

2017 Last Chance Seminar

Product Liability Litigation: Case Screening, MDLs and the Example of Lawnmower Litigation

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PART ONE:

Screening Product Liability Cases

- **Requirements for any “good” case:**
 - **Liability**
 - **Damages; and**
 - **Deep Pockets**
 - **4th factor for products cases: The cost to win**

Factors to Consider in a Products Case

- **Do you have the product?**
 - **Preserve the product**
- **Damages: Do you have a catastrophic injury?**
 - **What is catastrophic: death, paralysis, most lost limbs, lost vital organs or other seriously disabling injury**

Factors to Consider (continued)

- Financial Responsibility (Deep pockets)
 - Most product manufacturers are financially responsible, either through their own self-insurance or high liability limits.
 - Research the manufacturer's resources
 - Look for bankruptcy, mergers, etc.
- Are you still within the statute of limitations and statute of repose?
- Need for experts
 - Needed to prove a defect
 - How many experts are needed? What kinds?

Factors to Consider (continued)

- Does the case fall into a common scenario?
- Roof Crush
- Seat Belt Malfunction
- Tire Defect
- Vehicle Crashworthiness
- Product Recall
- Is there Multi-district Litigation (MDL)?
 - talc litigation, hernia mesh or Invokana



PART TWO:

AEMLD

- Alabama's Extended Manufacturers' Liability Doctrine – modified form of strict liability
- AEMLD Elements
 - Defective product;
 - Product left defendant's control in defective condition;
 - Product reached and was used by plaintiff without substantial change;
 - Defect is traceable back to the defendant; and
 - Defect caused the injury.

Types of Defects

- Three major types of defects:
 - Design defects:
 - Product dangerous despite proper manufacturing or appropriate consumer use
 - (ex. Saw has no guard, vehicle rollover)
 - Manufacturing defects; and
 - Occur during manufacturing process
 - (ex. Tainted medicine, using wrong type of screw)
 - Marketing defects.
 - Failure to provide adequate instructions or warning labels
 - (ex. Medicine lacks warning of side effect).

AEMLD Defenses

- Assumption of the Risk
 - Was the client drinking or using drugs? What role did intoxication play? For example, is plaintiff a passenger or a driver?
 - Excessive speed in a vehicle crash?
- Client Misuse
 - Did the victim ignore the warning label or instructions? Did the victim alter the product? Was it a foreseeable use?
- Sealed Container Doctrine

Sealed Container Doctrine

- Applies to retailers and distributors sued on product liability claims
- A seller is not liable if the seller receives the product from the manufacturer and sells it without knowing of the defect or having a reasonable opportunity to inspect the product.
- *Sparks v. Total Body Essential Nutrition, Inc.*, 27 So. 3d 489, 490 (Ala. 2009)
 - The sealed-container defense was not available to the retailer in claims asserting a breach of implied warranty under the UCC.

2011 Amendments Protecting Distributors

- Alabama Act 2011-627
- Amended Ala. Code § 6-5-501 and 6-5-521 to generally prohibit product liability actions against wholesalers, dealers, distributors or retailers (collectively, “distributors”).
- Exceptions allowing for liability
 - Distributor is also the manufacturer;
 - Distributor controlled design or labeling;
 - Distributor alters the product; and
 - Distributor commits independent acts of negligence, wantonness, etc.

PART THREE:

MULTI-DISTRICT LITIGATION (MDL)

- Coordination of cases into an MDL will be sought where:
 - Numerous plaintiffs with similar facts;
 - with complaints pending against the same defendants;
 - for similar damages;
 - in multiple federal district courts.
- Once ordered, all cases pending in federal courts from around the country are transferred to a single judge for pretrial proceedings.

What is a Mass Tort?

- A single tort that results in injury to many victims, and therefore involves many plaintiffs suing one or a few defendants.
- In most cases, mass tort claims are brought when consumers are injured on a large scale by defective drugs, medical devices or defective products.
- Each plaintiff has an individual claim with distinct damages, and each plaintiff will, theoretically, receive a separate trial.
- A class action is not viable procedure.

Rising Amount of MDL Proceedings

- 349,666 total pending actions in U.S. district courts.
- Of those, 125,373 actions are presently pending in MDL
- 36 percent of all cases pending in federal courts are in an MDL

The MDL Panel

- Judicial Panel on Multidistrict Litigation (“JPML”)
- Consists of 7 federal judges
- Includes Judge Proctor of AL-ND
- Decides the Motion for Centralization
 - Cases in several federal districts transferred to a single federal court for pretrial proceedings
- Issues on Motion for Centralization:
 - Does case meet criteria for centralization?
 - Which judge should handle the MDL?

What Happens When MDL Forms?

- The transferor courts lose jurisdiction and the transferee court's jurisdiction becomes exclusive
- Plaintiffs' Leadership Committees form
- Plaintiffs' Steering Committee (PSC)
- PSC litigates discovery for all plaintiffs
- Common benefit order
 - To compensate leadership for its work
 - To pay for general litigation expenses
 - Percentage taken from primary attorney's fee

Procedures Used in MDLs

- Plaintiff's Fact Sheets
 - Uniform discovery requests to each plaintiff
- Bellwether Trials
 - A small group of lawsuits, chosen from a larger group of similar cases, to be tried first.
 - Case outcomes serve as litmus test for how future litigation might turn out.
- Group Settlement
 - Matrix/Grid Settlements
 - Variables taken into consideration (e.g., age)
- Remand for trial

PART FOUR: The Example of Lawnmower Back Over Litigation



Lawn Mower Back Over Statistics

- Each year approximately 560 children are injured as a result of a back over incident with a riding lawnmower. (David Vollman, et al., *Lawnmower Related Injuries to Children*, 59 *Journal of Trauma*, 724,727)
- Riding lawnmowers provide an annual injury rate of 2.6 injuries per 1,000 ride-on mowers. “This injury rate is more than three times greater than that for walk behind power mowers.” (Gary Smith, Technical Report: Lawnmower Related Injuries to Children, *Pediatrics* Vol. 107 No. 6 (June 2001))

Lawn Mower Back Over Statistics Continued

- The overall injury rate for all lawnmowers and children is an average of 9,400 annual injuries per 100,000 U.S. children per year. (David Vollman, et al., *Epidemiology of Lawnmower Death Related Injuries to Children in the United States, 1990-2004*. Pediatrics Vol. 118, No. 2 (August 2006))
- It is estimated that 2,000 children are permanently impaired every year as a result of lawnmower injuries. (Jorge E. Alonzo, M.D. and Fernando El Sanchez, M.D., *Lawnmower Injuries in Children: A preventable Impairment*, 15 Journal of Pediatric Orthopedics 84 (1995))

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Wounding Capacity

- The kinetic energy of an average blade at 3,000 RPM is 2,100 ft/lb. (Jorge E. Alonzo, M.D. and Fernando El Sanchez, M.D., *Lawnmower Injuries in Children: A preventable Impairment*, 15 Journal of Pediatric Orthopedics 83 (1995))
- The wounding capacity of a rotary blade is the same as the power generated by dropping a 211 lb object from the height of 100 ft or three times the power of a .357 Magnum gun. (Id)
- The momentum at the tip of a blade moving 3,000 RPM can launch a 1.5 lb object at 232 MPH. (Id)

Consumer Product Safety Commission June 1981 Report

- The Consumer Product Safety Commission identified the hazard pattern of a child being backed over by a riding lawnmower in its' 1981 report. (Ray Newman and Regina Miles, *Hazard Analysis Injuries Associated With Riding Type Lawnmowers*, U.S. Consumer Product Safety Commission (1981))
- A “Blade-Stop and Alarm When in Reverse” feature was suggested which is “A requirement that, all during the time that the mower is in reverse gear and the propulsion engine is running, the blade shall be stopped and there shall be an intermittent sound signal of specified characteristics.” (Id)

Government Hazard Recognition

- 1970, March – OPEI and Institute of Agricultural Medicine at the University of Iowa “Research Report”. “Accident surveillance funded by the USPHS supported the fact that backover type accidents are definitely becoming a predictable hazard.”
- 1973, March – CPSC Summary Analysis of Riding Power Mowers (1422) lists eleven operating in reverse accidents including one death between April, 1966 and October, 1971.

Government Hazard Recognition Continued

- 1974, November - CPSC Blade Contact Subcommittee minutes recognize that several studies indicate that backover accidents are in the area of 11% of blade contact accidents.
- 1974, December – CPSC Blade Contact Subcommittee minutes stating backover accidents are 8.8% of the total reported mower accidents but rate over 4.5 times the average severity index of all mower accidents.

Government Hazard Recognition Continued

- 1977, May CPSC proposed safety standard and extension of time. “In order to reduce injuries connected with backover accidents, the blade of a riding mower must come to a stop when the transmission or traction drive is positioned for reverse travel (Fed. Register, §1205.11(a)(3), P. 23057). The blade of a riding mower shall be inoperative while the transmission or traction drive is positioned for reverse travel (Fed. Register, §1205.11(a)(3), P. 23071).
- 1983, September – CPSC disapproves the OPEI proposed B71.1 standard. Reasons for disapproval include failure to require mower blade(s) to be stopped when the transmission or traction drive is positioned for reverse travel.

Government Hazard Recognition

Continued

- 1984, September – CPSC comments on Proposed ANSI B71.1-1980 revisions. CPSC submitted requirements again for the backover hazard. Automatic blade stoppage within 2 seconds (max.) upon placing the machine for reverse travel or prevention of reverse mowing was recommended along with a possible manual override with six-second audible alarm.
- 1988, May – CPSC Hazard Analysis – Ride-on mowers. Runover/backover represents 3% of all mower in use injuries. Runover/backover, etc. related hazards accounted for nearly 20% of the death incidents and ranked second in number of reported deaths identified with ride-on mowers.

Government Hazard Recognition Continued

- 1993, September – Report that the primary hazard “runover and backover” included all incidents in which the victim was injured from being run over or backed over by the mower. About 5% of all incidents were related to this hazard. Average age of the backover victim was 5 years old. Estimate of 365 backover accidents per year. (Ride-On Mower Hazard Analysis (1987-1990), U.S. Consumer Product Safety Commission, September 1993)

ABC News: Good Morning America

Monday, August 20, 2001

- “MTD Products, which makes a Cub Cadet, Yard Man and some other brands, developed a no-mowing reverse feature in the early 1980s and put it on all of their consumer model ride-on lawn mowers.”
- “...If the mower is in reverse, the blade stops. The idea was not patented. The industry was free to follow MTD’s lead. But as the company points out in a statement, ‘MTD was the only company worldwide to use a no-mow-in-reverse feature for 18 years before other companies followed.’ The company says the no-mow-in reverse safety feature effectively ended backover blade injuries involving its ride-on lawn mowers.”

ANSI B71.1-2003

Industry Standard sponsored by the Outdoor Power Equipment Institute

- 14.2.1.8 - A means shall be provided that prevents reverse drive operation at a ground speed greater than 0.3 m/s (1ft/s) with powered blade(s). An override capability may be provided to permit reverse drive with powered blades temporarily. If an override capability is provided, it shall automatically reset when one or more of the following actions occur: (1) the blade(s) is (are) re-engaged or (2) the engine is restarted or (3) the directional control is moved from reverse. Ride-on machines with zero turn radius capability and machines with front mount mowers are excluded from the requirement.

Any Questions?



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