New Jersey Law Journal

VOL. CLXXVIII – NO. 10 – INDEX 970 DECEMBER 6, 2004 ESTABLISHED 1878

PRODUCT LIABILITY & TOXIC TORTS

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When Does a Plaintiff Need An Expert?

Unless the product liability case falls within the common experience of the jury, the plaintiff is well advised to retain an expert

There is an odd mixture of case law and folklore governing the requirement for expert testimony in a product liability case. The case law is often contradictory, and the folklore is often inaccurate. In this article, we will attempt to set the record straight.

Lauder v. Teaneck Ambulance Corps., 368 N.J. Super. 320, 331-32 (App. Div. 2004), discusses the use of res ipsa loquitur and the necessity of expert proof involving defects in a "complex instrumentality case." Although *Lauder* arguably reached the right result, statements in the case concerning the necessity for experts and the use of res ipsa loquitur principles were somewhat opaque or simply incorrect. In *Lauder* a hospital gurney on which the plaintiff was being transported collapsed. Plaintiffs were unable to identify which of three gurneys had been used at the time of the accident, and the Appellate Division determined that there was nothing in the record to indicate that the gurney actually used was defective.

Relying upon *Scanlon v. General Motors Corp*., 65 N.J. 582, 591 (1974), the court examined the available methods to prove that a product is defective, absent direct evidence of a defect. See *Scanlon* at 594-96 and *Jakubowski v. Minnesota Mining and Mfg*., 42 N.J. 177, 182-84 (1964), discussed in detail in *Scanlon*. The *Lauder* court stated that there were only two ways to prove the defect — reliance on the testimony of an expert and proof of the defect by circumstantial evidence. The court rejected the doctrine of res ipsa loquitur, i.e., elimination of other causes for which the manufacturer would not be responsible, stating "the res ipsa loquitur doctrine is not available to product liability plaintiffs, however." 268 N.J. Super. at 341.

Applicability of Res Ipsa Loquitur

As explained in *Myrlak v. Port Authority of NY and NJ*, 157 N.J. 84, 104 (1999), although the negligence doctrine of res ipsa loquitur is not by name applicable in a product liability case, that doctrine's inferences are inherent in Section 3 of the Restatement (Third) of Torts: Products Liability (1997). Section 3, Circumstantial Evidence Supporting Inference of Product Defect, states:

> It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:
>
> a) was of a kind that ordinarily occurs as a result of product defect; and
>
> b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution. Id.

In *Myrlak*, Justice Coleman specifically adopted that section: "Section 3 of the Restatement parallels the elements of our res ipsa loquitur doctrine." The application of Section 3 "is limited to those product liability cases in which the plaintiff cannot prove a specific defect. ... A plaintiff can satisfy the requirements of Section 3 of the Restatement the same way as in the case of res ipsa loquitur, by direct and circumstantial evidence as well as evidence that negates causes other than product defect." 157 N.J. at 105. In the further words of *Myrlak*, "Section 3 of the Restatement in a product liability case does precisely what res ipsa loquitur does in a negligence context." 157 N.J. at 106-07. This doctrine had been applied earlier in both *Scanlon* and *Jakubowski*. See also similar cases discussed in *Dreier, Keefe and Katz, New Jersey Products Liability and Toxic Tort*

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Law (GANN 2004) § 8:2-2(b) and 9:1-5. *Lauder*'s rejection of res ipsa loquitur as an available method to prove a defect was therefore incorrect; *Myrlak* specifically holds to the contrary.

Complex Instrumentality

The second questionable issue in *Lauder* concerned the statement that "where the allegedly defective product involves a complex instrumentality, a plaintiff is required to provide expert testimony." 368 N.J. Super. at 341, citing *Rocco v. NJ Transit Rail Operations*, 330 N.J. Super. 320, 341 (App. Div. 2000); *Jimenez v. GNOCH, Corp*., 268 N.J. Super. 543, 546 (App. Div.), cert. denied 145 N.J. 374 (1996); and *Sparrow v. Cacatt, Inc*. 305 N.J. Super. 301 (App. Div. 1997). These cases cited by the Court as support for this principle were all pre-*Myrlak*, however. A close reading of *Rocco* and *Jimenez* shows that they turned on the issue of the plaintiffs' failure to exclude other possible causes of the injury. *Jimenez*, 286 N.J. Super. at 544 (an escalator case), *Rocco*, 330 N.J. Super. at 341 (emergency unlock mechanism on a railcar door). *Rocco*, citing *Jimenez*, did state that "where the case involves a complex instrumentality, expert testimony is needed in order to help the fact-finder understand 'the mechanical intricacies of the instrumentality' and how to exclude other possible causes of the accident."

These cases should not be read as an attempt to institute a new category of cases for which there would be different proof requirements. "Complex" was merely a shorthand for a required analysis of the alleged defect; an unaided jury could not be permitted to speculate about possible causes of the accident. *Rocco* cited *Sparrow*, supra, in which the plaintiff, without the benefit of expert proof, claimed a defect in a facial machine that emitted scalding water and steam, burning the plaintiff's face and neck. A reading of *Sparrow*, however, shows that Judge Skillman determined only that the predicates for res ipsa loquitur (elimination of other causes for which the manufacturer would not be responsible) had been totally absent from plaintiff's proofs. ("[P]laintiff did not present any evidence as to when the machine was manufactured, whether La Cachet purchased the machine new or used, whether La Cachet properly maintained the machine, or whether the machine was properly used by La Cachet's employees." 305 N.J. Super. at 304-05. It was only because of this lack of foundation that the court determined that expert proof would have been necessary to support a conclusion that the machine was defective when distributed.

Section 3 of the Restatement (Third) of Torts: Products Liability modifies the proof of liability provisions of Section 2. Section 3 recognizes a permissive inference that the defect existed at the time of sale or distribution, without proof of a specific defect, in cases where the incident was both the kind that ordinarily occurs as a result of a product defect, and the incident "was not, in the particular case, solely the result of causes other than the product defect existing at the time of sale or distribution." It is Section 2, however, that defines when there is a manufacturing defect, a design defect, or a warning defect, an analysis equivalent to that found in New Jersey's Product Liability Act, N.J.S.A. 2A:58C-2. Section 2 of the Restatement requires that the product be defective "at the time of sale or distribution." It is Section 3, utilizing a res ipsa loquitur basis, which permits an inference of such defect when the product was under the manufacturer's control.

The Restatement and many New Jersey cases require a plaintiff to show a reasonable alternative design which would have rendered the product reasonably safe. In Comment f to Section 2 the Restatement notes that the design defect section "does not require the plaintiff to produce expert testimony in every case. Cases arise in which the feasibility of a reasonable alternative design is obvious and understandable to laypersons and therefore expert testimony is unnecessary to support a finding that the products should have been designed differently and more safely. ... In many cases, the plaintiff must rely on expert testimony. ... Sufficient evidence must be presented so that reasonable persons could conclude that a reasonable alternative could have been practically adopted." Similar principles apply to the "advisory" use of experts to provide a foundation for findings that the defect existed at the time the product was put into the stream of commerce, and that a plaintiff has eliminated other causes for the accident for which the manufacturer would not be responsible. In fact, this would have been the function of the experts in the cases cited by *Lauder*.

With respect to complex instrumentalities, there may or may not be a need for an expert depending upon the part of the machine that malfunctioned and the surrounding circumstances. New Jersey has long recognized, even in complex instrumentality cases, that there need be no proof of a specific defect, where it is evident that there was some defect that caused the accident and for which the manufacturer would be responsible. Such cases include *Moraca v. Ford Motor Co*., 66 N.J. 454 (1975); *Scanlon v. General Motors Corp*., 65 N.J. 582, 593-94 (1974), and *Sabloff v. Yamaha Motor Co., Ltd*., 113 N.J. Super. 279, 281 (App. Div.), affirmed o.b., 59 N.J. 365 (1971). *Sabloff* involved a motorcycle, while *Scanlon* and *Moraca* involved automobiles, all "complex" instrumentalities.

In *Sabloff*, the owner of a three-day-old motorcycle was riding at a moderate speed on a clear road when the front wheel suddenly locked, causing the motorcycle to crash. He testified that he was an experienced operator and had not applied the brake. Plaintiff produced an expert explaining the alleged defect that caused the accident, however, the foundation for the expert's testimony was destroyed at trial. The Supreme Court held that "whenever the facts permit an inference that the harmful event ensued from some defect (whether identifiable or not) in the product, the issue of liability is for the jury, and the plaintiff is not necessarily confined to the explanation the expert may advance." (59 N.J. at 366) There, plaintiff's testimony and that of corroborating witnesses, if believed, eliminat-

ed causes for which the manufacturer would not have been responsible. Expert proof was unnecessary.

In *Scanlon*, the accelerator suddenly jammed on a nine-month-old station wagon that had traveled approximately four thousand miles. Plaintiff's testimony attempted to eliminate misuse, intervention of a third party or other causes for which the manufacturer would not be responsible. The Court found that this proof was "sufficient to permit a finding that the vehicle was defective at the time of the accident." 65 N.J. at 593. What plaintiff failed to do, however, was to eliminate possible alternative causes of the defect that may have happened after the vehicle left the manufacturer's control. The vehicle had been serviced twice by the dealer. Plaintiff's wife, not plaintiff, was the principal driver — and she failed to appear as a witness to testify concerning the vehicle's maintenance. Id. at 600. Improper maintenance or other causes had not been negated, and defendant prevailed.

In apposition to *Scanlon* is *Moraca*, in which a six-month-old Lincoln Continental driven 11,000 miles suffered a sudden locking of the steering mechanism, causing the car to skid off the road and strike a tree. In *Moraca*, however, the plaintiff's proofs eliminated causes for which the manufacturer would not have been responsible, and the court found that such proofs permitted "an inference that the accident was caused by some defect, whether identifiable or not;" a jury issue as to liability was legally presented. 66 N.J. at 460. In both *Scanlon* and *Moraca*, therefore, expert proofs were unnecessary, as the cases turned on lay testimony that eliminated causes for which the manufacturers would not be responsible.

Beyond Common Experience

There are many cases where, without expert proof, a jury cannot determine whether such additional causes have been eliminated because possible causes for the malfunction would be beyond the common experience of the jury. The prototypical case, albeit in a medical malpractice setting, is *Bucklew v. Grossbard*, 87 N.J. 512 (1981), involving a plaintiff whose bladder had been mistakenly cut during an operation. Her medical expert could state no more about such an event than it would not have happened in the absence of the surgeon's negligence. The expert had not examined the plaintiff, nor had the expert opined on the nature of the surgeon's negligence in the particular case. He merely aided the jury in understanding the nature of the operation. Once the jury had this understanding, it was able to treat the case as one of res ipsa loquitur.

The Court noted that although a jury could rely on its own knowledge of medical care to determine that it was negligence to leave a sponge in a plaintiff after an operation, jurors needed expert proof to understand whether the incision of a bladder in the course of an exploratory laparotomy ordinarily bespeaks negligence. 87 N.J. at 526. The expert witness is still subject to the net opinion rule and must have experiential or similar support for a conclusion that the mishap in question would not have occurred but for the negligence of the defendant. Id. at 529. But, the expert can provide the jury with such a foundation and standards to understand the factual situation of the parties. The jury can then proceed from that point on a res ipsa loquitur basis.

This is also true in the product liability field. There are situations where a jury may not understand whether a particular incident would have occurred but for the presence of some defect. There are other instances where an expert may be required to state that a particular type of defect (such as in a closed system) must have existed at the time of manufacture, even though a particular defect could not be located and shown to the jury. In still other situations, an expert may be required to define the causes for which a manufacturer would not be responsible, so that these causes can be eliminated by lay or other expert proof. Any or all of these types of expert proof may be present, whether or not the instrumentality is complex. The need for such proof is not defined by the complexity of the instrumentality, but rather by the need to tie the defendant to the particular or general class of defects alleged by a plaintiff.

Returning to *Lauder*, we see that at the end of the opinion the court explained that the defect in proof involved a failure to show that the defect existed while the product was in control of the manufacturer and that there had been no negation of "other causes of the failure of the product for which the defendant would not be responsible," citing the Appellate Division's decision in *Myrlak*. This reading was correct; the earlier res ipsa loquitur and complex instrumentality analysis was not. There was a failure of proof, but not for the reasons previously stated by the court. The locking mechanism on the gurney was not overly complex. There simply were other elements which may have caused it to fail. A blanket may have caught in the lock. It may not have been fully closed by the operator. Someone may have pressed the opening mechanism unintentionally. Of course, some of these explanations may have been the subject of expert proof concerning an alternative design, but this was not plaintiff's theory. The decision should not have addressed the inapplicability in a product liability case of res ipsa loquitur, nor the need for expert testimony in a case involving a complex mechanism. As in *Scanlon* and numerous other cases, there merely was a failure of proof that any alleged defect caused this accident. Hopefully, the language of *Lauder* and the somewhat ambiguous language of the precedent cases will not foreclose the proper use of res ipsa loquitur as defined by the Supreme Court in *Myrlak*, *Sabloff*, *Moraca* and *Scanlon*.

Should a plaintiff in most product liability cases present an expert? The answer is usually "yes." There is typically some aspect of the case for which the jury can use the aid of an expert, even if it may be unnecessary as a prerequisite to a judge sending the case to the jury. Of course there must be a balancing of need and expense; but plaintiffs can be reasonably assured that the defense will present an expert. Unless the case is open and shut as falling within the common experience of the jury, plaintiffs would be well advised to confront the defense expert with their own expert. ■