IADC Newsletter

October, 2003
No. 1

Product Liability

In This Issue

Mr. Livingston is a shareholder in the Livingston Law Firm in Walnut Creek, California, where he specializes in representing national and international manufacturers in defense of product liability claims. He is a frequent lecturer and author in the product liability area and is a member of IADC and DRI.

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Lessons From Jury Research: The Mythical "Safe Company" Standard And How Product Liability Defendants Can Measure Up

By Craig A. Livingston

Years ago, a common refrain among trial lawyers was, "I'd rather have good facts than good law." This old adage is grounded in the reality that jurors decide cases based on the facts and generally go about doing so by applying those facts to the law they believe - or want to believe - exists. Jury research has shown time and again that facts trump the law - which usually is delivered by the trial judge in boring and often unintelligible legalese - because jurors can see, hear, and touch the facts as they unfold during the trial. Jurors then fit those facts into their own life experiences, perceptions and biases, and, ultimately, use those facts to convince other jurors to adopt their position during the discussions and often heated arguments that take place in the deliberation room.

In the product liability context, extensive jury research has proven that the most important facts a manufacturer can marshal at trial are those that will lead the jury to conclude it is a company concerned about safety. When a juror perceives a manufacturer as a "safe company," he or she will be much less likely to find the product defective. Conversely, when the evidence presented convinces a juror that the manufacturer has not made safety a priority, then a finding of defect becomes much more likely, regardless of the specific defect theory being advanced. In other words, when a juror has concluded that the defendant manufacturer does not hold safety paramount, it matters little whether plaintiff's legal theory is negligence, design defect or failure to warn, as these labels are frequently tossed aside in favor of the facts.

Armed with this knowledge, a primary goal for defense

counsel in product cases is to develop and present persuasive facts that will support a central trial theme - namely, that the defendant manufacturer is a "safe company."

Larger, more sophisticated manufacturers will generally have plenty of facts from which defense counsel can persuasively support the "safe company" theme. For instance, there will likely be a gaggle of safety engineers, biomechanical engineers, test personnel and the like, whose functions are involved with, if not devoted exclusively to, designing and testing a product with safety in mind. Automakers, pharmaceutical companies and aircraft manufacturers are a few such examples. Moreover, such companies generally have document retention programs which provide defense counsel with easy access to helpful documents like high-quality engineering drawings, sophisticated engineering analyses, test protocols and subsequent test reports. With a few hand-picked in-house witnesses to weave these facts together, trial counsel can gather dozens of facts to demonstrate to the jury, in a variety of ways, that the notion of safety permeates the company, that the company designed, tested and manufactured a safe product, and that the company was concerned about safety even upon learning of the subject accident.

But what about smaller, less sophisticated manufacturers of more simple products? How does defense counsel support the "safe company" theme when there may not have been a design engineer at the company, much less an engineering/testing department? In truth, the challenges may be greater for defense counsel representing such companies, but the task remains the same. Defense counsel must still uncover and present as many facts as possible which will lead the jury to conclude the company is concerned about safety; however, the search may require more digging.

A recent product liability trial presents a convenient case in point. A small vertical access ladder manufacturer was sued for design defect based on the allegation that the tubular aluminum "boarding rails" that guide the user from the top of the ladder to the roof top were unstable and thereby caused the plaintiff to fall, rendering him paraplegic. The defendant company - which is a family-run business - had no engineers, no testing personnel and no helpful design documents other than a "concept" drawing on drafting paper. The task was to work with the president of the company (who had no engineering background himself) to assemble as many "safe company" facts as possible and present them in an organized, convincing way at trial.

Following several in-depth interviews and two visits to the manufacturing facility, the defense team developed a list of facts which supported the theme that this small company was concerned about safety from the moment an order was taken. These facts included such minutia as the use of graded bolts and locking nuts for the boarding rail mounting brackets to a description of the half dozen steps during the fabrication process where quality control functions were performed. Each such step was explained in detail during trial. The "concept" drawing was used frequently to demonstrate that the ladder being made conformed to the "specifications" as set forth in the customer's order. In the interviews following the defense verdict, many jurors commented on persuasive testimony that had been presented in support of the "safe company" theme.

This case illustrates how defense counsel can weave together sufficient facts to credibly portray the defendant manufacturer as a "safe company," even when it appears he or she may have little to work with. When defending product cases, there are a number of obvious and not-so-obvious subject areas to explore with the client. These can include: (1) all facets of the design and testing process, even those that may appear, at first blush, to be mundane or insignificant steps; (2) the manufacturer's use of

above-average or high quality materials; (3) identifying special manufacturing processes or machinery which suggest precision and attention to detail; (4) highlighting the training or skills possessed by manufacturing or assembly personnel (*e.g.*, use of "certified" welders); (5) any activity that can be argued as having a "quality control" function (*e.g.*, routine inspections during fabrication/assembly, as well as any final inspections during packaging and shipping); and (6) identifying in-house witnesses who can testify to the company's top-to-bottom commitment to making safe, quality products.

In sum, the key for defense counsel is an appreciation that jurors will often measure the product liability defendant against the mythical "safe company" standard. However, when armed with this understanding, defense counsel can set about, in the early stages of the case, long before employee depositions begin, to uncover and assemble "safe company" facts to support this central trial theme.