

**INTERACTIVE QUALIFYING PROJECT
ON
PRODUCTS LIABILITY**

Products Liability

An Interactive Qualifying Project

Submitted to the faculty of the Worcester Polytechnic Institute for partial
fulfillment of the requirements for the Bachelor of Science Degree

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Date: May 8, 2000

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Abstract

Our Interactive Qualifying Project for the terms A99, B99, C00, and D00 is entitled Products Liability. It includes an outline of the laws of product liability and evaluations and conclusions of three separate United States court cases. At the end of D-term, our advisor conducted a mock trial where we acted as lawyers in order to convince a jury of our views. The purpose of our project is to gain a better understanding of the interrelationship between engineering and safety.

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Products Liability: In a Nutshell

**As Outlined by the Instructional Book Products Liability: In a Nutshell, 5th Ed., by
Jerry J. Phillips**

Preface

Products liability is one of the most controversial areas of United States' law. It sets its own precedents for tort law from case to case, and from state to state. Through these laws and precedents, the United States has defined the rights of the consumer to claim strict liability and mass tort litigation should they be treated unfairly. It offers remedy to people who have incurred losses through such things as accidents that had proximately been caused by a product they purchased or came in contact with. The specific laws of products liability are very long and complicated and have many unresolved issues, making some cases very difficult to resolve. There have been, and will continue to be, many cases presented to the court of which there has been very little or no precedent set. Here, the judge and the jury need to make their own decisions as to whom they believe is at fault, based on law and overall fairness.

Products liability has its origins from such standards as *res ipsa loquitur*, vicarious liability, warranty, and abnormally dangerous activities. It arises from the United States constitution's ideal of the right to property. It exists to discourage manufacturers from producing unsafe products and from misleading their customers about the dangers presented by them. Some people believe that the products liability laws should be completely set by the federal government, but as of now they are set and run by the state.

The statutes that have been adopted in each state affect such matters as damages, statutes of repose, state of the art, joint liability, statutory compliance, and other similar matters.

Some areas of products liability law remain shadowy and uncertain. It is not uncommon to have two or more positions on a certain subject. For that reason, some liability cases may be very difficult to make judgements on. However, this only emphasizes the need to constantly develop ideals and laws in this area to account for all types of liability disputes.

Chapter 1: Definition & Scope

What is a Product?

A product is generally defined as tangible personal property, like a good or chattel. The law of products liability extends beyond tangible goods to include such things as pets, writings, and electricity. In the case of writings, however, a person is not liable for everything they write down. If a person reads something and tries to do what they read, the author is not necessarily at fault.

In deciding whether or not the law applies, the inquiry should be directed to whether or not the defendant is in the best position to spread the loss and prevent injuries.

What is a Defect?

The general reason for imposing liability against a supplier for injuries that resulted from a product is when the product is supplied in a defective condition. Liability goes beyond that, however, because sometimes a product is sold that has no defects, but that can still cause harm or injury. But the meaning of the term defectiveness can be

made broader to suit the laws of liability by saying that any product that does something it's not supposed to is defective. Determining defectiveness is one of the more difficult problems in products liability.

There are generally four types of defects – manufacturing or production flaws, design defects, defective warnings or instructions, and misrepresentation. Some people treat warning defects as a type of design defect. Warning and design inadequacies are characteristic of a whole line of products, where a production flaw is random and atypical of the rest of the products.

It is important to distinguish between production and design defects because strict liability is only imposed for production defects. Production defects fall so clearly below ordinary customer expectations of the product that fault is assumed.

Misrepresentation is not easily distinguishable for a variety of reasons. For instance, the product may carry express representations, or the product's appearance may imply safety. Misrepresentation is often used in conjunction with the topic of inadequate warnings.

The term defect is used to describe any actionably wrong the product has when it leaves the hands of the seller. A distinction exists between a dangerously defective product and an unmerchantable product, especially when only an economic loss is encountered. In the case of customer expectations, there is a strict definition for the term unreasonable danger. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary customer that purchases it, with the ordinary knowledge common to the community as to its characteristics. In design cases, an expert is needed to establish defectiveness. The foundation of a customer expectation case is

usually shaped by expert testimony, regardless of whether a case is brought in strict liability or in negligence.

In the case of presumed seller knowledge, strict liability does not require a risk-benefit analysis when based on innocent misrepresentation. Risk-benefit analysis is used by the courts to determine design defects. There are seven standards to determine fault using this approach: 1) The usefulness and desirability of a product. 2) The likelihood and probable seriousness of injury from the product. 3) The availability of a substitute product that would meet the same need and not be as unsafe. 4) The manufacturers ability to eliminate the danger without impairing the usefulness or making the product too expensive. 5) The users' ability to avoid the danger. 6) The users' anticipated awareness of the danger. 7) The feasibility on the part of the manufacturer of spreading the risk of loss by pricing or insurance.

In determining liability for state of the art products, the burden of eliminating danger may be greater than the risk that the danger itself creates. It is possible for a product to be deemed unavoidably unsafe. This situation requires the absence of the knowledge or ability to eliminate a danger. Strict liability does not apply in the case of an unavoidably unsafe product. The burden of proof of negligence in the case of an unreasonably dangerous product lies with the plaintiff.

What is a Sale?

A sale is generally described by law as merely a passing of title from the seller to the buyer for a price.

Chapter 2: The Causes of Action and Damages

Historical Evolution – The Breakdown of Privity

Strict tort products liability evolved in large part to avoid the privity requirement and other restrictions of warranty law, such as breach, disclaimer, and the warranty statute of limitations. The breakdown of privity requirements is a classic example of the evolutionary nature of the common law, as it developed to meet the necessities of the time.

Negligence

Negligence arises from inadequacies in inspection, processing, packaging, warning, design, marketing, or in any manner in which the defendant fails to hold up a reasonable standard of care. The plaintiff is responsible for demonstrating that the accident could not possibly occur had the negligence not taken place. He or she must show that it was the defendant's duty to eliminate the danger by disclosing evidence that would remove responsibility for the accident from all parties except the defendant.

Statutory Violations

A statutory violation is a cause of action that relies directly on the terms of the statute or the intent of a legislative or regulatory body. A violation of a penal statute can give rise to a negligence case if the plaintiff is within the class of persons protected by the statute and the risk involved is within the statute's coverage.

Reckless Misconduct, Concealment, and Deceit

Reckless misconduct justifies the recovery of damages for emotional distress. This form of distress is not otherwise recoverable. Intentional misrepresentations can counteract what might otherwise be considered adequate warnings of danger.

Strict Liability

An implied obligation is the warranty of merchantability. Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

Merchantability is dependent on a number of specifications. It must pass without objection in the trade under the contract description. In the case of fungible goods, it must be of average quality within the description. It must be fit for the ordinary purpose for which goods are used. It must run of even kind, quality, and quantity within each unit and among all units involved. It must be adequately contained, packaged, and labeled as the agreement may require. It must conform to the promises or affirmations of fact made on the container or label if there is one.

Implied warranties are permitted to arise during the course of dealing or usage of trade, unless otherwise permitted. Strict liability applies for warranty of fitness for a particular purpose. This is unusual, but worth mentioning because strict liability does not normally apply in merchantability or strict tort. The strict tort products liability law states that one who sells a defective or unreasonably dangerous product to a consumer is liable for physical harm caused to the consumer or his property if the seller is engaged in a business of selling such a product, and if it is expected to and does reach the customer without substantial change in the condition in which it was sold. This law applies regardless of whether the seller has exercised all possible care in preparation, and also if there is no contractual agreement between the buyer and the seller.

There is a list of standards that determine whether or not a product is abnormally dangerous: the existence of a high degree of risk; the likelihood that the resulting harm

would be great; the inability to eliminate the risk through the exercise of reasonable care; the extent to which the harm-causing activity was a common usage; the inappropriateness of the activity to the place where it was carried on; and the extent to which its value to the community is outweighed by its dangerous attributes.

Express warranty by the seller is any statement or promise made by the seller related to the goods. It states that any description or model that is used in the making of a bargain must be accurate at the time of sale. The seller creates express warranty without even using the word warranty – it is implied just by affirming the value of the good.

Strict tort states that a seller is still liable for harm done by a product sold even if it is not made negligently or fraudulently, and if the customer has not bought the product under any form of contract.

Damages

In general, the plaintiff is entitled to recover for any foreseeable damages in tort or in warranty. There are differing opinions on whether recovery is an option for sufferers of emotional distress, assuming that there are no accompanying physical damages. If physical damage does occur, recovery can be made on the basis of emotional distress. Punitive damages are awardable based on the wealth and reprehensive conduct of the defendant. Joint liability is imposed when the damages are practically indivisible.

Chapter 3: The Parties

Plaintiffs

The plaintiff is a person who sues any products defendant for the purpose of recovering from personal injuries. This person could be the buyer, the user, the consumer, or any bystander who could be in harm's way.

Defendant: Seller of New Products

In the case of a manufacturer, there are a variety of parties who could be sued. The final assembler may be sued as well as any manufacturer of component parts. These parties may be sued if the part is defective. However, even if the component meets the specifications, the manufacturer is still at fault if there is foreseeable risk involved with installing the component into the final product. The manufacturer is responsible for its product before and after it is assembled. They are responsible for all components that go into the product as well as the assembly of the product, even if they don't actually produce the components or assemble the products themselves. If a manufacturer's name is on a product, they are responsible for any problems that occur.

Retailers are not held liable for any latent defects in a product, unless the defect was caused under their inspection. The Sealed Container Doctrine is a term of art used to relieve non-manufacturing sellers of implied strict liability for latent defects that are not discoverable by reasonable inspection. It does not apply to cases of misrepresentation, however, or if there was any sort of repair or rebuild done by the retailer.

A middleman may also be found liable, on some level, if they receive any sort of commission from the sale of the defective product.

Defendant: Used-Product Sellers

The retailer of used products should not be strictly liable unless it has an action over against its supplier, since where it has an action over it can force its supplier to correct or prevent the manufacture of dangerously defective products. Strict liability may be imposed on the seller if the product contains a manufacturing defect or a defect of a kind that ordinarily occurs only as a result of a defective condition.

Defendant: Successor Corporations of Product Sellers

This section deals with the buying and selling of entire businesses, and how the responsibility for previously manufactured parts is distributed. There are two major rules in this area of product liability. The Turner rule spells out how the buyer of the business can be liable for the defective products of the previous owner. It requires continuity of management, personnel, physical location, assets, and general business of the predecessor; dissolution of the predecessor as soon as legally and practically possible; assumption by the successor of all liabilities of the predecessor necessary for the continuation of normal business operations; and a holding out of itself to the public by the successor as the effective continuation of the predecessor. The Ray rule applies when the successor acquires all or essentially all of the manufacturing assets, and undertakes essentially the same manufacturing operation, of the predecessor. It is based on policies of virtual destruction of remedies against the predecessor though the acquisition, the ability of the successor to spread the risk, and the fairness of requiring it to do so as a burden reasonably attached to the benefit of requiring the good will of the predecessor.

Defendant: Lessors, Bailers, and Licensors of Products

Lessors are liable for injuries that arise from use of their product, provided that the injury occurs during the term of lease. A long time lease is considered the same as the purchase of a product. If the lessor marketed the product or placed it in the stream of commerce, he is held liable.

Defendant: Employer - Suppliers of Products

Employers can be held responsible for certain injuries that occur to employees in the workplace. These instances include the cases where the employer knew about a potential problem area on a machine and did nothing about it. Employers can avoid litigation through workers' compensation contracts.

Defendant: Providers of Service

There are four types of people that can be held liable under Representational Conduct laws. They are the product certifiers, the trade associations, the trademark licensors and franchiser, and the advertisers. This is due to misrepresentation of the defective product. The providers of professional services are not held in strict liability, where the suppliers of non-professional services are, in general. Product related services are covered by strict liability. Strict product liability does not apply when a pure service is provided and where no product is involved.

Defendant: Real Estate Suppliers

Builders of buildings are strictly liable for injuries caused by defective construction. This applies whether the building is large or small. Liability is based on the assumption that the contractor should have superior knowledge and skill regarding the construction of the building. Lessors are required to upkeep the building that they are

leasing. The person living in there has the right to live in a well-maintained dwelling. The landlord is strictly liable for injuries caused by a latent defect, if present at the time of the let. A landlord is considered part of the production and marketing enterprise. This rule is broken if the occupier's actions can be considered abnormally dangerous, where the occupier is liable.

Contribution and Indemnity

If a plaintiff is found intentionally liable, he or she is not entitled to contribution. The indemnity doctrine states that one passively or secondarily at fault is permitted to recover over in full against one found actively or primarily at fault. Not all courts follow this doctrine and favor comparative fault, whereby the victim's recovery is reduced by the degree of his or her own fault or causation.

Chapter 4: Factors Affecting Choice of Remedies, Jurisdiction, and Procedure

Reliance

Proof of reliance is expressly required as a condition to recovery for conscious misrepresentation, negligent misrepresentation, and innocent tortious misrepresentation, resulting in personal injury. It is a condition of recovery for breach of the implied warranty of fitness, unless it is grounded in tort and not in contract. The express warranty provision states that an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. The buyer is not entitled to place reliance on such statements.

Disclaimers and Limitations of Remedies

One of the primary reasons for the modern development of the doctrine of strict tort liability was to avoid the contractual restrictions on liability availability in warranty law. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumers hands. Contractual restrictions for physical harm may be effective in negligence or warranty, even though not in strict tort. This presents no problem to the consumer as long as he or she has strict tort remedy.

The Uniform Commercial Code distinguishes between disclaimers and limitations of remedies. A disclaimer arises when no remedy is given, while a limitation of remedies exists when the plaintiff is given some remedy that may be different from or less than that otherwise provided by law.

A disclaimer will be invalidated if it is inconspicuous or unclear. A hidden disclaimer may also be invalidated for lack of conspicuousness. A disclaimer must be timely delivered in order to be effective. Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had. If a court finds a contract or contract clause to be unconscionable, it may refuse to enforce the contract or enforce it without the unconscionable clause. Disclaimers of fraud or deceit are unenforceable. A disclaimer is effective to bind only those who either directly or indirectly are a party to the agreement.

Recovery of Solely Economic Loss

Many courts hold that a plaintiff cannot recover in tort – either in negligence or in strict liability – when he or she has suffered solely economic loss from a defective product. This is because product recovery, whether in tort or warranty is limited to foreseeable damages, and because negligence and personal injury are not disclaimable. This rule is valid regardless of privity between the plaintiff and the defendant. Solely economic loss is typically defined as loss in value, cost of replacement, lost profit, and damage to a business' reputation, where no physical accident is involved.

Notice of Breach

Where a tender has been accepted, the buyer must, within a reasonable amount of time after he discovers or should have discovered any breach, notify the seller of the breach or be barred from any remedy. This is a protection for the seller. It allows for them to prepare for a possible claim against them.

Wrongful Death

A breach for warranty or negligence may be considered a wrongful act, thus may be subject to a wrongful death action. This is due to the fact that culpability exists in the consciousness and understanding of all right-thinking persons.

Procedural Considerations

In the case where the defendant breaches an express warranty, state consumer protection statutes give the plaintiff the right to treble damages and also to collect attorney's fees. Congress has the right to establish a private right of action for damages where someone is injured due to a violation of a consumer product safety rule. Both of these are examples of statutes that create causes of action.

If a defect occurs outside of the manufacturer's home state, he or she cannot be found liable for that defect. The retailer is not found liable unless he avails himself as being of the privilege of conducting business in the home state or of serving directly or indirectly.

There are four types of class actions, as follows. 1) Where there is a risk of inconsistent or varying adjudication, 2) where adjudication of some claims will be dispositive of the claims of others not a party to the litigation, 3) where the defendant has acted or refused to act on grounds generally applicable to a class, making final injunctive or declaratory relief appropriate, and 4) where questions of fact or common law to the members of the class predominate over questions, affecting only individual members. The first three are mandatory for all parties because every member is bound by judgement, while the fourth is optional to any member that wishes to be excluded.

Issue preclusion, or collateral estoppel, prohibits relitigation of an issue that has been finally determined in prior litigation between the same parties. It also prohibits litigation of an issue by one party where that issue has been finally determined against that party in previous litigation, when mutuality of parties is not required. Non-mutual defensive collateral estoppel arises where the plaintiff has litigated and lost an issue in a prior suit, and a different defendant in a later suit attempts to bar the plaintiff from relitigating that issue. Non-mutual offensive collateral estoppel arises when the defendant has litigated and lost in an issue in a prior suit, and a different plaintiff in a later suit attempts to bar the defendant from relitigating that issue.

A state will apply its own procedural rules, even though it might apply the substantive law of another jurisdiction, provided that law does not conflict with the

state's public policy. If a federal law determines that an issue is procedural, then the state court resolves conflict with its own procedural rules.

Statutory Compliance

The general rule is that compliance with applicable state or federal statutes or regulations is evidence that the defendant exercised due care and that the product is not defective or unreasonably dangerous.

Defense Contract Specifications

One who manufactures a product in accordance with the specifications of a nongovernment purchaser is not strictly liable for a defect in design, unless the danger is obvious. If the products are deemed so defective and dangerous that a reasonably competent contractor would realize that there was a grave chance that his product would be dangerously unsafe, the manufacturer would be liable.

According to government specifications, the manufacturer is not liable if: 1) the approval of the design by the U.S. involves discretionary function, 2) if the U.S. has approved reasonably precise safety specifications for that product or type of product, 3) the product has conformed to those specifications, and 4) the supplier has warned the U.S. about the dangers in the use of the equipment that were known to the supplier.

Statutes of Limitation

There could be two or more statutes of limitation that could apply to a case. To solve this, a plaintiff could rely on a warranty statute for a warranty claim and a personal injury statute for tort claims. Another method is to look to the gist of the action, and apply only the tort statute even to a claim on breach of warranty. A statute of repose is a limitation whose period runs between two fixed dates, regardless of the situation.

The time at which the period of the statute of limitations begins to run is called the accrual date. It may vary depending on the statutory language or the applicable rule adopted by the court. The date of the injury and the date the plaintiff learned of the claim are examples of accrual dates.

Statutory Retrenchments

A number of state legislatures have enacted statutes cutting back on consumer rights in the areas of product liability, in an attempt to meet a perceived crisis in the availability and affordability of liability insurance owing to a claimed mushrooming of the quantity of litigation and the size of the verdicts. The accuracy of such perceptions and claims is the subject for much dispute. Statutory retrenchment issues include limitations on the amount of chargeable or contingent fees, elimination of the collateral source rule, provision for periodic payment of judgements, elimination of strict liability and the adoption of a product state-of-the-art defense, and elimination or restriction of recovery for punitive damages.

Chapter 5: Production and Design Defects

Production Defects

Production defects are ones one in which the defective product is defective simply because it does not conform to the manufacturer's specifications. The definition of manufacturing defects appears to indicate that a manufacturer can set its own standard. The manufacturer is liable for all production defects.

Design Defects

The overwhelming consensus among courts in deciding defective design cases is in the use of some form of risk-utility analysis. The risk utility balance test is merely a detailed version of some judge's negligence calculus. The liability of the manufacturer rests upon a departure from proper standards of care, so that the tort is essentially a matter of negligence. As a common sense of matter, the jury weighs competing factors presented in evidence about the judgement or decision of the manufacturer. Some courts focus their decisions on the conduct of the manufacturer when determining the standard of liability.

Another method to determine design defect is as follows. First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.

Examining the utility of the product is necessary to give weight in determining liability. Things that are looked at when determining this are the relative need for the product, essential vs. luxury, and cost of making the product safer.

If a decision made about a design is described as being polycentric, it means that each point for the decision affects all others. This describes how some flaws in design may result from concisely imputing one design that is safe under most conditions, but flawed under lower percentage conditions.

There is not always a bright line between design and warning defects. The failure to warn of an obvious danger in a product is a case of liability, but to warn of an obvious danger that can be avoided though a feasible alternate design can also be seen as liable. Therefore, placement of written warning labels and notices does not release the manufacturer of all of their responsibility in the safety of a product. Lack of mechanically engineered warning may also be a case of design defect. Depending on the situation at hand, the degree of liability due to warning or lack thereof is dependent on the view as to whether the warning is adequate or if the manufacturer neglected to warn the customers of the dangers.

The rule that an obviously dangerous product is as a matter of law not unreasonably dangerous was once widely followed. It is widely believed that “we [as a species] have not yet reached the state where a manufacturer is under the duty of making a machine accident proof or foolproof. To illustrate, the manufacturer who makes, properly and free of defects, an axe or a buzz saw or an exposed airplane propeller, is not liable if one using the axe or buzzsaw is cut by it, or if someone working around the airplane comes in contact with the propeller. In other words, the manufacturer is under no duty to render a machine or other article “more” safe as long as the danger to be avoided is obvious and patent to all.”

The obvious danger defense conflicts with the defense of assumption of risk. To establish assumption of risk it must be shown that the plaintiff discovered the defect, fully understood the danger it presented, and regarded this known danger and voluntarily exposed himself to it. While there may be a duty to eliminate obvious dangers by

redesign of a product, it is unlikely that a court will find a duty to warn of the truly obvious danger. If there is an obvious danger, a warning is redundant.

Crashworthiness is a term used to describe the capability of a product to protect against increased injury from an accident caused by something or someone other than the product. It is widely believed in courts today that there is a duty to reasonably design against foreseeable accidents. Injuries resulting from unforeseeable accidents, however, are not the responsibility of the manufacturer.

Chapter 6: Inadequate Warnings and Instructions, and Misrepresentations

Warnings and Instructions

A warning is distinguished from an instruction in that a warning is installed to insure safe use, while instructions are installed to direct in proper use. A warning must describe the nature and extent of the danger involved in order to be adequate. A warning must describe such things as toxic qualities and means of disposal. A warning is not required for a danger that is obvious. Sometimes expert testimony is required to determine the adequacy of warnings to a specialized group, such as doctors. For the most part, however, the adequacy of product warnings to lay persons is a matter that a lay jury can determine without the aid of expert testimony.

The commentary that pertains to failure to warn cases would seem to sanction the imposition of liability only when the defendant has knowledge or should have knowledge of the product's dangerous propensities. The successful maintenance of a failure to warn action requires a showing of negligence.

Generally an expert need not be warned of dangers commonly associated with the use of products about which he has expert knowledge. The cases differ as to whether an employer's knowledge of a danger will relieve the manufacturer of a duty to warn the employer's employees, and the cases in this area are very fact-specific. It is a general rule that magnitude of the risk involved must be compared with the burden of requiring a direct warning. The risk's magnitude is determined not only by the chance that some harm may result but also the serious or trivial character of the harm that is likely to result. Many products can be made to carry their own message to the understanding of those who are likely to use them by the form in which they are put out, by the container in which they are supplied, or by a label or other device, indicating with a substantial sufficiency their dangerous character. Where the danger involved in the ignorant use of their true quality is great and such means of disclosure are practicable and not unduly burdensome, it may well be that the supplier should be required to adopt them. In the case of prescription drugs, it is not a duty of the manufacturer to warn of all dangers – that is the job of the doctor who prescribed them.

Whether or not a warning might otherwise be adequate, it can be made inadequate by counteravailing representations that downplay the danger or mislead the user regarding the nature or extent of the danger. Pictures or appearances of safety also may neutralize a warning, making the manufacturer liable.

Where a defendant markets a defective and unreasonably dangerous product, it may have a post-sale duty to warn of dangers associated with the product. If the court holds that the duty to warn is based on negligence, then that duty might not arise until sometime after the product is sold – at a time when the seller knows or should know of a

danger. A negligent failure to warn can also exist at the time of the sale, as can a duty based on strict liability. A successor corporation's duty to warn can also arise, even where the successor is also vicariously liable under the doctrine of de facto merger.

The seller of a product is required to inform the consumer of the ingredients of their product that are known to be allergenic. Failure to inform of an allergen could result in strict liability.

Misrepresentations

An action for misrepresentation can arise in a variety of contexts. The misrepresentation can be based on deceit, negligence, strict tort, or strict warranty. No defect need be shown other than the fact that the misrepresentation was made and proximately caused the plaintiff's injury. Where strict liability is imposed for misrepresentation – based either on warranty or tort – a number of product defenses and liability limitations can be avoided. A misrepresentation can toll the statute of limitations, and it can prevent a disclaimer of liability from being effective. It can neutralize the effect of a warning. These and other attributes of an action based on misrepresentation make it a potent basis of liability in products litigation.

Chapter 7: Problems of Proof

Cause-in-Fact

The plaintiff must not only show that the defendant's product was defective and that the defect caused his injuries, but he must also show that the defect existed when the product left the defendant's control. He must reasonably eliminate alternative causes not attributable to the defendant. Having done so, he need not identify the precise defect that

caused his injury. Where a defect attributable to the defendant is established, courts may be more willing to allow an inference of causation than they would if no such defect is shown.

As a rule, the mere occurrence of an accident is not sufficient to establish that the product was not fit for ordinary purposes. However, additional circumstantial evidence, such as proof of proper use, handling, or operation of the product and the nature of malfunction, may be enough to establish the requirement that something is wrong with it.

Where a defect is reasonably established by the proof, the courts appear more prone to allow the causation question to go to jury. The plaintiff in a strict liability action is not required to disprove every possible alternative explanation of the injury in order to have the case submitted to the jury. He need only show that the material fact to be proved may logically and reasonably be inferred from the circumstantial evidence.

In warning cases, the necessary proof of causation may be attenuated. Causation of damages can be inferred when their likelihood is within the realm of common knowledge. A plaintiff may be able to recover a *res ipsa loquitur* approach to proof of causation. There are some cases where a plaintiff's proof of harm is less than a preponderance, and a plaintiff has been permitted to recover a fraction of his damages proportional to the amount by which his risk of injury is increased by the chance of harm.

There are two common fact patterns where the conduct of more than one at-fault actor may combine to cause an injury. The first is where only one of the actors actually caused the injury. In this situation, the burden of proof is shifted to the actors to show they were not the cause. The second is where the conduct of two or more at-fault actors actually contributed to the injury, but the extent of their contribution is unclear. In this

situation, the burden of proof is shifted to the actors to show the extent of their contribution to the cause. In either situation, actors who are unable to carry this burden will be liable for all actors for the damages attributable to the multiple actors.

Proximate Cause and Foreseeability

Sometimes courts speak of the absence of duty, the lack of proximate cause, and the unforeseeability as if these terms were interchangeable, and often the meaning of one does reinforce the other. Sometimes the concept of foreseeability is used to describe occurrences that can reasonably be anticipated, while proximate cause is used to describe occurrences that are the direct, natural, or probable result of another event. Occurrences that are fully anticipatable, such as injuries from obvious dangers, or from products, or from products that are dangerous as a matter of common knowledge, may be described as unforeseeable. Other occurrences, however, that result from a complex chain of causation may be described as proximately caused by a remote event in that chain. The terms are, therefore, considered interchangeable.

Misuse is treated by some courts as an affirmative defense, while others place the burden on the plaintiff to show the absence of misuse as part of the plaintiff's case-in-chief. It is not usually treated as a bar to recovery unless it is considered unforeseeable. It is questionable whether the misuse defense has a wide scope in cases of manufacturing defect, which, by definition, present a flaw in the product not intended to occur. In these circumstances, misuse relates only to causation of the accident rather than tending to prove the absence of a defect in the product as manufactured.

A special problem of misuse concerns the alteration of a product. A substantial alteration that causes the accident may be unforeseeable barring recovery, unless the

alteration should have been anticipated because of the characteristics of the product that invite or encourage the change.

If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable. The actor's conduct may be held not to be a legal cause of harm where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.

Plaintiff Misconduct and Comparative Fault

The three types of plaintiff misconduct that can bar or limit the plaintiff's recovery are contributory negligence, assumption of the risk, and misuse including alteration of the product. Contributory negligence is the failure of the plaintiff to take reasonable care for his own safety. It generally places the burden of proof on the defendant, and it is determined by a reasonable-person standard. Assumption of risk is a knowing and voluntary confrontation of an appreciated risk. It, also, places the burden of proof on the defendant, but is based on the subjective knowledge of what the plaintiff actually knew. It is usually raised in a case involving an obvious danger. Some courts hold that contributory negligence is no defense in a strict products liability action.

Comparative fault has been widely adopted, either by statute or by judicial decision. There are three possible methods that a plaintiff can recover with comparative fault: 1) if her fault is less than that of the defendant, 2) if it is not more than that of the defendant, or 3) if the defendant is at fault to any degree. The third method is called pure comparative fault, and is preferred by commentators and is the method usually chosen by

judicial adoption. If the plaintiff is permitted to recover, her recovery will be proportionately reduced by the percentage of fault, if any, attributable to herself. If she's found 30% at fault, she can recover 70% of her damages. If there are more than one defendants, the damages could be divided among them due to the percentage of fault of which each party is found. If one party is unable to fully pay their percentage, other parties may be forced to apportionately pay for the one that can't pay.

Some courts apply comparative fault to conduct based on plaintiff misuse of the product. It is applied where misuse is foreseeable and resembles contributory negligence. Where it is unforeseeable, or where it establishes the absence of a defect or of probable cause, there should be no comparison made since no duty is owed.

Some states apply comparative fault to strict liability actions, while others may be limited only to negligence actions. In this case, however, the court may or may not extend comparative fault to strict liability by judicial decision.

Subsequent Remedial Measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. Many courts hold that this rule does not exclude evidence of remedial measures taken by one other than the defendant. It also does not exclude evidence of remedial measures taken by the defendant after the plaintiff's accident when those measures are involuntarily undertaken. The rationale

behind this is to discourage the defendant from taking remedial measures. The rule does not apply unless the evidence concerns conduct that can fairly be described as a remedial measure.

Evidence of subsequent remedial measures may be admitted, even in a negligence case, if offered for some purpose other than that of showing negligence or culpable conduct. Evidence of subsequent measures is admissible when offered to prove feasibility of precautionary measures, if controverted, or impeachment. However, it is difficult to tell if the defendant has controverted feasibility. Some courts hold that feasibility should be deemed controverted unless the defendant is prepared to make an unequivocal admission of feasibility and concedes that at the time of the accident it would have been possible to make a safer product, even where the feasibility of remedial measures is apparent.

Miscellaneous Problems of Proof

Evidence of unsafe use and of prior accidents with similar products is admissible for a variety of purposes, including proof of notice of the alleged defect by the defendant, the magnitude of the danger, the foreseeability of user conduct, the defendant's ability to correct the defect, and causation.

Spoliation occurs when a person willfully or negligently disposes of product evidence vital to a litigant's case. The person who disposes of the evidence may be held liable to the litigant for the damages she likely could have recovered but for the disposal.

In some products cases, product defectiveness for example can be established through circumstantial evidence without the need of expert testimony. However, in many such cases, expert testimony will be essential to establish prima facie case of

defectiveness, causation, damages, and other issues in the suit. Expert testimony is generally admissible if it will aid the fact finder in its determination of an issue in the suit. Experts may be lay persons, in the sense of lacking academic credentials, provided they have acquired specialized knowledge through experience with the product. An expert need not be familiar with all the aspects of the subject matter of his testimony, in order to be qualified.

Courts have difficulty in distinguishing between state of the art and industry custom, and a number of courts permit evidence of industry custom to show state of the art. Industry custom is admissible to show a standard of care. State of the art is usually defined as the scientific or technological knowledge available or existing when a product is marketed. In theory, such knowability need not reflect what people actually know or are actually doing, or even what they should know or should be doing at a particular time or place. It is believed that while evidence bearing upon design alternatives and the state of the art in the industry may be relevant to determining whether a product is unreasonably dangerous, such evidence is not an essential element of the plaintiff's case.

Safety codes drawn up by industry-sponsored associations are admissible on the issue of defectiveness, due care, and other disputed issues in a case. Government codes and regulations offered by expert witnesses are widely admitted to establish the elements of a products case.

The use and abuse of discovery have become controversial issues in civil litigation generally, including products liability. Some commentators believe discovery is used excessively, while others think that it is underutilized. In the Federal Rules of Civil Procedure, it is stated that extensive exchange of information must be provided at

the beginning of a lawsuit, without waiting for a discovery request. It includes the names and addresses of witnesses, a copy of the description of relevant documents, and information relating to the computation of damages.

Epilogue

“Products liability will undoubtedly continue to be a controversial field of law, because it cuts across many fundamental issues in our society. It will also remain a stimulating field of study and practice, since it combines a healthy mixture of the practical and the theoretical. The subject will certainly continue to change, both by statutory and by common law modification.

“Products liability implicates many of the basic values of our society. It is a test of the ability of private industry to accommodate competitiveness and safety. It tests the fairness and the workability of the tort system of recovery, and the jury system as a method of resolving disputes. It is perhaps not inappropriate to view the law of products liability as a microcosm and a distillation of the entire system of civil litigation in this country.”

An Engineer In The Courtroom

Preface

- Lose or control their fear of courtroom and of lawyers and litigation.
- Do a better job of avoiding litigation
- Perform more effectively in matters of litigation

Chapter 1: Introduction

- Be able to avoid litigation altogether
- Know what leads to litigation
- Understand what accidents are, and how they are caused.
- learn something about the litigation process
- Realize the importance of decisions made by an engineer
- Be aware of how the engineer can assist the attorney
- Know what to expect in discovery, in deposition, and at trial.
- Know how to best conduct himself in those situations.

Two points on the eye for an eye concept.

- It didn't prevent misdeeds.
- It punished a misdeed with another deed which turned out to be an identical misdeed.

Chapter 2: The Nature of Accidents

An accident can be defined as:

- An occurrence that is unexpected.
- An occurrence that causes loss or injury, which can be expressed in some form of economic terms

Accident examples:

1.0 Collision.

1.1 Two moving machines or vehicles.

1.2 A vehicle or machine hitting a fixed object.

1.2.1 A vehicle or machine hitting a parked or stopped machine.

1.2.2 Airplane Crashes

1.3 A vehicle hitting a person

1.3.1 A person running into a moving machine

1.4 A person running into another person

2.0 Slip and fall accidents

2.1 Loss of traction between the foot and the surface.

2.2 Tripping.

2.2.1 Scuffing

2.3 Physical malfunction of the person.

2.3.1 Dizziness

2.4 Unexpected change in surface level.

- 2.5 Loss of step support.
- 2.6 Loss of balance and/or support of the body.
- 2.7 Fall from ladder or step.
- 3.0 Loss of control.
 - 3.1 Inadvertent motion
- 4.0 Hit by falling object.
 - 4.1 Hit by rolling object.
- 5.0 Suffocation.
 - 5.1 Drowning.
- 6.0 Electrocution.
- 7.0 Poisoning.
- 8.0 Shock and Vibration.
- 9.0 Entanglement
- 10.0 Cuts and Abrasions.
- 11.0 Fire
 - 11.1 Chemical burns.
 - 11.2 Explosion
 - 11.3 Radiation
 - 11.4 Burns from contact with hot surfaces.
- 12.0 Mechanical Failure
- 13.0 Struck by moving projectile.
 - 13.1 Firearms and other such devices.
 - 13.2 War.

14.0 Natural or Environmental Factors.

14.1 Heat

14.2 Cold

14.3 Lack of water

14.4 Animal attacks

14.5 Wind

14.6 Lightning

15.0 Homicide

15.1 Suicide

15.2 Legal Intervention.

16.0 Other Accidents.

Examples of accidents – Many examples are given to help provide which category any given incident would be.

Chapter 3: Why Go To Court?

The sum and substance of the litigation process is the right of the citizen or other entity to seek redress for damages in a Court of Law.

- The litigation system – filing suit, naming claims, arrival at a settlement.

An example of a drunk driver provides questions about wrongful death.

Seeking the cause of death there exist several possibilities.

- The driver was negligent.
- He violated the liquor law.
- The person who sold him the liquor might have done so illegally.

Other cases are cited for claims against manufactures of machines.

“There are literally millions of possible incidents and claims. You can begin to see how the legal system may be the area of argument.”

New laws require product rules and regulations:

- The product must meet the expectations of the buyer and user.
- The product must not be unreasonably dangerous.
- The product must not be defective.
- The product must warn of hidden or unexpected dangers.
- The product must be manufactured according to specifications.
- The product must not be misrepresented.
- Proper instructions for safe use and operation must accompany the product.

Other laws apply to the user of a product:

- He must use the product according to instructions and warnings.

- He must not misuse the product.
- He must maintain, repair, and inspect the product according to instructions.

Chapter 4: Avoiding Litigation

Avoiding or Reducing Litigation:

1. Avoid the accident – If the accident doesn't occur there can not be any claims.
2. Protect from the Accident – Try and prevent an accident with the use of safety devices
3. Make the Accident Safe – If an accident occurs design it so little injury will occur.
4. Warn of an Impending Accident – The use of buzzers and other devices could potentially warn a victim.
5. Warn of the Possibility of an Accident – This would include instructions prior to use and other decals warning the user of times when an accident could occur.
6. Protect the operator(or Other Personnel) from the Accident if it should Happen – This would include seat belts, hard hats, etc...

The Conflict Between “Efficiency’ and “The Quality of Life”

- A balance must exist between these two opposing forces.
- Workers need proper compensation for their work.

A Balanced Product

- Specifications – the physical size, power, and other measurable details of the product.

- Performance – The work the product is to do and the rate at which it will do that work.
- Life – How long the machine will last or continue to work.
- Reliability – How dependable the machine will be or how often the machine will break down.
- Serviceability – How dependable the machine will be or how often it will break down.
- Costs – The cost to produce the machine, an important and basic concern to the designer; and the operation and maintenance costs of importance to the user.
- Safety – How safe is the product, and what hazards does it present?

The Idea of Cooperative Solutions

Many people of different specialties should all work together to make a better product.

Avoiding Accidents Through Engineering Consideration:

- Specifications and Objective Targets
- Design to Those Objections, Including Safety Goals
- Failure Mode and Effect Analysis
- Accident probability/Effect/Severity Studies
 1. Conditions which make the failure occur in such a way as to eliminate or drastically reduce any potential injury.

2. Signs and indications of deterioration or impending failure to warn the operator or mechanic.
 3. Any other means of lessening the possible injurious effect of the failure.
- Audit the Design
 - Simulate Failures Which Might Lead to Accidents
 - Life and Reliability Predictions
 - Share Your Information and Data
 - Play “What If” Games
 - The Product Safety Review Team

Chapter 5: The Litigation Process

The Basic Idea of Suing Someone

The Steps of the Litigation Process

- The claim(Summons and Complaint)
- The response and defense (Answer)
- The discovery process, including:
 - Interrogatories
 - Requests for Production
 - Requests for Admissions
 - Inspections
 - Depositions

- The trial

Claim – The description of the accident and what is the amount for settlement.

Response – A response of guilt or innocence will result and most of the time it will go to court.

Defenses – The case of the defense and its engineers is the team and studies of the given product.

Discovery – The debate over the product, whether it is faulty or not.

Interrogatories – questions asked on the stand by both sides during a court hearing.

Questions like these would exist:

- Who designed the product?
- Who made the decision to use the hydraulic control instead of a mechanical control?
- List all of the standards, codes, and laws considered and complied with in the design of the product.

Requests for Admission

These requests look like this:

- Admit that you are the designer and manufacturer of the model or product
- Admit that you sold the subject machine without certain attachments or suggested features.

Inspections

..Cj Yf`U]X`hYI h'cb dageg(' !((`
.....UddYUfg`]b`cf][]bU`

IQP/MQP SCANNING PROJECT



George C. Gordon Library
WORCESTER POLYTECHNIC INSTITUTE

This involves inspecting the product in question and analyze why it broke or
IMPROVED SALE NO. 1 (Cont.)

Indicators

Sale Price/Gross SF	\$82.99
Sale Price/Unit	\$239,000
Depositions	0.06
Plot Area Ratio	16.94:1

The testimony of the witnesses and other experts as to what is wrong or right

Remarks

This is a sale of a commercial office building located in Leicester,
about the product.

Trial

The point in which both cases present their side of the argument

Chapter 6: Engineers And Engineering Information

- Why is Engineering Information Important? – This consists of all the production information, and is vital to understand if a problem was known before hand.
- Information and the Plaintiff – The plaintiff will want all the data and will probably hire an expert witness. This is why the data is necessary, in order to find fault with the product.
- Information and the Defendant – The defendant will be asked questions on the information. Questions like product changes, considerations ..etc.
- Where is the Information? – The company is required to maintain information regarding a product if they say the information no longer exists it could hurt the defense.
- Who Can explain the Information? – The best person to explain the information is the person that was responsible for it.

- How Does the Engineering Information Fit into the Litigation Process? – It may be
IMPROVED SALE NO. 1

offered as proof of a contention that a product is defective, or it may be offered as rebuttal.

- What if There is No Information? – Information does get lost but to destroy it on purpose is criminal and if no information is available it will not go over well with the jury.
- My Advice on Information – To make good engineering information recording decisions and have good reasons for those choices.

Chapter 7: How The Engineer Can Help The Attorney

Property Identification

1. As a designer and engineer, he knows the design and development process.

Record ID

Property Type

Commercial, Office

2. The engineer can explain in products, systems, parts, and operation of the machine.

County, Massachusetts 01524

3. He can talk about how the product is developed, evaluated, and tested.

Sale Data

Grantor

JR White Studio Incorporated

4. The designer or engineer can tell the attorney about the successful product, and

Grantee

Spencer Savings Bank

Sale Date

April 26, 1999

5. Why it is successful.

Deed Book/Page

21308/22.

Recorded Plat

20C-A19.

Verification

MassComp, 5/5/00; Leicester Assessor, 5/5/00; Other sources:

5. Where needed, the engineer can test or analyze

Worcester Reg. Of Deeds, B & T

6. The engineer is familiar with the uses and applications of the product.

Land Data

Land Size

1.120 Acres or 48,787 SF

Utilities

Public Water & Sewer.

Shape

Irregular

8. The engineer is technically equipped to conduct accident reconstruction.

General Physical Data

9. The engineer should be the best spokesman available to discuss "state of the art."

Building Type

Single tenant

Gross SF

2,880

No. of Units

10. Engineering literature is growing very rapidly.

Stories

2

11. The engineer can assist the attorney in the examinations, interviews, and depositions of those involved in a matter.
12. As with questions or with reconstruction, the engineer can list possibilities, practical scenarios, and likely conditions and results.
13. A good engineer will be able to translate technical information into common language.
14. Part of the arsenal of the engineer is the mathematical science of probabilities.
15. The engineer can explain complex technical processes.
16. The engineer can listen and react both as a technical person and as a layman.
17. The engineer can testify, both in deposition and at trial.
18. Reports and other hand written materials are sometimes requested and required in the litigation process.
19. The engineers should not ask questions, it is the job of the attorney.

Chapter 8: The Discovery Process

Interrogatories:

- When was the machine designed?
- How many of them were made? During what production period?
- What is the history of accidents on the model in question?
- What is the history of similar models?
- What is the history of complaints on the model in question?
- What is the field and service history of the subject machine?

These are basic questions that would be asked about the product more specific to injury would look like these:

- The plaintiff has incurred injuries or other economic loss
- A feature or component or action of the machine caused the loss.
- That feature amounts to a defect in the design or the manufacture of the machine as it existed at the time of the incident.

The defense would say things along this line:

- The claims of the plaintiff are not valid
- The injury did not happen
- That the fault or “proximate cause” of the accident was not as the plaintiff claimed.

Always watch for words that are inflexible or infinite, such as:

- Always
- Never
- All
- None
- Impossible
- Absolute
- Certainly

The smoking gun – Is a piece of evidence that the attorney feels is strong enough to win the case.

Review of general Discovery – the use and study of evidence in order to prosecute or defend.

Request for production –

- operator's manuals
- parts books
- service and technical manuals
- drawings, blueprints, and layouts
- notices of memos with the drawings
- letters
- product information records
- employee lists
- organization charts

Request for admission –

- Admit that your company designed and manufactured the subject machine.
- Admit that you were aware of other similar accidents prior to the data of this accident.
- Admit that you know operators do not read the operators manual or pay attention to the warnings.

Chapter 9: The Deposition

- General comments on Depositions – The process is used for discovery and analysis before the trial occurs, this information is used by both the plaintiff and the defendant.
- The place of the deposition in the discovery process - Information is properly a subject for discovery that is, the opponent has a proper right to discover that information because it has something to do with the case.
- General rules for Deposition:
 1. Listen to the question
 2. Pause before you answer the question.
 3. Answer only the question asked
 4. Answer truthfully and completely, to the best of your ability.
 5. Don't volunteer
 6. Don't argue or advocate

The reasons for depositions:

1. Is the purpose of discovery.
2. depositions are taken to establish facts and to determine the origins of and bases for those facts.
3. The attorney uses the deposition to determine the opinions an expert witness may offer at trial, and to explore the bases for those opinions.
4. The attorney will be seeking information and bases to impeach the witness, if such opportunity exists.
5. The deposition may be used to pin down testimony, so it may not be changed at trial.

6. The deposition is used to preserve testimony for trial.
7. The attorney may use the deposition as a means of learning the plans or strategy of his or her opponent.

The Corporate Representative – Under the law a corporate member may be called to testify or for deposition in order to have a qualified affiliate to the company.

The fact witness – This witness will be asked questions on facts and questions will concentrate on these areas. How you know the facts, and whatever background material the questioner might ask.

The expert witness – This person may be asked their opinions based on their expertise. This can only be done by an expert a lay person will not be allowed to speculate.

The plaintiff's witness – This witness will be asked to offer opinions concerning defects or other inadequacies, and their relationships to the accident.

The defendant's expert – Basically the same as the plaintiff's but on the other side of the argument.

Chapter 10: The Trial

The purpose of the trial – The trial is the high point of the litigation process. At this time, the parties to the case have reached a situation where they agree that they cannot agree on a suitable resolution to the matter.

The trial Process:

- Picking a jury – Usually consists of 6 or 12 people determined following court proceedings.
- Opening Statements – Opening statements gives each attorney an opportunity to tell the jurors what the case is all about, from his client's view.
- Plaintiff presents his case – Includes presentation of witnesses, evidence, and other information with which the plaintiff hopes to convince the jury that his client is right and should prevail in the case.
- Defense presents his case – The defense presents his refutation of the plaintiff's claims, and offers information to support those positions.
- Final arguments – The purpose of the final arguments is for each side to put the evidence in perspective.
- The charge to the jury – The judge will tell the jury that all the evidence is before them and that they must go and make a decision as to what is charged.
- Jury deliberation – The jury then will consider and discuss the evidence presented during the trial.
- The Verdict – The verdict can go one of several ways; the jury can find for the plaintiff, defendant, partial liability, or product defect but not responsible for the accident.

Direct examination – Is when a witness is examined by first their attorney then by the opposing attorney. The same rules apply as in deposition.

Cross-Examination – Is the opportunity by the opposing attorney to question the witness and to ask general questions.

There exists many question and answer rules regarding the way one should answer questions and how to do so. There is also several ways you shouldn't answer a question.

Chapter 11: Questions

When Questions are asked – Questions can range from a simple inquiry to a legal inquiry.

Legal inquiry has more weight put on it, if one was to lie perjury would result.

Various Types of questions:

- specific or general
- open or closed
- leading or non-leading
- formal or casual
- polite or serious
- rhetorical or interrogating
- simple or complex
- probing or outlining

The questioners – Only refer to your attorney never answer questions to other people or they might get into the wrong hands.

The questions they ask – One must pause before answering a question to give the attorney time to object because a question might be not proper, reasonable, or even logical.

The way people ask questions – Control the questioning party by slowing them down if they are firing off questions one after another or vice versa if deemed necessary.

Conclusion – Inflection and voice pitch changes. Careful wording of a question or an answer, may carry far more meaning than the mere words used. Answer truthfully.

Chapter 12: Accident Reconstruction

Why do we need accident reconstruction? – Accident reconstruction becomes necessary when evidence is needed to prove fault and to paint a picture for the jury. In the ideal situation, all of the evidence, testimony, and personal recollections fit together, in a logical and reasonable scenario.

What goes into a good accident reconstruction? – The use of an accident reconstructionist to develop his concept of the incident and his opinions as to the proximate cause of the incident. A collection of every piece of available information is the starting point. Next

would be to accumulate all of the information, testimony, and impressions of the people involved and the witnesses. All parts must be examined to determine the true cause.

How is reconstruction done? – The expert must recreate the accident as it happened.

- Some of the information will contradict other information.
- Some evidence and information will be in poor definition.
- Some needed or desired evidence may be missing altogether.
- Some of the information may not seem correct on the surface.
- Some of the testimony may change as it is being assembled.
- Some of the evidence and information doesn't seem to fit into any logical format.
- Sometimes the information has no outward or apparent problems.

A believable accident reconstruction:

1. The good reconstruction analysis must square with the laws of physics and rules of engineering used in the analysis.
2. The reconstruction scenario should have good agreement with the mass of information and evidence available.
3. The reconstruction should be explainable to lay people.
4. The reconstruction should be as free as possible from bias and from preconceived notions and ideas.
5. As a rule, an accident reconstruction will not be a big surprise.

6. Accident reconstruction may be disputed, they are in dispute in active litigation matters.

Chapter 13: Definitions And Techniques Employed By Attorneys

Adverse Witness – A witness called to testify by the opposing attorney.

Balance of evidence – Comparative weights of the evidence.

Bar:

- Location of legal activity
- “BAR Association,” grouping of attorneys
- Prevent or keep out.

Charge – Instruct.

Hearsay – Something other than what a witness experienced or heard first hand.

Proximal cause – Without the existence of the incident would not have occurred.

Puffery – Exaggeration or overstatement of a product in order to sell it.

Tort – Legal wrong committed.

Techniques often used:

- Never ask too many similar questions.
- Don’t fight or argue with the witness.
- Keep Cross-Examination short.
- Know the answer before you ask the question.
- Tell a story, paint a picture for the court and jury.

- Stop when you have made your point.
- Don't assume anything.
- Listen to the answers.
- Plan ahead and don't try to feel the judge and jury.

Chapter 14: War Stories

Seventeen-hour deposition – An expert gave a deposition that lasted 17 hours in that time he refused to take a break unless an attorney took one, and never took off his sport coat. After the deposition he made a new rule that he wouldn't be involved unless it was 8 hours or less.

Deposition at the airport gate – One who takes a deposition or one who provides a witness or consultant for deposition has an obligation to provide a reasonable place for deposition.

I don't know – "I don't know" is a good answer if it is the truth.

I can prove it didn't happen that way, but I can prove how it did happen – Proving an accident didn't happen a certain way isn't a defense for the accident.

The judge down south – Judges are normal people.

At deposition who is calling the shots – One should not be hassled by disagreements or differences between attorneys outwardly on the same side of the matter, especially when they are on your side.

Can you tell what the jury is going to do? – Don not try and read the jury. It is unlikely that a jury can be read in a specific case.

Surprises – Surprises happen. When they do occur, a surprise response is often effective.

Two hours to present your case – The trial is a game of presentations. Don't be surprised if you're a witness, and if things are going well, you may keep going on the stand or inversely your time is cut short.

You know something your attorney doesn't know – It isn't wise to go against your attorneys.

When the cross-examination empties out your briefcase – Be careful what you take into court in your briefcase.

When the cross-examiner checks your books and your private papers – Be ready to defend yourself, answer the questions, keep good records, give more expanded and complete answers when you know it is truthful and your actions are proper and reasonable, and try to return to the facts of the case rather than on your charges and costs.

When your lawyer is against you in the next case – Extra caution must be used when dealing with the same attorney in two different cases.

When your attorney – client gets fined – Be prepared for anything your writings will be read back to you.

Chapter 15: Tips For The Engineer Involved In Litigation

- Don't try to run the game.
- Always be truthful.
- Don't be frightened or overcome.
- Be prepared, listen to directions.
- Follow instructions precisely and accurately.
- Tell the truth.
- A good attorney will help you, so help him – but he is in charge
- View the legal system as flawed, but effective
- Offer attorney best professional advice possible
- Offer your own special skills, if applicable
- Be yourself (but in a professional way)
- Beware of possible traps during questioning
- Always think before answering something
- If you make an error correct it don't try to cover it up

Listen to advice; and use all that applies

Videos

Tape #1-Opening Statement

Kelly V. Admiral Realty - Case where Chris Kelly was buried alive in a gravel pit. The opening statement-most are trite, apologetic, tentative, and unimaginative.

A study in Chicago that interviewed jurors in trials stated that 80% of jurors had the same thoughts at the beginning of the trial as at the end.

A story telling technique was developed by attorneys such as orientation and protagonist
→ Establishing a theme. He would make a believable motif that would permeate the story line. One must utilize a story in the opening statement as a primary tool of persuasion.

Particular style-soft spoken and intimate. He approaches the jury with certain integrity.

Attorney will have the jury view the case through the eyes of a child, making them sympathetic, preparing them to their final decision.

They should use quotes, shift to narrative tense, and be dramatic

Uses a rhetorical question to make the transition and anticipate the question in the minds of the jury-asks “How do three little boys collapse gravel?” Asks, “How do admiral Realty & D’Lorenzo fit into the story?”

Contents include: A situation in which certain elements must be proved by the plaintiff;
A situation in which the lawyer deals with the term “attractive Nuisance” so that the jury would be familiar with it, made phrases that were argumentative in nature, such as saying that certain things will attract children.

Chris was excited by the gravel pit.

Credibility-he will not mislead the jury, he will tell both sides.

Case-Steve was injured by a cement truck.

3 Points -Ownership of the truck
 -Agency of the driver
 -No evasive action

How does the lawyer condition the jury?

Problems for Steve in the future

Experts testify to this

Est. Credibility

The non-emotional presentation of facts and the problems that Steve will have for the rest of his life.

Tape #2 Direct Examination

Direct examination is probably the most difficult part of the trial because witnesses can make or break you.

Your own witnesses generally help when you question them because you already know their answers.

Control the Direct Examination:

Primary and recency –we remember best what we hear first and remember longest what we hear last.

Contents-Jury limited by attention span, grab their attention and give them information.

Object is to control the jury and the content. Establish credentials, education and background, if you use the blackboard, make sure that the jury can see it

Keep your voice steady and clear (triangle method)

Use of easel & markers can be used as evidence, and helps jury's deliberation.

Tape#3: Opening Statement

The initial shot in an opening statement should be a real grabber-recite the theme Al Duke is an ordinary guy who suffered extraordinary injuries that he feels never should have happened-asks- what? Why? how?

The goal that is sought by the trial advocate is to identify with the jury. He speaks as “we” as if they were on his team seeking the same thing.

He asks the questions that he wants the jury to know the answer to

Credibility-“I will never mislead you”

Mentions defense arguments and then dismisses them. Then notes his argument that the product is liable. Recitation of injuries is necessary. Imagination is a powerful tool, visualize descriptions of injuries.

Deal with damages in opening statement-talks about medical bills, difference in wages, punitive charges and differences between how Al Duke was and is.

He cannot predict if the testimony of the doctor will help.

Case II - Is about a boy named Steve that was hit in the skull by the lever arm of a baseball-pitching machine. Rhetorical device or repetition-Steve failed out of school.

Testimony of Economist

Establishing credentials of people testifying and subject matter which they are testifying about

Compensatory damages

Punitive damages

Used self assurance-“There will be a compensatory and punitive damage verdict.”

Being a good storyteller is important to help the jurors follow you and accept your version of the facts.

Tape #4 Cross Examination of Non-Medical Experts

Styles of cross-examination include:

Passive, aggressive (undercutting witness credibility), attacking

Method:

Introduce the witness to the jury-deposition witnesses first to get a just of what he will say.

Trial lawyers must establish is integrity with the jury.

Confronting: Who has the dominant personality.

Use the witness as a sounding board to re-affirm facts to the jury (would you agree that.).

Look at the jury to make them feel important.

Miller makes a simple statement that is true to seek affirmation from witness. Jury responds to it before witness does. This is Miller's style:

1. Control content
2. Control pace,
3. Develop a pattern of response to condition the witness:

It is important to control the witness: Use an open-ended question

Culmination of the witness is a good tactic to use at the end of the examination.

Tape#5 Cross-Examination of Non Medical Experts

Cross-examination is the most interesting, dangerous, and risky part of the trial. If lawyer is organized and disciplined, he can use it well to his advantage. (Basically to support his own theories, or to discredit the witness)

Cross Examination should not be used to reiterate the testimony of the witness from the direct examination.

Lawyer should use psychological control, physical presence, good eye contact, and control of flow of testimony.

Use leading questions – Statement that is a basis for argument.

Case – Robert Havish lost hand in a combine.

Lawyer – Dominant presence – established that they were going to play by his rules.

Havish attempts to reveal witness as being bias.

Keep an evasive witness under a tight reign. Ask simple questions and be careful how you phrase a question in cross- examination.

Tape # 6 Preparing for a deposition in a Business Case

A deposition is a formal legal procedure, whereby an opposing lawyer asks questions to find a weakness in your statement.

The deposition is disarming, but the witness is under oath, never the less, don't ever lie – can always be used against you and do not volunteer any information, only give what is asked.

Common method of procedure:

Identify a major player.

Raise sensitive issue.

Mention a player by name.

Disclose another document.

Highlight importance of document.

Name another player.

Disclose privileged information.

Answer only the question that is asked to you.

Make sure you:

1. Listen to the question.
2. Pause before you answer.
3. Keep your answer short.
4. Never volunteer

For tricky questions:

1. Give lawyer time to object.
2. Ask for clarification. (Clearer questions)
3. Interrogate the interrogator.
4. Ask lawyer for advice.
5. Do not be afraid to say, “I don’t know”, never guess.

Tape # 7 – Closing Arguments

Bill Colson – Lawyer in three different cases.

Shows his experience and know-how in his final thought – closing argument.

30-Year-old woman was paralyzed. Bill Colson who was her attorney used a technique whereby he made the jury feel bad for her saying – husband left her- mother takes care of her – mother has a heart problem. Tries to have the jury sympathize with her to get her the money she needs.

Used similar techniques in case where a young woman had her face disfigured by a gas explosion. Talked about beauty and what it's like to be ugly – how she will never have a really good man because of her ugliness – tries to make the jury feel bad to get her money.

Another case was about a migrant worker with 5 children with different fathers. She died because of her status. Nobody felt that her children deserved money except attorney Colson. He convinced the jury that they were just as deserving of that money as would be 5 rich children. He calls for the verdict to be on facts and not on the woman's status.

Santino Arthur Dellea v. Automar New England Inc.

Overview

This case concerns an accident that occurred on September 22, 1992 involving an Arcanus 2-post electric hydraulic lift (TP9). The accident occurred as the plaintiff Santino Arthur Dellea, the owner of Stockbridge Motors, was using the lift to raise a customer's car for inspection. As it was lifting, one lever arm became dislodged to the car, allowing it to fall front end first off the lift. In the process, Mr. Dellea was hit in the hand by one of these arms, causing permanent injury to Mr. Dellea.

Mr. Dellea purchased the used Arcanus lift from Automar New England Inc. for a price of \$12,000. Mr. Dellea argues that the lift in question is not the one that he ordered but he signed for the lift even though it is a different model. The plaintiff is suing on six counts of negligence on the part of Automar New England Inc, as follows:

1. For failing to provide the plaintiff's corporation with the lifts originally agreed upon.
2. For failing to provide and install overhead doors.
3. For providing a defective lift, as it was installed without the requisite safety features.
4. For exhibiting negligence that caused the plaintiff permanent disability, pain, and suffering.
5. For violation of Massachusetts consumer protection law in selling them a defective product.

6. For negligently and carelessly installing the lift in a dangerous and defective condition.

Plaintiff's Expert Witnesses

In order to prove negligence the defendant's and the extent of his injuries, the Mr. Dellea will provide the testimony of three experts to the court. The first two are doctors who will testify to the extent of the injuries inflicted upon Mr. Dellea's arm and hand. The third witness is an engineer, who will provide expert testimony to prove that the installed lift was, in fact, defective.

The first witness is Doctor Lawrence Cohen of Pittsfield, MA. Doctor Cohen testifies that within a reasonable degree of medical certainty, the plaintiff, Santino Dellea suffers from Causalgia or Reflex Sympathetic Syndrome (RSD) as a result of the accident. He treated the plaintiff Mr. Dellea from September 22, 1992 through March 10, 1995. Dr Cohen's testimony is based on his treatments of Mr. Dellea as well as the review of the records which includes nerve testing and other treatment modalities. Doctor Cohen's opinion is also based on his education, training and experience.

Mr. Dellea's second witness is Dr. John Bouilon of Pittsfield, MA. Dr. Bouilon examined Mr. Dellea in September and October of 1995. He is expected to testify within a reasonable degree of medical certainty that the plaintiff suffers from Myofibrosis of the extensor pollicis and a radial nerve neuroma. Doctor Bouilon will also testify that Mr. Dellea has an estimated loss of function of the left upper extremity, which has left him with approximately 40% partial permanent disability. His opinions are based upon his examinations of Mr. Dellea and his review Mr. Dellea's medical history and

previous x-rays. Doctor Bouillon's opinion is also based upon his education, training and experience.

The third witness is an engineer, Lawrence L. Voelker of Pittsfield, MA. Mr. Voelker is expected to testify that the automobile lift system installed in August of 1992 should have had an arm restraining safety feature, and that this feature should not have been optional but rather standard on the lift. He believes that without these arm restraint devices, the delivered lift system is operationally hazardous. Mr. Voelker bases his opinion upon industrial standards, specifically ANSI, the Automobile Lift Institute's manual entitled "Safety Requirements for the Operation, Inspection, and Maintenance" and the safety manual published by the Automotive Lift Institute, entitled "Lifting It Right." Mr. Voelker's opinion is also based on his education, training, and experience.

Plaintiff's Witnesses

Matthew Sutton

Carlo Masiero

Les Rathbun

Nancy Minkler

Defendant's Witnesses

Ann Marie Jefferies

Frank Zipp

Exhibits

Exhibit A – All documents relating to the sale of the hydraulic lift to the plaintiff.

Exhibit B – Any and all general liability insurance policies that were in effect from June 1, 1993 to the present.

Plaintiff's Deposition

Mr. Dellea has been a mechanic for over 30 years and has had a great deal of experience with numerous lifts. Mr. Dellea testified that on September 22, 1992 he lifted a customer's vehicle half way up the installed lift, left for about a half-hour to talk on the telephone. As he returned to continue lifting the vehicle, one of the four lift arms flew out from under the car causing the vehicle to drop front-end first into the ground. During the fall the failed arm swung back and hit Mr. Dellea in the left forearm, causing permanent damage.

The said lift in question was installed without safety locks, which, according to Dellea and his witnesses, was the cause of the accident. The installer of the said lift works for the New England subsidiary of Automar, Inc. This individual told Dellea that the lift did not need the safety locks and that people generally just throw them away. However, Dellea insisted on having the safety locks anyway, so he contacted Ann Jeferies, the seller of the lift, and demanded that she have it fixed.

Another problem that Mr. Dellea reports is that the lift he bought was not the same as the one that he ordered. The installed lift is a used model of the brand Arcanus. Mr. Dellea claims that he ordered a used model of the type Mohawk. Mr. Dellea took the vender's word that this model was as good as the Mohawk and signed all the

necessary paperwork. Mr Dellea allegedly also complained that the installed lift appeared to be uneven in that the front end of the lift was lower than the back. A customer representative came and told him that everything was fine and there was nothing to worry about.

Lawrence L. Voelker Santino Dellea's expert witness testified that the lift should have never been installed without the safety locks. According to Mr. Voelker these safety devices would have prevented the accident by keeping the restraining arms in place. His opinion is based on the ANSI standard from 1992 that made safety locks a requirement on all lifts produced from that point. Voelker argues that if a safety device was known, it should not have been sold without one. By doing so, Voelker implies that Automar should bear full responsibility of the accident.

Defendant's Deposition

Automar New England Inc. claims that it was negligence that caused the accident and that they cannot be held accountable for Mr. Dellea's actions. Automar says there are no documents of conversation and requests to support the plaintiff's claims. The reported conversations between the representative and the plaintiff have no grounds of misconduct or misinformation. As for Mr. Dellea's request for safety locks, no records exist for such a request.

Automar says they have no obligation to supply safety locks since the lift was made in 1984, at that time ANSI standards did not include safety locks. However, had the lift been made in 1992, it would actually require the safety devices. Automar went on to say that problems existed with the locks in that they would often "lock up"

and cause numerous other problems in adjustment. Furthermore there is no guarantee that the safety locks would be able to support the intense pressure of an improperly lifted vehicle.

Even if Automar was required to install the safety devices, the fact that Mr. Dellea had knowledge about the safety locks, and that they were not installed, would make the plaintiff at fault for operating the lift when he knew it was unsafe to do so. Automar believed that the safety locks are only designed to prevent the arms from swinging when the vehicle is lowered and when the frictional force on the arm is released, i.e. when the vehicle is on the ground.

Medical Depositions

Following is a summary of events listing doctor's notes and prescriptions to the exact nature of the problems associated with the plaintiffs forearm:

9-22-92

- no fracture
- symptomatic treatment
- tenderness over the carpometacarpal joint of his thumb on the same side

9-33-92

- Plaintiff said there was a great deal of pain in his arm
- Prescribed Toradol

11-16-92

- Sudden blow which he received may well have contributed to the possibility of a lunate osteochondrosis.

3-15-93

- Still great deal of pain in his left wrist
- Repeat x-rays
- Cohen believes problem is at the carpometacarpal joint
- An aggravation of a pre-existing condition of degenerative arthritis of the thumb carpometacarpal joint. The injury, no doubt, has traumatized this area.

3-22-93

- wrist injection didn't really help him
- EMG's of forearm and hand

12-9-93

- Areflex sympathetic dystrophy
- Negative Finkelstein test
- Problem related to sensory nerve
- Significant impairment (he is right-handed)

9-19-94

- still has sensation of a loss of grip strength
- grip strength testing
- convinced of the diagnosis is causalgia or reflex sympathetic dystrophy

3-10-95

- same amount of pain
- problems related to dystrophy

In other testing done with Dr. Bouillion, tests for nerve damage were negative along with other tests for the cause of pain. However, in other testing, he recorded that Dellea lost about 40% of his grip strength. There are no further treatments that can be performed on Mr. Dellea for his injury. It is also reported that Mr. Dellea had a prior injury to the same arm caused by a ball bearing shooting into his arm causing some nerve damage.

Damages

Mr. Dellea would need to hire an additional mechanic to perform the work he can no longer do (\$25,000). The car also suffered substantial damage from the accident. Mr Dellea is also looking to get compensated for his injury to his arm, pain and suffering, and lost wages due to the fact that he has limited use of his arm. The total amount of damages is in the neighborhood of \$625,000.

Analysis

In determining who is at fault in this case, one must examine negligence on the part of both Automar New England Inc. and Santino Arthur Dellea. Evidence that would lead one to believe that Automar is at fault includes the missing safety locks and the flawed advice of the installer, who is a supposed expert. In order to prove negligence, the plaintiff says safety locks should have been installed on the lift because ANSI standards have them as a requirement. Since the lift was made in 1984 there is no reason

as to why the lift would require these locks. ANSI standards only apply to products being produced at the time of the given requirements. Otherwise any product would become outdated as soon as new requirements have been established. This would lead to a very costly amount of equipment updating, if at all possible, and would make older equipment unusable.

Another problem with Mr. Dellea's position is that he already knew about the safety locks and stated that he would like them to be installed. This being the case, he knowingly operated a machine that he deemed to be unsafe. If the plaintiff had no knowledge of the locks then Automar would be at fault for not telling the customer about optional safety devices. Mr. Dellea's admission about the absence of safety locks in itself is enough to put the burden of negligence on himself.

Another problem with the case is that there is no guarantee that the safety locks would have made any difference in preventing the accident. The safety locks are small devices that were not designed to withstand a great deal of force, especially the amount of a vehicle. Here are the forces involved:

- Oldsmobile Cutlass Ciera4000lbs
- Each arm held.....1000lbs
- Coefficient of friction at $U_s =$(.3)
- Outward force needed to dislodge the arm would approximate.....300lbs

Even according to "Lifting it Right," the vehicle must be lifted properly in order to prevent an accident. It is more likely that the accident was caused by Mr. Dellea lifting the car incorrectly.

If the control arms were correctly in place under the frame of the car friction itself would prevent the car from sliding off the lift. The control arm must have been placed carelessly under the car so that the majority of the force was pushing outward not downward. When Mr. Dellea lifted the car from halfway this sudden movement must have been enough force to cause the arm to shoot out from under the car. Even with a safety lock, the force would have been too great to stop it.

Verdict

We find Automar New England Inc. not to be a contributing factor to the accident. The company met their responsibility in the installation of the lift and in no way take any responsibility for Mr. Dellea's accident.

Contributing percent of the accident:

Plaintiff: 100%

Santino Arthur Dellea

Defendant: 0%

Automar New England Inc.

Napco Inc. v. Brunswick Corp.



Overview

In this case, a machine manufacturer named Napco Incorporated is suing a golf supplies company named Brunswick Corporation for the final payment of a machine that they sold to Brunswick. This machine is a hydraulic return type-hoisting machine that Brunswick uses to metal-plate golf club shafts. Brunswick purchased the machine in March 23, 1992 directly from Napco for an agreed total payment of \$1,561,605. Napco designed the plating machine especially for Brunswick, basing their design on previously manufactured return-type machines and on the specifications provided by Brunswick. Napco installed the plating machine into the defendant's Connecticut facility in October of 1992, to complete the sale.

After using the machine for a year or so, Brunswick stopped payments to Napco with an outstanding balance of \$162,385 still remaining. They claim that they owe no more payments to Napco, due to the lost production time that they encountered while trying to operate the defective machine. They believe that, under contract, the payment of the said price was based on the plaintiff's full performance of their obligations, and that this

performance was not accomplished. For this reason, Brunswick says that the final payment is to be retained as a result of the plaintiff's breach of the terms and conditions of the contract

Background

From the point that Napco installed the machine to present day, Brunswick encountered a number of serious problems with this \$1.5 million machine that forced them to shut down the plating process for days. Under warranty, it was the responsibility of Napco to fix the machine any time that it breaks down or is not running as it was designed to, a responsibility that they fulfilled. However, Brunswick believes that this new machine should not have had to be repeatedly shut down for repairs. For the money that they paid, they expected a machine that would be superior in design feature, durability, structural integrity, low maintenance, and operating up-time. They believe that they deserved these qualities under the express warranties of the plaintiff, and did not get them.

The machine undoubtedly experienced a long list of different problems as it was being operated in the facility. Following is a list of problems that had occurred:

10/11/93	Two setscrews on left side of left side sheave assembly came loose, allowing sheave to drift to right pillow block. Machine shut down and repaired by NAPCO, costing 5 production hours.
10/26/93	Limit switch failed, causing waste of oil. The switch was replaced and the oil filled.
10/27/93	The elevator is not making contact with the upper limit switch due to chain

	stretch. Two hours of production time lost and 2640 shafts were scrapped.
11/3/93	Elevator stuck down for 10 minutes. As a result 900 shafts were lost.
11/11/93	Elevator won't go all the way up due to chain stretch. Upper limit switch was not activated.
11/18/93	Cardboard shim used.
11/24/93	Two load-bearing chains failed and were replaced with chains that are 1 7/8" times the size. The manufacturer said that the load-bearing chains failed because of poor alignment, lubrication, and overloading. The lubrication and alignment problems have not been corrected. Brunswick suspects that the lifting load is too big.
11/29/93	The right chain was drifting right, towards the edge of sheave.
11/30/93	NAPCO installed a plate on the right side of the sheave to prevent Chain from drifting off edge.
2/8/94	Two over traveled system faults. Elevator tilt faults.
3/22/94	A new lube brush was installed because the old one could not.
5/01/94	The system visually appears to have a sheave that takes the pivot load, that have been replaced 5 times. The twin lift chains have been replaced twice. The current lubricating system does not adequately lubricate the chains.
8/4/94	Triple sheave was replaced with a new triple sheave because the fins on the old one were getting cut down to a knife's edge.
5/16/95	The 1 7/8" diameter sheave axle snapped in half.
5/16/95	Axle on triple sheave snapped.
7/12/95	Draw bar being pulled by lifting chains broke.

The agreement with Napco was that the plating machine would be able to plate nickel/chrome on steel golf club shafts. The machine would be capable of producing at least 2880 shafts per hour. The exact figures are as follows. Shafts that were to be chrome plated would have a minimum thickness of 0.00001 inches. Shafts would be plated with a minimum thickness of 0.0005 inches of duplex nickel plate, dispersed uniformly over the entire shaft exterior. As called for by ASTM#B117-73 standard, the shafts will have no more than 15 spots over the entire shaft after 48 hours of salt spray testing. Shafts, when produced would look like 6 sample shafts given to them by the plaintiff.

Plaintiff

The plaintiffs in this case, Napco Inc., are represented by attorney Michael D. O'Connell of Hartford. Napco is a fully owned subsidiary of Thermo Electron Corporation of Waltham, MA. The president of Napco is named Max Caldwell. He has a B.S. in mechanical and electrical engineering. He is considered an expert witness for the plaintiffs, and has expressed the following views on behalf of his company. He believes that the design of plater fully met the specifications that Brunswick called for. He said it was appropriately designed with no inadequacies that he is aware of. The specifications were based on the design and performance criteria supplied by Brunswick.

When asked to testify on specific issues concerning the problems found in the machine, Caldwell answered as follows. He says that the electrical fluctuations that occurred in the machine were most likely caused as a result of the chemicals used in the tanks. He backed this up by having the company Rapid Power come to inspect the

machine, who claim to have found no evidence that the fluctuations were the result of anything electrically or mechanically wrong with the machine. Caldwell claims that the mechanical problems that occurred in this machine are a direct result of misuse by the operators, but has no real evidence to back this up. He believes that many of these problems occurred because operators improperly ran the machine in reverse for a step or two, causing serious jams in the system. He says that Brunswick failed to properly adjust and maintain the chains, causing problems with them. He attempts to back this statement up with some of their own inspection records stating that a few of the chains were not adjusted properly, and needed to be. He claims that Brunswick modified the ventilation system by removing tank covers and plastic sheets between the tank hoods. The removed items are apparently used to control and direct the flow of air within the plater. He believes that these actions severely disrupted the effectiveness of the ventilation system, and could have an impact on the chemicals in the tanks themselves.

Caldwell states that the performance of the plater he sold to Brunswick was typical of their perspective since its installation, with the exception of the ongoing warranty situation regarding a broken axle sheave, which, according to him, was certainly not expected by Napco. It is his opinion that whether or not the machine requires high maintenance is unimportant because there were no up-time regulations on the contract.

The Napco engineer that was in charge of the design and installation of the machine was a man named Michael Laplante. He determined all of the changes that needed to be made from previous designs in order to make the machine suitable for the plating of Brunswick's clubs.

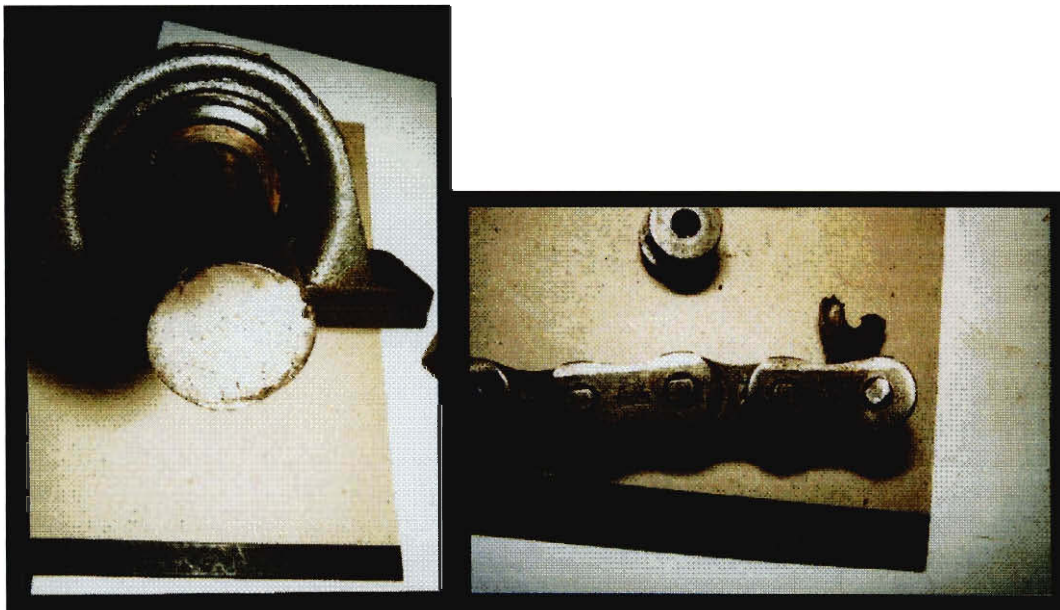
Defendant

The defendant in this case is Brunswick Corporation. Attorneys James H. Rotundo and Katherine Dempsey are representing them in this lawsuit. The defendant signed a contract for the plating machine on date of purchase, acknowledging the plaintiffs purchase order, thereby accepting its terms and creating a valid agreement. Brunswick concedes that during the installation of the golf club plating machine, they inspected it for discoverable defects. The plating machine was accepted on the basis that the plaintiff's warranty was not breached.

The plaintiff's obligations to the defendant include repairing or replacing any problems in the plating machine that may arise should the installed system not perform as specified in the contract. In buying the return type plating machine, it was understood by the plaintiff that the machine would be long-lasting, low maintenance, free from defects, and able to plate 2880 golf shafts an hour. Breach of these and other express warranties of the contract are the basis for the defendant's case.

Brunswick relied on the Napco's apparent skill and judgement as specialists to select and produce a suitable automated return type plating system. However, they soon discovered that the system was inherently flawed, and Brunswick engineers soon lost all faith in Napco's design. According to them, even if proper repairs were made to the machine, a substantial loss of production time still forced them to shut down and lose a great deal of money. They had lost entire workdays and were forced to send employees home without pay. Within the first eighteen months of Brunswick's production, they encountered a number of serious problems with this machine, including such troubles as wear and tear of chains and axles due to poor load distribution.

The most disturbing problem that Brunswick encountered within the first two years of production was the breaking of a main axle that was used to guide large elevation chains. It was a six-inch long cylinder made of heat-treated 1040 stainless steel, with a diameter of 1 15/16 inch. The apparent cause of failure was found to be a mechanical error caused by a setscrew. The chains that ran along this axle were also a source of many different problems that had occurred with this machine. They had worn apart and been replaced repeatedly. They had drifted to one side of the axle when they were supposed to be in the middle. They had drifted off the axle that holds them in place. All of these problems resulted in the shutting down of the facility and the loss of production time.



Currently, or as the trial preparations were being conducted, Brunswick is still experiencing difficulties with Napco's machine. They say that it requires more maintenance than all three of their other machines combined. There are problems with the machine's automated lubrication system; they are forced to lubricate some chains manually. The chains are constantly experiencing premature stretching, causing

Brunswick to have to tighten them more often than they should. Also, the machine occasionally experiences elevator tilts that will automatically shut down the machine during production.

According to Brunswick, Napco had breached their contract by building an unreasonably defective machine that was incapable of performing its needed tasks due to the constant breakage and need of repair. Thus, Brunswick felt that they deserve at least the amount due Napco as compensation for the numerous problems that they had encountered, and for the future problems that would undoubtedly come about. They have actually estimated that they have incurred incidental costs that exceed the amount that they are withholding. They will, thus, gladly accept any future compensation that they may be entitled to as a result of this trial.

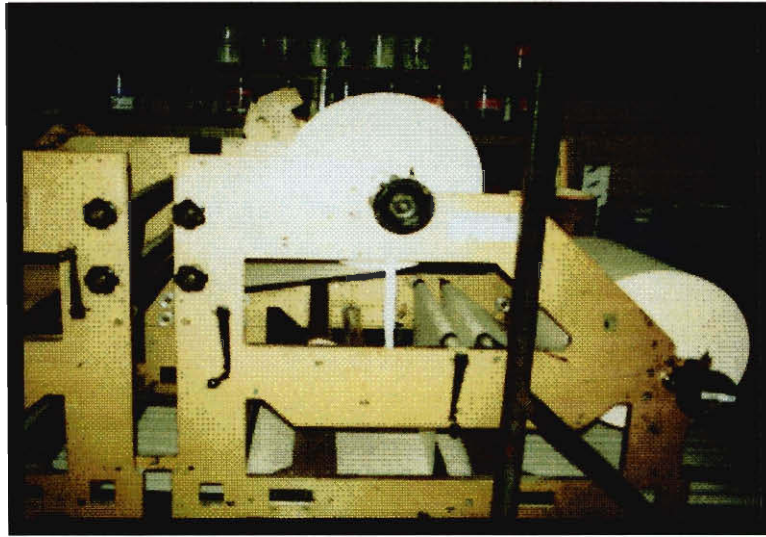
Analysis

After reviewing this case, we have come to the conclusion that the defendant should not be forced to pay the remainder of the machine's cost to the plaintiff. Napco obviously built an unreasonably defective machine for Brunswick, and if the final payment is enough to satisfy the defendant, then so be it. We believe that Brunswick has supplied more than enough information regarding the problems associated with the machine to establish that it was, and probably still is, defective.

It is quite obvious that the express warranties were the basis for the contract that the plaintiff provided during the sale, and Napco has yet to prove otherwise. It is also obvious that the plaintiff has failed to comply with the express warranties of the contract, and to provide a cure for the machine's defects in production and performance. By doing

this, the plaintiff has caused a great deal of time and money to be lost by the defendant. Should the defendant decide to countersue the plaintiff, I believe that he would win, and be entitled to even more compensation.

Barton Ankenman vs. Web Press Corporation



Overview

Barton Ankenman and his wife Brenda are suing Web Press Corporation for injuries that occurred to Mr. Ankenman's left hand while he was operating a printing press manufactured by Web Press. Ankenman was working for a printing company named World Printing at the time of the March 24, 1993 accident. He was attempting to remove an impurity, which is commonly called a "hickey," from the plate cylinder of one unit on the subject machine. Ankenman proceeded to clean the slow-moving cylinder using a small piece of Mylar that resembles a credit card. As he was doing so, he was distracted by a loud bang of a hammer, allowing his hand to slip and be drawn in between the plate cylinder and the ink roller. The two rollers spin in directions that are opposite one another, pulling the plaintiff's hand in a direction away from him. Ankenman claimed that the procedure he used to clean the machine was the method that was taught to him by his employer World Printing, and was also the method that he had used for all ten plus years of his employment in the printing industry.

Impurities, or hickeys, are said to be a usual occurrence in press maintenance and are generally consistent of a small piece of lint, dirt, or an ink smudge that was left on a roller from a previous process. This hickey causes the finished product to be incorrectly printed. It is apparently very difficult to spot a hickey, unless the cylinder is in motion. Web Press Corporation published a pressman's manual that outlined the proper procedure for removing a hickey. It was not the method that Mr. Ankenman used and, in fact, it warned against using that method. For that reason and others, Web Press stands that they are not responsible for Ankenman's accident.

According to Mr. Ankenman, it is Web Press' fault for not providing their design with a proper guarding system to prohibit his hand from being drawn into the machine, and for not providing their machine with a proper method of cleaning hickeys. Under New York State law, the seller of a defective product is liable for injuries proximately caused by negligence and is in strict tort liability for a defective design. Mr. Ankenman believes that Web Press violated this law by building a defective press, in that they failed to perform testing to determine the presence of one or more "nip points," and, in particular, with the presence of the nip point hazard that was responsible for his injury. The said nip point was that area which was formed between the rotating plate cylinder and ink roll on the said press.

Background

The product that the plaintiff has declared defective in this case is a printing press machine. World Printing purchased this machine from Web Press Corporation in 1985. It consists of five different printing units. Each unit has the ability to print words and

patterns on a continuous sheet of paper that runs through it. The paper is pulled into each unit by the plate cylinder and the ink roll. As the paper passes through this region, the pattern that is engraved on the roller is printed onto the sheet. At each unit, there is a red stop button that can stop the machine from running. At both ends of the machine, there are control panels that allow the machine to perform a number of functions. There is an additional stop button on each of these panels that also allows the machine to be run in SAFE mode. There is a run button that starts the machine and a dial above the run button that allows the speed of the machine to be altered. There is also an inch button on the control panel that can be used while the machine is in SAFE mode. It allows the machine to jog forward slowly to allow for inspection and cleaning.



(picture of control unit containing speed adjust, inch button, start button, and stop button from top to bottom)

It has been estimated by the National Printing and Equipment Supply Association, Inc., that sixty percent of all printing press accidents occur within the inking system of the press. Furthermore, a majority of these inking system accidents have been caused by people attempting to hand-clean the machine while the rollers are turning.

Barton Ankenman was not the first World Printing employee to injure himself by lodging his hand into the press machine. Three years earlier on July 23, 1990, a man named Richard Jones was injured in a similar manner. While he was preparing the machine for the next printing, he slipped and accidentally got his right hand caught in between the two rollers. He sustained serious injuries to his right fingers and palm from the accident.

This accident drove Sam Clevenson, the owner of World Printing, to install guards onto the machine to cover the rollers. He hired a company called Rand Manufacturing Corporation to install guards over them to prevent another occurrence. Each guard consisted of a rectangular metal netting that prevented any objects larger than about an inch from entering. These guards are movable in that they are capable of being pulled down in a similar method one would use to open a mailbox. It could be opened so that certain tasks could be performed in that area, such as the cleaning of the rollers. This applies to this case in that Barton Ankenman was holding down the guard while he was cleaning the cylinder when his accident occurred.

The Plaintiff

The plaintiffs in this case are Barton Ankenman and his wife Brenda. E. Stewart Jones is the name of the attorney representing the plaintiffs in this case. Ankenman has worked in the printing industry for over ten years, until his accident in 1993. According to his doctors, Ankenman sustained permanent damage to his left hand from this accident that will prohibit him from working in the printing industry for the rest of his life. He

was 37 years old at the time of the accident, and would have been expecting to retire at age 61.

The plaintiffs intend to rely on the doctrine of *Res Ipsa Loquitur* to establish the negligence of the defendant Web Press Corp. According to the plaintiffs, Web Press is negligent on six charges, as follows:

1. They are negligent in designing, manufacturing, and selling a printing press with an inadequate guarding system.
2. They are negligent in failing to provide a proper guarding system as standard equipment on the printing press to prevent the user's fingers from being drawn in between the ink roll and the plate cylinder.
3. They are negligent in failing to prevent, by mechanical means or otherwise, the plaintiff's hand from entering this region.
4. They are negligent in failing to provide proper warnings, communicating the danger, the nature of the hazard, the risk of serious personal injury or death, and the means to avoid the hazard.
5. They are negligent in failing to provide instruction and warning in the use of the product and in the method and manner of operation.
6. They are negligent in failing to provide a proper guarding system as standard equipment on the subject press.

The plaintiffs believe that the defendant should have properly guarded the nip point between the plate cylinder and ink roll. They believe that Web Press should have used an interlocking gate guard to prevent access of the user's fingers, hands, or clothing with this hazard. The plaintiffs also believe that proper interlocking would have

prevented the machine from being run during an operation that requires a great deal of access to the area around the ink roll and plate cylinder.



(A picture of the press without the guard, the yellow arrow points to an exposed nip point)

The Plaintiff's Expert Witnesses

Ankenman opted to provide expert witnesses to prove his points that the damages to his left hand are the fault of the defendant, and that these damages will result in his inability to work for the rest of his life. He will provide two expert witnesses to testify that the said Web Press was, in fact, defective, one expert witness to explain his past and future economic loss, and four medical professionals to explain his injuries and his need for treatment.

The plaintiff's first witness is a man by the name of Gerald C. Rennell of Grand Blanc, Michigan. He will testify regarding his hazard analysis of the accident and of his

knowledge in industrial machine guarding, printing press guarding, and printing press safety. Rennell is qualified by State and Federal Courts as an expert in machine guarding. He is, in particular, qualified by New York State courts as an expert in printing press guarding. He has designed interlocked guards and has performed hazard analysis for over fifty presses in his life. According to Rennell, the subject machine was not reasonably safe and, in thus defective, in that there was no proper guarding system to protect the user from the in-running nip point hazard. He will explain that this hazard should have been guarded with an interlocked barrier guard, and that the press should have had an inch or crawl button on each unit of the machine in order to jog the machine to locate and remove a hickey. He will verify that the presence of hickies is foreseeable because it is a common occurrence. Finally, he will acknowledge that the defendant was, in fact, negligent in failing to perform a proper hazard analysis.

Mr. Ankenman's second witness is Dr. Richard E. Harkness of Hudson, Ohio. Harkness is also an expert in the field of machine guarding. He has also designed guarding systems and testified on the matter in the past. He will verify the statements of Gerald Rennell and add his knowledge that an interlocked guarding system was technologically feasible and economically practical at the time when the press was manufactured. In fact, he states that appropriate safeguarding which would have prevented Mr. Ankenman's accident has been available and in use for over fifty years prior to the accident. He will also add that removing hickies in the manner that Mr. Ankeman was using is common practice by press operators, and is frequently allowed by employers. This method is used in order to clean the machine without shutting it down so as to maintain production.

Mr. Ankenman's third expert witness is an economist named Anthony H. Riccardi of Albany, New York. Riccardi will testify on behalf of the economic loss that Ankenman will incur as a result of his injuries. His testimony will consist of his calculations as to how much the plaintiff lost and will continue to lose due to his inability to work. Mr. Ankenman's wage at the time of the accident was ten dollars per hour at fifty hours per week. Riccardi estimated that his wage would increase by three percent per annum, that he would receive fringe benefits every year of about thirty percent his wage, and that he would retire at age 61. He calculated that the plaintiff's past loss in wage is \$140,457.00 and in fringe benefits is \$33,301, and that his future loss is \$583,728.00 in wage and \$176,365.00 in fringe benefits, coming to a grand total of \$933,851.00.

The remaining four experts are medical professionals that will explain Mr. Ankenman's conditions and the necessary steps that have been taken for his treatment. Dr. Suheil Khuri and Dr. Arvinder Singh are medical doctors that treated the plaintiff for his injuries. They each agree and will testify that Mr. Ankenman is permanently disabled from his previous job as a pressman. They will testify that their treatment was necessary and that Ankenman's left hand is virtually without functional use. Dr. James Dolph, M.D., will testify to the need for Mr. Ankenman's plastic surgery to his hand. He will explain that the use of his hand will diminish over time as a result of the injury and that it will affect his ability to pursue both vocational and avocational interests. In his opinion, Mr. Ankenman's quality of life will be adversely affected on a permanent basis. The final expert witness that will appear on behalf the plaintiff is Nancy Clemente, a physical

therapist for Albany Memorial Hand Rehabilitation Center. She will testify as to the necessity of the therapy services that she provided to Ankenman.

The Defendant

The defendant in this case is the company Web Press Corporation. The name of the attorney representing them is Kevin P. Burke. It is the defense of Web Press that they are not at fault due to the disregard that Mr. Ankenman conducted in attempting to clean the press with an unorthodox and unsafe manner. According to them, Mr. Ankenman, while attempting to clean the hickey, demonstrated a complete disregard for his personal safety. He used a cleaning method that was completely opposite to all instructions and warnings provided by Web Press.

There are numerous warning and caution labels in different areas of the press that caution the user against acting in certain manners that would be harmful to their personal safety. Among other statements, the labels warned against removing or defeating safety devices. Ankenman did, in fact, defeat a guard that was on the machine while attempting to clean it, but this guard was not one that was originally provided by Web Press. The caution label also explicitly instructed the user not to touch or wipe moving parts, which was exactly what Ankenman did. It says to stop the press and put it on SAFE mode before cleaning, lubricating, or adjusting it – Ankenman did not. It says to follow written instructions; Ankeman undoubtedly did not read anything pertaining to safe maintenance of the machine.



(Two warning signs that were posted on the printing machine in plain view.)

Web Press Corporation published a how-to manual in 1989 that detailed complete instructions on, amongst other things, how to and how not to clean hickeys off the rollbar area of the press. At the very beginning of the document, there is the following statement, "It is essential that this section be read, understood, and reviewed by every person who will be in the press room while the press is operating." Whether or not this document was provided to Mr. Ankenmen by his employer is questionable, but World Printing did have this manual in their possession and Ankenman undoubtedly did not read it. This manual provides the following explicit instructions. Do not bypass safety guards; they should be functional at all times. Do not open guards while the machine is running. Do not attempt to clean cylinders while press is moving. The plaintiff, despite the instructions, performed all of these procedures. There is also a section that describes hickeys and causes for them. The method that Web Press suggests to clean the hickeys is to use the drive side handwheel, which is located on the side of each unit, to manually

turn the cylinders while they are in SAFE mode in order to locate and remove the impurity.

In examining that Mr. Ankenman was so obviously misusing the machine at the time of the accident, it is the belief of Web Press Corporation that they are not at fault and that they owe no remedy to the plaintiff for the accident that occurred. They believe that they had sufficiently warned the user, through labels and instruction manuals, of the apparent danger of the nip point. It is their understanding that they were not negligent in designing the machine with no guard because it was not even suggested by ANSI standards at the time that the machine was purchased, and because they supplied the machine with other types of cleaning methods.

A Third-Party Trial

Should Web Press Corporation be forced to pay remedy to Barton Ankenman for the accident, a third-party trial will likely take place. In this trial, the plaintiff will be Web Press Corporation and the defendant will be World Printing Corporation. Web Press will be suing World for losses incurred to their company due to World's improper training and supervision of employees in the maintenance of their machine. In particular, they will be suing for the money they owe to Barton Ankenman's trial. Web Press believes that World Printing is at least partially responsible for Mr. Ankenman's accident, and thus should pay at least that portion of the remedies.

The president of World Printing is a man by the name of Samuel Clevenson. Clevenson undoubtedly knew of the dangers that the press presented, but the question is whether or not he informed his workers of the proper cleaning techniques for this press.

He seems to know, just by what was said in his deposition, the correct method for the safe cleaning of the machine, but Ankeman certainly did not know it. Furthermore, Mr. Clevenson admitted that he had witnessed workers using Ankenman's method, and that he did nothing about it.

Analysis

In deciding who is at fault in this case it is important to examine all of the points made by the plaintiffs and the defendants. Each party has made good arguments for their side. It is our belief, however, that most of the fault lies on the part of the plaintiff. While it is true that interlocked guards would have prevented this accident, had Mr. Ankenman been following directions in cleaning this overly obvious nip point, the accident would not have had the opportunity to occur. Ankenman was being careless in that he spent no time to examine the dangers that the press displayed. He misused the press in a manner that was in complete disregard of all regulations provided by Web Press toward the operation of their machine. Had the accident occurred in the same manner as in Richard Jones' accident, perhaps Mr. Ankenman might have had a case.

On the other hand, in regard to the testimony of Mr. Ankenman's witnesses, there was good evidence supplied that proves some negligence on the part of Web Press in the design of the press. It is true that they could have taken more care in providing safer and easier methods to cleaning the machine during production. Installing an inching mechanism on each printing unit of the machine would have made it easier for one person to locate and remove a hickey. Installing interlocked guards to each nip point would have made the machine much safer in that it would shut down the machine if it

were disabled. But who would have thought to do it? The same year that this machine was sold, there was a manual of ANSI standards published. There was a section in this publication that spoke specifically of printing press safety, yet there was no reference to any type of interlocking guard or inching mechanism placement. That is why more blame is placed on the plaintiff.

Even though the machine's design demonstrates slight negligence on the part of the defendant, it is our opinion that there had been a great deal more negligence on the part of the plaintiff for failing to truly understand the concepts of personal safety as they apply to this machine. There is more than enough evidence to prove that Mr. Ankenman was not using proper cleaning techniques. Whether that is his own fault or the fault of his employer for lack of training, it is a fact, and thus not the responsibility of Web Press.

We have thus decided that by using comparative fault, it is 70% the fault of the plaintiff and 30% the fault of Web Press. Under New York State Law, if the plaintiff is found to be 51% or more responsible or more responsible for the accident, he gets no remedy. After our decision, Mr. Ankenman will surely have a large hospital bill to pay, but it was, unfortunately, his own fault.

The next question may be, "Why not cut out the middle man? Why can't Mr. Ankenman just sue World Printing for poor training?" Unfortunately, under a worker's compensation agreement that Ankenman signed before being employed at World, he cannot, under law, sue them for any damages that occurred on the job. This prevents any action to take place, leaving Barton Ankenman to take responsibility for his own actions.

Mock Trial

On April 30, 2000, we held a mock trial for the case of Barton Ankenman v. Web Press Corporation, and then another third party trial for the case Web Press v. World Printing. Each group was asked to help in the presentation of evidence. It was mediated by Professors Hagglund and Dimentberg, and was held before a jury of our peers. We briefly explained to the jury the liability laws as they apply to this case. We also explained to them the views that each of us hold and the reasons for our views.

There was a worksheet provided by the mediators of questions that needed to be answered in order to determine who was at fault. After hearing the cases of all of the students, the jury deliberated amongst themselves to fill out this question sheet, basing their opinions on the information that we provided to them. While they were out, we, the students, deliberated amongst ourselves to get an idea of who we believed to be at fault. When all questions were voted on, the final decision was very close, 5-4 in favor of the defendant – although none of us believed that it was entirely the plaintiff's or the defendant's fault. However, since the plaintiff receives no compensation if they are found more than 50% at fault, Mr. Ankenman would have received nothing.

The jury also decided in favor of the defendant, but to a much higher degree than we had. Following is the list of the questions asked, and the jury's replies:

Trial #1 – Barton Ankenman v. Web Press

Q. Did Web Press sell a defective machine to World Printing?

A. No.

- Q. Did Web Press sell defective guards to World Printing?
- A. No.
- Q. Did the printing press have a defective stop/jog/start control system
- A. No.
- Q. Did the web press have defective warnings?
- A. No.
- Q. Did Web Press provide adequate instructions?
- A. Yes.
- Q. Should Web Press pay any money to Barton Ankenman for his injuries?
- A. No.
- Q. Should Web Press pay any money to Linda Ankeman for her loss of consortium?
- A. No.
- Q. Did Barton Ankenman contribute to his own accident?
- A. Yes. About 90% at fault.

Trial #2 – Web Press v. World Printing

- Q. Did Web Press sell a defective press to World Printing?
- A. No.
- Q. Did Web Press provide adequate instructions to World Printing?
- A. Yes.
- Q. Did World Printing alter or modify the web press to make the press defective?
- A. No.
- Q. Did World Printing provide defective guards?

A. No.

Q. Did World Printing contribute to Mr. Ankenman's injuries?

A. Yes.

Q. Did World Printing provide adequate instructions to Mr. Ankenman?

A. No.

Q. What percent did Web Press contribute to Mr. Ankenman's accident?

A. 0%

Q. What percent did World Printing contribute to Mr. Ankenman's accident?

A. 100%

Q. Should Web Press be awarded any money from World Printing for this case?

A. Yes, all that they have been sued for.

Under New York State Law, if a plaintiff is found to be more than 50% responsible for his own accident, he receives no compensation. Therefore, by the ruling of this jury, Web Press owes Mr. Ankenman nothing. Furthermore, had they been forced to pay remedies, under the ruling of the second trial, World Printing would have been forced to replenish all money that they lost.

After the trial, Professor Hagglund provided us with the information that Mr. Ankenman did, in fact, win the case, despite our views. He is believed to have won a million dollars or more. This just goes to show you what a good lawyer and a good presentation of the case can do in swaying one's jury. We were told to expect an appeal.