Jones Walker E*Zine

Products Liability
February 2005 Vol. 49

IN THIS ISSUE:

Mitsubishi Liable For Air Bag Which Deployed When Plaintiff Honked Horn

Lawson v. Mitsubishi Motor Sales of America, Inc.,
2004-839 (La. App. 3 Cir. 12/29/04); ___ So.2d ___

In *Lawson,* the Louisiana Third Circuit Court of Appeal affirmed the trial court's application of *res ipsa loquitur* to find that a manufacturing defect existed in a Mitsubishi Galant, making it unreasonably dangerous under the LPLA. Plaintiff was injured when the driver-side air bag deployed when she honked the horn of her used 1996 Mitsubishi Galant. Plaintiff and her husband sued Mitsubishi, alleging that the deployment of the air bag was caused by a manufacturing defect and that warnings for the air bags were inadequate under the LPLA. The jury rendered a verdict in favor of Mitsubishi. The trial court, however, applying the doctrine of *res ipsa loquitur,* granted the plaintiffs judgment notwithstanding the verdict on liability.

Plaintiffs' expert testified that clocksprings – which operate the air bags by bundling together electrical wires that are controlled from the steering wheel – were the only thing that malfunctioned when he inspected the Galant. Relying on a Mitsubishi service bulletin, he opined that a clockspring likely malfunctioned because it was misaligned. The expert concluded that a misaligned clockspring was the only thing he found that could have caused the deployment. Mitsubishi's expert supported this conclusion by testifying that the clockspring did not perform correctly upon his inspection. He also testified that a clockspring can become misaligned if a certain part falls off before it is installed, and that misalignment could cause something like the deployment.

Mitsubishi argued it was not the manufacturer of the clockspring. Further, it was not responsible for aligning the clocksprings, nor did it verify that they were properly aligned before installation. Mitsubishi also argued that a misaligned clockspring was not a manufacturing defect because misalignment could have occurred after installation. Mitsubishi asserted that, because the Galant had been owned by three different parties, there may have been work performed on the Galant that caused the clockspring to malfunction. Mitsubishi, however, failed to produce evidence of any work on the car. The court held that this unsupported inference was not reasonable, and therefore could not defeat the application of *res ipsa loquitur.* Further, plaintiffs provided evidence that the steering column had never been opened after it left Mitsubishi, which is required to remove the clocksprings.

The court also rejected Mitsubishi's argument that the SRS warning light had been illuminated in the Galant prior to the accident, and that, had plaintiffs taken the car in, the defect with the air bag would have been discovered. The court held that, even if the SRS warning light had been on prior to the accident, this light does not warn of manufacturing defects, such as a defect that could result in deployment of an air bag when the horn is honked.

The court affirmed that *res ipsa loquitur* was applicable, finding that plaintiff's injuries would not have occurred absent negligence, and that the installation of a properly aligned clockspring is within Mitsubishi's scope of duty to the plaintiffs. The court held that there was no evidence that anything other than the misaligned clockspring caused the air bag to deploy. Further, because there was no reasonable inference that anything after the manufacturing process caused the misalignment, it was more probable than not that the clockspring was misaligned at the time of the manufacture. The court therefore concluded that the only reasonable conclusion that could be reached was that plaintiff's injuries were caused by a manufacturing defect in the Galant.

Finding the record complete, the Third Circuit also assessed damages without remand to the trial court. The court awarded plaintiff $200,000 in compensatory damages and approximately $773,000 in special damages, consisting of past and future medical expenses, past lost wages, and loss of earning capacity. The court also awarded plaintiff's husband and son loss of consortium damages in the amount of $35,000 and $15,000, respectively.

- Stacie M. Hollis

back to top

Asbestos Diseases: One Cause Of Action Or Many?

Cichirillo v. Avondale Industries, Inc.,
2004-0131 (La.App. 4 Cir. 10/27/04), ___ So.2d ___

A cause of action is a party's right to sue for an actionable injury. It accrues the moment that substandard conduct (fault), injury and causation are present. The accrual of a cause of action and its nature are critical determinants of 1) when a plaintiff may institute a suit, 2) when any statute of limitations could begin to run, 3) what substantive law applies, 4) what claims must be brought in any suit, and 5) what future claims are foreclosed by settlement or final judgment. Despite these fundamental implications, courts do not generally provide precise descriptions of the nature and scope of the causes of action presented. Mostly likely, this is because in the vast majority of torts the substandard conduct, the manifestation of resulting injury and causation occur within a relatively short period of time. This makes the determination of the date of accrual of the cause of action and the claims it includes straightforward and obvious. However, in asbestos litigation the substandard conduct and manifestation of injury is generally separated by decades (referred to as a latent period). This situation is also present in some other types of toxic tort cases and creates substantial ambiguity regarding the date of accrual and nature of the cause of action.

Unfortunately, Louisiana courts have not set forth a complete description of the cause of action for asbestos injuries leaving the litigants to infer its parameters from a series of result-oriented decisions. At the present time, these decisions establish that the legally cognizable injury in asbestos cases is the embedding of asbestos fibers in the lung, and the cause of action accrues at that time. This means that the substantive law applicable to the claim is that in effect at the time of the exposure even if the injury does not manifest itself until many years later. An interrelated issue is that the statute of limitations would normally begin to run once the cause of action accrues. However, because the exposed individual is not generally aware he has been injured at the time of exposure, the doctrine of *contra non valentem* suspends the running of liberative prescription until the individual knew or should have known of his injury.

The most significant question remaining regarding the nature of the cause of action for asbestos injury concerns the claims it encompasses. Occupational exposure to asbestos can give rise to a variety of different conditions that may manifest themselves at different times including changes of the lining of the lung, asbestosis, lung cancer and mesothelioma. Louisiana courts have not directly addressed whether all of these injuries are included within one cause of action or multiple causes of action.

If all claims for asbestos injury are encompassed within a single cause of action, an individual who becomes aware that he has sustained any injury, such as asbestosis, would be required to bring suit within a year for all of his past, present and future injuries. If, for example, a plaintiff obtained a final judgment for asbestosis but failed to include in his suit a claim for the likelihood that he would

develop lung cancer in the future, the doctrine of res judicata would preclude any subsequent suit for such lung cancer. This is, actually, the traditional rule in Louisiana and most other states. However, due to the perceived injustice of this result in long latency toxic tort cases, a number of states have recognized a limited exception to the traditional rule and allowed asbestos plaintiffs a second cause of action. Although most parties assume that Louisiana will follow suit, our courts have not directly addressed this issue.

Ostensibly, the decision in *Cichirillo v. Avondale Industries, Inc.,* 2004-0131 (La.App. 4 Cir. 10/27/04), ___ So.2d ___ relates to prescription of a mesothelioma claim. In 1992, plaintiff filed suit in Jackson, Mississippi contending that he had sustained one or more of a number of asbestos-related injuries including mesothelioma. At the time, plaintiff had only sustained asbestosis. The Mississippi suit languished but was not dismissed. In 1999, plaintiff was diagnosed with mesothelioma; however, he failed to file suit in Louisiana until 2002. Because the suit was filed more than one year from the date of discovery of the disease, the trial court granted defendants' exception of prescription. The Fourth Circuit Court of Appeal considered the effect of the ongoing Mississippi suit and held that under Louisiana Civil Code article 3462 (filing a suit in a court of competent jurisdiction and venue interrupts prescription) it constituted a continuing interruption of prescription regarding plaintiff's claim for mesothelioma. The court ignored the fact that the interruption described in article 3462 takes place only with regard to claims forming part of the cause of action sued upon. Therefore, although certainly unintentional, the necessary implication of the court's ruling is that plaintiff's claim for asbestosis and his future claim for mesothelioma were parts of the same cause of action sued upon in the Mississippi suit.

From the perspective of traditional tort theory, plaintiff sustained a legally cognizable injury when he was first exposed to asbestos. The asbestosis and subsequent mesothelioma were separate sequelae of that legally cognizable injury but part of a single cause of action. Language in the Cichirillo opinion supports this view:

> Although asbestosis and mesothelioma are two separate and distinct diseases, the situation we have in the instant case is somewhat perplexing. When Mr. Cichirillo filed his lawsuit in Mississippi, he was suffering only from asbestosis. However, in that same lawsuit mesothelioma was one of the conditions that the plaintiffs generally listed that either they or their decedents had received injuries from. The question is whether this is enough to interrupt prescription in the instant case. Even though Mr. Cichirillo's mesothelioma had not manifested itself at the time the Mississippi lawsuit was filed, the mesothelioma occurred as a result of the same exposure which caused the injuries he was suffering from at the time.

It is not possible to address one aspect of a cause of action such as prescription without affecting other aspects such as the claims encompassed by it. By holding that the Mississippi suit interrupted prescription on plaintiff's claim for mesothelioma, the *Cichirillo* court provides some inadvertent support for the contention that all injuries arising from asbestos exposure form part of a single cause of action.

- William L. Schuette

back to top

LARS Unit Manufacturer Denied Summary Judgment On Warning Claim

Laird v. Deep Marine Technology, Inc.,
2005 WL 22949 (E.D. La. 1/4/05)

Plaintiff James Laird, an employee of Deep Marine Technology ("DMT"), sued Ashton Marine, among others, for injuries sustained when he stepped inside a Launch and Recovery System ("LARS unit") in order to disassemble it and the unit collapsed. At the time of the accident, the unit was suspended from a crane by a strap. The strap broke causing the A-frame of the unit to collapse. Ashton Marine, the company that employed the crane operator, filed a third party demand against Harbor Branch, the company that manufactured and designed the LARS unit, and Bridgeport, the company that manufactured the strap. Harbor Branch moved for summary judgment regarding Ashton Marine's claim against it. Chief Judge Berrigan of the Eastern District denied the summary judgment because there were genuine issues of material fact for trial. (See our previous article on this case in the November 2004 issue: DESIGN & WARNING CLAIMS AGAINST LARS UNIT MANUFACTURER SURVIVE MOTION TO DISMISS.)

Ashton Marine brought this action against Harbor Branch based on the Louisiana Products Liability Act ("LPLA"). The threshold issue in a products liability claim is whether the injuries arose from a reasonably anticipated use of the product. If the use is not reasonably anticipated, there is no claim under the LPLA. On the other hand, if the use is reasonably anticipated, the next issue is whether the plaintiff can succeed under one of the theories of liability set forth in the Act. In the present case, both parties acknowledged that the relevant theories were whether the LARS unit was unreasonably dangerous due to a defect in design or due to lack of an adequate warning.

Harbor Branch's summary judgment asserted that the DMT employees were not dismantling the LARS unit in a way that was reasonably anticipated by Harbor Branch. The LPLA defines reasonably anticipated use as "a use or handling of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances." The Eastern District denied the summary judgment and in so doing agreed with Ashton Marine that the reasonably anticipated use analysis intertwines with the adequate warning analysis. Stated another way, reasonably anticipated use depends on what the DMT employees were instructed to do and warned not to do with respect to dismantling the LARS unit.

In order to prove that the use of the LARS unit by DMT employees was not a reasonably anticipated use, Harbor Branch argued that an adequate warning was provided because the operator's manual specifically warned against the manner in which the unit was disassembled. The operator's manual stated that all slings and shackles must be certified for the weight requirement and that the handling of the equipment should be done by only certified crane operators. Both of these provisions were ignored by DMT. Harbor Branch also argued that the demonstrations and training sessions provided by Harbor Branch instructed DMT employees how to properly break down the LARS unit.

Judge Berrigan found that despite the demonstrations and the general warnings in the operator's manual, there was still a genuine issue of material fact as to whether Harbor Branch provided an adequate warning or instruction on how to dismantle the LARS unit. The Eastern District reasoned that the warnings in the manual were generalized and did not address, in particular, the collapsing function of the LARS unit. Furthermore, the manual did not include the 14 step breakdown procedure. As to the demonstrations, Judge Berrigan stated that they were done more to verify that the breakdown process worked properly rather than to instruct. Also, Judge Berrigan found that it was unknown whether Harbor Branch provided the DMT employees with the 14 step breakdown procedure at the demonstrations even though the steps were not included in the manual. Because there was a genuine issue of material fact as to whether Harbor Branch provided adequate warnings or instructions, Judge Berrigan also held that a genuine issue of material fact existed as to whether Harbor Branch could have reasonably anticipated that DMT employees would have collapsed the LARS unit by using an improper method.

Judge Berrigan also found that there were other issues which could not be disposed of by summary judgment. Judge Berrigan held that there was an issue of fact as to the following: (1) whether Laird was handling the product in a dangerous manner; (2) whether Laird was an experienced operator; and (3) whether DMT was a sophisticated user/purchaser of the LARS unit, which would shield Harbor Branch from liability under the LPLA. Thus, Judge Berrigan denied Harbor Branch's motion for summary judgment.

It appears that the Court placed the burden on Harbor Branch to prove that the employees received not only the general instructions provided in the manual but also specific instructions contained in the 14 step breakdown procedure. Perhaps Harbor Branch should have deposed Laird and other employees about what warnings were actually received before filing for summary judgment.

- Katie V. McGaw

back to top

Jury's Fault Allocation Reinstated, Reducing Fault Of Ladder Manufacturer

Guidry v. Coregis Ins. Co.,
2004-0325 (La. App. 3 Cir. 12/29/04), ___ So. 2d ___

This case arises from the death of Melvin Guidry. Guidry was a billboard and sign repairman for Signko, Inc. He was killed when he made contact with some overhead power lines while repairing signs at a truck stop. At the time of the accident, Guidry was using an aerial ladder manufactured by Sponco Manufacturing. The jury allocated fault among all the potential defendants, with the largest percentage, 45%, being allocated to Guidry's employer, Signko, and only a small amount, 5%, allocated to the manufacturer, Sponco. The trial judge then entered a judgment notwithstanding the verdict (JNOV) reallocating all of the Signko's fault percentage to Sponco. Both sides appealed the JNOV. On appeal, the Louisiana Third Circuit vacated the JNOV and reinstated the jury's allocation fault.

In actuality, this is a legal malpractice case. Guidry's wife never sued for the wrongful death of her husband because the statute of limitations on her claim ran out before it was filed. She brought a malpractice action against the two attorneys who allegedly let it prescribe. In a malpractice action, the plaintiff must prove damages, and damages are determined, in part, by the damages, if any, a plaintiff would have received in the underlying lawsuit. Thus, a malpractice suit contains a "trial within a trial" in which the plaintiff must prove that she would have been entitled to damages but for the negligence of the attorney. That is, the plaintiff must prove that she would have prevailed in the underlying lawsuit. In this case, the defendant attorneys admitted their negligence and the existence of an attorney client relationship. The burden of proof then shifted to the attorneys who had to prove that Mrs. Guidry could *not* have prevailed on the underlying suit. On appeal, the defendants argued that Mrs. Guidry was not entitled to damages based on their alleged malpractice because she would not have recovered any damages in the underlying wrongful death suit. They argued that fault for the accident should have been divided between the late Mr. Guidry and Signko. Mrs. Guidry would not be able to recover for any percentage of the damage attributed to Mr. Guidry. Moreover, plaintiff's sole remedy against Signko, as Mr. Guidry's employer, was through the Louisiana Workers' Compensation Act. Even if fault were allocated to Signko, the plaintiff could not recover any damages. The defendants argued that because the fault lay entirely with two entities from whom damages could not be recovered, the plaintiff could not recover any damages against them.

The Third Circuit did a very thorough analysis of Sponco's liability under the Louisiana Products Liability Act (LPLA). Under the LPLA, a manufacturer is liable if a characteristic of the manufacturer's product renders it unreasonably dangerous; the unreasonably dangerous condition proximately caused the plaintiff's damages; and the damages arose when employing the product in a reasonably anticipated use. La. R.S. 9:2800.54(A). A product is unreasonably dangerous in design if an alternative design existed at the time the product left the manufacturer's control and that alternative design had the ability to prevent the plaintiff's damages. Additionally, the LPLA requires a balancing test: the likelihood that the design would cause the claimant's damage and the gravity of that damage must be outweigh the burden on the manufacturer of adopting the alternative design. La. R.S. 9:2800.56. Here, the Third Circuit found that an alternative design did exist for the aerial ladder: the bucket could have been insulated with fiberglass. Further, the Third Circuit found that Sponco knew of the alternative design since it produced ladders with exactly that feature. Moreover, the jury could have found that insulation could have prevented Mr. Guidry's accident, resulting perhaps in a mild shock, but not a fatal one. The Third Circuit found that since the shock would not have been as severe if the bucket had been insulated, the failure to insulate the bucket was a proximate cause of Mr. Guidry's accident. Finally, the ladder was being used in a reasonably anticipated manner at the time of the accident. Based on these findings, the Third Circuit found that a jury had a reasonable basis for finding liability on Sponco's part.

Thus, the defendants were unsuccessful in having Sponco's percentage of the damages reduced to zero. But the Court did not agree with the trial judge's reallocation of fault either. The Third Circuit reduced Sponco's allocation of fault from 50% back down to the 5% initially allocated by the jury, reallocating to Signko the 45% initially allocated to it by the jury. This is significant to the defendants in the case because it lowered the plaintiffs' recoverable damages. From a products liability

standpoint, the reasoning behind this reallocation is interesting as well.

The Third Circuit reasoned that Sponco knew that the buckets of these ladders could be insulated. Indeed, Sponco produced an aerial ladder *with* insulation. However, as the evidence showed, Sponco allowed their customers a choice: ladders with insulation or ladders without insulation. Signko chose to purchase the ladder without insulation. The Third Circuit reasoned that the jury could have found that the customer, Signko, was in the best position to know what type of equipment it needed, and, therefore, should bear the majority of the responsibility for the fact that Mr. Guidry's ladder was uninsulated. Put simply, since it was Signko's choice to purchase the uninsulated ladder, the Third Circuit found they should bear the greater share of the fault. Accordingly, the Third Circuit vacated the JNOV and reallocated the fault, leaving Sponco with only 5%.

Sponco was not a defendant to the legal malpractice lawsuit, and therefore this judgment will not require them to pay anything, but the reasoning of the court is relevant to more traditional products liability actions. For the traditional products liability defendant, the argument follows that while an alternative design did exist, and that alternative design would have prevented the type of injury sustained, it was ultimately the choice of the customer to go with the "less safe" design. In the words of the Third Circuit, "the customer is in the best position to know how often external dangers, such as power lines, will pose a threat." Under this reasoning, it is the consumer who should bear the responsibility. A manufacturer cannot be faulted because the customer should have, in hindsight, bought a different model or design. The manufacturer is not entirely relieved of responsibility, but a lesser allocation of fault means a smaller amount of money that must be paid to the plaintiff. Ultimately, *Guidry* provides a way for manufacturers to cast at least some of the blame back onto the customers who make the choice between different models with different safety features.

- Emily E. Eagan

back to top

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:

Leon Gary, Jr.
Jones Walker
Four United Plaza
8555 United Plaza Boulevard
Baton Rouge, LA 70809-7000
ph. 225.248.2024
fax 225.248.3324
email lgary@joneswalker.com

To subscribe to other E*Zines, visit our Web site at http://www.joneswalker.com/news/ezine.asp.