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Products Liability- Preparing and Pleading the Plaintiff's Case

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PRODUCTS LIABILITY

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PREPARING AND PLEADING THE PLAINTIFF'S CASE

INTRODUCTION

When an injured client takes his seat across your desk for the first time to tell you his story, you, as his lawyer, have more opportunities to serve him, and at the same time are charged with a heavier legal responsibility that any time in history. This is largely because of new vistas that are being opened every day in the personal injury field. Although numerically increasing, the variety of automobile accident cases as such is nearly static. Every new automobile that comes off the production lines becomes a potential target for some fifty million other vehicles. As the automobile population increases arithmetically, the litigation it generates increases geomerically. This is brought about by an increase in the number of accidents—not in their variety. Liability stems largely from some careless conduct on the part of the actor, not from the product he drives.

Product liability, however, is in its infancy, both in theory and practice. Industrial production is being geared annually to new high levels, with previously untried drugs and other products of merchandise finding their way into our stores and homes each year. Aside from the great benefits they confer upon the consuming public, they not infrequently result in injury or harm if not properly manufactured or compounded, carefully tested, or clearly and accurately labeled. Additionally, the law has sought more and more to protect the consuming public from injuries resulting from use of these new products, and has imposed rigid requirements both through legislatures and courts, upon those who supply them. New bases of recovery outdate formal legal principles that were instilled in us as recently as ten years ago.

It is because of these changes that the plaintiff's lawyer must now, as never before, be keenly alert, beginning with initial client interview, to explore all channels and theories of recovery before bringing his case to court.

Almost every type of injury could have a product liability theory lying hidden but awaiting discovery. Where the source of injury is damage to the hair or scalp from application of an improperly compounded hair wave lotion, or a collison caused by a blown out tire, the lawyer may readily recognize that a defect in the product might be the sole or most likely cause of injury. However, such a liability can crop up in the most unsuspected places. Even in a rear end automobile accident or head-on collison, claim may be made by the defendant driver that the sole cause of the accident was defective brakes, a failure of the steering gear or

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other mechanical defect for which he denies responsibility. Such a claim may be made, either to the police at the scene or through subsequent discovery proceedings. Only the most unsophisticated lawyer would sue only the driver and rely upon the doctrine of res ipsa loquitur. Many believe that a "res ipsa" case is tantamount to money in the bank. They are the same lawyers who leave the courtroom following an adverse jury verdict shaking their hands and bemoaning the parade of skilled experts who have convinced the jury that the paltry inference to which res ipsa loquitur gives rise, and which was so heavily relied upon, had been found by the jury to have been dispelled.

The difficulties besetting the careful lawyer in such a case are many. He must, *at the outset*, be able to point to the product which caused or contributed to the injury, endeavor to locate the defective object, and test it, or test a product of identical composition, to be able to show what was wrong with it. He must also understand the laws of product liability as they exist at the time he accepts the case; and he must forecast the probable interpreation of the courts at the time his case is tried or appealed.

Let us turn, then, to some of the factual matters that should be drawn from the client at the initial interview, to the tactical problems that arise before the complaint or declaration is filed, and how that very important pleading should be prepared.

THE CLIENT'S STORY

At the initial interview, and not later, the attorney should exhaust all of his client's factual knowledge of any possible product liability involvement. This is especially so in those jurisdictions in which a written claim or demand must be presented within "a reasonable time" and prior to the filing of suit. Because the time limitation for presenting such claim or demand is not specifically prescribed by statute, the premium for promptness is greater than would be case if it were prescribed. If, for example, a sixty, ninety, or one hundred and eighty day claim time is fixed by statute, the attorney need merely be concerned with having it presented at any time within that period. However, where the law provides for "reasonable notice" the actual time of filing of the claim is always open to challenge by the defendant upon the ground that it was "unreasonable." A wait of ninety days, for example, might well be excessive where a restaurant patron was poisoned by food, saw a lawyer the same day, and had recovered fully one month later. While an adverse summary judgment of the trial court on that ground could always be challenged on appeal as an abuse of discretion, it is never wise for the plaintiff to put himself at the trial court's mercy. So long as discretionary power is vested in the lower court, the plaintiff's attorney should never risk his client's cause by delaying the filing of a claim. The solution is to file it immediately, as soon as the identities of the offending parties are learned.

Although the product may have passed through several hands, e.g.,

manufacturer, assembler, middleman, wholesaler and retailer, before reaching the ultimate consumer, it costs no more than the expenditure of a four cent stamp to serve notice of breach upon each of them. There is no sound argument for failing to do so as soon as the facts have been made known to the attorney. The form of the claim is not too important. The most skeletal details, i.e., name and address of the claimant, date of the occurrence, and relationship of the claim to the product and to its manufacturer or handler, will get you by in most jurisdictions.

The changing and expanding court interpretations of the law of implied warranty point up the importance of filing claims in questionable cases as a means of second guessing the courts. Until the *Peterson*[1] case was decided in California, for example, there was no authority for an employee of the purchaser of a non-food product, i.e., a disintegrating emery wheel, to sue its manufacturer or retailer for breach of implied warranty. Even so, a careful attorney for such employee would, in anticipation, have lodged a claim against both retailer and manufacturer. Then with the change in the law, assuming he had unsuccessfully attempted to pioneer the *Peterson* principle, the plaintiff could move to amend his complaint and state a cause of action for breach of warranty, even though such cause of action had not been sanctioned by the courts at the time his own suit was filed. In the experience of the writer, trial courts have permitted complaints to be amended, even after the "expiration" of the statute of limitations, to add a theory of action for breach of implied warranty, even though it was not recognized by the courts at the time of filing the original complaint.

Routinely, if a product is involved, the lawyer should find out from the client or from his own investigation from whom it was obtained, its manufacturer and assembler, also through whose hands it passed from the time of its manufacturer to the date of ultimate sale, so that all links in the product chain can be supplied. If not consumed, effort should be made to locate the defective product. If all this information cannot be ascertained from the client or through other means of investigation, it should be ascertained by interrogatory or deposition after suit is filed. If one single handler of the product is omitted from the complaint, the other defendants will leave no stone unturned to unload all responsibility at the door of the missing "defendant."

Any writing, for example, a tire warranty or a label stating that the particular substance is "safe" or in some particular is "not harmul," should be obtained and carfeully preserved. The clint can be questioned as to whether he read about the safety of the product in a newspaper or magazine advertisement and, if so, every effort should be made to obtain a copy. If the client had heard or seen the virtues of the product extolled through radio or television, your best efforts should be expended to obtain a copy of the transcription or tape through discovery means after suit has

1. Peterson v. Lamb Rubber Co., 54 Cal.2d 339, 353 P.2d 575.

been filed. Do not place entire reliance on implied warranty, if, through any of the foregoing means, you can established facts sufficient to hold one or more of the defendants on an express warranty.

When an injury has been sustained through the use of household products, such as polishes, bleaches, detergents, furniture waxes, lighter and cleaning fluids, paints or paint thinners, technical requirements for safety labeling have been set up by the Federal Hazardous Substances Labeling Act. Among other requirements, the main panel of the label is required to carry adequate statements as to the nature and degree of the hazard, the harzardous ingredients, precautionary steps in use of the product or handling it, and first aid instructions, as necessary. The words "Danger" or "Poison" must appear as appropriate. In the case of less dangerous products, the words "Warning" or "Caution" or "Keep out of the reach of children" are required. The necessity of immediate inquiry into the adequacy of such labels is well shown in a recent furniture polish case,[2] in which the manufacturer was held liable for furniture polish swallowed by a young child, even though the product was never intended for human consumption, despite defendant's claim that the use to which it was put was abnormal and not foreseeable.

PRE-SUIT INVESTIGATION

By the time you have completed your initial interview with the client, you should have formuated a tentative plan of action. Because some time has doubtless lapsed from date of injury to date of initial interview, you will probably start the investigation race a poor second to the defendant or his insurer. You are fortunate if a representative of the defendant has not already obtained a signed or court-reporter statement from your client, and an authorization to receive medical information from his attnding physician or to have an independent examination of his own. If as much as one week has passed, as is almost always the case, you may be sure that every effort has been made to do just that. No matter how honest all of our clients may be, a skilled inquisitor who has the privilege of subjecting them to early brainwashing, can usually come up with something adverse, if nothing more than to obtain the names and addresses of witnesses known peculiarly to them.

If your case in any way involves the failure of or other unsafe condition in a product of any kind, your most urgent order of business is to secure the offending product, or a sample of it; or, if it involves a trade name product, to acquire a specimen identical in nature. If your client is its owner, this task should be easy. Lotion that burns the scalp, a defective tire, or a contaminated can of mushroom soup, may be readily available for your testing. Your problem is compounded, of course, if your client has destroyed or otherwise disposed of the offending article or substance, as may have been true of the soup. In all cases, however, the client

2. Sprull v. Boyle-Midway Inc., ED Va. Civil Action No. 3178, Feb. 6, 1962.

should be directed to guard carefully whatever is left until it can be delivered into the hands of an expert for testing.

One of the simplest, yet most important, steps in the preservation of evidence is to trace carefully all hands through whom it passes. There is no frustration greater than being unable at the trial to establish conclusively that the exhibit presented as evidence in court is the same exhibit that caused the injury. This can only be done if there is no break in the chain of possession. For obvious reasons it is desirable that the exhibit should have passed through as few hands as possible. Where it can be avoided, it should not be stored in your office, or you may be placed in the uncomfortable position of having to take the stand to identify it. You may then be subjected to full cross-examination of your interest in the litigation, including the probable introduction of your retainer agreement into evidence. Your expert, or a public agency, would be the logical repository, and it is well if on your side of the litigation the product can be handled by no others aside from your client.

Selection of a proper expert is always troublesome. The man who bespeaks integrity, experience and general knowledge of his field is invariably more effective in court than the ivory-towered professor who has difficulty in getting through to a jury. Neither you nor your expert should ever lose sight of the specific issue you are seeking to prove: that the product was defective, i.e., unmerchantable, or was not fit for the purpose for which it was intended, or that the injury was proximately caused by such condition. The homespun mechanic who has been working with automobiles for twenty years can give as credible an account of the reason for failure of the steering mechanism of a new car as can the factory-trained engineer or degree-laden university professor. In all likelihood the salty testimony of the mechanic will be far more meaningful to a jury. The main purpose of an expert is to confirm what the jurors suspect to be the cause of an accident. Juries are quick to discard expert testimony which does not make sense to them. It is not hard to sell an expert's estimate of 35 miles per hour at impact when the entire front end of an automobile is caved in, but no jury would believe the same testimony when the physical damage to the car as shown by photographs is slight.

THE INITIAL PLEADING

In preparing a complaint involving products liability, it is well to keep in mind two principles that govern the drafting of any complaint: one—say as little as you have to; two—keep it broad enough to cover any theory that reasonably could later develop.

Most states now are very liberal in allowing the pleader to use general language. This policy enables you to avoid tying your own hands. Where negligence may be pleaded in general terms, you need not allege precisely negligent acts you charge. For example, if you charge the defendant

driver with "negligent and careless driving" you may prove not only the aberrations of his own conduct from the normal, but also that he was driving a car that was defective in some particular. If you charge that he and other defendants, whether specifically named or otherwise, "carelessly and negligently supplied, drove, operated, maintained, serviced and controlled" the vehicle, any mechanical defect subsequently uncovered will be included within your charging allegations. Similary, a potential defendant who had control of that particular vehicle at any time before the accident and whose conduct may have played a part in the collison, may be served with summons and complaint and be brought is as though he had been originally named and charged with specific acts of negligence.

It is rare, if ever, that you will have a products liability case in which the defendant would not be charged with negligence as well as with breach of implied warranty, even though he might be exonerated by court or jury upon this count. Your first count, or cause of action, will therefore normally be for negligence.

Pleading a breach of warranty should give no trouble where the defective condition is known at the outset. One of the problems you may encounter is whether to sue both for an express and an implied warranty. It is difficult to imagine a case of product injury where a claim would not be made for implied warranty, even though a cause of action for express warranty also exists. If there is doubt as to whether there was an express representation giving rise to a cause of action for express warranty, the doubts should be resolved in favor of adding a cause of action on that ground. It is, of course, essential that if suit is brought on an express warranty, the particular warranty must be set forth in your pleading. The fact of giving notice of the breach of warranty, whether it be express or implied, must also be pleaded in the complaint and proved at the trial.

Where the cause of action is for breach of implied warranty, the relationship giving rise to privity must also be pleaded in the complaint Failure to do so will draw a demurrer in most jurisdictions. Where privity is in issue, the defendant may well base a motion for summary judgment upon the lack of privity. If you feel that you would have a good case except for privity, and you are not in a state which has gone as far as New Jersey did in *Henningson*,[3] you are faced with an insoluble dilemma. If you attempt to plead a cause of action for breach of implied warranty, you have the defendant moving to strike your cause of action upon the ground that the courts of your state have required privity as a necessary prerequisite to your cause of action. If the cause of action is stricken, it in effect wipes out that theory from your complaint. If, on the other hand, you do not plead an implied warranty cause of action because of failure of privity, you could still seek to amend at any time before trial should the case law of your own state be changed to allow a cause of

3. Hennigston v. Bloomfield Motors, Inc. 161 A.2d 69 (N.J. 1960).

action. You would still then be confronted with the problem of convincing the trial judge of the merits of your motion. No answer can presently be given to this delimma.

CONCLUSION

In a products liability case, as in every other legal situation that crosses your desk, there is no substitute for thorough investigation and an up-to-the-minute knowledge of the laws applied in your own state before your suit is launched. In products liability cases, however, this knowledge is even more important because of the current trend toward enlarging the law of warranty to allow fixing of responsibility upon those who place their products in the daily stream of commerce. The lawyer who learns to allow his imagination to run somewhat rampant may one day find himself unexpectedly rewarded. In all likelihood it will be the exploring lawyer who will play the important role in modernizing the law of products liability.