

Where do the Children Play?

The Misuse Defense in Children's Products Liability Cases

Stuart J. Goldberg, Esq.

Mark W. Sandretto, Esq.

EASTMAN & SMITH LTD.
ATTORNEYS AT LAW
Established 1844

What is the Problem?

- 210,000 people (157,500 under the age of five) were treated for injuries caused by toys in 2004.
- Accidents, not including automobile accidents, were the leading cause of death among children 1 to 14 years of age in 2003.

Are Products Unreasonably Dangerous?

- Between 1990 and 2004, 272 children under the age of 15 have died due to a toy.

■ Riding toys, scooters	73
■ Balloons (choking)	68
■ Toy or toy part (choking)	43
■ Balls (choking)	41
■ Toy chest	13
■ Strangulation	12
■ Marbles (choking)	5
■ Other	17

Top Ten Worst Toys (2006)

- **Heelys**
 - Injuries and a death
- **Z Launcher Turbo Water Balloon Launcher**
 - Injuries and choking
- **Pram Decoration Blossoms**
 - Strangulation or injuries in digestive tract
- **Pyramid Stacker**
 - Injuries
- **Bow & Arrow Set**

- **Zip-Itz Do Dolly**
 - Choking and injuries to digestive tract
- **Lil Snoopy**
 - Strangulation or entanglement
- **Superman Lamp**
 - Electric shock possibility
- **Sky Blaster**
 - Eye hazard
- **Fear Factor Candy Challenge**
 - Choking and injuries to digestive tract

- Products liability cases were the third most frequently litigated types of federal tort cases in 2002-2003, though plaintiffs won only 34% of the trials. Median award was \$350,000. Only medical malpractice cases had a higher median award.

One Choice?

- Remove from the market

Christmas Beagle



- Red pom-poms on wreath can detach, posing a choking hazard.
 - No injuries or deaths reported

Team Talkin' Tool Bench



- Two deaths by suffocation when toddlers swallowed bolts.

Bendable Dog & Cat Toys



- Paint contains high levels of lead.
 - Given away as prizes by libraries
 - No injuries reported

Chicken Limbo



- Has collapsed unexpectedly causing 23 reports of injuries.

Monster Rockets



- Cap can come off unexpectedly and bystanders may be hit by landing rocket. Eight reports of injuries filed with the CPSC.

Spit Smatter



- Pressurized cans have broken apart, causing injury.

Alex Super Cooking Sets



- Pots come with glass lids, which can break. One injury has been reported.

Another Choice?

- Defend claims based on misuse and proximate causation

Restatement of Law (Third) Products Liability

- **Section 15**
- **General Rule Governing Causal Connection Between Product Defect and Harm**
 - Whether a product defect caused harm to persons or property is determined by the prevailing rules and principles governing causation in tort.
 - **Comment b.**
 - **Misuse, alteration, and modification.** When the plaintiff establishes a product defect under the rules stated in Chapter 1, a question can arise whether the misuse, alteration, or modification of the product by the user or a third party, contributed to the plaintiff's harm in such a way as to absolve the defendant from liability, in whole or in part. Such a question is to be resolved under the prevailing rules and principles governing causation or . . . comparative responsibility, as the case may be.

Proximate Cause

- “The proximate cause of an event is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event and without which that event would not have occurred.” – *Oswald v. Conner*, 16 Ohio St.3d 38, 42 (1985).
- “A cause that is legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor”. – Black’s Law Dictionary.
- “A cause that directly produces an event and without which the event would not have occurred.” – Black’s Law Dictionary.

Think about Causation from Defense Perspective

- “The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when causes are independent of each other that the nearest is, of course, to be charged with the disaster. – *Blythe v. Denver & R.G. Railway Co.*, 15 Colo. 333, 337 (1890) (finding proximate cause of train fire and attendant lost shipment of watches to be Act of God rather than negligence of carrier in having lighted kerosene lamps and coal stoves on the train).

The Misuse Defense

- “Misuse occurs when a product is not used in a manner which should have been foreseen by the defendant. To prevail on the defense of product misuse [the defendants must] establish ***that [the product] was misused, that the misuse was not foreseeable and that the misuse was the proximate cause*** of the plaintiff’s injuries.” – *Stevenson v. Kettler*, 2006 Conn. Super. LEXIS 2416 (Aug. 14, 2006).
- “The misuse of a product which will constitute a bar to an action predicated upon strict liability in tort has been objectively defined as a use for a purpose neither intended nor reasonably foreseeable by the manufacturer.” – *May v. Rubbermaid, Inc.*, 2002 U.S. Dist. LEXIS 4404 (Mar. 18, 2002).

The Challenge

- “As one might expect, courts react differently to misuse/proximate cause cases. Because the facts differ from case to case, reconciling the decisions is difficult. ***Most courts send the misuse/proximate cause issue to the jury.***” - Restatement of Law (Third) Products Liability Section 15, Reporter’s Note.
- The Problem: Overcoming Plaintiff’s Claim of *Foreseeable* Misuse.

Some cases

- ***Stevenson v. Kettler***, 2006 Conn. Super. LEXIS 2416 (Aug. 14, 2006).
 - Plaintiff filed an action on behalf of his nine year old daughter after she was injured while unfolding a Ping-Pong table. Plaintiff bought the Ping-Pong table in reliance on assurances by retail sales persons that the table was suitable for use by a child of her age.
 - Defendant pled misuse of product as a “special defense” pursuant to Connecticut civil rules. Plaintiff moved to strike the misuse defense.

Stevenson, continued

- **Ruling:** Although the Defendants amended their answer to allege the elements necessary to prove the misuse defense, they failed to plead any facts to support their conclusion that either the parent or the child misused the product.
- Lesson: The misuse defense depends on proving that plaintiff's actions were the source of injury.
 - Find facts establishing that plaintiff's actions were a causative factor.

- ***Landrine v. Mego Corp.***, 464 N.Y.S.2d 516 (1983).
 - Plaintiff sued on behalf of her infant daughter who died after playing with a “Bubble Yum Baby” doll. The doll could simulate the blowing of a bubble gum bubble using a small balloon, a mouthpiece, and a pump activated by pumping the doll’s arm. The child swallowed the balloon. Plaintiff argued that the balloons were defectively made or inherently unsafe when used by children.
 - Defendant argued that its balloons when used for their foreseeable and intended uses were not unreasonably dangerous.

Landrine, continued

- **Ruling:** The court of appeals reversed the trial court's denial of summary judgment for defendant. Absent a finding that all balloons are inherently dangerous, and that consequently a warning of the possible dangers must be given, the balloon manufacturer could not be held liable. Balloons in and of themselves are not dangerous. Their characteristics are well known, to children and adults alike. According to the court "no duty to warn exists where the intended or foreseeable use of the product is not hazardous." To the extent that swallowing a balloon was foreseeable, it was a risk that both parent and child must be wary of.
- Lesson: If no foreseeable misuse, no duty to warn.
- Recent citations to *Landrine* focus on the rule that a manufacturer has no duty to warn of obvious hazards or dangers.

- ***Swix v. Daisy Manufacturing Co.***, 373 F.3d 678 (6th Cir. 2004).
 - Plaintiff, a ten-year-old child was shot in the eye by his friend, who was playing with an air rifle manufactured by Defendant. Plaintiff sued manufacturer of air rifle alleging that the air rifle was defectively designed and failed to warn of a known danger.
 - Defendant moved to dismiss the case, arguing *inter alia* (1) that an air rifle is a “simple tool” and (2) manufacturers are not required to warn of the open and obvious dangers associated with a simple tool.

Swix, continued

- **The Ruling:** Manufacturers owe no duty to warn of open and obvious dangers associated with simple tools. An air rifle is not a simple tool. The test to determine whether a product danger is open and obvious is objective. If the product is one customarily used by children, the danger must be one which children would be likely to recognize and appreciate to prevent recovery on an “open and obvious” defense.
- **The Lesson:** Take the depositions of child witnesses. Establish unforeseeable and/or unreasonable conduct.

- ***May v. Rubbermaid, Inc.***, 2002 U.S. Dist. LEXIS 4404 (N.D. Ill., 2002).
 - Plaintiff sued the manufacturer of a playpen when daughter severed the tip of her pinky finger. The playpen instructions and warnings stated that the product should not be used unless all side rails were fully erected and locked.
 - Plaintiff testified in deposition that she used the product with a sagging side rail and conceded that she had read warnings against doing so. However, she testified that she did so only because she thought the danger presented in the warnings was that her daughter might flip out of the playpen, not that it would amputate her finger.

May, continued

- **Ruling:** The court found that Plaintiff misused the product, but denied summary judgment for Defendant, because an issue of fact remained as to whether it was foreseeable that the warnings would alert to the user to the possibility of a pinching hazard.

May, continued

- **The Lesson:** Develop testimony that plaintiff misused the product.
- Establish:
 - Plaintiff inspected the product.
 - Plaintiff knows generally that hinges open and close and can pinch.
 - If plaintiff did not misuse the product, her child would not have been injured.
 - Argue sole proximate cause on summary judgment. Foreseeability is the more challenging element. Defendant needed to adduce testimony that there was no way to foresee that a reasonable person would misuse a product in a manner that was explicitly warned against, regardless of the subjective interpretation of the warning.

- ***Pinchinat v. Graco Children's Products*, 390 F.Supp.2d 1141 (M.D.Fl. 2005).**
 - Plaintiff filed suit alleging failure to warn after her daughter was choked by sliding into stroller's leg opening. The stroller owner's manual contained warnings in three different languages; the stroller had additional warnings affixed to the seat. Plaintiff, relying on prior Florida case law, argued that the warnings were inadequate because they lacked visual aids. Plaintiff also alleged that the stroller was defectively designed.
 - Defendant adduced testimony that Plaintiff failed to read the warning even though she was capable of doing so. Defendant claimed that Plaintiff's misuse of the product (in the exact fashion the warnings instructed her not to) was the proximate cause of the child's death.

Pinchinat, continued

- **Ruling:** The court granted summary judgment on the issue of failure to warn. The warnings in the manual and on the product were unambiguous, clear, and accurate. The fact that warnings did not contain pictorials had no bearing where Plaintiff was fully capable of reading the warnings. However, Plaintiff convinced the court that issues of fact remained with respect to the defective design, specifically, whether Defendant should have foreseen her misuse of the product and designed out the hazard.
- **The Lesson:** In some jurisdictions, cultivating a misuse defense based solely on a plaintiff's failure to follow the dictates of the warnings may not be enough.
 - Don't ignore the distinction between failure to warn cases and design defect claims.
 - Focus on parent's misconduct as sole proximate cause to counter plaintiff's claim that misuse was foreseeable.

- ***Bunch v. Hoffinger Industries, Inc.***, 123 Cal. App.4th 1278 (2004).
 - An 11-year-old child was rendered quadriplegic after diving into a 4 foot deep aboveground swimming pool. Plaintiff sued manufacturer of pool liner alleging failure to warn. The manufacturer proved that the pool owner was provided a sticker, warning of the dangers of diving in a shallow pool. The pool owner did not recall seeing the stickers but instructed the children not to dive because the pool was shallow. Pool owner did not describe injuries that children could suffer. Plaintiff's experts, Ross Buck, PhD (communications sciences & psychology) and Ralph Johnson, PhD (sports admin.) testified to the inadequacy of the warnings as applied to children and the "open and obvious" standard as applied to children. Summary judgment was denied. The jury reached a verdict of about \$16 million (reduced by plaintiff's 5% comparative fault and co-defendant's 20% fault).
 - On appeal, Defendant argued that the danger of diving into shallow pools was open and obvious as a matter of law; that defendants were not required to warn; and that diving into a shallow pool constituted a misuse of the product and misuse was the true proximate cause of the injury.

Bunch, continued

- **Ruling:** The dangers of diving into a shallow pool were not open and obvious to an 11-year-old as a matter of law and a manufacturer is required to foresee some degree of misuse and take adequate precautions to minimize the harm.
- Plaintiff effectively used experts to demonstrate that dangers open and obvious to adults are not necessarily open and obvious to children; and that warnings were inadequate for children. Defendants countered with corporate insiders that warnings were adequate.
- California is tough on defendants in swimming pool cases.
 - Argue for application of *Colosimo v. May Dept. Store.*, 466 F.2d 1234 (3d Cir. 1972) (holding that the error in judgment of an experienced 15-year-old swimmer proximately caused his injury, not the lack of warnings on pool or ladder).
 - Hard questioning of the child and parents.

- ***Celmer v. Jumpking, Inc.*** 2006 U.S. Dist. LEXIS 34104 (M.D.Md. 2006).
 - Plaintiff injured her knee while trying to dismount from a trampoline owned by her neighbor. Plaintiff alleged that the trampoline was defective and that Jumpking failed to adequately warn of the dangers of having multiple jumpers on the trampoline. Plaintiff, a sixteen-year-old girl who had never been on a trampoline before, found her younger sister and a friend jumping on the trampoline. Plaintiff's sister encouraged her to join. Plaintiff did not look for warnings regarding multiple jumping prior to using the trampoline. Plaintiff asked the other jumpers to stop so she could dismount. Plaintiff was jarred into the uncovered spring area of the trampoline.
 - Defendant argued that the hazards associated with multiple jumpers on a trampoline are "open and obvious", that the warnings provided were adequate to warn of the danger, and that Plaintiff's misuse of the product was the source of her injury.

Celmer, continued

- **Ruling:** Defendant provided adequate warnings as a matter of law. However, it was unclear (as a matter of law) that the trampoline was used in an unforeseeable manner.
- The court concluded that foreseeability of multiple jumpers was underscored by the fact that Defendant went to great lengths in brochures, owner's manual, and warning labels to warn regarding those risks. ?#!?
- Argue that warnings don't prove foreseeability; they prove *unforeseeability*.

Developing Unforeseeable Misuse Defense

■ The Plaintiff

- Elicit testimony in discovery phase that suggests the danger was open and obvious.
- Use of the “simple tool” variation on “open and obvious” when appropriate.

■ The Plaintiff’s Parents

- Elicit testimony that warnings were not read.
- Elicit testimony that warnings were read but ignored.
- To whom is the product marketed? (*Swix* case)
- Written discovery: requests for admissions

■ The Plaintiff’s Experts

- Elicit testimony in deposition or on cross-examination that the product is not unreasonably dangerous if used as intended.
- *Daubert* – Attack reliability of plaintiff experts.

Developing Unforeseeable Misuse Defense

- **The Defense Experts**

- Elicit direct testimony on the effectiveness of warnings.
 - *E.g., Bunch.* Plaintiff's experts testified that an effective warning for children should consist of (1) an attention getter ("Danger!"), (2) a rule ("No Diving!"), and (3) a consequence ("Serious or Fatal Injury!")

- **The Owner's Manual**

- Evidence can demonstrate the irrationality of acting contrary to the warnings contained in the owner's manual.

Proximate Cause is Usually
A Question of Fact,

The Right Idea

- *Ryobi v. American Corp.*, 181 F.3d 608 (4th Cir. 1999). Plaintiff removed blade guard from miter saw could not prove liability under design defect theory.
- *Messer v. Amway*, 106 Fed. Appx. 678, 683 (10th Cir. 2004). When plaintiff failed to read warnings about floor stripping chemical, i.e. failed to follow proper instructions and directions, there may be a unforeseeable misuse.
- *Rosholt v. Blaw Knox Construction Equip.*, 2006 U.S. Dist. LEXIS 20720 (D.Minn. 2006). A plaintiff, with 20 years experience, had his foot severed in a hydraulic paving machine; failed to follow proper instructions may constitute unforeseeable misuse.

Contact Information:

Stuart J. Goldberg

Eastman & Smith Ltd.

One Seagate, 24th Floor

Toledo, OH 43604

sjgoldberg@eastmansmith.com

419-247-1641