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GEORGE W. CONK*

* Certified Civil Trial Attorney

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MARCIA K. GRAYDON*+

* Admitted in New Jersey & New York

JOHN D. FEELEY*+

* Admitted in New Jersey & District of
Columbia

April 23, 2004

GEORGE W. CONK

+ OF COUNSEL

EDUCATION

- J.D.** Rutgers Law School, Newark, New Jersey (1974)
M.A. Boston University, Boston, Massachusetts (1971)
A.B. College of the Holy Cross, Worcester, Massachusetts (1967)

BAR ADMISSIONS, CERTIFICATION & APPOINTMENTS

American Law Institute, Elected member (since 2001)

Fordham Law School, Adjunct Professor (2002 - present)

Fulbright Program, Senior Specialist Roster (China), Office of Academic Exchange Programs, Bureau of Educational and Cultural Affairs, U.S. Department of State (2004 - 2009) Grant awarded for:

Huazhong Science & Technology University, Wuhan, China, visiting scholar (spring 2004)

New Jersey Lawyer weekly, NJ State Bar Association, editorial board member (since 1995)

Seton Hall Law School, Visiting Professor (fall 2000); Adjunct Professor (1995 - 2001)

Supreme Court of New Jersey

Certified as a Civil Trial Attorney by the Supreme Court of New Jersey (since 1990)

Committee on Model Civil Jury Charges, Supreme Court of New Jersey (1992 - 1996)

Subcommittee on Product Liability (1992 - 2000)

United States Supreme Court

United States Court of Appeals for the Federal Circuit

United States Court of Appeals for the Third Circuit

United States District Court, District of New Jersey

PRACTICE

Tulipan & Conk, P.C., South Orange, N.J., managing partner, 1979 - present. Civil litigation: Tort claims (professional negligence, product liability, automobile and other negligence), commercial litigation; Occupational disease claims; Small business and estate fiscal management and consulting; Intellectual property - copyright, trademark, trade secret protection.

MAJOR LEGAL WRITINGS

Zhen Zheng De Jian Yan Biao Zhun: Zhuan Li Long Duan Shi Chang Zhong Dui Yao Pin He Yi Liao She Bei Cai Yong De 'Ke Xuan Ze De Geng An Quan De She Ji' (The True Test...), 3 Si Fa [Private Law Review] 200 (2002), School of Law, Peking University, Beijing, China.

The True Test: Alternative Safer Designs for Drugs and Medical Devices in a Patent-Constrained Market, 49 UCLA Law Review 737 (2002)

Qin Quan Xing Wei Fa Chong Shu(Di San Ci): Chan Pin Ze Ren; Zhong You She Ji Que Xian Ma? (Is There a Design Defect...), 1 Si FA (Private Law Review) 206 (2001), School of Law, Peking University, Beijing, China.

Is there a Design Defect in the Restatement (Third) of Torts: Products Liability?, 109 Yale Law Journal 1087 (2000).

Compared to What? Instructing the Jury on Product Defect Under the Product Liability Act and the Third Restatement of Torts: Products Liability, 30 Seton Hall Law Review 273 (1999).

Legend v. Pragmatism, 3 Boston University Journal of Science and Technology Law 9 (1996).

Against the Odds: Proving Causation of Disease With Epidemiological Evidence, 3 Shepard's Expert & Scientific Evidence Quarterly 103 (1995).

Brief of Amici Curiae Physicians, Scientists & Historians of Science o/b/o Ronald Bayer, Stephen Jay Gould, Gerald Holton, et alii, (co-author). Lexis: genfed\usbriefs\1992 US briefs 102. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579(1993).

LAW SCHOOL FACULTY SERVICE

Fordham Law School, Adjunct Professor (since 2002)

Torts (first year), Products Liability, Copyright law.

Seton Hall Law School, Visiting Professor (fall 2000); Adjunct (1995 - 2001)

Intellectual Property, Products Liability, Remedies, Scientific Evidence, Torts II.

J. William Fulbright Scholarship Board, Senior Specialist grantee, (June 2004):

Huazhong Science & Technology University, School of Law, Wuhan, China, Visiting Scholar

Peking University School of Law, Beijing, China, lecturer.

Chinese Academy of Social Sciences, Institute of Law, Beijing, China, consulting scholar - draft civil code - tort liability.

Law School Courses Taught

Copyright (Fordham)

Fundamentals of the law of copyright - protected subject matter under the Copyright Act of 1976 and the Digital Millennium Copyright Act (DMCA), exclusive rights of owners of copyright, assignment, licensing and other transfers of rights, duration, termination and renewal, infringement of protected expression, fair use, remedies - statutory, compensatory, and punitive damages, injunctions, counsel fees.

Intellectual and Industrial Property (Seton Hall)

Survey of the law of trade secret, trademark, copyright, patent, emphasizing protection of computer software.

Products Liability

Development of the law of product liability, beginning with *McPherson v. Buick*, the expansion of the law commencing with Section 402A of the Restatement of Torts 2d, its codification in New Jersey in 1987 and the American Law Institute's new Restatement of the Law of Torts - Third - Products Liability. The course covers the essential concepts of negligence, strict liability in tort and product defect. Limits on liability, including user choice (obvious dangers, inherent risks, product misuse) and the factor of time in determinations of liability (state of the art, latency of disease, post-sale duties, right of repose). The causal relation issue (proximate cause, cause in fact, medical causation) and the effect of the plaintiff's conduct on liability determinations (comparative and contributory negligence, assumption of risk, product misuse).

Drug and Medical Products Liability (Fordham)

Drug and medical device products liability after the Third Restatement of Torts - Products Liability; the concepts of product defect and strict liability in tort; immunities and alternatives to liability in tort: blood shield laws and the National Childhood Vaccine Injury Compensation Act; inadequate warning claims; relationship of product liability claims to medical malpractice, particularly the learned intermediary doctrine and the informed consent doctrine; federal preemption and the regulatory compliance defense; scientific evidence - using epidemiological, toxicological, and other scientific evidence to prove causation of harm; class actions.

Remedies

Detailed examination of the substantive law of civil remedies - damages, equity, restitution. The measurement of damages in contract and in tort, limitations on damages - present value, foreseeability, certainty, proximate cause, comparative fault, allocation and apportionment of damages, avoidable consequences - mitigation of damages. The use of the equity power - injunctions for nuisance, specific enforcement of contracts, enforcement of constitutional rights - such as compensation for takings for public use, race and gender discrimination. The power to punish - criminal contempt, civil contempt and punitive damages. The right to trial by jury, counsel fees, declaratory judgments, restitution and unjust enrichment.

Scientific Evidence

This course explores the use of scientific evidence in litigation and in regulatory actions. Issues include the nature of scientific knowledge; the Federal and New Jersey Rules of Evidence regarding expert witnesses; the 'junk science' debate of the past decade; the replacement of the 'general acceptance' test with more flexible standards; current approaches to resolving the tension between the demands of evidential reliability and scientific innovation; the use of epidemiologic surveys in proving causation of cancer and environmental disease; psychological testimony regarding future dangerousness in death penalty cases and to determine guilt or innocence in child sex abuse prosecutions; use of DNA evidence to identify or exclude defendants in criminal trials.

Torts (Fordham)

First year required course (5 credits) A study of the causes of action arising from breaches of legally recognized duties relating to the protection of person, reputation and property, including the traditional tort actions of negligence and new and developing areas of tort liability. Fundamental concepts of liability and compensation for breach of duty of non-injury to others. Various defenses, immunities and privileges are discussed.

Advanced Torts

Right to privacy, (intrusion, appropriation, false light) and right to reputation (defamation actions and their constitutional limitations). Infringement of intellectual property rights in trademarks, copyrights, and patents. Intentional economic harms, civil rights/government liability.

SELECTED LITIGATION

Daubert v. Merrell Dow Pharmaceuticals, United States Supreme Court, 113 S. Ct. 2786 (1993)

In a product liability case alleging anti-nausea drug Bendectin to be a cause of birth defects, Supreme Court, in landmark decision, rejected 70 year old rule of Frye v. U.S. that proponent of scientific evidence must prove "general acceptance" by other scientists before jury can hear the expert's opinion. Amicus brief of Physicians, Scientists & Historians of Science argued for wide standards of admissibility of expert opinions. Science, like law, proceeds by argument, by replacement of old ideas with new. Judges and juries should have access to all relevant scientific opinions, even those of a minority or dissenting nature.

Counsel to *Amici Curiae* Ronald Bayer, Stephen Jay Gould, Gerald Holton, et alii; on the brief. Reply Brief of Plaintiffs-Petitioners, of counsel to Prof. Michael H. Gottesman, Counsel of Record

I/M/O Dreis & Krump Mfg. Co., United States Bankruptcy Court, N.D. Illinois, Judge Eugene R. Wedoff; # 93B-23174; 28 Bankruptcy Court Decisions Issue 22, May 7, 1996.

Chapter 11 Reorganization of 100 year old metal working press manufacturer; precipitated by plaintiff's verdict of \$1.1 million in *Middleton v. Dreis & Krump*; Five year reorganization plan dedicates all estimated operating profits to compensating 80 present product liability claimants. Future claims trust established.

Chairman, Official Committee of Unsecured Creditors; Plan Administrator, Present Creditors Trust.

In re Factor VIII or IX Concentrate Blood Products Litigation, United States District Court, N.D. Illinois, MDL-986, 93-C-7452.

Class action by hemophiliacs infected with AIDS virus by blood product manufacturers. Class action settlement submitted for court approval. Objection filed on behalf of von Willebrand's disease patients who were infused with defendants' blood products, whom defendants sought to exclude alleging that use for those patients was not indicated and that lower levels of infusion raise doubts re causal relationship of infection to defendants' products. Judge Harold Grady, at Rule 23 fairness hearing, ordered special hearing (sine die) on inclusion of such patients in opt-out plan of settlement. All von Willebrand's claimants ultimately accepted into settlement class.

Counsel to P.B., et alii and Hemophilia Association of New Jersey.

Chin v. St. Barnabas Medical Center, Supreme Court of New Jersey, 160 N.J. 454 (1999); 312 N.J. Super. 81 (App. Div. 1998)

Jury apportioned liability for wrongful death of woman during surgery among hospital, surgeon, and two of three nurses who were present when a nitrogen gas hose was connected to an inflow port instead of the pump driver. Trial judge entered judgment N.O.V. asserting absence of proof of standard of care as to nurses and hospital. Appellate Division panel rejected the burden shifting rule of *Maciag v. Strato Medical*, 274 N.J. Super. 447. Affirmed by Supreme Court, holding that in such circumstances, not only the burden of production, but the burden of proof passes to the defendants who must exculpate themselves by competent evidence.

Of counsel to cross-petitioner/plaintiff in Supreme Court. On the brief in the Appellate Division.

Collins v. Union County Jail, Supreme Court of New Jersey, 150 N.J. 407 (1997)

Collins, a male prisoner, was sexually assaulted by a guard. Supreme Court reversed lower courts and ruled that New Jersey Tort Claims Act permits claims against government agencies for psychological rape trauma syndrome, even absent permanent physical harm. Court adopted our arguments, as friends of court, that bodily harm includes psychological injury. We surveyed the epidemiological evidence that few rape victims suffer permanent physical harm, but long-lasting psychological harm is common. Rape trauma syndrome evidence accepted by the Court as a reliable evidentiary basis for damage awards.

Counsel to National Organization for Women - New Jersey (NOW); on the brief; co-counsel with Prof. Nadine H. Taub, Rutgers Law School - Newark, Women's Rights Litigation Clinic.

Fiore v. Consolidated Freightways, Inc., Supreme Court of New Jersey, 140 N.J. 452 (1995)

Truck driver was awarded partial disability on holding that carbon monoxide in vehicular exhaust fumes contributed to his coronary artery disease. Appellate Division reversed and dismissed claim, holding petitioner's scientific evidence to be inadequate. New standard established by Supreme Court - smokers who assert occupational heart disease must show work-related factors, not personal risk factors to be dominant cause of disease. Other occupational disease claimants need only show contribution in a material degree. Evidence standards relaxed in workers' compensation courts to permit direct submission of relevant scientific studies for court review. Absent toxicology studies by employer, workers may prove toxic exposures by lay testimony. Remanded for re-trial. Counsel to NJ State Industrial Union Council, AFL-CIO., on the brief and argued the cause.

Caterinicchio v. Pittsburgh Corning Corp., Supreme Court of New Jersey, 127 N.J.428 (1992), companion case: *Landrigan v. Celotex*, 127 N.J. 404 (1992)

Landmark New Jersey cases rejecting concept of "relative risk of 2.0" as a threshold burden of proof for plaintiffs using epidemiological evidence to prove causation of disease; and presaging *Daubert v. Merrell Dow Pharmaceuticals, Inc.* by establishing sound methodology as foundational requirement for scientific evidence.

Counsel to ATLA - NJ; on the brief and post-argument memorandum.

Hinojo v. New Jersey Manufacturers Insurance Company, 802 A. 2d 551 (N.J. App. Div.2002)

Workers compensation insurer who supplied plans, parts, and technical assistance is a designer and manufacturer under the New Jersey Product Liability Act; jury must be instructed that existence of a practical and feasible alternative safer design is an element of plaintiff's burden of proof, not merely an element to be considered in a design defect product liability case.

Co-counsel for plaintiff on appeal; on the brief.

Middleton v. Dreis & Krump Manufacturing Co., 13 Product Liability Law Reporter 67, May 1994; Docket # ESX L-11835-89, Superior Court of NJ, Essex County; Jury verdict: April 27, 1993; affirmed, Appellate Division, Superior Court of NJ, April 19, 1995; certification denied, 142 N.J. 515 (1995).

Product liability claim against manufacturer of 'Chicago' brand metal forming press brake which was manufactured and sold in 1955 to Westinghouse Electric. Jury found by vote of 6-2 that unsafe design of bending machine was cause of 1988 accident, despite alteration of actuation system of press by Westinghouse, plaintiff's employer, which had converted it to air-electric operation. 33 year old machine operator suffered crush-avulsion amputation of four fingers of left hand, with successful replantation of three fingers, absent middle knuckle. No future wage loss claim. Unanimous verdict on damages: Personal injuries: \$1,003,168; medical expenses: \$55,778.95; post accident net wage loss: \$8,526.87; wife's loss of services: \$100,000.

Roe v. New Jersey Transit, Appellate Division, Superior Court of New Jersey, 317 N.J. Super. 72 (App Div. 1998)

N.J. Tort Claims Act permits liability claim against publicly-owned mass transit operator for failure to lock gate from station to beaten path under highway to heavily wooded area of adjoining park which had been scene of frequent criminal activity. Twelve year old girl sexually assaulted. Open gate held to constitute dangerous condition of public property, exposing users to hazards of foreseeable criminal activity, for which public entity may be held liable even though assault did not take place on its property.

Attorney for plaintiff.

D.J.L. v. Armour Pharmaceutical, Superior Court of New Jersey, 307 N.J. Super. 61 (Law 1997)

Products liability litigation by hemophiliacs infected with HIV against manufacturers of concentrated blood products in 1978 - 1984 period confronted statute of limitations defense. Legislature established July 13, 1995 as accrual date - citing publication of report by National Academy of Sciences as source of sufficient knowledge to identify AIDS infection as an injury possibly due to the fault of proprietary pharmaceutical defendants. Manufacturers' declaratory judgment action attacked statute as an unconstitutional violation of equal protection and due process right of repose. Constitutional defense included history of AIDS epidemic in U.S.A. and other industrialized democracies, demonstrating special measures taken elsewhere to compensate persons infected via blood products. Statute upheld as constitutional by Douglas K. Wolfson, J.S.C. Special counsel to plaintiff D.J.L.; Counsel to Hemophilia Association of New Jersey.

State of New Jersey v. Edgar Justiniano, Indictment # 2804-81, Superior Court of New Jersey, Essex County; for armed robbery and murder.

First trial, before Hon. Edward F. Neagle, Jr., J.S.C. and a jury - mistrial

Second trial, before Hon. Edwin H. Stern, J.S.C. and a jury - mistrial

Third trial, before Honorable Edwin H. Stern, J.S.C. and a jury - not guilty, April 15, 1983.

Attorney for Defendant

CONTINUING LEGAL EDUCATION FACULTY SERVICE

LECTURES (selected)

American Bar Association `Judicial Control of Scientific Evidence', New Orleans, La., August 8, 1994. Lecturer: `Legend v. Pragmatism, Scientific Evidence after Daubert v. Merrell Dow Pharmaceuticals'

New Jersey Judicial College `Judicial Gatekeeping of Scientific Evidence', November 24, 1997. Faculty/panelist. Program Moderator: Prof. Charles Nesson, Berkman Center for Internet & Society, Harvard Law School.

UMDNJ., School of Public Health, Environmental & Occupational Health Sciences Institute, Residents' Seminar Series, December 2002. *The Rigor Typical of the Field: Proving Causation of Disease in Court.*

CLE PROGRAMS

Association of Trial Lawyers of America- New Jersey

Lecturer, annual Boardwalk seminars, 1996, 1997 - Occupational disease claims.

Fordham Law School, 12th Annual International Intellectual Property Conference, panelist - recent trends in United States Supreme Court decisions regarding Copyright, Patent, and Trade Secret. (April 15, 2004)

Institute for Continuing Legal Education, New Brunswick, NJ:

Ethics for Trial Lawyers, panelist, February 21, 2002.

The Law Governing Lawyers, June 24, 2001, Moderator, lecturer - Lawyers' Civil liability

Getting Past the Gatekeeper, November 8, 1999, lecturer 'Daubert and its Progeny: Diversity & Reliability'.

Litigating the Alternative Safer Design Case - Products Liability, March 21, 1998, lecturer: 'The Turn of the Screw: Tightening the Definition of Design Defect in the Third Restatement of Torts: Products Liability'.

Personal Injuries at Contaminated Sites; January 11, 1997, lecturer 'heeding presumption, causal inferences'.

Proving Causation of Disease - Update 1996, October 1996, seminar co-moderator and editor of *Proving Causation of Disease, Cases & Materials*, 367 pp, on use of toxicological and other scientific evidence to prove causation of disease by environmental or occupational exposures to suspected toxic agents.

Products Liability: Update 1996, April 27, 1996, editor of seminar materials and lecturer 'Operating While Impaired: Consumer Expectations and Product Defect'.

Product Liability & Toxic Tort Law: Reason or Ruin?, February 27, 1993, lecturer: Foundations of admissibility of scientific evidence under NJ & federal rules of evidence.

Proving Causation of Disease, November 3, 1992, seminar moderator and editor of *Proving Causation of Disease, Cases & Materials*, 683 pp, on use of epidemiological and other scientific evidence to prove causation of disease due to exposures to suspected toxic agents.

Practice pointers

Proving (Product) Defect, 7 NJL 1318 (1998).

Marshaling Scientific Evidence to Prove Disease Causation, 141 NJLJ 988 (1995)

Supreme Court Could Bar Gender-based Challenges, 3 NJL 273 (1994)

Daubert v. Merrell Dow, 1 Shepard's Expert and Scientific Evidence Quarterly 55 (1993)

Deciding What Science is Good Science, 2 NJL 552 (1993)

Juries to Decide Disputes Between Scientists, 1 NJL 831 (1992)

Continuing Education Course Materials

Litigating the Alternative Safer Design Case - Product Liability, Cases & Materials, Editor, 273 pp., ICLE, New Brunswick, NJ, 1998.

Proving Causation of Disease - Update 1996, Cases and Materials, Editor, 367 pp., ICLE, New Brunswick, 1996.

Proving Causation of Disease, Cases & Materials, Editor, New Jersey Institute for Continuing Legal Education, 683 pp, New Brunswick, 1992.

Hot Tips on Torts VIII - January 10, 1998, 'A Safer Mousetrap - Proving Causation of Disease Under the Third Restatement of Torts'; *Hot Tips on Torts IV*, Contributor, 'The Junk Science Case', November 1993; *Hot Tips in Tort Law III*, Contributor, 'Sound Methods, Relevant Evidence' 19 pp., 1992; *Hot Tips in Tort Law II*, Contributor, 'Using Epidemiology and Other Scientific Evidence', ICLE, New Brunswick, 1991.

PROFESSIONAL ORGANIZATIONS

American Law Institute, elected member, Members' Consultative Committee - the Restatement of Torts (Third)

Association of Trial Lawyers of America, member.

Association of Trial Lawyers of America- New Jersey, member; of counsel.

Essex County Bar Association, member.

National Organization of Social Security Claimants' Representatives, member.

New Jersey State Bar Association:

New Jersey Lawyer - weekly newspaper, Editorial Board member, 1995 - present.

Civil Trial Bar Section:

Executive Committee, 1988 - 1994; 2002 - present

Civil Trial Bar Section Newsletter, Editor, 1988 - 1994

Amicus Curiae Committee, member, 1991-1994

New Jersey Lawyer - The Magazine, Editorial Board member, 1991-1993

Product Liability & Toxic Tort Section:

Executive Committee, 1993-1994

Scientific & Medical Evidence Committee, Co-chair, 1993-1994