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Combating the Intervening Negligence Defense in Product Liability Cases

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Imagine this typical case: The ABC Paintball Gun company markets its weapons primarily to 17 year old boys. One of its guns, "The Predator", has a cross bolt safety that is not marked in any way. The user either has to recall from prior experience, or guess, when the gun is in "safe" mode and when it is "fire" mode. On a sunny fall day, Tommy Smith is playing paintball with a group of his friends when, between games, Billy Jones points his gun at Tommy, calls Tommy by name, and when Tommy turns Billy pulls the trigger. Tommy is blinded in his right eye. Billy is a good kid who was showing off. He thought the safety was in "safe" mode and that he was just "striking a pose". He guessed wrong. Tommy sues Billy for negligence and ABC Paintball Gun company under strict liability.

Or, consider the case of Wally Worker who is killed using a lift machine manufactured by General Lift Co., and rented to his employer by Safety Equipment Rentals. Wally is killed because the lift turned over due to a defect (likely the bypass of a safety feature) that allowed rapid movement of the lift when it was elevated. This rapid movement led to instability and ultimately to Wally's death. Wally's Estate sues both General Lift and Safety Equipment, alleging that General is strictly liable for manufacturing a defective lift and that Safety failed to insure it was in proper condition before renting it. Safety Equipment is one of General Lift's largest customers.

In both of these cases, the defendant manufacturers might assert that Billy and Safety Equipment are really the parties at fault and that they, the manufacturers, should not be held responsible for the tragedies. This is not to say they would abandon their products and admit they are unfit for their intended purposes. No, they would simply have as a backup position that even if their products are obvious "widow makers" that they, the manufacturers, shouldn't be held liable because someone else allowed the product to cause an injury.

In criminal cases this defense is called the SODD defense, i.e., "some other dude did it." In products liability cases, the silk stocking defense lawyer crowd calls the defense "intervening negligence" or "superceding causation."[i]. Either way, the defendants are not really saying they aren't bad guys, they're just saying they didn't kill

the victim – some other dude did. In this paper, we discuss two strategies to avoid this defense in product liability cases. The first strategy is to keep the defense out of the courtroom by forcing the defendant manufacturer to exonerate the middle-man; the second strategy is an algebraic explanation to use in the courtroom to assist plaintiff's counsel in explaining why the manufacturer must be held liable for the plaintiff's injuries.

I. Combating Intervening Negligence In Discovery.

In the two examples discussed above, the likelihood of the intervening negligence defense differs substantially. Recall that in the paintball gun case, ABC has no connection to Billy the shooter; whereas in the lift truck case, Safety Equipment is General Lift's largest customer. When planning how to handle the manufacturer's intervening negligence defense, counsel must be very alert to these kinds of relationships. Questions such as "Can we get the intervener to help us go against the manufacturer? Can we get the manufacturer to help us against the intervener? Are the two defendants going to circle the wagons and put up a united front?" must be considered at the outset.

In every case we file, even where there is obviously only one defendant, we use the same discovery questions and have found them useful in causing the defendant to tip its hat as to who it will assert is the real cause of the plaintiff's injuries. Our interrogatories always include questions more or less identical to these:

Typical Interrogatory

> Do you contend that any other person or entity (whether a party to this lawsuit or not) was guilty of any act(s) or failures to act that played any part in causing Plaintiff's injuries or the damages complained of? If so, state each specific act (or failure to act) by each such person or entity (giving the name, current address, and telephone number of the person or entity) that you claim supports your contentions.

Typical Interrogatory

> If you allege that any person or entity, including but not limited to the Plaintiffs' decedent, was careless or negligent, or failed to exercise reasonable care, or was the cause of this incident in any way, please

identify each such person or entity and as to each describe with specificity what you believe they did that caused or contributed to the incident. (Even though words such as "negligent" are used in this question, no legal opinion is sought. Instead, simply put, if Defendant thinks co-Defendant Sunbelt's failure to maintain the scissors lift caused this event it should describe why it holds that opinion.)

We find that if we push for the answers to these questions early on, we can then figure out where the defendants are going, and who each defendant blames for the incident. We also look closely at the defendants' answers to see what kind of position they are taking with respect to the cause of the event. But looking at the answer is not enough; it is imperative to follow up with discovery. Depending on the situation, another round of specific interrogatories can be sent; or, as shown below, a 30(b)(6) deposition notice can be served. When we use a deposition notice we include the following topics:

30(b)(6) Topic

All facts that support the fourth affirmative defense in your Answer that the negligence of the Plaintiff and/or parties other than Defendant constitute the sole proximate cause of Plaintiff's injuries.

30(b)(6) Topic

All facts that support the ninth affirmative defense in your Answer that other persons were at fault other than this Defendant.

The point of this exercise in discovery is to require the defendant to commit to a position. If the defendant says no one else was at fault, then this frees us up to settle with one party with a reduced fear of the "empty chair" defense. On the other hand, if the defendant blames a co-defendant or an outside party, then we at least know what to expect at trial.

In the paintball gun type of case, the usual response will be that the intervening actor is the sole cause of the event. In contrast, in the lift truck type of case, the response

is hard to predict. Rarely will the manufacturer point the finger of blame at a large customer and risk losing the sale of millions of dollars of products. Most often, both the manufacturer and the rental company will join forces and claim that the event is not either of their faults. Trapping them into a hard position on this will make preparing for trial much easier.

II. Combating Intervening Negligence At Trial.

Once we know who is blaming whom, the question becomes how to try the case and maximize the likelihood of a recovery against the responsible manufacturer. In the rented forklift type of case, depending on the discovery responses, it might not matter how the ultimate liability plays out (so long as one of the defendants is held liable), because both defendants likely have adequate assets to cover a foreseeable verdict. However, in the paintball gun type of case (or any case where the intervener does not have adequate financial resources to satisfy an expected verdict), it is essential to keep the manufacturer in the case and obtain a verdict against it. Here is a suggested thought process that might be of assistance when explaining to the court (say, in response to a motion for summary or directed verdict) and to the jury why justice demands that the manufacturer be held liable for the plaintiff's injuries.

A couple of prefatory thoughts are in order. First, think of the scales of justice. In a just result, we might think of the scales as being balanced. The judgment rendered against the defendants must equal the damages suffered by the plaintiff. Or, thinking of it another way, the totality of the defendants' conduct must equal the present condition of the plaintiff. When we start talking about one side "equaling" the other side, we are really talking about an algebraic formula. That is to say, whatever is on one side of the equation must equal what is on other side.

A. First, Decide What Is On the Plaintiff's Side of the Equation.

The plaintiff is ours. We know what they have suffered. But, how do we quantify this loss in some kind of a numeric term we can put on the right side of the equation? It is not difficult if we think of a complete tort victim in terms of someone who has had the elements of tortious conduct come together to affect them. In every tort case, the plaintiff must prove three basic elements to recover:

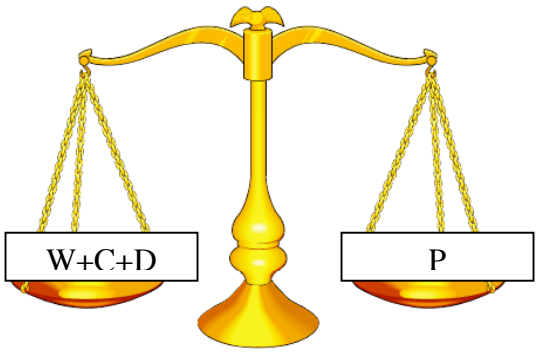
(1) Wrongful Conduct (breach of a duty by negligent conduct or production of a defective product where strict liability applies) that
(2) Causes
(3) Damages.

This can be expressed algebraically as follows:

$$1W + 1C + 1D = P$$

(3 = 3)

W is wrongful conduct
C is causation
D is damage
P is plaintiff



To those of us who struggled with math (and thus chose a careers in law where we figured we would not have to worry with numbers), it is amazing how easily the formula describing the plaintiff comes together. In defining P (plaintiff) we also identified what we will have to prove to establish the defendant's liability. The two sides must balance. If any element on the left side of the equation is missing, we still have an injured person but we don't have a plaintiff – that is, someone who is the victim of tortious conduct. For example:

XYZ Motor Co. manufactured a car with defective airbags. The driver fails to stop for a train and is hit by a 60 mile per hour train and the car explodes, killing the driver. In this example, we don't have a complete plaintiff because we don't have a completed tort. The wrongful conduct "W" is there, but both the causation "C" and the resulting damage "D" are missing. Without these essential elements, we have no case against the manufacturer of the car.

B. Second, Decide What Is On the Defendants' Side Of The Equation.

We already know that on the defendants' side of the equation, there must be conduct sufficient to equal the plaintiff's side. That conduct must include actions sufficient to constitute the W for wrongful conduct, the C for causation, and the D for damages suffered by the P for plaintiff. Without all of these elements, we don't have a balanced equation, or balanced scales, and we don't have a case. This is really where this whole idea becomes useful, because when one of the defendants in a multi-defendant case attempts to escape liability, it can only do so by tipping the scales of justice in a way that should be unacceptable to the jury and court.

Let's first look at the paintball gun type of case. We know our elements on the left side will have to equal the totality that is our plaintiff on the right side of the scales of justice. But with two defendants, the formula is a little more complex. To complete it we have to decide what element of the left side of the formula (W or C or D or a portion thereof) each defendant contributed to. In the paintball gun case, the breakdown might be as follows:

> ABC Paintball Gun company is .25 of the wrongful conduct by virtue of manufacturing a defective gun.
>
> Billy the shooter is .75 of the wrongful conduct by virtue of pointing the gun at Tommy and pulling the trigger.
>
> ABC is .75 of the causation because Billy would not have been confused but for the defective gun.
>
> Billy is .25 of the causation because he shouldn't have taken the chance of being confused.
>
> Both ABC and Billy came together to share equally the cause of the damage.

Thus, the formula in the paintball gun case might look like this:

$$(ABC.25W + Billy.75W). + (ABC.75C + Billy.25C) + (ABC.5D + Billy.5D) = P$$

Now that we have this formula, and have proved our case establishing that ABC did contribute to the W (wrongful conduct), did contribute to the C (cause), and did contribute to the D (damages), we have a powerful tool (or at least thought process) to keep ABC from avoiding liability. The real power of this approach is that it provides a method to hold ABC liable and blunt ABC's effort to argue that even if it is 25% responsible for the wrongful conduct, that because it is zero % liable for causation it must be exonerated. If ABC is exonerated the scales do not balance because of its contribution to W and D too.

Note what happens if we take ABC's conduct out of the equation of events that led to our plaintiff becoming the complete P. We now have an incomplete event.[ii]

$$Billy.75W. + Billy.25C + Billy.5D \neq P.$$

$$(1.5 \neq 3)$$

The conduct on the left side of the equation is not sufficient to add up to our complete plaintiff (the sum total of the three necessary elements in a tort case). Instead of being blinded, if we take out the defective gun and the confusion it caused, we simply have Billy being a 17 year old kid doing something stupid that did not have any consequences.

We have 1W + 1C + 0D ≠ P. When ABC pulls its conduct out of the equation the scales of justice no longer balance for Tommy – any jury should be offended by innocent Tommy not getting an evenly balanced set of scales.

In contrast, if we only remove ABC from the only C portion of the equation, given the forseeability of Billy's conduct, a verdict against ABC is still appropriate.

(ABC.25W + Billy.75W). + (ABC.0C + Billy.1C) + (ABC.5D + Billy.5D) = P

The equation still balances and ABC still has to compensate Tommy.

Another example might illustrate this even better. How about XYZ Motor Co. making a car with a defective front seatback that is hit from behind by Joe Tipsy, a drunk driver. The front seatback collapses and a rear seated infant is killed. XYZ wants to say the entire event is Joe's fault for driving drunk. But, when XYZ's conduct is removed from the formula, D (damage) is not sufficient to balance the scales. To wit:

JoeW + JoeC + JoeD = P

The "Joe only" formula does add up. But the P on the right side of the equation is not our P. Our P is dead. The P in this formula – without XYZ's defective seatback – has only soft tissue injures. To create a balanced formula that has enough weight on the left to balance the right, XYZ's conduct has to be included. Without the D and W contributions from XYZ the conduct of Joe is insufficient to create the P that exists after the crash.

The same algebraic analysis works for the lift case. In fact, the necessity of bringing back a verdict against the defendants is even more obvious. Wally Worker is without fault of any kind because he was just being lifted. Yet, both ABC and Safety deny liability. If we diagram this defense, the formula will look like this:

(ABC 0W + Safety 0W) + (ABC 0C + Safety 0C) + (ABC 0D + Safety 0D) ≠ P

Yet, we know that our P, Wally, is dead. This is not the kind of event that happens without a defect in either the machine or its maintenance. Therefore, to balance the scale the jury must replace the zeros with numbers representing the conduct of each defendant.

C. Third, Using The Formula.

Now that we can think about a P plaintiff being the sum of 1W wrongful conduct plus 1C causation plus 1D damages, we have to figure out how to use this tool or whether to relegate it to the world of intellectually weird ideas. If we think of jurors as needing images to assist them in understanding the evidence, and if we think of how abstract most of the concepts relating to legal liability, particularly proximate cause, can be, it is obvious that some tool is needed. This algebraic approach, using the scales of justice might just be that tool.

Provided we don't get bogged down in trying to assign particular numbers to each defendant's conduct, and instead if we talk about the necessity of an entirety of wrongful conduct and an entirety of causation and entirety of damage to equal our plaintiff and balance the scales of justice, then this will work. Obviously, we have to be careful about falling into a trap where we have said the evidence is evenly balanced – that would result in a defense verdict. But, if we can use this approach to insure that jurors recognize that it takes all of the conduct to equal all of the harm, then this analytic approach should be useful in obtaining jury verdicts against product manufacturers who argue that some intervening force or action absolves them from liability.

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[i] The actual definitions of intervening negligence and superseding negligence are different. Intervening negligence is often thought of as foreseeable negligence and superceding negligence is unforeseeable. In the words of the Restatement 2d, Torts sec. 442A: "Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause."

Restatement 2d Torts sec. 442 is instructive:

> Considerations Important In Determining Whether An Intervening Force Is A Superseding Cause
>
> The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:
>
> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
>
> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
>
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
>
> (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
>
> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

However, in the real world, as opposed to a classroom, courts and lawyers often use the two terms interchangeably.

[ii] Note, what the Restatement 2d, Torts, sec. 442B provides:

"Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing the harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of risk created by the actor's conduct."