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Analyzing Manufacturers' Duties with Respect to Post-Sale Safety Improvements

By Kenneth Ross

According to Professors Henderson and Twerksi, the Reporters for the Restatement (Third) of Torts: Products Liability, "… post-sale warnings are probably the most expansive area in the law of products liability." The authors go on to say that "[I]f you want to see people turn ashen white quickly, we recommend that you gather representatives from industry in a room and then flash the words 'post-sale warnings' on a screen." They further describe post-sale warnings as "timeless" and a "monster duty."

With this in mind, Henderson and Twerski and the members of the American Law Institute attempted to structure the analysis of this duty and to make it clear under what circumstances this duty would apply.

The Restatement has three sections devoted to post-sale warnings. Section 10 provides four factors the plaintiff must establish to recover against a defendant for failing to issue post-sale warnings. This section makes it clear that, in certain circumstances, this post-sale duty may exist whether or not the product is defective at the time of sale. Therefore, such duty might arise in the case of a product that was not defective at the time of sale but, due to improvements in technology, was, in comparison to products introduced into commerce at a later date, unreasonably dangerous.

The factors to be used in determining the presence or absence of a post-sale duty involve balancing the risk against the difficulty of finding those subjected to the risk and the difficulty they would have acting on the warning. This balancing test is the same as the analysis used to establish negligence.

Section 11 deals with the duty to recall a product and Section 13 deals with a successor manufacturer's responsibility to issue a post-sale warning. Section 11 says, in part, that a manufacturer cannot be held liable for failure to recall a product unless the manufacturer voluntarily decides to recall it, and then does it negligently.

With these sections in mind, the issue discussed below is whether a manufacturer either has a duty to warn prior customers of a post-sale safety improvement or has a duty to offer the improvement to prior customers.

Products are always being improved. Whether it is a new safety feature developed to reduce a risk identified after sale or a new warning label or guard required by a new industry standard, the manufacturer must analyze whether this improvement could fall into the post-sale warning duty.

Let's first look at what the Restatement says. Comment a to Section 10 says: "If every post-sale improvement in a product design were to give rise to a duty to warn users of the risks of continuing to use the existing design, the burden on product sellers would be unacceptably great."

Then in the Reporter's Notes to this comment, the Reporters point out that it will be difficult for a plaintiff to prove each of the four factors enumerated in Section 10 if the warning is merely about the availability of a product-safety improvement.

With reference to any duty to recall a product that, due to safety advances, is subsequently manufactured in a way that has reduced avoidable risk, Section 11, Comment a, states:

> Duties to recall products impose significant burdens on manufacturers. Many product lines are periodically redesigned so that they become safer over time. If every improvement in product safety were to trigger a common-law duty to recall, manufacturers would face incalculable costs every time they sought to make their product lines better and safer.

In an illustration to Comment a, the Restatement describes the following situation:

> [The manufacturer] develops an improved model that includes a safety device that reduces the risk of harm to users. The washing machines sold previously conformed to the best technology available at time of sale and were not defective when sold. [The manufacturer] is under no common-law obligation to recall previously-distributed machines in order to retrofit them with the new safety device.

These statements and this illustration make it clear that there is no post-sale duty to recall where the product was not defective when sold. In contrast, regarding merely warning duties, Section 10 makes it clear that the product does not need to be defective at the time of sale to give rise to a post-sale duty to warn.

So, where does this leave the manufacturer? Probably confused. Since a post-sale improvement is an "alternative design"

and an admission that the product can be made safer, the plaintiff might argue that this improvement proves that the product without the improvement was defective when sold and that the improvement could have been developed much earlier. This, in effect, potentially turns the post-sale safety improvement into a situation where the manufacturer is fixing a defective product. Thus the jury could hold the manufacturer liable for selling a defective product, as well as for negligent failure to warn those customers that purchased the product before it was "improved."

For example, in *Tabieros v. Clark Equipment Co*, 944 P.2d 1279 (Haw. 1997), the Hawaii Supreme Court held that "a manufacturer has no duty to 'retrofit' its products with 'after-manufacture' safety equipment, although it may be found negligent or strictly liable for failing to install such equipment — or not otherwise making its product safer — existing at the time of manufacture."

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To add to a manufacturer's uncertainty, a California case suggests that even if the product is not defective at the time of sale, negligence for failure to conduct an adequate retrofit campaign may be found, even when the product is not defective when sold. The California Court of Appeals in *Hernandez v. Badger Construction Equipment Co.*, 28 Cal. App. 4th 1791 (1994), held the manufacturer negligent for not informing its prior customers that an optional safety device was now mandatory and for not trying to retrofit old products that did not have the safety device. The *Hernandez* court, relying in part on *Balido v. Improved Machinery, Inc.*, 29 Cal.App. 3d 633 (1972), justified imposition of liability based on the rationale that "Badger did not do 'everything reasonably within its power to prevent injury' to plaintiffs."

Thus, manufacturers should take no solace in the helpful language in the Restatement on safety improvements. There are many opportunities for plaintiffs to argue that the manufacturer should have done more. Furthermore, manufacturers should be very mindful of these arguments when making significant improvements in safety. Assuming that the products in the field can be retrofitted with this new technology, the manufacturer should seriously consider offering such technology to prior customers. It will enhance safety for those customers who take the new technology and make any litigation more defensible where the customer refused the new technology.

It is not necessary for manufacturers to offer safety improvements to customers at no charge. The customer would have paid for the safety improvement if it had been on the product originally. Consequently, they should pay for it now. Furthermore, a plaintiff might actually argue that offering a safety improvement for free constitutes evidence that the manufacturer is really just trying to fix a defective product.

Products evolve over time and the law supports making safety improvements. Consequently, no manufacturer should avoid making better and safer products. When doing so, however, the manufacturer should consult with experienced product safety counsel to decide whether it should offer the improvement to prior customers and how to make the offer so as not to be considered negligent.

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