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The Big Four defense strategies in products-liability cases

Blame the state of the technology, the plaintiff, his employer or a component manufacturer

By Larry Booth

Defense strategies in products cases are very predictable. The idea is to confuse the jury on what makes a product defective, blame the accident on the injured plaintiff or his employer or deflect blame to some other company. Here then, are the Big Four defenses and their accompanying strategies.

State of the art

Defense attorneys will contend that the product is not defective because it is "state of the art." State of the art is not strictly a defense, but it is used so often that it must be understood. The true meaning of state of the art is the state of technological development at the time the product is introduced into the stream of commerce.

Defense attorneys use it to mean any product that is consistent with similar products actually being manufactured. In other words, they use state of the art interchangeably with custom and usage.

Perhaps, more importantly, defense experts will misuse the term repeatedly and it is difficult to control. For example, in our practice, we sued the manufacturer of a power lawn mower that blinded the operator in one eye when it propelled a rock into his eye. The defense expert repeatedly attempted to refer to the fact that our safer design was not actually used by any manufacturer, although it was clearly within the state of technology. The mower merely needed a shield, which has been used to deflect rocks since Julius Caesar. It took a motion in limine, a good trial judge, and numerous *in camera* instructions to keep this information away from the jury. Custom and usage is irrelevant in a products liability case in which the plaintiff is not claiming negligence.

Plaintiff's negligence

The plaintiff's comparative negligence is, of course, a defense to a negligence claim, but logically, it should not be a defense to a products liability theory. It makes little sense to apportion fault between a plaintiff and a defendant when the defendant's liability is not based on fault. Often, the defense is framed in terms of the plaintiff's misuse of the product. In most jurisdictions, misuse by the plaintiff is not a defense if the misuse is reasonably foreseeable. Allegations of misuse bring into play anecdotal evidence of typical use and evidence of prior similar accidents and injuries.

Employer negligence

Products cases often arise in industrial settings, e.g., a punch press. When they do, defendants will initially point the finger at the plaintiff for "misusing" the product and/or the employer for failing to instruct properly in the use of the product.

The plaintiff's best argument is the manufacturer's vastly superior knowledge about the product compared to the plaintiff or the employer. The manufacturer may have had 100 prior similar injuries and a thousand prior similar complaints. None of these is known to the plaintiff or plaintiff's employer. What is worse, the defendant will exaggerate the product and make claims that are completely unsupportable and actually induce the employer to purchase the product or the employee to misuse it.

Component-part manufacturers

The fact that a component part made by another company may have caused the accident because of a physical or design defect does not relieve the defendant manufacturer of the entire product from liability. It is highly unusual to find any product in which the hardware is entirely made by the company that puts its name on it.

If the component-part manufacturer is also a defendant or cross-defendant, the plaintiff and the main defendant may end up ganging up on it, which always helps the plaintiff. Of course, this assumes that the component manufacturer has adequate coverage or is sufficiently large to pay any judgment on a self-insured basis.

Sometimes, plaintiffs will settle at the last minute with the main manufacturer and then try the case against the component manufacturer. The component manufacturer often assumes that it is just along for the ride, and hence not properly prepared and represented by less than stellar talent. It can be a mismatch. For example, some years ago, in our jurisdiction, a well-known plaintiff's attorney settled at the last minute against a manufacturer of a car. The claim at trial was that the plaintiff was ejected from the automobile because of a defective door lock manufactured by the component manufacturer. The size of the resulting verdict was a disaster for the lock manufacturer.


Booth

Larry Booth is the author, along with his son, Roger Booth, of the 600-page Personal Injury Handbook *(www.JamesPublishing.com) and has tried hundreds of jury trials. His firm,* Booth & Koskoff, *has achieved over 70 jury verdicts and settlements in excess of $1million. In 1974 he was selected to the Inner Circle of Advocates, whose membership is limited to the top 100 Trial Lawyers in the United States.*

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