

Products Liability

Preparing the Plaintiff's Cases

By Richard Alexander



The plaintiff's attorney wins or loses a products case in the early days following the accident, when he must initiate the preliminary investigation.

Immediate Investigation

The first priority is preservation of evidence. The product must be secured and photographed when appropriate, at the scene of the injury. The product and its container should be marked and detailed photographs taken.

Counsel also should obtain the complete history of the article. Determine the date of the original sale, identity of the dealer, distributor, subsequent purchasers, lessees and users. Locate the instruction booklet, assembly booklet, warranties and all other written material that accompanied the new product at the time of the original sale and distribution. Determine whether the article was modified or otherwise changed after it left the possession of the manufacturer and distributor and, if so, the identity of the persons or entities which made the modification and the dates involved.

When the product is in the possession of a third party or one of the anticipated defendants, plaintiff's counsel should immediately file an independent action for a temporary restraining order and a preliminary injunction to avoid alterations or destructive testing. The temporary restraining order should be carefully drafted so that anyone receiving notice of the order should be carefully drafted so that anyone receiving notice of the order and in control of the article will be required to deliver it to the possession of a neutral person and to initiate preventive measures against damage in transit.

Counsel should next obtain the basic background data. This includes a complete description of the article; the manufacturer, distributor, sources of all component parts and all written materials pertaining to the product; advertising brochures, instruction booklets, technical data, parts manuals, repair manuals, operating manuals, catalogs, technical and lay advertisements, blueprints and diagrams of the article and component

parts.

Consider buying two or more duplicate products for later testing and use at trial. Often designs and product literature will change or are simply not available as trial time draws near.

Defendants

The potential defendants in a products case include the manufacturer, assembler, component supplier, testing laboratories, advertising agencies, distributors, retailers and repairers. See generally, 8 Pacific L.J 865 (1977), 9 Univ. of Cal. Davis L. Rev. 421 (1976).

It is always important to name not only successor but predecessor corporate manufacturers. *Ray v. Alad* 19 C 3d 22 (1977). In some jurisdictions a purchaser of an existing business does not assume the liability of a former corporation unless such liability is expressly assumed in a contract of sale or under circumstances where two corporate entities have merged. In these cases it is important to name the predecessor corporation.

In addition, bailors and lessors can be held strictly liable, *Foster v. Day and Zimmerman Inc.* 502 F2d 867 (8th Cir 1977), as well as an employer, when the employer manufactured the defective product. *Douglas v. E. J. Gallo Winery* 69 CA 3d 103 (1977).

Governmental Assistance

In proving the plaintiff's case, a plethora of federal and state statutes, regulations, and safety orders concerning a variety of products will assist.

Obviously, the discovery of a violation gives the plaintiff's attorney an outstanding advantage. Not only may a statutory scheme such as the Consumer Products Safety Act, provide for a direct civil remedy, but counsel may also locate agencies concerned directly with the product which can serve as a basis for gathering further information. Federal statutes encompass aircraft, automobile equipment, boats and boating equipment, insecticides, electronic products radiation, flammable fabrics, foods, drugs, cosmetics, medical devices, hazardous substances, highway safety, household refrigerators, packaging to protect children, mobile homes, motor vehicles, natural gas pipelines and occupational safety and health.

In California, as well as other states, the Legislature has provided standards for a broad range of products: animal feed, blood products, brake fluid, canned foods, barbecue charcoal, electrical power lines, excavations, fire extinguishers, flame retardants, bedding, ceramic tableware, fireworks, honey, water, paint, meat, milk, petroleum products, pipelines, cranes, trenches, plastic bags, radio-active materials, swimming pools and toys. In addition the California Division of Industrial Safety issues safety orders regarding aerial trams, boilers, compressed air, construction safety, electrical safety, elevators, mobile equipment, plant equipment, dangerous machinery, power transmission equipment, high voltage electricity, sawmills, mines, oil drilling, oil refining, ship building, tunnels and window cleaning.

State police or the highway patrol should be checked for regulations concerning the use and equipment of motor vehicles. Most state fire marshals issue fire safety standards and basic building design and construction standards.

Numerous federal agencies can help the attorney prepare the plaintiff's case.

The U.S. Consumer Products Safety Commission is an independent federal agency whose main purpose is to reduce injuries. The Commission issues consumer product safety rules and can ban hazardous products. It maintains an Injury Information Clearing House to investigate and disseminate data relating to the cause of injuries associated with consumer products.

The National Technical Information Service of the U.S. Department of Commerce supplies a wide range of technical information and has a literature search service.

The Occupational Safety and Health Administration (OSHA) publishes numerous regulations and pamphlets on workplace safety and health standards, the use of industrial substances, and safety in industrial and construction operations.

Another source for information on regulated substances is the Environmental Protection Agency, which has the authority for air, water and pesticide standards.

Information concerning standards for various products and materials is available from the Office of Technical Information and Publications of the National Bureau of Standards.

The Food and Drug Administration should be contacted in cases involving food, drugs, medical devices or cosmetics. The FDA establishes the standards for regulated products and also has information on drug ingredients and food and drug manufacturing methods.

Electronic products which may emit radiation are regulated by the Bureau of Radiological Health, which has information concerning research, testing, and recall campaigns.

The National Highway Traffic Safety Administration develops and issues safety standards for all new cars, conducts research on accident prevention, investigates motor vehicle defects and enforces notification of defects to owners of record. Numerous publications are produced by the Administration for consumers and their lawyers. The Federal Highway Administration is concerned with improving highway safety and conducts highway safety research relating to trucks and busses. The Transportation Research Board will conduct a computerized search and furnish abstracts of all engineering articles pertaining to highway topics.

The United States Coast Guard sets standards, makes factory inspections and conducts investigations of consumer complaints of defective boats. The Coast Guard notifies boat owners when defects are found.

Some other federal agencies that can assist the plaintiff's lawyer are the Federal Aviation Administration, the National Transportation Safety Board, and the Federal Fire Council.

Private Sources of Product Information

Counsel also should take advantage of the enormous amount of safety and accident prevention information published by insurance organizations. The Factory Mutual Engineering Corporation of Norwood, Massachusetts, publishes a catalog of books, pamphlets and films on the prevention of industrial accidents and data containing technical

information for preventing losses by fires, explosions and machinery accidents.

The American Insurance Association maintains an engineering and safety service and has pamphlets concerning a wide range of accident prevention topics.

Technical and scientific information can be located in several indices which contain references to scientific books, articles and reports on almost every product manufactured. The Applied Science and Technology Index, Engineering Index, and Science Citation Index should be checked.

The National Safety Council, National Fire Protection Association, American National Standards Institute, American Chemical Society, American Society of Mechanical Engineers, American Water Works Association, and the Manufacturing Chemist's Association all have scientific and technical data.

The Automotive Safety Foundation in Washington, the Transportation Safety Department of Calspan in Buffalo, New York, and the Highway Safety Research institute in Ann Arbor, Michigan all do research in the field of automobile design. The Society of Automotive Engineers in Warrendale, Pennsylvania maintains a complete library on automobile components and safety standards.

Expert Advice

The search for information is often an arduous task and in many cases will be assigned to an expert in the field. Finding a qualified expert at the outset is usually the major factor in successfully proving the plaintiff's case.

Although a university professor may make an excellent witness, the skilled technician or mechanic with years of practical experience should not be overlooked.

Lists of experts in various fields can be purchased from the California Trial Lawyers, San Francisco Trial Lawyers and the Los Angeles Trial Lawyers Associations. The *Jury Verdict Reporter*, in addition to its monthly report of verdicts, publishes a valuable semi-annual index of all experts who have testified during the preceding six months. The list is indexed by name and field and is cross-referenced to the reported verdict. Should a particular expert interest you, speak with the attorney for whom the expert testified. Determine the nature and extent of the expert's qualifications and his or her impact on the jury.

A literature search can usually provide a list of potential experts on esoteric subjects or, at a minimum, will lead to qualified experts willing to consult with attorneys. In a recent case involving a vintage fire hose coupling which failed when placed under pressure, all identifying marks had been obliterated by use and the manufacturer was unknown. A literature search uncovered a San Diego author, an expert on fire hose coupling threads, who was able to identify the small Wooster, Ohio, manufacturer from a photograph of the coupling. After service the manufacturer admitted that the coupling had been originally designed with set screws to prevent failure, but this safety device had not been utilized until after field complaints confirmed the need for this feature. This information flowed from a few hours in the library and a telephone call and short letter to the author.

Often a competitor of the defendant manufacturer will refer you to a

recently retired employee "with forty years experience in the field" who is now consulting. While many such persons can never shake their "company" orientation, they are useful for referrals to other qualified persons in the industry. A patent search also can be a source of potential experts, and most patent files contain numerous references to industry data not catalogued or otherwise indexed.

In addition to utilizing engineering testimony, consideration should also be given to psychologists or experts specializing in the field of human factors. On occasion a strict engineering approach fails to consider that a product must be designed so that people can safely use it.

In appropriate cases, testing, either destructive or nondestructive, may be necessary to determine whether there is evidence that the product failed or could fail in the manner theorized by the plaintiff.

Approaches to Discovery

The plaintiff's expert should also help determine exactly what information needs to be developed or obtained in the course of discovery.

Carefully drafted interrogatories can be a strong tool to perfect the plaintiff's claim. Interrogatories should identify and locate blueprints and diagrams of the product and component parts, the materials used in manufacture and their suppliers, a breakdown and analysis of the manufacturing and quality control processes, the schedule of inspecting and testing of the product, patents and patent applications, dealer bulletins, advertising materials, trade journals, and scientific journals.

In some instances, a manufacturer may have an indexing system to all its records. In the birth control pill litigation with Searle Company, manufacturer of Enovid, Searle denied that one of the known side effects was thrombophlebitis. In the course of discovery a computer printout listing complaints from doctors about the side effects was located which referred to numerous complaints of thrombophlebitis.

Interrogatories should also obtain information pertaining to subsequent design or manufacturing changes, since evidence of subsequent changes is admissible in products litigation. *Ault v. International Harvester Co.*, 13 C.3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1975).

Interrogatories must identify pertinent standards issued by engineering associations concerning the product in question and locate the complete accident history file for the product and other similar models, and information concerning any other lawsuits. Counsel should determine if the manufacturer maintains a safety committee and whether or not minutes of discussions exist. Determine if there is a regular document destruction program and, if so, what documents have already been destroyed.

Interrogatories should identify each person connected with the design not only of the product in question but of similar products, including employees of the manufacturer and others consulted concerning the design. Reasons for selection of the design in question from alternates should be explored, as well as a description of safety features, the persons designing such safety features and all subsequent testing of safety features. Information regarding safety devices known to a manufacturer but not used should also be obtained. Much testing goes on during designing and a description of each test conducted with all test records should be elicited from the defendants. Counsel should also determine the intended use of the product

when the design was originally considered and the contemplated conditions under which the product was to be operated.

Often answers to interrogatories will provide you with an opportunity to gain access to valuable test data and interoffice memoranda. During the MER/29 litigation against Richardson-Merrell Company, a number of skeletons were found hiding in corporate file drawers. MER/29 was developed and marketed to help reduce blood cholesterol. One side effect was the appearance of cataracts on the eyes of some users, which led to partial loss of sight in some cases.

Over a thousand personal injury claims were eventually filed and in the course of discovery a memorandum detailing cataracts in laboratory dogs and monkeys was found. The fact that Richardson-Merrell had concealed this knowledge was proved through interoffice memos obtained through discovery.

When doctors began to realize the side effects of MER/29 they were contacted by Richardson-Merrell employees. One interoffice memorandum advised a Richardson-Merrell employee to respond to a complaining doctor by cooperating with him in the hope that it might keep him from publishing before Richardson-Merrell could "snow" him with data from other sources.

In a 1974 Paris air crash 345 people were killed when an aircraft baggage door opened unexpectedly. Detailed discovery was the key to the plaintiffs' success. Two years before the accident, in June, 1972, one of the defendant's engineers wrote a memo stating:

"The fundamental safety of the cargo door latching system has been progressively degraded since the program began in 1968. The airplane demonstrated an inherent susceptibility to catastrophic failure when exposed to explosive decompression of the cargo compartment in 1970 ground tests."

These examples of successful discovery prove the truth of the litigator's adage that "the paper does not lie." Every successful products liability case rests on a solid foundation of thorough discovery of internal corporate records, which provide unimpeachable, convincing proof of liability.

Conclusion

Because product liability cases require detailed preparation, an early determination of potential liability is essential before expensive discovery is undertaken. Promptly securing the defective product and fully utilizing inexpensive sources of product information can reduce the cost of litigation and at the same time provide valuable aids for establishing liability.

Appendix

National Technical Information Service, US Dept of Commerce, 5285 Port Royal Road, Springfield, Virginia 22161.

Consumer Product Safety Commission, 5401 Westbard Avenue, Bethesda, Maryland 20016.

Injury Information Clearing House Consumer Product Safety Commission, 5401 Westbard avenue, Room 323, Bethesda, Maryland 20016

Editor, Publications Newsletter National Bureau of Standards, Administration Building, Washington, D.C. 20234

Office of Technical Information and Publications, National Bureau of Standards, Washington, D.C. 20234

Automotive Safety Foundation, 1776 Massachusetts Avenue, N.W., Washington, D.C. 20036

National Transportation Safety Board, Washington, D.C. 20594

Federal Highway Administration, 450 Golden Gate Avenue, San Francisco, California 94102

National Highway Traffic Safety Adm. Technical Reference Bureau, 400 Seventh St., SW, Room 5108, Washington, D.C. 20590

California Trial Lawyers Assn., 1020 - 12th Street, Sacramento, California 95814

Institute For Product Safety, 1410 Duke University Road, Durham, NC 27701, 919/489-2357

Transportation Research Board Department of Industrial Relations, 455 Golden Gate Avenue, San Francisco, California 94102

National Safety Council, 425 North Michigan Avenue, Chicago, Illinois 60611

American National Standards Institute, 1430 Broadway, New York, New York 10018

Transportation Safety Department, Calspan Corporation, Post Office Box 235, Buffalo, New York 14221

Society of Automotive Engineers, Inc., 400 Commonwealth Drive, Warrendale, Pennsylvania 15096

Highway Safety Research Institute, University of Michigan, Ann Arbor, Michigan 48105

Institute Of Polymer Science, University of Akron, Akron, Ohio 44325

Oregon Trial Lawyers Association, 225 S.W. Harrison, Suite 1-C, Portland, Oregon 97201

Association of Trial Lawyers of America, 1050 - 31st Street NW, Washington, D.C. 20007

Washington Trial Lawyers Assn., 738 Bellevue Avenue, East, Seattle, Washington 98102

IN BRIEF SPONSORS

The Attorney's Suite

95 South Market St., Suite 300

San Jose, CA 95113

(408) 288-5250

Western Appraisers

1101 S. Winchester Blvd. I-209

San Jose, CA 95128

984-2121