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Effective Use of Industry Standards to Cross-Examine a Liability Expert Witness

by Scott Haworth and Abigail Bowen



Most of us went to law school because we did not consider ourselves particularly adept at math or science – perhaps this is even an understatement. Yet, as product liability attorneys, a case is often won or lost based upon

expert testimony. Experts in the very subjects that we avoided in school like the plague – mechanical engineering, chemical engineering, metallurgy and physics. Experts that you will need to be able to credibly cross-examine in front of a jury.

There are many tools available to address this seeming knowledge gap. For the purpose of this article, we will focus on the use of industry standards in cross-examination of liability experts.

I. Identifying the Applicable Standard

Your own liability expert, and often times the client, will play an integral role in identifying the applicable standard and its relevance to the alleged defect in your case. These standards are promulgated by established industry associations and govern areas such as testing, safety protocols, operation requirements, and criteria to determine the cause of an alleged accident. For example: in a flammable fabrics case the American Society for Testing and Materials ("ASTM") standards are applicable; in an automatic door case the American Association for Automatic Door Manufacturers ("AAADM") and ANSI/BHMA standards are applicable; and in fire cases The National Fire Protection Association ("NFPA") standards are applicable.

It is important to note that in most jurisdictions, compliance with industry standards is not an absolute defense. See e.g., *McAlonan v. Tracy*, 2011 WL 6125 at 1 (N.J. App. Div. 2010),

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Committee Chair
Tammy J. Meyer
MillerMeyer LLP
(317) 571-8300
tmeyer@millermeyerllp.com



Committee Vice Chair
John C.S. Pierce
Butler Pappas
(251) 338-3801
jpierce@butlerpappas.com



Publications Chair
Jonathan Judge
Schiff Hardin
(312) 258-5587
jjudge@schiffhardin.com



Publications Vice Chair
Laura L. Meny
John C Buratti & Associates
(917) 344-6800
laura.meny@farmersinsurance.com

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Sims v. Washex Machinery Corp., 932 S.W.2d 559, 565 (Tex.-App.-Houston [1st Dist.] 1995); *but see* Tex. Civ. Prac. & Rem. Code § 82.008. However, it is strong evidence that a product was not defectively designed or manufactured. See *id.*

II. Cross-Examination Tactics

Before you ever enter the courtroom for trial, you must be completely comfortable with the language, key elements and meaning of the standard in relation to the facts of your case. This knowledge will be acquired during discovery, fact investigation, inspection and testing of the product. However, as noted above, your most important tool will be your conversations with your expert and insured. A good expert will be able to explain to you in lay terms exactly how this standard impacts your case. On cross-examination, you will use your knowledge of this standard to undermine the credibility of your adversary's expert, and ultimately, their theory of liability.

For the purpose of illustration, the following is a brief fact pattern. Plaintiff was injured when his hand was caught in an in-running nip point while cleaning a three roll mill during the course and scope of his employment with Factory X. Your client sold the mill to Factory X and prior to its sale ensured that it was fully compliant with the applicable ANSI standard. Plaintiff alleges that the product was defective because it was not equipped with the requisite nip point guard. Based upon discovery, it is evident that at the time the mill left your client's possession, custody and control, Factory X was provided with an ANSI-compliant removable nip point guard. Furthermore, discovery reveals that plaintiff was not following the proper ANSI step-by-step wash-up procedure.

Based upon this information, there are a number of ways to use the standard on cross-examination:

Establish Employer Responsible Under ANSI

Q: Would you agree with me that on the date of plaintiff's accident, the 1997 ANSI standard was in effect?

A: Yes.

Q: Would you agree with me that the ANSI B177.1 is authoritative with respect to



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three roll mills?

A: Yes.

Q: Would you also agree with me that the 1997 standard put responsibility for enforcement of safe wash-up/clean-up procedures with the employer?

A: Yes, it did.

Establish Plaintiff Following Improper Procedure

Q: And to access the end running nip, the safety bar would have to be out of the end running nip, yes?

A: Certainly, yes, but it also depends on the condition of the bar itself, whether it's worn, damaged or seated properly in the end running nip, but without the bar there for sure.

Q: So, assuming the bar is in the proper condition, you can't access the nip with the bar in there, correct?

A: You should no be able to.

Q: Is there any circumstances during the wash-up procedure where the ANSI standard states, that the operator should remove the wash-up stick?

A: Not during the clean-up process it should not be removed according to the ANSI standard.

The Product Was Fully Compliant With The Standard

Q: Am I correct that when this three roll mill left my client's possession and control, the 1975 ANSI standard was in effect?

A: Correct.

Q: And at that time, are you aware of any way in which the mill did not comply with the 1975 ANSI standard?

A: No, it did comply.

While the above examples are not exhaustive, they demonstrate three different ways to undermine you adversary's case by simply referring to the standard. Their expert cannot argue that the standard is not applicable because he would then undermine his own credibility.

We cannot stress enough that your ability to effectively use this tool is based upon your prior investigation and analysis of the standard and its application to your product. As

evidenced above, if you are properly prepared, you will remain in control of the cross-examination and lead the expert into the answers that ultimately exculpate your client.

Abigail Bowen represents and advises corporate clients in complex litigation matters involving products liability, mass tort, labor law, consumer fraud and general negligence in both state and federal court. Ms. Bowen's prior experience includes defending pharmaceutical companies in complex multi-district litigations involving products liability and consumer fraud claims brought on behalf of a nationwide class of purchasers and the attorney general's offices of multiple states. In addition, Ms. Bowen has experience defending and counseling corporate clients in matters involving commercial litigation, contract disputes and professional liability.

Ms. Bowen is currently Vice Liaison to DRI's Trial Tactics Committee and is on the Steering Committee for the Trial Tactics Seminar. In that position, Ms. Bowen is responsible for organizing events at DRI's Trial Tactics Seminar and facilitating communication between members of the Young Lawyers Committee and members of the Trial Tactics Committee.

Scott Haworth is the Managing Partner of Haworth Coleman & Gerstman, LLC. Mr. Haworth's practice focuses on the defense of product liability matters involving medical devices, recreational products, juvenile products, industrial products and others. Mr. Haworth is a member of DRI's Product Liability and Trial Tactics Committees and has served as Chairman of DRI's Specialized Litigation Groups on Recreational Products and Food Law.

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