PRODUCT LIABILITY

LAW SECTION • STATE BAR OF GEORGIA

Volume 4 • Number 2 • May 2003

Inside this Issue

Visit the State Bar's Website

www.gabar.org

For section web pages go to "Attorney Information" and select "Sections."

Ontario Sewing Machine: Prologue Rather Than Precedent

By Albert M. Pearson, III
Moraitakis, Kushel & Pearson

Al Pearson

In *Ontario Sewing Machine Co. v. Smith*, 275 Ga. 683, 572 S.E.2d 533 (2002), the Supreme Court of Georgia affirmed an opinion of the Court of Appeals, *Smith v. Ontario Sewing Machine Co.*, 249 Ga. App. 364, 548 S.E.2d 89 (2001) dealing with the post-sale duties of a product manufacturer. In so doing, the Supreme Court distanced itself from much of the discussion in the lower court opinion. Some have attached considerable significance to this ruling, but I am inclined to disagree with that assessment. There is a lesson from *Ontario Sewing* to be sure, but it has less to do with substantive product liability law than with the appellate court's limited role in reviewing grants of summary judgment.

The plaintiff in *Ontario Sewing* severely cut her hand while operating a yarn cutter that activated without warning. She was at work when injured and thus had no right of action against her employer who purchased the allegedly defective machine. Approximately nine months before, the manufacturer of the yarn cutter advised the employer that the machine was defective and should not be used anymore. The manufacturer offered to replace the old yarn cutter with a new, improved and more expensive version. The manufacturer also offered to reimburse the employer for the cost of the defective machine and for the expense of removal. The offer was open for 90 days. The employer refused to discontinue use of the machine for financial reasons — a shutdown would have jeopardized the business — but never told the

Continued, p. 5

Ontario Sewing Machine:
Maintaining the Status Quo . . . For Now

By Robert B. Friedman
King & Spalding LLP

Robert Friedman

In the recently decided case of *Ontario Sewing Machine Co, Ltd. v. Smith*, 275 Ga. 683, 572 S.E.2d 533 (2002), the Georgia Supreme Court struck down a decision from the Court of Appeals that threatened to greatly expand a manufacturer's duties when it discovers a dangerous defect in its product. Although the Supreme Court's decision leaves Georgia law unchanged, the opinion is instructive on the scope of a manufacturer's obligations when it discovers a product defect and the framework for assigning liability when an injury occurs after a recall has been announced.

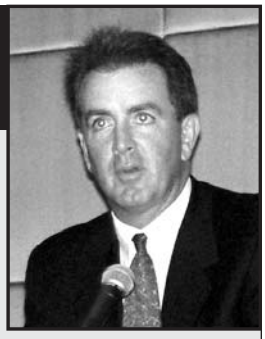
The Facts of the Case

The plaintiff, Regina Smith, was employed by Wilen Mop Manufacturing ("Wilen"), operating a yarn cutter manufactured by the defendants, Ontario Sewing Machine Company and Texmatic Machinery ("Ontario"). In early 1998, Ontario learned of two injuries which had occurred from use of the yarn cutter, but had not yet determined the specific nature of the defect which had caused these injuries. In response, Ontario undertook a voluntary recall of

Continued, p. 7

Message from the Chair

Dart Meadows



This newsletter contains a very thoughtful analysis of the Georgia Supreme Court's decision in Ontario Sewing Machine Co, Ltd. v. Smith, 275 Ga. 683, 572 S.E.2d 533 (2002), both from the plaintiff (Albert M. Pearson, III of Moraitakis, Kushel & Pearson) and from the defense perspective (Robert B. Friedman of King & Spalding LLP). I know you will find this useful.

The 12th Annual Product Liability Seminar was held on May 16, 2003, at the Swissôtel in Atlanta. Al Pearson, the seminar chair and vice-chair of the section, put together an outstanding group of speakers on many useful subjects. Topics included Recent Developments in Product Liability, Post-Sale Duty to Warn, Litigating the Alternative Design Issue, Case Management-Ethics in Product Liability Litigation, Electronic Data Base Discovery, Rule 30(b)(6) Depositions, and Motions in Limine.

Jane Thorpe of Alston & Bird gave us an update on recent developments in product liability, both judicially and legislatively. Lance Cooper of Cooper & Jones spoke on the subject of post-sale duty to warn. Joseph Fried, of Henry, Spiegel, Fried & Milling, addressed litigating the alternative design issue from the plaintiff's perspective and W. Ray Persons of King & Spalding presented the same issue from the defendant's perspective. The Honorable Melvin K. Westmoreland, Judge of the Fulton County Superior Court; William Custer of Powell, Goldstein, Frazer & Murphy; and Ralph Knowles, Jr. of Doffermyre, Shields, Canfield, Knowles & Devine held an interesting and informative panel discussion on case management and ethics in product liability litigation. Leigh Martin of Butler, Wooten, Fryhofer, Doughtery & Sullivan; Laura Owens of Alston & Bird; and Andy Scherffius of Scherffius, Ballard, Still & Ayres talked about electronic data base discovery in product liability cases. Leigh spoke from the plaintiff's perspective, Laura's talk was from the defendant's perspective and Andy's talk involved proposals to amend federal rules regarding electronic data base discovery. Karen Deming of Troutman Sanders addressed pitfalls and practical pointers relating to Rule 30(b)(6) depositions. Finally, Charles Beans of Hawkins & Parnell and Dennis T. Cathey of Cathey & Strain spoke about motions in limine in product liability cases. Charles talk involved why defendants file them, while Dennis' talk was related to how plaintiffs overcome them. If you did not attend the seminar, you may be interested in acquiring the seminar materials from ICLE.

A very valuable resource you should consider acquiring for your library is the Third Edition of Georgia Products Liability, published by Harrison Company. Included in this newsletter is an article describing the book. Thanks to the many hours of work of Jane F. Thorpe, David R. Venderbush and J. Kennard Neal put into this treatise together, as well as arrangements they made with the publisher, Harrison Company, to offer members of the Product Liability Section of the State Bar of Georgia a 10% discount. To obtain a copy of the book and get the discount call Pete Thomas at (404) 431-8135 or e-mail him at *pete.thomas@thompson.com*.

Finally, I mentioned in our last newsletter that we have put together a detailed listing of more than 50 previous articles that have been published by the Product Liability Section of the State Bar of Georgia, including both newsletters and seminar materials, dating back to 1999. The list is included in this newsletter. Copies of past newsletters are included on the section website and may be downloaded and printed free of charge. You may access them at *www.gabar.org*. The seminar materials are still available for purchase through ICLE and we are still working on trying to have some of the older ones available on-line as well.

Please keep our Section in mind if you are willing to write an article, speak at a future seminar, or have other ideas of how you can contribute.

James D. Meadows ("Dart")
Meadows, Ichter & Bowers
3535 Piedmont Road, N.E.
Building 14, Suite 1100
Atlanta, Georgia 30305

404-261-6020
404-261-3656 fax
Email: jdm@miblaw.com

Product Liability Seminar – May 16th, 2002

The Product Liability Section hosted its 12th Annual Product Liability Seminar on May 16, 2003. ***Top left****, Ray Persons of King & Spalding provides a defense perspective on litigating alternative design issues.* ***Top right****, a discussion on ethics in product liability litigation among panelists, from left to right, Ken Canfield of Doffermyre, Shields, Canfield, Knowles & Devine; Judge Melvin K. Westmoreland of the Fulton County Superior Court; and William Custer of Powell, Goldstein, Frazer & Murphy.* ***Middle left*** *is Lance Cooper of Cooper & Jones, addressing the emerging doctrine of a post-sale duty to warn.* ***Middle right****, former Section Chair Lee Tarte Wallace of The Wallace Law Firm, Lance Cooper, Al Pearson, and Leigh H. Martin of Butler, Wooten, Fryhofer, Dougherty & Sullivan, attend the Speakers' Dinner at Cherokee Town Club on May 15.* ***Bottom left****, Jane Thorpe of Alston & Bird speaks on recent product liability developments on both the judicial and legislative fronts.* ***Bottom right****, seminar attendees Jake Daly, Dorian Daggs, and Matt Harman.*

The New Georgia Products Liability Treatise Is Published

Earlier this year, West Publishers, which recently acquired the Harrison Company last year, published the Third Edition of Georgia Products Liability. The Third Edition is "new" in every sense of the word.

The Third Edition replaces the Second Edition of this book, which was written over a decade ago by Professor Maleski. Alston & Bird has provided updates since then. However, as the new century began, Harrison approached us and asked if we would rewrite the treatise from a "practitioner's point of view." Not fully appreciating the scope of the task, we agreed and thus began the Third Edition. We reorganized the book to follow the flow of how a trial lawyer would approach a typical case. We rewrote many sections (several times). We updated the case cites. We supplemented all portions of the treatise. Our goal throughout was to review and evaluate products liability law in a manner that we hope will instruct beginning practitioners, and yet assist experienced practitioners. We provide the basic rules of products liability law, along with case cites to assist you in your research. We also include some history of the origin of various legal principles, a comparison of Georgia law with other states where appropriate, and discussions on various issues to highlight anticipated changes in the law. We have taken out sections that are out of date and generally reduced the number of string cites which means we do not include every product case ever decided. Instead, we try to highlight where the law is in Georgia today and provide guidance on what issues might be decided in the future.

The Third Edition can be divided generally into four major sections. The first thing that a practitioner in this area will typically want to understand is what makes a product "defective" and on what types of claims can someone sue or be sued. Accordingly, the first major section of the book addresses the various theories of liability that have developed for dealing with defective products. In Chapter 1, we provide a historical overview of how products liability law has developed, first nationally and then in Georgia specifically. We recommend that a beginner to this area of the law review this section to get a sense of some of the key developments and changes, such as the enactment of the Georgia product liability statute in 1968 and the decision in Banks v. ICI Ams., Inc., 264 Ga. 732, 450 S. E. 2d 671 (1994), because it will help put what otherwise might seem to be conflicting case law into context. We then move in Chapters 2 through 5 to focus in more detail on the different theories of liability that have been used in Georgia. Chapter 2 discusses strict liability, which in Georgia has been codified in the product liability statute. Any understanding of modern Georgia products liability law must start with what is covered in this statute. Chapter 3 focuses on negligence theories. In general, the law here mirrors the traditional requirements for negligence causes of actions in other contexts; however, as we discuss, Georgia negligence products liability law does contain a few wrinkles of its own. Chapter 4 addresses express and implied warranty theories of recovery. Warranty theories are the grandfather of all products liability theories, but Georgia's adherence to the privity requirement makes them less useful in most products cases. There are, though, certain economic injuries that are still only compensable through a warranty claim. Chapter 5 discusses misrepresentation claims. Although a cause of action for misrepresentation is as old as tort law, it has really only begun to be asserted with any type of frequency in products liability law during the last decade.

The second section of the book deals with the application of these liability theories to specific types of defects in products and related issues of causation. Chapter 6 discusses manufacturing defects. Chapter 7 addresses design defects and Chapter 8 explores warning defects. Because different bodies of law have developed around each of these types of defects, we explore them separately. In particular, the law surrounding design defects has undergone several metamorphoses in Georgia over the last twenty years, and will likely continue to evolve in the future. Consequently, it is important to understand not just where the law in each area is today, but also where it came from and how it relates to other types of defect claims. Chapter 9 finishes this section and covers causation. Causation is probably the most important but also most confusing aspect of products liability law and we attempt to explain both factual and proximate cause as simply and clearly as we can. However, as any lawyer who remembers his or her first year Torts class can attest, you can devote hundreds of pages to studying all the various nuances that are important in understanding causation issues. Because we cannot devote hundreds of pages to any topic, and because many other distinguished authors have written on this subject, we streamline our discussion and predominately focus on causation issues as they have arisen in the products liability context.

After the practitioner determines what things can form the basis for products liability litigation in Georgia, the next line of inquiry often is who can sue or be sued, and what legal issues should the lawyer consider when representing his or her client. We tackle these topics in the third major section of the book. This section deals extensively with litigation issues and approaches this topic from a variety of viewpoints. Chapter 10 evaluates possible plaintiffs and defendants in products liability actions. Chapter 11 addresses primarily legal (as opposed to factual) defenses that are likely to arise in products liability litigation. Chapter 12 contains a number of points that we have grouped together under a topic called "Trial Issues." Predominately, these subjects discuss various proof and evidentiary questions that frequently arise in products liability cases. We have not tried to cover all the issues that could arise in complex products liability trials; rather we focus on certain "big picture" issues that come up repeatedly in this type of litigation.

The last section of the main text is Chapter 13 that addresses damages. In this chapter we discuss the types of remedies that are available if a defective product has caused injury. We debated putting this chapter earlier in the book after causation because this is one of the essential elements that a plaintiff must establish in order to prevail in a products liability claim. However, we ultimately decided to leave it at the end of the treatise because it is usually the last major issue that practitioners and courts address in a case.

Additionally, we have created and attached two appendices to this treatise. Appendix A collects some of the recent Georgia cases and organizes them around various product types that are often at issue in products liability litigation. This list of cases is not exhaustive; rather, it is merely intended to give the practitioner a jumping off point in beginning research on a particular category of product. We have additionally separated the list into Federal and State cases because we found that practitioners were interested in this demarcation. Appendix B approaches this issue from the other end of the spectrum. This appendix collects pattern jury charges that relate to an issue in products liability law. We have not tried to collect jury charges that relate to generic issues, such as burden of proof, causation, damages, etc., which would also be applicable to products liability cases. Instead, we have only included jury charges that are specific to products liability law. We thought this would be useful even though there are not a lot of reported cases that specifically address jury charges given in Georgia products liability actions. However, this fact also means that this appendix cannot be, and should not be, relied upon as exhaustive of the jury charges needed in a products liability case.

Although we have tried to cover all the critical topics and identify the most important cases, no treatise of this type can address everything. There are undoubtedly areas of law or cases that some of our readers will feel we should add, or there may be statements with which some disagree. In particular, there may be cases that you know about that should be added to the Appendices. We welcome all constructive suggestions and feedback. Please feel free to write us in care of Alston & Bird in Atlanta.

A great deal of time and energy went into this book. The effort was worth it if we have been able to create something that you find useful. We hope that the Third Edition to Georgia Products Liability is a helpful tool for your future practice.

Jane F. Thorpe
David R. Venderbush
J. Kennard Neal

plaintiff, a temporary worker with little experience with the yarn cutter, about the hazards associated with its continued operation. Nor did the employer disclose to the plaintiff that two other workers had previously suffered similar injuries while operating the yarn cutter.

The manufacturer moved for summary judgment. The defense strategy was to cast blame on the employer and, to a lesser degree, the plaintiff. There were five grounds for summary judgment: (1) lack of proximate cause due to the employer's failure to discontinue use of the defective machines; (2) lack of proximate cause due to the employer's failure to take certain remedial measures recommended by the manufacturer; (3) the employer substantially modified the yarn cutter after putting it into use; (4) the plaintiff assumed the risk; and (5) the hazards associated with the operation of the yarn cutter were open and obvious. Each ground attacked the plaintiff's case based on the legal effect of some intervening act or event. The trial court granted the manufacturer's summary judgment on the first ground only, holding that the employer's failure to discontinue use of the yarn cutter was the *sole* proximate cause of the plaintiff's injury. Noting that the case was "fact-intensive," the Court of Appeals reversed "because the issue of proximate cause . . . is for the jury." As will be seen, the Court of Appeals was correct in this precise holding and was affirmed by the Supreme Court for that reason. The dicta in the Court of Appeals' opinion and the Supreme Court's rejection of it, however, have attracted much attention. None of this has any immediate significance for the development of substantive product liability law.

Judge Eldridge wrote the principal opinion for a Court of Appeals panel that included Judges Andrews and Miller. Judge Eldridge is recognized for the breadth of his legal knowledge and a scholarly bent. In *Ontario Sewing*, he obviously believed that to support his ruling on the triability of the proximate cause issue, he had to discuss the various post-sale duties of a product manufacturer. In his view, only through such a discussion could one write an intelligible opinion about such issues as "supervening proximate cause versus concurrent proximate cause" and "assumption of risk." From an intellectual standpoint, Judge Eldridge had a point. But, on some occasions, it is better for an appellate court to say less rather than more.

The summary judgment movant gets to set the terms of engagement for legal battle in the trial court. In *Ontario Sewing*, the manufacturer does not appear to have disputed the following factual or legal issues: (1) the defectiveness of the old yarn cutter; (2) the existence of a post-sale duty to warn owners, users and others of the hazards posed by a defective product; (3) the existence of a post-sale duty to recall or remedy a defective product and to do so by the exercise of reasonable care. For summary judgment purposes, the manufacturer did not need to delve into any of these issues. Indeed, it could have conceded the existence of competent evidence to raise a jury issue on all of them. The rationale for summary judgment was a trumping argument. No matter how dubious its actions may have been in designing, warning and recalling the yarn cutter, the manufacturer still could *not* be blamed *legally* for the plaintiff's injury. All of the manufacturer's arguments for summary judgment, including the four that the trial judge did not rule upon, were variations on causation — a question almost always left to the jury.

Under the circumstances, all the Court of Appeals had to decide was whether the *plaintiff* had competent evidence to raise a factual issue of causation given *her* theories of liability. If the manufacturer did not raise a legal challenge to the plaintiff's theories of liability, the proximate cause issue was simple and straightforward. Standing alone, did the employer's failure to discontinue use of the defective yarn cutter break the chain of causation that might otherwise be imputed to the manufacturer? Judge Eldridge's opinion recognized a number of factual arguments that could establish proximate cause or affect the apportionment of liability: (1) the adequacy and specificity of the manufacturer's defect warning; (2) the reasonableness of the manufacturer's *voluntary* recall effort; and (3) the manufacturer's actual knowledge that the employer would not — and for financial reasons could not — discontinue use of the defective yarn cutter. These factual scenarios were sufficient to justify reversal of the trial court.

In the Supreme Court's view, nothing else needed to be said to decide the case in its present posture. To the extent that Judge Eldridge's opinion appeared to assign weight to the plaintiff's evidence and to anticipate and rule on certain legal issues, it went further than it had to go. This clearly triggered the Supreme Court comment that "it is unnecessary to resolve the issues that [the manufacturer] raises concerning the Court of Appeals'[ ] holdings regarding the manufacturer's duties, as a resolution of those issues is unnecessary to a determination of the only issue on which the trial court granted summary judgment . . . ." But most assuredly, the issues flagged in Judge Eldridge's opinion will resurface if this case goes to trial.

At trial, the manufacturer's strategy will differ markedly from its strategy on summary judgment. The manufacturer's post-sale duties will be front and center. At a minimum, the manufacturer will propose jury charges that define its legal duties narrowly in the context of a recall — voluntary or not. This will likewise be true of the scope of its post-sale duties to warn. These proposed charges will most likely build upon a motion for directed verdict and will be followed by a motion for judgment n.o.v. if the jury finds for the plaintiff. Several crucial issues come to mind. First, were the terms of the recall reasonable given the economic situation of the employer? In other words, was there a quicker and cheaper fix than the one offered by the manufacturer under the terms of its recall? Second, did the recall notice properly identify the defect in the yarn cutter? Third, did the manufacturer have a duty to warn potential users of the yarn cutter independent of any duty to warn the employer/purchaser? If so, by what means must this warning be communicated? Fourth, more specifically, when the manufacturer *knew* that the employer would *not* discontinue use of the defective yarn cutter, did the manufacturer *at that point* have an independent duty to warn any foreseeable users of the yarn cutter about the hazards associated with its continued use? If so, what form should that warning take and by what means should it be communicated.

These issues are still largely uncharted territory in Georgia and nationally. A manufacturer is generally subject to post-sale duties to warn concerning product defects although there is major dispute about whether state product liability law imposes a duty to recall in the absence of compelled action by an appropriate regulatory authority. *See* Restatement (Third) of Torts: Products Liability §§ 10-11 and accompanying comments. The details of this emerging and growing body of law remain to be developed. The facts in *Ontario Sewing* provide a clear opportunity for development of this law in Georgia. The only hint of its future direction comes from the Supreme Court's willingness to treat the proximate cause issue as a multifactor and a multifaceted fact question. The Court could have fashioned a bright-line rule as requested and relieved the manufacturer of any potential liability after it had undertaken its voluntary recall effort and after it specifically notified the employer to discontinue use of the defective yarn cutter. It did not do so.

This is generally in line with the fact intensive balancing approach approved in *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 450 S.E.2d 671 (1994). In the short term, juries in Georgia may well continue to resolve product liability cases under fairly broad legal standards. But this approach by no means hampers the ability of the product liability defendant to win cases. Getting to the jury in a case like *Ontario Sewing* and winning it at trial are two vastly different achievements. The employer's actions in the case — susceptible to Dickensian characterization — could tempt the jury to shift the blame away from the manufacturer and thus could make the plaintiff's practical burden of persuasion most difficult.

Previous Product Liability Section Publications

Available On-line at www.gabar.org or for purchase from ICLE

Claims - Industrywide Aggregated Claims – Potential Claims By The United States
November 2000 Newsletter by Peter Bierstecker

Class Action - Products Liability Class Actions – Are They Dead, Dying or Merely Down for a (Short) Count? Plaintiffs' Perspective
Seminar – February 13, 1998 by Leslie J. Bryan

Class Action - Products Liability Class Actions: Are They Dead, Dying or Merely Down for a (Short) Count? The Defense Perspective
Seminar – February 13, 1998 by William T. Plybon and Stephen L. Bracy

Class Action - News from the Class-Action Front: The Practical Impact of Amchem and Other Recent Products Liability Class Action Decisions
Seminar – March 25, 1999 by Robert E. Shields

Damages - Financial Damages In Product Liability
November 2000 Newsletter by Denise Hipps

Daubert – A Way Around The Daubert Gate?
December 1999 Newsletter by Robert Iscaro

Daubert – The Factors Courts Consider Under Daubert
March 2002 Newsletter by Albert M. Pearson

Defect - Manufacturing and Design Defects and Marketing Defects
Seminar – March 25, 1999 by James W. Hagan

Discovery - Computer Databases: The Emerging Battlefront in Discovery
Seminar – February 13, 1998 by Philip E. Holladay and Richard H. Neuwirth

Discovery - Discovery of Corporate Computer Databases: A Commonplace Practice
April 2002 Newsletter by Leigh M. Martin

Evidence - Circumstantial Evidence of Product Defect
Seminar – May 17, 2002 by Allen Willingham

Evidence - Evidence of Subsequent Design Changes
Seminar – May 17, 2002 by Charles R. Beans

Defense - Joint Defense Issues
May 2001 Newsletter by David B. Alden

Learned Intermediary Doctrine - Impact of Direct-To-Consumer Advertisements On Georgia's Learned Intermediary Doctrine
March 2001 Newsletter by Brandon Hornsby

Legal Theory - When is a Product Liability Case Not a Product Liability Case? Why You Must Find Out What Your Plaintiff's Legal Theory Is
April 2002 Newsletter by Judson Graves & Paula Kosky

Motions in Limine: Shield, Sword and Scud
Seminar – May 17, 2002 by Jason Crawford

Negotiating and Settling a Products Case: Defendant's Prospective
Seminar – March 25, 1999 by Scott A. Farrow

Ogletree v. Navistar – The Proper Roles of Judge and Jury in Design Defect Cases
December 1999 Newsletter by John Barrow

Opening Statement from the Defendant's Perspective
Seminar – May 17, 2002 by Lori G. Baer and Laura C. Johnson

Opening Statement from the Plaintiff's Perspective
Seminar – May 17, 2002 by William C. Lanham

OSIs - Proving Up Other Similar Incidents or Claims After Cooper Tire
March 2002 Newsletter by Lance A. Cooper and Scott B. Cooper

OSIs - The Use of Other Incidents to Show Defect in a Product Liability Case
Seminar – May 17, 2002 by Laura M. Shamp

OSIs - What the Jury Doesn't Know Won't Hurt You – Other Claims and Suits
Seminar – May 17, 2002 by Daniel R. Lanier

Perfecting the Record for Appeal: Expert Opinion; Risk-Utility Analysis; Prior Similar Occurrences; and Proffer of Proof
Seminar – March 25, 1999 by Frank M. Eldridge

Preemption - Buckman Preemption: Drawing The Lines One Year Later
March 2002 Newsletter by Andrew T. Bayman and Amy M. Power

Preemption in Product Liability Cases – Recent Developments
Seminar – December 13, 2002 by Leslie A. Brueckner

Proximate Cause - Palsgraf on Prozac: Proximate Cause in the Emerging Context of Pharmaceuticals and Medical Devices
Seminar – February 13, 1998 by Kristen D.A. Carpenter and Laura Lewis Owens

Punitive Damages in a Products Case: What You Can't AF(Ford v. Uniroyal) Not to Know about Threshold Evidentiary Standards and Juror Reactions to Punitive Claims
Seminar – February 13, 1998 by Edward E. Strain and David A. Sleppy

Punitive Damages – The Georgia Standard for Review in Punitive Awards
July 2002 Newsletter by Chris Booth

Recent Case Development
Seminar – May 22, 2001 by David M. Monde

Recent Developments in the Post-Banks Arena
Seminar – March 25, 1999 by Hutton Brown

Recent Developments in Georgia Product Liability
Seminar – May 17, 2002 by R. Hutton Brown and Laura M. Shamp

Recent Developments - The Class of 2001–2002: New Developments in Georgia Product Liability Law
Seminar – May 17, 2002 by William V. Custer and Chandler P. Thompson

Recent Developments 2001 Products Liability Case Law Update
Seminar – May 22, 2001 by Dart Meadows and Gregory S. Esslinger

Reimbursement and Subrogation Issues in Product Liability Cases: The Bark and The Bite
Seminar – May 17, 2002 by Kenneth S. Canfield and Geoffrey E. Pope

Resolution - In-House Counsel's Perspective on Positioning Products' Cases for Early Resolution
Seminar – February 13, 1998 by Anthony F. Lovallo

Restatement (Third) of Torts and the Now-Larger World of Products Liability Law
Seminar – March 25, 1999 by Douglas P. McManamy

Restatement - Impact of Products Liability Restatement – Nationally and in Georgia
Seminar – December 13, 2002 by Thomas A. Eaton

Safer Vehicles Through Product Liability
Seminar – May 17, 2002 by Clarence M. Ditlow

Service - Serving Japanese Companies by Mail
April 2002 Newsletter by Patrick A. Dalson

Spoilation of Evidence
Seminar – December 13, 2002 by Lee Tarte Wallace

Spoilation of Evidence Remedies in Georgia: A Defense Perspective
Seminar – December 13, 2002 by Andrew T. Bayman, Michelle Jerusalem Cole and Nancy A. Washington

Statute of Repose: My Statute of Repose or Yours?
July 2002 Newsletter by Antoinette D. Johnson

Strict Liability for Allergenic Products: Not So Strict After All
Seminar – March 25, 1999 by James C. Grant and Heather R. Browning

Trial Techniques in Product Liability Cases
Seminar – May 22, 2001 by Stephanie Parker

Trial Techniques in Product Liability Cases – New Ideas & Proven Strategies
Seminar – December 13, 2002 by Stephanie E. Parker and Christopher D. Booth

Update on Recent Cases for the 1997 Supplement to Georgia Products Liability
Seminar – February 13, 1998 by James W. Hagan

Voir Dire
Seminar – May 17, 2002 by Lance A. Cooper

Voir Dire - Formulating Presenting and Objecting to Jury Charges in a Post-Banks World
Seminar – February 13, 1998 by Albert M. Pearson

Voir Dire - Striking Jurors for Cause and Batson Challenges in Jury Selection
Seminar – March 25, 1999 by Stephanie E. Parker

the machines. Ontario sent a recall notice to Wilen instructing Wilen to stop using the machines and offering to reimburse Wilen for the cost of the recalled machines. The reimbursement offer was open for 90 days. Ontario also offered to sell Wilen a new and improved yarn cutter to replace the recalled machine, although the new machine was more expensive than the recalled machine. Despite receiving the recall notice, Wilen did not stop using the machines, in part because it could not afford to shut down its operations to switch out the machines. On July 22, 1998, the blade of a yarn cutter severely injured Smith's hand.

Smith brought a product liability suit against Ontario, alleging that the machine was defective and unreasonably dangerous. Upon Ontario's motion, the trial court granted summary judgment to Ontario solely on the ground that Wilen's failure to stop using the defective machinery after the recall was announced by Ontario was the sole proximate cause of Smith's injury.

The Court of Appeals' Decision

In a broad and far-reaching opinion, the Court of Appeals reversed the trial court. *Smith v. Ontario Sewing Machine Co., Ltd.*, 249 Ga. App. 364, 548 S.E.2d 89 (2001). In doing so, the Court of Appeals created a set of legal duties for product manufacturers who do business in Georgia. While it has been well settled for years that a manufacturer has a duty to warn users of the risk of injury from its product, the Court of Appeals significantly expanded this rule.

First, even though Ontario undertook a voluntary recall absent any regulatory requirement that it do so, the Court of Appeals found in Georgia law a common law duty to recall, repair, and/or retrofit a defective product, notwithstanding that no prior Georgia case had even suggested such a broad-ranging duty. Second, the Court of Appeals drastically heightened a manufacturer's or seller's duty when a recall does occur. Ontario voluntarily recalled its machinery and asked Wilen to return the machines for a full refund of the purchase price, but the Court of Appeals held that Ontario should have done more. Specifically, the Court of Appeals suggested that Ontario should have repaired or retrofitted the machine on-site to avoid causing Wilen inconvenience and hardship. In addition, the Court of Appeals required that any voluntary recall must specifically state the exact nature of the defect and its root cause.

Third, the Court of Appeals imposed on manufactures a duty to seek out and warn each end-user of its products — with no time limit — of the latent defect. This duty would apply regardless of the notice given to the product user's employer and the employer's actual knowledge of the defect.

On the proximate cause issue, the Court of Appeals reversed the trial court and held, as a matter of law, that Wilen's failure to comply with the recall was not the supervening proximate cause of the injuries, but that Wilen's and Ontario's actions were concurrent proximate causes of Smith's injuries. The Court of Appeals thus took the issue of proximate cause away from the jury.

The Arguments to the Supreme Court

Ontario's reaction to the Court of Appeals' decision was visceral. The common law duty to recall imposed by the intermediate court's decision threatened to chill a manufacturer's incentive to improve its products. Under such a rule, a manufacturer who improves a product by introducing a new safety feature opens itself to liability unless it recalls and replaces or upgrades — at its own expense — all the prior models which did not contain the safety feature. The Court of Appeals' ruling ignored the well-settled Georgia rule that a manufacturer or seller is not an insurer of its products. Further, Ontario argued, courts are ill-suited to conduct the balancing of interests necessary to support a finding that a manufacturer should recall a product. Instead, the providence of a recall, which has broad public policy implications, is best left to legislative and administrative bodies.

With respect to the Court of Appeals' expansion of the requirements when a manufacturer does undertake a recall, Ontario argued that it created an unworkable standard that provides no predictability for product manufacturers and sellers. First, it would be literally impossible for a manufacturer of mass-market products to arrange to replace or repair a defect in a manner that is convenient for the customer as the Court of Appeals suggested. Second, the court's requirement that a manufacturer take into consideration each individual customer's needs and preferences to come up with the "best" or "perfect" remedy is patently unworkable. Third, the Court of Appeals' decision frustrates the long-established goal that the law provide predictability so that it can guide conduct. The Court of Appeals rule offers no guidance to Georgia businesses in how to conduct their affairs responsibly with their customer's safety in mind. Lastly, the Court of Appeals' requirement that the recall provide specific details of the defect would necessarily delay the implementation of any recall, allowing more injuries to occur.

Ontario also challenged the Court of Appeals' holding that a manufacturer must warn the specific users of its product. Such a rule would negate the sophisticated user doctrine, which removes the duty to warn a product's ultimate user when it is sold to a knowledgeable distributor. *See, e.g., Exxon Corp. v. Jones*, 209 Ga. App. 373, 433 S.E.2d 350 (1993). Moreover, the Court of Appeals' ruling failed to consider the realities of business and of the workplace, where a manufacturer's representative would hardly be permitted free access to a customer's factory to warn employees of the dangers of its product.

In support of the Court of Appeals' decision, Smith argued that the Court of Appeals did not expand Georgia law. Rather, the Court of Appeals merely held that a manufacturer must take reasonable steps to remove a danger in its product when a general warning is not sufficient. A manufacturer's duty to warn arises "whenever the manufacturer knows or reasonably should know of the danger arising from the use of its product." *Chrysler Corp. v. Batten*, 264 Ga. 723, 723, 450 S.E. 2d 208 (1994). Moreover, it is well-established under Georgia law that "[w]here a duty to warn arises . . . 'this duty may be breached by . . . failing to adequately communicate the warning to the *ultimate user*' . . . ." *Battersby v. Boyer*, 241 Ga. App. 115, 118, 526 S.E.2d 159, 163. Accordingly, whether a manufacturer can discharge its duty to end users by giving notice to employers of those end users depends on the facts of each case and is an issue best left to a jury. The Court of Appeals, Smith argued, simply rejected the notion that a manufacturer can uniformly rely on intermediaries to pass along the warning to end users.

With respect to the duty to recall, Smith argued that such a duty may exist depending on the circumstances of the case, and that the Court of Appeals' decision was subject to being read too expansively. The Court of Appeals merely held that, given the facts of this particular case, Ontario had a duty to recall its machines.

Similarly, the Court of Appeals' holding that a manufacturer must give specific details about the nature of the defect was not an expansion of Georgia law, but rather a restatement of the requirement in Georgia law that the warning be "adequate" and effectively communicate the danger and the risk. By fully communicating the nature of the risk, a user can make an informed decision about whether to continue use of the product. Because Ontario's letter merely stated that two people had been injured, Wilen was incapable, Smith argued, of making an informed decision.

The Supreme Court's Decision

The Supreme Court granted certiorari to address the following issue:

> Does the opinion of the Court of Appeals constitute an erroneous expansion of the law of this state regarding the existence and scope of the duties of manufacturers and sellers with respect to dangerous product defects?

In a short, unanimous opinion, the Supreme Court upheld the reversal of the grant of summary judgment, but vacated the finding on proximate cause and remanded the case to the trial court for proceedings consistent with the opinion.

At the outset, the Court noted that the Court of Appeals decided issues concerning the duties of manufacturers that were unnecessary to a resolution of the issue of proximate cause, which was the only issue on which the trial court granted summary judgment to Ontario. The Court later stated that it "disapproved" of the Court of Appeals' resolution of these issues.

On the issue of proximate cause, the Court held it was an issue of fact for the jury. The Court highlighted two principles noted by Judge Andrews in his special concurrence. First, "the failure of manufacturer's customer to comply with a reasonable recall program instituted by the manufacturer may constitute an intervening act sufficient to break any connection between a wrongful act by the manufacturer and the injured party and thus may be sufficient to become the sole proximate cause of the injuries in question." Ontario Sewing, 275 Ga. at 686, 572 S.E.2d at 535. Second, "for an intervening act of a third party to become the sole proximate cause of a plaintiff's injuries, the intervening act must not have been 'foreseeable by defendant,' must not have been 'triggered by defendant's act,' and must have been 'sufficient [by] itself to cause the injury.'" Ontario Sewing, 275 Ga. at 686, 572 S.E.2d at 536. In this case, the Court held, jury questions were presented regarding the reasonableness of the recall and the foreseeability of whether Wilen would comply with it. Accordingly, the Supreme Court affirmed the Court of Appeals' reversal of the trial court's grant of summary judgment to Ontario, noting that the Court of Appeals "went too far in doing so." Although the Court did not need to discuss the limits of a manufacturer's duties in this situation, the Court's mention of the factors for a jury to consider in deciding issues of causation preview the battleground at trial, and suggest the Court is willing to reconsider these issues at a later time.

To Join the Product Liability Section

Fill out form and Mail To: MEMBERSHIP DEPARTMENT
State Bar of Georgia
104 Marietta Street, N.W.
Atlanta, GA 30303

FROM: Name _____

Bar # _____

Address _____

City _____ State _____ Zip _____

Please include your $25 check made payable to: **The State Bar of Georgia**

State Bar of Georgia
Product Liability Section
104 Marietta St. NW, Suite 100
Atlanta, GA 30303

NON-PROFIT ORG
US POSTAGE
PAID
ATLANTA GA
PERMIT NO 1447