Jones Walker E*Zine

Products Liability
July 2004 Vol. 42

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2d Cir. Holds Med. Mal. Prescriptive Period Unconstitutional In Blood Case

Walker v. Bossier Medical Center,
38,148 (La. App. 2 Cir. 5/12/04), _____ So. 2d ____

In January 1981, Aiko Walker underwent surgery at Bossier Medical Center. During surgery, Walker received a blood transfusion. Ten years later, she was diagnosed with Hepatitis C resulting as a result of the 1981 transfusion.

After an adverse opinion by a medical review panel, Walker and her husband filed a petition in district court against Bossier Medical Center, Lifeshare Blood Center, and the Louisiana Attorney General.

Bossier Medical Center filed a peremptory exception of prescription arguing that the three-year limitation in La. R.S. 9:5628 barred the plaintiffs' claim. The statute states that a plaintiff may file an action within one year of the alleged act or one year from the date of the discovery of the alleged act. Nevertheless, the latest time within which to file a claim for damages for injury or death for medical malpractice is three years from the date of the alleged act. Relying on this language, the trial court sustained Bossier Medical Center's exception of prescription.

The Second Circuit Court of Appeals reviewed La. R.S. 9:5628 to determine whether the statute comported with constitutional due process requirements when applied to claimants such as the plaintiff, whose condition made it impossible for her to know or for any physician to diagnose her disease within the limitation period. In a three-to-two opinion the court found the statute unconstitutional as applied reasoning that claimants like the plaintiff have a vested property right in their claims. Application of this statute, according to the Second Circuit, would divest that right without due process of law.

Judge Williams, however, dissented arguing that the statute was adopted by the legislature in the interest of the community as a whole, and therefore it bore a substantial relationship to an appropriate governmental objective, satisfying substantive due process. Judge Williams also considered and discussed the plaintiffs' equal protection arguments, even though they had not been addressed by the majority He likewise rejected these arguments concluding that the defendant's exception of prescription should have been maintained.

- *Michelle D. Craig*

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4th Cir. OK's "Featherweight" Proof Of Cause In Jones Act Asbestos Disease Case

Torrejon v. Mobil Oil Company,
2003-1426 (La.App. 4 Cir. 6/2/04), 2004 WL 1338156

In Louisiana, claims for asbestos related injuries are ostensibly subject to the same requirements as other tort claims including proof of causation. However, although the statistical association between certain exposures to asbestos and an increased incidence of certain diseases is established, the mechanisms by which asbestos causes any of its associated diseases are unknown. A further complication results from the fact that rarely, if ever, are plaintiffs exposed to asbestos from a single source. For this reason, it is not possible for plaintiffs to offer direct proof that the exposure to asbestos from a particular defendant's products or activities caused his injury. To resolve this dilemma, most courts allow evidence of a sufficient exposure to asbestos from a particular product or activity as circumstantial evidence of causation. Typically, exposures constituting proof of causation are described as having sufficient regularity and frequency such that they are a substantial factor in causing the injury.

In *Torrejon,* the Louisiana Fourth Circuit Court of Appeal was faced with determining the standard for proof of causation in an asbestos case arising not under Louisiana products liability law but under the Jones Act. Although most elements of proof are identical, the causation requirement is relaxed in Jones Act claims and is described as only slight or featherweight causation.

In this case, plaintiff alleged that her husband died of mesothelioma resulting from exposure to asbestos while working for different employers at various work sites including work as a merchant seamam on Mobil's ships. Due to the husband's death, there was no direct evidence of exposure on the Mobil ships. Rather, plaintiff attempted to prove that it was likely that decedent was exposed due to the nature and use of asbestos-containing products on the ships and her husband's job duties. Mobil, the sole defendant at trial, argued that any exposure on its ships was insignificant and did not cause decedent's mesothelioma. Not surprisingly, the opinions of the experts concerning the relevance of the Mobil exposure differed. After trial, the jury concluded that Mobil was negligent for exposing the decedent to asbestos but that Mobil's negligence did not cause the mesothelioma. The trial court granted plaintiff's motion for judgment notwithstanding the verdict, held that the Mobil exposure was a cause of the mesothelioma and entered judgment in favor of plaintiff.

Mobil appealed the granting of the JNOV arguing that sufficient evidence existed to support the jury's original verdict. Emphasizing that the case arose under the Jones Act, the Fourth Circuit examined the evidence in light of the slightest causation requirement. Accepting plaintiff's argument that mesothelioma is a dose responsive disease and any exposure no matter how slight contributes to the development of the disease, the Court held that the featherweight causation requirement had been satisfied.

As a practical matter, the Court's holding equates Jones Act causation with even the most minimal and transient exposure to asbestos based on the argument that every inhaled fiber contributes infinitesimally to the causation of the disease. However, it appears that the Court confused causation and a statistical increase in the incidence of mesothelioma associated with asbestos exposure. Although it may be correct to conclude that every inhaled fiber infinitesimally increases the risk of developing mesothelioma, no one can currently conclude that every fiber factually contributes to the development of the disease because the biological mechanism is unknown. Risk and causation are not interchangeable concepts. Many factors and exposures may contribute to the risk of injury without actually causing it. Even in a Jones Act case, plaintiff must prove the slight causation by a preponderance of the evidence. A substantial increase in the risk of developing a disease should be required to conclude that an event more likely than not caused an injury. Many courts have held that the event must at least double the risk of injury before this conclusion can be drawn. However,

depending on the time of exposure, the intensity, the duration and the type of asbestos, the increased risk of mesothelioma from isolated exposures may be so small that it is statistically insignificant.

Virtually all merchant steam ships constructed prior to 1972 contained substantial amounts of asbestos. With normal maintenance and repair, the argument can be made that virtually every merchant seaman was exposed to at least very minor amounts of respirable asbestos. There is also ample evidence concerning the shipbuilding industries' knowledge of the hazards of asbestos as early as the 1940s. In light of these facts, the Torrejon decision creates a virtual absolute liability for Jones Act employers.

- *William L. Schuette*

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Federal Suit Against Drug Manufacturer Barred By Prior State Malpractice Suit

Hall v. Elkins Sinn, Inc.,
2004 WL 1418787 (5th Cir. 2004) (unpublished opinion)

Barbara Hall suffered from recurrent boils on her right arm. She sought treatment from Dr. Kent Seale, who prescribed injections of Gentamicin, a powerful drug that can have serious potential side effects, especially when taken in large dosages or for prolonged periods. Although a recommended course of treatment usually lasts 7-10 days, Seale wrote Hall a prescription for 21 days. In addition, the pharmacist compounded Hall's risk by providing her with a 33-day supply of the drug. After taking the drug for 28 days, Hall began to experience dizziness and was told by Seale to discontinue her use of Gentamicin. Since then, she suffered numerous side effects associated with permanent bilateral vestibular damage, or ototoxicity, as a result of using the drug.

Plaintiff filed a medical malpractice claim against Seale under the Louisiana Medical Malpractice Act. A medical review panel found that Seale had deviated from the applicable standard of care. Her claim against him was eventually settled for $100,000. She also sued and settled with the pharmacist.

After resolving the state court case, plaintiff sued the manufacturers of Gentamicin in federal court, using diversity jurisdiction. Plaintiff charged that they failed to provide adequate warnings for their drug and that the failure was the legal cause of her injuries. The manufacturers filed a motion summary judgment. The district court granted summary judgment based on defendants' assertion that the plaintiff was precluded from asserting her claim because of the earlier filed state court suit. The district court found that the plaintiff's failure to join the manufacturers as parties in the first litigation effectively amounted to a waiver of any claim against them.

The court further noted that the "learned intermediary doctrine" also obligated the court to grant the motion for summary judgment. Under the doctrine, a manufacturer's duty to warn the end-user is discharged to the physician because of the expertise necessary to understand the warning labels adequately. Therefore, a plaintiff must prove that the manufacturer failed to warn the treating physician of the dangers associated with the drug and that this failure was both a cause in fact and a proximate cause of plaintiff's injury.

Plaintiff appealed to the Fifth Circuit and argued that the district court erred in applying issue preclusion because the new cause of action involved different parties and derived from different circumstances. The court stated that the fact that the two actions involve different defendants was irrelevant; the purpose of issue preclusion is to prevent relitigation of issues already dealt with by the courts so as to maximize judicial economy and minimize conflicting judgments.

Moreover, the Fifth Circuit agreed with the district court that the "learned intermediary doctrine" applied in this case. Seale's affidavit acknowledged that he never read the warning and that he was aware of the risks of the drug independently of manufacturers' labels; therefore, the manufacturers'

warnings played no role in the events leading to Hall's injury. Accordingly, the judgment of the district court was affirmed.

- *Michelle D. Craig*

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Air Bag Case Dismissed for Lack of Expert Testimony Connecting Damages to Alleged Defect

Battistella v. Daimler Chrysler Motors, Co., LLC,
2004 WL 1336444 (E.D. La. 6/14/04)

Battistella was injured during a rear-end collision. The driver's side air bag in his 2001 Dodge Ram truck failed to deploy. Battistella claimed his injuries would have been less severe if the air bag had worked. Judge McNamara of Louisiana's federal Eastern District court dismissed the claim on summary judgment holding that Battistella failed to prove his damages were caused by the alleged defect.

Judge McNamara pointed out that even if Battistella proved that the air bag malfunctioned, he could not win his case unless he also proved that his injuries were enhanced or made worse by the defect. Battistella offered two experts on this subject. Chrysler, the defendant manufacturer, moved to exclude the testimony of both. As to the first expert, Dr. A.L. Baxley, a chemical engineer, the court excluded his opinion as to how air bag deployment would have prevented or lessened the injuries because Dr. Baxley had no special expertise in medicine, biomechanics, or occupant kinematics. As to the second expert, Dr. Brian Fong, Battistella's treating physician, his affidavit was not only offered late, it also failed to set forth any "indicia of Dr. Fong's qualification to offer an opinion related to air bags." Judge McNamara then held that Battistella could not prove an essential element of his case, because he had no expert testimony and the question of whether the air bag's failure to deploy enhanced his injuries was "not a part of the everyday experience of the consuming public." Thus, Judge McNamara granted Chrysler's motion for summary judgment and dismissed the case.

This case illustrates that a plaintiff in a product liability case must do more than simply prove a defect. If the plaintiff does not prove the defect caused his injury – proof that may require expert testimony – he cannot recover damages under the Louisiana Products Liability Act.

- *Madeleine Fischer*

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Appeals Court Overturns Trial Court and Holds Ford Free of Fault in Gas Tank Design Case

Andrews v. Dufour,
2003-0736 (La.App. 4 Cir. 6/2/04), 2004 WL 1345279

Plaintiff sustained burns over 35% of her body when an Oldsmobile slammed into the rear bumper of her 1976 Ford Granada on the interstate, tearing a hole in the gas tank and causing gasoline to leak and ignite. Plaintiff sued Ford Motor Company, among others, averring that Ford was strictly liable for an alleged improper design of the Granada's gas tank. The jury assessed Ford with 80% fault and the driver of the Oldsmobile with 20% fault. The trial judge rendered a judgment

notwithstanding the verdict, assessing Ford 25% fault, the driver of the Oldsmobile 25% fault, and plaintiff with 50% fault. Plaintiff and Ford appealed on a number of issues, with plaintiff contending the trial court erred in granting the JNOV, assessing her with 50% fault and reducing Ford's fault from 80% to 25%, and Ford contending that the trial court erred in holding Ford strictly liable for a defect in the design of the gas tank.

At trial, evidence was presented that plaintiff's vehicle was either stopped or moving very slowly on the interstate in the far left lane at the time of the collision. Based on the experts' calculations, the difference in speeds of the Granada and the Oldsmobile at the time of the impact was between 45 and 65 miles per hour. In this circumstance, it was foreseeable that damage would occur and that the gas tank would rupture. The evidence also established that plaintiff was driving at least ten miles slower than the speed limit in the far left lane, contrary to Louisiana law, and that her lights were not on at the time of the accident. The appellate court held that reasonable minds could not arrive at a conclusion that plaintiff was not at fault in the accident based on the evidence, and affirmed the trial court's 50% allocation of fault to plaintiff.

On the design defect issue, plaintiff asserted that her mechanical engineer expert provided sufficient evidence that an available alternative design for the gas tank – a plastic shield placed on the bottom of the gas tank – would have prevented her injuries. Plaintiff also asserted that her systems engineer expert testified that feasible alternative designs for the gas tank existed when the 1976 Ford Granada was manufactured. Ford contended that plaintiff did not submit proof of the required elements under the Louisiana Products Liability Act because plaintiff's mechanical engineer did not show that the shield would have prevented the hole in the gas tank. The expert could not demonstrate what the shield would look like, nor how thick the metal of the gas tank would have to be to have prevented the puncture from the accident. Ford also argued that plaintiff failed to present evidence showing how susceptible the Ford Granada was to the risk of fire, because there was no evidence demonstrating other fires caused by rear-end collisions with vehicles with the same fuel tank system. Relying on its prior opinion in *Jaeger v. Automotive Cas. Ins. Co.,* 95-2448 (La. App. 4 Cir. 10/9/96); 682 So.2d 292, 298, in which it held that the failure to offer specific evidence of an alternative design was "insufficient to establish that a feasible alternative design existed at the time the product left the manufacturer's control that would have prevented the plaintiff's injury," the Fourth Circuit held that plaintiff did not provide sufficient evidence that an existing, feasible alternative design could have prevented her injuries. Thus, the court of appeal reversed the finding that Ford was strictly liable for the design of the gas tank, and assessed Ford with no fault.

- *Stacie M. Hollis*

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Nail Gun Maker Wins Summary Judgment On Unreasonably Dangerous Design Element

White v. Black & Decker (U.S.) Inc.,
2004 WL 1373271 (E.D. La. 6/16/2004)

Judge Engelhardt's opinion in this case addressed two of the four elements of a products liability claim implicated in a nail gun manufacturer's summary judgment motions.

Kenneth White, an experienced carpenter, sustained a serious eye injury when a Black & Decker pneumatic nailer he was using double-fired, causing an unintended nail to ricochet and inject into his left eye. In the suit that followed, Black & Decker filed two separate motions for summary judgment. The first motion questioned whether Mr. White's injury arose from a "reasonably anticipated use" of the nail gun. The second motion raised the issue whether the nail gun possessed a characteristic that made it "unreasonably dangerous." The court denied the first motion and granted the second.

Reasonably Anticipated Use. Black & Decker contended that because Mr. White was not wearing safety glasses, contrary to warnings that he admittedly read, his injury did not arise from a reasonably anticipated use. It unsuccessfully nudged the court towards a subjective consideration of

Mr. White's experience and heightened awareness of the risk of eye injury. In the court's opinion, the applicable standard was that of an "ordinary user" in the same or similar circumstances as Mr. White; and, although for certain products such a user would be an experienced user, that was not the case here. Mr. White introduced evidence that Black & Decker knew that a significant percentage of users of its nail gun did not wear safety glasses, notwithstanding its warnings. Finding genuine issues of fact, the court denied summary judgment.

Unreasonably Dangerous Design. Mr. White's burden under this element was to demonstrate that the likelihood that Black & Decker's design would cause his injury and the gravity of that injury outweighed the adverse effect adopting his proposed alternative design would have on the utility of the nail gun. Courts consider adequate warnings in evaluating the likelihood of damage.

Black & Decker put forth undisputed evidence that the type of nail gun Mr. White used, a brad nailer, had less recoil than larger nail guns – a characteristic that reduced the chance of double firing and, thus, the likelihood of Mr. White's injury. In addition, Black & Decker provided users with safety glasses that met ANSI standards. It adequately warned users of possible double firing and instructed them to wear glasses to avoid injury. Mr. White failed to demonstrate that the safety glasses could not have prevented his injury even if he had worn them. His proposed alternative design would have a drastic negative effect on the utility of the nail gun by substantially reducing the speed at which nails could be driven. Consequently, the court found that he had not carried his burden and entered summary judgment against him.

- *Andrew M. Obi*

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Federal Judge Finds Captain's Chair Maker Liable Under Maritime Products Law

Daigle v. L&L Marine Trans. Co.,
2004 WL 1349015 (E.D. La 6/14/2004)

In *Daigle,* Judge Fallon of Louisiana's Eastern District found a marine employer, a seller/manufacturer of a chair pedestal, and a manufacturer of a component part of the pedestal jointly liable for personal injuries sustained by the plaintiff. Plaintiff, captain of the M/V MYRNA ANN, was injured when the captain's chair in which he was sitting collapsed while the vessel was engaged in barge moving operations on the Mississippi River. The chair collapsed when one of the footpads became disengaged from the chair pedestal. Plaintiff sued his employer under the Jones Act, 46 U.S.C.App. § 688, and the general maritime law, for negligence and unseaworthiness. Plaintiff's employer filed a third-party complaint against the seller/manufacturer of the pedestal and tendered the seller/manufacturer to plaintiff as a direct defendant under Rule 14(c) of the Federal Rules of Civil Procedure. The seller/manufacturer then filed a third-party complaint against the manufacturer of a part of the pedestal and tendered the manufacturer to plaintiff under Rule 14(c).

After a two and one-half day bench trial, the court found in favor of the plaintiff, holding the employer forty percent at fault, the seller/manufacturer fifty-five percent at fault and the manufacturer of the component part five percent at fault. The trial court applied the Jones Act and general maritime law to find the plaintiff's employer liable for failure to provide a safe place to work and failure to provide a seaworthy vessel. The evidence at trial established that a faulty leveling screw in the footpads, that loosened when the chair was adjusted, caused the chair to eventually dislodge from the pedestal. The court concluded that the employer had notice of this hazardous condition and had failed to correct the condition.

The trial court also found the seller/manufacturer and component manufacturer strictly liable under the general maritime law's application of strict products liability. Applying the principles of the Restatement (Second) of Torts, the court concluded that the defendants had sold or manufactured the product (both the chair pedestal and the footpads), that the product was unreasonably dangerous or in a defective condition when it left the defendant's control and that the defect resulted in injury to the

plaintiff. The court found that the pedestal was defective because it lacked instructions and/or a warning indicating that the leveling screw could not be safely adjusted and assessed the majority of fault to the seller/manufacturer for failure to provide instructions and/or a warning. The manufacturer of the component part argued that it had no liability because it followed the direction of the manufacturer/seller. The evidence at trial established that the manufacturer of the component part had knowledge of the design flaw and potential for injury, notwithstanding that it followed the instructions of the seller/manufacturer.

- *L. Etienne Balart*

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Exclusivity Provision of La. Products Liability Act Doesn't Prohibit Redhibition Claim

De Atley v. Victoria's Secret Catalogue, LLC.,
2004-0661 (La.App. 4 Cir., 5/14/04), 2004 WL 1344861

Carol De Atley purchased a cotton flannel dress from Victoria's Secret in December, 1999. Cheri Pink allegedly sold the dress to Victoria's Secret for retail sale. On January 8, 2001, the dress caught fire from a nearby gas fireplace and caused Ms. De Atley severe bodily injury. She filed suit under the Louisiana Products Liability Act ("LPLA") on September 21, 2001, alleging that the dress was unreasonably dangerous. On December 11, 2003, she added, for the first time, a redhibition claim. Victoria's Secret objected, contending that there was no cause of action for redhibition or, alternatively, that such action had prescribed. The trial court allowed the amendment, and Victoria's Secret appealed. The Fourth Circuit Court of Appeals affirmed the trial court's decision to allow concurrent causes of action under both the LPLA and redhibition.

Victoria's Secret contended that the LPLA was the exclusive cause of action against manufacturers for allegedly defective products; and, therefore, Ms. De Atley could not sustain a claim of redhibition. Although the LPLA does contain an exclusivity provision that purportedly establishes the sole theory of recovery for "damages" as that term is defined in the LPLA, an additional redhibitory cause of action is allowed where the claim is limited to economic loss. Thus, concurrent claims under both redhibition and the LPLA are permitted in appropriate cases, in spite of the exclusivity provision, when each seeks a different remedy. An LPLA claim prohibits the recovery of attorney's fees, yet, redhibition allows such compensation. Because the Fourth Circuit limited the redhibitory action to damages for economic loss, the recovery of any attorney's fees was correspondingly restricted as well. Attorney's fees, consequently, would not be allowed for the portion of the damages recovered pursuant to the LPLA.

The appellate court also addressed the issue of whether the amended petition, which asserted the redhibitory claim, related back to the original filing. When an original pleading gives fair notice of the factual situation out of which an amended claim arises, amendment is permitted despite prescriptive problems. As long as there is some factual connexity between the original and amended claim, the amendment is usually allowed. Here, the Fourth Circuit found a sufficient factual connection between the two pleadings. The original petition alleged that Mrs. De Atley purchased a dress, which subsequently caught on fire due to its defectiveness. Similarly, the amended petition alleged that the dress was so defective that plaintiff would never have purchased the item had she known of its defectiveness. Thus, the amended redhibition claim related back to the original LPLA claim. Prescription did not bar the action.

- *Sarah B. Belter*

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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