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La. First Circuit Holds Crane Manufacturer Liable for its Failure to Warn in Operations Manual

American Cent. Ins. Co. v. Crane,
2003-0279 (La.App. 1 Cir. 11/7/03), 2003 WL 22519466

In a recent case, the First Circuit affirmed a jury's allocation of fault to the manufacturer of a crane and affirmed the jury's award of damages to the plaintiff. The plaintiff, a steel worker, filed suit against a crane manufacturer and a contractor for injuries sustained when a bolt in the crane fractured. As a result of this malfunction, the plaintiff was forced to jump from a beam on the roof of the building to the ground to avoid being hit by the falling boom.

At trial, the jury assessed the contractor with 62% of the fault for the accident and assessed the manufacturer of the crane with 38% of the fault. The manufacturer appealed the jury's allocation of fault for its failure to warn. In addition, the plaintiff sought an increase in the damages awarded by the jury.

Under La.R.S. 9:2800.57(c), the manufacturer of a product has a continuing duty to provide warning of any danger inherent in the normal use of the product which is not within the knowledge of an ordinary user. Neither party disputed that a fractured bolt caused the boom hoist brake to fail. Both parties put on experts to explain the reasons why the bolt failed. Additionally, both parties utilized the operations manual to support their cases. An employee of the manufacturer testified that a crane with the same type of bolt had broken years earlier, and he had informed the manufacturer of the problem. Additionally, an analysis of the operations manual revealed that there were "no specific instructions" for maintenance or replacement of the anchor bolt.

A manufacturer with knowledge that a machine it built could malfunction acquires a duty to warn a product user of that danger. The jury concluded that the manufacturer had been warned about the failure of the bolt in a previous accident, and that it had breached its duty to attempt to notify the crane owners of the potential danger. The First Circuit found these conclusions reasonable in light of the evidence.

Additionally, the jury awarded the plaintiff $140,000 in general damages and $100,000 in loss of future income. The plaintiff sought an increase in the general damage award. The manufacturer argued that the loss of future income award was an abuse of discretion. The court compared the award of general damages to other awards in the First Circuit for the same type of injuries. It concluded that while the plaintiff's injuries were extensive, including a crushed fracture of his left foot, a fractured wrist, a fractured elbow and a fractured thoracic disc in his spine, a $140,000.00 award of general damages, while low, was not so unreasonable so as to require correction.

The court also reexamined the award for loss of future income. According to the court loss of future income is determined not by the difference between a plaintiff's earnings before and after a

disabling occurrence, but, instead, by a plaintiff's earning capacity before and after the accident. An expert testified that the plaintiff should not return to his job as an ironworker, and that the plaintiff's activities should be restricted to lifting only 20 to 30 pounds. The First Circuit found that the jury's reliance on that testimony was not unreasonable, and therefore the award was not an abuse of discretion.

- *Michelle D. Craig*

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Eastern District Judge Dismisses Cases Against Spine Dye Manufacturer for Lack of Evidence

Robin v. Nycomed, Inc.,
2003 WL 22416377 (E.D.La. 10/23/03)

Plaintiff Rejeane Jackson Robin alleged she developed lesions on her spine as a reaction to Omnipaque dye inserted into her spine during a myelogram, and that she also contracted arachnoiditis as a result of the dye. Robin filed suit in state court against Amersham Health, Inc., the manufacturer of the dye, asserting under the LPLA that Amersham was negligent in failing to warn users of the potential hazards of the dye and that it failed to test the dye to determine its potential hazards. Amersham removed the case to federal court and eventually moved for summary judgment, asserting plaintiff had no evidence to prove the dye was defective under the LPLA, because she had not listed an expert witness to testify on her behalf at trial, nor had she produced any expert reports. Robin did not file an opposition to the motion. Judge Lance Africk of Louisiana's Eastern District granted Amersham's motion, finding that plaintiff failed to provide any evidence that she could sustain an LPLA claim. "Unsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment."

- *Stacie M. Hollis*

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Electrocution and Oxycontin Claims Properly Joined Defeat Federal Court Jurisdiction

Bright v. No Cuts, Inc.,
2003 WL 22434232 (E.D. La. 10/27/03)

This case involves a personal injury claim arising from the electrocution of the plaintiff and his subsequent death, allegedly as a result of the ingestion of Oxycontin. At issue was the existence of federal court jurisdiction after plaintiff asserted claims against the manufacturer of Oxycontin and non-diverse defendants relating to the death.

The original plaintiff, Bright, was electrocuted while he was digging a trench for a cable television line. Bright named No Cuts Inc, a Pennsylvania corporation, and the local landowner as defendants. In a series of amended and supplemental petitions, plaintiff added another local defendant and Entergy Corp. During the pendency of the lawsuit plaintiff died, and his wife substituted in as plaintiff and

asserted a new claim against Purdue Frederick Company ("Purdue"), the manufacturer and distributor of Oxycontin. Plaintiff claimed that Bright died from the toxic effects of Oxycontin on his body and that Oxycontin was an unreasonably dangerous product. Plaintiff alleged that the fault of the "electrocution" defendants, together with Purdue's fault, was the legal cause of Bright's death.

Purdue removed the case to federal court on the grounds that the plaintiff had fraudulently misjoined the negligence claims against the non-diverse "electrocution" defendants with the claim against Purdue. Plaintiff filed a motion to remand and Purdue filed a motion to sever the products liability claim from the claims made against the "electrocution" defendants. Judge Africk refused to sever the claims and granted the motion to remand.

Under the concept of fraudulent misjoinder, removal jurisdiction cannot be defeated by the assertion of claims against a non-diverse defendant as to whom there is no allegation of joint, several or alternative liability and where the claims have no real connection with the controversy. *Tapscott v. MS Dealer Serv. Corp.,* 77 F.3d 1353 (11th Cir. 1996), *abrogated on other grounds, Cohen v. Office Depot,* 204 F.3d 1069 (11th Cir. 2000). After noting that the mere misjoinder of claims does not constitute fraudulent misjoinder, Judge Africk found that the joining of these claims was not egregious, as there was a "palpable connection" between the claims against the joined defendants. Plaintiff had alleged one series of events that led to Bright's death, and fraudulent misjoinder did not exist.

Judge Africk found common issues of fact between the claims, including that Bright's physical condition resulting from the electrocution could have played a role in whether Oxycontin was unreasonably dangerous. The trial court also found common issues of law due to Louisiana's comparative fault scheme. Thus, the apportionment of fault for Bright's death would be common among all defendants. Finally, Judge Africk cited the "weakened condition" theory, which extends a tortfeasor's duty not to injure a victim to risks that the victim would, due to his weakened condition, require the assistance of a medical device or appliance that might be defective, further injuring the victim. *Younger v. Marshall Indus., Inc.,* 618 So.2d 866 (La. 1993). According to Judge Africk, it was therefore possible that if the plaintiff proved that Bright's death was due to his "weakened condition" and the toxic effects of Oxycontin, a factfinder could conclude that the acts of the "electrocution" defendants were a legal cause of Bright's death.

- *L. Etienne Balart* back to top

Notice of Infection Starts the Prescription Clock in Blood Products Claim

Ducote v. Touro Infirmary,
2003-0755 (La.App. 4 Cir. 10/22/03), ___ So.2d ___.

The Louisiana Fourth Circuit affirmed a finding of prescription of a blood products claim filed approximately twenty years after the alleged wrongful act and more than a year after the plaintiff received notice of being infected with the hepatitis C virus ("HCV"), even though the plaintiff might have been ignorant of or misunderstood the extent or probable consequences of her infection.

Pre-1982 claims against hospitals based on tainted blood transfusions are not governed by the medical malpractice prescriptive period, but rather fall under Louisiana's general one year tort prescription set forth in Louisiana Code of Civil Procedure, Article 3492. Prescription starts to run when an injured person obtains notice sufficient to excite her attention, put her on guard, and call for her investigation. She may still have the requisite knowledge to commence prescription even though she may be ignorant of, or misunderstand, the extent or implications of her injuries, because such ignorance differs from ignorance of actionable harm which delays commencement of prescription.

This case illustrates the foregoing principles. Mrs. Ducote allegedly received transfusion of blood or blood products at Touro Infirmary in 1972 when she was hospitalized for childbirth. In 1992, Mrs.

Ducote donated blood at a blood drive. Shortly thereafter, she received a letter from the blood bank. The letter informed her that she had HCV and could no longer donate blood. It also advised her to consult her physician, which she did. Her physician confirmed the infection but allegedly said "there was nothing to worry about." He also allegedly told her that if she started "feeling bad," she should "come in and have tests every now and then." Mrs. Ducote later testified in her deposition that she did not realize at the time the seriousness of HCV.

Several years after consulting with her doctor, Mrs. Ducote began to experience fatigue, lightheadedness, and blackouts. She consulted another doctor, who confirmed that she had HCV and referred her to a specialist. After evaluating Mrs. Ducote's liver in early 1998, the specialist also confirmed she had HCV and prescribed treatment. The specialist questioned her about the various risk factors for acquiring HCV and found that the only risk factor applicable to her was receiving a transfusion of blood or blood products from Touro in 1972.

Within a year after the specialist explained to Mrs. Ducote the implications of being infected with HCV, she and her husband filed this lawsuit against Touro. Their petition alleged that Mrs. Ducote was diagnosed with HCV infection on January 23, 1998. Touro excepted on grounds of prescription. It contended that prescription ran from the time Mrs. Ducote received the letter from the blood bank. The Ducotes disagreed, contending that prescription started to run only after Mrs. Ducote's infection became symptomatic and her physician explained to her in 1998 the meaning of her diagnosis.

The trial court granted Touro's exception and dismissed the case. The Ducotes appealed. The Fourth Circuit stated that prescription did not run during the approximately twenty years between the transfusion in 1972 and the time she received the letter from the blood bank advising her that she had been infected with HCV because there was no evidence that she knew of her infection during that time. However, it determined that Mrs. Ducote had notice sufficient to begin the running of the one year prescription period when she received that letter. The Court reasoned that the fact that her first doctor gave her a false sense of security related only to her ignorance or misunderstanding of the probable consequences of her infection. It did not amount to ignorance of her actionable harm. Moreover, the fact that the blood bank had advised Mrs. Ducote never to donate blood again should have alerted her to ask more probing questions, even if it meant getting a second opinion shortly after the initial consultation. The Fourth Circuit thus affirmed the dismissal.

- *Andrew M. Obi*

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East. Dist. Grants Summ. Judgm't On Design & Warning To Ladder Maker But Not On Manufact'g Claim

Scordill v. Louisville Ladder Group, LLC,
2003 WL 22427981 (E.D.La. 10/24/03)

John Scordill, a welder, was injured when he fell off a Davidson Model 592-61 ladder, one of two ladders Mr. Scordill purchased at Home Depot in 1997 or 1998. Mr. Scordill had placed the ladder alongside a wall, climbed up to the second rung and turned around so that his back was to the ladder. He then reached up with his right arm to begin welding and leaned his left elbow against the wall to steady himself, his left hand grabbing his right wrist to support the welding gun in his right hand. Mr. Scordill claimed that at that point the ladder buckled beneath him because it failed along its left front rail, just below the first rung of the ladder. Mr. Scordill and his wife Cynthia filed suit in state court against the ladders' manufacturer, Louisville Ladder, alleging claims of unreasonably dangerous manufacturing, unreasonably dangerous design, and failure to warn under the Louisiana Products Liability Act ("LPLA"). Louisville Ladder removed the case to the Eastern District and filed two motions for summary judgment, one on the design defect and inadequate warning claims and the other on the manufacturing defect claim. Louisville Ladder also moved to exclude the testimony of Greg Garic, Mr. Scordill's expert.

The court first addressed Louisville's motion to exclude the testimony of plaintiff's expert Mr. Garic. Louisville Ladder claimed that Mr. Garic failed to apply the scientific method by not properly testing his hypotheses regarding the cause of Mr. Scordill's accident. The court first applied the test for reliability of expert testimony developed by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993): (i) whether the expert's theory can be or has been tested; (ii) whether the test has been subject to peer review; (iii) the potential or known rate of error; (iv) existence of standards and controls; and (v) degree of acceptance of expert's technique in the scientific community. Finding many of these factors inapplicable, and noting that the *Daubert* factors are "flexible", the court turned to other indicia of reliability. The court found that Mr. Garic reached his conclusions by applyling his education, skill and experience to the plaintiff's description of the sequence of events and his observations of the ladder. The court denied Louisville Ladder's motion to exclude Mr. Garic's testimony finding that his testimony was sufficiently reliable and relevant to present to a jury.

The court next reviewed Louisville Ladder's motions for summary judgment. Under the LPLA, if Mr. Scordill's injuries did not arise from a reasonably anticipated use of the ladder, then the question of whether the product is "unreasonably dangerous" under the Act is moot. As a preliminary matter, the court rejected Louisville Ladder's contention that Mr. Scordill's posture of placing his back to the ladder as he worked was not a "reasonably anticipated use."

Finding that Mr. Scordill would not have read any instructions, however, the court found in favor of Louisville Ladder on the inadequate warnings claim. The court also found in favor of Louisville Ladder on Mr. Scordill's design defect claim, noting that Mr. Scordill failed to identify a specific alternate design that would have prevented Mr. Scordill's injuries, as required by the LPLA.

Finally, the court denied Louisville Ladder's motion for summary judgment on the manufacturing defect claim, finding that Mr. Garic's testimony created a genuine issue of material fact as to whether a manufacturing defect caused the buckling and Mr. Scordill's injuries.

- *Diana A. Cross*

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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