Products Liability Section

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Themes in Product Liability Cases

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What does "Where's the beef?"; "Things go better with Coke," "You deserve a break today,"; and "Don't leave home without it," have to do with the trial of[41] product liability lawsuits?

Advertising themes persuasively motivate people. They unify images and advertising into a simple message that succinctly summarizes the selling point of the product. Likewise, the theme in a product liability case is a persuasive technique that unifies the case.

A good case theme must be simple and easy to understand and remember. It must make sense and coincide with a juror's concept of right and wrong. A strong case theme should lead the jury to an intended result, and a causal connection between the theme and the outcome must exist.

The theme provides the framework for the jurors to evaluate the evidence. Just as in advertising which appeals to the psychological aspect of a consumer's motivation to buy, jury themes containing simple messages psychologically persuade the jury to pay attention and to remember key points. Valuable themes summarize the story of the case and create a visual image for the jury.

The theme should coincide with the

continued on Page 2

Volume 11, Number 3, Spring 2006

Themes in Product Liability Cases,
cont. from Page 1

jurors' experiences and beliefs, and guide them in their decision-making process. In other words, the theme should connect the jurors and their values to the very essence of the case. Repetition of the theme in voir dire, opening statement, and throughout the case keeps the jurors focused and helps them to organize and remember the evidence supporting the theme. The theme helps jurors justify the result despite the potential evidentiary conflicts. It creates the context in which to decide the case.

Trial lawyers should consider the theme from the case inception and throughout discovery. The theme is the unifying factor that provides the roadmap to the end result.

Focus groups are one of the best strategies to develop case themes. When focus group jurors are deliberating they use words like "should have," "ought to," "could have" or "everybody." Their discussions boil down to a central theme which provides the ammunition. The key question becomes "what will the jurors believe after hearing all the evidence?" A theme should incorporate the potent evidence that jurors are most likely to believe. The theme should resolve the jurors' conflicts and reconcile them into the theme.

The search for the theme(s) is one of the most important acts for a trial lawyer to win the case. But no theme will be successful with a jury unless the trial lawyer can develop a deep level of personal conviction about the theme.

A theme, in addition to providing guidance for the jury, also becomes a guiding light for the lawyer in presenting the case through its various phases. The theme must be incorporated into voir dire, exposing the jury to the basic concept of the theme, such as greed, profit motive, arrogance, indifference, deception, prevention, or safety in the workplace.

For success, the theme must be repeated during the opening statement, direct examination, cross-examination, and closing argument. The theme reminds the jury of the salient points in the evidence that supports it.

continued on Page 3

Themes in Product Liability Cases, cont. from Page 2

Undoubtedly, every case has a compelling theme, but no single theme works for every case. Themes start out as ideas, catch phrases, and rhetorical devices, which are constantly refined as the evidence and issues are defined. The question for the trial lawyer: "What basic value do the jurors hold that will support the plaintiff's theme?"

Commonly used themes involve personal responsibility, not only the plaintiff's, but also the defendant-manufacturer's. Another common theme is "accountability" to protect powerless victims against powerful, uncaring corporations.

Most cases require more than one theme. Additional themes may be necessary to explain the factual discrepancies or liability issues; to explain the effect of the irresponsible conduct or damages; to deal with the defense issues or themes; or to motivate the jurors to right the wrong or to do justice.

Every product liability case involves injury or death which caused tragedy or injustice because of someone's breach of responsibility. Liability themes include indifference to safety, accident prevention, safety in the workplace, profits over safety, or breach of trust.

Focus groups provide the medium to test the attitudes and beliefs of the prospective jurors to a given theme, and they provide feedback. The theme can then be fine-tuned to ensure that it is persuasive.

Testing a theme with a focus group will determine how much of the irrelevant information, which might dilute the theme's impact, can be eliminated.

It helps to focus the presentation. The jurors' response to a given set of facts or a story can be totally altered by changing the focus. It is important to concentrate on the defendant's conduct to develop a theme that shows the jury that if the defendant's conduct had been eliminated or changed the plaintiff's tragedy would have been prevented.

PLAINTIFF THEMES IN A PRODUCT LIABILITY CASE

A theme often used by plaintiffs is that the manufacturer put profits ahead of safety or people. Jurors identify with this dialectic which is two opposing ideas-profit versus safety. Variations of this basic theme include profit versus sales goals, or profit at the expense of safety, or safety sacrificed in the name of profit or profits first-safety last.

Other product liability themes focus on responsibility, accountability, betrayal of consumer trust, or the corporation's arrogance due to its power. The consumer has no choice but to depend on the manufacturer for safety. The manufacturer has years to make the product safe while the plaintiff's use or the accident's timing is momentary.

The manufacturer has skilled engineers and available resources, which the plaintiff lacks. The manufacturer has the duty to make the product safe, while the plaintiff has none. Another common theme is that the manufacturer buried its head in the sand when it came to safety. The manufacturer used consumers as guinea pigs. The consumer trusted the manufacturer to make the product safe.

OTHER PLAINTIFF THEMES TO CONSIDER

A product liability case is about the powerful versus the powerless. Manufacturers know their product, how it is used, and the consequences of use. The scales of responsibility are tipped toward the manufacturer.

Warnings cannot substitute safety engineering and safety devices. Warnings are useless if they fail to communicate the dangers. An ounce of prevention is worth a pound of cure. The manufacturer created the illusion of safety and knows the difference between safe and unsafe.

The manufacturer had a duty to foresee the product's uses and the potential outcomes. A manufacturer must consider human error, inadvertence, and design safety. A manufacturer chooses or decides with respect to product safety. The manufacturer chose or decided not to act responsibly in failing to make the product safe.

The manufacturer's choice or decision is the key that shows a conscious lack of responsibility. To err is human, to forgive is design. The theme could be that the manufacturer chose to disregard safety engineering, or decided not to test the product, or chose to ignore consumer complaints or accidents.

A manufacturer should not decide who is to be injured or die while using their product. Sometimes the manufacturer loses or destroys important documents or evidence which shows avoidance of accountability. The manufacturer chose to destroy its test data to

continued on Page 4

Chair's Message, cont. from Page 1

which showed that Ford weakened the roof of its popular Ford Explorer SUV.

Post trial, Ford moved to seal the documents and thereby conceal them from the public. TLPJ, representing Public Citizen, filed a legal challenge to the court order sealing the crucial exhibits. TLPJ argues that denying public access to these documents violates Florida's Sunshine Litigation Act, which forbids court orders that conceal "public hazards." The matter is still pending.

Groups like TLPJ and Public Citizen should make all of us proud to be consumer justice attorneys. These groups refuse to turn a blind eye to public safety and access to the courts.

We all can learn from the actions taken by these groups as we fight for these same goals and ideals on the front lines each and every day.

Let's all hope that justice prevails in Jacksonville, Florida. Either way, it will always be said that we at least did not turn our backs when we were needed the most.

Theodore J. Leopold is the chair of the Products Liability Section.

Volume 11, Number 3, Spring 2006

Themes in Product Liability Cases, cont. from Page 3

avoid accountability.

Themes should be specifically focused, depending upon the product and type of accident involved. For example, a floor buffer that emits sparks could be characterized as a detonation device when used around fammable chemicals. A fuel tank that leaks could be characterized as an incendiary device. An absent or defective seat belt could be characterized as a seat that needs a safe seat belt.

DEALING WITH DEFENSE THEMES

Product liability cases are complex. They provide an opportunity for a defendant to assert more defenses than in any other type of tort case. The defenses can be singular, or a blast from the barrel of a shot gun, hoping that one or more defenses sells.

It is important to anticipate product liability defenses and to meet the defenses with a theme. Sometimes a defense theme can be turned against the defendant. Use focus groups to highlight the defenses and to explore themes to refute them. Some of the typical defenses in a product liability case are:

1) The product was altered or modified-The manufacturer will claim that because the product was altered or modified causation is non-existent between the product and the injury. The alteration or modification occurred after the product left the manufacturer's possession. Therefore, a substantial change in the product caused the accident.

The plaintiff characterizes the alteration/modification as a minor change that did not significantly increase the hazard. The product defect was unaffected by the change and the change did not cause the injury. In addition, the manufacturer should have contemplated the change because of known use.

The change should be characterized as being reasonably foreseeable to the manufacturer, and the need for changes should have been avoided. The manufacturer should have considered the environment in which the product is being used, which causes the need for alteration or modification.

A manufacturer must show that the alteration/ modification is the sole proximate cause or was a superseding or intervening cause, not just a contributory cause. If the alteration / change is only a contributory cause, then the liability of the manufacturer and others will be compared.

Evidence of the need for the alteration/modification before and after the change, evidence of other accidents, complaints and lawsuits, and subsequent design changes to prevent or minimize the hazard are offered to ameliorate this defense. A predictive engineering analysis indicating the likelihood of the change to occur is important to show that the manufacturer knew or should have anticipated it.

2) The product's danger was open and obvious-The manufacturer asserts that the product's defect or condition is open and obvious to prove that it did not breach its duty. The manufacturer created the danger and has superior knowledge and means to deal with it.

The manufacturer cannot assume that the consumer will protect himself when he is easily distracted and may make inadvertent contact with the obvious hazard.

The open and obvious danger of a machine is one element for the jury to consider in the risk/benefit test. It does not matter that the user was negligent. Rather, the focus is on the manufacturer who should have employed safety devices to guard against the obvious risks, including the user's familiarity with the risks. The manufacturer is simply trying to shift the burden for safety to the user, knowing it could have worked harder to make the product safe.

3) The warnings were adequate-The manufacturer says that by providing adequate warnings of the dangers it did not breach its duty. The manufacturer blames the user claiming that the warnings should have been read and heeded to, or that a third party should have warned the user. The manufacturer may claim surprise in how the product was used at the time of the accident in light of the warning.

The manufacturer is the product expert and knows or should know how its product will be used. The manufacturer created the danger and has superior knowledge. The manufacturer cannot rely on the warning as a defense unless it designed out the hazard and provided safety devices.

The manufacturer was the trusted expert who would make the product safe, and should have researched and tested the effectiveness of its warning. The manufacturer's lack of research and testing may have more to do with their willingness to pay the cost of injuries than to conduct appropriate safety engineering and provide safety devices.

Without research and testing the warnings, the manufacturer is just guessing on whether the warnings are effective in communicating the dangers. Warnings may constitute evidence that the manufacturer disregarded safety and took the easy way out. The manufacturer cannot escape responsibility for its product just because it gave a warning if more could have been done. The product is still defective despite the warning which was not adequate accident prevention in light of the foreseeable risks.

4) The product is state-of-the-art-The manufacturer says that its product was made to the state-of-the-art at the time it was manufactured, therefore it did not breach its duty. It claims that its product was the safest design at the time it was manufactured. It also claims that no one knew about the danger, or that a safer design came about after it was manufactured.

The manufacturer's design is not state-of-the-art, rather it is state-of-the-market. State-of-the-market is controlled by the manufacturer and its competitors. The plaintiff must show proof of an alternative safer design. This may be in the form of other manufacturer's products, both in the United States and abroad, or technical literature showing the feasibility of a safer design.

The manufacturer was in the best position to foresee that the product would cause injury, and it had the

greater opportunity and capacity to prevent the danger. The defendant should never have marketed the product knowing it was unsafe. The manufacturer failed to protect against the dangers. At a minimum, it was required to issue adequate safety warnings and instructions that would make the product safe.

5) The plaintiff or his employer was a sophisticated user-The manufacturer says that it did not breach its duty because the dangers were known to the plaintiff and employer. This claim is similar to the open and obvious defense. The manufacturer is merely trying to shirk its responsibilities by pointing the finger at others to make its product safe in light of its foreseeable uses.

No one knows more about this product than the manufacturer. If the product is defective, it is still defective, even if the users know about its dangers if it could have been made safer by the manufacturer.

6) The plaintiff misused the product - The manufacturer raises misuse as an affirmative defense of comparative fault. The manufacturer will characterize the use as an unintended use, claiming the product was used differently than what was intended. The manufacturer will contend that the product is safe if it was used as intended.

The plaintiff should point out that the test for misuse is foreseeable use, not intended use. The manufacturer is trying to unilaterally define intended use without reference to foreseeable use. Plaintiff needs to show how the product is typically used, which includes foreseeable misuse that must be taken into account. Even if there is some degree of misuse there may be concurrent fault between the product and the user.

7) The product complied with industry custom-The manufacturer claims that there is no breach of duty because other manufacturers have similar practices, and nobody makes the product any safer. The product is therefore not dangerous or defective.

The fact that other manufacturers make and sell a defective product, does not make it right. The custom is unsafe or dangerous. For example, just because manufacturers of tractors fail to include rollover protection does not make it safe not to do so. The manufacturer should have done its own predictive engineering analysis to determine the hazards. It can obtain empirical data or statistics regarding other accidents.

The manufacturer knows the danger, but hides behind everyone else in the industry who failed to address the problem. The fact that everybody does it the same way does not make it right. The manufacturer and its competitors cannot agree on their own safety standards that usurp the function of the jury. Industry motivation is their mutual interest in making a profit, not the user's safety.

There is an industry bias. There was a time that manufacturers of over-the-counter pills failed to provide safety caps or shrink wrap, and a time when automobiles only included lap belts in the front seats and lacked safety belts in the rear seats. The fact that everybody else is doing it wrong does not make it right nor does it excuse the manufacturer from making it safe.

8) The product complied with safety standards or government regulations- The manufacturer claims that it did not breach its duty because it met or exceeded minimum safety standards. Oftentimes industry opposes government safety standards claiming that they are unnecessary, too costly, they lack the state-of-the-art to accomplish it, and the public does not want it. Once the safety standard is adopted, the industry tries to use the safety standard as a shield to protect itself from liability.

The plaintiff should urge that the safety standards are only minimum standards and are inconclusive on whether the product was defective. Safety standards, even those government-approved, are usually watered down by the industry, or they adopt other industry consensus standards or industry practices. The consensus standards, such as ANSI, do not represent manufacturers' true capability in terms of safety. The Pinto whose gas tank was located in the rear, the Titanic with only 20 lifeboats, and the dangerous Firestone Tires, all complied with their minimum safety standards.

A violation of a consensus standard does not automatically render the product defective. Similarly, compliance with the same standard does not automatically render the product safe. The jury decides if the product was defective and that responsibility cannot be usurped by the industry's own consensus standards regarding what it thinks ought to be done.

9) The safety device was available as an option-The defendant will claim that it did not breach its duty because the plaintiff or someone on his behalf chose not to buy or incorporate the safeguard as an option. The manufacturer attempts to shift the burden of injury avoidance to someone else.

The manufacturer has a non-delegable duty to make the product safe. The fact that a safety device is offered as an option proves that the manufacturer was aware of the danger and chose not to make the product safer because of an economic motive. By not including the safeguard, the manufacturer makes or saves money.

The plaintiff rarely has the opportunity to exercise the option because the product is purchased by someone else such as an employer or purchasing agent. The plaintiff is usually unaware of the danger or the option. The manu-

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continued on Page

Themes in Product Liability Cases,
cont. from Page 5

facturer is in the best position to know the danger and to make a safe product.

The cost of the optional safeguard is usually minimal compared to the product's cost. The optional safeguard should have been included as standard equipment. The product is defective without the optional safeguard.

10) *An unforeseeable risk-The* manufacturer says it had no duty to prevent the accident because it was unaware of the risk.

The manufacturer will argue that encountering the risk was an unintended use of the product. This again depends on the manufacturer's subjective statement regarding the meaning of intended use. The manufacturer's argument discounts foreseeable use. The manufacturer attempts to unilaterally establish the product uses as it intended them to be, instead of its foreseeable use-the legal test.

The plaintiff should allege that the risk of injury was within the realm of reasonable foreseeability. The manufacturer may not have conducted a predictive engineering analysis to understand the product's hazards, risks, and dangers. Empirical data dealing with other accidents and technical literature outlining the nature of the risks are usually available to the manufacturer. The point is to show that a reasonable likelihood of harm existed, and that the manufacturer should have anticipated and safeguarded against it.

11) *A reasonable* risk-The manufacturer will claim that there is some risk involved in using many products and that the manufacturer is not the insurer of everyone who is injured. Because the risk is reasonable, the manufacturer will claim that it had no duty to protect the user.

The plaintiff should assert that the probability of harm creates an unacceptable risk. The manufacturer should have eliminated or minimized the risk. The plaintiff is not claiming that the product should be safe for all uses, just reasonably foreseeable uses. If it is foreseeable that someone can be injured because there is an unreasonable risk of harm, the manufacturer must address the risk.

Plaintiffs should show that a predictive engineering analysis would have revealed a real risk. Other complaints or accidents show that the manufacturer knew the risk was unreasonable. Empirical data on other accidents should be examined. Subsequent product modifications dealing with the unreasonable risk show the feasibility of addressing the risk.

12) *The product was not used with due care-The* manufacturer will claim that the product was not used with due care, and therefore there is no breach of duty. This contention is similar to the misuse, open and obvious danger, and altered/ modified defenses.

The plaintiff must prove a defect's existence would not have caused injury if the manufacturer had practiced accident prevention. Lack of due care is an incomplete defense, but rather a matter of comparative fault. Prior and subsequent accidents occurring in a substantially similar manner show that the product was used with due care. Technical literature, safety standards, and other manufacturers' designs should be considered to show due care was being used.

13) *The design was based on consumer demand for style, comfort, convenience-* The manufacturer will contend that its design was motivated by public demand, and therefore it did not breach its duty.

Public demand is usually created by the defendant's advertising and marketing. The public does not make its style or comfort choice with full knowledge of the dangers and the accident prevention solutions. Other companies' safer designs, including those from other countries, counteract this defense. The manufacturer could have made it safer if it chose to do so. Safety should have been the manufacturer's first choice.

14) The accident would have occurred -The manufacturer contends that causation is lacking between its product and the injuries. Even if there was a safer design the accident or the injuries would have occurred. It does not matter where the gas tank is located or whether the roof collapsed because the accident involved huge forces that would have caused the injuries.

The manufacturer created the dangerous defect and had the opportunity to avoid its consequences. The manufacturer should have avoided the injuries and cannot put the risk of loss for its defective product on the user. It is only speculation that the plaintiff would have been just as seriously injured if the manufacturer had made its product safely.

Data from other accidents, crash tests, safer alternative designs, subsequent modifications, recalls, and retrofits help to highlight the differences in the outcome if the product was made safely. Predictive engineering analysis should have been employed to anticipate the accident and to provide accident prevention. The manufacturer has no power to decide who should live or die in a certain type of accident.

15) A *third party is responsible-The* manufacturer claims that there is no causation between the product and the accident or injuries, but rather a third party is responsible.

A third party's actions do not take away from the manufacturer's dangerous and defective product unless it is determined to be an intervening and superseding cause. A third party's actions may be reasonably foreseeable and the manufacturer should have considered those actions in its design. A manufacturer is merely looking to escape responsibility by pointing the finger at someone else.

A theme provides the concept that runs throughout the case. An effective theme promotes juror identification with the important evidence and helps to reconcile the disputed evidence in the plaintiff(s favor. Themes persuasively motivate the jury.

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