Products Liability – Elements of Proof

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BY DON WALTZ

A significant percentage of subrogation claims involves fires or other property damage caused by defective products. Most often, these involve some sort of electrical or mechanical failure of the product. Proving the defect in the product is often difficult, because, for example, if the product was involved in a fire, normally the product is completely destroyed, and this makes it difficult to establish the precise nature of the defect. Therefore, in order to maximize subrogation recoveries, it is important for the subrogation practitioner to have a general understanding of the background of products liability, and the manner in which a defect can be proven.

Background of Strict Products Liability

Strict liability in tort is a doctrine which was developed during the 1960's. Before the adoption of strict products liability, those persons injured by a product were restricted to negligence and implied warranty theories. This limitation often left consumers who were injured by products with no remedy.

With regard to negligence claims, there were two significant hurdles. First, the injured consumer had to establish that the supplier of the product failed to exercise reasonable care in designing or manufacturing the product, or failed to provide sufficient warnings to accompany the product. If the supplier exercised reasonable care, but the product was nonetheless defective and caused damage to the consumer, the injured consumer could not recover. Additionally, negligence claims could not be asserted in the absence of privity. Privity is best described as a direct contractual relationship between the consumer and the supplier. Since many products were purchased from retailers or wholesalers, the injured consumer could not bring a claim

against the manufacturer based on the manufacturer's negligence in designing the product absent such privity.

Similarly, implied warranty claims were an inadequate remedy for consumers. Under implied warranty theories, the supplier of a product impliedly warrants that the product is free from defect. If the product is defective, and causes injury to the consumer, then the supplier is responsible for those defects. However, until the adoption of the Uniform Commercial Code, privity issues still predominated the implied warranty theory. Absent privity between the consumer and the manufacturer of the product, the consumer was precluded from bringing a claim.

Strict liability in tort was adopted to alleviate the limitations on consumer recoveries inherent in negligence and implied warranty theories. The basic principle of strict liability in tort is that if someone sells a product that is defective, and that defect causes injury, the supplier of the product is liable for those injuries regardless of whether the supplier was at "fault" in causing the defect. In adopting this theory of liability, courts, and often legislatures, reasoned that an injured consumer should not be required to solely bear the cost of his injury. Rather, the cost of injuries caused by defective products should be spread among the manufacturers, and, by price increases, to the consuming public as a whole. In addition, strict liability in tort eliminated the privity restrictions which were inherent in negligence and implied warranty claims. All suppliers in the "chain of distribution" of the product are liable for the defect, regardless of who created the defect.

Adoption of Strict Liability

In the 1960's, the American Law Institute drafted and adopted Restatement (Second) of Torts § 402A. That section provides as follows:

(1) 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, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Although states vary in their application of § 402A, and many states have adopted statutory versions of the Restatement, the Restatement does serve as the "model" for virtually all strict products liability law.[1] Generally, the key elements of strict liability established by the Restatement are:

1.) the product reaches the consumer in substantially the same condition as it left the hands of the supplier;

2.) the product contains a defect; and

3.) the defect is the proximate cause of the damages sustained by the consumer.

These are the key elements in any products liability claim. The first element is often easily established. If the product is sold in its packaging, the fact that the consumer received the

[1] Some states, notably, Delaware, Virginia and Massachusetts, have not adopted strict liability in tort.

product in its original packaging is certainly *prima facie* evidence that the product is in the same condition as it was when it left the hands of the manufacturer. Also, testimony that the insured never altered or modified the product in any manner serves to establish that the product, at the time of the incident, was in the same condition as when it left the hands of the manufacturer.

The third element in a subrogation case is also most often easily proved. Your cause and origin expert needs to have determined the cause of the fire before you can proceed with any product liability claim.

The second element, the existence of a defect, is usually the most difficult element to prove. If the product in question caused the fire or other property damage loss, then the question becomes precisely how the product caused the loss, and whether that loss is a result of a defect in the product. There are generally three types of defects in products:

1.) Manufacturing Defects

The manufacturing defect is the most basic defect. It simply means that the product was not manufactured to its own specifications. For example, a metal used in the product may have contained a fracture. Wires may not have been properly connected during the assembly process. Examples of manufacturing defects are myriad. Once a manufacturing defect is identified and established, the liability of the supplier of the product is clear. Obviously, the product should have been manufactured to its own specifications. Therefore, while physical evidence of a manufacturing defect is often difficult to prove if the product was destroyed by fire or other means, if the manufacturing defect can be identified, subrogation prospects are very good.

2.) Design Defects

Design defects are easier to physically identify than manufacturing defects. For example, if a product is completely destroyed by fire, it may be difficult to prove that a specific wire was

not connected as required during the manufacturing process, etc. It is easier to show, by design drawings, exemplars, etc., that there is some criticism in the design of the product which may have led to the fire. For instance, a product which your expert knows overheated and caused the fire would be a good example. If the product lacked thermal protection in its design, then establishing factually that this design allowed the fire to occur is easier than establishing a manufacturing defect.

There are many different "tests" used by the courts to establish the existence of a design defect. They are as follows:

1. Whether the product has an element which makes it unsafe, or lacks an element necessary to make it safe;
2. The consumer expectation test. This allows the jury to consider whether the product reached the consumer in as safe a condition as a reasonable consumer would expect;
3. A risk/utility analysis. Under this test, the jury is allowed to consider whether the risks of the product design outweigh the utility of the product design, and if they do, to determine that the product is indeed defective.

All of the above defect tests obviously require expert testimony to establish the existence of a defect. However, expert testimony in design defect cases will be subject to the highest level of judicial scrutiny. Your expert will in essence be testifying that he would design the product better than the design engineers employed by the manufacturer. Therefore, if you wish to prove this type of case, you need the most qualified, specific expert possible. In addition, your expert must do all of his homework, and must explore all alternative designs, the feasibility of such designs, the state of the art in the industry at the time the product was sold, etc.

Use of industry standards can be a very fertile ground in design defect cases. There are industry standards that are used as guidelines in designing and manufacturing products. One set of the standards are those promulgated by the American National Standards Institute. They have a variety of standards on design issues and warnings issues for products. If you can establish a violation of one of these standards, it can serve as good, tangible proof of a defect.

Another set of standards are those promulgated by Underwriters Laboratories. Underwriters Laboratories has extensive standards for electrical products. In addition to establishing these standards, Underwriters Laboratories actually certifies, for a fee, that the product is in compliance with the standards. If an electrical product does not meet UL standards, that, again, is good proof of a defect. There are exceptions, however, in which some products may actually be certified by UL, but for some reason, do not meet the UL standards. Again, if that is the case, this is persuasive evidence of the existence of a defect. Occasionally, a manufacturer may use the UL label on a portion of a product, when, in fact, the entire product has not been certified by UL. For example, in one instance, the manufacturer of a product placed the UL sticker on the cord of the product. The cord was, indeed, UL approved. However, the product as a whole was not. This would certainly lead the consumer to believe the product was UL approved. Under those circumstances, you could actually allege fraud or misrepresentation concerning the fact that the product was UL approved.

3.) Failure to Warn

Another basis of product liability is a failure to provide proper warnings or instructions with the product. If the failure to provide such warnings or instructions to the consumer renders the product unsafe for use, then the product is defective. Typically, this requires a hazard of the product that is “latent” rather than open and obvious. A classic example is the spontaneous

combustion capabilities of oil finishing products such as linseed oil. The average member of the consuming public does not know that linseed oil or other finishing oils can self-ignite if left on rags in a pile. Therefore it is incumbent on the manufacturer to provide a clear warning concerning this risk and how to avoid it.

It is important to note that just because a warning does exist on the product, this does not mean that there is no potential for subrogation. The key is that there must be an "adequate" warning. If the warning does not thoroughly explain the risk, and plainly explain the manner in which to avoid the risk, it is not adequate. Similarly, if the placement of the warning is such that a reasonable consumer may not see it, then again, the warning is not adequate.

States differ as to whether warnings should be judged on a "fault" based concept. Some states have ruled that a determination of whether there is an adequate warning on the product necessarily involves a determination of what was reasonable on the part of the manufacturer. When courts start imposing a determination of what is "reasonable", this necessarily involves concepts of fault. Therefore, with warnings, you should be prepared to establish that the manufacturer was unreasonable, and was at "fault" when it designed the warning. One way to do this is to establish that the manufacturer employed no experts on the issue of designing the warning. Often, manufacturers will simply have the R&D engineers or their marketing staff draft the warnings. If the product is hazardous, that is inadequate. The manufacturer should either have a person "expert" in designing warnings on its staff or retain a firm expert on warnings to formulate the label for the product.

Fault

It has been noted several times above that strict products liability is not a "fault" based concept. The manufacturer is responsible for defects in the product even though the

manufacturer has exercised all reasonable care. However, this is a legal concept. As a practical matter, in all cases, you should be prepared to, if possible, establish "fault" on the part of the manufacturer. The jury may impose its own version of products liability on your case. If the jury views the manufacturer's conduct as reasonable, it may find that the manufacturer is not responsible, even if the product was defective and caused the loss.

The Malfunction Theory

The malfunction theory of products liability is simply an acknowledgement that sometimes it is impossible for the plaintiff to offer direct evidence of the defect and therefore proof of the defect must be made by circumstantial evidence. An example is when a coffee carafe breaks while it is being held by the handle and the plaintiff is burned. The plaintiff cannot establish the specific reason the carafe cracked, but nonetheless the jury is permitted to infer that there must have been a flaw in the glass. In other words, the malfunction theory allows the jury to infer a defect from the circumstances.

The elements of the malfunction theory are phrased differently from state to state. However, they generally are:

1.) Proof that the product failed at a time or in a manner in which it would not be expected to fail from ordinary wear and tear;

2.) There is an absence of "secondary causes" that could explain the failure.

The malfunction theory has particular and important application in fire subrogation cases. In these cases, the product is often so damaged by fire that the direct proof of the defective

nature of the product cannot be established. Generally in such cases, the plaintiff can rely on the malfunction theory if the plaintiff can establish:

1.) The cause and origin expert has determined that the fire originated at the product;

2.) The product was relatively new, i.e., early in its useful life;

3.) The product was properly used by the plaintiff;

4.) There was never any known incident of trauma to the product;

5.) An additional but not necessary factor would be to have an expert specialist testify that he has examined the product, that it is so extensively destroyed that he cannot identify the precise defect, but that there are several ways that the product could have started the fire, all of which would be attributable to a defect.

An example of where the malfunction theory would be permitted is where a relatively new toaster is identified by the cause and origin expert as the only potential cause of the fire. The plaintiff testifies that nothing happened to the toaster and that it was always used properly. Your electrical expert testifies that the damage to the toaster is so extensive that it is impossible to identify the specific defect that caused the fire, but that it could have been caused by an improper electrical connection, a failure of a switch, or a failure of the thermostat, etc. The case should go to the jury and the jury should be permitted to infer a defect from the circumstances. However, the jury certainly does not have to. In fact, the defendant can offer evidence as to quality control measures, design safety features, and the absence of other fires to establish that the plaintiff's experts are simply wrong.

An example of where a case is not permitted to proceed on a malfunction theory is where a power cord to an eight-year-old refrigerator causes a fire. The remains of the cord are so damaged that it is impossible for any expert, plaintiff's or defendant's, to identify the specific problem with the cord that caused the fire. Under these circumstances, the court would properly refuse to allow the case to go to the jury. The power cord functioned without a problem for eight years prior to the fire. Power cords by their nature are susceptible to external damage, which over the eight-year history of the cord is impossible to rule out. The jury simply should not be entitled to infer from these circumstances that a defect must have existed.

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