Asking the Right Question: Admitting Into Evidence Expert Opinions In A Products Liability Case

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Proof of a defect and causation of injury in a product liability action almost invariably require testimony of experts. The Virginia Supreme Court historically has been quite rigorous in policing the admission of expert testimony. These seemingly inconsistent facts create a conundrum requiring imagination, planning and a bit of good luck for the lawyer representing the plaintiff to resolve favorably. The following thoughts are intended to stimulate your thinking about ways to ask the right question that results in admission into evidence of your expert's opinion.

A. Select the Right Expert.

Successful communication is not simply a matter of content. Selection of the best medium for the message is of at least equal importance. This means selecting the best expert to deliver the opinions helpful to your case.

There many grades of quality in experts. Expert selection driven by convenience to counsel, a cheap price or pliability of the expert's opinions usually results in an expert who grades out at C- or less.

Presenting an expert who, after a long struggle, is found to be qualified by the trial judge by the thinnest of margins creates an atmosphere that invites exclusion of a portion or all of the expert's opinion. A "utility" expert seen by the trial judge on a routine basis with opinions on a host of diverse and unrelated subjects will engender cynicism and not respect from the trial judge. *See Lemons v. Ryder Truck Rental, Inc.*, 906 F. Supp. 328, 330, fn.1 (W.D. Va. 1995). A judge unimpressed with your expert's credentials or scruples is going to give the close calls in her evidentiary rulings to your opponent.

Always make the extra effort to find an expert endowed with a wealth of experience directly germane to the controversy before the court. If the expert's credentials and lack of evident bias impress the judge, the judge will be deferential to the expert in determining what opinions have an appropriate foundation supporting admissibility.

B. Avoiding the "Common Knowledge" Objection.

For many years expert opinions were often objected to as "invading the province of the jury". This catchy phrase was grounded in two traditional

prohibitions-an expert could not voice an opinion on (1)the ultimate issue of the case or (2) matters of common knowledge.

The first basis for this objection has been abolished by the statutory adoption of Federal Rule of Evidence 704. Now, an expert's opinion cannot be excluded solely because it addresses a matter of fact that represents an ultimate issue or is critical to the resolution of the case. *Va. Code* § 8.01-401.3. This provision was cited by the Supreme Court in holding admissible the opinion of an accountant that a business's lost profits were caused by an employee's departure. *R.K. Chevrolet v. Hayden*, 235 Va. 50, 480 S.E.2d 912 (1997).

The prohibition against expert testimony on matters of common knowledge is very much alive. *David A. Parker Enterprises, Inc. v. Templeton*, 251 Va. 235, 467 S.E.2d 488 (1996) reversed a trial judge's decision to permit a physician to testify wounds were inflicted by a rotating propeller on the grounds a jury was capable of reaching it own conclusion. In *Chapman v. City of Virginia Beach*, 252 Va. 186, 475 S.E.2d 798 (1996), the Court held it was error to admit the testimony of a human factors psychologist concerning the hazardous nature of a gate and the foreseeability of a child becoming entrapped in the gate. Both of these cases bode ill for product liability practitioners seeking to introduce reconstruction and human factors testimony.

Overcoming the "common knowledge" objection starts with jury selection. Establish on the record that no members of the venire have any knowledge about the subjects about which the expert will testify. In *Hot Springs Lumber Co. v. Revercomb*, 110 Va. 240, 65 S.E. 557 (1909), the Supreme Court suggested that the background of jurors may be a factor in considering admissibility of an opinion. The court sustained the admission of an opinion of a logger on the feasibility of floating logs down a certain stream and stated:

> Can it be doubted that the opinion of a witness who had made the floating of logs down mountain streams a part of the business of his life, who professed, and, as far as the question under consideration is concerned possessed, intimate knowledge of the stream with reference to which he testified before a jury composed of farmers and mechanics and men in the various avocations of life of ordinary experience and of average intelligence, would be of distinct value in enabling them to arrive at a correct conclusion?

Id. At 268, 65 S.E. at 561.

Before getting to the expert's opinion, you should lay out meticulously all of the training and experience of the expert that elevates his knowledge on the subject matter over that of the average person. The boundary between "common knowledge" and "specialized knowledge" was laid out in Board of Supervisors v. Lake, 247 Va. 293, 297, 440 S.E.2d 600, at 602 (1994):

> Expert testimony is inadmissible regarding "matters of common knowledge" or subjects "such that [persons] of ordinary intelligence are capable of comprehending them, forming an intelligent opinion about them, and drawing their own conclusions therefrom."
>
> Thus, when the question presented can be resolved by determining what precautions a reasonably prudent person would have taken under like circumstances, no expert testimony is required or permitted.
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> Further, expert testimony is admissible only when specialized skill and knowledge are required to evaluate the merits of a claim. Issues of this type generally arise in cases involving the practice of professions requiring advanced, specialized education, such as engineering, medicine, and law, or those involving trades that focus upon scientific matters, such as electricity and blasting, which a jury cannot understand without expert assistance.

(Citations omitted).

The greater the perception your expert is a credentialed member of a well accepted profession or guild, the more likely the judge will conclude the expert's opinion will assist the trier of fact. Similarly, a detailed discussion of the research and data upon which the opinion is grounded with an emphasis on its esoteric nature should precede a statement of the opinion itself even though you are not required to do so under the provisions of Va. Code § 8.01-401.1.

Many times the commonly held view of the average person is wrong. For example, all fire trucks were usually red because of the prevailing belief this heralded to the public their presence. Based upon scientific research, this belief was shown to be specious. Now we see yellow fire and emergency vehicles. An expert should therefore call attention to data demonstrating the fallacy of leaving a jury to rely solely upon their perception of physical phenomena.

C. Empiricism Trumps Reconstruction.

A frequent killing ground for expert opinions is a judicial finding that the expert has failed to consider all of the relevant factors or is based upon facts dissimilar to those prevailing in the pending case.

If an expert's opinion is based upon assumptions unsupported by the evidence, the opinion will be "mere inadmissible speculation." *Thorpe v. Commonwealth*, 223 Va. 609, 292 S.E.2d 323 (1982). For example, in *Swiney v. Overby*, 237 Va. 231, 377 S.E.2d 372 (1989). the Court found that it was impermissible for an expert to testify on the stopping distance of a vehicle when the subject vehicle's brake condition was not in evidence. *See also Runyon v. Geldner*, 237 Va. 460, 377 S.E.2d 456 (1989); *accord, Mary Washington Hosp. v. Gibson*, 228 Va. 95, 319 S.E.2d 741 (1984). Where tests are a component of the opinion's basis, there must be proof that the conditions existing at the time of the tests and at the time relevant to the facts at issue are substantially the same. *Tittworth v. Robinson*, 252 Va. 151, 475 S.E.2d 261 (1996).

It is often difficult to discern before trial what is going to be all of factors deemed significant by the trial court. Even if one clears the trial court hurdle, the Supreme Court gives scant deference to the trial court and will often reverse a trial judge's determination that the expert's reconstruction testimony had an adequate foundation.

In contrast, an expert's opinion based simply upon the expert's experience seems to fare far better in the Virginia Supreme Court. This proposition is supported by comparing the recent cases of *Tittsworth v. Robinson*, 252 Va. 151, 475 S.E.2d 261 (1996) excluding biomechanical testimony about the forces imposed upon the plaintiff in an auto accident based upon crash testing data and vehicle damage and *Griffin v. The Spacemaker Group, Inc.*, 254 Va. 141, 486 S.E.2d 541 (1997).

In *Griffin*, the Supreme Court reversed the finding of the trial court excluding the expert testimony of a mechanic and engineer that the abrasion of a hose installed on a forklift could not have occurred entirely during 101 hours of use since the forklift had been reconditioned. The Supreme Court held that the experts' inspection of the forklift and their knowledge of its operation was a sufficient factual basis for their opinions. Each expert had "considered the structure and design of the hoses and the force necessary to cause abrasion of their exterior coating and interior lining." Id. at 486 S.E.2d 544.

Griffin cited *Tittsworth*. The distinction between the cases appears to be that the *Griffin* experts relied upon their experience with similar products and materials while the *Tittsworth* experts relied upon the research and tests of others. The Supreme Court discerned a lack of similarity in the research and tests in *Tittsworth* that was not apparent in the empiricism embodied in the *Griffin* experts' opinion basis.

The lesson of this comparison is to avoid reliance upon reconstruction whenever possible. An expert whose credentials and experience are impressive delivering a firm opinion based upon experience is a much better bet than a mathematical analysis purporting to recreate the conditions at the time of incident. If anyone doubts the verity of this proposition, remember the treating physician in *Tittworth* had no difficulty opining that the plaintiff's injury was caused by the collision based on history and experience whereas the defense reconstructionist team was tossed out of the game by a unanimous Supreme Court.[1]

D. Prove The General Principle.

Sometimes, a point can be made through expert testimony which is helpful even thought it falls short of an opinion on an ultimate issue such as whether the alleged product defect caused or enhanced an injury. It may be proving or disproving one subsidiary fact relevant to the ultimate issue will be of assistance.

The case of *Cantrell v. Commonwealth*, 229 Va. 387, 329 S.E.2d 22 (1985) illustrates this tactic. A criminal defendant sought to buttress his claim that he had sustained a head injury even though no external signs of trauma were found by calling a forensic pathologist to testify that in ten to twenty per cent of cases, a blow will produce an injury without external signs of trauma. The Supreme Court held it was error to exclude this testimony. "It was not speculative, and did not, in itself, deal with possibilities rather than probabilities. Rather, it was offered to furnish the jury with empirical data available in the discipline of pathology, and thus to enable the jury to determine the degree of probability for itself." *Id*. at 229 Va. 396, 329 S.E.2d 22.

E. The *Bartholomew* Dictum.

In *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 297 S.E.2d 675 (1982), the Court held an expert's opinion that a transmission was defectively designed based upon his study of instruction manuals, data compiled by the National Highway Traffic Safety Administration, his examination and experimentation with type of transmission involved in the case and other transmissions was sufficient to support a verdict in favor of the plaintiff. Ford had contended that the evidence was insufficient as a matter of law because the plaintiff introduced no evidence the transmission design failed to satisfy what Ford characterized as "objective engineering standards". In dicta, the Court dismissed the hypothesis advanced by Ford:

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[1] Reliance on experience by the expert to reach his opinion as opposed to a particular methodology avoids scrutiny in federal litigation pursuant to *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *Freeman v. Case Corporation*, 118 F.3d 1011 (4th Cir. 1997).

> But the record indicates that safety standards for automatic transmission design had never been promulgated. Absent an established norm in the industry, it was a matter of opinion of trained experts what design was safe for its intended use.

224 Va. at 430, 297 S.E.2d at 679.

Since 1982, the Supreme Court has never elaborated on this dictum. Does it signal that private standards and industry customs are merely admissible in addition to the opinions of experts on questions of product design? Or does it preclude the opinion of an expert testifying about the suitability of a design if there is an "established norm" in the industry?

As we will see below, the Fourth Circuit has seized upon this dictum to fashion a rule excluding expert testimony branding a design defective when the design conforms to governmental or industry standards.

In state court, one can argue that the dictum supports admissibility of governmental and private standards but that such standards are conclusive and will not preclude expert's opinion that a design was defective notwithstanding the design's conformance to the standard. This view is consistent with the often expressed rule in negligence cases that evidence of custom and usage is admissible on the question of ordinary care but is not conclusive. *Collins v. Smith*, 198 Va. 778, 102 S.E.2d 156 (1957); *Bly v. Southern Ry. C.o.*, 183 Va. 162, 31 S.E.2d 564 (1944). *See also Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 413 S.E.2d 630 (1992). Custom and usage is only conclusive when there is no evidence tending to show that the custom or usage is not reasonably safe or adequate. *Turner v. Manning*, 216 Va. 245, 217 S.E.2d 863 (1975); *C&M Promotions v. Ryland*, 208 Va. 365, 158 S.E.2d 132 (1967);*Andrews v. Appalachian Elec. Power*, 192 Va. 150, 63 S.E.2d 750 (1951).

When confronted with a suggestion that your expert cannot testify a product design is unreasonably dangerous because its design comports with the "established norm" in the industry, reply with the following analysis:

> (1) The expert is entitled to render an opinion on the ultimate issue in the case.
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> (2) The safety of the product's design is not within the common knowledge of the jury.
>
> (3) The established norm is not conclusive and the plaintiff is entitled to offer evidence of a duly qualified expert that the design is not reasonably safe.

F. Affirmative Use of Custom and Usage.

Pretrial preparation must always include an intensive investigation of what are the germane industry practices and standards.[2] You should not necessarily assume that custom and usage and standards will support the defendant. A case frequently can be made the design violates the prevailing practices and standards.

As the above cited precedents show, admitting custom and usage into evidence is well established. You must however your expert is sufficiently qualified to testify as to the custom and usage of the industry. In order to qualify to so testify, it must be established that the expert has full knowledge and long experience on the subject and is able to testify explicitly about the duration and universality of the usage. *Craddock Mfg. Co. v. Faison*, 138 Va. 665, 123 S.E.2d 535 (1924).

No Virginia Supreme Court decision has addressed squarely the admissibility of private standards. Although in the past some courts were reluctant to admit such standards, the prevailing trend has been to admit private standards. *Admissibility in Evidence, on Issue of Negligence, of Codes or Standards of Safety Issued or Sponsored by Governmental Body or by Voluntary Association,* 58 A.L.R.3d 148 (1975).

The frequent citation to such standards by the Supreme Court of Virginia suggests strongly that private standards are admissible on questions about product design. For example, in cases involving injuries caused by electrical distribution lines and systems, the Court has deemed compliance with the National Electrical Safety Code to be evidence of due care unless rebutted by the plaintiff. *Eg., Vepco v. McCleese*, 206 Va. 127, 141 S.E.2d 755 (1965).

In product liability actions, the Court has similarly given great weight to private standards. In *Turner v. Manning, supra* an ANSI standard was one of the items of evidence cited to support the holding of the Court.

The positive impact private standards can have on a plaintiff's case is well illustrated by *Morgen Industries, Inc. v. Vaughan*, 252 Va. 60, 471 S.E.2d 489 (1996). Plaintiff's expert testified that the American National Standards Institute (ANSI) standards recommended the use of wheel guards to prevent injuries on "nip points" in support of his opinion of his opinion that the subject conveyor unit was unreasonably dangerous and defective. This testimony was cited by the Court in its holding that the evidence was sufficient to support a finding the product was in an unreasonably dangerous condition.

G. Federal Court Construction of *Bartholomew*.

[2] An excellent method to search for standards are the databases provided by Dialog. Some examples are "International Standards and Specifications", "SAE Automotive Standards" and "Technical Standards".

In *Alevromargiros v.Hechinger Company*, 993 F.2d 417 (4th Cir. 1993), the Court relied upon *Bartholomew* to fashion a rule that in a product liability design defect case where industry or governmental standards exist, the plaintiff must establish violation of the standards or, in the alternative, prove that consumer expectations have risen above the standards. This holding makes it imperative that a plaintiff thoroughly investigate whether any such standards exist and be prepared to show why standards cited by the defendant are not germane.

This holding, however, does create opportunities to introduce evidence otherwise excludable. Consumer expectations can be established through evidence of actual industry practices, published literature and from direct evidence of what reasonable purchasers considered defective. *Alevromargiros,* 993 F.2d at 421. [3]

The Fourth Circuit has yet to flesh out the boundaries of this type of proof. Would a Consumers Union publication critical of the industry for not adopting certain safety measures be probative of consumer expectations? Would a well designed survey of purchasers be admissible? Should the word "purchaser" be deleted and replaced with "user" in light of the holding of *Morgen Industries, Inc., supra* that in a breach of warranty claim the sophistication of the employer purchaser of the product is not a defense?

An example of evidence offered on issue of consumer expectations is found in *Mear v. General Motors Corporation,* 896 F. Supp. 548 (E.D. Va. 1995). The defendant proffered the testimony of a former automotive engineer with UPS which is large scale truck purchaser that UPS had rejected purchasing trucks with the types of brakes the plaintiff contended should have been installed on the product at issue.

H. Use "Reliable Authorities".

By statute, Virginia has adopted Federal Rule of Evidence 803 (18). *Va. Code* § 8.01.1-401.1. This rule opens the door to admitting a broad range of evidence previously excluded as hearsay.

Introduction of published matter as a reliable authority also circumvents many of the difficulties spawned by *McMunn v. Tatum,* 237 Va. 558, 379 S.E.2d 908 (1989) which forbade experts from explaining the basis of their opinion to the extent it would reveal the opinions of others.

Conclusion.

[3] Expert testimony on consumer expectations cannot be simply conclusory, but must represent a factual examination of what society demanded or expected from a product. *Sexton v. Bell Helmets,* 926 F.2d 331, 337 (4th Cir. 1991); *Lemons v. Ryder Truck Rental, Inc.,* 906 F. Supp. 328. 333 (W.D. Va. 1995). Similarly, the plaintiff's subjective conclusions are insufficient to establish the degree of protection society expects of a product. *Redman v. John D. Brush,* 111 F.3d 1174, 1181 (4th Cir. 1997); *Greene v. Boddie-Noell Enterprises, Inc.,* 966 F. Supp. 416, 419 (W.D. Va. 1997).

Asking the right question of experts to prove defect and causation leads back to selection of the right expert and an exhaustive research into the scientific and technical history embodied in the literature and other sources of information. It is then simply a matter of arguing relevancy to the issues of feasibility, open and obvious nature of the hazard, unreasonably dangerous, consumer expectations, state of the art and other shibboleths of product liability litigation.

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