entities for which vicarious liability theories may apply, are limited to $250,000 per facility, not to exceed a maximum of $500,000 from all medical facilities, regardless of the number of medical facility defendants against whom the claim is asserted.

Noneconomic damages recoverable in a medical malpractice action against single or multiple health care providers and/or single or multiple medical facilities are limited to $750,000.

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AUTOMAKERS HIT HARD IN TENNESSEE FRONT SEAT COLLAPSE CASES

Tennessee juries have returned significant verdicts in product liability actions against automobile manufacturers in recent months. In two separate state court cases involving front seat collapse, DaimlerChrysler Corporation was hit with a verdict in excess of $100,000,000, including $98,000,000 in punitive damages, and Ford Motor Company was hit for $7,000,000 in a case where the jury declined to award punitive damages. Ford, however, won a defense verdict in federal court in a case stemming from an accident that killed four members of one family, including two small children, when the Ford pickup truck in which they were riding burst into flames after a rear-end collision.

Flax v. DaimlerChrysler Corp., et al.
No. 02-C-1288, Davidson County, Tennessee Circuit Court

After a four-week trial, a Davidson County, Tennessee jury returned a $105.5 million verdict in favor of the parents of an infant killed in a 2001 motor vehicle accident involving a 1998 Dodge Grand Caravan minivan struck from behind by another vehicle. Eight-month-old Joshua Flax was fatally injured when the driver and front passenger seats collapsed into the back seat where Joshua was sitting beside his mother.

The jury found that the minivan was defective and unreasonably dangerous, and that DaimlerChrysler was also at fault for failure to warn those pre-failure and post-failure. The driver of the pickup truck that collided with the Plaintiff’s vehicle was assessed 50% of the fault, and DaimlerChrysler Corporation was assessed 50% of the fault, with total compensatory damages in the amount of $5,000,000 to the parents of Joshua Flax for his wrongful death, and an additional $2.5 million to the mother of Joshua Flax, individually, for negligent infliction of emotional distress.

The jury further found by clear and convincing evidence that DaimlerChrysler Corporation had acted recklessly, thus meeting the standard for punitive damages in Tennessee, and in the second phase of this bifurcated trial awarded $65.5 million to both parents on the wrongful death claim, and an additional $32.5 million to the mother individually on her claim for negligent infliction of emotional distress.

Potter v. Ford Motor Company
No. CV003993, Cumberland County Tennessee Circuit Court

In another case involving the collapse of the front seats of a vehicle during a rear-end collision, a Cumberland County, Tennessee jury returned a $10,000,000 verdict against Ford Motor Company. In this case, Plaintiff Betty Potter’s seat collapsed and she was thrown into the back seat when the Ford Escort she was driving slid off the road on a curve, impacted a roadside sign post, and rotated approximately 180 degrees, with the rear of the vehicle ultimately colliding with a tree. Mrs. Potter suffered spinal cord injuries that left her paralyzed from the chest down. Ford was sued in this case under various theories of strict product liability and negligence. In its defense, Ford contended that the front seats of the vehicle were designed for a multitude of reasons (e.g. whiplash prevention), and that front seat collapse during high-speed collisions was an acceptable result.

The jury in this case returned a general verdict finding Ford to be at fault, without any specific findings on the individual legal theories asserted, and awarded compensatory damages to Mrs. Potter in the amount of $10,000,000. The jury did, however, find Mrs. Potter to
be 30% at fault, thereby reducing Ford’s liability to 70%, or $7,000,000. The jury declined to award punitive damages in this case, and awarded no damages to Mr. Potter on his claim for loss of consortium.

**Teets v. Ford Motor Company**  
No. 3:01-CV-415  
United States District Court for the Eastern District of Tennessee

Ford won a defense verdict in this wrongful death case with horrific facts, stemming from a fiery crash that killed four members of the Teets family, including two very young children. The accident occurred when the Teets vehicle, a Ford F-350 pickup truck, came upon a disabled vehicle being pushed by another vehicle in the center lane of traffic on Interstate 75. As the Teets vehicle slowed, it was struck from behind by a tractor-trailer at approximately 50 miles per hour. The Teets vehicle immediately burst into flames, and all four members of the Teets family burned to death.

The Plaintiffs claimed that the Ford F-350 burst into flames and killed the vehicle’s occupants in a foreseeable rear-end collision because (1) the design of the vehicle’s fuel system was defective and unreasonably dangerous and (2) the vehicle was not crashworthy. Specifically, the fuel tank was located too close to protruding parts of the vehicle’s frame rails, without a protective shield to prevent the tank from being punctured in a foreseeable accident.

Ford successfully asserted in its defense that the 1999 F-350 cab/chassis and fuel system were reasonably safe and consistent with the prevailing industry state of the art at the time the truck was placed on the market by Ford and met or exceeded the Federal Motor Vehicle Safety Standards. Ford also contended that the Plaintiff’s 1999 Ford F-350 cab/chassis was sold as an incomplete vehicle and was modified by a body builder after leaving Ford Motor Company, and that the aftermarket installation of the bumper assembly was the cause of the fire post collision. Ford also argued that the actions of the other motorists, and not any defective or unreasonably dangerous condition of the Ford fuel system, proximately caused the Plaintiffs’ injuries.

The jury returned a defense verdict in favor of Ford, with a specific finding that the fuel system of the 1999 Ford F-350 cab/chassis was neither defective nor unreasonably dangerous when it left the control of Ford Motor Company.

**Evidence of substantially similar acts are not limited to the specific model at issue, however, court must prevent the “side show from taking over the circus.”**


When thirteen month old, Joel Stokes pulled the cord of a fryer. The fryer slid off a counter and spilled hot oil on him. He was seriously injured. Stokes’ parents, acting on their son’s behalf, sued the fryer’s manufacturer, National Presto Industries, Inc. and the boy’s grandmother, who was cooking with the fryer when the mishap occurred.

In the pretrial phase, the trial court limited the discovery produced by National Presto to the specific accident model, a National Presto “Kitchen Kettle”. The plaintiff was able to discover additional accidents, involving other fryers, from the Consumer Products Safety Commission and Underwriter Laboratories. These accidents involved youngsters pulling fryers off counters and injuring themselves.

At trial, the court limited the plaintiff’s counsel to the three prior incidents involving the same model, the “Kitchen Kettle”. The jury returned a verdict for National Presto Industries and against the grandmother. The plaintiffs appealed.

The Missouri Court of Appeals for the Western District held that the trial court abused its discretion in limiting the evidence to the Kitchen Kettle model. The court commented that National Presto manufactured three other units that were designed for deep frying food: the FryBaby, the FryDaddy and the GranPappy models. While these differed in capacities, they all have an aluminum pot, a cooking oil fill-line and plastic feet. However, unlike the Kitchen Kettle model, the cords are not detachable.

The court of appeals did not rule that all prior incidents should be admissible. It instructed the circuit court, upon retrial, to determine whether or not the pullover incidents involving Presto’s other deep fryers were “substantially similar” to Stokes accident. The appellate court gave some guidance as to what was “sufficiently similar”. To be “sufficiently similar” the accidents must: (1) be of like character, (2) have occurred under substantially the same circumstances, and (3) have resulted from the same cause.

While the circuit court was instructed to evaluate the prior incidents and determine whether or not they were “sufficiently similar,” the appellate court also admonished the circuit court to not interpret the decision to mean that it must allow Stokes to delve into all of the details of the prior incidents, involving National Presto’s other products. For instance, Stokes sought to introduce photographs of injuries, deposition testimony, allegations from complaints filed in lawsuits against Presto, and testimony from some of the victims’ parents. The appellate court commented that such detail could be unduly prejudicial and could cause confusion by becoming the proverbial “side show taking over the circus”. 

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The appellate court also instructed the trial court to allow Stokes to discover claims involving similar incidents with National Presto’s similar deep fryers.

The Stokes case is instructive because it predicts the evidence allowed at trial concerning prior similar incidents. This opinion sends the message to manufacturers that plaintiffs are not limited to the specific model that was involved in the accident that is the subject matter of the lawsuit. Rather, plaintiffs are allowed to discover and/or adduce evidence concerning similar incidents involving similar models.

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“In the Trenches” Notable Accomplishments of ALFA Attorneys

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In McClain v. Metabolife Int’l, Inc., No. 03-12776, 2005 U.S. App. LEXIS 3505 (11th Cir. Mar. 2, 2005) (Anderson, Birch, & Royal, J.J.), the Eleventh Circuit reversed the district court’s decision admitting the plaintiffs’ causation testimony in a lawsuit which alleged a link between Metabolife 356 (an herbal appetite suppressant containing ephedrine and caffeine) and plaintiffs’ injuries (stroke and heart attack). Essentially, the lower court determined that it was unable to evaluate the methodologies employed by plaintiffs’ experts. The appellate panel held that this represented an impermissible abdication of the district court’s gatekeeping function.

The panel’s opinion went on to provide a detailed review of the methodology employed by plaintiffs’ experts, and held as a matter of law that plaintiffs’ experts did not offer reliable grounds to justify their opinions on general causation. In so holding, the Eleventh Circuit reversed the $4.1 million judgment entered after the November 2002 trial. The opinion offers an excellent roadmap for evaluating expert testimony in a toxic tort case and should be of immediate benefit to counsel defending such cases.

If you have any questions or comments on this case, the authors may be contacted at (215) 344-5151, or via e-mail at: egb@bowronlatta.com, or jpk@bowronlatta.com.

ALFA Attorneys Team Up With National Electrical Manufacturers Association for Conference

ALFA Attorneys Jeff Johnson of Cosgrave Vergeer Kester, LLP, in Portland, Oregon, and J.K. Leonard of Ball & Weed, P.C. in San Antonio, along with a team of ten other ALFA attorneys from four countries, are collaborating with the National Electrical Manufacturers Association (www.nema.org) to co-sponsor and speak at NEMA’s Product Liability and Safety Conference at the Palmer House Hilton in Chicago September 12-14, 2005. Jeff and J.K. are the co-chairs of the program in conjunction with NEMA General Counsel, Clark Silcox. In addition to Jeff and J.K., the ALFA speakers consist of Bill Drury of Renaud Cook Drury & Mesaros in Phoenix; John Bell of Johnson & Bell in Chicago; Dean Murtagh of German, Galligher & Murtagh in Philadelphia; Gary Gordon of Rider Bennett, LLP in Minneapolis; Skip Martin of Haight, Brown & Bonesteel, LLP in Los Angeles; Richard Wageman of Lehman, Lee & Xu in Beijing, China; K.V. Ramesh and Antony Alex of Kochar & Co. in Mumbai, India; John Cowden of Baker Sterchi, Cowden & Rice, LLC in Kansas City, Missouri; and Bruce Churchill-Smith of Parlee McLaws in Alberta, Canada. The ALFA team arranged to have Hal Stratton, Chairman, U.S. Consumer Product Safety Commission, and Michael G. Connors, Region V Administrator, OSHA, serve as speakers during the program with Chairman Stratton delivering the keynote address.

This program is one in a series of seminars jointly sponsored by ALFA and a national trade association.
Subcommittee News

**CPSC Subcommittee**

The CPSC committee met in Washington, D.C. on March 7 and 8, at the invitation of Hal Stratton, Chairman of the Consumer Products Safety Commission. A number of ALFA clients were able to attend. In addition, several ALFA member firms' representatives were present, including practice group chair Skip Martin of Haight, Brown & Bonesteel, Los Angeles, and CPSC committee members Paul Rosenlund of Hancock, Rothert & Bunshoft LLP, San Francisco; Kevin Owens of Johnson & Bell, Ltd., Chicago; Del Lantz of McNees, Wallace & Nurick, LLC, Harrisburg, PA; as well as Chuck Stewart of Bradley Arant Rose & White, LLP, the ALFA firm for Huntsville, Birmingham, and Montgomery, Alabama. All client representatives and these ALFA firm lawyers met at Thompson O'Donnell, LLP, the Washington, D.C. ALFA firm.

After the meeting, the ALFA lawyers and clients had dinner with Chairman Hal Stratton, Gib Mullan (Director, Office of Compliance), and Page Faulk (General Counsel). The dinner allowed everyone to get to know these individuals in a social setting. Client issues were not discussed, but it is hoped that social gatherings like this will assist the CPSC in fostering better communications with product manufacturers, distributors and retailers. A number of consumer organizations already are very active in CPSC issues.

The next day, March 8, 2005, there was a meeting at the CPSC's offices at which the CPSC introduced the Wal-Mart matrix for reporting potential product hazards as a safe harbor mechanism for fulfilling CPSA section 15 reporting obligations. Questions and suggestions were solicited in regard to how this matrix works for Wal-Mart, how it might be simplified for retailers without the size or resources of Wal-Mart, and how it might be adapted for use by product manufacturers and distributors.

The CPSC committee plans to continue to meet in an effort to investigate how it can provide meaningful assistance to those ALFA clients who have matters before the CPSC. We encourage any ALFA client to participate in the committee, or to make suggestions about how this committee can be helpful to its clients.

If you have any questions or concerns that you would like the committee to address, please do not hesitate to contact any ALFA lawyers or ALFA clients listed above.

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**Teleseminar Subcommittee**

In the Fall of 2004, Skip Martin asked Mark Verwys, John Cowden and Jack Klecan to put together a series of teleseminars focusing on issues important to clients and attorneys litigating product liability matters. The first such seminar took place December 7, 2004 on the subject “Controlling Litigation Dissemination Of Confidential Information”. The subcommittee is currently developing its next teleseminar for the June/July timeframe on the subject of digital discovery, including a discussion of the new ABA standards regarding electronic discovery, the implications for document retention policies, and practical tips for serving and responding to discovery requests. If you would like to serve as a panelist, or have additional ideas for future teleseminars, please contact (e-mail preferred):

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Charles A. Stewart III, Chairman of CPSC Subcommittee
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Upcoming ALFA International Events

May 20, 2005 – May 21, 2005
**European Membership Meeting**
Prague, Czech Republic
**Contact Info**
ALFA Contact: Amy Sammon (312) 642-5244

Spring 2005

**Pacific Rim Membership Meeting**
Beijing, China
**Contact Info**
Group Chair: Richard L. Wageman (86) (10) 8532-1919

Jun 01, 2005 - Jun 03, 2005
**Insurance Law Seminar**
The Marriott Financial Center
New York City, New York
**Contact Info**
Group Chair: J. Snowden Stanley, Jr. (410) 539-5040
Group Vice Chair: George D. Fagan (504) 585-7500
Group Vice Chair: Kevin E. O'Brien (303) 628-3300
ALFA Contact: Jessica Zaroski (312) 642-5244

Fall 2005

**International Law Practice Group Seminar**
Singapore
**Contact Info**
Group Co-Chair: Laurence Watt 44-20-7203-5000
Group Co-Chair: Harvey Jay Cohen (513) 977-8200
Program Chair: Pavel Safár +420 221 990 455
ALFA Contact: Amy Sammon (312) 642-5244

October 20, 2005 – October 23, 2005
**Annual Business Meeting**
The Westin Chicago River North
Chicago, Illinois
**Contact Info**
ALFA Contact: Amy Sammon (312) 642-5244

November 9, 2005 - November 11, 2005
**Health Care Seminar**
The Wyndham Canal Place
New Orleans, Louisiana
**Contact Info**
Group Chair: Bruce G. Arnold (414) 273-2100
Program Chair: James D. Lantier (315) 474-2911
ALFA Contact: Amy Sammon (312) 642-5244

September 12, 2005 - September 14, 2005
**National Electrical Manufacturers Associations Seminar**
ALFA Contact: J.K. Leonard (210) 731-6300
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