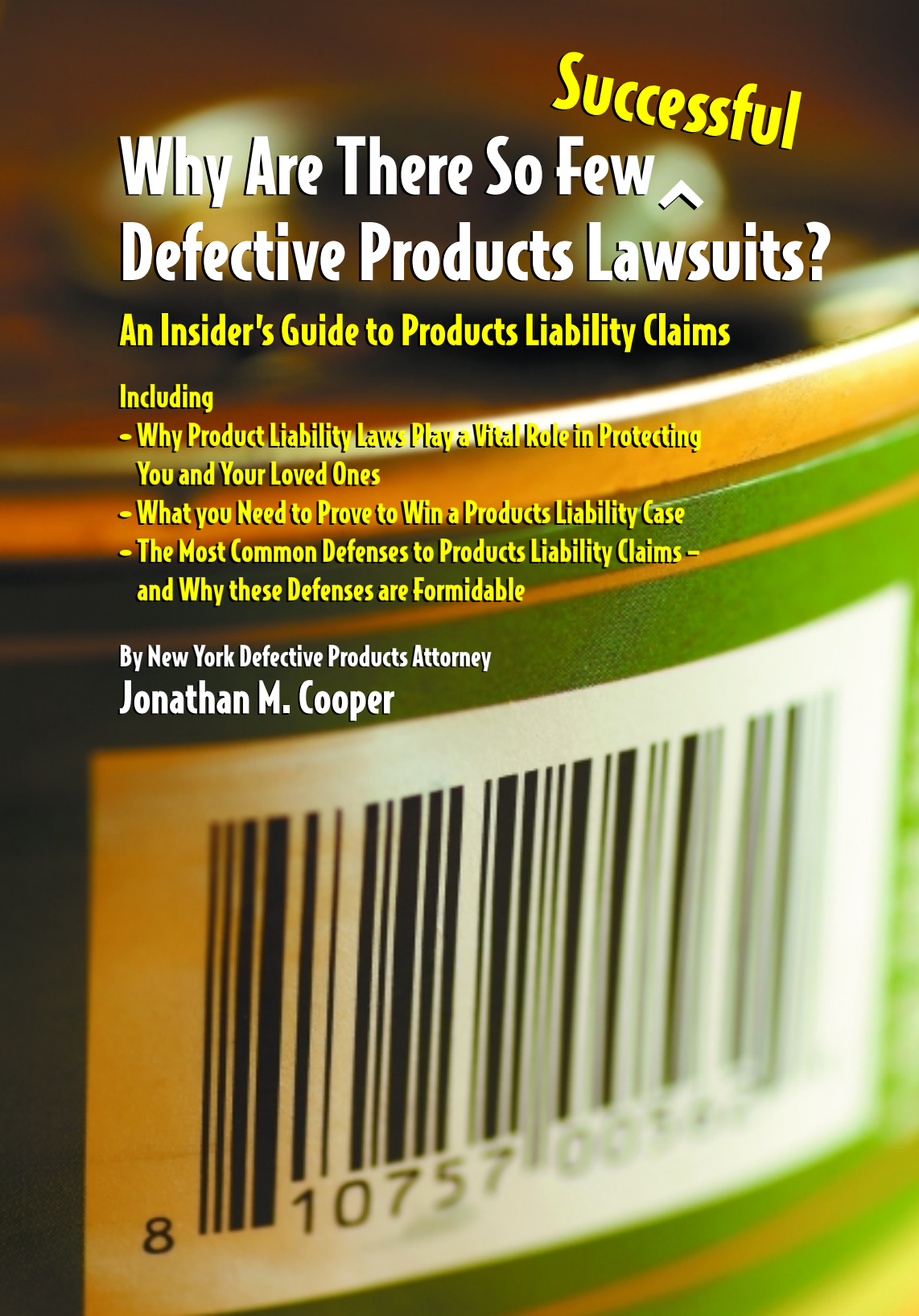
Why Are There So Few Successful Defective Products Lawsuits?

An Insider's Guide to Products Liability Claims

Including
- Why Product Liability Laws Play a Vital Role in Protecting You and Your Loved Ones
- What you Need to Prove to Win a Products Liability Case
- The Most Common Defenses to Products Liability Claims – and Why these Defenses are Formidable

By New York Defective Products Attorney
Jonathan M. Cooper



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Why Product Liability Laws Play a Vital Role in Protecting You and Your Loved Ones

As you may be aware, the Consumer Products Safety Commission ("CPSC") issued an unprecedented 448 product recalls in 2007, as a result of which 2007 was later dubbed "The Year of the Recall." And guess what? In 2008 the CPSC issued even *more* recalls.

Lest you think that these recalls were made for frivolous or "minor" reasons, consider this: nearly 30 million potentially hazardous toys were pulled from the nation's shelves because some of these toys were covered in lead paint, and others had small magnets that could damage small children's stomachs.

Although President Bush signed into law the Consumer Product Safety Act of 2008 ("CPSA") at the end of August, which includes many important provisions, such as a phased-in ban on the sale of children's toys containing certain types of lead, adopting new safety specifications for many toys and child care articles, and increasing the CPSC's funding and staffing, this legislation is not nearly enough to protect you or your family from dangerous consumer products. Here's why:

First, this bill contains a maximum cap on the damages that can be assessed for violating the CPSA. Consequently, a company can easily determine that it remains cost-effective to market and sell their products in a less-than-safe fashion.

Second, the CPSC is charged with responsibility for ensuring the safety of *over 15,000* consumer products such as toys, cribs, power tools, cigarette lighters, and household chemicals. And even though the CPSC's staffing will be increased to 500 people from its current level of 400 full-time staff, the CPSC was overburdened with roughly 800 full-time staff in 1978, when the number of products it oversaw was far smaller than today.

Consequently, the last line of defense – and one of the best checks on product safety -- remains the companies' fear of lawsuits brought by injured consumers (that's you and me). And the laws that govern these cases are called Products Liability.

About the Law Offices of Jonathan Cooper

As indicated at my firm's website, for more than a decade, I have handled numerous products liability cases, ranging in complexity and scope from a simple action against a retail store for a defective ceramic mug to State and Federal Class Actions against foreign and domestic manufacturers and

distributors. And, as you will probably glean from this book, I have handled these cases from both the plaintiff's and defendants' perspectives.

Since products liability is somewhat of a specialized area of practice, and these cases are generally more difficult to litigate than standard negligence cases, many attorneys do not handle these types of cases. Admittedly, I find products liability one of the most interesting and gratifying of my areas of practice because it entails the rigorous analysis of technologies against the backdrop of available scientific data, and often involves significant – and perhaps precedent-setting – legal issues.

I'm proud to say that my firm is regularly consulted and brought in as trial counsel on products liability matters, and that I get well over 95% of my clients from other attorneys who used to be my adversaries, and from former satisfied clients. My firm's website (www.JonathanCooperLaw.com) has a lot of useful information and links on a variety of topics, such as defective products and environmental hazards (including mold), and is regularly updated.

Is This Book for You?

If you are willing to understand that the world of products liability cases is intricate, and, for

the reasons that are explained below, there are very few "nuisance value" or small products liability cases in New York, then you stand to gain a fair amount of knowledge from this book. On the other hand, if you have an unshakable belief that prosecuting or defending a defective products case is simply a matter of common sense, and that these cases can or should be disposed of easily, then this book will only help you as a paper weight, or perhaps as a makeshift fly-swatter.

I have written this book so you can have a basic understanding about how products liability cases work in New York, how a products liability case should be evaluated, and what questions you should ask your attorney to assure that you are being given an honest assessment of the liability and exposure in your case. And I have written this book so you can do all of this from the comfort of your own office or home.

Additionally, by writing this book, I get a chance to tell you what you need to know about products liability cases so you can make a more informed decision about what steps you need to take to make sure that your interests are protected – even before you consult with an attorney.

This Book Is Not Legal Advice

It is important that you understand the limitations of this book. Although I believe this book is extremely valuable as a resource to identify common pitfalls that plague products liability cases and the defenses to these claims, every case is unique, and presents its own particular facts and legal issues. Consequently, please do not construe anything in this book to be legal advice about your case until we have mutually agreed in writing that I have accepted your case.

Before we begin, however, it is important that I debunk some myths about cases involving dangerous or defective products.

Separating Fact from Myth

Myth #1: If Someone is Seriously Injured by a Product, He is Automatically Entitled to Recover Damages

Over the last several years, I've been struck by the terrible misconceptions that the public has about products liability cases. Some of the better-known products cases involved recalls of children's toys, cars, asbestos, leak-prone silicone breast implants and tobacco. With respect to many, if not all, of these examples, people tend to have very strong feelings and beliefs, whether out of concern for children's safety, or because of the illness or

death of a loved one secondary to cancer or asbestosis.

As a result, I have also found that people tend to believe that if they or a loved one has been seriously injured by a product, the product must inherently be defective, and the injured parties should automatically be entitled to recover damages for their injuries.

This notion is pure fantasy.

Myth #2: Trial Lawyers Have Brought a Disproportionately High Share of Products Liability Suits Relative to the Number of Defective Products on the Market

Despite the nearly 220,000 toy-related injuries that required treatment at a hospital emergency room in 2007 (that does not even begin to account for injuries related to children's nursery equipment, sports and recreational equipment, personal use items, household products, home furnishings or fixtures, nor does it account for presumably less serious injuries that did not result in hospitalization) only a small fraction of these

incidents resulted in the filing of a products liability lawsuit.[1]

Under the circumstances, the question is clearly not why are there are so many lawsuits related to products; the question is why are there so ***few*** lawsuits related to products?

To understand the answer to this question, some background explanation as to what is entailed in a defective products lawsuit is necessary.

What Are the Different Types of Products Liability Cases?

In very broad terms, a product may be defective as the result of a manufacturing flaw, a defective design, or inadequate warnings or instructions. Applying these principles to practice, products liability cases are generally brought under one or more of the following five (5) theories, which in legal terms, are called "causes of action":

(1) Defective manufacture;

(2) Defective design;

[1] For a more detailed list of these statistics, please see the CPSC's National Electronic Injury Surveillance System (NEISS) at http://www.cpsc.gov/neiss/2007highlights.pdf.

(3) Failure to warn;

(4) Negligence; and,

(5) Breach of warranty.

Each of these theories of liability is discussed (and illustrated) more fully below.

What Must a Plaintiff Prove to Win A Products Liability Case?

At the end of a jury trial, but before the jury "retires to deliberate," the Court gives the jury instructions in order to provide a framework within which they must consider the evidence they heard over the course of the trial, and determine whether the plaintiff proved her case.

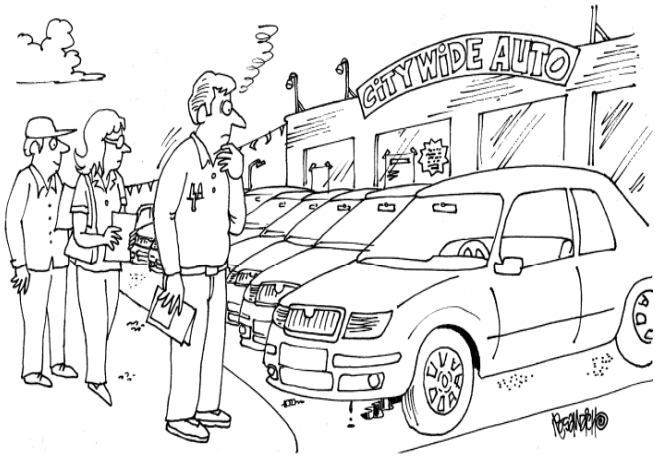
These instructions have been largely formalized, and are known as the Pattern Jury Instructions. Although these instructions provide the most authoritative benchmark for what the plaintiff needs to prove at trial (as a result of which I have quoted extensively from their practice commentaries in compiling the following list), they are fairly difficult to understand and apply, because they are filled with a lot of "legalese," or "lawyer talk."

Consequently, I've tried to make these concepts more understandable by including a few

illustrations (which I hope you will find informative, and perhaps a bit amusing), as well as some examples from my own practice.

(1) ***Defective Manufacture***

Definition: Under this theory, the plaintiff contends that this particular unit of the product differs from the manufacturer's internal quality standards.



Little did Dan know he was the one guy who got the lemon in the bunch

Burden of Proof: The plaintiff must prove that the product did not perform as intended, and that it was defective when it left the manufacturer's control; in other

words, the plaintiff must establish that the product was not built to the manufacturer's own specs or that the product, as constructed, deviated from any such specifications or design.

(2) ***Defective Design***

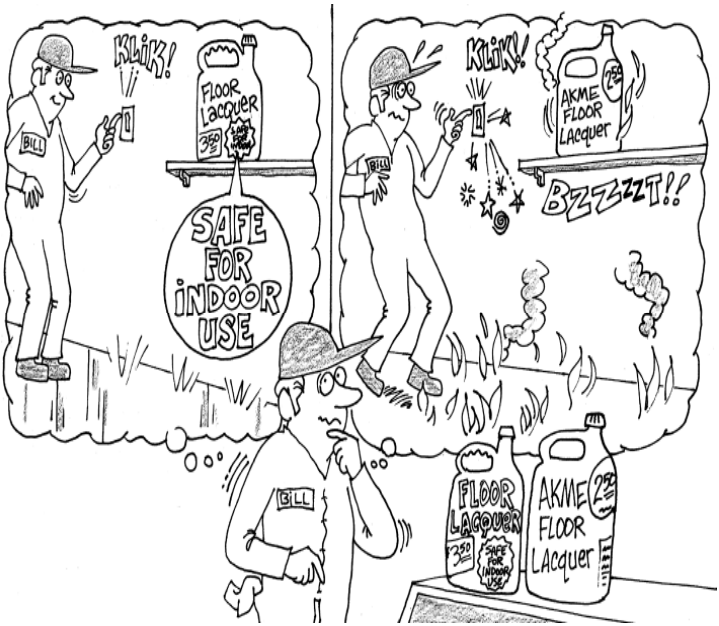
Definition: In contrast to the defective manufacture cause of action, in a design defect case, the plaintiff claims that the entire model line or a particular feature of an entire model line of the product is defective.

Under New York law, a manufacturer has a duty to design its product in such a way that it does not unreasonably risk harming anyone – whether the product's user or any third parties – when the product is being used in a foreseeable manner. Therefore, as long as the manufacturer had reason to suspect that the product would be used in the manner that the plaintiff did, they can be held liable if the product's design was unreasonably dangerous – even if the plaintiff did not use the product in its intended fashion.

Burden of Proof: New York's courts have required plaintiffs to demonstrate

that a product fails a seven-factor test in order to demonstrate that the product is defectively designed. These factors include considering the following: (a) the product's utility to the public as a whole and to the individual user; (b) the likelihood that the product will cause injury; (c) the availability (and feasibility) of a safer alternative design; and, (d) the degree of awareness of the product's potential danger that can reasonably be attributed to the injured user.

Illustration: In a case that I handled a few years ago, the plaintiffs were severely burned when the floor lacquer that they were using to finish an apartment floor spontaneously ignited. The plaintiffs' expert opined that the floor lacquer was defectively designed because safer, less flammable alternative lacquers were available, and were unlikely to have ignited under the same conditions. The expert further opined that these alternative formulations were available at the time of occurrence at a comparable cost.



A Word of Caution: Contrary to popular belief, the issuance of a recall by a manufacturer will **NOT** be deemed sufficient, in and of itself, to prove that the product was defective.

(3) ***Failure to warn***

Definition: A manufacturer must warn consumers about the latent, or hidden, dangers that are associated with a consumer's foreseeable use of its product -- even if the particular use is an unintended one, and even if the product is not otherwise defective.

Illustration: Since this particular type of claim is often litigated in the pharmaceutical context, I will provide a typical example. Pharmaceutical company P manufactures a drug which it has reason to know can cause the negative side effect of excessive bleeding in pregnant women, but fails to disclose it to consumers in its warnings. Woman W, who is pregnant, and is particularly concerned about vaginal bleeding due to her particular medical history, suffers hemorrhaging which requires corrective emergency surgery as a direct result of taking this drug. Had W known that P's drug has this possible side effect, she would have used the comparable drug manufactured by C, which does not have this side effect.

Another illustration can be seen from the cartoon above which depicts a design defect claim. In the cartoon, Akme Floor lacquer manufacturing company has reason to know that its product can ignite rather easily, even at room temperature, with a small spark, but fails to disclose it to consumers in its warnings. Bill the Maintenance Man, who is responsible to re-finish the tenants' floors in his building, is naturally concerned about

not catching fire when he applies the floor lacquer. A leading competitor's product, although marginally more expensive, does not pose the same fire hazard as Akme's product. Had Bill known that Akme's floor lacquer had this associated danger, he would have chosen to purchase the competitor's safer alternative product, even though it cost a little more.

Burden of Proof: In order to prevail on this theory, the plaintiff will have to prove that if adequate warnings had been provided, the injury would not have occurred. As a practical matter, this burden is often difficult to meet, because the defenses to this claim are typically quite formidable.

(4) **Negligence** – The elements that the plaintiff will have to prove on this cause of action mirror those set forth in the first three causes of action. The chief difference between this cause of action and the others is that the negligence claim is stated in slightly different, and simpler, terms, i.e., the defendant is liable because it failed to take reasonable measures to make their product safer.

(5) **Breach of Warranty** – This cause of action, which is essentially a breach of contract theory, comes in two forms:

(a) *Breach of Express Warranty* –

Definition: The defendant can be held liable if the product did not perform as advertised (or as indicated in their own product literature), *provided* that the plaintiffs can demonstrate that they relied to their detriment upon these warranties.

Illustration: In a class action products liability action that I prosecuted several years ago against a foreign manufacturer of technology for fashioning and bonding dental restorative implants, the plaintiffs contended that the restorations did not perform as advertised in the manufacturer's own published product literature, as the bonding failed and the restorations cracked or "popped off" in a very high percentage of cases.

Moreover, the plaintiffs claimed that the manufacturer's instructions to the laboratories and dentists for using the bonding and restoration technology were inconsistent and, at times, contradicted itself.

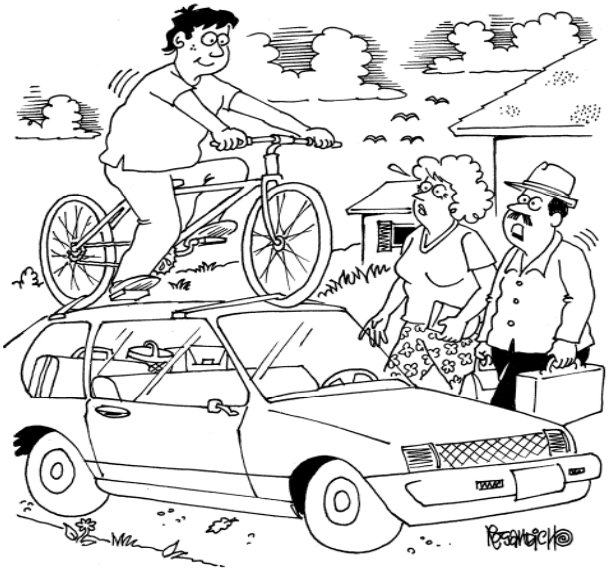
Burden of Proof: In order to avoid dismissal of this cause of action, the plaintiff must provide either a copy of the actual literature relied upon, or cite with specificity the language that he relied (to his detriment) upon in electing to purchase or use the defendant's product.

(b) *Breach of Implied Warranty*

Definition: Similarly, the defendant can be held liable if the product was not fit for its intended purpose, or for its reasonably foreseeable use.

Illustration: Although a folding chair is not intended for use as a stepstool for changing lightbulbs, chances are that this would still be deemed a foreseeable use of this product.

Conversely, as clearly demonstrated in the cartoon shown on the next page, the roof of a car is obviously neither designed nor intended to support both a bicycle and its rider.



"Can't you wait until we get there?"

Burden of Proof: In order to prevail on this theory of liability, the plaintiff will have to prove two (2) things: 1) that the product was unfit for its intended, or reasonably foreseeable, purpose; and, 2) since this theory, as stated earlier, is grounded in contract, the plaintiff will have to demonstrate that he was "in privity," i.e., had a direct, contractual relationship with, the defendant.

Why There Are So Few (Successful) Products Liability Cases

(1) ***Expense*** – in a products liability case, both sides will need an expert in the relevant scientific discipline (and often more than one) to establish whether the product was defective; it is highly unlikely that the Court will allow the parties to rely on the jury's common sense and experience alone to make this determination, because it will almost certainly entail information that is beyond the ken of the average judge or juror.

Moreover, since products liability cases often entail pursuing a foreign manufacturer, the costs associated with pursuing such an entity (assuming the manufacturer is subject to the Court's jurisdiction – which is far from certain), including having them served with the summons and complaint in compliance with the terms of the Hague Convention (which sets forth the manner in which foreign entities must be served), or enforcing a judgment against a foreign entity, are much higher than those involved in a standard negligence case.

Finally, in order to demonstrate what the defendant knew or should have known about

safer, reasonable alternatives that were available at the relevant time, both the plaintiff and defendants will need to conduct a significant amount of research of the peer-reviewed scientific, product and medical literature to support their respective positions on this important issue.

(2) ***Nature of the Defendants*** – in contradistinction to a typical negligence defendant, who does not face the specter that an adverse verdict could have dire consequences to its core business, the manufacturer of an allegedly defective product is confronted with the stark reality that a negative verdict could have a tremendous impact on their bottom line. Simply put, if the manufacturer is ultimately found to have made a defective product, the negative publicity flowing from that finding (aside and apart from having to pay the adverse judgment) could be disastrous. Therefore, a defendant manufacturer is apt to defend the case with greater vigor than the average negligence defendant, because from the manufacturer's vantage point, the plaintiff is pursuing its very lifeblood.

(3) The Defenses to Products Liability Claims Are Often Formidable -- The defenses to

products liability claims are essentially self-explanatory, and grounded in common sense. Most often, the defendant's goal is to attack plaintiff's case on the grounds that even if the product was defective, that defect had nothing to do with causing the plaintiff's accident. Here's a partial list of the most common defenses:

(a) ***Misuse of the Product*** – If the plaintiff misuses the defendant's product, the defendant shouldn't be held responsible for the consequences of the plaintiff's actions.

(b) ***Custom-Made Product*** – If the plaintiff requests that its product be made to particular design specifications (and the defendant complies with said specs), the plaintiff will not be permitted to later complain that the specifications were defective.

(c) ***Post-sale Modifications*** – If the plaintiff (or any third party) alters the product after it leaves the manufacturer's hands, such as removing a safety guard on a saw, it would be unfair to hold the manufacturer liable for any injuries that

the plaintiff sustains due to the lack of a safety device on the saw.

(d) ***Statutory and/or Regulatory Compliance*** - Compliance with legal standards promulgated by the relevant overseeing body is significant, and occasionally conclusive, evidence that may defeat liability claims. This defense is commonly used in pharmaceutical litigation, particularly in failure to warn cases.

(e) ***Open and Obvious Danger*** – in other words, *"DUUUH!"* It's the plaintiffs, and the lawyers that bring these cases that most often are the butt of lawyer jokes, as the absurdity of these claims is the stuff of legend (See cartoon opposite this page).

Illustration: When a person gets badly cut when using a knife, the knife's manufacturer is not liable because it is open and obvious that a knife is sharp, and that it would defeat the knife's entire purpose if it weren't sharp.

(f) Failure to Read/Heed the Warnings

Illustration: In a case that I defended several years ago, the plaintiffs claimed that their infant son had spilled the contents of a caustic household cleaner over his body, as a result of which he sustained serious chemical burns. The mother contended that the defendant manufacturer's warnings which stated "**WARNING: KEEP OUT OF REACH OF CHILDREN!"** did not adequately apprise her of the dangers of the product because it did not say "**CAUTION: CAUSES BURNS."**

> Needless to say, the plaintiff's claim that she was not aware of the product's danger because the warning merely advised her to keep the product out of her child's reach, instead of specifically apprising her that it could cause burns, was (and is) absurd.

It is incumbent on your attorney and you to gather and put the pieces of this complex puzzle together in a coherent fashion so that your case or defense is presented most effectively before the Court or jury. In order to help you understand the roles that each of you should play in this process, I have compiled the following list.

Having A Clear Understanding of the Roles that Your Attorney and You Have in the Litigation Process is Critical to the Success of Your Case

You have every right to expect that your attorney will give you, at a minimum, quarterly updates on the status of your case. Your attorney should also keep you apprised of significant developments in your case as they occur. Some examples of this include when the complaint is filed, advance notice of your deposition (including scheduling a preparatory session), and when your case has been assigned a trial date.

You should also find out which attorney will actually be working on your case. One of the chief advantages of hiring a smaller firm, such as mine, is that the vast majority, if not all, of the details of your case will be handled by one attorney. In order to further clarify the role that the attorney may play in your case, following is a general outline of the tasks that he/she may do in prosecuting or defending your case:

- Client interview
- Educate you about products liability claims
- Gather documentary evidence, including photographic, investigative and medical records, as well as product literature
- Interview known witnesses and potential experts
- Research and analyze the pertinent legal and scientific issues, such as the relevant statutory or regulatory guidelines governing the specifications for the product's manufacture, packaging or warnings, and the defendants' compliance – or violation – of same
- Obtaining the relevant scientific and/or medical literature and talking with experts to

gain a fuller understanding as to whether in fact the product was defective and/or of the nature of the alleged extent of injuries

- Obtaining and analyzing all applicable insurance policies to ensure (to the extent possible) that all available avenues for recovery and/or indemnification are contacted

- Recommending whether an attempt should be made to negotiate the case

- If suit is filed, preparing the client(s) and witnesses for depositions

- Preparing written demands for documents, such as incident reports, from the other side, and responding to the other side's written discovery demands

- Preparing and/or responding to motions made to the court on various legal and discovery issues

- Going to court to set a discovery schedule and a trial date

- Preparing the client(s) and witnesses for trial, including organizing scientific, medical and demonstrative exhibits, filing briefs and/or

motions with the court to eliminate surprises at trial, taking the case to trial with a jury or judge, and analyzing the jury's verdict to determine if either side has grounds to appeal the case.[2]

On the other hand, your attorney should explain that you will be expected to keep his/her office advised as to any change in your situation that can have a bearing on the case such as financial distress, or a change in your contact information. In that vein, it is imperative that you keep the appointments that are made for you in the context of the litigation. (On personal note, I have "fired" clients that failed to keep their appointments without justification, because I have found such behavior not only time and money-consuming, but embarrassing for my office before the courts and my adversaries.)

Finally, and most importantly, your attorney should expect that you will disclose to her all information that could be potentially harmful to your case. If your attorney expects anything less, and is content to operate on a "need to know basis," you have bought yourself a mercenary that will likely be looking out for her best interests rather than yours.

[2] Unless specifically indicated in our agreement, my firm is not obligated to participate in any appeal.

Why You Should Hire Us

- ***Knowledge*** **-** As I'm sure you are aware, there are many, many attorneys who advertise that they accept products liability cases. Unfortunately, many of these attorneys don't handle these cases themselves, or worse, try to handle them even though they lack the experience or knowledge to properly evaluate or handle the cases. Unlike those firms, we have a thorough knowledge of this area of the law.

- ***Experience*** **–** As indicated earlier in this booklet, we've handled cases that vary in complexity and scope from a (relatively) simple defective Styrofoam cup to class actions arising out of defective bonding technologies for medical devices. And we've litigated these cases *from both the plaintiffs' and defendants' perspectives*, giving us a broader perspective and enhanced ability to anticipate the other side's likely strategic moves.

- ***Personalized Attention*** **–** Finally, our clients get personal attention because we are very selective in the cases that we take. Without looking at formal numbers, we probably decline well over 90% of the cases that are

referred to our firm in order to devote personal, careful attention to the cases that meet our criteria.

OUR SERVICES

My firm is here to represent you every step of the way of your claim. Sometimes the best advice is that you do not have a claim that can be won. If that is true, we will tell you so. If your case meets my firm's criteria for acceptance, you can be assured that you will receive my personal attention. I will keep you advised as to the status of your case, and give you my advice is to whether your case should be settled, or whether we should go to trial.

An initial consultation is free. We will fully explain our fees and costs to you before proceeding. Together, as a team, we will decide on the tactics best suited for your case.

Jonathan Cooper