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Litigating the Products Liability Case: Law and Practice

The Law: Elements of the Plaintiff's Case

- A. Negligence Actions: Design/Manufacturing Defect and Failure to Warn.
- B. Strict Product Liability Actions: Design Defect, Failure to Warn and Manufacturing Defect.
- C. The Role Played by Proof of Prior Similar Claims.
- D. Early Investigation and Retention of an Expert.

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A plaintiff's product liability action can be brought under any or all of three theories:

- Negligence (PJI 2:125);
- Strict Products Liability (PJI 2:120);
- Breach of Warranty (PJI 2:140)

The three theories overlap and intersect each other; as such, all three will frequently appear in a plaintiff's complaint and bill of particulars.

What are you trying to prove?

- Product was "defective" or "not reasonably safe".
- What makes a product "defective"? Design defect or flawed manufacturing process or inadequate instructions/warnings.

Who are the plaintiffs?

- Users;
- Bystanders.

Who are the defendants?

- Manufacturers;
- Sellers (including wholesaler, distributor or retailer).

NEGLIGENCE

New York PJI 2:125 Products Liability-Negligence

Generally speaking, the negligence theory requires the plaintiff to prove that the manufacturer failed to exercise “reasonable care” in making the product for its intended (normal) or foreseeable uses. The negligence theory can also extend into examination of whether the defendant exercised reasonable care in inspecting or testing the product.

Plaintiff cannot hold the defendant to a higher standard of engineering, scientific or technical “know how” than what existed when the product was placed on the market. The manufacturer’s conduct is gauged as of the time the product entered the stream of commerce.

But because the manufacturer is in the business of designing and marketing a particular product, it is held to an “expert” standard. Plaintiff, therefore, can make out a negligence case by showing proof that the defendant did not stay abreast of the engineering, scientific and technical literature pertaining to its product line. But a defendant can still win by showing it exercised “reasonable care” in design or manufacture even if it did not adopt the “safest possible” practice (see Cover v. Cohen, 61 N.Y.2d 261).

The duty of care owed by the defendant under negligence theory varies based upon the defendant’s role in the design, manufacture, marketing and distribution of the product. For example, a distributor or retailer would not have been involved in the design or manufacturing processes and therefore that defendant’s duty of care would likely be limited to reasonable testing or inspection and the duty to warn.

STRICT PRODUCTS LIABILITY

New York PJI 2:120 Strict Products Liability

The strict products liability cause of action was adopted by the Court of Appeals in the Codling v. Paglia decision in 1973 (32 N.Y.2d 330).

Strict products liability is liability without proof of fault; meaning the plaintiff need not show that the manufacturer knew or should have known that the product was defective or dangerous.

The Codling court cited to justice and equity concerns; reasoning that a manufacturer of a product should not be permitted to avoid responsibility for injury simply because there was no contractual privity between the plaintiff and manufacturer (as required in a breach of warranty claim).

The manufacturer is the party with the opportunity and incentive to produce safe products. If doing so causes the cost of the product to increase, so be it; that's the price the user/plaintiff pays in exchange for a safer product.

As with a negligence cause of action, plaintiff can succeed in a strict products claim by showing defective design, a manufacturing flaw or inadequate warnings/instructions about use of the product.

But strict liability is not absolute liability. Plaintiff must still prove proximate cause (was the defect a substantial factor in causing the injury?) and plaintiff's recovery can be reduced by his or her own comparative negligence.

Comparative negligence is a defense. But evidence relevant to comparative negligence (what the plaintiff did or failed to do) is a consideration in whether plaintiff has made out a prima facie case.

Plaintiff must show the product was being used for its intended purpose or a reasonably foreseeable purpose (PJI 2:120 and PJI 2:125). But misuse of the defective product is not the same as a use of the product which was not intended but was reasonably foreseeable.

Stated another way, a manufacturer has a duty to warn of the danger of unintended uses of a product provided those uses are reasonably foreseeable (see Luqo v. LYN Toys, Ltd., 75 N.Y.2d 850).

BREACH OF EXPRESS WARRANTY

New York PJI 2:140 Breach of Express Warranty

Breach of Warranty is the third theory (along with negligence and strict products liability) upon which a Plaintiff can premise his case. But don't let the name fool you.

Warranty liability doesn't require privity of contract; thus remote users of a product or bystanders can recover under a warranty theory.

Breach of warranty actions can be based on express warranties (such as an advertisement or a product label), or the implied warranties of merchantability or the fitness of a product for a particular purpose.

Breach of implied warranty is not identical to strict products liability but there is what the Court of Appeals called a "high degree of overlap" (Denny v. Ford Motor Co., 87 N.Y.2d 248).

WHAT IS THE CLAIMED DEFECT?

Within the legal theories of negligence or strict product liability, the nature of the claimed defect will generally be one or more of three choices:

- design defect,
- manufacturing defect and/or
- failure to warn.

Design Defect

Plaintiff's burden is to show:

- The product was not reasonably safe due to the substantial likelihood of harm;
- It was feasible to design the product in a safer manner; and
- That the defect was a proximate cause of the injury sustained.

(Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102)

The Voss Court articulated a risk versus utility test and the factors that might be considered in that analysis. Those factors are prominent in the pattern jury charge on strict products liability (PJI 2:120) and include:

- The utility of the product to the individual user and the public as a whole;
- The likelihood of injury;
- The availability of a safer design;
- The manufacturer's costs in relation to a safer design; and
- The plaintiff's level of awareness of the potential danger of the product.

Manufacturing Defect

The crux of the claim (prima facie case) is that a product caused injury because it did not perform as intended; while another product of identical design did not fail.

Plaintiff is not obligated to prove negligence in the manufacturing process. Instead the focus is on the condition of the product when “finished”; as it left the factory or plant of the defendant manufacturer. The plaintiff frequently focuses his or her proof on the manufacturer’s own design, materials or assembly specifications.

Failure to Warn

What’s left to the poor plaintiff if the offending product that caused an injury was properly designed and properly manufactured; and was therefore reasonably safe for use?

Perhaps the defendant did not adequately warn the user of one or more dangers associated with use of the product.

“...the consumer is not on an equal footing with the manufacturer who is in a unique position to know the specific risks involved. The imposition of the duty to give a warning of some kind involves a balancing test which weighs the seriousness of potential harm to the consumer against the cost to the manufacturer”.

(See Cooley v. Carter-Wallace, Inc., 102 A.D.2d 642).

The manufacturer has a duty to warn against:

- Latent dangers resulting from foreseeable uses of the product of which it knew or should have know; and
- Danger arising out of unintended uses of the product that are reasonably foreseeable.

In the second category; unintended but foreseeable uses of a product; would be the warning not to stick your hand into the discharge chute on a snow blower when it gets clogged while the machine is running.

Adequacy of Warning

Not all warnings are created equal. A defendant cannot escape liability simply by pointing to its warning about the danger associated with the product. The warning must be adequate in relation to the risk involved in the ordinary use of the product.

Generally speaking, an adequate warning passes three tests:

- Sufficiently communicates the specific hazard;
- Sufficiently communicates the magnitude of the hazard; and
- Sufficiently informs the user how to avoid the hazard.

Claims premised on an alleged failure to warn often require more 'common sense' evidence as opposed to technical/engineering proof a plaintiff would rely on if the claim was that the product was not properly designed or engineered.

Experts are instead debating questions like:

- How **big** should the letters in the warning be?
- Should the warning be in **bold type**?

- Is black print sufficient or should it be red?
- Should there be an exclamation point at the end of the warning?
- How many warnings are too many?

Proximate cause must be shown in the failure to warn case; meaning had the warning been adequate, the plaintiff would have heeded the warning and the accident would have been prevented.

Plaintiff must be prepared for this question at deposition. It does no good to argue that a stronger or larger or enhanced warning was necessary in relation to the magnitude of the hazard, if the plaintiff concedes that the warning would not have been read before use of the product.

The age and experience of the plaintiff is also an important consideration in failure to warn cases. For example, an injury sustained on a dive into the shallow end of a pool; where the plaintiff claims an inadequate warning of the danger; will be much more likely to succeed with a young, novice swimmer not familiar with that particular pool.

In 1986, the Court of Appeals decided Smith v. Stark (67 N.Y.2d 693) in which an 18-year old college student injured in the shallow end of a residential pool claimed the defendants negligently failed to place depth markers around the pool. There was no dispute that plaintiff was an experienced swimmer and diver and he admitted at deposition that he was familiar with the location of the shallow and deep ends of the pool in question. The Court cited to that evidence (and “common sense”) in dismissing the failure to warn claim, concluding that the manufacturer’s failure to place depth markers could not have been a proximate cause of the plaintiff’s accident and resulting quadriplegia.

A manufacturer may not be held liable for failure to warn of risks that are:

- Open and obvious to the user without a warning; or
- Known to the plaintiff because of her particular background, training or experience.

A distributor or retailer of a product does not have the same duty to warn as does the product manufacturer.

Generally speaking, those “underlying” defendants (sellers of the product after manufacture) have a duty to:

- warn of known dangers in the use of a product learned prior to sale.

That duty can arise from the failure to discover a defect that an “ordinary inspection” would disclose.

PROOF OF PRIOR SIMILAR CLAIMS

Evidence that the product that injured your client did the same thing to one or more persons before your accident can be very compelling proof on several issues:

- the probability of the product’s defect;
- the existence of the danger;
- the defendant’s notice that the danger existed; and
- causation.

But expect a tooth-and-nail fight from defense counsel to prevent that “prior similar claim” evidence from being considered at trial.

Under New York law and in federal practice, generally speaking, the plaintiff’s burden will be to show those prior events and injuries were

“substantially similar” to the product at issue in your litigation.

And even upon such a showing, the court might still exclude some or all of the prior claim evidence if it finds the probative value outweighs the potential prejudicial effect or the risk that the jury might be confused or misled by evidence of another accident and/or injury not at issue in the case.

In Doty v. Navistar (219 A.D.2d 32), the 9-year old plaintiff lost his arm when it became stuck on an auger in a combine his grandfather was operating to harvest corn. The trial court permitted the plaintiff to introduce evidence of a prior accident involving a different model combine (manufactured and sold by the same defendant, formerly known as International Harvester). The court gave a curative instruction about the difference in models, and the 4th Department affirmed the plaintiff’s verdict while noting:

“Proof of a similar accident involving the same combine model was admissible as proof that the combine was unreasonably dangerous and defective”.

Plaintiffs should also expect defendants to respond in kind to “prior similar claim” evidence:

- A limited number of prior accidents and claims in relation to the number of products sold can establish the reasonableness of the product design or the safety of the product;
- If the product’s history is good, so-called “absence evidence” can be admissible to negate the plaintiff’s claims “because continued use over a long period of time without incident may indicate that the condition has been proven to be adequate or safe”. (Ake v. General Motors Corp., 942 F.Supp. 869 (W.D.N.Y. 1996)).

EARLY INVESTIGATION AND RETENTION OF AN EXPERT

Early investigation of the accident is not always possible. When the opportunity for investigation shortly after the harm presents itself, the plaintiff's lawyer should move quickly:

- Preserve/secure the offending product if possible;
- Determine ownership and/or custody of the product;
- Ensure safe storage/protection of the product;
- Determine product history (purchase to DOA);
- Secure product manuals, instruction, directions, and all product literature;
- Photograph the product;
- Photograph the scene of the injury with product;
- Accident/incident reports;
- Witness statements;
- Plaintiff's account of accident.

Expert witness, for "merit" stage and litigation, is critical.

Expert witness for litigation is almost a certainty.

"When a case involves a matter of science or art or requires special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state (his) opinion for the information of the court and jury."
(New York PJI 1:90).

Fortunato v. Dover Union Free School District (224 A.D.2d 658): 7-year old girl hurt on defendant's property which was formerly used a playground. The Second Department found the trial court did not err in precluding the plaintiff's expert witness engineer from testifying to the existence of a defective condition resulting from disassembled and discarded playground equipment because "unless the jurors are unable or incompetent to

evaluate the evidence and draw inferences and conclusions, the opinions of experts, which intrude on the province of the jury, are both unnecessary and improper”.

In New York courts, the admissibility of scientific evidence has been governed by the Frye standard (Frye v. United States, 293 F. 1013) of “general acceptance”. Courts, in the “gatekeeper” role commonly preside over “Frye hearings” that challenge expert witnesses and their opinions. The Court first determines whether the theory of the expert is “novel” or “experimental”, and if so, whether the theory has gained general acceptance in the relevant (expert) community.

In federal court, the admissibility of expert opinion is tested according to Daubert v. Merrell Dow Pharmaceuticals (509 U.S. 113), in conjunction with FRE 702 and 703, determining whether the disputed expert evidence is relevant, competent and material. Among the issues considered are:

- Has the theory been tested?;
- Has the theory been subjected to peer review and publication?;
- Can the theory/technique be replicated?;
- Has the theory gained general acceptance in the relevant scientific community?; and
- Expert’s qualifications and credentials.

Where to find the expert?

Robson Forensic (robsonforensic.com)

The TASA Group (Technical Advisory Group for Attorneys) (tasanet.com)