

PRODUCT LIABILITY UPDATE

April 2006

Foley Hoag LLP publishes this quarterly Update concerning developments in product liability and related law of interest to product manufacturers and sellers.

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Massachusetts Supreme Judicial Court Holds Expert Testimony Applying Scientific Facts to Medical Standard of Care Subject to *Daubert-Lanigan* Reliability Screening

In *Palandjian v. Foster*, 446 Mass. 100 (2006), plaintiffs filed medical malpractice, wrongful death and loss of consortium claims against decedent’s physicians for failing to diagnose his gastric cancer earlier. At trial, plaintiffs’ expert testified the applicable standard of care required the defendant internist to have ordered an endoscopy earlier than he did, which would have discovered the cancer while it was still treatable. The court, however, precluded the expert from testifying that the fact that the decedent’s grandmother and maternal aunt had died of gastric cancer should have increased the internist’s suspicion. Because plaintiff offered no medical or scientific evidence that a history of gastric cancer in second-degree relatives increased a patient’s risk, the court ruled that the proffered testimony did not meet the reliability criteria for expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and adopted by the Massachusetts Supreme Judicial Court in *Commonwealth v. Lanigan*, 419 Mass. 15, 26 (1994).

After a jury verdict for defendants, plaintiffs appealed. The Massachusetts Appeals Court reversed, relying on older case law holding that the medical standard of care generally does not have to be scientifically tested or proven effective and thus ruling that

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the *Daubert-Lanigan* reliability test need not be applied to testimony involving the standard of care.

On further appellate review, however, the Supreme Judicial Court reinstated the judgment, holding that where standard of care testimony involves the application of science to patient care, a *Daubert-Lanigan* screening of that application *is* appropriate. Here, plaintiffs' expert's proffered testimony that a history of gastric cancer in second-degree relatives increased the patient's risk incorporated a scientific fact. Given plaintiffs' inability to offer evidence that the underlying service was reliable, the trial judge properly excluded the expert's testimony.

First Circuit Holds Owner of Press That Injured Employee Not Liable Under "Dual Persona" Theory as Successor to Previous Owner Because Predecessor Owed No Duty in Tort

In *Braga v. Genlyte Group, Inc.*, 420 F.3d 35 (1st Cir. 2005), defendant's employee was injured operating a hydraulic press which defendant had acquired from a predecessor owner through a series of corporate mergers. Although plaintiff had received workers' compensation for his injuries, he sued his employer arguing it was subject to tort liability in its "dual persona" as successor to the predecessor press owner. The federal district court granted summary judgment to defendant, holding it was immune from suit under the worker's compensation statute.

On appeal, the United States Court of Appeals for the First Circuit noted that although the Massachusetts workers' compensation statute generally provides the exclusive remedy for employees who suffer work-related injuries, under the "dual persona" doctrine the employer may be subject to tort liability if the employer possesses a second legal persona independent from and unrelated to its status as employer. A previous Massachusetts case applied the doctrine to hold an employer liable in tort to an employee for a workplace injury from a product that had been designed and manufactured by a predecessor entity to which plaintiff's employer was a successor by merger.

Here, however, the predecessor entity did not owe any duties in tort with respect to the press as it had merely purchased it second hand--it did not either design or manufacture it. Thus, defendant did not owe plaintiff any duty arising outside the employment relationship, and the court affirmed the grant of summary judgment.

First Circuit Reverses Summary Judgment Based on Plaintiff's Failure to Meet Expert Disclosure Deadline and Remands for Consideration of Harm Caused by Delay

In *Gagnon v. Teledyne Princeton, Inc.*, 437 F.3d 188 (1st Cir. 2006), plaintiff sued for defective design, manufacture and warnings, breach of implied and express warranties and violation of Massachusetts' unfair and deceptive trade practices statute, Mass. Gen. L. ch. 93A, based on injuries sustained when the forklift he was operating tipped over. Three days after the court-ordered deadline for disclosure of expert witnesses had passed (the deadline having been extended once by agreement), plaintiff's counsel moved for an extension. The court denied the motion for failure to show a "substantial justification" for the late disclosures as required by Federal Rule of Civil Procedure 37(c)(1).

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Approximately one month later, plaintiff filed a motion to reconsider along with a twenty-four page expert disclosure. Plaintiff argued his disclosure delay was justified because defendants had misrepresented that the machine had been subjected to stability testing and complied with safety standards and had long delayed identifying a former employee familiar with the testing; plaintiff also cited various problems and delays in his own experts' testing in the months before the deadline. The district court found these arguments insufficient to justify reconsideration because plaintiff had had access to the forklift for several years, had examined it and knew its location, yet did not conduct any testing until the months before the disclosure deadline; plaintiff also failed to inform the court of the alleged problems with his own experts until *after* the deadline. The court thus denied reconsideration, struck plaintiff's proposed expert testimony and granted summary judgment for defendants on the ground that, without expert testimony, plaintiff could not prove his claims.

On appeal, the United States Court of Appeals for the First Circuit held the district court had not abused its wide discretion in case management decisions by ruling plaintiff's explanations did not provide substantial justification for his untimely disclosure. The court vacated the summary judgment, however, based on the district court's failure to consider whether any harm resulted from plaintiff's lack of timely disclosure, as under Rule 37(c)(1) information not disclosed as required may not be used as evidence at trial unless the lack of disclosure was "harmless." Here, plaintiff argued his late disclosure was made before any trial date had been set and did not involve serious or repeated misconduct. The appellate court thus remanded for the district court to consider potential harms to both sides, fairness and case management constraints.

"Economic Loss" Doctrine Precludes Tort Claims Involving Allegedly Defective Component Product Where Only Property Damage Was to Parts of Structure in Which Component Was Incorporated

In *Pro Con, Inc. v. J&B Drywall, Inc.*, 2006 WL 392123, 2006 Mass. Super. LEXIS 35 (Super. Ct., Jan. 31, 2006), a construction contractor sued the manufacturer of an exterior insulating and finish system and a sealant used in the construction of a hotel, alleging tort, warranty and contract claims after water infiltrated and damaged the hotel wall in which the insulating system and sealant were incorporated. Defendant moved for partial summary judgment on plaintiff's tort claims under the "economic loss" doctrine, which bars recovery in tort for purely economic losses. Economic losses are defined as damages for inadequate value or repair or replacement of the defective product itself, or resulting loss of profits, without any personal injury or damage to *other* property. The rationale for the doctrine is that when a loss is purely economic the only harm is to plaintiff's contracted-for bargain, so his recovery should be governed by contract law.

Here the question was whether damage to the hotel wall constituted damage to "other" property. The Massachusetts Superior Court held that when the allegedly defective product is a component that is integrated into a finished product, the relevant product is the latter. Plaintiff sought to construct a hotel, and the insulating system and sealant were components of it. Because the only damage was to parts of the hotel incorporating these components, the economic loss doctrine precluded any recovery in tort.

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Exhibits Submitted in Support of Summary Judgment Struck for Failure to Authenticate with Affidavit

In *Goguen v. Textron, Inc.*, 234 F.R.D. 13 (D. Mass. 2006), plaintiff sued for the wrongful death of his decedent who was killed in an industrial accident while operating a milling machine. Defendant moved for summary judgment on the grounds that it did not manufacture or sell the machine and could not be held responsible on a theory of successor liability. Defendant submitted eight documentary exhibits with its motion, and plaintiff moved to strike four of them on the ground that defendant had not authenticated them.

The United States District Court for the District of Massachusetts noted that generally evidence must be admissible at trial in order to be considered on summary judgment. Affidavits, although not admissible at trial, are assessed for summary judgment purposes as if the testimony therein were offered orally. For both summary judgment and trial purposes, documents must be authenticated in order to be admissible. Generally, such authentication requires witness testimony, although some documents--such as certain public or certified business records, as well as newspapers--are self-authenticating under Federal Rule of Evidence 902.

Here, defendant failed to submit authenticating affidavits for any of its exhibits, and the court held that two of them were not self-authenticating under Rule 902. Accordingly, the court felt compelled to strike the exhibits even though the exhibits were clearly relevant and there was little chance they were forgeries.

This *Update* was prepared by Foley Hoag's Product Liability and Complex Tort Practice Group, which includes the following members:

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