

OPENING STATEMENT

INSIDE THIS ISSUE

Opening Statement	1
<u>Roane v. Greenwich Swim Committee-Daubert</u> Revisited	1
Recent Cases of Interest Regarding "Additional Insureds"	2
Other Cases of Interest	3
AGFJ Developments	4
Public Education Service	4

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Since the United States Supreme Court's 1993 decision in Daubert v. Merrell Dow Pharmaceutical, the playing field has been somewhat leveled for defendants in cases where the claim against them has been supported by experts relying on "junk science" or flawed, unreliable methodology. AGF&J has recently been successful in obtaining the dismissal of a product liability claim against a boat manufacturer, persuading the Court that, based upon the criteria set forth in Daubert, the methodology of plaintiff's expert was so unreliable that the expert's opinion should be precluded. As a result, the case against the boat manufacturer was unsupportable and was dismissed by the Court, as a matter of law. In Roane v. Greenwich Swim Committee, et al., Judge Charles Haight of the United States District Court, Southern District of New York, issued an instructive opinion analyzing Daubert and applying it to the facts in this case. Judge Haight's decision in Roane is the subject of our lead article.

ROANE v. GREENWICH SWIM COMMITTEE : DAUBERT REVISITED

By: Michael E. Gorelick

In its landmark 1993 decision Daubert v. Merrell Dow Pharmaceuticals Inc. (509 U.S. 579), the United States Supreme Court ruled that Federal Rules of Evidence 702 assigned to the District Courts the "gatekeeping" task of ensuring that expert opinion testimony rests upon a reliable foundation. The Daubert case and subsequent holdings of the Court have established the parameters of the District Court's gatekeeping function. Thus, before a jury can consider expert testimony as to a party's liability or fault, that expert opinion testimony must rest upon a reliable foundation.

Application of the Daubert factors to a plaintiff's expert's opinion that a boat had been negligently designed were recently addressed by the United States District Court, Southern District of New York in Roane v. Greenwich Swim Committee, et al (decided July 9, 2004).

Roane was a tort action arising out of injuries suffered by a swimmer during the course of a distance swimming event and a related rescue attempt. On July 8, 2000, plaintiff, Stephen Roane, participated in the Greenwich Point one mile swim organized and operated by the Greenwich Swim Committee and held in the Long Island Sound near Greenwich, Connecticut.

On the day of the event, conditions were less than optimal. The temperature was colder than expected and the water was choppy. Plaintiff swam for approximately one-eighth of a mile when he began swallowing sea water and became severely distressed. Realizing that he could not continue in the race, Roane swam to a nearby buoy and signaled to a lifeguard in a nearby kayak for help. The lifeguard paddled to Roane and

directed him to straddle the front of the kayak with his arms and legs. The lifeguard then transported Roane to a support boat operated by the co-defendant, Walter F. McDermott. McDermott's vessel had been designed and built by defendant, S2 Yachts, in 1984 and purchased by him second-hand in 1997. The boat was powered by two inboard/outboard engines. At the rear of the boat was a "swim platform", which was nine feet wide and extended approximately thirty inches from the stern. A fold-down ladder was positioned at the center of the swim platform.

At the time of the rescue, the vessel's starboard outdrive was off while the port drive was in neutral. Due to the rocking of the vessel, the rough seas, the slipperiness of the platform and his own fatigue, Roane could not pull himself up onto the boat. After several failed attempts, he was suddenly drawn beneath the vessel. While beneath the water, he was struck by a sharp object sustaining injuries to his lower abdomen and testicles. A rescuer positioned in the water to assist Roane discovered that Roane's loose fitting swimming trunks had gotten entangled in the propeller.

Roane's shorts were cut free, he was taken ashore by lifeguards using surfboards and transported by ambulance to a local hospital, where he was treated.

Plaintiff sued Greenwich Swim Committee, (the sponsor and organizer of the event), the boat owner/operator (Walter McDermott), and the boat's manufacturer (S2 Yachts, Inc.). The cause of action against S2 alleged negligent design and manufacture of the boat. S2, represented by AGF&J, moved to preclude plaintiff's expert testimony pursuant to Daubert and for summary judgment.

In an instructive opinion granting S2's motions, Judge Haight examined Federal Rules of Evidence 702 in light of Daubert. In doing so, he applied four factors that a District Court may consider in its Rule 702 analysis that Daubert had identified:

1. Whether a theory or technique can be or has been tested;
2. Whether it has been subjected to peer review and publication;
3. Whether it has a high known or potential rate of error; and
4. Whether it is generally accepted in the relevant scientific community.

Judge Haight noted that, in undertaking his inquiry, he was required to focus on the principles and methodology employed by the expert, without regard to the conclusions reached or the Court's own belief as to the correctness of those conclusions. He explained that the flexible Daubert inquiry gives the District Court the direction needed to ensure that the Courtroom door remains closed to "junk science" while admitting reliable expert testimony that will assist the trier of the fact.

Plaintiff's expert's finding, as it related to the claim against S2, was that the design of the vessel was a contributing factor to plaintiff's injury. The expert concluded that the design of the vessel's swim platform and ladder placed swimmers dangerously close to the sharp surfaces of the vessel's engine outdrives. He suggested two design alternatives that would, in his opinion, have placed swimmers at less risk of harm. Finally, he was prepared to testify that S2 failed to provide any warnings in its vessel documentation, including the owner's manual, alerting swimmers in the vicinity of the swim platform to dangers posed by the nearness of the ladder and the platform edge to the outdrives.

The methodology used by the expert to formulate his opinion consisted of the following:

1. Inspection and review of photographs of the vessel that Roane was attempting to board when he suffered his injuries;
2. Review of medical records documenting Roane's injuries and treatment;
3. Review of all deposition testimony taken in the case.
4. Comparison of that information with photographic evidence of the vessel; and
5. Reliance on his experience and training as a professional engineer, designer, naval architect and risk assessment consultant.

In fulfilling his role as "gatekeeper", Judge Haight found that the methodology utilized by plaintiff's expert failed to meet any of the four factors noted in Daubert. The expert had not tested his own design or subjected his alternate design theories to peer review. His design had no known rate of error since it had not been tested, and the expert did not show general acceptance of his design or methodology. Alternative design theories were not accompanied by any drawings or models; nor did the expert submit any examples of other boats that had adopted such designs. The expert never attempted to reconstruct the accident for himself, nor had he tested his own theories of design safety.

Based upon a review of the expert's deposition testimony, affidavit and report, Judge Haight found that plaintiff's testimony with respect to the design and manufacture of the S2 vessel was insufficiently reliable to fall within the guidelines of Rule 702. Thus, he excluded the expert's testimony to the extent that he discussed design and manufacturing defects of the vessel. Having excluded the expert's testimony as to S2, Judge Haight found that plaintiff could not make out a *prima facie* case of design defect. Therefore, he granted summary judgment in S2's favor.

S2 Yachts was represented by Glenn A. Jacobson and Joseph A. Fitapelli of AGF&J. Should you have any questions concerning the Roane case or the Daubert principles, call Glenn A. Jacobson or contact him at gjacobson@agfjlaw.com.

Recent Cases of Interest Regarding "Additional Insureds"

- Employers Insurance Company of Wausau v. General Star National Insurance Company (SDNY, decided July 9, 2004) - Subcontractor's "additional insured" coverage for owner/general contractor was primary and general contractor's insurance was "excess".

In this case, the subcontractor's employee sued the owner/general contractor for injuries suffered in a workplace accident. The subcontract between the general contractor and the subcontractor/employer provided that the subcontractor would procure insurance naming the owner/contractor as an additional insured.

The owner/general contractor's own insurance specifically provided that it was "excess" over "any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement". By contrast, the subcontractor's insurance provided it would share pro rata with any other primary insurance.

Based on the language of the policy's "other insurance" provisions, the Court found that the owner/general contractor's policy was specifically intended to be excess over the additional insured coverage provided by the subcontractor's policy.

- Cavanaugh v. 4518 Associates (1st Dept., decided May 11, 2004) - Indemnification provision in subcontract requiring subcontractor to indemnify general contractor for any injury or damage caused in part by any negligence of subcontractor violated the statute prohibiting agreements which indemnify a party for its own negligence.

In Cavanaugh, third-party defendant appealed from the grant of a post-verdict motion for contractual indemnification in favor of another tortfeasor.

Plaintiff was injured in an on-the-job accident. The general contractor had subcontracted the carpentry work to S&H Carpentry which, in turn, hired the plaintiff's employer to perform taping work. Plaintiff sued the owner, construction manager, general contractor and the carpentry subcontractor, alleging violations of the Labor Law.

At trial, the jury returned a verdict of \$500,000 in plaintiff's favor, apportioning the award 70% against the general contractor (Ambassador) and 30% against the carpentry subcontractor (S&H). After the trial, the Court granted Ambassador's motion for summary judgment against S&H for contractual indemnification.

On appeal, the First Department examined that the agreement which provided that S&H shall "indemnify and hold harmless" Ambassador against all claims, damages, losses and expenses, including, but not limited to, attorneys' fees, arising out of or resulting from the performance of the work attributable to bodily injury or to property damage and, caused in whole or in part, by any negligent act or omission of S&H regardless of whether or not it is caused in part by a party indemnified hereunder.

The Court found that General Obligations Law prohibited a party such as Ambassador who, itself, has been found partially at fault from obtaining contractual indemnification. Thus, the Court reversed the grant of summary judgment to Ambassador and dismissed its claim against S&H.

- National Union Fire Insurance Co. v. Utica First Insurance Company (2nd Dept., decided April 26, 2004) - Timely disclaimer pursuant to § 3420(d) is unnecessary where a policy clause limits the circumstances in which a party is an “additional insured” and the underlying claim falls outside the limited coverage provided.

Additional insured coverage to CHI under the Utica First policy was limited to situations where CHI’s liability arose out of the financial control it had over All Phase or for liability arising out of premises owned by CHI, but only while All Phase leased or occupied those premises. An employee of All Phase was injured while working at a location owned by CHI, which was not leased to, or occupied by All Phase.

Initially, when the claim was reported under the Utica First policy, it disclaimed coverage based upon a policy exclusion applicable to employees of All Phase injured during the course of their employment. Thereafter, National Union and CHI brought a declaratory judgment action against Utica First and raised the defense, for the first time, that CHI was not an additional insured under the particular circumstances of the underlying case.

In reversing the trial court’s denial of Utica First’s motion for summary judgment (which also granted the cross-motion of National Union), the Appellate Division, Second Department agreed that where the additional insured coverage does not apply, the insurer is not obligated by § 3420(d) to promptly disclaim coverage and that its failure to do so does not estop it from asserting lack of coverage.

Other Decisions of Interest

- Insurance Coverage: Lead Poisoning/Number of Occurrences
In Hiraldo v. Allstate Insurance Company (decided June 1, 2004), the Appellate Division, Second Department, found that an infant’s injuries from exposure to lead paint while residing at a premises arose out of a single occurrence. Thus, it constituted one loss under the policy’s terms which defined injury from continuous or repeated exposure to the same general conditions as resulting from one loss constituting one “occurrence” within the meaning of the policy.
In Hiraldo, Allstate insured the owners of premises under a Landlord Policy covering the premises where the infant plaintiff resided during the first three years of his life. The infant plaintiff suffered brain damage as a result of lead poisoning, which was first diagnosed in August, 1991 when he was one year old. Subsequent to his initial diagnosis, the infant plaintiff was diagnosed with continuously elevated blood levels on seven separate occasions, with a final diagnosis in January, 1993. The plaintiff continued to reside at the insured’s premises through November, 1993.

In the underlying tort action, plaintiffs were awarded \$555,000 in damages (\$500,000 to the infant plaintiff and \$55,000 for past and future loss of services to the mother). Allstate contended that its indemnity obligations under its policy were limited to the sum of \$300,000, the policy’s per occurrence limit for one year. In the resulting declaratory judgment action, the Appellate Division Second Department held that under the policy’s definition, all of the infant plaintiff’s injuries from exposure to lead paint while residing at the insured premises arose out of a single occurrence and constituted the one loss. Thus, the Court found that coverage under the Allstate policy was limited to the one occurrence limit of coverage, \$300,000.

- Negligence: Landlord’s Duty to Protect Visitors from Criminal Acts

In Gross v. Empire State Building Associates, decided March 2, 2004, the Appellate Division, First Department, reversed the denial of summary judgment to the defendant/landlord and, instead, dismissed the Complaint, as a matter of law.

Plaintiff had been visiting the observation deck of the Empire State Building when a deranged gunman opened fire. Plaintiff was struck in the head by a bullet, sustaining brain injuries. Plaintiff commenced action against the building owner alleging that it was negligent in failing to prevent the shooting. The defendant moved for summary judgment contending that it had shown that significant security precautions had been undertaken prior to the incident, including, among others: the installation of a million dollar closed circuit television surveillance system in the public areas of the Empire State Building, the posting of signs that all persons entering the building were subject to a search of packages and bags, the employment of a large security force and conducting random bag checks. Prior to the incident, there had been only a minimal amount of actual violent criminal activity within the Empire State Building, despite the fact that the observation decks attracted 10,000 visitors daily and 25,000 on weekends. Furthermore, there had never been a shooting in the 65 year history of the building and only two muggings or assaults from January 1995 until January 1997.

In reversing the denial of the owner’s motion for summary judgment and dismissing the Complaint, the Court noted that there is a firmly established common law duty on the part of a premises owner to take only “minimal precautions” to protect tenants and visitors from foreseeable harm, including foreseeable criminal acts. The Court found as a matter of law, that this duty had not been breached by the defendant and that, defendant’s failure to prevent the shooting was not actionable.

- Insurance Coverage: A Certificate of Insurance, Standing Alone, is Not Proof That Insurance Coverage Exists.

In Tribeca Broadway Associates v. Mt. Vernon Fire Ins. Co., (1st Dept., decided March 11, 2004), the Appellate Division, First Department, reversed the trial Court’s grant of summary judgment to the insured. Instead, it granted the insurer’s cross-motion for summary judgment declaring that, as a matter of law, the insurer was not obligated to defend or indemnify the insured in an underlying tort action.

Tribeca, a building owner, had contracted with GDM Construction services for renovation work on its premises. The construction agreement included a provision that the contractor would hold the owner harmless for claims attributable to personal injuries arising from the contractor's negligence or for the negligence of a subcontractor for whose acts the owner may be liable. The construction contract also provided that the contractor would maintain insurance, which would indemnify the owner for all liability arising from the contractor's work.

The contractor provided Tribeca with a Certificate of Insurance, which stated that the owner was an additional insured under the contractor's policy. The Certificate of Insurance provided that "this Certificate is issued as a matter of information only and confers no rights upon the certificate holder. This Certificate does not amend, extend or alter the coverage afforded by the policies below". However, the contractor's policy, issued by Mt. Vernon, did not list Tribeca as an additional insured.

Subsequently, a worker injured on the job commenced an action against the contractor under New York's Labor Law. Mt. Vernon refused to provide a defense or indemnification to Tribeca because Tribeca had not been added as an additional insured and the insurer had not been asked to do so.

Tribeca commenced a declaratory judgment action and moved for summary judgment arguing that Mt. Vernon's defenses had been waived because of its failure to timely deny or disclaim coverage. It also opposed Mt. Vernon's cross-motion on the ground that issuance of the Certificate of Insurance to it by the broker was evidence of coverage which, at the very least, created a question of fact.

In reversing the trial Court's decision and in granting summary judgment to the insurer, the Appellate Division First Department concluded that a party claiming insurance coverage does not satisfy its burden of proving coverage where it is not named as an insured or an additional insured on the face of the policy. Furthermore, the issuance of a Certificate of Insurance by the broker does not confer coverage. Although it is "evidence" of a carrier's intent to provide coverage, it is not a contract to insure; nor is it conclusive proof, standing alone, that such a contract exists. Thus, the Court concluded that, since the broker issuing the Certificate had no authority to bind Mt. Vernon and did not act as its agent, the Certificate of Insurance did not create a question of fact that Tribeca was entitled to coverage under the policy. The Court also found that since the claim fell outside the policy's coverage, Mt. Vernon was not required to disclaim coverage that did not exist in the first instance and its failure to issue a prompt denial of coverage did not estop it from disclaiming.

- Negligence: An "Open and Obvious" Defect Relieves the Owner of the Duty to Warn Not of the Duty to Maintain the Premises in a Safe Condition.

In Westbrook v. WR Activities-Cabrera Markets (1st Dept., decided March 9, 2004), the Appellate Division, First Department, was called upon to decide an appeal from the trial Court's (Bronx County) grant of summary judgment to a defendant/premises owner.

The First Department noted that the case gave the Court the "opportunity to investigate and reexamine the proposition that a

property owner will not be liable in tort under a theory of common law negligence when a complained of dangerous condition was open and obvious". Plaintiff, Westbrook, tripped and fell over a cardboard box that had been left in an aisle at a supermarket. Deposition testimony described that she was at the check-out counter when the cashier informed her that a certain product was on sale. She left her purchases at the check-out counter and, carrying only her pocketbook, returned to the aisle where the product was located. As she turned into that aisle, plaintiff fell forward across a box which was just off the corner, near the middle of the aisle and was injured. The box had not been visible as plaintiff approached the aisle and she did not see the box before she fell.

Plaintiff sued, alleging negligence. Ultimately, defendant moved for summary judgment, arguing that the box over which plaintiff fell did not constitute a dangerous condition as a matter of law and did not give rise to a duty to warn as it was open, obvious and readily observable.

After reviewing the record, the Appellate Division reversed, finding that it had been error to conclude as a matter of law that a box a customer happened upon as she rounded a corner into an aisle was "open and obvious". More significantly, however, the Court held that even if a hazard qualifies as "open and obvious" as a matter of law, it merely eliminates the property owner's duty to warn of the hazard. It does not eliminate the broader duty to maintain the premises in a reasonably safe condition.

As a result of this decision, the First Department has now clearly joined the other Judicial Departments in holding that the open and obvious nature of a defect does not abruptly end the analysis of a negligence claim against a property owner. Instead, although it does eliminate the duty to warn of the condition, all of the Departments now hold that a question of fact still exists as to whether the owner has satisfied its duty to maintain the premises in a safe condition.

• AGFJ DEVELOPMENTS

AGFJ is pleased to welcome Allison Leff as an associate.

Allison is a graduate of the University of Michigan and Cardozo Law School. She will join our tort defense unit.

Glenn A. Jacobson, who is a member of the Board of Directors of the Association of Trial Lawyers of the City of New York, will serve as co-chairman of the Association's Annual Dinner to be held in October, 2004.

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