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PRODUCT LIABILITY

LAW SECTION · STATE BAR OF GEORGIA

October 1999 • Volume 1, Number 1

Section Activities

November 12, 1999
9:00 a.m. – 3:30 p.m.
Product Liability Seminar
Atlanta, Georgia
(co-sponsored with ABA)

January 7, 2000
12:00 Noon
Section Lunch
Swissotel - Atlanta, Georgia
(Midyear Meeting of State Bar)

April 2000
Product Liability
Institute Seminar

June 2000
Section Meeting
Savannah, Georgia
(Annual Meeting of State Bar)

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Product Liability Seminar

By Larry Jones, Executive Director, Institute for Continuing Legal Education

One of the initiatives commenced by the ICLE Board of Trustees this past year is the formation of alliances with other organizations for the purpose of enhancing the CLE offerings in Georgia. One alliance we have made is with the Tort and Insurance Practice Section of the American Bar Association. We obtained permission to use materials from several ABA national programs and present these programs in Georgia using local speakers in addition to the national ones. The idea is to provide the attendees with an extensive set of original program materials at a cost far below the standard price for such a program, and without having to travel outside Georgia.

The first program we co-sponsored with the ABA was held May 14, 1999, in Atlanta. The program focused on emerging issues in employment litigation. The program was a tremendous success and well attended; in fact, the audience in Atlanta was larger than the audience at the initial offering of the program in Boston.

The next program we are offering in this manner is the Product Liability Megaconference which was originally held in October 1998 in Boston. This will be presented in Georgia on November 12, 1999 at the Ritz-Carlton Downtown Hotel. The Boston seminar lasted two days. Our plan for the Atlanta seminar is a one day program using about half of the original program topics. However, the attendees will receive the entire book from the original conference.

Please put this date on your calendar and don't miss this opportunity to obtain the latest information in your practice area. A stellar panel of local and national speakers has been recruited to present these materials in Georgia. A full brochure detailing the topics and speakers will be mailed shortly.

Reduced registration fee for Section members

Pictured above are some of the seminar speakers: Judge Yvette Miller, Neal Pope, and Laura Owens.

Message from the Chair

Stephanie E. Parker
Jones, Day, Reavis & Pogue

I am very pleased that our Section's first-ever newsletter is now in print. This newsletter is just one of many initiatives our Section plans to undertake this year.

We are very fortunate that our State Bar President, Rudolph Patterson, is attuned to the issues we are facing in revitalizing the Section. Rudolph is very committed to our Section becoming more active and has been supportive of those efforts.

Section Goals for the Year

I hope that we will be able to accomplish the following goals this year:

1. Publish a quarterly newsletter that is truly first-class. You're reading the first issue!
2. Establish bylaws for our Section. A draft (based on the State Bar's model bylaws) has been submitted to the Board of Governors for their consideration.
3. Sponsor two product liability seminars. The Section's annual "Product Liability Institute" has always been well received, and I hope we can continue that tradition every spring. In addition, this year the Section is co-sponsoring a seminar with the American Bar Association which is covered on page 1 of this newsletter. It will take place on November 12th at the Ritz-Carlton.
4. Begin a series of small luncheon meetings for our members in Rome, Savannah and Macon. Our Section covers all of Georgia and we hope those meetings will be another way to include all our members.
5. Last but not least, we need to establish a larger group of volunteers for leadership succession. We especially need volunteers to assist with the seminars and this newsletter.

I send my sincere thanks to Lesley Smith, our enthusiastic Section Coordinator at the State Bar, for all her help and to Larry Jones, Executive Director of ICLE, for his assistance and creativity with the November 12th seminar.

I am looking forward to working with the Section members this year. If you have any ideas on how we can be of additional assistance to our Section members, or if you would like to volunteer, please contact me at:

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News About www.gabar.org

Caroline M. Sirmon
Internet Coordinator, State Bar of Georgia

The State Bar of Georgia is proud to announce a new area of the Web site specifically designed for Sections. This new area can be found by going to "Site Map" and selecting "Sections" or by clicking on the "Attorney Information" button on the home page. This new area expands the sections' presence on the Web to include a separate page for each section, a page for section meeting notices, information about joining a section, and notes from Section Liaison Lesley Smith. In addition, each section has its own Forum on the Discussion Board that can be used to share ideas, discuss important topics, or broadcast messages to other section members. If you have ideas or suggestions concerning new content you would like to see on the site, please contact your section leadership.

Make sure to check out the article about the redesigned State Bar of Georgia Web site in the new August issue of the *Georgia Bar Journal*. The article details many of the site's features, and answers questions that newcomers might have.

Please feel free to drop me a line with your comments at caroline@gabar.org. Enjoy!

A Way Around the Daubert Gate?

By Robert Iscaro
Jones, Day, Reavis & Pogue

Contrary to popular belief, it is not always necessary to support expert medical testimony with published scientific studies. Some courts will allow a "scientific methodology" known as "differential etiology." For example, the following case was recently decided by the Second Circuit U.S. Court of Appeals.

A plaintiff claimed she developed a very rare and fatal lung condition because her physician over-prescribed a medication to treat endometriosis, a disease of the female reproductive tract. Her experts conceded that no formal studies had ever been done to determine whether the drug could cause the lung condition and, in fact, very few women ever received the doses of the drug that the plaintiff received in any setting.

Nonetheless, her treating physician and expert testified that the drug caused her injuries, based not on any scientific data, but on his care and treatment of the plaintiff, his knowledge of her medical history, and his training and experience. The plaintiff in this case was awarded more than $1 million in damages.

One would expect this verdict to be reversed on appeal as it was not based on any scientific data, but that was not the case. The Second Circuit affirmed the lower court in *Zuchowicz v. United States,* 140 F.3d 381 (2nd Cir., 1998). The appellate court found that it was sufficient that the physician-expert used differential etiology.

This result seems to fly in the face of the triumvirate of Supreme Court decisions, beginning with *Daubert v. Merrell Dow Pharmaceuticals inc.,* 509 U.S. 579 (1993), which breathed new life into Rule 702 of the Federal Rules of Evidence. *Daubert* cast the trial judge as the "gatekeeper" who should allow only "reliable" expert evidence into the courtroom. Four years later, in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), the court strengthened that role by holding that an expert opinion, even if based on valid methodology, is not admissible just by the say so (*ipse dixit*) of the expert. Rather, the expert's conclusion must logically follow from the data and methodology that she uses. Most recently, in *Kumho Tire Co. Ltd. v. Carmichael,* U.S., 199 S. Ct. 1167 (1999), the court held that the trial court's gatekeeping function extends to "non-scientific" testimony, and should be applied to all testimony concerning technical or specialized knowledge, such as an engineering, as well.

A split in the circuits on the appropriate use of the methodology known as "differential diagnosis" (or "differential etiology") highlights the inherent ambiguity in applying the principles espoused by *Daubert.* Three are two general approaches. One, best exemplified by the Fifth Circuit's *en banc* decision in *Moore v. Ashland Chemical Inc., Moore, supra.* rehearing denied, F.3d (5th Cir., Sept. 18, 1998), *cert.* denied, U.S., 143 L. Ed. 2d 541 (1999), holds that in an action where general causation is contested (which usually entails a toxic tort claim involving exposure to either a drug or chemical), a physician/expert may not rely solely on the methodology of differential diagnosis to offer an opinion on specific causation. Rather, the physician-expert must also establish general causation, i.e., that the drug or chemical is capable of causing the claimed illness, by reference to objective scientific data, such as published epidemiologic studies. The other approach, best exemplified by the Third Circuit's decision in *Heller v. Shaw Industries Inc.,* 167 F.3d 146, 154 (3rd Cir., 1999), holds that as long as the methodology is one used by similar experts in actual practice (which is true for differential diagnosis), then the testimony is admissible, even in the absence of any proof of general causation.

The *Moore* approach makes sense. Differential diagnosis, as methodology, does not, and cannot, resolve issues of general causation. E.g., *Cavallo v. Star Enterprise*, 892 F. 756, 771 n. 34 (ED VA, 1995), affirmed in part and reversed in part, 100 F.3d 1150 (4th Cir. 1996), *cert.* denied, 522 U.S. 1044, 118 S.Ct. 684 (1998). Rather, differential diagnosis is a method whereby clinical physicians review a patient's symptoms and medical history and arrive at a diagnosis by listing various known causes of the observed symptoms and ruling out those that are least likely. But because the methodology itself is limited to considering only known causes, by definition it cannot be used to rule in a previously unknown cause.

Thus, if a drug or chemical has not previously been shown, through appropriate scientific methods such as case controlled studies, to cause a particular side effect, then its inclusion as a possible cause in a differential diagnosis cannot establish it as a cause; in fact, it should not even be on the list. Otherwise, the meth-

odology of differential diagnosis simply allows an expert to bootstrap any speculation into a causation opinion, even though the causal connection has never been proven. This is precisely what *Daubert* is intended to prevent. As stated by the Court of Appeals for the Fifth Circuit:

> The underlying predicates of any cause-and-effect medical testimony are that medical science understands the physiological process by which a particular disease or syndrome develops and knows what factors cause the process to occur. Based on such predicate knowledge, it may then be possible to fasten legal liability for a person's disease or injury.... Absent these critical scientific predicates, for which there is no proof in the record, no scientifically reliable conclusion on causation can be drawn.
>
> *Black v. Food Lion Inc.*
> 171 F.3d 308, 314
> (5th Cir., 1999)

Because the methodology of differential diagnosis arose in a clinical setting, at trial reliance on this methodology is most frequently seen not with traditionally retained experts, but with treating physicians. There is no question as to the impact such testimony can have. A treating physician is perceived (rightly or wrongly) as an impartial witness who frequently formed her opinion in the course of treating the plaintiff before litigation was even considered. Such testimony carries great weight and, concomitantly, the potential for great prejudice. Yet to woodenly accept the methodology of differential diagnosis on the ground that it is used by physicians in their practice misses the point.

A physician's purpose in a clinical setting is vastly different from a causation expert's role at trial. A clinician's concern is to treat the patient, and not to determine which of several possible causes is more likely than the others. In doing so, a physician might speculate as to causes without any scientific support as to whether the particular drug or chemical can, in fact, cause the injury. This may not matter in a clinical setting. Often, irrespective of the differential diagnosis the treatment of the patient's symptoms will be the same, whether the cause is known or not. By contrast, an expert in court testifies as to whether it is more likely than not that a particular drug or chemical caused the plaintiff's injuries. The methodology of differential diagnosis was not intended for this type of inquiry. It seems axiomatic that without scientific proof of general causation, any opinion with respect to specific causation (that is, whether a drug or chemical in fact caused a reaction in a particular plaintiff) is nothing more than speculation of the kind that should be stopped at the gate by Fed. R. Evid. 702 and *Daubert*. But whether the gate is open may depend on which federal circuit you are in.

For example, the Court of Appeals for the Third Circuit opens the gate fairly wide by holding that "a differential diagnosis and a temporal analysis" meet the criteria for admissibility under *Daubert*, even though there are no published studies establishing general causation. *Heller v. Shaw Industries Inc.,* 167 F.3d 146, 154 (3rd Cir. 1999). Incredibly, the court stated, "we do not believe that a medical expert must always cite published studies on general causation in order to reliably conclude that a particular object caused a particular illness." *Id.* At 155. The court seems to recognize the shortcomings of its decision and, rather than insisting on scientific data to establish some link between the chemical at issue and plaintiff's illness, it instead requires that in the absence of scientific data, a strong temporal relationship must exist between exposure to a chemical and the plaintiff's illness in order to render the causation opinion admissible. *Id.* At 154. Yet common sense reveals the well-known shortcomings of relying on a temporal relationship to prove causation. To name a few, there is no accounting for confounding factors, idiosyncratic reactions, or fortuity. The court in *Heller* found a temporal relationship lacking, largely due to the testimony of one of the plaintiffs that his symptoms started before he was exposed to the chemicals contained in the defendant's product. So the court excluded the disputed testimony.

How wide the gate is open in the Second Circuit seems to depend on which way the wind is blowing. That court also allows into evidence the testimony of treating physicians who use the methodology of differential diagnosis, even though there is no medical and scientific literature establishing general causation. *Zuchowicz,* supra; *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038 (2nd Cir., 1995). But while the court in *Zuchowicz* placed great weight on the temporal relationship between the ingestion of the drug and the onset of symptoms, the court in *McCullock* did not feel the need to do so. Rather, the court simply stated that the lack of "textual authority" for the disputed expert's opinion goes to "the weight, not admissibility, of his testimony." *Id.* at 1044.

The Ninth Circuit will exclude causation evidence if there is no scientific proof of general causation. *Cabrera v. Cordis Corp.,* 134 F.3d 1418 (9th Cir., 1998). But if there is any data to support an expert's opinion, the court will admit it, even if the data does not demonstrate that the offending substance causes the actual disease suffered by the plaintiff. *Kennedy v. Collagen Corp.,* 161 F.3d 1226 (9th Cir., 1998), *cert.* denied sub nom *Collagen Corp. v. Kennedy,* 119 S.Ct. 1577 (1999) ("The fact that a cause-effect re-

lationship between Zyderem, the alleged offending substance, and lupus in particular has not been conclusively established does not render Dr. Spindler's testimony inadmissible.") The question then becomes, without scientific proof of general causation, isn't the court allowing testimony as to causation based solely on the *ipse dixit* of the physician?

The Court of Appeals for the Fifth Circuit believes so. In *Moore v. Ashland Chemical Inc.,* 151 F.3d 269 (5th Cir., 1998), (*en banc*) rehearing denied F.3d (5th Cir., Sept. 18, 1998), *cert.* denied, U.S. 143 L.Ed. 2d 541 (1999), the court upheld the exclusion of a treating physician's causation opinion using the differential diagnosis methodology because the proposed expert was not able to demonstrate an established scientific connection between exposure to the chemical and the illness. *Id.* at 278-79 *Accord, Black, supra*. In so doing, the court also dismissed the importance of any temporal relationship, except in the most severe cases. The court cited the example used *Cavallo*, stating that a temporal relationship would be important if the plaintiff had been doused with jet fuel (the chemical at issue in *Cavallo*) just before experiencing symptoms or if there was a mass exposure of jet fuel to many people who in turn suffered similar symptoms.

The Seventh Circuit has also affirmed the exclusion of a treating physician's causation opinion because he was not able to support his opinion with any scientific studies or experiments. *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1107 (7th Cir., 1994), *cert.* denied 512 U.S. 1222 (1994), as has the Eighth Circuit. *Wright v. Willamette Industries Inc.,* 91 F.3d 1105, 1106 (8th Cir., 1996) (treating physician's causation testimony excluded due to lack of proof that plaintiffs were exposed to scientifically proven toxic levels of formaldehyde emitted from defendants fiberboard manufacturing plant).

After vacillating between allowing the admission of the testimony of treating physicians that relied on a differential diagnosis methodology without reference to supporting scientific literature, *Benedi v. McNeil-PPC Inc.*, 66 F.3d 1378, 1374 (4th Cir., 1995), and, one year later, affirming the exclusion of an expert's testimony who relied on the differential diagnosis methodology because his opinions were not supported by the published scientific literature, *Cavallo,* supra, 100 F.3d. 1159 (4th Cir., 1996), *cert.* denied, 118 S.Ct. 684 (1998). the Fourth Circuit has recently aligned itself in favor of admitting opinions based on differential diagnosis. *Westberry v. Gislaved Gummi AB*, 1999 WL317535 (4th Cir., May 20, 1999). In *Westberry,* the court held it was not error to admit the causation opinion of a treating physician, based on differential diagnosis, even though there were no epidemiological studies, no peer-reviewed published studies, no animal studies, and no laboratory data to support the opinion. *Id.* at 3.

All of this means that those circuits that do not require proof of general causation, a plaintiff has a way around the *Daubert* gate so long as she has a treating physician that is willing to testify as to causation based on the methodology of differential diagnosis. As stated by the Second Circuit, the lack of any "textual" support goes to the weight of the evidence, and not its admissibility. But if that were so, then why have a gate at all? *Kumho* seems to signal a more vigilant watch over the gate and provides support for a motion in any circuit to exclude an expert's opinion based solely on differential diagnosis in a case where general causation is contested.

This article has been reprinted with permission from Andrews Publications Medical Devices Litigation Reporter, July 15, 1999.

Submission of Materials

The Product Liability Newsletter welcomes submission of articles and case summaries involving issues of interest to product liability lawyers. If you are aware of a significant or interesting case, please bring it to our attention. We are also interested in short articles.

Thank you to Christine Panchur and Joseph Sabol of Jones, Day, Reavis & Pogue for contributing the design and layout of this newsletter.

Case Updates

Lexy DeVane
Emory University School of Law, 2001

Fluidmaster, Inc. v. Severinsen,

238 Ga. App. 755, – S.E.2d – (1999)

Facts: A toilet in Severinsen's nine-year old home overflowed as a result of water seeping out of a tank. Severinsen brought action against Fluidmaster, the manufacturer of the toilet-tank valve in use when the toilet overflowed.

Question Presented: Is Fluidmaster liable under a negligent-failure to warn theory based on the claim that it had a duty to warn Severinsen that the seal of the valve would deteriorate over time when exposed to normal toilet-tank conditions?

Holding: Fluidmaster, Inc. was entitled to summary judgement on Severinsen's claim for negligent failure to warn, since Fluidmaster had no duty to warn Severinsen of the deterioration of the valve seal over a 9-year period due to normal wear and tear.

Reasoning: Under Georgia law, one who supplies a chattel for use by another is subject to liability "for physical harm" if the supplier (a) knows or should realize that the chattel is likely to be "dangerous for the use which it is supplied," (b) has no reason to believe that the user of the chattel will realize its dangerous condition," and (c) fails to exercise reasonable care to inform them of its dangerous condition or the facts that make it likely to be so. Thus, the duty to warn doctrine does not require a product manufacturer to warn of a product-connected danger which is obvious or generally known. Even if the risk of product failure as a result of normal wear and tear could be characterized as a "dangerous condition," it is obvious that the internal component parts of a device such as a toilet tank wear out over time. Therefore, Fluidmaster had no duty to warn Severinsen of any danger posed.

Daniels v. Bucyrus-Erie,

237 Ga. App. 828, 516 S.E.2d 848 (1999)

Facts: Daniels suffered severe injury as a result of a crane manufactured by Bucyrus-Erie that tipped over on him. Before lifting the two 12-ton ice machines off the top of a building owned by Daniels' employer, the crane owner-operator had placed additional supports under only two of the four horizontal outrigger arms. The first lift occurred without incident. During the second lift, an unsupported outrigger arm sunk eight inches in the ground, causing the crane to tip, which resulted in the arm telescoping back into its housing. Daniels was working nearby when the crane toppled.

Procedural History: The trial court entered summary judgement on the "failure to warn" claim holding there was no duty to warn and no proximate causation.

Question Presented: Is Bucyrus-Erie liable for failure to warn of the potential danger of using the crane without placing supports under the crane's outrigger arms?

Holding: Since the crane operator understood that supports were necessary, Bucyrus-Erie was not liable for failure to warn that the crane's outrigger arms did not lock and required supports. Bucyrus-Erie was also not required to warn innocent bystanders, such as Daniels, since it was sufficient that the operator be aware of the risks.

Reasoning: An open and obvious danger may bar "failure to warn" claims. Since Daniels admits that the crane operator was keenly aware of the very risks about which Daniels claims he should have been warned, the warnings Daniels proposes should have been placed on the crane would provide the crane operator with no new information. The user's knowledge of the hazard excused any lack of warning. Further, Daniels' argument that he as an innocent bystander should have received a warning regarding the dangers of the crane is without merit. Besides the fact that he would not have been able to see the warnings anyway, the court noted that the bystander's inability to determine whether the crane is adequately supported prevents a bystander from doing anything about it. The warning need not necessarily be given to the person actually injured in order for the manufacturer to escape liability. The warning may be given to a person in a position such that he may reasonably be expected to act so as to prevent the danger from manifesting itself. Even if a warning should have been given, Daniels admits to having paid no attention to the arms of the crane prior to the accident, and thus would not have seen any warnings proposed by the experts. Thus, there could be no showing of proximate cause and summary judgment was warranted.

Whatley v. Medical Engineering Corp.,

Civ. Action No. 1:93-CV-2836-RLV (N.D. Ga. 1998)

Facts: Whatley alleges that the silicone gel breast implants manufactured by Defendants delayed the detection and treat-

ment of her breast cancer by blocking or masking the cancer from mammographic detection. Whatley asserts the implants were radiopage, a term meaning exhibiting opacity to or impenetrability by x-rays or any other form of radiation.

Holding: Because Whatley could not offer sufficient evidence to meet the threshold issue of causation, the Defendant's motion for summary judgement is proper.

Reasoning: Both of the Plaintiff's expert witnesses were not admissible because they did not satisfy the *Daubert* test for a scientific opinion. As a result, Plaintiff could not meet the threshold requirements for causation. In addition, Defendant's expert witness stated in her affidavit that the breast tumor was visible and not masked or obscured by the breast implant. The Plaintiff did not come forward with any argument or evidence which contradicts this expert's statement. Because Plaintiff could not meet the threshold for causation and had no evidence to contradict Defendant's expert, summary judgement was proper.

Jones v. Sofamor, S.N.C.,

Civ. Action No. 1:96-CV-3167-RWS (N.D. Ga. 1999)

Wheat v. Sofamor, S.N.C.,

46 F. Supp. 2d 1351 (N.D. Ga. 1999)

Facts: Each Plaintiff in both cases sustained some type of back injury and eventually underwent back surgery which included instrumentation manufactured by Sofamor.

Question Presented: Is Sofamor liable for defective design, manufacture, and failure to warn–and negligence based on the aforementioned allegations and the failure to seek FDA approval?

Holding: The evidence in both cases was insufficient to survive summary judgement. There is no reliable evidence of a design defect and no reliable evidence that any alleged defect caused an injury. Plaintiffs' claims based on the failure to seek FDA approval, defective design, defective manufacture, or negligent failure to warn, all fail to prove that any allegedly negligent act caused an injury.

Reasoning: In Georgia there is no liability for an "unreasonably dangerous" product absent some defective condition. The court in both cases excluded Plaintiff's expert testimony with respect to the issue of whether the pedicle screws in question were defective. As a result, Plaintiff had no evidence of a defect in either case and Defendants' motions for summary judgement were granted. Moreover, applying the risk-utility test, the trier of fact considers the availability of an alternative safer design, cost trade-offs, tactical market decisions, product development, research/testing demands (technological feasibility), varying corporate management styles, and regulatory restrictions. While evidence may have existed which might suggest that "pedicle screws" did not meet regulatory standards, Defendants proffered evidence that the screws at issue here were cleared for use by the FDA. Since the Defendants demonstrated that by applying the risk-utility test the lack of defect is plain and undisputable, summary judgement is appropriate.

Whether Plaintiffs' claims are based on the failure to seek FDA approval, defective design, defective manufacture, or negligent failure to warn, Plaintiffs cannot prove that any allegedly negligent act caused an injury. The negligent failure to warn claim was insufficient because the "learned intermediary", the doctor, had actual knowledge of the substance of the alleged warning and would have taken the same course of action even with the information the Plaintiff contends should have been provided. The learned intermediary breaks the causal link and Plaintiff cannot recover. Therefore, Defendants are entitled to summary judgement because of the absence of evidence creating a genuine issue of fact on causation.

Gentry v. Volkswagen of America,

– S.E.2d. –, 1999 WL 494107 (Ga. Ct. App. 1999)

Facts: The Gentrys are the parents of Lori Gentry who was killed in an automobile crash while riding in an 1981 Volkswagen Rabbit. The 1981 Rabbit was equipped with a fully passive restraint system which consisted of a passive (automatic) two-point shoulder belt harness, a ramped seat and a deformable knee bolster (the VWRA system). The Rabbit did not have a lap belt but used the ramped seat and deformable knee bolster to restrain the lower part of the passenger's body.

Procedural History: The trial court granted partial summary judgement to Volkswagen on the grounds that the National Traffic & Motor Vehicle Safety Act (the Safety Act) preempted the Gentry's wrongful death claim for the death of their daughter.

Question Presented: Are the Gentrys' common law product liability claims preempted by the Safety Act? The Gentrys assert that the specific design selected by Volkswagen for the VWRA system was defective. Volkswagen argues that if the Gentrys are allowed to bring their state law claim a conflict between the state law claim and federal law would result.

Holding: The judgment of the trial court is affirmed as to the Gentrys' claim that the 1981 Rabbit was defective because it did not include a lap belt. No conflict of law was held to be created.

Reasoning: The 1981 Rabbit was defective because it did not include a lap belt. Although options within the federal Standard 208 are available to manufacturers, Volkswagen's choice of design within the range of options under Standard 208 was defective. An automobile manufacturer's compliance with federal regulations does not eliminate liability for design defects under Georgia law. Under the risk utility analysis applied to claims asserting design defects, compliance with applicable federal standards is simply one of the factors

to consider. Thus, Volkswagen's compliance with the requirements of the Safety Act does not bar Plaintiffs from asserting a product liability claim under Georgia law. Holding a manufacturer liable where a fully passive restraint system failed to exceed this minimum standard does not create a conflict, but instead dovetails with congressional intent. Manufacturers are encouraged to design fully passive restraint systems which offer greater occupant protection. A manufacturer can meet both the minimum federal standard and the state tort standard by designing its restraint system to meet the later. Thus, it would not conflict with congressional intent to hold Volkswagen liable in tort for failure to design a passive restraint system that exceeded federal standards.

Ogletree v. Navistar Int'l Transp. Corp.,

236 Ga. App. 89, 511 S.E.2d 204 (1999)

Facts: Decedent's wife brought wrongful death action against the manufacturer of a cab and chassis converted into a fertilizer spreader truck that backed over her husband, causing his death, alleging that manufacturer had duty to install audible back up alarm on vehicle.

Procedural History: After the jury returned a verdict awarding the plaintiff funeral and medical expenses, the State Court granted the manufacturer's motion for judgement notwithstanding the verdict, and plaintiff appealed. The Court of Appeals affirmed, 227 Ga. App. 111, and cert. was granted. The Supreme Court reversed and remanded, 269 Ga. 443.

Question Presented: Was manufacturer negligent for failing to install a audible back up alarm on vehicle?

Holding: On remand, the Court of Appeals held that the manufacturer was not negligent in failing to install a back up alarm on cab and chassis, and the evidence was insufficient to establish that risk of the cab and chassis without a back-up alarm outweighed the usefulness of the product in that condition, as required to support the design defect claim.

Reasoning: First, the court noted that the burden of presenting evidence that the manufacturer acted negligently is always on the plaintiff by showing that the risks inherent in a product design outweigh the utility or benefit derived from the product. Therefore the question of negligent or defective design need not always be presented to a jury.

The court found that the manufacturer was not negligent in failing to install a back-up alarm on a cab and chassis that years later was substantially modified and used for a fertilizer spreader vehicle. No fertilizer spreader had ever had a back-up alarm because such alarms were not required by government regulation or industry practice. Moreover, there was no evidence that such vehicles had ever injured anyone while backing up, and the manufacturer had offered a back-up alarm option at the time cab and chassis were sold, which the buyer had opted not to purchase. Further, absence of the alarm was apparent to the decedent. Finally, the evidence was insufficient to establish that the risk of the cab and chassis without a back up alarm outweighed the usefulness of the product in that condition, as required to support the design defect claim against its manufacturer. Cab and chassis could be used in a variety of vehicles that did not need a back up alarm.

Versico, Inc. v. Engineered Fabrics Corp.,

– S.E.2d –, 1999 WL 455382 (Ga. App. Jul. 7, 1999)

Facts: A roofing system was installed by Goodyear Tire & Rubber Co., the predecessor in interest to Versico, on buildings owned initially by Goodyear Aerospace and currently owned by Engineered Fabrics Corp. (EFC). The record shows that the roofing installed in 1986 never performed properly. It began leaking almost immediately, and Goodyear honored the warranty by inspecting the premises and carrying out repairs when called upon to do so first by Goodyear Aerospace, then EFC. After Versico became responsible for the business, it, too, responded to warranty claims and continued to perform repairs. This continued until October 27, 1995, when Versico informed EFC that it would no longer honor the warranty. Further requests were ignored or refused, and EFC filed this action against Versico for breach of the warranty.

Procedural History: Trial court denied Versico's motion for summary judgement and granted partial summary judgment to EFC on the issue of liability.

Question Presented: Was Versico liable for failure to honor the warranty?

Holding: Trial court's judgement affirmed and partial summary judgement granted to EFC.

Reasoning: Versico was contractually obligated to honor the warranty. Versico breached the warranty when it refused to repair or replace the roofing system on EFC's buildings. No doubts existed that the language of the agreement intended for Versico to take over Goodyear's obligations with regard to roofing warranties already issued. Since the contract had no apparent ambiguity, the contract raised no jury question unless the ambiguity remains after applying the rules of contract construction.

Ray v. Ford Motor Co.,

237 Ga. App. 316, 514 S.E.2d 227 (1999)

Facts: Motorist who was injured when her car ran over her after she removed the keys sued car's manufacturer for negligence, fraud, breach of warranty, and strict liability. She alleged that the car suffered from a design defect in that it lacked an ignition/transmission interlock device to prevent removal of ignition key unless transmission was in "park" position.

Procedural History: The State Court entered judgement on jury verdict for manufacturer. Motorist appealed.

Question Presented: Was manufacturer liable in negligence for design defect?

Holding: The Court of Appeals held that, first, evidence of prior instances of inadvertent vehicle movement in cars lacking ignition/transmission interlock device was inadmissible on issue of notice, second, the instructions to the jury on motorist's own negligence over her objection was proper, but third, the trial court erred reversibly by failing to clarify the applicable law when jury inquired as to what verdict was required in event that both parties were considered to have equal liability.

Reasoning: First, evidence of prior instances of inadvertent vehicle movement in cars lacking ignition/transmission interlock device was inadmissible on the issue of notice. The motorist failed to establish a sufficient foundation for evidence and expert testimony about auto manufacturer's database listing two separate groups of prior instances of inadvertent vehicle movement in cars lacking an ignition/transmission interlock device. The motorist did not argue that instances in the first group were similar to her accident, and while the motorist did cite to four factors among the second group of incidents that she claimed were consistent with her accident, the manufacturer introduced uncontroverted evidence that the information from which motorist's expert gleaned these factors was unreliable. In product liability actions, evidence of other incidents involving the product is admissible, and relevant to the issues of notice of a defect and punitive damages, provided that there is a showing of substantial similarity. Without a showing of substantial similarity, the evidence is irrelevant as a matter of law.

Second, the instructions to the jury on the motorist's own negligence over her objection was proper in her design defect action against auto manufacturer, despite her claim that she pursued only claim for strict liability at trial. She asserted claims for both strict liability and negligence in her complaint. She made no mention of strict liability per se in pre-trial order, but asserted only that she was entitled to damages based upon manufacturer's negligence and her attorney declined the manufacturer's attorneys' suggestion during charge conference that she dismiss her negligence claims and proceed only on her strict liability claim. Moreover, the court ruled that the jury instruction on the relationship between motorist's negligence and her claim for strict liability against the auto manufacturer did not confuse the jury. The jury was instructed that "contributory negligence of the plaintiff is not a defense to a claim of strict liability for product caused harm," and the judge agreed to preface this charge on contributory and comparative negligence by stating that it was applicable to plaintiff's claim for negligent design.

Third, the trial court erred reversibly by failing to clarify the applicable law when jury inquired as to what verdict was required in the event that both parties were considered to have equal liability. Despite the trial court's accurate instructions on comparative and contributory negligence, the question demonstrated the jury's lack of understanding as to how to apply the previous instructions. The trial court merely instructed the jurors to rely on their recollection of the charges that were previously given. Although the court's instructions on comparative and contributory negligence were accurate, the judge had the responsibility to respond to jury's question and to clarify applicable law, either by repeating her earlier charge or by giving clarifying charge.

General Motors Corp. v. Blake,

237 Ga. App. 426, 515 S.E.2d 166 (1999)

Facts: Plaintiff, who had been permanently crippled in automobile accident, brought negligence action against automobile manufacturer. The driver of a taxicab had lost control of his cab, crossed over into the oncoming lane of traffic, and crashed head-on into the 1988 Chevrolet Spectrum automobile driven by the plaintiff. Plaintiff sued the driver, the taxicab company, and General Motors Corporation, the maker of the Spectrum which failed to restrain her.

Procedural History: The trial court ruled in favor of driver, and manufacturer appealed.

Question: Was the manufacturer entitled to a continuance of the trial on the basis that it was surprised and prejudiced by the plaintiff's identification of an expert witness the week before?

Holding: The Court of Appeals held that GM, the manufacturer, was not entitled to a continuance.

Reasoning: A motion for continuance of a trial is properly addressed to the "sound legal discretion" of a trial judge who is in control of the management of the case in court. O.C.G.A. § 9-10-167. The appellate court, which is far removed from the unfolding development in the life of the case in court and does not participate in its ongoing journey, is therefore bound to respect the exercise of the trial court's discretion and reverse it only if it is "manifestly abused." Although GM stated that at the deposition of the expert witness it learned for the first time the theory of defect which Blake would use, GM did not explain how the theory differed or how it would be prejudiced if a continuance was not granted. GM simply stated that severe prejudice would result unless there was time for additional discovery. The trial court cannot be faulted on these facts for not granting a continuance.

First, GM did not provide the court with a clear reason why the change of theory was different in an important magnitude. Second, the evidence accepted by the jury clearly shows that the defective seatbelt failed to perform its intended function which led to the plaintiff's permanent disfunction. Both the former and new theories dealt with the defective seat belt. Thus, thirdly, GM had every opportunity to completely examine the belt during preparations for trial.

Dissent: Because the record shows that GM was unfairly surprised by the plaintiff on the eve of this complex litigation trial with an entire new theory of

recovery, the trial court abused its discretion by denying GM's motion for continuance. The dissent points to the fact that GM specifically sought the information in formal discovery that was not revealed by the plaintiff until the deposition immediately before the trial date. The expert witness who spoke about the second theory was a critical witness whose testimony GM should have known about prior to two days before trial.

Jennings v. BIC Corp.,
181 F.3d 1250 (11th Cir. 1999)

Facts: Child's mother sued makers and distributors of pajamas and of a disposable cigarette lighter after child was injured when his pajamas caught fire. The child was injured when his three-year-old brother set fire to the child's pajamas while playing with the lighter.

Procedural History: The U.S. District Court for the Middle District of Florida granted partial summary judgement to the lighter manufacturer, denied the mother's motion for leave to amend her complaint, and entered judgement on jury verdict for defendants. The mother appealed.

Question: Was it proper for the court to grant partial summary judgement as to the product manufacturer?

Holding: Florida law did not impose a duty upon the cigarette manufacturer to child-proof its lighters. The district court committed no reversible error.

Analysis: Under Florida's strict product liability standard, the manufacturer of a defective product can be held liable if the manufacturer made the product in question, if the product has a defect that renders it unreasonably dangerous, or if an unreasonably dangerous condition is the proximate cause of the plaintiff's injury. A manufacturer's liability under Florida's strict product liability standard extends to a product that may be defective by virtue of a design defect, a manufacturing defect, or an inadequate warning. The defectiveness of a design is determined based on an objective standard, not from the viewpoint of any specific user.

Although Florida strict product liability law allows the jury to be instructed on the consumer expectation test, the risk-benefit test, or both, both tests require the application of the objective standard to determine the defective nature of the product. The consumer expectation test requires consideration of the ordinary consumer's expectations, and the risk-benefit analysis requires consideration of the normal public expectation of danger. As predicted by the Court of Appeals, the cigarette lighter manufacturer had no duty to child-proof its cigarette lighters because ordinary consumer and the general public appreciated that lighters could start dangerous fires and therefore that care was required in handling them. The use of a lighter as a child's plaything was not its intended use. In Florida a manufacturer is not held strictly liable for all injuries caused by a product, however it is used. On the contrary, the Court reasoned that a manufacturer is liable only when a product is used as intended.

In Florida, courts impose a different standard in assessing liability under negligence and strict product liability. Florida law imposes a broad duty of care in the negligence context, but it is unnecessary in a strict liability action to show that the manufacturer has been negligent in any way. Where a defendant's conduct creates a foreseeable zone of risk, Florida law generally will recognize a duty placed upon the defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses. Thus, as the risk grows greater, so does the duty, because the risk to be perceived defines the duty that must be undertaken. It was reasonable for manufacturer to assume that its "Keep out of reach of children" warning on its lighter was sufficient and adequate for adult purchasers of its products to read, understand, and heed.

Goodlin v. Medtronic,
167 F.3d 1367 (11th Cir. 1999)

Facts: Cardiac pacemaker recipient sued manufacturer of pacemaker's leads, asserting common law claims under Florida law for negligent design and strict liability.

Procedural History: The United States District Court for the Southern District of Florida granted summary judgement for the manufacturer. Recipient appealed.

Question: Did federal law preempt state law claims?

Holding: The Court of Appeals, recognizing the abrogation of Duncan, 12 F.3d 194, held that the Medical Device Amendment (MDA) did not preempt claims, even though Food and Drug Administration (FDA) approved leads pursuant to MDA's pre-market approval (PMA) process for Class III devices.

Reasoning: In reviewing the district court's decision to grant summary judgement on the issue of preemption, the Court of Appeals applies the same standards that bound the district court. In considering whether the MDA accorded a preemptive effect to a federal obligation, three things are required: (1) the imposition of a specific federal requirement that (2) applied to a particular device and (3) focused on the safety and effectiveness of the device. No specific "federal requirement" was imposed on the manufacturer of cardiac pacemaker leads as a result of the FDA's PMA of those leads. Thus, the MDA did not preempt state common law claims against the manufacturer for negligent design and strict product liability. Even though the MDA imposed a legion of specific and rigorous requirements upon PMA applicants, the FDA issued no regulation, order, or any other statement of substantive benchmark, and approval represented only a finding that a manufacturer's proposal to market leads had reasonably assured the FDA of device's safety and effectiveness. In addition, other provisions of the statutory scheme also indicated that Congress expected some state tort liability to survive the MDA. Further, the MDA provides no federal means by which injured plaintiffs can pursue legal remedies against the manufacturers of the defective devices.

Section Member Questionnaire

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To Join the Product Liability Section

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FROM: _____

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Yes, I'd like to join the Product Liability Section. Dues are $20.00 per year.