THE RISK OF POST-SALE SAFETY IMPROVEMENTS

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By Kenneth Ross

In many product liability cases where a design defect is alleged, the key focus is on whether there was a "reasonable alternative design" that would have prevented the accident. The plaintiff's expert says that they could have made a safer product at a reasonable cost, and that the manufacturer was negligent in not incorporating this safer design into its product or, alternatively, that this safer design is proof that the product was defective when it was sold. It's then up to the jury to decide whether the technology was available at that time and whether the safer design should have been implemented.

One important piece of evidence that can be used against the manufacturer can be found in cases where the manufacturer improved the product's design after the sale of the product to the plaintiff. This article will discuss the law concerning pre-sale and post-sale safety improvements and offer practical suggestions on how to analyze and document these changes.

THE LAW – DEFECTIVE AT THE TIME OF SALE

Evidentiary rules affect the admissibility of post-sale safety improvements. In cases where the improvement was made after sale but prior to the accident, such evidence is generally admissible. However, in many situations where safety improvements are made after an accident occurs, the court's rules typically exclude such evidence. This exclusion is meant to encourage manufacturers to fix a safety-related problem after an accident occurs.

However, this exclusion does not work if the evidence is offered in order to rebut a manufacturer's position that the design improvement proposed by plaintiff is not feasible. It also does not apply to actions by third parties such as competitors who come out with safety improvements before or after an accident involving the manufacturer's product. And, in some states, it does not apply to actions brought under the theory of strict liability.

Of course, all this evidence could be used to support the plaintiff's position that the manufacturer could have made the product safer, and that this improvement could have been made before sale to the plaintiff. As such, it supports a negligence or strict liability claim that the product was defective when it was sold.

For planning purposes, I have told clients that they should assume that any post-sale safety improvement will, at the very least, be discoverable by the plaintiff in a lawsuit and may well be admitted into evidence to support the plaintiff's claim. Therefore, the manufacturer must be prepared to explain why that improvement was not available or appropriate to implement before the product was sold to the plaintiff.

THE LAW – POST-SALE DUTY TO WARN

Post-sale safety improvements can also create a post-sale duty to warn. The "Restatement (Third) of Torts: Products Liability" ("Restatement") includes a section devoted to post-sale warnings. It details four factors that must be established by the plaintiff to recover damages from 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 known to be defective at the time of sale. Therefore, such a duty might arise where the product was not defective at the time of sale but, due to post-sale improvements in technology, was arguably unreasonably dangerous, especially when compared to similar products previously sold into commerce.

Products are always being improved. Whether a new safety feature is introduced to reduce a risk identified after sale, or a new warning label or guard is added to comply with a new industry standard, the manufacturer must analyze whether this improvement could create a duty to issue a post-sale warning.

The law also raises the issue of whether a manufacturer has a duty to either warn prior customers about a post-sale safety improvement or to offer the improvement to prior customers.

Products are always being improved. Whether a new safety feature is introduced to reduce a risk identified after sale, or a new warning label or guard is added to comply with a new industry standard, the manufacturer must analyze whether this improvement could create a duty to issue a post-sale warning.

Let's first look at what the Restatement says. It 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, the Restatement points out that it would be difficult for a plaintiff to prove each of the four factors enumerated in the Restatement if the warning is about the availability of a product safety improvement. Therefore, the drafters of the Restatement were trying to point out how difficult it would be for a plaintiff to prove a case under the post-sale duty theory. Of course, it is up to the jury and the Restatement would allow a plaintiff to at least present the argument to the jury.

With reference to any duty a manufacturer may have to recall a product that has received post-sale safety improvements, the Restatement says:

> *"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 the Restatement, it 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, with a few minor exceptions, there is no common law post-sale duty to recall a product when the product was not defective when sold.

So where does this leave the manufacturer? Since a post-sale improvement is an "alternative design" and, effectively, 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 an admission that the manufacturer is fixing a defective product. Thus, the jury could hold the manufacturer liable for selling a defective product, as well as for negligence in failing to warn those customers who purchased the product before it was "improved" or before the defect was fixed.

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."*

To add to a manufacturer's uncertainty, a California case suggests that 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 held that a manufacturer was negligent for not informing its prior customers that an optional safety device was now mandatory, and for not attempting to retrofit old products that did not have the safety device. The court justified the imposition of liability based on the rationale that the "[the manufacturer] did not do 'everything reasonably within its power to prevent injury' to plaintiffs."

The Supreme Court of Kentucky discussed whether a manufacturer had a common law duty to retrofit existing products when post-sale safety improvements were developed. They held that the manufacturer had no such duty and that the plaintiff could only recover if they could show that the product was defective at the time of sale. However, evidence of the retrofit and the safety improvements could be introduced to support such a claim.

In addition, the Court refused to adopt the Restatement saying that:

> *"A retrofit campaign is a complex process requiring an abundance of technical, administrative, and legal coordination. Imposing liability on a company for a good faith—but perhaps incomplete—effort to undertake that task might dissuade that company from acting until required to by a government directive."*

WHAT TO DO?

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.

If 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 accept the new technology and make more defensible any litigation involving a customer who refused it. This consideration and the basis for their decision should be well-documented in the event that it is later challenged.

With new technology, there is no rationale for manufacturers to offer customers true post-sale safety improvements at no charge. The customer would have paid for the safety improvement being currently offered as an improvement if that improvement had been part of the original product. Consequently, they should be required to pay for at least the cost of the improvement now.

Despite that, be careful in making a profit as it might not look good to a jury. Furthermore, a plaintiff might argue that providing a safety improvement for free is an admission that the manufacturer is really trying to fix a defective product. And, of course, a manufacturer should be careful in attempting to charge a customer to fix a defective product in the field that is out of warranty.

Products evolve over time and the law supports making safety improvements. Consequently, no manufacturer should avoid trying to make better and safer products. However, when the law or standards change or when competitors come out with a safer product, the manufacturer has no choice. Also, the safety improvement might be appropriate after settling a case or after a jury rules that the manufacturer's product is defective.

When making significant improvements in safety, 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 they do not risk being considered as having acted negligently or having sold a defective product. And counsel can advise on whether the manufacturer can charge for the improvement, how to adequately document this decision, and the customer's response.

Taking these steps can help the manufacturer minimize the risk of these safety improvements being used against them in the future and tarnishing the safety of prior products made without the improvement.