Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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ILLINOIS SUPREME COURT COMBINES CONSUMER-EXPECTATION AND RISK-UTILITY TESTS IN DEFECTIVE AUTO CASE

The Illinois Supreme Court has ruled that a trial court erred by refusing to provide a risk-utility instruction to the jury in a case involving an allegedly defective automobile seat. ***Mikolajczyk v. Ford Motor Co.*, No. 104983 (Ill., decided October 17, 2008)**. In its opinion, the court carefully explores strict liability jurisprudence in the state, noting how it has evolved over time, and discusses how the consumer-expectation and risk-utility tests apply to the evidence introduced in design defect cases.

The issue arose in a case involving the death of a man who was killed when his car was struck from the rear and his seat collapsed. The trial court provided the pattern jury instruction then in effect; it required the jury to determine only whether the driver's seat was "in an unreasonably dangerous condition," that is, whether, in light of the use to which it was put, it failed consumer expectations. The decedent's widow was awarded $27 million when the jury answered the question affirmatively. The defendants contended on appeal that the trial court erred by refusing to provide the non-pattern instruction they tendered; it would have instructed the jury to consider the "overall safety" of the design, whether the foreseeable risks of harm of the design outweighed its benefits, and whether the adoption of a feasible alternative design would have avoided or reduced the risks.

The court agreed that the defendants' "risk-utility" instruction should have been given, because the parties had introduced evidence about the issue and the defendants had properly preserved the matter for appeal. Concluding that the defendants were prejudiced by the trial court's failure to give the instruction, the court reversed the judgment and remanded the case for a new trial. While the court declined to adopt the *Restatement (Third) of Torts: Products Liability* as a statement of substantive law on the issue, it did adopt the *Restatement's* formulation of the risk-utility test as an "integrated" test.

Thus, in Illinois, "the risk-utility balance is to be determined based on consideration of a 'broad range of factors,' including 'the magnitude and probability of the foreseeable risks of harm, the instructions and warnings

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accompanying the product, and the *nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing*,' as well as 'the likely effects of the alternative design on production costs; the effects of the alternative design on product longevity, maintenance, repair, and esthetics; and the range of consumer choice among products."

The court declined defendants' invitation to rule that the risk-utility test is the only test to be used in a design defect case or that a product meeting the risk-utility test cannot be found defective even it if does not meet the consumer-expectation test. In this regard, the court stated, "Adoption of this integrated test resolves the question of whether the answer to the risk-utility test 'trumps' the answer to the consumer-expectation test because the latter is incorporated into the former and is but one factor among many for the jury to consider."

OHIO SUPREME COURT APPLIES NEW TORT REFORM LAW TO PENDING ASBESTOS CLAIMS

The Ohio Supreme Court has determined that legislative amendments requiring plaintiffs to file qualifying medical evidence in their asbestos personal injury lawsuits can be applied retroactively to claims pending when the law was changed. ***Ackison v. Anchor Packing Co.*, No. 2008-5243 (Ohio, decided October 15, 2008)**. At issue were the claims of a widow for her decedent's nonmalignant asbestosis. The trial court dismissed the claims, finding that the revised asbestos legislation applied to them, and an appeals court reversed that ruling, stating that she had a vested substantive right to pursue recovery for her husband's illness and death under the law in effect when her complaint was filed.

Because the legislature provided that the law was to apply to cases pending on its effective date, the court had to determine whether the statute was "substantive, rendering it *unconstitutionally* retroactive, as opposed to merely remedial." The court found that the change was remedial because (i) it caused a hold to be placed on asbestos claims until a diagnosis is made and did not extinguish the claim entirely; (ii) its definition of "competent medical authority" simply established "the procedural framework by which trial courts are to adjudicate such claims," and, as such, was procedural in nature and did not change any of plaintiff's vested rights; (iii) its requirement that plaintiffs show that asbestos exposure was the "predominate cause" of injury simply embodied the common law and did not alter it; (iv) its definition of "substantial contributing factor" did not alter the proof necessary to establish causation and thus did not affect accrued substantive rights; and (v) its definition of "substantial occupational exposure" did not apply to plaintiff's claims nor was it substantive in nature. The court reinstated the trial court's judgment.

A dissenting justice prefaced his opinion by asking "Do one man's injuries matter in the midst of a crusade?" He disagreed that the changes were only remedial, noting that no recovery will be allowed for the plaintiff in this case because her decedent's diagnosed condition was not serious enough to qualify under the new law, and concluded, "This court's complicity with the General Assembly when it violates the Constitution is not judicial restraint; it is doing the work of the legislature from the bench."

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Shook, Hardy & Bacon Public Policy lawyers **Victor Schwartz**, **Mark Behrens** and **Christopher Appel** urged reversal in the case on behalf of *amici curiae*, including the American Insurance Association, National Association of Manufacturers, National Association of Mutual Insurance Cos., and American Chemistry Council.

FEDERAL COURT BARS USE OF STATISTICS TO SHOW RACIAL DIFFERENCES IN LIFE EXPECTANCY

After U.S. District Court Judge Jack Weinstein awarded $18.3 million to a man rendered quadriplegic in a ferry accident, he issued a written order justifying his decision not to rely on "racially" based life-expectancy statistics in making the award. ***McMillan v. City of New York*, Nos. 03-6049 & 08-2887 (U.S. Dist. Ct., E.D.N.Y., decided October 14, 2008)**. Seeking to limit the plaintiff's damages, the city, which operated the ferry that crashed, introduced evidence "suggesting that a spinal cord-injured 'African-American' was likely to survive for fewer years than persons of other 'races' with similar injuries." According to the court, such evidence is not only unreliable as a predictor of life expectancy, its use violates "normative constitutional requirements of equal treatment and due process."

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The court first observed that the races have been mixed in this country "for more than three and a half centuries," and thus, "[r]eliance on 'race'-based statistics in estimating life expectancy of individuals for purposes of calculating damages is not scientifically acceptable in our current heterogeneous population." Referring to race as a "social construct" and "biological fiction," the court also observed that "socio-economic factors have a large role in influencing length of life," which reinforces "the conclusion that despite a documented gap in life expectancy between 'Black' and 'White' Americans, the simple characterization of individuals as 'Black' or 'White' is not only misleading, it risks masking the complex interactions between a host of genetic and socio-economic factors."

Exploring how other courts have handled the issue and what scholars have written about it, the court also determined that equal protection "demands that the claimant not be subjected to a disadvantageous life expectancy estimate solely on the basis of a 'racial' classification," and that the use of "race"-based statistics at trial creates "arbitrary and irrational state action" violative of due process rights. The court concluded, "There is no factual basis for discriminating against this claimant by finding a reduced life expectancy based upon 'race.' That conclusion is particularly sound in the instant case where the damages awarded are designed to extend claimant's life by providing him with the best medical and other care—more than the equivalent of what the average American quadriplegic could expect."

The court concluded, "There is no factual basis for discriminating against this claimant by finding a reduced life expectancy based upon 'race.'"

According to one legal commentator, the opinion "may ultimately have profound repercussions if other judges agree with its logic. Indeed, if so, it could be the beginning of a revolution in how tort damages are calculated in the United States." Law Professor Anthony Sebok reports that "traditionally, courts have used, or allowed juries to use, race when determining damages in civil cases." Yet, many states have prohibited the use of race-based actuarial tables in the pricing of auto, life and other insurance. Sebok notes that Judge Weinstein's

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decision was not unique, but "is one chapter in a long struggle that will have to be resolved by each state system and the federal system deciding for itself whether the goals of the tort law require or forbid the use of race-based actuarial tables." *See FindLaw.com*, October 22, 2008.

BONE MATERIAL TRANSPLANT PLAINTIFFS LOSE SOME CLAIMS AFTER COURT EXCLUDES EXPERT TESTIMONY

The federal court presiding over more than 200 cases involving the transplant of mishandled bone material has excluded some of the testimony of plaintiffs' expert witnesses as speculative and unreliable and has summarily dismissed some of the plaintiffs' claims. *In re: Human Tissue Prods. Liab. Litig.*, MDL No. 1763 (U.S. Dist. Ct., D.N.J., decided October 22, 2008). The litigation arose out of transplants derived from material stolen from cadavers and mishandled before processing. The plaintiffs, those either receiving the transplants and fearing disease or emotionally distressed relatives of decedents whose tissue was recovered, sought to show that certain diseases, such as HIV, syphilis and cancer, could survive in un-refrigerated bones for longer than 30 days.

In a 104-page opinion, the court ruled that the plaintiffs' experts, forced to rely on studies without direct relevance and lacking in relevant expertise, were unable to extrapolate from the studies with any degree of scientific reliability to support their conclusions about incubation periods. So ruling, the court granted defendants' motion for summary judgment as to "claims of general causation with respect to the transmission of HIV, HBV, HCV, cancer, and syphilis through unprocessed human bone tissue that has been stored at room temperature for thirty days or more before transplantation into an individual and the transmission of prion disease through human cadaveric bone tissue." The court also granted the motion as to "claims that those plaintiffs who have tested negative" for these diseases "after six months from exposure to potentially infectious bone tissue are capable of developing these diseases from such bone tissue."

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ALL THINGS LEGISLATIVE AND REGULATORY

Senators Seek Greater Transparency in Medical Industry Funding

U.S. Senators Herb Kohl (D-Wis.) and Charles Grassley (R-Iowa) recently issued joint letters to **Columbia University** and the **Cardiovascular Research Foundation** (CRF) asking them to disclose any financial ties to pharmaceutical and medical device companies. Grassley and Kohl set an October 30, 2008, deadline for Columbia University and CRF to list all funding received from five medical device makers since January 1, 2003. The senators also requested information on 22 individuals, including three members of the CRF board of directors, who received money through the two groups. CRF has since responded that the foundation "welcomes the inquiry … and intends to comply fully with their request for information about research and educational activities and funding sources."

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Kohl currently chairs the Senate's Special Committee on Aging, and Grassley is a ranking member of the Senate Committee on Finance. Co-sponsors of the 2007 Physician Payments Sunshine Act, the senators have apparently cited a lack of transparency in university and hospital policies that require doctors to report outside income. "We have a duty to protect the health of Medicare and Medicaid beneficiaries and safeguard taxpayer dollars authorized and appropriated by Congress for those programs," stated Kohl and Grassley in their letters. "We are also concerned that funding from the medical device industry may influence the practices of nonprofit organizations that purport to be independent in their viewpoints and actions." *See Product Liability Law 360,* October 17, 2008.

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ANSI Adopts Standard Providing Guidance for Text of Product Safety Manuals

"Until recently, product manufacturers could only guess how to best articulate safety precautions in their manuals," according to an October 14, 2008, *Law 360* article discussing new American National Standards Institute (ANSI) guidelines that apply "specifically to product safety and instruction manuals." The article identifies a need for this standard, known as ANSI Z535-6, to ensure that manufacturers and retailers meet their "duty to warn" obligations. These new ANSI guidelines "set forth a hazard communication system" specifically for "'collateral' materials—manuals, pamphlets, booklets, single sheets of paper, and even electronic documents."

ANSI Z535-6 apparently offers guidance on four types of safety messages—supplemental directives, group safety messages, section safety messages, and embedded safety messages—as well as the use of safety alert systems and signal words. Noting that the standard distinguishes between personal safety and property damage warnings, the article provides an overview of these messages and ANSI's recommended approach to their "purpose, content, format and location," and observes that group and section safety messages, like safety alerts signals, should "describe the type of hazard, potential consequences of the hazard, and avoidance actions to be taken." "A product's safety and instruction manual is a showcase for the manufacturer's concern for safety," concludes the article. "The new ANSI Z535-6 standard is a positive step in allowing manufacturers to address their legal duties to warn and instruct."

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ABA Task Force Issues Report Critical of Government's Attempt to Place Agency Rulemaking Dockets Online

An American Bar Association task force has released a **report** that examines the federal government's plan to create a single e-rulemaking portal and electronic docket for every federal entity that engages in rulemaking. According to the report, "The federal government's eRulemaking Initiative has had significant success," with a common database now in use for more than 170 different rulemaking entities and 15 cabinet-level departments. Yet, the report also notes, "much work remains to be done."

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Apparently, an early decision to use a single, centralized system resulted in "a very basic design" with a number of limitations; funding through existing agency budgets "caused financial instability and uncertainty" that "often diverted funds from other agency activities"; design choices were made through a "complex multi-level structure of collective decisionmaking" that "often undervalue[d] or misapprehend[ed] the needs of the public"; the Web site design is difficult for those outside the government to use; and the "one-size-fits-all" architecture prevents the development of components and formats that would better serve some of the agencies involved.

The report includes a number of recommendations for the *regulations.gov* Web site. Task force chair Sally Katzen, who served as administrator of the Office of Management and Budget's regulatory policy office during the Clinton administration, expressed the hope that "this tome does not sit on bookshelves." The task force apparently intends to present its findings and recommendations to the incoming administration and Congress. Members have already reportedly met with representatives of the Obama and McCain campaign teams. Katzen was quoted as saying, "We had a nonpartisan framework throughout the process. We wanted to find common ground and not be bound to any ideological approach or agenda. This is a win, win, classic good government case." *See BNA U.S. Law Week*, October 28, 2008.

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THINKING GLOBALLY

Ecuadorian Banana Workers' Suit Against Makers of Fungicide Removed to Federal Court

Chemical companies and banana producers have removed to federal court a lawsuit alleging that they harmed several putative classes of Ecuadorian plaintiffs by exposing them to a fungicide that can cause neurological damage. *Orellana v. Croplife Int'l*, No. 08-01790 (U.S. Dist. Ct., D.C., removed October 21, 2008). More than 300 individual plaintiffs have joined the lawsuit; they include pilots and ground crew that sprayed the fungicide, plantation workers, nearby residents and their children, and several municipalities. They seek to certify two classes of litigants: a plantation worker class seeking medical monitoring and a resident class seeking medical monetary and property damages. According to the complaint, the fungicide—Mancozeb—can lead to a number of health problems, including cancer, respiratory disease, neurological injury, sterility, and birth defects. It has been banned in the United States and can be used now only under restricted conditions.

The complaint alleges battery, assault, fraudulent concealment, negligence per se, negligent supervision, and strict liability. The resident and municipal plaintiffs also allege trespass, negligent trespass, nuisance, and nuisance per se. The plaintiffs claim that the defendants "conspired to provide false and misleading information to the public, the government of Ecuador, and those involved in the application of Mancozeb on the banana plantations, regarding the dangers of the chemical. Indeed, defendants promoted the product in Ecuador as a 'green' chemical that had no adverse effect on humans, when they knew … that the chemical was hazardous." The president and CEO

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of defendant Croplife reportedly issued a statement indicating that the company "and its members are committed to the health and safety of farmers and consumers, and take any concerns extremely seriously." *See Product Liability Law 360*, October 23, 2008.

LEGAL LITERATURE REVIEW

Katherine Santon, "The Worth of a Human Life," *North Dakota Law Review* (Forthcoming)

This student-authored paper provides a comprehensive analysis of how courts go about placing a value on loss of society or loss of consortium damages in wrongful death cases. The author discusses the issue from the perspective of two hypotheticals, one involving a toddler's death that devastates her mother, and one involving the death of a wealthy doctor whose widow is more relieved at his death than grieving. According to the article, most courts would not permit evidence occurring after these deaths to determine the value of the loss, a result the author considers counterintuitive and unjust. The paper suggests that courts "adopt a framework for considering the admissibility of post-death evidence that comports with the tort system's notions of justice and fair compensation." This would include "all post-death evidence that is relevant to determine loss of society damages," with some exceptions to preclude the admission of speculative or prejudicial evidence and to disallow the use of post-death evidence that would allow a defendant to benefit from her tortious conduct.

Adam Scales, "'The Chicken and the Egg: Kenneth S. Abraham's *The Liability Century*,'" *Virginia Law Review* (2008 Forthcoming)

Washington & Lee University School of Law Assistant Professor Adam Scales reviews a book that provides a much-needed analysis of the interrelated fields of tort law and insurance law. According to Scales, Kenneth Abraham has undertaken an anthropological exercise that "might be labeled 'The Ages of American Liability Law' and suggests that these areas of the law "enjoy a symbiotic relationship." The book apparently discusses the evolution of personal injury law and liability insurance; reforms, such as workers' compensation, that have taken place over the years and legal responses to mass disasters. The review concludes by noting, "Professor Abraham has unveiled some complexities about the interaction between tort and insurance that are easy to forget or ignore. Time and again, what has been regarded as a tort law problem is revealed as an insurance problem in disguise. Or, tort solutions are undone by insurance system problems."

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LAW BLOG ROUNDUP

***Wyeth v. Levine,* Part I**

"Suppose plaintiffs win *Wyeth v. Levine* and Vermont juries can second-guess FDA on medication's labeling for IV use. What then?" Manhattan Institute Center for Legal Policy Senior Fellow Walter Olson, linking to the blog of an ER physician who suggests that the doctor was at fault in the case, which will be argued before the U.S. Supreme Court in early November, for improperly administering the drug at issue and calls it "down right wrong" for states to be able to supersede the Food and Drug Administration "and put their own restrictions on the use of legal and safe drugs that may be very helpful, medically indicated, and perhaps lifesaving just to avoid the one in a million chance for a human error."

PointofLaw.com, October 24, 2008.

***Wyeth v. Levine*, Part II**

"We're hoping the U.S. Supreme Court takes notice when it hears the *Wyeth* case next week!" Lawyer Andy Hoffman, blogging about the documented failure of federal agencies like the Food and Drug Administration and the Consumer Product Safety Commission to keep unsafe products out of the marketplace.

ThePopTort, October 24, 2008.

***Wyeth v. Levine*, Part III**

"Monday's argument in *Wyeth* will likely attract more attention than the argument in *Carcieri v. Kempthorne*, the Indian land case that will also be heard on November 3. But the Law Blog will be watching." *Wall Street Journal* legal correspondent Dan Slater reporting about the ongoing dispute over who will argue the land case on behalf of Rhode Island Governor Carcieri. Apparently, the governor and his attorney general want Ted Olson, who appears frequently before the U.S. Supreme Court, to represent the state, while the small town of Charlestown, where the disputed land is located, wants its lawyer, Joseph Larisa, to argue the case.

*WSJ*LawBlog, October 28, 2008.

THE FINAL WORD

Diet-Drug Lawyers Permanently Disbarred Over Use of Settlement Funds

William Gallion and Shirley Cunningham Jr. have reportedly been permanently disbarred at their request by the Kentucky Supreme Court. They face federal charges of conspiring to cheat clients out of settlement proceeds in a class action involving the diet-drug fen-phen. With the lawyers splitting more

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than $100 million from the settlement, they were able to purchase shares in Curlin, the nation's richest racehorse. A judge has apparently ordered that their minority share be sold to help satisfy a $42 million civil judgment against them. *See New York Lawyer*, October 24, 2008.

UPCOMING CONFERENCES AND SEMINARS

American Bar Association, New York, New York – November 7, 2008 – "12th Annual National Institute on Class Actions." Shook, Hardy & Bacon Tort Partner **Laurel Harbour** and Pharmaceutical & Medical Device Litigation Partner **James Muehlberger** will join panels addressing the latest developments in class action law. Harbour will discuss "Class Actions Sans Frontières," while Muehlberger will explore the "Rigorous Analysis" standard that courts apply when evaluating whether to certify a class.

Brooklyn Law School, Brooklyn, New York – November 13-14, 2008 – "The Products Liability *Restatement*: Was It a Success?" Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz** will present along with a number of other distinguished speakers, including *Restatement* reporters James Henderson and Aaron Twerski.

Insight Conferences, Calgary, Alberta – November 26-28, 2008 – "Electronic Records and Information Management." SHB Tort Partner **Amor Esteban** will present "Lessons Learned from e-Discovery in the U.S.," focusing on issues that include amendments to the Federal Rules and instances in which data sources are "not reasonably accessible" under Rule 26(b)(2)(B).

American Conference Institute, New York, New York – December 9-11, 2008 – "13th Annual Drug and Medical Device Litigation." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Madeleine McDonough** will discuss "Successfully Asserting the Preemption Defense Post-*Riegel* and in Anticipation of *Levine*," and International Litigation and Dispute Resolution Partner **Simon Castley**, who is managing partner of SHB's London office, will serve on a panel to consider "Coordinating the Proliferation of Mass Tort Litigation Outside the U.S.: International Class Action and Product Liability Litigation Trends."

ABOUT SHB

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys have unparalleled experience in organizing defense strategies, developing defense themes and trying high-profile cases. The firm is enormously proud of its track record for achieving favorable results for clients under the most contentious circumstances in both federal and state courts.

The firm's clients include many large multinational companies in the tobacco, pharmaceutical, medical device, automotive, chemical, food and beverage, oil and gas, telecommunications, agricultural, and retail industries.

With 93 percent of its nearly 500 lawyers focused on litigation, Shook has the highest concentration of litigation attorneys among those firms listed on the AmLaw 100, *The American Lawyer's* list of the largest firms in the United States (by revenue).

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