trucks had been incident-free, and therefore reasonably safe in their design. The plaintiff pointed to a number of claimed deficiencies about the proffered non-occurrence evidence, including insufficient gathering, review and analysis of data concerning the trucks that had not been involved in fuel fires as well as mere reliance on the recollection of a retired GM engineer, which was unsupported by any written records concerning the details of post-collision fuel fires. Citing the *Schwartz* case, the court held that foundation evidence regarding the absence of prior accidents need not be ideal, nor "satisfy some high threshold of data accumulation and review before the requisite foundation can be established," and that any claimed deficiencies in to the collection and review of the data regarding the occurrence or absence of post-collision truck fires go to the "weight of the testimony, not its admissibility." *Id.* at pp.19-21.

III. Conclusion.

Federal trial judges are granted broad discretion in deciding evidentiary matters such as those involving the admission or exclusion of evidence concerning either the presence or absence of other accidents, and their determinations regarding the admissibility of such evidence will not be overturned absent a clear abuse of discretion.

In determining the threshold issue of substantial similarity between the design and use of the product on trial and that of other products designed and sold by the defendant, the courts will focus first on whether commonality exists between the theory of liability espoused by the plaintiff and those asserted in the other claims or cases. The courts will examine the facts of the case at bar and compare them with those of the proffered other occurrences, and the degree of the court's scrutiny, as well as the height of the bar "substantial similarity," will depend upon the purpose for which the evidence is proffered. If the plaintiff seeks to introduce evidence of other accidents as substantive proof of the existence of the claimed defect, or its causal connection to the accident, a higher degree of substantial similarity between the case at bar and the other occurrences will be required in order to make the "other accident" evidence admissible. Conversely, if the plaintiff seeks to introduce evidence of other accidents simply to demonstrate notice on the part of the manufacturer of the claimed condition a more relaxed standard for admission of the evidence will apply. Once the balancing test under F.R.E. 403 has been undertaken, and a decision is made to either admit or refuse the evidence of other accidents, the trial court's determination is granted significant deference, and will rarely be overturned on appeal.

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CAUSATION, THE UNCERTAINTY PRINCIPLE & THE BENIGN EXPERIENCE PRINCIPLE

By: William "Skip" Martin

I. Causation

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

avoiding the incident which gave rise to the lawsuit.

In many cases, plaintiff's ability to establish causation can be an almost insurmountable hurdle. While the law varies from state to state and from state court to federal court, there are cases that hold that a plaintiff may not testify to what he would have done if there had been an adequate warning because such testimony is self -serving and speculative. *Kloepfer v. Honda Motor Co., Ltd.*, 10th Circuit 1990, 898 F.2d 1952; *Washington v. Department of Transportation*, 5th Circuit 1993, 8 F.3d 296; *Nevada Power Company v. Monshato Company*, 9th Circuit 1995, 891 F. Supp. 1406; *Beatty v. Michelin Tire Corp.*, 2nd Circuit 1999, 1999 U.S. Dist. LEXIS 21970; *Magoffe v. JLG Indus*, 10th Circuit 2008, 2008 U.S. Dist. LEXIS 99080; *Federal Rules of Evidence* § 701. Recognizing the difficulty of plaintiff's ability to prove causation, some states have adopted the "Heeding Presumption." This rebuttable presumption instructs the jury to presume that, had an adequate warning been given, plaintiff would have "heeded" or followed it. In effect, it establishes causation by presuming an adequate warning would have altered plaintiff's conduct.

But, if the plaintiff is precluded from testifying to what he would have done, plaintiff may use a human factors or warnings expert to provide the needed evidence on the causation issue. When challenged, however, most warnings experts fail to present any competent evidence on this issue.

Human factors experts will usually agree that the following five steps must be part of the process used to create a proper warning for use in the "real world":

1. Learn about the product;
2. Identify the users of the product;
3. Determine how the product is being used (foreseeable use and foreseeable misuse);
4. Prepare a warning; and
5. Evaluate the effectiveness of the warning.

If asked for his opinions, plaintiff's expert will almost always have one on each of these five categories. Thus, instead of asking the warnings expert for his opinion, he should be required to demonstrate what work he actually performed with regard to each topic. Answers revealing that he (1) only examined the product once or read the Owner's Manual, (2) is unfamiliar with the typical users of the product, (3) has not investigated how the product is used, (4) has not prepared an alternative warning, and (5) has not done anything to determine if an alternate warning would have altered plaintiff's conduct, will undermine the credibility and admissibility of his opinions.

In other words, asking the proper questions can effectively establish that the human factors/ warnings expert has criticized the existing warning or the lack of a warning, but has done little or nothing more.

The failure of plaintiff's expert to have investigated the five categories in a meaningful way substantially undermines any opinion he has concerning causation and may even be grounds to strike his testimony, especially under the *Daubert* and *Kumo Tire* decisions. But what happens when plaintiff gets beyond summary judgment and the jury is going to hear his failure to warn theory? This is when the doctrines of "Uncertainty" and "Benign Experience" become relevant. Both doctrines deal directly with the causation issue.

II. 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 is called, this principle is best described by comparing the following examples:

> Scenario 1: A person opens a box containing a new hair dryer. Because of that person's familiarity with hair dryers, he immediately plugs it in and begins to use it. No attempt is made to read any warnings or instructions because of that familiarity. There is no uncertainty in the mind of the user about how to use the product.
>
> Scenario 2: A person opens a container of toxic weed killer. Because of the person's unfamiliarity with that product, he is more apt to review the written materials which contain warnings or instructions. The uncertainty how to handle that material makes the person more apt to look for information.

"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 vehicles over very rough 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. The method of attaching the tow strap to the ATV on top of the hill causes the ATV to flip over, paralyzing the plaintiff. 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 not have altered the conduct of the plaintiff; therefore, an inadequate warning or the absence of a warning was not a cause of plaintiff's injuries.

III. The Benign Experience Principle

When a person's previous conduct or experience with a set of circumstances has not resulted in an incident causing injury, the Benign Experience Principle suggests that a subsequent warning would be unlikely to alter plaintiff's conduct. The concept of Benign Experience is best illustrated by the following example:

> For six months, a mother allows her young child to stand in the grocery cart when shopping at the grocery store. The child never falls out. Because the mother's prior history of letting her child stand in the cart has not resulted in any incident, 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 likely not have altered the mother's conduct.

IV. Conclusion

Generally speaking, "familiarity" or "uncertainty" generally applies to a situation involving a product, while "benign experience" generally 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 that a plaintiff would like to provide. 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," past experience teaches 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, whether by judicial ruling or by jury finding, plaintiff is unable to demonstrate that an "adequate warning" would have altered his or her conduct.

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HOW MUCH COMPLIANCE IS ENOUGH UNDER THE FOREIGN CORRUPT PRACTICE ACT?

By: Colleen Murnane and Lindsey Carr Siegler

As product manufacturers doing business abroad are acutely aware, the United States' enforcement of the Foreign Corrupt Practices Act (FCPA) has recently reached unprecedented levels. In a nutshell, the FCPA's anti-bribery provision, 15 U.S.C. §§ 78dd-1, et seq., prohibits a company from bribing a foreign official to obtain or retain business. Its "books and records" provision, 15 U.S.C. § 78m et seq., requires companies whose securities are listed in the United States to "(a) make and keep books and records that accurately and fairly reflect the transactions of the corporation and (b) devise and maintain an adequate system of internal accounting controls." Dept. of Justice, "Foreign Corrupt Practices Act, An Overview." While the concepts are simple, what businesses have to do to comply with the statute is not.

In November 2011, Assistant Attorney General Lanny Breuer announced that in 2012 the DOJ hopes to "release detailed new guidance on the [FCPA's] criminal and civil enforcement provisions." Over the past several months, government officials have been engaged in discussions with both businesses and public interest groups, all of whom are concerned about the content of the guidance. As recently as last April, members of the DOJ, SEC and Department of Commerce met with the U.S. Chamber of Commerce's Institute for Legal Reform, along with representatives from several trade groups.

In the meantime, as the business community eagerly awaits this guidance, and because there is little case law in this area, practitioners must look to actions and decisions of federal enforcement agencies – specifically, the release of Deferred Prosecution Agreements (DPAs), Non-Prosecution Agreements (NPAs) and the DOJ's Opinion Releases – to create and maintain effective compliance programs and ensure employees are adhering to the law.

I. Developments in the Compliance Arena

In the January 2012 Special Edition of *Product Liability Perspectives*, we outlined the compliance framework that has begun to evolve from the SEC's "Cooperation Initiative" launched in 2010 and the compliance procedures the Department of Justice ordered in the DPAs with Panalpina and Johnson & Johnson. While the DOJ and SEC have still not crafted bright line parameters for "enforcement proof" compliance programs, they continue to provide glimpses of "dos" and "don'ts" in their DPAs and Non Prosecution Agreements with other companies.