THE DEFECTIVE PRODUCT

Defective design, instructions and manufacturing

It is important to understand that a person injured by a product does not automa..ically have a cause of action against the manufacturer or anybody else. There can only be a claim when the product is in some way defective and moreover only when that defect is the cause of the injury. You will note that I said that liability would arise when it could be shown that the defect caused the injury. I did not say that it is necessary to show that the defect caused the accident and this statement can be supported by a number of decisions relating to motor car accidents. On many occasion an accident happens for some reason quite unconnected with the defect, but because of the defect the passengers in the car were injured more severely than they would have otherwise been. Thus, if a car overturns because the driver was trying to avoid an animal on the road there is no defect in the car that can be said to have caused the accident. In some cases, however, the driver is severely injured because his seatbelt broke under the stress of the accident and did not give him the protection that he had a right to expect. If the seatbelt broke as has on occasions happened, because it was defective then the injured driver may sue the manufacturer of the seatbelt not for causing the accident but for causing him injury.

An example of this situation is the case of "Jeng v. General Motors Corporation". Jeng and his wife were passengers in the rear seat of a 1963 Buick saloon car which was in a collision

with a Ford automobile. The rear door of the Buick flew open and the plaintiff and his wife were thrown out on to the road. Mrs. Jeng was killed and Mr. Jeng was injured. He claimed that the death of his wife and his injuries were caused by the faulty design of the doorlatch. He tried to prove to the court that if the doorlatch had been properly designed, the door would not have opened and his wife would not have been killed by being thrown out. However, the jury in this case said that the doorlatch was not defectively designed and the decision of the jury was upheld by a court of appeals. At the trial the judge had explained the law to the jury as follows :

> "Any design defect not causing the accident would not subject the manufacturer to liability for the entire damage but the manufacturer would be liable for the portion of the damage or injury caused by the defective design over and above the damage or injury that probably would have occurred if there had not been a defect in the design".

This case illustrates two points. One is that a plaintiff does have to prove a defect before he can hope to obtain damages and that juries, no matter how sympathetic they may be, do require to be satisfied on that point. The second point is that if the plaintiff had succeeded in proving to the satisfaction of the jury that the doorlatch had been defective, it would have followed that the damages awarded would have been for those extra injuries caused by the defect and not the entire injuries resulting from the accident.

The Design Defect

When we are dealing with a design defect we are not saying that the manufacturer made a mistake in the production process. The product coming out of the factory was exactly as intended and the plaintiff, if he is going to obtain damages, must prove that the design of the product was dangerous and caused the harm.

Sometimes, of course, it may be that there are both manufacturing and design defects present at the same time. In a number of cases relating to a defective brake assembly on trucks it was shown that the brake failed because a retaining pin had been inserted during the production process upside down so that it fell out and allowed the foot pedal to become detached. Although this was clearly a manufacturing defect it was also a design defect in that the design of the assembly should have been such that this type of mistake in production could not have occurred.

It is difficult to to define a design defect, but the courts have developed a number of factors that must be considered. One of these factors is the technological and practical feasibility of an alternative design at the time the product was put into manufacture. This is the "state of the art" controversy because many defenders claim that the courts look at the design in the light of the technical knowledge available at the time of trial rather than at the time was being designed. There is no evidence from the reported decisions that in fact the courts are influenced in this way, but nevertheless one should stress that

a defective design implies that it was defective in the light of the knowledge available to the manufacturer at the time he was designing the product and not at any later period. However, you should notice that we are concerned with the knowledge that was available to him and not the knowledge that he actually had. A manufacturer is supposed to be up-to-date in the technical knowledge of his industry. So one of the factors that is to be considered in deciding whether a design is defective is the technical knowledge and the feasibility of an alternative and presumably a safer design at that time. There are other factors that must be taken into account, namely :

1) any warnings or instructions given with the product.
2) the effect of a change of design on the usefulness of the product
3) the comparative costs of producing and maintaining an alternative product, and
4) any new or additional harm hat might result from the alternative design.

All these factors taken together will help a court to decide whether the manufacturer could have reasonably used an alternative design and in view of the "Pinto" cases we should perhaps mention briefly the question of comparative costs. Clearly, the manufacturer should not be expected to produce a product that is so expensive that it will not sell in the marketplace. However, he is expected to look at the likely dangers that will follow from the design he is using and to decide whether at no unreasonable expense the dangers can be removed. The implication in the Pinto cases is that the Ford Motor Company knew that the design of their cars was dangerous and knew that serious harm

might result and yet decided to adopt the design in order to save money. I should perhaps stress here that these statements about the Ford Motor Company are allegations made by plaintiffs and I am not putting them forward as established facts. The cases,however, do indicate the dilemma of manufacturers which is to make a choice between the likelihood of harm and the cost of avoiding that harm. The ultimate choice must depend not on the impact on the manufacturer's products, but on the possibility that a more expensive product will not be accepted in the marketplace.

Failure to warn

We have seen one of the factors that enters into the design problem is the nature of warnings and instructions. A product may be perfectly safe if it it is used properly, and in that case it is the responsibility of the manufacturer to ensure that the user is given adequate instructions. Another possibility is that a product is necessarily dangerous, but does serve nevertheless a useful purpose, and in that case the manufacturer must clearly tell the user that the risk exists. This applies particularly to unavoidably dangerous drugs and there have been many cases in which drug manufacturers have been held liable for harm to a patient because the patient has not been adequately informed of the possible consequences of taking the drug. In these drug cases, the warning may have to be given not to the patient but to the doctor and if the doctor fails to pass on the warning to his patient then the responsibility is his and not the manufacturers. An action for professional negligence against the doctor is therefore the proper remedy for the injured patient.

As in the case of design defects, the courts had established a series of factors which had to be considered in relation to warnings. There are really two questions involved. One is whether the product has a propensity to cause harm about which the user should be warned. The other is whether the warning that was given was adequate in the circumstances. The factors to be considered are :

1) whether the likelihood of harm and the serious nature of that harm were such that the instructions or warnings given were inadequate and whether the manufacturer could and should have provided the warnings that a plaintiff alleges would be adequate.
2) the manufacturer's ability to be aware of the danger.
3) the user's awareness of the danger.
4) the feasibility of providing warnings or instructions.
5) the clarity and conspicuousness of the warnings that were provided.
6) the adequacy of the warnings.

The first factor mentioned above refers to the warnings that the plaintiff alleges would have been adequate . It is, in fact, part of the case of a plaintiff that adequate warnings were possible, and the burden is on the plaintiff to show that adequate warning should have been given. The plaintiff must also prove that if the warning, in the terms he suggests, had been given then a reasonably prudent user would either have declined to use the product, or would have used it so as to avoid harm.

It is perhaps worth emphasising that the law does not require a warning of an obvious danger. The manufacturer of a kitchen knife, for example, is not required to attach to it a warning "this knife is sharp and it may cut the user".

An example of failure to warn

A skier in Colorado was injured on a skilift when the chair fell to the ground because of the failure of a cable clamp unit. It was discovered that this failure was due to the fact that the threads on a nut were dirty. The plaintiff claimed that the maintenance manual was inadequate in that it did not adequately state the consequences that could follow from a failure of the clamp. At a jury trial the verdict was in favour of the manufacturer and the Court of Appeal affirmed the lower court. However, the State Supreme Court reversed the decision. It said that the jury had not been properly instructed and should have been told to consider whether the instructions in the manual were adequate.

Failure to warn must be cause of injury.

The plaintiff may be able to satisfy the court that there was a duty to warn and that the warning was inadequate, but he will still not necessarily have won his case. He must also show that the injury was caused by the absence of the warning and the question therefore arises whether the warning would have been heeded if it had been given. Of course, the plaintiff is not going to say in evidence that he would have disregarded the warning if there had been one there, but the defence might be able to establish by bringing evidence of previous conduct that

it was very likely the warning would have been ignored. There is also the possiblity that the warning could not have been read because the plaintiff was perhaps lying or perhaps unable to read. This point was discussed by the editors of the Restatement 2nd and comment (j) to section 402 A states that when a warning has been given it may be assumed that it had been read. This is in legal language a rebuttable presumption and evidence may be brought to show that the assumption that the warning would have been read is in fact wrong. This point was raised in a Texas case in 1972 and the court then said that the defendant could produce evidence to show that the plaintiff could not have read the warning even if it had been there because he was blind, illiterate or intoxicated at the relevant time. Alternatively, the defendant could bring evidence to show that the plaintiff was by nature irresponsible and would not have heeded the warning. (Technical Chemical Co. v. Jacobs 480 SW 2nd 602).

Who must be warned.

In some circumstances the manufacturer is not able to warn the user of the product and in some circumstances he is entitled to assume that a warning will be passed on to the user. In 1974 a Federal Circuit Court of Appeals said that it would be sufficient to warn the employer of the user if

1) the actual user was controlled or supervised by the employer, and
2) it would be difficult or unduly expensive to warn the actual user.

In that case the plaintiff was injured by an explosion caused by fumes given off by a paint. He was painting the inside of a

tank and the question was whether a warning of the possibility of dangerous fumes was sufficient if given to the employer. The Court held that in the facts of the case the painter was not supervised and that he could have been directly warned by a warning on the can of paint itself. The manufacturer did not put a warning on the can and he was therefore held to be liable. There has been a number of cases relating to injury caused by paint and in general it seems that the courts feel a warning on the can is the only reasonable way in which the user can be informed. In fact, that is what the comment to 402 A says, i.e.,

> "in order to prevent a product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use".

Effect of Advertising

The duty of a manufacturer to warn of possible dangers may be enhanced by claims made in advertisements. If a product is advertised as being safe, then it all the more important that the user's attention should be drawn to any potential danger. The principle is set out in the Restatement 2nd in section 402 B under the heading, misrepresentation by seller of chattels to consumer. The section says that

> "one engaged in the business of selling the chattels, who, by advertising, labels, or otherwise, makes the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the

misrepresentation, even though

> "(a) it is not made fraudently or negligently, and (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller."

A 1967 Minnesota case illustrates this point. A child was severely burned by boiling water when a vaporiser tipped over. The equipment had been advertised as "safe", "foolproof" and "tip-proof", but nowhere was the statement made that the water in the container was heated to boiling point and was dangerous. The Court held that the manufacturer was liable for the failure to make this warning.