THE LIMITS CONTRACEPTIVE LITIGATION:
JUDICIAL RISK MANAGEMENT AND RESULT-ORIENTED JURISPRUDENCE

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Prepared for delivery at the 1991 Annual Meeting of the
American Political Science Association
Washington, DC August 29 - September 1, 1991

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Contraceptive litigation has focused on the oral contraceptive and the intrauterine device. Ortho Pharmaceutical and another manufacturers have weathered numerous products liability suits over the Pill, but the class action suits over the Dalkon Shield have driven A.H. Robins, into bankruptcy. (Isaccs and Holt, 1987; Lincoln and Kaeser, 1988) Until last year, one contraceptive drug received no legal attention. The drug is Depo-Provera, a three month injectable developed by The Upjohn Company. Used world-wide as a contraceptive, the Food and Drug Administration (FDA) has denied the drug a license for contraceptive use, because it is a suspected carcinogen. (Green, 1987). Depo-Provera is, nevertheless, widely prescribed as a contraceptive by private physicians, family planning clinics, and mental health facilities nationwide. Women who have used the drug have experienced a variety of adverse reactions and have sued their physicians and Upjohn, but until Upjohn v. MacMurdó, all these cases were settled or dismissed.

Anne MacMurdó's experience with Depo-Provera began on May 27, 1974 with her first injection of the drug and ended on May 31, 1990, almost sixteen years to the day, with the decision of the Florida Supreme Court. Her case addresses a question common to all contraceptive litigation. Who shall bear the risk of prescription drug use: the pharmaceutical company, the physician, or the patient? Asking this question places the MacMurdó case within the confines of the science policy debate over the role of private litigation in managing risk and resolving medical and products liability issues. (Huber, 1988; O'Brien, 1988) In general, this debate has condemned the vices of the adversary process and touted the virtues of administrative regulation, but has not given sufficient attention to a subject this paper will address: the responsibility of fragmented system of pharmaceutical risk management for propelling risk and liability issues into the judicial forum. In particular this paper will analyze the MacMurdó case as a product of the failure to manage pharmaceutical risk.

Part I will rely upon the Senate and House hearings in 1973 and 1974 to explore the risk management attitudes and actions of the prescription drug system's three major participants --the Food and Drug Administration (FDA), The Upjohn Company, physicians in private practice, and family planning clinics-- at the time that Anne MacMurdó received her injections of Depo-Provera. These hearings exposed the fragmented character of pharmaceutical risk management: the FDA's lack of authority over pharmaceutical marketing and physician prescribing of drugs for unapproved uses, Upjohn's failure to control its marketing to Depo-Provera's approved uses, and physicians' failure to provide women with information about the drug's FDA status and the risks its use poses to their personal health. As a consequence, these hearings concluded that fragmented drug risk management made it virtually impossible for women to make an informed choice about the use of a contraceptive drug.

Part II will examine the judicial response to this risk management failure in terms of Anne MacMurdó's suit against Upjohn. Other women who have had adverse reactions to the drug and who have sued her physician and Upjohn have had their cases either a settled or dismissed. Anne MacMurdó's case was tried and appealed all the way to the Florida Supreme Court. As a consequence, it provides the fullest opportunity to examine the judicial assessment of the drug's risk and the assignment of liability for its adverse effects. To this end, Part II will explore the use of the law of negligence, the rules of civil procedure, and the adversary process to assess contraceptive risk. In the end, it will find that the MacMurdó case failed to manage risk not solely because
of these features of civil litigation, but because of the Florida's Supreme Court's result-oriented decision.

Part III will explore the lessons of Depo-Provera's unapproved use for the debate over the judicial role in assessing risk and assigning liability. Part III will argue that Depo-Provera's unapproved use experience documents the failure of not only the prescription drug system to manage contraceptive risk, but also the limited utility of the judicial system to compensate victims and prevent future adverse prescription drug reactions. In this regard, Upjohn v MacMurdo is likely to undersevedly insulate pharmaceutical companies from products liability suits and may embolden them to support national products liability legislation which may make it more difficult for consumers injured by defective products to collect damage awards.

I. Prescription Drug Risk Management

Prescription drug use is based on decisions about risk made by the FDA, pharmaceutical companies, physicians, and patients. In 1974, Depo-Provera was readily available, because of the FDA's limited authority to control the drug's nonapproved use, Upjohn's unwillingness to limit Depo-Provera's sale to its approved use, and physicians' freedom to make a professional judgment about the drug's contraceptive use.

The Food and Drug Administration

Risk management is initially a matter for the FDA. Under the Federal Food, Drug, and Cosmetic Act of 1938 and its amendments, the FDA has the drug licensing authority to make an initial judgment about a drug's availability and use. The FDA's pre-market screening process begins when a pharmaceutical manufacturer submits an Investigational New Drug Application, IND approval permits the manufacturer to conduct preliminary tests. If the tests suggest the drug will be safe and effective, the manufacturer submits a formal license application, the New Drug Application (NDA), which includes reports of its animal and human studies. FDA approval permits the pharmaceutical company to market and physicians to prescribe the drug for specific medical purposes. As part of its NDA approval action, the FDA also accepts the official label or package insert which contains a statement of and instructions for the drug's approved use(s).

What contraceptive risk management decisions has the FDA made on Depo-Provera? The FDA granted Upjohn experimental (IND) approval in 1963 to conduct animal and human clinical trials to determine the drug's safety and effectiveness as a female contraceptive. Four years later, Upjohn submitted an application for marketing approval. In accordance with the NDA, Upjohn initiated two long term animal toxicity studies in 1968 - a 7 year beagle dog study and a 10 year rhesus monkey study - and the following year, human clinical trials at 12 domestic sites and other sites overseas.

While these studies were being conducted, Upjohn requested the FDA to grant Depo-Provera approval for limited contraceptive use: for women who found other methods of contraception unacceptable or for women who were mentally retarded and institutionalized. In October 9, 1973, the FDA announced its intention to grant Upjohn's NDA on the condition that two cautionary measures would be employed to assure its proper use: first, a distribution provision which required Upjohn "to maintain a registry of physicians who have utilized
the drug for contraception" and, second, an informed consent provision which
required that the drug package include an informational leaflet and a detailed
brochure to explain to the patient the drug's use and risks. (Schmidt, October
4, 1973, p. 27,940)

The FDA's proposal to approve Depo-Provera's limited contraceptive use
became the subject of congressional hearings in April 1974. When the House
Subcommittee on Intergovernmental Relations, chaired by Representative L.H.
Fountain (D-NC) reviewed the circumstances surrounding the Obstetrics and
Gynecology Advisory Committee's affirmative recommendation of Depo-Provera's
limited use, it found the committee was "in the unenviable position of having
to decide about the safety of the drug without the full data before it." (House Hearings on FDA Advisory Committees, 1974, p. 375)

The FDA, apparently undeterred by this congressional scrutiny, took the
first step in approving Depo-Provera's limited contraceptive use by issuing a
final patient label rule on September 6, 1974. At this point, Congressman
Fountain sent a letter of protest to HEW Secretary Caspar Weinberger in which
he requested that the FDA revoke the rule because "there were many serious
and, as yet, unresolved questions concerning the drug's safety including the
drug's role in causing cancer." (Fine, October 22, 1974, p. 36,472) FDA Com­
mmissioner Sam Fine subsequently stayed approval of the drug pending further
advisory committee review of the scientific evidence.

A lengthy internal agency review followed. In 1978, the FDA disapproved
the drug for general contraceptive marketing. Upjohn challenged the FDA's
action before a Public Board of Inquiry composed of three eminent scientists
appointed in 1981. The board held five days of hearings in 1983 and issued a
report in 1984 upholding the agency's 1978 decision. The FDA accepted the
report as its final decision in 1986. In sum, Depo-Provera has never been
approved for contraceptive use, but as a drug approved for at least one
medical purpose over the past thirty-one years, it has been permissible for
Upjohn to sell it and for physicians, exercising their informed medical judg­
ment, to prescribe it for contraception. [1]

Depo-Provera's Unapproved Contraceptive Use

Depo-Provera's unapproved contraceptive use first came to public atten­
tion during the February 1973 hearings on the "Quality of Health Care - Human
Experimentation" before the Senate Public Welfare Subcommittee on Health
chaired by Edward M. Kennedy. Witnesses informed the committee that private
physicians, university hospitals, mental health physicians, and family planning
clinics throughout Tennessee had used Depo-Provera as a contraceptive as
early as 1963. In fact, one witness stated: "the Tennessee Public Health
Department [currently] has a computer printout sheet indicating that between
1,000 and 1,500 women are given Depo-Provera each year in the State." (Senate Hearings on Health Care, 1973, p. 67) Tennessee's use of Depo-Provera for
contraceptive purposes was not, however, an isolated unapproved use of the
drug. Dr. Norman Kase, Chair of the Department of Obstetrics and Gynecology at
Yale University School of Medicine, testified that his direct observation and
conversations with colleagues nationwide led him to conclude: "As a contracep­
tive agent ... it is widely used throughout the country." (Senate Hearings on
Health Care, 1973, p.62) Depo-Provera's nationwide use led the committee to
examine in detail the risk management attitudes and practices of Upjohn in
marketing the drug and physicians in using it for contraception.
The Upjohn Company

Pharmaceutical companies manage risk in physician use of their drugs by means of package inserts. The insert describes the drug, identifies the drug's FDA approved uses (indications), disapproved uses (contraindications), warnings and precautions in its use, and adverse reactions associated with its use. Since 1974, the Depo-Provera package insert has stated that the drug is approved only as chemotherapy for terminal endometrial cancer. Under the warning heading, the 1974 package insert had stated: "The use of Depo-Provera (medroxyprogesterone acetate) for contraception is investigational since there are unresolved questions relating to its safety for this indication. Therefore it is not an approved indication for this purpose." Finally the package insert lists the following adverse reactions: breakthrough bleeding, spotting, and change in menstrual flow.

What responsibility does a pharmaceutical company have where a drug is used in an unapproved manner? In his testimony at the Senate hearings, Dr. William N. Hubbard, Jr., an Upjohn Executive Vice President, stated that even though the company had met its responsibility in the case of Depo-Provera, because the package insert was FDA approved, it had taken additional measures: its promotional materials for Depo-Provera made no reference to the drug's contraceptive use and its sales force was not permitted to initiate discussions regarding the drug's contraceptive use. If physicians wrote requesting information on the drug's contraceptive use, he said, Upjohn "will give reference citations to the published literature ... but will not comment upon that literature." (Senate Hearings on Health Care, 1973, p. 105) Beyond the use of these measures, he argued, Upjohn had been careful in monitoring its marketing of Depo-Provera, because "it would be inappropriate for the company to supply the drug directly to physicians who had declared their intention to use it for an unapproved use." (Senate Hearings on Health Care, 1973, p.105) Upjohn also recognized that there were medical professional limits to its monitoring of unapproved drug use. "[If pursued too energetically [it] runs the risk of having the company intrude on the legal rights of the physician to utilize medicinals as he judges to be in the best interests of his patient." (Senate Hearings on Health Care, 1973, p. 108).

At the same time, the hearings also revealed that Upjohn's statement of policy was at odds with the minimal control it had exercised over Depo-Provera's sale to Tennessee state institutions which were likely to use the drug for its unapproved purposes. State officials testified that Upjohn had not asked about the drug's intended use and had sent it directly to the family planning clinics. In response, Dr. Hubbard said that many of the orders for the family planning clinics came as "a blanket order from the State purchasing agent," but for those which were to be sent directly to a county family planning clinic, Upjohn had terminated these sales in late May or June 1972. Since August 1972, he said, the company's marketing groups were told to be "on the lookout ... for orders from any source that could reasonably be inferred as being intended for unindicated use" and to ask in the case of family planning clinics about the drug's intended use. (Senate Hearings on Health Care, 1973, p. 106)

In spite of these assurances, Upjohn seemed to be unable or unwilling to limit the marketing of Depo-Provera to its approved uses. In 1978, the FDA disapproved the drug's general marketing, in part, because it concluded that the labeling requirements would have limited value in controlling physician
prescription practices and assuring patient consent. In 1984, the Public Board of Inquiry recommended against general approval on other grounds, but based its disapproval of limited marketing, in part, on the absence of any effective mechanisms to limit the drug's distribution to patients with special needs. Even after Upjohn withdrew Depo-Provera's NDA in 1986, House hearings on the "Use of Depo-Provera by the Indian Health Service" the next year revealed that the company had continued to sell the drug to private physicians, mental health professionals and family planning clinics nationwide for contraception.

Physicians and Patients

Physicians manage risk by making an informed and individualized decision about patient use of prescription drugs. The 1973 Senate health care hearings disclosed that Depo-Provera's unapproved contraceptive status created a dilemma for physicians. According to Dr. Robert Hutchinson, Assistant Commissioner of the Tennessee Department of Health, family planning physicians claimed that they had to decide whether to provide an unapproved drug in order to prevent unwanted pregnancies by women in special circumstances or whether to allow the women take their chances with another pregnancy. One class of women in these special circumstances were those who had medical contraindications to the oral contraceptive or who had not tolerated the IUD. In resolving this dilemma, Dr. Hutchinson testified that physicians made risk management judgments for themselves on the basis of their own independent review of the medical literature. In commenting upon the Tennessee Department of Health's decision to use Depo-Provera, he observed: "[W]e came to realize that many of the initial reasons for our reluctance to use the drug were being removed by medical studies" including those by Gardner and Mitchell and by McDaniel. (Senate Hearings on Health Care, 1973, p. 83) As a consequence, Depo-Provera had "a place in our 'contraceptive cafeteria' approach to family planning [because of] ... [t]he simplicity of the method, the absence of any estrogenic side effects, the high reliability, combined with good acceptability, despite the unpredictable bleeding associated with its use." (Senate Hearings on Health Care, 1973, p.84) Still Depo-Provera was not their first choice, because of the uncertainty about the return of a woman's fertility. Dr. Kase, less generously, called it "a tertiary drug in contraception, well below the intrauterine device." (Senate Hearings on Health Care, 1973, p.63)

The Senate hearings also disclosed that physicians failed to inform their patients about Depo-Provera's FDA status and its personal health risks. Anne Burgess, a welfare mother from rural Tennessee, was the first patient to publically address the lack of informed consent and the social welfare control rationale for the Depo-Provera's use. She testified that she was pressured into taking the drug "because they [the welfare office] said they would rather pay for one child as two." (Senate Hearings on Health Care, 1973, p. 59) When she went to the health department for her injection, she testified that the clinic doctors did not tell her Depo-Provera was unapproved for contraceptive use, nor did they inform her about its side effects.

Anne Burgess' personal experience was supported by Dr. Kase who had interviewed six women in Cumberland County, Tennessee. "Informed consent," he said, "was not obtained, nor was an attempt made to achieve patient awareness or acceptance of this issue. In particular, the potential short and long term hazards of the drug were not discussed" (Senate Hearings on Health Care, 1973, p. 61) even though the Depo-Provera consent form specifically mentions two major known side effects: "(a) an irregular menstrual pattern following the
shot which sometimes leads to periodic heavy bleeding during the first few months, or no monthly periods while on the shot. (b) a possibility of a delay in the ability to have children following discontinuation of this shot." (Senate Hearings on Health Care, 1973, p.108)

Dr. Hutchinson agreed that the women who signed the consent form did not know that Depo-Provera was not approved by the FDA for contraception, nor did they know the value of the drug as opposed to its side effects. "[T]hey will not know of it if the clinic physician has not explained it to them, but," he added, "we have advised them to explain it." (Senate Hearings on Health Care, 1973, p. 87) Dr. Hutchinson acknowledged, however, that the FDA's October 1972 revision of Depo-Provera's package insert, based on the evidence that the drug had induced breast cancer in beagle dogs did have an impact on its use in Tennessee: "patient load had dropped from 1,400 to 942." (Senate Hearings on Health Care, 1973, p. 90)

Since 1973, physician attitudes and informed consent practices have not changed. House hearings on the "Use of Depo-Provera by the Indian Health Service" in 1987 disclosed that physicians in private practice and family planning clinics have continued to prescribe Depo-Provera, but its contraceptive use was not limited to poor women with special needs. Informed consent continued to be a problem, because Depo-Provera's side effects, if mentioned to the patient at all, were misrepresented. If consent forms were used, they were often incomplete or contained editorial comments.

Summary

The 1973 Senate and 1974 House hearings exposed the fragmented character of pharmaceutical risk management by the FDA, Upjohn, and physicians. Those hearings made clear that the FDA was a licensing agency which had limited direct control over pharmaceutical marketing and physician prescription practices, that Upjohn had made Depo-Provera available for nonapproved contraceptive use, and that physicians failed to provide women with information about the drug's FDA status and the risks its use posed to their personal health. As a consequence, Anne Burgess and other women who were injected with Depo-Provera were not able to make informed contraceptive choices.


The 1973 Senate hearings raised two legal questions about Depo-Provera's unapproved contraceptive use. First, what is Upjohn's legal duty in the sale of Depo-Provera for contraceptive use? What risks does Upjohn have a duty to disclose in the package insert? Second, what is the legal duty of physicians who prescribe Depo-Provera for contraception? What risks do physicians have a duty to disclose to their patients to enable them to give their informed consent to the unapproved use of a prescription drug? If a woman believes she has been harmed by the use a drug, because of the manufacturer's failure to warn her physician, her legal remedy is a products liability suit. If, however, her physician has failed to provide her with the information necessary to make an informed personal judgment, her remedy is the medical malpractice suit. These two remedies are legal risk management means which women may use to target the failure of two critical linkages in the pharmaceutical risk management system: the package insert and informed consent.
Anne Burgess was the first woman to publically report the side effects she experienced from Depo-Provera: nervousness and excessive bleeding for three to four weeks. She took no legal action. Gloria Popham, Secundina Perez, and Monica Shannon, among others, have sued their physicians and Upjohn, but their cases were either dismissed or settled. Anne MacMurdo's case is the only Depo-Provera case to be tried and decided on the merits and to be reviewed on the merits by a state supreme court. Her case is, therefore, the first opportunity to fully explore how the law of negligence, the rules of civil procedure, and the adversary process function to manage Depo-Provera's contraceptive risk prior to trial, during trial, and on appeal. [2]

Anne MacMurdo's legal odyssey began on May 27, 1974 when she visited Dr. Donald Levy, an OB/GYN at the Ochsner Clinic in New Orleans. At the time, she was 23 years old and unmarried. She was bleeding from an IUD which had to be removed and alternative forms of contraception considered. Having read the package insert, Dr. Levy knew that Depo-Provera was still being investigated for contraceptive use. Nevertheless, he prescribed a 250 mg injection to control her bleeding and for contraception, because she had previously experienced adverse reactions to oral contraceptives. The first injection acted as expected and caused amenorrhea for approximately 90 days. On August 15, 1974, Anne MacMurdo visited Dr. Arthur Shapiro, an OB/GYN at the University of Miami's Family Services Clinic. Dr. Shapiro, knowing that Depo-Provera was not FDA approved for contraception, but aware that she had previously received the drug from Dr. Levy, administered a second injection. This time, she experienced a totally different reaction: she had continuous heavy menstrual bleeding. At first, she attempted to control her bleeding through nutrition, but that did not help. Four months later, she returned to Dr. Levy and on January 7, 1975, he performed a hysterectomy. Why the operation was performed came to be a central feature of her lawsuit.

Ann MacMurdo did not take legal action immediately even though "she began to read information concerning ... Depo-Provera, sometime in the months following her hysterectomy, [and concluded] that her injuries were the direct result of her ingestion of the drug." (Amended Complaint, January 11, 1979, p.4) When she filed a complaint on May 19, 1978, she had waited too long to bring a medical malpractice action against either physician. Louisiana's and Florida's statutes of limitations had run after one year. Her complaint against Dr. Shapiro, the University of Miami, and Upjohn, grounded on the legal theories of negligence, strict liability, and implied warranty of merchantability, claimed unspecified compensatory damages for her dysmenorrhea and hysterectomy and $1 million in punitive damages.

Dr. Shapiro and the University of Miami denied that they were sellers of Depo-Provera and claimed that she was comparatively negligent. Upjohn asserted that it had no informed consent obligation to Anne MacMurdo and that any harm she suffered was due to either her assumption of the risk and/or her negligence. The defendants also brought two pretrial challenges to her complaint which, in part, delayed a trial until 1986. MacMurdo I (1980) addressed the implied warranty of merchantability issue and MacMurdo II (1983), the products liability issue. When the Florida courts decided these issues and later heard her case on the merits, they made risk management judgments: who shall bear the risk, the pharmaceutical company, physician or patient.
Anne MacMurdo's complaint did not state a claim for medical malpractice against Dr. Shapiro and the University of Miami, because Florida's one year statute of limitations foreclosed that claim. Instead, it claimed that, in prescribing and administering an injection of Depo-Provera, they were liable for breach of warranty, because they had sold her a defective drug which they warranted to be safe for her use. Moreover, they were strictly liable, because they did not warn her that Depo-Provera was an experimental and dangerous drug, that she was a subject in an experimental trial of the drug, and that she might risk serious and deleterious side effects from its use.

Dr. Shapiro and the University of Miami moved almost immediately for summary judgment. [3] In Broward Circuit Court, the judge treated her complaint as a medical malpractice claim and, on the defendant's motion, dismissed the complaint without leave to amend "without first proceeding through medical mediation." (MacMurdo v. Upjohn, 1980, p. 1103) MacMurdo appealed. In October 1980, a unanimous Court of Appeals acknowledged that her complaint did not state a claim for medical malpractice, but even if it had, the Florida Supreme Court in Aldana v. Holub (1980) had recently declared the state's medical malpractice statute unconstitutional. Then the court turned to the plaintiff's implied warranty and strict liability claims. "We are not prepared at this stage of the pleadings," it declared, "to accept as an inevitable conclusion that appellant will not be able to state a cause of action against the appellees on any theory." (p.1103) Remand was appropriate, it concluded, "to give appellant her day in court ... to seek redress for her injuries." (MacMurdo v. Upjohn, 1980, p.1104)

Anne MacMurdo survived a second summary judgment motion the following October, but she was not so fortunate in September 1985 when she encountered a motion to dismiss. Dr. Shapiro and the University of Miami claimed that her suit was, in fact, a medical malpractice claim which was barred by Florida's statute of limitations. The defendants persuasively argued that she had "styled her claim as one of strict liability and breach of warranty, rather than medical malpractice in order to avoid the Statute of Limitations for such a cause of action .... However, the law is not so easily circumvented." (Memorandum of Law in Support of Motion to Dismiss, September 20, 1985, p.1)

A cause of action based on breach of warranty, the defendants argued, did not apply to the administration of drugs supplied as part of medical services provided by a hospital and physician. Florida courts and those of other jurisdictions had recognized the distinction between sale and a service and also recognized the distinction between the sale of goods and "the incidental transfer of property as a necessary part of ... [individual contracts for professional] services." (Memorandum, September 20, 1985, p.4) This was not, they concluded, a sale within the contemplation of the Uniform Commercial Code and, therefore, did not give rise to a breach of warranty claim. On the issue of strict liability, the defendants argued that the remedy was inappropriate to impose liability without fault when a drug is administered as a part of a course of treatment. In conclusion, the defendants cited Perlmuter v. Beth David Hospital (1954), where the New York court observed: "The act of healing frequently calls upon a balancing of risk and danger to the patient. Consequently, if injury results from the course adopted, where no negligence is present liability should not be imposed upon (one) seeking to save or otherwise assist a patient." (Memorandum, September 20, 1985, p.5)
Anne MacMurdo, perhaps recognizing that the law could not be so easily circumvented and aware that her implied warranty and strict liability theories were weak, took a voluntary dismissal in December 1985. Now the only defendant was Depo-Provera's manufacturer: The Upjohn Company.

MacMurdo II

Anne MacMurdo's complaint did state a products liability claim. She argued that Upjohn was negligent in marketing Depo-Provera and that its package insert warnings were inadequate to inform Dr. Levy that the drug could cause dysmenorrhea and heavy and prolonged bleeding. As a consequence, he misdiagnosed her problem and performed a hysterectomy. Her complaint also held Upjohn strictly liable for her injuries, because the company knew Depo-Provera was an experimental drug with serious and deleterious side effects, but it had failed to inform her that she was an experimental subject.

Upjohn moved for summary judgment. The Broward Circuit Court judge who had two weeks before had denied Dr. Shapiro's and the University of Miami's second summary judgment motion, granted Upjohn's. At the hearing, he found the package insert warnings adequate as a matter of law, but his comments on his lack of faith in the jury system, revealed the subjective basis for his decision. "[T]he reason I love to give summary judgments is when you put six people in the [jury] box, God knows what they'll come out of the [jury] room with." (MacMurdo v. Upjohn, 1983, p.450) MacMurdo, once again, appealed.

In December 1983, Judge Walden, speaking for a divided Court of Appeals, reversed and remanded for jury trial. "It is not for judges, but for the jury to determine if a particular warning is adequate under the circumstances." (MacMurdo v. Upjohn, 1983, p. 450-451) He relied initially upon the Florida Supreme Court decision in Tampa Drug Co. v. Wait (1958) which held that the adequacy of the warning on a prescription drug label was a jury question. He found support in Lake v. Konstantinou (1966) where the Florida Court of Appeals, Second District, had held: "the question of the sufficiency of the warnings of the drug's extremely dangerous potentiality and the inherent danger in its use .... must certainly be submitted to the jury." (MacMurdo v. Upjohn, 1983, p. 450. Emphasis in original.) Judge Walden then disposed of Upjohn's argument that summary judgment was proper, because there was no conflicting testimony. In Lake, he said, the court had stated: "Florida was committed to the 'slightest doubt' rule and even though there is no conflict in evidence, a motion for summary judgement should be denied where inferences are reasonably deductible therefrom." (MacMurdo v. Upjohn, 1983, p. 451)

MacMurdo III

Anne MacMurdo's attorneys allowed her case to languish for over two years and almost to die in the summer of 1986 when Upjohn moved for summary judgment because of her failure to respond to its expert witness interrogatories. This motion set the stage for a series of hearings before Judge Miete Burnstein which revived the case, led to the appointment of Michael Ericksen as her attorney, and set a December 1, 1986 trial date.

Broward Circuit Court

Anne MacMurdo's products liability suit against Upjohn (MacMurdo III) went to trial, as scheduled, before Judge Burnstein. The trial was grounded in
the law of negligence. MacMurdo claimed that she suffered her injuries because Upjohn had negligently marketed Depo-Provera and negligently failed to warn her physicians about the drug's adverse effects. In response, Upjohn claimed that MacMurdo was comparatively negligent. Over three days a six member jury heard Michael Ericksen and David Covey, Upjohn's trial counsel, sketch out these legal theories in their opening statements, elaborate them in their examination of witnesses, and summarize them in them in their closing arguments. Here in brief are their arguments.

**Negligent Marketing**

Michael Ericksen argued that pharmaceutical companies have a responsibility to limit the marketing of their products to their approved uses. Upjohn knew of the drug's widespread unapproved contraceptive use. In fact, its marketing of the drug had created "a national scandal" which became the subject of a congressional hearings in 1973. At these hearings, senators were assured that the company had established a program to control the marketing of Depo-Provera. In fact, Ericksen argued, Upjohn had only a paper program, created at its Kalamazoo headquarters. In the Miami area, however, the failure of its field personnel, the district sales manager and detail men, to exercise reasonable care to implement the program had caused Anne MacMurdo's injuries. As Mr. Ericksen observed in his closing argument: "when folks at the bottom whose job it is to execute the program don't care ... that's negligence. (Trial transcript, p. 1026-27)

David Covey agreed that Upjohn had a responsibility to control its prescription drug marketing practices, but it did not have legal obligation to police the medical profession. In the case of Depo-Provera, he argued, Upjohn had marketed the drug responsibly. At the time Anne MacMurdo received her shot, the drug was not sold domestically in the 150 milligram doses used for contraception. Nor did Upjohn fill orders coming from family planning clinics or from physicians who suggested that they would use it as a contraceptive. In MacMurdo's case, he further argued, the University of Miami Family planning Clinic had not purchased Depo-Provera, not recommended the drug to its patients, and not given it to them as a contraceptive option. Upjohn was, therefore, not negligent, because it was unable to predict that Dr. Shapiro who did not use Depo-Provera as a contraceptive would give it to Anne MacMurdo.

**Negligent Failure to Warn**

Michael Ericksen argued that when Anne MacMurdo received her Depo-Provera injections in 1974, the package insert did not warn that use of the drug could produce heavy and prolonged bleeding and dysmenorrhea (a painful and dysfunctional bleeding), but listed only spotting, breakthrough bleeding, and change in menstrual flow (functional bleeding) as adverse reactions. Moreover, the package insert did not state that Upjohn did not recommend the drug's contraceptive use, nor was its contraceptive use contraindicated, it merely advised Drs. Levy and Shapiro that the drug was still being investigated for contraceptive use and had not yet received FDA approval. Undiagnosed vaginal bleeding was contraindicated, but Dr. Levy explained that her bleeding had been diagnosed as secondary to her IUD. In any event, neither Dr. Levy, nor Dr. Shapiro considered the package insert to be a direction from Upjohn not to use the drug for contraception. In fact, both testified that its contraceptive use was clearly acceptable, because there was support for such use in the medical community and medical literature.
Mr. Ericksen further argued that when she returned to Dr. Levy's office in December 1974 with symptoms of non-stop bleeding for four months, he was at a disadvantage, because the package insert did not warn him that her condition could be caused by an injection of Depo-Provera and because he did not know what Upjohn knew: the results of a study conducted by Dr. Paul Schwaille, Upjohn's principal Depo-Provera researcher, which showed that in women who had received one injection of the drug about 33% experienced severe menstrual bleeding, and in women who had received two injections, the figure was 23% to 27%. (Schwaille, 1973) As a consequence, Dr. Levy did not know that Depo-Provera might have caused her dysmenorrhea and heavy and prolonged bleeding, because it was supposed to have the opposite effect. If he had been warned, he would have allowed the effects of the drug to wear off instead of performing the hysterectomy. Thus, Mr. Ericksen argued that Upjohn was legally responsible for her injuries, because it had breached its duty to place Dr. Levy, and also Dr. Schapiro, on notice that the use of Depo-Provera involved the possibility of dysmenorrhea and heavy and prolonged bleeding.

David Covey argued in response that the company had taken reasonable care to warn physicians about Depo-Provera's use. The drug's 1974 package insert specifically stated that its contraceptive use was investigational and warned against the injuries Anne MacMurdo claimed she suffered from the drug's use. On cross examination, Drs. Levy and Shapiro both testified that they were aware that the package insert contained a warning about the drug's contraceptive use and the adverse reactions Anne MacMurdo experienced. Mr. Covey admitted that the package insert did not quantify the amount of bleeding to be expected, but noted that Dr. Shapiro testified that he knew that prolonged bleeding was a possible, but rare side effect. As a consequence, Mr. Covey argued that the Schwaille article would have been unlikely to alter Dr. Shapiro's decision to prescribe Depo-Provera, because it merely confirmed what he already knew. Given this evidence, Upjohn was not liable for Anne MacMurdo's injuries, because the warnings were adequate to inform her physicians about the drug's adverse reactions. Instead, Mr. Covey argued, the cause of her injuries were Drs. Levy and Shapiro's administration of Depo-Provera for contraception in the face of clear warnings in the package insert and Dr. Levy's performance of a hysterectomy without any evidence that the package insert led him to misdiagnose her condition. As a consequence, Mr. Covey concluded that if Anne MacMurdo had any legal recourse, it was a malpractice suit against her OB/GYNs. After all, Dr. Sorosh Roshan, an OB/GYN had suggested in her testimony that it was malpractice to prescribe Depo-Provera. Moreover, the appropriate treatment for Anne MacMurdo's bleeding, she testified, was not a hysterectomy, but "iron and bedrest initially, then the use of estrogen and finally a D&C, if the other procedures were unsuccessful." (Petitioner's Initial Brief on the Merits, 1989, p.13).

Comparative Negligence

Upjohn had claimed that even if it were liable for its failure to warn, the damages should not include the hysterectomy, because Anne MacMurdo's failure to exercise the care of a reasonable person contributed to her surgery. David Covey made two arguments to support Upjohn's burden of proving her comparative negligence. First, he attempted to link her use of drugs, initially cocaine, LSD, and mescaline in the late 1960's and later her continued use of marijuana and hashish in the early 1970's, to her prolonged bleeding. He also suggested that her drug use was related to her decision to have a hysterectomy, because it "severely impaired" her judgment and led to her disregard
available opportunities known by her ...[and] to proceed with the hysterec­
tomy." (Reply Brief on Appeal and Answer Brief on Cross Appeal, 1987, p. 22)
Secondly, he argued that the birth of an acephalic child and her subsequent suicide attempts provided her with a strong motivation to avoid pregnancy and led to her snap decision to request the hysterectomy in order to become sterile. In conclusion, Mr. Covey suggested that she was comparatively negligent, because she did not seek a second medical opinion when she should have known, having had a D&C to treat her bleeding from the IUD, that there were other means short of a hysterectomy to treat her bleeding problems.

Michael Ericksen argued in response that there was no evidence that the effects of the recreational drugs she used would last for four years. In fact, none, except LSD would have an effect beyond several months. There was also no evidence that her marijuana use contributed to her bleeding or that she knew it would contribute to her bleeding. Furthermore, it was not contraindicated on the package insert. All the evidence on drugs, he argued, was never tied to any relevant issue, because its sole purpose was to prejudice his client in the eyes of the jury. Mr. Ericksen also argued that Anne MacMurdo merely wanted relief from her bleeding. She did not request sterilization, because she had been informed at the genetic clinic where she sought counseling following the birth of her acephalic child that she only had a 1 in 20 chance of bearing another child with the same defect. Her failure to know that a D&C for her IUD bleeding would be an acceptable treatment for her Depo-Provera induced bleeding and her failure to seek a second medical opinion was not comparative negligence under Florida law.

Jury Verdict

After six hours of deliberation, a six person jury, two women and four men, found that Upjohn was not negligent in marketing Depo-Provera, but that it negligently failed to provide adequate warning in the drug’s package insert. The jury also found Anne MacMurdo 49% comparatively negligent and assessed her total damages at $370,000. Judge Burnstein subsequently entered a final judgment for Anne MacMurdo in the sum of $188,700.

Florida Court of Appeals

Upjohn appealed. Anne MacMurdo cross-appealed. The Fourth District Court of Appeals heard oral argument and rendered a decision on December 21, 1988 in which it affirmed the trial court’s judgment on liability and reversed its judgment on comparative negligence. The court then remanded with instructions to enter a judgment for MacMurdo for the full amount of her damages.

The court’s opinion first addressed Upjohn’s argument that the evidence was insufficient to establish both the drug manufacturer’s alleged failure to adequately warn the medical community that Depo-Provera might cause excessive and prolonged bleeding and the existence of a causal connection between its failure to warn and Anne MacMurdo’s hysterectomy. Judge Anstead, speaking for a unanimous court, took as his starting point Judge Walden’s statement in MacMurdo II regarding the legal standard announced in Lake v. Konstantinu (1966): the sufficiency of the manufacturer’s warnings to physicians was a jury issue even where there was no conflicting evidence." (Upjohn v. MacMurdo, 1988, p.339) He then approved the trial court’s decision to submit the issue to the jury, because he found that "considerable evidence presented may have supported a verdict for Upjohn, [but] there was also substantial evidence
presented that the drug ... caused MacMurdo's bleeding problems, that the warnings were insufficient to alert her physicians of this risk, and that her hysterectomy was performed to treat the bleeding condition." (Upjohn v. MacMurdo, 1988, 340)

Judge Anstead then turned to Anne MacMurdo's claim on cross-appeal that she was entitled to a directed verdict on the issue of comparative negligence. First, he disposed of the so-called marijuana defense. At oral argument, he observed, Upjohn's counsel had conceded the lack of evidence connecting her drug use to her bleeding condition. His review of the record supported that concession. Then he examined at length and disposed of Upjohn's snap decision theory, because "the jury could have inferred MacMurdo was negligent by opting to proceed with a hysterectomy without considering available alternatives to treat her bleeding problem." (Upjohn v. MacMurdo, 1988, p.340) Yet Judge Anstead held that she had no legal duty to question her physician's advice or to seek a second medical opinion. Even if she had a legal duty to determine whether a hysterectomy was the proper treatment, it was error for Judge Burnstein to have submitted the issue to the jury. Upjohn had also argued that MacMurdo had a hysterectomy, not to stop her pain and bleeding, but because she wanted to be sterilized. However, Judge Anstead's review of Dr. Levy's testimony led him to conclude: "[W]e do not believe that there was a sufficient basis in the evidence to hold that reasonable persons could differ on whether MacMurdo voluntarily had a hysterectomy outside the context of treatment for her bleeding condition or that she had treatment alternatives available to her at the time." (Upjohn v. MacMurdo, 1988, p.341)

Florida Supreme Court

Upjohn appealed the decision. The Florida Supreme Court heard oral argument and handed down its decision on May 31, 1990. The court, 4 to 2 with one justice recusing herself, disapproved of the Court of Appeals decision on the negligent failure to warn issue and remanded with instructions to enter a judgment for Upjohn. Justice Grimes, speaking for the majority, first addressed the standard which the court had recently announced in Felix v. Hoffman-LaRouche Inc. (1989) that the adequacy of a manufacturer's warning about the dangers of a drug is frequently "'a question of fact, [but] we hold that it can become a question of law where the warning is accurate, clear, and unambiguous'." (Upjohn v. MacMurdo, 1990, p. 681-82) In reaching the holding, the court disapproved not only MacMurdo II, but also the Court of Appeals decisions in Lake v. Konstantinu (1966) and Ricci v. Parke Davis & Co. (1986) which, according to Justice Grimes, had misread its decision in Tanpa v. Wolf, (1958) "to say that the adequacy of drug warnings is invariably a jury question." (Felix v. Hoffman-LaRouche, 1989, p. 104).

Justice Grimes then applied the court's new standard to the question of the sufficiency of Depo-Provera package insert warnings. His opinion began with a summary of the drug's package insert which identified breakthrough bleeding, spotting, and change in menstrual flow as adverse reactions. "No medical expert," he reported had "testified that the package insert was insufficient to put a doctor on notice that the symptoms displayed by MacMurdo in January 1975 could result from the use of Depo-Provera." (Upjohn v. MacMurdo, 1990, p. 683) Justice Grimes did acknowledge that Dr. Levy's testimony came close to concluding that the package insert was insufficient to warn when, as he reported the physician's testimony: "MacMurdo was suffering from dysfunctional bleeding which he [Dr. Levy] characterized as anything other than
normal bleeding while the package insert only referred to breakthrough bleeding and to change in menstrual flow." (Upjohn v. MacMurdo, 1990, p. 683) Yet Justice Grimes quickly added that Dr. Levy testified he would have been warned if he had "had the insert in front of him when Anne MacMurdo was describing her bleeding, he might have concluded that the drug was causing her problem." (Upjohn v. MacMurdo, 1990, p. 683)

In sum, the Florida Supreme Court held that the expert testimony on the inadequacy of the Depo-Provera package insert was insufficient to present a jury question. As a matter of law, it held, the warnings, per Felix, were accurate, clear, and unambiguous even though the package insert did not specifically warn about excessive, continuous, or prolonged bleeding, because "the insert [had] warned of the possibility of abnormal bleeding outside the menstrual period." (Upjohn v. MacMurdo, 1990, p. 683)

Justice Shaw in his dissenting opinion condemned the court for clearly excluding "contrary and competent substantial evidence to support the jury's verdict" in three respects. (Upjohn v. MacMurdo, 1990, p. 683) First, the court made highly selective use of Dr. Levy's testimony. As Justice Shaw noted, the court failed to mention that Dr. Levy testified that the change in menstrual flow [i.e. biologically functional bleeding] he would have expected from Depo-Provera was amenorrhea. As Dr. Levy testified: "[D]id I consider that Depo-Provera might have been causing the dysfunctional bleeding? .... I considered just the opposite .... In fact, it usually .... causes amenorrhea." (Levy Deposition, 1978, p. 57-58) In reporting Dr. Levy as testifying that "MacMurdo was suffering from dysfunctional bleeding which he characterized as anything other than normal bleeding," (Upjohn v. MacMurdo, 1990, p. 683) the majority conveniently excised the first half of the same sentence in which Dr. Levy testified that "she was complaining of dysmenorrhea, which is painful menstruation." (Levy Deposition, 1978, p. 41) The majority also failed to report his testimony about both symptoms in the sentence immediately following: "I don't see either one of these listed as an adverse reaction on the package insert." (Levy Deposition, 1978, p.42) Second, the majority also overlooked Dr. Shapiro's and Dr. Benjamin's testimony that the language of the package insert was inadequate. Dr. Shapiro had testified that "the package insert would not have put him on notice that the drug could cause prolonged continuous bleeding." (Motion for Rehearing, 1990, p.2) Third, the majority excused Upjohn from failing to warn against excessive, continuous, and prolonged bleeding in the 1974 package insert, even though Upjohn knew the results of the Schwaille study in 1971, because the prolonged bleeding was "unpredictable and more often spotty or light." (Upjohn v. MacMurdo, 1990, p. 683, fn.4) This view of the study, Justice Shaw argued, clearly minimized the heavy and prolonged bleeding from Depo-Provera use.

III.
Conclusion

Depo-Provera continues to be widely prescribed as a contraceptive in spite of serious questions about its safety. The drug is readily available because the Food and Drug Administration, the Upjohn Company, and physicians have been unable or unwilling to limit the drug to its approved use. The practices of these professional risk managers, examined in Part I, have, therefore, been largely responsible for the adverse Depo-Provera reactions women have suffered and the products liability and medical malpractice suits they have initiated to address the failure of two critical linkages in the
pharmaceutical risk management system; the package insert and informed consent. Anne MacMurdo's twelve year legal odyssey, explored in Part II, documents the enormous difficulties one Depo-Provera victim confronted in using the courts to seek redress for her injuries and exposes the failure of the Florida Supreme Court to manage the drug's contraceptive risk. Its decision in *Upjohn v. MacMurdo*, the first state supreme court decision on Depo-Provera's unapproved contraceptive use, is important for two reasons.  

First, Upjohn has won a legal victory which may insulate it from many future Depo-Provera products liability suits. The Florida Supreme Court's decision suggests that Upjohn will not be held liable for its Depo-Provera package insert not characterizing the menstrual bleeding as excessive, continuous, or prolonged. As Footnote 4 to the court's opinion states, it is unnecessary for Upjohn to specifically describe unpredictable and occasional prolonged bleeding even though the Schwaille study found 25% of women who took Depo-Provera suffered this adverse effect. Upjohn and other drug companies will surely cite the Florida decision for the proposition that since an adverse reaction "only happens on occasion, it is not necessary to specifically warn about it." (Motion for Rehearing, 1990, p. 6) MacMurdo will also add substantial weight to Upjohn motions to dismiss cases based on the claim that the Depo-Provera's package insert warning is "accurate, clear, and unambiguous" as a matter of law. Finally, the decision may shift Depo-Provera legal action to physicians. If a court, for example, decides as a matter of law that, given the facts in a particular Depo-Provera products liability case, the package insert meets the Florida Supreme Court's "accurate, clear, and unambiguous" standard, that may encourage Depo-Provera plaintiffs to bring a medical malpractice action.  

Second, Upjohn has also won a political victory. The Florida Supreme Court's decision may embolden Upjohn and other pharmaceutical manufacturers who are lobbying in Washington for the passage of products liability reform legislation. S.1400, one of the more recent examples of conservative tort reform, proposed to establish national rules which would make it more difficult for consumers injured by defective products to collect damage awards. One of its provisions which shifts the burden for paying legal fees to the losing party in a products liability case would clearly discourage women like Anne MacMurdo. Instead of passing S. 1400, the odyssey of Depo-Provera suggests that Congress should pass legislation which would require that a drug's non-approved uses be clearly stated in all drug package inserts and advertisements, that drug manufacturers maintain a detailed record of drugs with non-approved uses, and that physicians fully inform their patients by giving them the package insert and discussing its warnings with them. (Senate Hearings on Health Care, 1973, p. 68). These suggested requirements are not newly crafted on the basis of Anne MacMurdo's case, but were proposed by Marcia Greenberger of the Center for Law and Policy at the 1973 Senate Hearings, a year before Anne MacMurdo received her injections of Depo-Provera.
ENDNOTES

1 The FDA first approved Depo-Provera in 1959 to treat amenorrhea, irregular uterine bleeding, and threatened or habitual abortion and the following year to treat endometriosis. In 1972, the FDA also approved Depo-Provera as adjunctive therapy and palliative treatment of inoperable, recurrent, and metastatic endometrial cancer. In the meantime, however, the FDA withdrew the drug's approval for amenorrhea and irregular uterine bleeding and in 1973 withdrew its approval for treating endometriosis and threatened or habitual abortion.

2 This analysis of Upjohn v. MacMurdo was based not only on the documents cited in the text, but also upon the all pleadings, the entire trial transcript, and all appellate briefs and upon interviews with Anne MacMurdo, Michael Eriksen, her trial attorney, and Richard Kupfer, her appellate attorney.

3 Summary judgment motion is granted when "there is no genuine issue of material fact and ... [a party] is entitled to prevail as a matter of law. The motion may be entered against all or part of a claim or defense." Black's Law Dictionary, 5th ed., 1980, p. 1287.
REFERENCES

Books and Articles


O’Brien, David M. 1987. What Process is Due?


Government Documents


U.S. Congress. House Committee on Governmental Relations. April 30, 1974. Use of Advisory Committees by the Food and Drug Administration: Hearings Before the Subcommittee on Intergovernmental Relations.


Cases

Aldana v. Holub, 381 So.2d 231 (1980).
Lake v. Konstantinu, 189 So.2d 171 (Fla. 2d DCA 1966).
MacMurdo v. Upjohn, 388 So.2d 1103 (Fla. App. 4 Dist. 1980).
MacMurdo v. Upjohn, 444 So.2d 449 (Fla. App. 4 Dist. 1983).
Perlmutter v. Beth David Hospital, 123 N.E.2d 792 (N.Y. 1954).
Ricci v. Parke Davis & Co., 491 So.2d 1182 (Fla. 4th DCA 1986).
Tampa Drug Co. v. Wait, 103 So.2d 603 (Fla. 1958).
MacMurdo Case Documents


Shapiro, Dr. Arthur and the University of Miami. September 20, 1985. Memorandum of Law in Support of Motion to Dismiss. Broward Circuit Court, Florida.
