A good offense against products liability defenses

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The absence of prior accidents and evidence of product alterations are two often-used, and effective, defenses in products liability cases. Defeating them is never easy, but case law is on your side.

In a products liability trial, the president of the defendant manufacturer is allowed to testify that when he joined the company, he asked numerous people whether there had been prior accidents with the product and received no information. The president then testifies that the absence of accidents means the pro d uct is safe and not defective. In closing argument, the defense lawyer tells the jury more than 20 times that the product has a perfect safety record over many years and this is the only accident and injury known to the manufacturer.

In another case, an industrial machine in use for many years underwent several changes, none of which affected the hazard that was present at the time of sale. The defendant argues that the changes mean that the machine is no longer the defendant's product and it is not responsible for the plaintiff's injuries-despite a lack of evidence that any change caused the injury. When asked if the product was in substantially the same condition as when it left the manufacturer, the jury marks "no" on the verdict form.

Although these are hypothetical scenarios, *they* depict two of the most effective defenses in products liability cases. When the defense claims an absence of prior accidents like the one that injured your client, the jury is often left with the strong impression that a product is safe. Indeed, this *type* of evidence maybe relevant to prove that the product is not defective or dangerous, let alone unreasonably dangerous.

Defendants often use evidence of changes, alterations, and modifications to a product to argue that strict liability should not apply, because the *Restatement (Second) of Torts* requires that the product reach the user without substantial changes. In addition, this argument allows the defense to claim that any changes are a superseding, intervening, or concurrent cause of the accident, which relieves the manufacturer of liability in whole or in part.

The `Who knew?' defense

In cases where there is no evidence of prior accidents, defendants often argue that their products are safe: If they weren't, the reasoning goes, there would have been reports of other accidents and injuries. Defendants claim

that a lack of prior incidents proves there is no causation between the alleged defect and the injuries the plaintiff suffered-and that those injuries were not foreseeable.

Predictably, testimony that thousands of similar products used in a similar fashion did not yield any complaints, accidents, or injuries severely prejudices the plaintiff's case. If there are, in fact, no prior incidents, this is powerful evidence for the defense, and juries accord substantial weight to such negative evidence.'

On the liability question, this evidence shifts the focus to the injured person and his or her employer if the injury was work-related.

The leading case on this subject, *Jones v. Pak-Mor Manufacturing Co.,* illustrates well this defense-and its weakness. In *Jones,* the plaintiff was riding on the side of a trash compactor truck; when the truck turned sharply along a curve in a narrow alley, the plaintiff was caught between the truck and a fence, severely injuring the plaintiff's leg.

The truck was a 1972 model that had been originally designed in 1947. The evidence indicated that there was no material change in the design for 26 years.

The defendant manufacturer claimed that it sold thousands of similar trash compactor trucks and that there were no reports of similar accidents. It argued that the absence of prior accidents proved that its design was not defective, that the product was not dangerous, and that the company had no notice of any defect.

The Arizona Supreme Court upheld the trial court's exclusion of the no-prior-accidents evidence because the defendant had failed to establish the necessary foundation:

> [T]he proponent of the evidence must establish that if there had been prior accidents, the witness probably would have known about them. This portion of the ew identiary predicate will, in most cases, be formidable. It is not, however, insurmountable. The defendant may have established a department or division to check on the safety of its products and may have a system for ascertaining whether accidents have occurred from the use of its products. The defendant or its insurers may have made a survey of its customers and the users of its product to determine whether particular uses of the product have produced particular types of injuries'

In this case, the truck manufacturer had shown no evidence of any record-keeping system regarding complaints or accidents, nor any safety surveys or user data. The court noted that the company president's testimony that there were no prior accidents "does not tell us how many near-accidents, nor how many fortuitous escapes from injury may have occurred.-

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The president's, or other employees', testimony of lack of accidents could not be admissible, said the court, unless foundational evidence established that the witness would have known of prior accidents or claims personally or from a system designed to track the product's safety history.

The court made it clear that safety history, including absence of prior accidents under similar use, may make the ultimate fact as to whether the product was defective more or less probable. But the court noted that "if the import of the evidence is no more than testimony that no lawsuits have been filed, no claims have been made, or 'we have never heard of any accidents,' the trial judge generally should refuse the offered evidence since it has very little probative value and carries much danger of prejudice."'

In *Benson a Honda Motor Co.,* the California Court of Appeal cited the *Jones* opinion more than 10 times in its decision holding that a defendant auto manufacturer had provided sufficient foundational testimony to support its argument that an absence of prior accidents was proof of no defect.' When the plaintiffs' Honda was struck from behind by a larger vehicle, the back of the front seat yielded, allowing Mr. Benson to slide into Mrs. Benson (who was seated in the back seat) and causing her severe facial injuries. The Bensons claimed that Honda knew the seat back design was defective.

The defendant's foundational testimony came from a product-analysis engineer employed by Honda for nearly 22 years. The engineer reviewed information collected by Honda's legal department, including customer complaints, claims, lawsuits, and reports of personal injuries. Honda kept this data in a computerized system that dated back more than 25 years.

Honda's engineer testified that after a search of Honda's database, he found no accidents similar to that in *Benson.* The trial court ruled that this foundation was sufficient and allowed his testimony, and the ruling was upheld on appeal. The appeals court stated the foundational requirement for testimony showing an absence of prior accidents: "[A] t minimum, the proponent should proffer evidence through a witness who is familiar with product safety surveys or safety records concerning the product"'

On the other hand, evidence showing an absence of prior accidents was erroneously admitted at trial in a federal case, *Fonxst v. Beloit* Cot p.The plaintiff's arm became stuck between multi-ton rollers made by the defendant at a paper mill where the plaintiff worked.

The defendant manufacturer admitted during discovery that it kept no records relating to safety complaints or past accidents involving the machine. However, at trial, the defendant

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was permitted to have several of the plaintiff's coworkers testify that during their more than 30 years of working with the machine, they had never seen another accident like the plaintiff's. The jury found that the machine was not defective.

Reversing the judgment, the Third Circuit found that this evidence lacked sufficient probative value and should have been excluded! Pointing to *Jones,* the court stated that the mere fact that a witness does not know of prior accidents does not prove that no such accident oc curred, and it noted that evidence that prior accidents did occur maybe difficult or impossible for a plaintiff to obtain when the defendant manufacturer has not kept records concerning its products' safety history.'

The court noted that the required foundation for evidence of no prior accidents usually involves three elements:

- "similarity-the defendant must show that the proffered testimony relates to substantially identical products used in similar circumstances"
- "breadth-the defendant must provide the court with information concerning the number of prior units sold and the extent of prior use"
- "awareness-the defendant must show that it would likely have known of prior accidents had they occurred.'"

The Third Circuit's decision shows that in the absence of evidence concerning safety history, there is no reliable way to determine the probative value of what is essentially anecdotal testimony. The court held that permitting the defendant manufacturer to elicit this testimony and use it in its arguments "was prejudicial error."

An appellate court in Illinois reached a similar conclusion in *McKenzie* v. SK *Hand Tool* Corp. The plaintiff, an engine mechanic, was attempting to remove engine bolts at his workplace with a ratchet wrench. The plaintiff put an extension on the wrench to enable him to better remove one of the bolts, but the wrench came apart and the plaintiff fell, resulting in the injuries he suffered."

The wrench manufacturer's corporate personnel manager testified that the company made approximately 7,000

ratchet wrenches per year and, after reviewing corporate records, he found no claims or allegations indicating problems with the wrench. However, the court determined that the defendant had failed to lay a sufficient foundation to show that the wrench the plaintiff was using was the same product.

Expert testimony at trial established that the plaintiff's wrench had parts supplied by other companies that did not conform to the manufacturer's specifications. The court found that the defense witness provided no foundation as to whether the other ratchet wrenches the company made complied, or failed to comply (as in the plaintiff's case), with design specifications.

The defendant also failed to establish that the company's other ratchet wrenches were used under conditions substantially similar to those in which the plaintiff used his wrench. For these reasons, the court held, the testimony was improperly admitted.

On the other hand, in *Savant v. Lincoln Engineering,* a manufacturer was allowed to submit evidence through its manager of engineering that its hydraulic jack (which collapsed on, and injured, the plaintiff, a mechanic, while the jack was hoisting a transmission above him) was used to lift transmissions in repair shops throughout the country, that company policy required all accidents to be reported to him, and that no incidents had been reported to him in the past. 'The court determined that this provided sufficient foundation to allow evidence of the absence of prior accidents. In this case, such evidence showed the absence of a defect, the lack of a causal relationship between the injury and the defect, the nonexistence of a dangerous condition, and the manufacturer's lack of knowledge of a hazard.

Cracks In the foundation

Always assume that a defendant manufacturer will assert the absence of prior accidents to defeat a products liability claim. Examine written materials produced in discovery to find out if the manufacturer has a database or any other records pertaining to complaints, accidents, lawsuits, and injuries. If so, find the people most knowledgeable about these records. Have them produce the data, and depose them to expose deficiencies in this foundational evidence.

If the defendant claims that a particular person has personal knowledge of the absence of prior accidents, depose that person to explore variations in the product, the conditions of its use, and the basis of his or her claimed knowledge. If the defendant does not have data, follow up with a request for admission to preclude the defendant from later claiming that there are documents or writings on the subject.

Additionally, file a motion in limine to keep out evidence of the absence of prior accidents. If the jury hears this prejudicial evidence, your objections to it-even if sustained-may not matter. If the defendant claims it can provide foundational evidence, ask the court for an evidentiary hearing outside the presence of the jury.

If the defendant succeeds in getting the foundational evidence admitted, expect to hear repeatedly in closing argument that

- the product has a perfect safety record
- the product operated millions of timeswithoutan accident or injury
- the product is not defective or dangerous
- the cause of the accident and injuries is the user, the user's employer, or both.

To counter these claims, argue that the defendant's evidence doesn't account for near-misses, workers' compensation claims, and minor injuries. Point out to the court that even in the absence of prior accidents, a product can still be defective-and there is always a first victim.

Of course, these arguments cannot erase the impact of the defendant's evidence. The best-case scenario is for the court to exclude it. Persuade the court to do so at the earliest opportunity by showing that the evidence lacks foundation.

The 'It was out of our hands' defense

Manufacturers often use evidence of changes to their products to claim that plaintiffs cannot prove their cases under §402A of the *Restatement (Second)* of Torts, which imposes strict liability on a seller if (among other things) the product reaches the user "without substantial change in the condition in which it is sold."* However, although changes to a product may constitute a defense or diminish recovery for a defective product, the fact that a product has been altered does not automatically exculpate the manufacturer. Analyze whether the modifications were substantial and material, relevant, a cause of the accident or injuries, or foreseeable to the defendant.

Changes that are not causally linked to the accident should be excluded from evidence. As *Sheldon v. West Bend Equipment* Corp. showed, if the change in the product did not cause the injury, the defendant is not relieved of responsibility for the defective product."

Part of the plaintiff's case was against the manufacturer of a manlift whose bumpers, safety chains, and three of its four welded rings were missing when the plaintiff lost his balance and fell off the manlift, sustaining injuries. The jury in the trial court found in favor of the defendant when it noted that the product was not defective as designed

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and delivered nearly 20 years before the accident

On appeal, the Third Circuit stated that without adequate instruction on the issue of causation, a jury could find that substantial changes had been made that the manufacturer could not have foreseen but that did not cause the injury to the plaintiff-"and then erroneously conclude that [the manufacturer] was not liable simply because of the substantial change. Such a substantial change would properly only be relevant, of course, if absent the change the injury would not have occurred.""

The Fifth Circuit recently stated,

> All products, especially complex products like can, change between the time of purchase and the time of accident, but not every change would obviate a manufacturer's liability. [The plaintiff] could have replaced the tires on the car, which may mean it was not in substantially the same condition as at the time of manufacture, but the replacement tires are only relevant if they were a cause of the accident... [T]he supposed alteration must be relevant to the theory of defect."

As the Third Circuit noted in *Sheldon,* jurors may believe that because a product has been changed, the product is not substantially the same as it was when it was sold and therefore the defendant is not responsible. By arguing that any changes are the cause of the accident, the manufacturer is blaming whoever made the modifications, taking the focus off the defective product.

But changes unrelated to the accident and injury are not a superseding or intervening cause, which would relieve the product's manufacturer of liability.18Analyze causation whenever a product modification occurs. If there is no evidence that the product's alteration was a substantial factor in causing the plaintiff's injury, ask that the court exclude any evidence of the product's alteration.

A manufacturer is liable for a substantially altered product with an original design defect if the original defect was a concurrent cause of the accident and the alteration was not a superseding cause or the sole proximate cause of the injury19 And if the product's substantial alterations were reasonably foreseeable to the manufacturer because users commonly modified it (by, for example, removing a safety device), the manufacturer may be held liable under a failure-to- warn theory-even if the substantial-modification defense might preclude a design defect claim7D Indeed, in cases that involve removal of a safety device, the manufacturer may not escape liability if the presence of the safety device would not have prevented the injury."

If there is no substantial evidence that product change was a substantial factor in causing the injury, make a motion in limine, ask for an evidentiary hearing and consider a motion for a directed verdict

Even if the plaintiff proves his or her prima facie case, the defendant may still allege changes are a substantial factor in causing the injury and seek a complete defense or an offset of liability based on comparative causation. Deal with any product changes from the outset by showing that they are not substantial and relevant to the cause of the accident. File a motion in limine to exclude this irrelevant evidence, which is potentially confusing and misleading to the jury. If it cannot be excluded outright, ask the court to prohibit the introduction of evidence of changes until there is a foundational hearing outside the presence of the jury to establish its relevance and causation. Focus on the fact that the product was defective when it left the defendant's possession, that the original design defect is a substantial factor in causing the injury, and that any changes lack relevance and causation for the accident.

When the only reasonable inference from the evidence is that the product was defective as designed and caused the accident, and the changes were not a cause of the accident or injuries, the question of the changes being a causative factor should not be submitted to the jury." Make a motion for a directed verdict that changes to the product were not a substantial factor in causing the accidentor injury and ask the court to conclude the product was substantially the same as when it was sold. If the court grants the motion for a directed verdict, the risk that a jury will be confused by changes that are not a substantial factor in causing the injury is greatly reduced.

By giving careful attention and analysis to the defenses of absence of prior accidents and changes to the product, you can counter the attack that can undermine your case. The best defense is a strong offense, especially where there are foundational weaknesses or causation cannot be proved. This evidence should be excluded byway of motions in limine, evidentiary hearings, or a motion for a directed verdict. These defenses should not be taken lightly. ■

Notes

1. *Jones u Pak-Mor Mfg.,* 700 P.2d 819, 824 (Ariz. 1985).
2. Id at825.
3. *Id* at 826.
4. Id at 825.
5. 82 Cal. Rptr. 2d 822 (Ct. App. 1994).
6. Id at 326.
7. 424 Aid 344 (3d Cir. 2005).
8. Id at 358.
9. Id at 357.
10. *Id* at 358.
11. Id at 362.
12. 650 NL2d 612 (Ill. App. 19%).
13. 899 S.W.2d 120,122 (Mo.App. 1995).
14. *Restatement* (Second) *of* Torts §402A(1) (b) (1965).
15. 718 F.2d 603 (3d Cir.1983).
16. Id at 608.
17. *Muth u Ford Motor* Co., 461 Rid 557,562 (5th Gr. 2006).
18. *Vatdesu J.D.Dif(enbaugh* Co.,124Ca1.Rptr. 467,478 (Ct. App. 1975).
19. 3Am. Jur.3d Prog(of Fads 623,§7 (2007).
20. 63A Am. Jur. 2d Products *Liability* §1317 (2007).
21. Id §1447.
22. Id