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Louisiana Supreme Court Explains Standards for Allowing Experts to Testify

Cheairs v. State ex rel. Department of Transp. and Development,
2003-0680 (La. 12/3/03), ___ So.2d ___

Occasionally this e-zine will note a case that is not a products liability case because of its impact on the field of products liability. In this case the Louisiana Supreme Court set forth a three part inquiry that must be satisfied before an expert may testify in any type of case. Although the case involved an automobile accident and claims of negligence rather than strict products liability, the three part inquiry will be used to determine the admissibility of expert testimony in all types of cases. As products liability cases invariably involve expert testimony and cannot survive without it (*see for example* CASE AGAINST CHOLESTEROL DRUG ZOCOR DISMISSED ON SUMMARY JUDGMENT BY EASTERN DISTRICT noted below) this latest pronouncement by the Louisiana Supreme Court on the standards for allowing experts to testify will significantly affect future products cases.

The plaintiff Mark Cheairs was injured when he ran into the rear of a stationary vehicle owned by the Department of Transportation and Development ("DOTD") while driving his car up an entry ramp to the Mississippi River Bridge in Baton Rouge. The DOTD vehicle was stopped on the scene of a spill of metal rods. The DOTD driver had turned on a lighted electronic arrow board mounted on the cab of his vehicle to alert oncoming traffic to the presence of the vehicle while he picked up the metal rods to clear the roadway.

Plaintiff's case largely depended upon the testimony of an expert, Michael Gillen, who testified that the DOTD was negligent in not dispatching two vehicles to the scene of the metal rod spill, rather than relying on a single vehicle with an arrow board. Gillen, a former police officer and currently a "traffic reconstructionist" for a private consulting firm, contended that DOTD's actions violated standards set forth in the Manual of Uniform Traffic Control Devices ("MUTCD"), a publication of the Federal Highway Administration.

DOTD argued at a pre-trial hearing that Gillen should not be allowed to testify concerning interpretation of the MUTCD because he was not an engineer. Certain language in the MUTCD states that "the manual is not a substitute for engineering judgment" and that, "Qualified engineers are needed to exercise the engineering judgment inherent in the selection of traffic control devices...." However, plaintiff pointed to other provisions of the MUTCD that implied that in certain circumstances people other than traffic engineers are qualified to apply the provisions of the manual.

The trial court overruled DOTD's objection and allowed Gillen to testify. After trial the jury returned a verdict finding both plaintiff and the DOTD, as well as the unknown individual who spilled the metal rods, at fault. The jury allocated 55 % of the fault to the DOTD. The DOTD appealed, but the

judgment was affirmed by the First Circuit Court of Appeal. In this opinion the Louisiana Supreme Court also affirmed and took the opportunity to explain the basis for allowing an expert to testify in cases tried in Louisiana courts.

The starting point for the court's analysis was Louisiana Code of Evidence article 702 and the well-known United States Supreme Court *Daubert* case on expert testimony. The court's focus on these two items and the course of its analysis emphasize the identities between Louisiana and federal procedure when determining whether expert testimony should be admitted. Article 702 of Louisiana's evidence code follows Federal Rule of Evidence 702, and the *Daubert* case, decided by the United States Supreme Court under federal procedural law was adopted by the Louisiana Supreme Court in 1993 in *State v. Foret,* 628 So.2d 116.

Article 702 provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The *Daubert* case, relying on the federal counterpart to article 702, established several non-exclusive factors to be considered when determining whether expert testimony is sufficiently reliable to be admitted into evidence. Those factors are:

1. The "testability" of the scientific theory or technique;
2. Whether the theory or technique has been subjected to peer review and publication;
3. The known or potential rate of error; and
4. Whether the methodology is generally accepted in the scientific community.

Although the DOTD had challenged Gillen's qualifications in what it called a pretrial *"Daubert"* hearing, the Louisiana Supreme Court critiqued that approach saying that an inquiry as to an expert's qualifications has nothing to do with the *Daubert* factors. This should not "be interpreted to mean that a court should not consider an expert's qualifications when deciding whether to admit a particular expert's testimony, only that the *Daubert* case does not directly address that issue." The court found that article 702 actually supports three separate inquiries that must be satisfied before an expert's testimony may be received in evidence:

1. The expert must be qualified to testify competently regarding the matters he intends to address;
2. The methodology by which the expert reaches his conclusions must be sufficiently reliable as determined by the sort of inquiry mandated in *Daubert;* and
3. The testimony must assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

These three principles were borrowed by the Louisiana Supreme Court from cases from the Third and Eleventh Circuit federal appeal courts, once again demonstrating the harmony between Louisiana and federal procedure.

The court noted that *Daubert* was not an issue in this case as the only challenge was to Gillen's qualifications. The court found that in the situation at issue – the decision to use a particular device at a particular location in face of an unpredictable incident of short duration (spill of metal rods) – people other than engineers, specifically policemen and highway department employees are qualified to make decisions at the scene, and accordingly Gillen was also qualified "to express his opinion concerning the application of the standards set forth in the MUTCD to lane closures necessary for incident management."

The case is also interesting for its discussion of the jury's allocation of 55% of the fault to the DOTD. Suffice it to say that the jury also found fault on the part of the plaintiff who was apparently driving without his glasses and admitted that his vision was only 20/200. Two of the Louisiana Supreme Court Justices, Victory and Traylor, dissented, contending that the presence of two DOTD vehicles rather than one would not have prevented the accident since it was likely that the plaintiff would simply have run into the first vehicle he came to. Nonetheless, dissent on these grounds does not detract from the new tripartite analysis set up by the majority as applicable to all cases involving expert testimony.

The Louisiana Supreme Court's opinion in this case sets up a structured matrix for examining expert testimony before allowing it into evidence. The distinction drawn between qualifications and the *Daubert* inquiry may seem self-evident, but in actuality a number of federal and state court decisions do not so clearly distinguish the two but rather blend the inquiries on the theory that an opinion cannot be reliable (*Daubert* inquiry) if the expert is not qualified. Indeed even the United States Supreme Court has suggested as much in the almost equally famous *Kumho Tire* case. ("The relevant reliability concerns may focus upon personal knowledge or experience." *Kumho Tire,* 526 U.S. at 150, 119 S.Ct. at 1176 (1999).)

As a practical matter, whether qualifications and reliability are considered separately or together, the result should be the same. Clearly separating the inquiries may assist some courts, however, who continue to make the mistake of believing that an expert who is qualified may testify to anything.

Perhaps the Louisiana Supreme Court may next take up the challenge of the third prong of the analysis: Does the testimony assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue? Few cases have explained the meaning of this question and a reasoned examination of this third inquiry would be welcome.

- *Madeleine Fischer*

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Louisiana Supreme Court Further Explains Retroactive Application of Laws in Asbestos Cases

Landry v. Avondale Industries, Inc.,
2003-0719 (La. 12/3/03), ___ So. 2d ___

The nature of a cause of action has profound legal effects, and more than any other area of law asbestos litigation provided the Louisiana Supreme Court with several recent opportunities to define these characteristics and effects. In *Austin v. Abney Mills,* 01-1598 (La. 9/4/02), 824 So.2d 1137, the Court held that a cause of action for an asbestos induced injury accrues at the time of the plaintiff's first significant exposure to asbestos. Since such events generally occurred before the mid-1970s, asbestos plaintiffs argue prevailing legal principles such as the workers' compensation exclusive remedy provision, the abolition of solidary liability in tort and the Louisiana Products Liability Act cannot be applied retroactively to their vested cause of action. However, the Supreme Court's holding in *Landry v. Avondale Industries, Inc.* demonstrates that this rule is not the only type of prohibited retroactivity and the applicable substantive law cannot be determined so mechanically.

In *Landry,* the decedent was exposed to asbestos beginning in 1959. He was subsequently diagnosed with and died from mesothelioma in 2002. The subsequent suit included a loss of consortium claim by decedent's spouse. Decedent's employers sought dismissal of the consortium claim arguing that 1) the 1982 amendment to Civil Code article 2315 creating the consortium cause of action could not be applied retroactively, and 2) they were statutorily immune from a tort claim under Louisiana Revised Statute 23:1032. Consistent with its prior decisions, the Court recognized that a

cause of action for loss of consortium arises when the family is actually deprived of the victim's services and society. Plaintiff argued that because this occurred in 2002, the 1982 amendment was not being applied retroactively but prospectively.

Relying on the turn-of-the-century French legal scholar Planiol, the Court recognized two situations in which application of law is retroactive. First, a law is retroactive when it changes the effect of a right already acquired. This is the proposition which asbestos plaintiffs argue requires application of the substantive law in effect at the time the cause of action accrues, *i.e.,* at the first significant asbestos exposure. However, the second type of retroactivity exists when a subsequent law evaluates the conditions of legality of a prior act. The Court interpreted this proposition as prohibiting subsequent laws from altering liability for prior conduct. The Court specifically rejected the proposition that the accrual of the cause of action necessarily determined the applicable substantive law. Rather, a defendant's liability is determined by the law in effect at the time of his conduct. Because the employers' conduct occurred prior to 1982, the subsequent creation of a cause of action for loss of consortium could not alter their potential liability.

The Court then analyzed the employer's executive officers' and directors' tort immunity defense under Louisiana Revised Statute 23:1032. Plaintiff argued that the immunity was inapplicable to conduct occurring prior to its creation in 1976. The Court rejected this argument because the plaintiff's cause of action accrued after 1976. Although somewhat confusing in light of its first decision, it is not necessarily inconsistent. The two rulings can be harmonized by understanding that the extent of a plaintiff's rights are governed by the law in effect at the time the cause of action accrues. Absent valid retroactive legislation, these rights cannot be reduced. However, a particular defendant's liability is determined by the law in effect at the time of his conduct. Absent valid retroactive legislation, the defendant's liability cannot be increased. In most situations, the defendant's conduct and the accrual of plaintiff's cause of action are nearly simultaneous. Therefore, the same law defines the plaintiff's rights and defendant's liabilities. However, when a temporal gap exists between the two, it is appropriate to apply laws reducing defendant's liability adopted during any time between defendant's conduct and the accrual of plaintiff's cause of action.

- *William L. Schuette*

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1st Circuit Affirms Summary Judgment for Bicycle Manufacturer on Warning & Design Theories

Matherne v. Poutrait-Morin/Zefal-Christophe, Todson Inc.,
2002-2136 (La.App. 1 Cir. 12/12/03)

On a bicycle race training ride in 1991, Brett Matherne fell off his bike and was injured while trying to stop his bike from colliding with the rear tire of the bike in front of him. Matherne purchased his bike, a Trek model 460, in 1986. His bike was equipped with toe clips: metal cages attached to each pedal intended to hold a cyclist's feet in continuous contact with the pedals, thus increasing pedaling power. On the day of the accident, Matherne was riding with the right toe clip loose but had tightly secured his left foot in the left toe clip. When he fell, his left foot remained attached to the bicycle pedal, leading to his injuries.

Matherne sued the bicycle's manufacturer, Trek Bicycle Corporation ("Trek") alleging that the bicycle was unreasonably dangerous under the Louisiana Products Liability Act ("LPLA") because it was defectively designed and because the manufacturer failed to provide adequate instructions on the use of the bicycle and, more specifically, on the use of the toe clips. Trek moved for summary judgment on both claims. The district court granted Trek's motion on the failure to warn claim, finding that Matherne was an experienced cyclist and already aware of the potential hazards of using the toe clips. However, the district court initially denied summary judgment on Matherne's defective design claim based on an affidavit of Matherne's "bicycling expert" who claimed that there existed a reasonable alternative design. After deposing Matherne's expert, Trek filed a supplemental motion for summary judgment on the design defect claim. The second motion was later granted.

The First Circuit Court of Appeals affirmed both judgments of the district court. With respect to Matherne's failure to warn claim, the First Circuit determined that Matherne had used the toe clips continuously since he purchased the bicycle seven years earlier and possessed both actual knowledge of the hazards of using the toe clips and personal experience with the operation of the toe clips, including previous occasions when Matherne fell off his bike while using the toe clips. Matherne was thus a "sophisticated user" of the toe clips who was not owed warnings of information already within his knowledge. Moreover, the court concluded that though there did exist conflicting instructions on the use of the toe clips in the 1986 owner's manual and later editions of the manual, all manuals contained an admonition that the toe straps must be loose for a cyclist to remain upright when stopped.

The First Circuit also rejected Matherne's alternative design claim, noting that Matherne was aware of other foot retention systems but chose not to use those systems. The court also determined that Matherne did not show the existence of an alternative, safer design that would have provided the same benefits nor did he show that the utility of the toe clips was outweighed by their risk of harm. Particularly important to the court was the testimony of Matherne's expert, who admitted that Matherne might still have suffered injury even if an alternative pedal design had been used.

- *Diana A. Cross*

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Eastern District Denies Summary Judgment to Crane Manufacturer's Successor

Thomas v. Applied Hydraulic Systems, Inc.,
2003 WL 22836078 (E.D.La. 11/25/03)

Judge Beer of the Eastern District denied summary judgment for the defendant when an employee sued the manufacturer of a crane and its successor corporation for injuries he sustained while installing the crane on an offshore platform.

After the accident, the manufacturer of the crane sold certain of its assets to a successor company. The sale of assets included the trade name, trademark and service mark of the previous company and their registrations and technical drawings. Additionally, the successor company received the right to use those items in manufacturing cranes.

The sales agreement provided that "Seller and purchaser agree that nothing herein shall ever be or be construed as an assumption by purchaser of any past, present or future products liability exposure or obligation of seller with respect to seller's previous manufacturing, sales and service activities...." Relying on that language, the defendant/successor filed a motion for summary judgment on plaintiff's claim.

Louisiana recognizes the rule of nonliability in an asset sale. However, there are three exceptions to that rule: 1) when the purchaser expressly or impliedly agrees to assume the obligations; 2) when the transaction is entered into to escape liability; or 3) when the purchaser is merely a continuation of the selling corporation.

The court determined, first, that the successor/defendant did not assume any obligation for the plaintiff's suit by contract. Second, the court concluded that the transaction was not entered into to escape liability. However, because the successor corporation purchased the trademark, trade name, logos, and technical drawings for the cranes, the court found that there was at least some proof of continuity of the identity of the business in the eyes of the public.

Accordingly, the court denied the summary judgment finding that whether the two corporations shared a common identity was a fact issue that should be left to the jury.

- *Michelle D. Craig*

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Eastern District Evaluates Contractual Designation of Louisiana Law in Products/Warranty Case

Skansi Marine, LLC v. Ameron International Corp.,
2003 WL 22852221 (E.D. La. 12/1/03)

In *Skansi Marine, LLC v. Ameron International Corp.,* the district court grappled with a choice of law issue in a maritime products liability/breach of warranty claim. The plaintiff, Skansi Marine ("Skansi"), alleged that a paint coating utilized by a shipbuilder on two vessels purchased by Skansi was defective. The vessels were constructed in Alabama by a shipbuilder with its principal place of business in Alabama under contracts with the shipbuilder that designated Alabama law as governing. The allegedly defective product was purchased in Alabama and the seller of the coating was a Delaware corporation domiciled in California. Skansi was a Louisiana domiciliary. Skansi moved for partial summary judgment seeking a declaration that Louisiana law governed, while the defendant moved for partial summary judgment that Alabama law governed.

Citing the rule of *Erie v. Tompkins,* 304 U.S. 64 (1938), Judge Berrigan began by analyzing Louisiana's choice of law rules. As Skansi asserted claims under products liability and breach of warranty, the court had to determine whether to apply Louisiana Civil Code articles 3542 through 3545, addressing choice of law for products liability, or article 3537, addressing choice of law for contracts. The court, relying on an earlier decision from the Eastern District of Louisiana, *R Square Invs., Inc. v. Teledyne Indus., Inc.,* 1997 WL 436245 (E.D. La 1997), held that the claims for damage to the product itself and associated economic loss would be governed by article 3537 (contracts), while claims for damage physically caused by the product to other property or persons would be governed by articles 3542 through 3545 (products liability).

Turning to the facts, the court concluded that genuine issues of material fact precluded entry of summary judgment on the choice of law issue for the products liability claim. The court did not have any information as to where the injury was sustained or whether the defendant's products of the same or similar type were sold in Louisiana. The court did grant the defendant's summary judgment on the choice of law issue for the breach of warranty claim, holding that Alabama law governed. In so holding, the court concluded that Alabama's interest in having its law apply outweighed any interest that Louisiana would have in applying its law. Central to the court's conclusion were that the transactions occurred in Alabama, the contracts were formed in Alabama and/or designated Alabama law as controlling and the object of the contracts was the sale and delivery of the coating in Alabama. These facts were essentially not rebutted by Skansi with any evidence, thus leading the court to conclude that summary judgment was proper.

- *L. Etienne Balart*

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Case Against Cholesterol Drug Zocor Dismissed on Summary Judgment by Eastern District

Sheridan v. Merck & Co., Inc.,
2003 WL 22902622 (E.D. La. 12/8/03)

Judge McNamara of Louisiana's federal Eastern District court dismissed this case against the prescription cholesterol-lowering drug Zocor after plaintiff failed to timely submit expert reports and was left with no evidence of any defect in the drug.

The plaintiff contended that his use of Zocor when combined with an IV dye used in an angiogram caused him to contract the disease rhabdomyolysis. He argued that the defendant manufacturer, Merck, failed to issue an adequate warning against using the two products in combination.

Plaintiff missed the usual pretrial deadline for submitting his expert reports. He managed to get an extension and eventually submitted two reports, but they were not meaningful. When Merck moved for summary judgment the plaintiff sought another reprieve – this time asking to be allowed to take the depositions of the same experts and submit those depositions in opposition. The court rejected this gambit saying, "to allow an expert to state an opinion for the first time in his deposition, *after his expert report has been produced,* would render meaningless the expert report deadline."

Judge McNamara found that the meager reports of the plaintiff's experts did not address the risk of using Zocor with the IV dye. Further, neither of the experts prescribed Zocor, performed the angiogram, or offered any opinion on what the prescribing/treating physician knew or should have known from reading the Zocor label. In essence, all the plaintiff could do was to argue that the Zocor warning was inadequate. The court found that the "mere allegation of inadequacy" without expert testimony did not suffice to defeat Merck's summary judgment motion.

- *Madeleine Fischer* back to top

Case Against Medical Device Manufacturer Remanded to La. State Court for Lack of Diversity

Turner v. Ethicon Endo-Surgery, Inc.,
2003 WL 22872103 (E.D.La. 12/2/03)

Juanita Turner underwent a surgical procedure to treat reflux disease. After the procedure, a piece of a device used for closing surgical wounds was discovered in Turner's abdomen. Ethicon, an Ohio corporation, was the manufacturer of the device. Turner and her husband sought relief for their injuries. Because Louisiana law requires a patient alleging a physician's malpractice not to commence a lawsuit until the patient has presented the matter to a medical review panel, the Turners brought the physician who performed the surgery and the hospital where it was performed before a medical review panel. While their medical malpractice claim was pending before the panel, the Turners filed a products liability claim in