

Litigating the Products Liability Case: Discovery

**New York State Bar Association
Buffalo, NY | October 22, 2013**



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Scope of Discovery

Article 31 of NY CPLR

- Full disclosure of all matter material and necessary in the prosecution or defense of an action
- Of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity
- The test is one of usefulness and reason

NY Discovery Devices

- Depositions
- Interrogatories
- Demands for Discovery and Inspection of documents and property
- Physical and mental examinations of plaintiffs
- Notices to Admit
- Demand for Verified Bill of Particulars

Discovery Limitations

- Cannot serve both interrogatories and Demand for Verified Bill of Particulars
- No interrogatories *and* deposition (one or the other) in straight negligence case (personal injury, property damage, or wrongful death action)
- Attorney-client privilege, work product, material prepared in anticipation of litigation

Overview of Products Liability Law in New York

- No need to prove negligence
- Defective product: not reasonably safe for its intended or foreseeable purpose
- Existed when it left the manufacturer's hands and was a proximate cause of the damage

Types of Product Defects

- Manufacturing Defects
- Design Defects
 - Risk/Utility Test
 - Consumer Expectation Test
 - Alternative Safer Design
- Warnings Defects

Discovery on Plaintiffs

- Straight-forward and predictable (usually)
- Identify product
- Theory of case - alleged defect
- Alleged damages/injuries
 - Medical records
 - Employment records (tax returns/W-2s)
 - Collateral sources
- Economic damages

Discovery on Defendants

- Far reaching
- Competing and prior designs
- Prior similar problems, notice, and warnings
- Other lawsuits involving defendant's products
- Prior accidents, including similar products
- Different products using same component part

Trial Notebook System

Notebook, 3-ring binders with pocket dividers containing the following sections:

1. Table of Contents
2. Discovery Plan
3. What I need to know (important stuff)
4. Analysis of case
 - Include your legal and factual theory of the case, as well as an analysis of your opponent's strengths and weaknesses
5. Proof checklist – list every principal fact you need to prove your claim or defense
6. Do it in 3 levels:
 - a) Elements (defendant's negligence) - the PJI is invaluable
 - b) Evidence (proof of prior accidents)
 - c) Source (pleadings and testimony from other lawsuits)

Trial Notebook System

(Continued)

7. Jury selection notes
8. Opening statement notes
9. Stipulations and pretrial orders
10. Witnesses
 - a) Focus sheet
 - 1) personal information
 - 2) evaluative comments
 - 3) direct or cross examination outline
 - 4) focus (responsibility or knowledge)
 - b) Index of witness' deposition
 - c) Documents and exhibits
11. Evident and procedural memos
12. Final argument notes
13. Motions and requests for instructions

Basic Discovery Plan

1. Use written interrogatories to find out whose depositions you want to take and where the documents you want can be located.
2. Use documents for information, to refine the list of depositions you will take and to help figure out what questions to ask.
3. Use depositions to nail down what you have learned, to get some important admissions, and to evaluate the witness.
4. Use requests for admissions to fill in the holes that are left.

Interrogatories

- Obtain general background information and facts prior to depositions
- Interrogatories on Plaintiff:
 - ID the product
 - Connection to the product
 - Familiarity with the product; how long using
 - Any warnings received
 - Date, time, and location of occurrence
 - Allegations concerning product defect (e.g., design, manufacturing, and/or warnings defect)
 - Other standard (non products) demands

Interrogatories on defendant

- Defendant's connection to product
- Complete description of product
- Explanation regarding how product operates
- Plans concerning design of product
- Who designed product
- Knowledge of defects prior to occurrence

Interrogatories on defendant (cont.)

- Any recalls
- Prior complaints to defendant
- Repairs or inspections of product
- Related litigation involving same or similar product
- Other standard (non products) demands

Interrogatories

Do not use interrogatories for:

1. Information about conversations
2. Why questions
3. Complex transactions or events
4. Identity of trial witnesses

Depositions

- Practice points

Jim McElhaney's Goals for Depositions

(Taken from John Moyer's Deposition Course Book
Published by the Professional Education Group)

- Learn the facts
- Nail down what you know
- Establish facts essential to your case
- Get and explain documents
- Establish damages and basis for them
- Develop a *prima facie* case and know the elements of your cause of action or defense and have them in front of you
- Preserve testimony
- Block a claim or defense
- Get the witness' perspective – their point of view
- Lock in the witness to prevent future “creativity”

Jim McElhaney's Goals for Depositions

(Taken from John Moye's Deposition Course Book
Published by the Professional Education Group)

- Get the basis for an expert's opinion
- Find out what the expert reads
- Find out who the expert respects
- Evaluate the witness – debrief yourself immediately after the deposition
- Evaluate the other lawyers
- Locate and develop impeachment material
- Locate missing witnesses
- Find out who knows key information
- Find out what the witness was shown and told before the deposition
- Show the other side that their cheap tricks don't phase you
- Show the opponent you are actually getting ready for trial

Nine Ways to Conduct A Bad Deposition

- Ask long, complicated questions
- Argue with the witness
- Go down irrelevant paths
- Ask narrow questions
- Don't resolve ambiguities
- Ignore follow up questions
- Let the witness know you are a lawyer, use plenty of legalisms
- Cross examine the witness
- Interrupt and cut off the witness

Use of Experts in Products Liability Litigation

- Proof of defect generally not within lay knowledge, requires expert testimony
- New York Rule – Trial “by ambush” replaced in 1980s by minimal disclosure of expert opinions by attorney. Expert reports need not be exchanged and expert depositions are not permitted. The *Frye* rule allows expert to testify if opinions shown to be “generally accepted” in field of specialty.
- Federal Rule – Expert reports detailing expert opinions and bases therefor must be exchanged. Parties may take depositions of opposing experts. Opinion testimony may be offered at trial only if relevant and reliable, as measured by *Daubert* rule.

Expert Discovery (cont.)

- Daubert v. Merrell Dow Pharmaceuticals, 1993 – US Supreme Court established factors for determining reliability of proffered testimony. Judge is the “gatekeeper” who must determine reliability, not the jury.
- Consequence – If expert excluded as unreliable, summary judgment/directed verdict should be granted.

Daubert Factors

The Daubert factors include the following:

- Is the expert qualified to give the opinion?
- Has the theory been (or can the theory be) tested?
- Has it been subject to peer review and/or publication?
- What is its known or potential rate of error?
- Has it attracted widespread acceptance in the relevant scientific community?
- Was the theory developed solely for litigation?

Sanctions

- Failure to provide discovery
- CPLR 3126: authorizes various forms of relief for a refusal to comply with a prior discovery order or a willful failure to provide discovery; the court may:
 - order that the issues to which the information is relevant be deemed resolved in accordance with the claims of the party who obtained the prior discovery order;
 - prohibit the disobedient party from supporting or opposing designated claims or defenses; or
 - strike a pleading

Spoliation – Courts Condemn It

“Courts uniformly condemn spoliation...The intentional or negligent destruction or spoliation of evidence cannot be condoned and threatens the very integrity of our judicial system.”

Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349
(S.Ct. Indiana 2005)

Spoliation

- Intentional
- Negligent
- Can occur at any state in the litigation
 - *Millard v. Alliance Laundry*, 20 A.D.3d 866 (4th Dept. 2006).

Spoliation – Can Include

- Striking of Answer or Complaint
- Monetary Sanctions
- adverse inference charge (NY PJI section 1:77.1), stating that the jury may conclude that the missing evidence, if produced in court, would not have supported the party's position (that is, the party that destroyed or lost the evidence) with respect to the issue to which the destroyed or missing evidence relates

Spoliation – No Sanction if

- Done in good faith:
 - Lack of notice of litigation/anticipated litigation
 - Destruction in the normal course of business
- Can establish through other evidence

Spoliation – Duty to Preserve

When does the duty to preserve arise?

- Knew that litigation was pending, threatened or likely
- Should have known that litigation was pending, threatened or likely
- Assumed a duty to preserve evidence
- Contractual or statutory duty to preserve

Duty to Preserve

You should be concerned:

- Any time an expert arrives on a scene, a duty to preserve arises
- Any time a product is even suspected to be involved, a duty to preserve arises