Litigating the Products Liability Case:

Law & Practices

The Essential Defense Theories

Presented by:

Kenneth A. Krajewski, Esq.
Brown & Kelly, LLP
1500 Liberty Building
Buffalo, New York 14202
(716) 854-2620

BROWN & KELLY LLP

Est 1924 ATTORNEYS

Three components to a product liability case:

- Strict Product Liability
- Breach of Implied Warranty
- Negligence

Strict Product Liability

v.

Breach of Implied Warranty

- The differences between strict liability and breach of implied warranty are laid out by the Court of Appeals in Denny v. Ford Motor Company, 87 N.Y.2d 248 (1995)

- It is this negligence-like risk/benefit component of the defect element that differentiates strict products liability claims from UCC-based breach of implied warranty claims in cases involving design defects. While the strict products concept of a product that is "not reasonably safe" requires a weighing of the product's dangers against its over-all advantages, the UCC's concept of a "defective" product requires an inquiry only into whether the product in question was "fit for the ordinary purposes for which such goods are used" (UCC 2–314[2][c]). The latter inquiry focuses on the expectations for the performance of the product when used in the customary, usual and reasonably foreseeable manners. The cause of action is one involving true "strict" liability, since recovery may be had upon a showing that the product was not minimally safe for its expected purpose—without regard to the feasibility of alternative designs or the manufacturer's "reasonableness" in marketing it in that unsafe condition.

Restatement Standard

- The rest of the English speaking world uses this standard from Section 402A of the Restatement of Torts:

- "One who sells any product in **a defective condition unreasonably dangerous** to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, … ."
- *See also Restatement of the Law – Torts* §402A

NY PJI Strict Liability Definition

- New York's PJI Section 2:120 states:
- "A (manufacturer, wholesaler, distributor, retailer, processor of materials, maker of a component part) that sells a product in a defective condition is liable for injury that results from use of the product when the product is used for its intended or reasonably foreseeable purpose.
- A product is defective if it is not reasonably safe—that is, if the product is so likely to be harmful to (persons, property) that a reasonable person who had actual knowledge of its potential for producing injury would conclude that it should not have been marketed in that condition."

NY PJI Strict Liability Definition cont'd

- The Restatement standard, defective condition unreasonably dangerous, is defined as: "The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. … . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

NY PJI Strict Liability Definition cont'd

- The drafters of the PJI justify the deviation from §402A because "The pattern charge uses the phrase "not reasonably safe" rather than "unreasonably dangerous," because the latter phrase carries with it a connotation of extrahazardous danger that the former does not and that could confuse the jury."

- The advantage to the plaintiff in New York is that the defense must prove a negative, i.e., that the product is not "not reasonably safe," as opposed to the Restatement term "unreasonably dangerous."

NY PJI Strict Liability Definition cont'd

- The Restatement definition was changed in NY in *Voss v. Black & Decker*. There the Court of Appeals opined: "We believe that a variety of terms with various subtle distinctions in their definitions may tend only to create confusion in ascertaining the proper standard to determine whether or not a given product is defectively designed. Therefore, we conclude that the proper standard to be applied should be whether the product as designed was "not reasonably safe"—that is, whether it is a product which, if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner."

- *Voss v. Black & Decker Manufacturing Company, 450 NE2d 204.*

Establishing a Product as Reasonably Safe

- 1. The product's utility to the public as a whole;
- 2. Its utility to the individual user;
- 3. The likelihood that the product will cause injury;
- 4. The availability of a safer design;
- 5. The possibility of designing and manufacturing the product so that it is safer but remains functional and reasonably priced;
- 6. The degree of awareness of the product's potential danger that can reasonably be attributed to the injured user; and
- 7. The manufacturer's ability to spread the cost of any safety-related design changes.

Warranty and the Law

- The law implies a warranty by a manufacturer (wholesaler, retailer) that places a product on the market that it is reasonably fit for the ordinary purposes for which such product is used. If the product is not reasonably fit to be used for its ordinary purposes, the warranty is breached.
- *NY PJI 2:142 Products Liability – Breach of Implied Warranty*

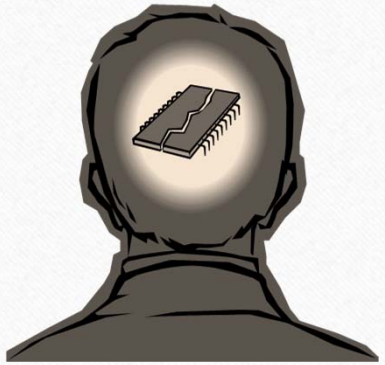
Strict Product Liability
v.
Negligence

- A difference between strict product liability and negligence is that there must be a finding of "fault" on the part of the manufacturer to find negligence.
- Strict liability requires no finding of "fault."

- *NY PJI 2:125 Products Liability - Negligence*

Identification of Product

- An immediate inspection is key. Memories change or fade.
  - What does a penny look like?
  - Which way does Lincoln face?
  - Where is the date?
  - What words are on the face of a penny?
  - What's on the back of a penny?




IN GOD WE TRUST
LIBERTY
2012
IN GOD WE TRUST
LIBERTY
2009
IN GOD WE TRUST
LIBERTY
1984


ONE CENT
ONE CENT
E PLURIBUS UNUM
UNITED STATES OF AMERICA
E PLURIBUS UNUM
ONE CENT

Identification of Product cont'd

- How many pennies have you seen in your lifetime?
  - Hundreds?
  - Thousands?
  - Millions?
- How many times has plaintiff operated or used the product?
- How many times have "witnesses" used or operated the product?
- How can you trust anyone's recollection?

Experts

- Use your client's expertise.
  - Do they have a product safety person?
  - A design engineer?
  - Who from the manufacturer knows the product?

- Caveat: at trial you may not want your "in house" person to be your only expert.

Expert Investigation

- Get an investigator to take photos and statements.
- What are you looking for?
  - Misuse, modifications to the product, wear and tear and lack of maintenance.
- If possible, get a court order to preserve the evidence.
  - *See CPLR 2701.*
- Learn the real story of what happened, good or bad.

Experts

- The attorney must also be an expert. A key to any great discovery deposition is knowing more about the product than the deponent. If you don't, you will be in trouble fast because you won't know the how to follow up on plaintiff's answers. Have the client "school" you on the product.
- In many cases, the client wants to be present during the plaintiff's dep. Be sure to work out all the ramifications of this with your client BEFORE making that decision.

Selling the Corporate Defendant

- Know your client!
- Know your product!

DEFENSE THEORIES

A) Establishing the Product is Reasonably Safe

- This is a usually jury question and does not lend itself to summary judgment.

- "It will be for the jury to decide whether a product was not reasonably safe in light of all the evidence presented by both the plaintiff and defendant."
  - *Voss v. Black & Decker Manufacturing Company, 450 NE2d 204.*

B) Compliance with Industry Standards

- ANSI
- UL
- ASME
- SAE
- NIOSH
- OSHA
- NYCRR
- Code of Federal Regulations

Compliance with Industry Standards cont'd

- Violation of a standard – does it mean negligence per se?

  - *PJI 2:29 Statutory Standard of Care—Ordinances or Regulations*
  - *PJI 2:28 Statutory Standard of Care—Special Statutory Actions*
  - *PJI 2:25 Statutory Standard of Care—Statute of General Application*

C) STATE OF THE ART

- "As the Supreme Court properly determined, the defendants made a prima facie showing that, at the time of its manufacture in 1988, the stitcher was state of the art, contained the same safety devices as comparable machines produced by its competitor, and conformed to industry safety standards." Maga*dan v. Interlake Packaging Corp*., 45 A.D.3d 650 (2 Dep't 2007).

- See also: *Terry v. Erie Foundry*, 235 A.D.2d 414 (2d Dep't 1997). (Erie submitted evidence from its own representatives and from an expert demonstrating that forging hammers manufactured in 1917 were not equipped with safety devices such as treadle guards, point of operation guards, or sweep guards. Moreover, the submissions established that the forging hammer at issue was state of the art at the time of its manufacture. The burden then shifted to the plaintiff to raise an issue of fact."

D) UNAVAILABLE ALTERNATIVES

- "A manufacturer or retailer may, however, incur liability for failing to warn concerning dangers in the use of a product which come to his attention after manufacture or sale, through advancements in the state of the art, with which he is expected to stay abreast, or through being made aware of later accidents involving dangers in the product of which warning should be given to users." *Cover v. Cohen*, 61 N.Y.2d 261 (1984).

- See also, *Perazone v. Sears, Roebuck & Co.*, 128 A.D.2d 15 (3d Dep't 1987): "[T]he Court of Appeals has held that, while evidence of postmanufacture design change is not admissible in a strict products liability action alleging a defect in design or failure to adequately warn or instruct, such evidence is admissible in a strict products liability action alleging a defect in manufacture. … . Such evidence is also admissible where a manufacturer disputes a plaintiff's proof of the feasibility of a design alternative or to establish the manufacturer's failure to warn of a known risk or defect… ."

D) Unavailable Alternatives cont'd

- Substantial modifications of a product from its original condition by a third party which render a safe product defective are not the responsibility of the manufacturer.
  - *Robinson v. Reed-Prentice Div. of Package Mach. Co.* , 49 N.Y.2d 471(1980).
- The manufacturer's duty, however, does not extend to designing a product that is impossible to abuse or one whose safety features may not be circumvented. A manufacturer need not incorporate safety features into its product so as to guarantee that no harm will come to every user no matter how careless or even reckless.
- Nor must he trace his product through every link in the chain of distribution to insure that users will not adapt the product to suit their own unique purposes. The duty of a manufacturer, therefore, is not an open-ended one. It extends to the design and manufacture of a finished product which is safe at the time of sale. Material alterations at the hands of a third party which work a substantial change in the condition in which the product was sold by destroying the functional utility of a key safety feature, however foreseeable that modification may have been, are not within the ambit of a manufacturer's responsibility.

E) MISUSE

- "A manufacturer is not liable for injuries caused by substantial alterations to the product by a third party that render the product defective or unsafe. Where, however, a product is purposefully manufactured to permit its use without a safety feature, a plaintiff may recover for injuries suffered as a result of removing the safety feature." *Liriano v. Hobart Corporation*, 92 N.Y.2d 232 (1998).

- AND: "The burden of placing a warning on a product is less costly than designing a perfectly safe, tamper-resistant product. Thus, although it is virtually impossible to design a product to forestall all future risk-enhancing modifications that could occur after the sale, it is neither infeasible nor onerous, in some cases, to warn of the dangers of foreseeable modifications that pose the risk of injury." *Id.*

F) Absence of Prior Similar Claims – Part I

- The questions about prior accidents were originally permitted over objection to establish that the condition was dangerous and that defendant had notice of it before plaintiff's injury. That evidence could have been admissible for such purposes if plaintiff established that the prior accidents were similar to his. *Sawyer v. Dreis & Krump Manufacturing Co.,* 67 N.Y.2d 328.
- We thus modify the order by directing defendant to disclose to plaintiffs all information, including design, engineering, manufacturing, and marketing records, and also including accident reports, complaints, claims, and lawsuits, involving Bobcat skid-steer loader models that are similar in design and operation to the Bobcat 742B model and that were involved in accidents similar to plaintiff's accident, i.e., in which a defectively designed or malfunctioning seatbar/safety bar and/or pedal interlocks led to the inadvertent movement of the Bobcat's lift arms. *Van Horn v. Thompson & Johnson Equipment Co., Inc.,* 291 A.D.2d 885 (4th Dep't 2002).

G) Absence of Prior Similar Claims – Part II

- In arriving at their conclusions that a software defect caused the alarm to fail, none of the experts did much actual testing of the software. Instead, they used a "reasoning to the best inference" analysis, which is similar to a differential diagnosis in the medical field where potential causes of the harm are identified and then either excluded or included based on their relative probabilities. *Graves v. CAS Medical Systems*, 735 S.E.2d 650 (S.C. 2012).

- Evidence of similar incidents is admissible "where there is some special relation between the accidents tending to prove or disprove some fact in dispute." *Id.*

G) Absence of Prior Similar Claims – Part II cont'd

- We also agree with the circuit court that these experts improperly relied on reports of other failures to bolster their conclusions that software error was to blame. Evidence of similar incidents is admissible "where there is some special relation between the accidents tending to prove or disprove some fact in dispute." A plaintiff bears the burden of demonstrating the other accidents are "substantially similar to the accident at issue" by demonstrating that the products are similar, the alleged defect is similar, the defect caused the other accidents, and there are no other reasonable secondary explanations. *Id.*

- While the products in the FDA report are similar to the one here, the record contains no evidence suggesting any further connection to or whether a software error was even involved in these other cases. In order to deem these other incidents substantially similar, we would have to automatically equate an alleged failure with a software defect of the kind claimed by the Graves without any evidentiary basis for doing so. *Id.*

H) Absence of Prior Similar Claims – Part III

- To establish that a manufacturer knows or has reason to know of the danger in a duty to warn case, a plaintiff may present evidence of similar incidents, provided the prior incidents occurred " 'under substantially the same circumstances, and had been caused by the same or similar defects and dangers as those in issue.'" *Funkhouser v. Ford Motor Co.,* 736 S.E.2d 309 (Va. 2013).
- Funkhouser notes that liability under a failure to warn claim does not require a showing of any defect, only a showing that the manufacturer "knows or has reason to know that its product is dangerous." Thus, Funkhouser advocates that a relaxed substantial similarity test, where the terms "defects" and "dangers" are interchangeable, is necessary in failure to warn cases. *Id.*
- [T]he substantial similarity test consists of two prongs: (1) the substantially same circumstances prong and (2) the causation prong. Removal of the defect requirement from the causation prong would allow a plaintiff to attribute notice and actual knowledge to a manufacturer based on the mere existence of a generalized danger; there would be no requirement for the danger to be attributable to the manufacturer in any way. *Id.*

H) Absence of Prior Similar Claims – Part III cont'd

- Indeed, Funkhouser's relaxed substantial similar-ity test would undermine the entire causation prong of the test. By advocating the elimination of the requirement of similar defects from the test, Funkhouser is asking this Court to invert the test and infer similar causes, i.e., defects, from the existence of similar effects, i.e., fires. This inversion simply does not work: although a faulty cigarette lighter may cause a key-off dashboard electrical fire, not all key-off dashboard electrical fires are caused by a faulty cigarette lighter. Whether it is a products liability claim or a failure to warn claim, our jurisprudence establishes that the evidentiary test governing the admissibility of evidence relating to prior incidents must be strictly adhered to. To hold otherwise would allow a plaintiff to establish that a manufacturer knows or has reason to know of a danger based on prior incidents that were not attributable to that manufacturer. Therefore, we reject Funkhouser's argument that the court should adopt a relaxed substantial similarity test for the admissibility of prior incident evidence in failure to warn causes of action. *Id.*

Thank you.

Kenneth A. Krajewski, Esq.
Brown & Kelly, LLP
1500 Liberty Building
Buffalo, New York 14202
(716) 854-2620

BROWN & KELLY LLP
Est 1924 ATTORNEYS