

FORESEEABILITY: A CRITICAL ANALYSIS IN MINIMIZING PRE-SALE AND POST-SALE LIABILITY

When Is Misuse Reasonably Foreseeable?



Kenneth Ross is a Senior Contributor to *In Compliance Magazine*, and a former partner, and now Of Counsel to Bowman and Brooke LLP. Ross provides legal and practical advice to manufacturers and other product sellers in all areas of product safety, regulatory compliance, and product liability prevention, including risk assessment, design, warnings and instructions, safety management, litigation management, recalls, dealing with the CPSC, contracts, and document management. He can be reached at 952-210-2212 or kenrossesq@gmail.com. Other articles by Ken can be accessed at <http://www.productliabilityprevention.com>.



By Kenneth Ross

The law requires manufacturers to anticipate foreseeable uses and risks when designing products and providing warnings and instructions. In addition to foreseeable uses, manufacturers must also predict future conduct by users and consider what conduct constitutes foreseeable misuse.

But how far must a manufacturer go to anticipate unintended but foreseeable misuses of a product? How does a manufacturer make this determination while designing the product? What do courts regard as a foreseeable misuse, and what must a manufacturer do about it? Does an unforeseeable misuse become a foreseeable misuse if, after a product's sale, it comes to light that some people have actually misused the product?

These questions go to the core of a manufacturer's quest to provide a reasonably safe product before and after a sale. Unfortunately, the answers are unclear and, in most situations, are provided by a judge and jury after a trial.

PRE-SALE LAW

At the birth of product liability, the California Supreme Court in *Greenman v. Yuba Power Products, Inc.* limited the manufacturer's liability to a product that was "unsafe for its intended use." Section 402A of the Restatement (Second) of Torts, adopted shortly after *Greenman*, imposed no liability for injuries caused by consumer "mishandling," "over-consumption," and "excessive use."

The Restatement Third, Torts: Products Liability (1998) continued that precedent by confirming that a manufacturer is liable only when its product is put to "reasonably foreseeable uses." If a use and the harm occurring during that use are reasonably foreseeable,

then the manufacturer must design the product to eliminate or minimize the risk of the foreseeable use. In addition, the manufacturer must warn of known or reasonably foreseeable risks that remain in the product.

However, consistent with case law as it developed after 1965, comments to sections 2(b) and 2(c) of the Restatement Third also provided that a manufacturer can be liable for "foreseeable product misuse, alteration, and modification" (hereinafter, generically, "misuse"). Accordingly, a manufacturer must also design its product and provide warnings so that it is safe for foreseeable misuse.

Injury caused by a misuse does not provide the injured party a separate theory of liability, but instead relates to the issue of whether a product is defective and whether a causal connection exists between the defect and injury. Misuse also is relevant to comparative fault, which can be used to reduce a manufacturer's liability based on the plaintiff's product misuse.

Setting aside the legal concept, though, the practical question for the manufacturer is what do the courts consider "misuse?" As one would suspect, the answers are all over the map. In fact, similar conduct has been deemed foreseeable misuse in one court and unforeseeable misuse in another court. But some common themes run through the cases that provide some guidance to manufacturers.

First, courts generally recognize that "nothing is unforeseeable" (especially in retrospect) and that the ways in which a product can be misused are "endless." To counter absolute liability for product-caused harms, however, courts have attempted to limit the foreseeability concept to what is "reasonable."

Recognizing this limitation, one court memorably stated: "Reasonably foreseeable ... does not encompass

the far reaches of pessimistic imagination.” While true, this limitation is not that helpful as a guide to manufacturers because an event must occur before a jury gets to decide whether it was foreseeable, reasonably or otherwise.

Certainly, though, foreseeable use (or misuse) is broader than “intended use.” One state statute (Louisiana Rev. Stat. § 2800.53) defines “reasonably anticipated use” as any use or handling of the product that the manufacturer should reasonably expect of ordinary persons in the same or similar circumstances. In addition, a technical standard for machine tools defines “reasonably foreseeable misuse” as unintended conduct that may result from “readily predictable human behavior.” *See* ANSI B11 (2008).

In some situations, the manufacturer may do something that increases the probability of unintended human behavior. For example, it may design a product in a way that increases the chance that the user will misuse or alter it because of some difficulty in using the product as originally configured. Or the product’s marketing may invite misuse by showing unintended users using the product or intended users using it in an unintended and unsafe way. In both situations, the user and the use would arguably be considered “reasonably foreseeable.”

IS THE RISK FORESEEABLE OR UNFORESEEABLE?

One court determined whether a misuse was reasonably foreseeable by asking if the use or handling was “so unusual that the average consumer could not reasonably expect the product to be designed and manufactured to withstand it?”

David Owen, in his treatise on Products Liability Law (3rd Edition, West Academic Publishing), gathered cases on this issue. The outcome of these cases illustrates how difficult it is to predict how a jury might react to a particular use:

- Hurling a beer bottle against a utility pole (unforeseeable);
- Teenagers scenting a candle by pouring cologne on it (foreseeable);
- A woman attempting suicide by getting in a car trunk, changing her mind, and then being unable to get out for 9 days (unforeseeable);

- Failing to maintain a machine (foreseeable);
- Disabling a machine’s safety devices (foreseeable);
- A baby drinking furniture polish in a bright red container that looks like a soft drink (foreseeable);
- A youth tilting or rocking a soft drink vending machine, causing it to fall on and kill the youth (foreseeable and unforeseeable);
- A child playing with a gas can without a child-proof cap (foreseeable and unforeseeable).

An additional difficulty in predicting how a jury might react to some conduct is that other juries can rule the opposite way.

The difficulty is even greater in warnings cases. Is it foreseeable that a product user will ignore warnings and instructions? Of course, it is. Thus, safety engineering principles, some case law, and the Restatement Third (section 2, comment 1) all encourage manufacturers to design out a hazard, guard against it or, as a last resort, warn against it.

But assuming that the manufacturer designed or guarded its product as safely as possible, can it rely on a warning if it is foreseeable that users will ignore the warnings? Thankfully yes, assuming that the warning was adequate. Judges and juries understand that manufacturers cannot make product users read and follow warnings. Any other answer would require manufacturers to sell products with no significant risk of harm based on their design and guarding. With most products, this is almost impossible to do.

Nevertheless, a plaintiff could still argue that it was reasonably foreseeable a user would ignore a warning because it is, for example, too hard to comply with, too detailed, or too small, or because there were too many of them or it was only in English. Users have many creative excuses for ignoring clear safety messages.

Likewise, another difficult issue is deciding whether a warning about a hazard in a label on the product or in the instruction manual could be considered an admission that the conduct that creates the hazard is also reasonably foreseeable. And, if so, what effect that would have on the risk assessment and final design decisions.

POST-SALE LAW

So far, this legal discussion has dealt with misuses that are reasonably foreseeable as of the time of sale. However, a separate issue—and a separate claim—arises for misuses that were unknown before sale but became known post-sale and the manufacturer failed to alleviate the risk by recalling or retrofitting the product or informing customers about the danger.

It is entirely possible for a manufacturer to be held not liable for selling a defective product but held liable for violating some post-sale duty. In the context of product misuse, a plaintiff could engage in conduct that would be deemed unforeseeable at the time of a product's sale but foreseeable by the time of the accident.

While the first incident of misuse may not make the misuse sufficiently foreseeable to require remedial action, the more misuses that occur, the more it can be argued that the misuse has become “reasonably foreseeable.”

PREVENTIVE TECHNIQUES

So, given the state of the law and the vagueness of its application, what should a manufacturer do? They can't just decide who they want to be an intended user and what is the intended use. Nor can they just review case law and rely on past decisions to conclude that some misuse would not be deemed reasonably foreseeable.

The manufacturer needs to employ preventive techniques through risk assessment, either before or after product sale, to try to identify conduct that is a misuse and could be considered “reasonably foreseeable.”

These techniques will differ when performed during initial product development and after the product is in the field. Pre-sale, the analysis will turn on whether the product is completely new to the manufacturer and/or consuming public or is an upgrade to an existing product made by that manufacturer or other manufacturers. Post-sale, the analysis depends on whether an accident is the first or the latest in a string of accidents where the same misuse has been observed?

Before the sale of a new product, every manufacturer should engage in a risk assessment of its product. Risk assessment has been described as

“... a tool for manufacturers to identify possible hazards and provide a basis for considering alternative designs to mitigate or control risks. A risk assessment offers the opportunity to identify hazards associated with intended uses and reasonably foreseeable misuses, and to take steps to eliminate or control them before an injury occurs. This process can be a key factor in successfully reducing risks to an acceptable level.” (Ross and Main, *Risk Assessment and Product Liability*, Defense Research Institute, For the Defense, April 2001.)

Risk assessment starts with identifying hazards during intended uses. There are many approaches to identifying hazards and many standards, technical guidelines, and safety specialists that can help in this regard. See <https://www.designsafe.net> for more information in this area.

By definition, risk is the probability of a harm occurring and the consequences of that harm if it occurs. When first identifying hazards that may give rise to a risk of harm, probability should not be considered. However, it does not follow that a completely unusual hazard should be considered during a risk assessment. Identifying something as a hazard and subjecting it to a probability-of-harm-and-consequences analysis could arguably be construed as an admission that the hazard is reasonably foreseeable.

Consequently, some screening of hazards at the beginning of a risk assessment is appropriate. If an unintended use or misuse has never or rarely happened or is an obvious hazard, it might not need to be included in the risk assessment. If in doubt, however, include it in the analysis. Then, when the risk is assessed, the manufacturer can indicate that it is not reasonably foreseeable or that the probability of harm is essentially zero.

However, one needs to be careful when omitting conduct from the risk analysis so that a plaintiff will not be inclined to allege that only intended uses were included, and that remote but possible misuses were ignored.

If a product is new to the manufacturer but has been sold by other manufacturers, searching the internet, and talking to trade associations, other manufacturers, and members of standards groups can be helpful in determining what misuses have previously occurred and should therefore be considered.

Since the goal is identifying misuses that might be reasonably foreseeable, it might be appropriate to interview potential product users or provide them a prototype to see how they would normally use and misuse the product. Certainly, this step is routinely taken with many children's products and toys.

TAKING THE NEXT STEPS

After a hazard is identified and included in the risk assessment process, the probability of harm and consequences must then be analyzed to determine whether the risk should be reduced by design, guarding, or warnings and instructions.

If a foreseeable misuse has serious consequences, probability analysis is critical to the decision on what risk reduction measures to implement. For example, if disabling a safety device is foreseeable misuse and the probability of disabling it is fairly high, then the manufacturer should consider incorporating a safety device that is difficult to disable and providing warnings and instructions about the hazards of disabling the device.

When a product has been used in the field without incident, that fact can be useful in determining what kind of risk assessment to conduct on a future model or similar product.

Conversely, when there have been prior misuses in the field, the manufacturer may need to reconsider whether that misuse is now reasonably foreseeable.

Or even on existing models, the manufacturer might want to issue a post-sale alert or warning that the conduct is a misuse that has resulted in serious accidents. While such misuse is open and obvious, the manufacturer would want to discourage it, and issuing such a notice to current product users may be the only feasible way of doing it.

Of course, issuing such a post-sale warning will be argued to be an admission that the misuse is "reasonably foreseeable" and that instead of issuing an "ineffective" warning, the product should have been recalled. Post-sale warnings, instead of recalls, have to be undertaken very carefully, and there are significant risks of issuing such a warning as well as not issuing one.

To help with the risk assessment, especially of products already in the field, a post-sale monitoring system with distributors, dealers, retailers, and consumers needs to be established to learn about field experience. The lack of misuses or lack of a particular misuse over time is probably the best evidence that some conduct is not reasonably foreseeable.

CONCLUSION

The defense in a significant number of product liability cases involves product misuse. Conducting an initial risk assessment can be critical to the successful defense of product liability actions. Unfortunately, the analytical techniques for conducting a proper risk assessment are not exact nor are the results definitive. All such techniques require predicting future behavior, which is by nature inexact and sometimes unknown and unknowable.

However, certain time-tested techniques and the use of experienced personnel can help with the process. Proof that a manufacturer employed state-of-the-art processes and experienced people to do the best job it could to anticipate reasonably foreseeable uses and misuses and implement appropriate risk reduction measures is the best defense against persons who sue regardless of misuse. 

