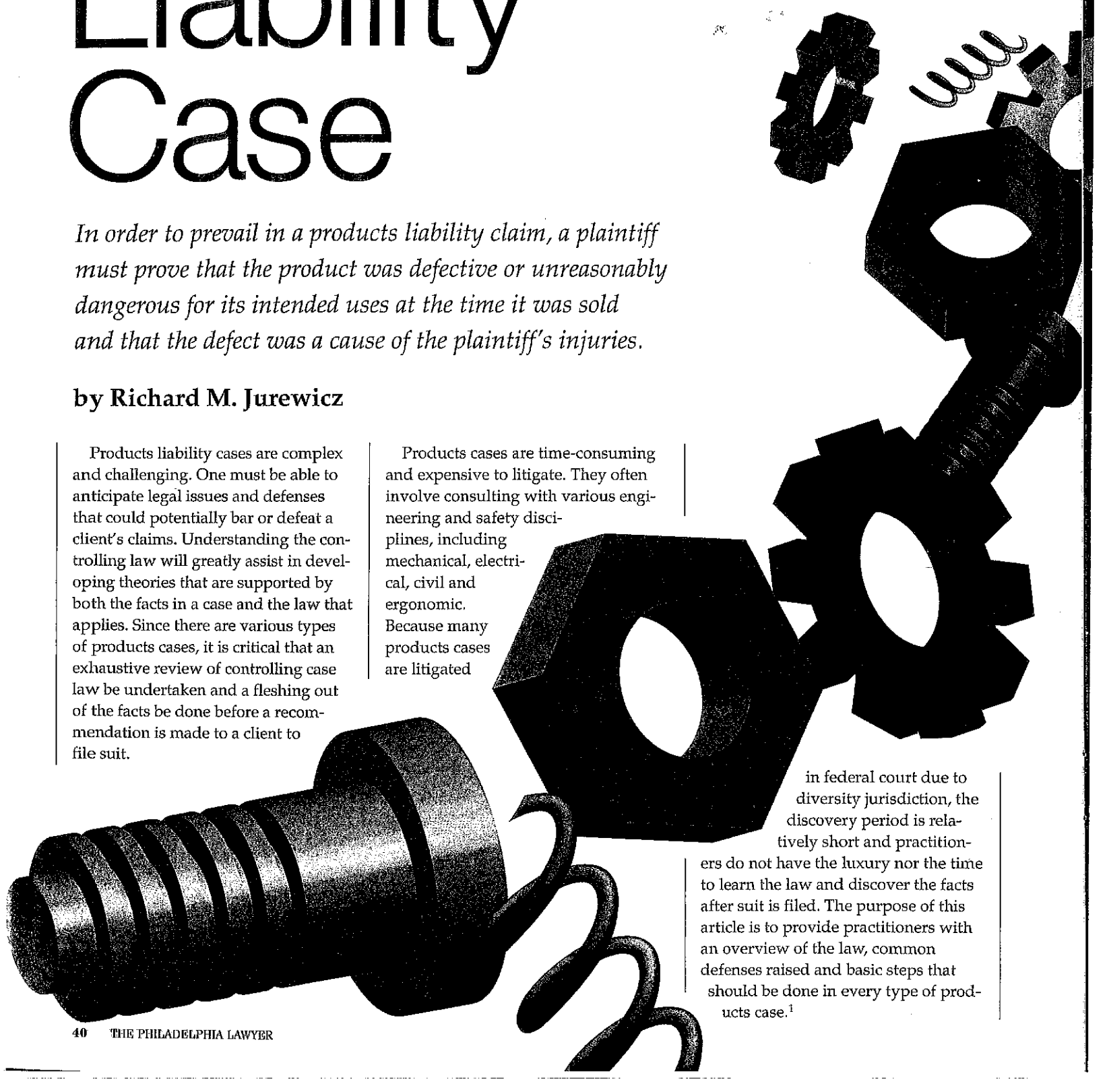
OVERVIEW OF A

Products Liability Case

In order to prevail in a products liability claim, a plaintiff must prove that the product was defective or unreasonably dangerous for its intended uses at the time it was sold and that the defect was a cause of the plaintiff's injuries.

by Richard M. Jurewicz



Products liability cases are complex and challenging. One must be able to anticipate legal issues and defenses that could potentially bar or defeat a client's claims. Understanding the controlling law will greatly assist in developing theories that are supported by both the facts in a case and the law that applies. Since there are various types of products cases, it is critical that an exhaustive review of controlling case law be undertaken and a fleshing out of the facts be done before a recommendation is made to a client to file suit.

Products cases are time-consuming and expensive to litigate. They often involve consulting with various engineering and safety disciplines, including mechanical, electrical, civil and ergonomic. Because many products cases are litigated in federal court due to diversity jurisdiction, the discovery period is relatively short and practitioners do not have the luxury nor the time to learn the law and discover the facts after suit is filed. The purpose of this article is to provide practitioners with an overview of the law, common defenses raised and basic steps that should be done in every type of products case.[1]

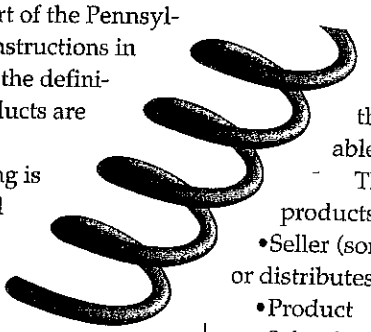
Historical Development in Pennsylvania

In 1966, Pennsylvania became one of the first states to adopt the doctrine of strict liability in tort as set forth in §402A of the Restatement (Second) of Torts, *Webb v. Zern*, 422 Pa. 424, 228 A.2d 853 (1966). Section 402A imposes strict liability upon a seller of a defective product that causes injury to a user or consumer.

The social policy behind products liability is set forth in *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337, A.2d 893 (1975). In this opinion, the Supreme Court observed that consumers and sellers of products did not stand on equal footing, and, from an evidentiary perspective, it was virtually impossible for a consumer to prove a seller's negligence. The *Berkebile* court further noted that there was a critical difference between strict liability and negligence in that the existence of "due care" in a strict liability case was entirely irrelevant both with respect to the consumer and the seller. In holding that sellers are the guarantors of their products' safety, the *Berkebile* court found that §402A recognized liability "without fault" for defective products. The relevant inquiry in a products case is the product, not the reasonableness of the parties' conduct. In emphasizing this concept, the *Berkebile* court imposed upon sellers a non-delegable duty to provide a safe product.

The standard for defining what constitutes a defective product was announced three years later by the

Pennsylvania Supreme Court in the seminal case of *Azzarello v. Black Brothers Co., Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978). In that unanimous decision, the Supreme Court reaffirmed its holding in *Berkebile* that suppliers are the guarantors of their products' safety and held that a defect can be found to exist when the product left the supplier's control lacking "any element necessary to make it safe for its intended uses or possessing any feature that rendered it unsafe for its intended uses." This definition has become part of the Pennsylvania standard jury instructions in products cases and is the definition by which all products are judged.



The *Azzarello* holding is firmly entrenched and followed by all courts in this state. Since *Azzarello* and *Berkebile*, state and federal courts have taken a consistent approach in strict liability cases taking great care to divorce from a products case any negligent concepts by refusing to permit any evidence of negligence on the part of the plaintiff to defeat his/her claim. Consequently, efforts to inject concepts of comparative fault or contributory negligence have been rejected by the impermissible defenses in a products case.[2]

However, recently the introduction of evidence of plaintiff's negligence has been circumvented by the defense bar and some courts on the issue of causation. *Foley v. Clark Equipment Co.*, 361 Pa. Super. 599, 523 A.2d 379 (1987) is seldom followed, especially by the federal courts that have rejected it and found that while plaintiff's conduct may arguably have some relevance on the issue of causation, if the plaintiff's conduct was an action that was foreseeable by the seller and the defect was found to be a cause of the injury, then the plaintiff's actions cannot preclude a seller's liability.[3] The emphasis in a products case is therefore on the safety of the product. Consequently, product suppliers are required to take all economically and technically feasible measures necessary to ensure their products' safety.[4] A manufacturer cannot defend an unsafe product design by claiming that it did not know about a safer feasible design alternative. Nor can it properly present evidence to support an argument that a feasible, safer design alternative was considered undesirable at the time the product was sold.[5]

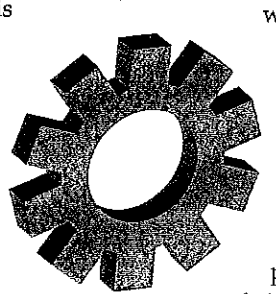
Elements of a Claim

In order to prevail in a products liability claim, a plaintiff must prove that the product was defective or unreasonably dangerous for its intended uses at the time it was sold and that the defect was a cause of the plaintiff's injuries.[6] Intended uses of a product include all uses that are reasonably foreseeable to a seller.[7]

The essential elements in products cases are therefore:

- Seller (someone who regularly sells or distributes a product)
- Product
- Sale of product
- Intended user or consumer of a product
- Defective condition of product at time of sale
- Defect causes physical harm to an intended user or consumer.

While the definition of a product is quite broad and liberal, there are situations in which a defendant will be removed from §402A liability. Services provided do not constitute a product for purpose of §402A unless the service is inextricably intertwined with the design of a product.[8] Section 402A also does not extend to a company that merely installs a product and is not involved in the design or manufacture of it.[9] However, a supplier of a component part, which is incorporated into another product, can be strictly liable.[10]



In determining what constitutes a sale for §402A purposes, incidental sales outside the normal course of a defendant's business are not subject to §402A liability.[11] Nor are products sold by auctioneers.[12]

Since there is no privity requirement under §402A, injured bystanders and pedestrians may be found to be users and consumers of a product.[13]

There are a number of ways to establish a product as defective as previously set forth. However, practitioners need to be cautioned that the issue of what constitutes a defective product is first a question of law that involves a threshold determination by the trial court on a dispositive motion. This determination, otherwise known as the risk/utility analysis, requires a court to consider numerous factors deciding whether the defect, as alleged, is the type that social policy would permit the application of strict liability.[14] What practitioners need to realize, however, is if a request for a dispositive determination is not made by a defendant and the trial court submits the case to the jury, then there is an assumption that it was implicitly done, even if not explicitly done.[15]

Proximate cause is generally satisfied where a plaintiff can show that the defective condition of a product was a cause of the injury. This is generally satisfied by showing that the presence of a proposed safety device would have prevented the plaintiff's accident. Although plaintiffs are not required to prove that an alternative safer design existed to have their case submitted to a jury,[16] they increase their probability if they have evidence of a proposed safe design alternative.

Types of Cases

There are many ways to prove a defect. The type chosen depends upon the type of product at issue and the facts underlying the accident.

- **Design Defect**

Generally, this theory is raised when the overall safety design of a product is being challenged. It is not limited exclusively to the particular product at issue, but applies to the model type of product involved in a plaintiff's accident. The failure to provide safety devices, guards, features or controls in the design of the product when it was sold are common bases for claiming that the product was defectively designed. Practitioners will usually theorize that there was a safer design alternative for this type of equipment available at the time it was sold.[17]

- **Manufacturing Defect**

This particular type of case is usu-

ally asserted when a particular product that caused the injury did not comply with the design specifications of the same lot of products made by the same manufacturer. This type of case is prevalent in accidents in which products break or fail upon normal use or component parts found in the product at issue are other than those specified.[18]

• Malfunction

This type of case enables a practitioner to show that a product was in a defective condition without proving a specific defect. This type of case usually develops when a product operates and functions in a manner other than expected or intended to function. Mechanical failures causing a machine to repeat a cycle (double trip) or failing to shut off when it is supposed to, are the usual fact pattern for this type of case. For a plaintiff to prevail on this theory, it is critical for counsel to eliminate secondary causes as an explanation for the malfunction.[19]

• Failure to Warn

Even a perfectly made product can still be defective for failure to provide warnings.[20] A failure-to-warn case arises in three contexts. Regardless of the context, proof must be established that the failure to warn was a proximate cause of the accident.[21] There is no duty to warn as to an obvious danger; the duty arises where a danger is latent or not apparent to the consumer or user of the product.[22]

1. Lack of Warnings

In this context, a product is not equipped with any warnings or instructions to explain how the product is to be used properly or what dangers are associated with the product.[23]

2. Inadequate Warnings

In this situation, warnings are provided, but the claim is that the warnings or instructions are not proper, complete or sufficient enough to instruct the users on the proper use of the product or the dangers associated with the foreseeable uses of the product.[24]

3. Post-Sale Duty to Warn

In a small number of cases after a product has been sold, but before the plaintiff's accident, a seller becomes aware of a specific defect that exists with the design of its product, but fails to communicate that information to consumers. Without providing a definitive rule for a post-sale duty to warn, the Pennsylvania Supreme Court suggests guidelines and circumstances under which a post-sale duty to warn could possibly arise.[25]

Defenses to a Claim

There are a number of defenses that can be raised, any of which when established can prove to be fatal to a plaintiff's claim.

• Unintended User

This defense is virtually certain to be raised in any case in which a product is used by a class of individuals whom a seller would not have expected nor intended the product to be used by. *Griggs v. Bic Corporation*, 981 F.2d 1429 (3d Cir. 1992) provides the best illustration. A product liability claim was dismissed because an unsupervised child was using a cigarette lighter, and as a matter of law, this class of individuals were not expected to be intended users of this product. Whether a child was a foreseeable user, which is a negligence concept, was not something the

manufacturer was legally obligated to consider in designing its product. However, if the manufacturer could reasonably foresee that the lighter would fall into the hands of children and cause injury, a claim of negligence would lie.

• Product Misuse

A closely related defense to unintended user is product misuse or use in a manner other than intended or recommended. This defense will rest on the issue of what the manufacturer/seller should have reasonably foreseen when the product was designed. If the manufacturer/seller anticipated that its product would be used in the fashion in which it was used by the plaintiff, such misuse will not relieve a manufacturer/seller of responsibility unless it can claim that the misuse was unforeseeable.[26]

• Sophisticated User

One should expect to see this defense raised where the plaintiff's employer provided specifications for the equipment to the manufacturer, has a history of using this type of product involved in plaintiff's accident, or if the equipment is manufactured for the specific needs of the user or the environment in which it is to be used.[27]

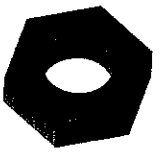
• Substantial Change/Alteration

The mere fact that a product underwent a change or alteration will not, in all cases, relieve a seller of liability. Like the misuse defense, if an alteration or modification was foreseeable by the manufacturer, then the manufacturer cannot be relieved of responsibility. However, a foreseeable alteration that amounts to an intervening superseding cause of an accident will relieve a manufacturer from liability.[28]

• Spoliation

Any time the product involved in a plaintiff's accident has been disposed of, lost or destroyed, this defense will be raised. The basis for the defense is that without an opportunity to inspect and examine the product involved in the plaintiff's accident, defendants are severely prejudiced from being able to prepare a defense in a lawsuit. In cases where a plaintiff is claiming a design defect that is common to all like products manufactured and sold by a defendant, then the failure to preserve the product at issue is not fatal to the plaintiff's claim.[29] On the other hand, where a plaintiff is claiming a manufacturing defect particular to the product at issue, the need to preserve it is critical and disposal of it will result in summary judgment or a non-suit.[30]

Client Interviews Will Provide Leads About Witnesses To The Accident, Prior Use Of The Product And Maintenance And Repair Work On It.



• Assumption of Risk

Where a plaintiff actually knows and appreciates the specific danger of using a product and voluntarily encounters the risk while realizing the danger, he is deemed to have assumed the risk of his injury and is precluded from recovery.[31] While the burden of proving that the plaintiff assumed the risk of his injury is upon the defendant, if the plaintiff can show that he believed he was in a safe position immediately before his accident and did not recognize or appreciate the danger in the use of the product, then this defense may not be applicable.[32]

• Government Contractor Defense

This defense is available to non-military government contractors who have the burden of showing that the government established specifications for the product, that the manufacturer complied with those specifications and that the government knew as much or more than the contractor about the hazards of the product.[33]

• Lack of Prior Claims

This is a relatively new defense and is relevant for the issue of causation. It does not dictate a finding as a matter of law that the product was not defective or unreasonably dangerous. This defense allows a manufacturer to plant a seed in the jurors' minds that since it has not been sued before for the particular product defect, then the product cannot be defective.[34] However, a foundation needs to be established by a defendant regarding historical accident and claims record-keeping before lack of prior claims will be admissible.

• Statute of Repose

This is available in situations in which an improvement to realty has been made that was completed twelve years before the plaintiff's cause of action arose.[35] Generally, manufacturers are not intended to be included within the class of persons protected by the Statute of Repose. However, if a manufacturer/supplier of a product undertakes a role other than manufacturing the product, such as providing specialized expertise in designing a unique or custom-made product or installing a product that becomes an improvement, then the defense is available to a manufacturer.[36]

• State of the Art/Industry Customs

Manufacturers will seek to show that their product was safe because it complied with industry standards. Any attempt by a manufacturer to do this should be met with great resistance. *Lewis v. Coffing Hoist*, 515 Pa. 334, 528 A.2d 590 (1987) specifically precludes the admission of industry standards, such as American National Standard Institute (ANSI), or industry practice, trade and custom.

• Employer's Responsibility to Guard or Provide Safety Devices

One should anticipate that this defense will be raised with any type of industrial equipment or machinery. A manufacturer will attempt to show that under Occupational Safety and Health Administration (OSHA) regulations, the responsibility to guard rests with the plaintiff's employer. *Sheehan v. Cincinnati Shaper Co.*, 382 Pa. Super. 579, 555 A.2d 1352 (1989) holds that OSHA regulations are irrelevant or have a non-delegable duty.

• Successor Liability

This is found where the original manufacturer is out of business and suit has been brought against the successor-in-interest. One seeking to hold liable a successor to a product line who acquired the assets, good will and/or product line of the predecessor will have to show that it was the transfer of the product line that destroyed the plaintiff's remedy and that the plaintiff

is without recourse against the original manufacturer.[37]

•No Duty to Warn of Obvious Defect

A manufacturer may be absolved from any legal responsibility as a matter of law for not providing warning or instruction if the danger is considered to be open and obvious.[38] The determination of whether a warning is adequate and whether a product is defective due to inadequate warnings is a question of law to be determined by the trial judge.[39]

•Risk/Utility Determination

As previously discussed, this doctrine applies to products that may be said to be so inherently dangerous that their utility to society is far outweighed by the risks involved in their use or that social policy reasons dictate that §402A does not apply to these types of products.[40]

•Causation

Essentially, this issue arises whenever it can be shown that the product is not in the same condition as it was when sold or that it was being used for a purpose other than that which was intended. While issues of causation are generally left to the fact finder, if the record is clear, a court will decide this issue as a matter of law.[41]

•Preemption

Some products by which plaintiffs are injured may be preempted by federal law and/or regulations.[42]

Investigating the Case

There are a few "musts" that you should do in any products liability case. To the extent possible, this information and documentation should be obtained prior to filing suit.

•Meet the Client

Interview the client in person and not by telephone. Client interviews will provide leads about witnesses to the accident, prior use of the product and maintenance and repair work on it.

•Inspect and Preserve Product

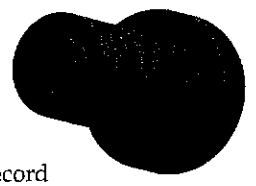
If the product involved a consumer product, more than likely the client will have it. If the product at issue is industrial equipment or machinery, then more than likely it will be located at the employer's premises. Arrangements should be made through the employer to conduct on-site inspection of the equipment for the purpose of, among other things, photographing and videotaping the equipment, testing and measurements, product identification (serial number and model number) and preservation of product, if practical.

•Contact Employer's Workers' Compensation Carrier

The carrier should be contacted for the purpose of securing cooperation in your investigation of your client's accident. In the more serious accidents, the workers' compensation insurance carrier will have done an independent investigation to determine whether there exists a third-party case/subrogation interest. You should request a copy of any third-party investigation done by the workers' compensation insurance carrier and any statements they obtained.

•Obtain Workers' Compensation Records

The workers' compensation carrier will have all the medical records, reports and bills for your client. You should request this to avoid unnecessary duplication of costs by asking for every medical record yourself, and it is also helpful in order to document the subrogation lien that the workers' compensation carrier is claiming.



•Request Documents From Employer

The employer will have a lot of information about the product and about your client that may be extremely helpful in evaluating your case. The items you should ask for include: personnel file on your client; purchase information of the product (purchase orders, requisitions, proposals, bids, specification, etc.); maintenance, repair and service records in order to show the upkeep on the equipment or modification and changes made to it; service records from outside vendors or contractors that may have been hired to service, repair, install or modify the product; loss control reports from consultants, insurance carriers and/or outside vendors or entities who furnished those services to determine whether there is a claim for negligent inspection; names of employees/witnesses, addresses and phone numbers; payroll/production records in order to document loss of earnings and earning potential; technical information on the product such as drawings, blueprints, schematics and/or diagrams; and literature/materials provided with the product such as operator's, parts, service, maintenance and/or instruction manuals.

•Research Corporate History of Manufacturer/Seller

Requesting a Dunn & Bradstreet Report is essential in cases involving an old product in which successor liability may be at issue.

•Research Information on the Product

This is accomplished by a variety of sources of materials such as Best's Directory, Thomas' Directory, magazines and journals.

•Obtain Safety Literature or Research

Search out industry standards, government regulations (OSHA) and articles, books and literature on product safety.

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•Request OSHA Records Pursuant to the Freedom of Information Act

OSHA may have been out to the site to do inspections before and in response to the accident, so you will need to obtain those reports.

•Perform Patent Searches

These are helpful to show feasible design alternatives that the product at issue was manufactured and can be done by a number of servicers that do patent searches, or by yourself at the Free Library.

•Check ATLA Databank

Write to the American Trial Lawyers Association and obtain information it has in its databank on the model product and the manufacturer in question.

•Check for Consumer Complaints or Recalls

Write to the Consumer Product Safety Commission (CPSC) and request a copy of any consumer complaints on the model product or any recalls on the product.

•Interview Witnesses

Get statements from the eyewitnesses to an accident, not only those individuals who have some knowledge and information about the history of the product, but also such people as maintenance and purchasing personnel.

•Consult Experts

There are a number of sources available that can provide you with an expert if you do not know of one. The most common sources of referral include Lawyers Desk Reference, Technical Advisory Service for Attorneys, Technical Assistance Bureau, Inc., magazines, ATLA, Pennsylvania Trial Lawyers Association (PaTLA) and referrals from other attorneys. Potential experts should be interviewed extensively to make sure that they possess the necessary qualification, skills and background to qualify as an expert in your case.

•Contact National Safety Council

Find out what information they have on the product and equipment at issue.

•Compare Models

For many consumer products, large retail stores carry the same item and competitors' models. Check products that are carried and obtain sales literature on your item and competitors' models.

•Obtain Medical Records From Health Care Providers/Practitioners

Make sure to obtain records from any previous injuries.

•Test Product

In cases involving a manufacturing defect, a product should be tested to determine the cause of the product's failure.

•Search the Web

With the Internet highway upon us, you do not want to pass up this resource to obtain information about the product, the manufacturer and/or other attorneys who may be handling similar cases.

•Network With Other Lawyers

Many lawyers place advertisements in legal periodicals or magazines looking for other attorneys who have similar cases or suits against the same manufacturer. You should contact these attorneys and exchange information and documents with them and share your pre-suit discovery to obtain more information on the product and manufacturer.

Notes

1. Lawsuits based upon defective products may be filed under several legal theories. Among practitioners in the field, however, the term "products liability" generally refers to the doctrine of strict liability in tort.
2. *McGown v. International Harvester*, 463 Pa. 13, 342 A.2d 381 (1975); *Staymates v. ITT Hobart Industries*, 354 Pa. Super. 37, 527 A.2d 140 (1987).
3. *Parks v. Allied Signal, Inc.*, 113 F.3d 1327 (3d Cir. 1997).
4. *Habecker v. Clark Equipment Co. (Habecker II)*, 942 F.2d 210 (3d Cir. 1991).
5. *Habecker v. Clark Equipment Co. (Habecker III)*, 36 F.3d 278 (3d Cir. 1994).
6. *Lewis v. Coffing Hoist Division, Duff-Norton Co.*, 515 Pa. 334, 528 A.2d 590 (1987).
7. *Pacheco v. Coats Company, Inc.*, 26 F.3d 418 (3d Cir. 1994); *Metzger v. Playschool, Inc.*, 30 F.3d 459 (3d Cir. 1994).
8. *Villari v. Terminix International, Inc.*, 663 F.Supp. 727 (E.D. Pa. 1987); *Klein v. Council of Chemical Associations*, 587 F. Supp. 213 (E.D. Pa. 1984).
9. *Malloy v. Doty Conveyor*, 820 F.Supp. 217 (E.D. Pa. 1993).
10. *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107 (3d Cir. 1992). See, Comment (j), *Restatement (Second) of Torts*, §402A.
11. *Cafazzo v. Central Medical Health Services, Inc.*, 430 Pa. Super. 480 (1983).
12. *Musser v. Vilsmeier Auction Co., Inc.*, 522 Pa. 367, 562 A.2d 279 (1989).
13. *Chialek v. Pittsburgh Brewing Company*, 430 Pa. 176 (1968).
14. *Azzarello v. Black Brothers, Inc., supra*; *Surace v. GMC*, 111 F.3d 1039 (3d Cir. 1997).
15. *Nowak v. Faberge USA, Inc.*, 812 F.Supp. 492 (M.D. Pa. 1992).
16. *Dipronicesco v. Exxon, Inc.*, 642 Pa. Super. 529, A.2d (1994).
17. *Heckman v. Federal Press Co.*, 587 F.2d 612 (3d Cir. 1978).
18. *Walton v. AVCO*, 530 Pa. 568, 610 A.2d 454 (1992).
19. *Rogers v. Johnson & Johnson Products*, 523 Pa. 176, 565 A.2d 751 (1989).
20. *Shark v. Daisy-Heddon*, 498 Pa. 594, 450 A.2d 615 (1982).
21. *Powell v. J.C. Posey Co.*, 766 F.2d 131 (3d Cir. 1985).
22. *Ellis v. Chicago Bridge & Iron Company*, 376 Pa. Super. 220, 545 A.2d 906 (1988).
23. *Petree v. Victor Fluid Power, Inc.*, 831 F.2d 1191 (3d Cir.).
24. *Mazur v. Merck & Co.*, 964 F.2d 1348 (3d Cir. 1992).
25. *Walton v. AVCO Corporation*, 530 Pa. 568, 610 A.2d 454 (1992).
26. *Dougherty v. Edward J. Mellonay, Inc.*, 443 Pa. Super. 201, 661 A.2d 375 (1995); *Burchick v. Sears, Roebuck & Co.*, 320 Pa. Super. 444, 467 A.2d 615 (1983).
27. *Phillips v. A-Best Products Co.*, 542 Pa. 124, 665 A.2d 1167 (1995).
28. *Petree v. Victor Fluid Power, Inc.*, 831 F.2d 1191 (3d Cir. 1987).
29. *O'Donnell v. Big Yank, Inc.*, Pa. Super., 696 A.2d 846 (1997).
30. *Raselli v. General Electric Co.*, 410 Pa. Super. 223, 599 A.2d 685 (1991).
31. *Walsavage v. Mannelli*, 334 Pa. Super. 396, 483 A.2d 509 (1984).
32. *McLaughlin v. Fellows Gear Shaper Co.*, 786 F.2d 592 (3d Cir. 1986).
33. *Davis v. Budd Company*, CCH PLR §14,468 (E.D. Pa. 1995).
34. *Spino v. John S. Tilley Ladder Co.*, 515 Pa. 418, 681 A.2d 745 (1996).
35. 42 F.R. 65536.
36. *Noll v. Harrisburg Area YMCA*, 537 Pa. 274, 643 A.2d 81 (1994); *McConnaughey v. Building Components, Inc.*, 536 Pa. 95, 637 A.2d 1331 (1994).
37. *Kaselyak v. Reach All, Inc.*, 443 Pa. Super. 71, 660 A.2d 1350 (1995).
38. *Fletcher v. Raymond Corporation*, 424 Pa. Super. 605, 628 A.2d 845 (1993).
39. *Mackowick v. Westinghouse Elec. Corp.*, 525 Pa. 52, 575 A.2d 100 (1990).
40. *Simmie v. GMC*, 111 F.3d 1039 (3d Cir. 1997).
41. *Davis v. Berwyn Corporation*, 547 Pa. 582, 655 A.2d 514 (1995).
42. *Lee v. Boyle-Midway Household Products, Inc.*, 792 F.Supp. 1001 (W.D. Pa. 1992).

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