Comments

Plaintiff's attorney, Michael G. Phelan, comments that a three to four week trial was set to commence on July 7, 1997. Plaintiff conducted a mock trial and the mock jury returned a substantial punitive damages verdict. The choice of law issue whether Virginia's $350,000 punitive damages cap would be applied was pending before the Court when the case settled. Also pending was Defendant's interlocutory appeal to the Court of Appeals of the District Court's rulings vacating Defendant's Protective Order and compelling Defendant to produce unredacted copies of consumer complaints/responses. Plaintiff contended that Defendants were not forthcoming with consumers who inquired about the ingredients and safety issues concerning Orafix Special.

Defendants initially believed that this case would be dismissed due to federal preemption and/or pursuant to *Daubert v. Merrill Dow*, however, Plaintiff survived both summary judgment motions.

Judge Greene ruled that plaintiff's experts' application of differential diagnosis in determining causation was a reliable methodology and therefore admissible.

$17.6 Million Verdict In Suit Alleging Defective Loader/Backhoe

On March 9, 1995, a 27-year-old profoundly hearing impaired laborer was injured while using a loader/backhoe.

The incident occurred on plaintiff's third day on the job. He was assigned to assist another laborer in picking up trash around the premises of a construction company, using the loader/backhoe manufactured by Case Corporation. The seat on the loader/backhoe rotates 180 degrees. The backhoe boom swing is operated by two foot pedals. When the left pedal is depressed the boom swings to the left and when the right pedal is depressed the boom swings to the right.

The plaintiff and the other laborer were operating the machine strictly as a loader, putting trash by hand into the loader bucket and then dumping the trash into a large bin. The plaintiff had no experience in the operation of the loader/backhoe, but he drove the loader during this operation.

Since the seat was facing toward the loader, the pedals which operate the boom were located behind the seat. The plaintiff and the other laborer had thrown their jackets behind the seat. The plaintiff had a two-gallon personal cooler containing lemonade which was placed on top of one of the jackets, which in turn was on top of one of the pedals. This depressed the pedal, causing the boom to move quickly in the direction of the plaintiff, smashing him against the stabilizer.

Suit was brought against Case Corporation for negligence and defective design. Plaintiff presented evidence that 30 years before the accident two engineers employed by defendant corporation had separately designed and patented devices to eliminate the possible inadvertent actuation of these pedals, and that one of these devices consisted of a locking mechanism which was standard equipment on the machine for approximately on year in the late 1960's. The plaintiff also argued and produced evidence that in 1962, an engineer at the factory had sustained a severe leg injury due to the same cause and that throughout the years in various areas of the United States there were at least three deaths and approximately seven serious injuries due to inadvertent actuation of these pedals. Plaintiff alleged that the locking device should have been left on the machine, or another type of device should have been installed to prevent inadvertent activation of the boom.

The defendant contended that the prior accidents were statistically small in light of the millions of work hours during the 40 years of its existence, and that the prior accidents were different in kind and involved machines of different design. The defendants contended that the locking device installed on the pedals in the late 1960's was cumbersome and not favored by operators. Defendant contended that the devices suggested by the plaintiff would cause more safety problems than they would solve and would severely compromise the usefulness of the product. Defendant argued that the employer and plaintiff were at fault for the accident; and that the plaintiff ignored a warning on the dash board.

Injury: Paralysis from the mid-chest down, flaccid arm; complete loss of hearing in the left ear; facial nerve damage; need for a dacron patch in the

plaintiff's aorta; vulnerability to infection and disease. Plaintiff requires 24-hour nursing care.

Result: $23,566,208 gross verdict, consisting of $23,566,208 economic damages and $10 million non-economic damages. The jury found plaintiff 2% at fault and his employer 49% responsible. After reduction for their fault and for a portion of the workers' compensation lien, the net verdict was $17,672,135.

Plaintiff's Expert Witnesses: John B. Sevart, design engineer, Wichita, Kan.; Morris S. Farkas, safety engineer, Los Angeles, Cal.; Roger Wilson, operating engineer, San Francisco, Cal.; Gary Wonnacott, operating engineer, Malibu, Cal.; Peter Formuzis, Ph.D., economist, Santa Ana, Cal.

Defendant's Expert Witnesses: Jim Bauer, design engineer, Richland, Mich.; Charles Hanson, in-house engineer, Iowa; Alan L. Dorris, Ph.D., human factors, Peachtree City; Ga.; Charles Bredden, Ph.D., economist, Milwaukee, Wis.; Jack Dahlberg, life care planner, Denver, Colo.

Plaintiff's Attorneys: Lawrence R. Booth, Johnna J. Hansen and Donald J. Beck of Booth & Koskoff, Torrance, Cal.

Defendant's Attorneys: Elliot D. Olson and Gary Kwasniewski of Sedgwick, Detert et al., Los Angeles, Cal.

Qualls v. Case Corp., No. 95-5516 IH (Los Angeles Cty. Super. Ct. Cal. March 10, 1997)

Settlement In Suit Against Manufacturer Of "Distraction Device" Used In Marine And DEA Training Exercise

On June 30, 1994, plaintiff, a 24 year old corporal in the United States Marine Corps, was participating in a joint training exercise with the Drug Enforcement Administration when he was struck in the face by a distraction device manufactured by the defendant. The device, similar in size and shape to a soda can, was thrown into a building by a trainee where it was supposed to create a loud noise and stay where thrown. The device exploded as it was supposed to but then rocketed out of the building and struck the plaintiff who was standing with other trainees approximately 30 feet from the building. Discovery revealed that the defendant knew the device was capable of "flying" after detonation and in fact knew of several such instances prior to this one. Plaintiff claimed that defendant failed to warn.

Defendant claimed it had warned the plaintiff's instructor but that the instructor failed to pass on the warning.

Injury: Plaintiff suffered a broken jaw, lost teeth, a broken nose, injury to his trigeminal nerve on the right side, and a closed head trauma. He has constant pain in his face and has been diagnosed with post-traumatic stress disorder. He has recurring flashbacks of the incident and continues to receive treatment at the VA pain management clinic. Plaintiff was discharged from the Marine Corps because of problems caused by this incident and now receives a monthly VA disability payment of $2,000. The monthly payments are tax free and will continue for his lifetime. Plaintiff is unemployed and will not be able to work until there is improvement in his physical and emotional condition. All of his medical treatment has been provided at no cost by the VA and will continue as long as necessary. The government has a $22,000 lien.

Result: $2,000,000 settlement.

Plaintiff s Attorney: David W. Bianchi of Stewart Tilghman Fox & Bianchi, P.A., Miami, Florida

Defendant's Attorney: H. Vance Smith of MacFarlane, Ferguson & McMullen, Tampa, Florida; Gregory A. Victor of Adorno & Zeder, P.A., Miami, Florida

Pandolfe v. Defense Technology Corporation of America, No. 96-007828 (20) (Dade County Judicial Circuit Ct., Florida July 2, 1997)