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WARNINGS

CAUSATION

A plaintiff's legal burden in a failure-to-warn case is often overlooked, says attorney William O. (Skip) Martin Jr. in this BNA Insight. The author offers practical advice for product liability defendants on a range of issues turning on causation, including guidance on how to challenge human factors experts, rebut the heeding presumption, depose plaintiffs, and focus juries on the plaintiff's conduct.

"If Only I Would Have Been Told . . . " A Failure to Warn Discussion: Causation, the Uncertainty Principle, and the Benign Experience Principle

By William O. (Skip) Martin Jr.

In order to prevail in a failure-to-warn case, a plaintiff must prove that the inadequate or missing warning was a substantial factor or the proximate cause of his or her injuries. In other words, had there been an adequate warning, plaintiff would have altered his or her conduct, thereby avoiding the incident giving rise to the lawsuit.

Causation

In many cases, establishing causation can be an almost insurmountable hurdle. While the law varies from state to state and from state courts to federal courts, there are cases that hold that a plaintiff may not testify what he or she would have done had there been an adequate warning because such testimony is self-serving and speculative:

(a) *Kloepfer v. Honda Motor Co., Ltd.*, 898 F.2d 1452 (10th Cir. 1990), a mother's testimony that she would not have allowed her 6-year-old son to ride a three-wheeled All Terrain Vehicle if there had been a proper warning is inadmissible, as speculative and self-serving;

(b) *Washington v. Department of Transp.*, 8 F.3d 296 (5th Circuit 1993), a district court properly excluded testimony by a co-worker as to what he would have done had he seen a vacuum cleaner warning label, on the grounds that the statements were too speculative and self-serving;

(c) *Nevada Power Co. v. Monsanto Co.*, 891 F. Supp. 1406 (D. Nev. 1995), the plaintiff's testimony that had it known more fully of the dangers of the product, it would not have used the equipment is too speculative and self-serving;

(d) *Messenger v. Bucyrus-Erie Co.*, 507 F. Supp. 41 (W.D. Pa. 1980), testimony of plaintiff was properly excluded where the testimony was pure conclusion, based on speculation, was self-serving, and contained no adequate basis of factual support;

(e) *Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10 (1st Cir. 2001), testimony of minor plaintiff's mother regarding what she would have done had the product displayed a warning was properly excluded be-

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cause it was speculative, self-serving and not based upon contemporaneous perceptions; and,

(f) *Magoffe v. JLG Indus*, No. CIV 06-0973 MCA/ACT (D.N.M. May 7, 2008); Federal Rules of Evidence § 701 does not permit a lay witness to speculate about whether he or she would have followed a hypothetical warning or what the hypothetical effect of that warning might be.

Enter the Heeding Presumption

Recognizing how difficult it can be for a plaintiff to prove causation, some states have adopted the Heeding Presumption. This rebuttable presumption instructs the jury that had there been an adequate warning they are to presume that plaintiff would have ''heeded'' or followed the warning, thus establishing causation by a presumption that an adequate warning would have altered plaintiff's conduct.

The following discussion concerning the Heeding Presumption is not intended to be a thorough state-by-state analysis, but rather to demonstrate how the doctrine applies in general. One of the first cases to recognize the Heeding Presumption was *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (5th Cir. 1974). The case involved an 8-month-old child diagnosed with polio slightly more than two weeks after receiving a dose of the oral polio vaccine. The child's father sued Wyeth Laboratories alleging, along with several other theories, that the company's failure to warn him or his wife of the risk involved with a live polio virus vaccine was the cause of injury to his daughter. After a monetary verdict was rendered by the jury and judgment entered in favor of the Reyes family, Wyeth Laboratories appealed, arguing that the jury should have been instructed on the issue of proximate cause. In affirming the trial court's refusal to submit the proximate cause issue the 5th Circuit adopted the Heeding Presumption, commenting as follows:

> Where a consumer, whose injury the manufacturers should have reasonably foreseen, is injured by a product sold without a required warning, a rebuttable presumption will arise if the consumer would have read any warning provided by the manufacturer, and acted so as to minimize the risks. In the absence of evidence rebutting the presumption, a jury finding that the defendant's product was the producing cause of the plaintiff's injury would be sufficient to hold him liable.

In many states that have adopted the Heeding Presumption the presumption has been expanded to include, not just the absence of a warning, but the inadequacy of an existing warning. In *Hisrich v. Volvo Cars of N. Am., Inc.*, 226 F.3d 445 (6th Cir. 2000), the 6th Circuit Court of Appeals discussed Ohio law in a failure-to-warn situation. In *Hisrich*, a 6-year-old child sitting in the front seat of a car died after a low-speed collision activated an air bag. In discussing the Heeding Presumption the court stated:

> Where no warning is given, **or where an inadequate warning is given**, a rebuttable presumption arises, beneficial to the plaintiff, that the failure to adequately warn was the proximate cause of the injury. See also *Sharpe v. Bestop, Inc.*, 314 N.J. Super. 54 (App. Div. 1998) (emphasis added).

These cases highlight several examples where some states have adopted the Heeding Presumption in order to help plaintiffs sustain their burden of proof on the issue of causation.

The Heeding Presumption is described as a rebuttable presumption. Evidentiary presumptions have been characterized to be one of two types, a ''Morgan Presumption'' that shifts the burden of proof to the defendant, and the Thayer ''bursting bubble'' Presumption, a rebuttable presumption that should disappear entirely from the case once the person against whom the presumption operates has introduced sufficient evidence to ''burst the bubble'' by either rebutting the presumption or supporting a jury finding against the presumption. The Heeding Presumption is a Thayer ''bursting bubble'' presumption.

In those states where the Heeding Presumption has been adopted it can normally be rebutted in one of two ways:

1. The plaintiff did not read or look for any warning; or

2. The plaintiff failed to follow adequate warnings on the product.

The first way the Heeding Presumption may be rebutted is when the plaintiff testifies that he or she didn't read any warnings associated with the product. The following cases are illustrative of this point:

(a) *Daniel v. Ben E. Keith Co.*, 97 F.3d 1329 (10th Cir. 1996). Heeding Presumption was rebutted when plaintiff testified that she did not look at the label;

(b) *Rowson v. Kawasaki Heavy Indus.*, 866 F. Supp. 1221 (N.D. Iowa 1994). Presumption was rebutted when plaintiff testified that he never read a label on any cleaning products for the three years that he worked for the employer; and,

(c) *Anderson v. Hedstrom Corp.*, 76 F. Supp. 2d 422 (S.D.N.Y. 1999). The Heeding Presumption can be rebutted by proof that an adequate warning would have been futile since plaintiff would not have read it.

The second way the Heeding Presumption may be rebutted involves plaintiffs who fail to follow warnings on the product.

In *Sharpe v. Bestop, Inc.* 314 N.J. Super. 54 (App. Div. 1998), plaintiffs contended that Bestop and Sears failed to warn that a convertible with a soft top was insufficient protection in the case of a rollover accident and that seat belts should be worn at all times. The jury found the defendants had failed to warn consumers of the dangers involved in driving a convertible, but failed to find the lack of warnings was the proximate cause of

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plaintiff's injuries. The appellate court affirmed the jury's findings.

The follow warning appeared on the sun visor of the Jeep:

> ''WEAR A SEAT BELT AT ALL TIMES – DON'T DRINK AND DRIVE''

Evidence introduced at trial demonstrated that the plaintiff failed to follow both the seat belt warning and the warning not to drink and drive. The court held that evidence the plaintiff had ignored both warnings was sufficient to rebut any presumption in his favor that he would have read and heeded any additional warnings regarding the use of the air bags. The appellate court upheld the jury verdict.

Attacking the Plaintiff's Experts

If the plaintiff is precluded from testifying about what he or she would have done, and if the Heeding Presumption does not apply, plaintiff may turn to a human factors or warnings expert in an attempt to provide evidence on the causation issue. When deposed, however, most warnings experts fail to present any competent evidence as to whether a warning would have altered the plaintiff's conduct.

Human factors experts usually agree that the following five steps should be taken when preparing a warning for use by a client or company in a real-life situation:

- Learn about the product;
- Identify the users of the product;
- Determine how the product is being used (foreseeable use and foreseeable misuse);
- Prepare a warning; and,
- Evaluate the effectiveness of the warning.

If asked, plaintiffs' experts will almost always have an *opinion* on each of the five categories referred to above. But instead of just asking for their opinions, warnings experts should be questioned in depositions about *what work they have actually done in this area*:

1. When the expert is asked what he has done to learn about the product, the answer is usually that the expert only examined the product once and/or read the owner's manual;

2. When the expert is asked what he has done to identify the types of people who use the product, usually he has performed no such investigation and is unable to identify them with any specificity;

3. When the expert is asked what he has done to determine how the product is being used, usually he has performed no such investigation;

4. When the expert is asked to present the warning he proposes should be on the product, usually he has not prepared an alternative warning; and

5. When the expert is asked what he has actually done to determine the effectiveness of the warning either by testing or by other means, i.e., what has he or she actually done to determine if a different warning would have altered the plaintiff's conduct, usually the expert has performed no such evaluation.

In other words, in the lawsuit the human factors/warnings expert criticizes the existing warning or the lack of a warning, but has done little or nothing to determine how a different warning would have altered the outcome, hence no evidence of causation. Usually, the plaintiff is not interviewed by the expert, focus groups are not consulted, and any proposed warning is not evaluated or tested.

It is important that the human factors expert acknowledges in his or her deposition the steps necessary to create an actual warning in a real-life situation. Then, the failure of the plaintiff's expert to have investigated in a meaningful way pursuant to the five categories just referred to substantially undermines any opinion he or she has concerning causation, and may even be grounds to strike his testimony, especially under *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The language in *Kumho Tire* is especially significant:

> . . . The objective of [the *Daubert*] requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, **employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field** (emphasis added).
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> *Kumho Tire Co.*, 526 U.S. at 152.

The human factors expert, in determining the effectiveness of a proposed warning, should use the same process in the courtroom as would be used in his or her relevant field. Once the expert validates the five-step process that effectively ''characterizes the practice of an expert in the relevant field,'' and acknowledges his subsequent failure to have performed his analysis in compliance with that process, the basis may exist to have the expert's opinion excluded under *Daubert* and *Kumho Tire*; or in the alternative, have summary judgment issued on the warnings cause of action in favor of the defendant because the plaintiff cannot establish causation as a matter of law.

But what if the plaintiff is able to get his or her case to the jury on a failure-to-warn theory? The doctrines of ''Uncertainty'' and ''Benign Experience'' now become relevant. Both doctrines deal directly with the causation issue from a factual, rather than legal, standpoint.

The Uncertainty Principle

This principle is actually known in human factor circles as the Familiarity Principle, but the author personally believes that a better name is the Uncertainty Principle as it is broader in its concept. By whatever name it's called, this principle is best described by the following examples:

> A person opens a box containing a new hair dryer. Because of that person's familiarity with hair dryers, he or she immediately plugs it in and begins to use it. No attempt is made to read any warnings or instructions because of that person's familiarity with the product. There is no uncertainty in the mind of the user about how to use the hair dryer.
>
> On the other hand, a person opens a container of a toxic weed killer. Because of a person's unfamiliarity with that product, he or she is more apt to review the written materials which contain warnings or instructions. The uncertainty how to handle that material makes the person more likely to look for information.

The author believes ''uncertainty'' is a better term because it can describe the situation where a plaintiff does not seek information even when that person is not familiar with the product. For example, two novice ATV riders are riding their ATVs over very hilly terrain. When approaching a steep hill, the first rider is able to climb it while the second rider becomes stuck at the bottom. A decision is made, literally within a matter of seconds, to attach a tow strap between the two ATVs and have the ATV on top of the hill tow the second ATV up the hill. Because of the method used to attach the tow strap to the ATV on top of the hill, that ATV flips over and the plaintiff is paralyzed. Since the two individuals are novice ATV riders they are not familiar with the product, but there was no uncertainty in their actions, having taken just seconds to make their decision. Applying the human factors principle of ''uncertainty,'' a warning would be unlikely to alter the conduct of the plaintiff; therefore, an inadequate warning or the absence of a warning would not be a substantial factor or proximate cause of plaintiff's injuries.

Benign Experience

Where a person's previous conduct or experience with a set of circumstances has not resulted in an injury-causing incident, this human factor principle states that a subsequent warning would be unlikely to alter plaintiff's conduct. The concept of Benign Experience is best described with the following example:

> For six months, a mother has been allowing her young child to stand in the grocery cart while she shops. The child never falls out. Because the mother's prior experience of letting her child stand in the cart has not resulted in any incident causing an injury, her benign experience with this situation would likely cause her to ignore, or at least not follow, a subsequent written warning which states that children should not stand in a grocery cart. Hence, the failure to provide an adequate warning would not be a cause of the child's injury. Under the doctrine of Benign Experience such a warning would be unlikely to alter the mother's conduct; therefore, an inadequate warning or the absence of a warning would not be a substantial factor or proximate cause of plaintiff's injuries.

Conclusion

In many cases it would seem that the plaintiff's legal burden requiring him or her to establish that an inadequate or missing warning was a cause of the injuries is overlooked. If the plaintiff is precluded from testifying what he or she would have done had there been a proper warning, and if the human factors expert has not done the requisite work to supply testimony on that issue, then the defendant may be entitled to a judicial determination that the plaintiff cannot establish the necessary causative link as a matter of law.

If causation becomes a question of fact for the jury, then the principles of ''Uncertainty'' and ''Benign Experience'' may come into play, to demonstrate factually why a proposed warning would not have altered plaintiff's conduct.

Generally speaking, ''familiarity'' or ''uncertainty'' applies to a situation involving a product, while ''benign experience'' applies to a person's conduct when exposed to a set of circumstances.

These two concepts center on the conduct of the plaintiff as opposed to the speculative and self-serving testimony a plaintiff would like to present to the jury. It is, therefore, important when deposing the plaintiff in a failure-to-warn case to solicit factual testimony that supports the application of the Uncertainty Principle or the Benign Experience Principle.

While these two concepts are really just ''plain old common sense,'' the author's experience has been that a jury is interested in hearing expert human factor testimony about these issues. It is also easy for a jury to relate these human factor concepts to their own everyday experience. The result will hopefully be that, either by a judicial ruling or by a jury finding, plaintiff is unable to demonstrate that an ''adequate warning'' would have altered his or her conduct, so that the failure to provide an adequate warning is not a substantial factor or proximate cause of the plaintiff's injuries.

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