THIRD-PARTY LIABILITY FOR WORKPLACE INJURIES

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Careful investigation and creativity may reveal alternative sources of liability for workers who are seriously injured on the job.

Hoping for some extra pay after a week-long vacation, Jim, a materials handler at his employer's steel-distribution center, reported for an overtime shift. He mounted a sideloader—a specially designed forklift—to move long bundles of steel in the narrow aisles between the storage shelf brackets fabricated from welded I-beams.

Minutes later, Jim's coworkers heard his screams. The left side of Jim's skull had been impaled on the end of an I-beam. Miraculously, he survived, but he suffered severe brain damage.

How did this happen? The employer was quick to blame Jim, asserting in its investigative report that he had been careless while operating the sideloader. Jim himself had little recollection of the incident, and, because of his brain injury, he was unable to fully communicate what he did know. There were no other witnesses.

The temptation for a plaintiff attorney is to consign Jim's legal recovery to the benefits available through state workers' compensation. Workers' comp laws are designed to provide relatively quick and certain benefits for individuals injured in the workplace.

These benefits are automatic, regardless of fault—a fact particularly relevant for Jim, whose employer blamed him for the accident.[1] In exchange for the guaranteed protection of workers' compensation, employees forfeit the right to sue their employers in all but a few of the most egregious circumstances.[2]

Guaranteed workers' comp benefits are not an adequate financial safety net, however, especially for workers like Jim who have catastrophic injuries. Most workers' comp systems replace, at most, only two-thirds of the pre-injury salary, typically excluding fringe benefits. The benefits are often capped without any cost-of-living adjustment. Though workers' comp benefits usually provide for medical and rehabilitation costs, they do not provide any compensation for pain and suffering.

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Moreover, benefits can be reduced or terminated if a worker, even one who has suffered a severe injury, is deemed still able to earn money. An employer may subject the worker to repeated medical and vocational examinations to determine the remaining degree of disability and lost earning capacity. Moreover, some states impose an absolute limit on the amount of time for which an injured worker can receive partial disability benefits, even if the worker has not fully recovered.[3]

Though injured workers cannot sue their employers, they can sue so-called third-party defendants—other entities that may have played a role in causing their injuries.[4] For Jim and other catastrophically injured workers, such litigation *21 may be the only route to a financial recovery commensurate with their injuries. In an industrial setting, potential third-party defendants often include manufacturers and distributors of unsafe machinery, outside contractors that have acted negligently at an employer's work site, and contracted employers—excluded from workers' compensation immunity—that have provided unsafe premises on which to work.

Third-party defendants can be difficult to identify, often requiring intensive, expensive prefiling investigation. However, you can increase your chances by paying careful attention to every element of the incident and using creative thinking. An investigation into Jim's injury, for example, revealed at least three culpable parties: the manufacturer of the sideloader, the local forklift distributor that had repaired the sideloader before the accident, and the installer of the storage shelves.

For catastrophically injured workers, the difference between a workers' compensation recovery and the addition of a third-party recovery can mean the difference between fiscal life and death.

INVESTIGATING THE INCIDENT

Third-party claims rely on prompt and thorough accident investigations. You must preserve every possible piece of relevant evidence. This means setting aside equipment, clothing, or any other physical objects involved in the incident. The employer can help; develop a positive relationship with the employer early on by emphasizing that it can recover its workers' *22 compensation payout through subrogation if a third-party claim is successful.[5]

While it may be impossible to sideline a large, integrated piece of equipment like a printing press, small pieces of equipment involved in injuries can be taken out of service, even if they have not been rendered useless. In some cases, if the equipment involved in the accident is inexpensive, you can purchase it.

Attempt to record the immediate aftermath of the incident. Have photographs taken of the site and the equipment involved Interview all witnesses. If this is not possible immediately, take a survey of people who were present to determine who might have useful knowledge. Again, a positive relationship with the employer is invaluable for gathering employee contact information, arranging interviews, and facilitating site visits for you and your experts.

The Occupational Safety and Health Administration (OSHA) may investigate a workplace injury. Because OSHA's mandate is to enforce the employer's responsibility to provide a safe workplace, its investigations usually focus blame on the employer, which is statutorily immune from a lawsuit on behalf of the injured worker.

However, OSHA investigators are often receptive to information from the injured workers' attorney that ultimately will support, rather than conflict with, a third-party case. For example, the attorney—either directly or through the employer or, if applicable, the union—may alert OSHA to other injuries caused by the same product, leading the agency to focus on the "unsafe product." Or the lawyer may inform OSHA of other entities' roles in the incident, especially at multi-employer work sites.

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At the least, obtain OSHA investigative materials, including photographs and videos, through a Freedom of Information Act request.

A great deal of information relevant to third-party claims is available on the Internet. For example, you can find detailed information about potential defendants, including corporate history, advertising materials, safety advice, optional safety equipment, identities of distributors, patents, and other lawsuits.[6] You may develop theories of liability by reviewing competing manufacturers' products for safety features that the defendant failed to adopt, using safety directories, or visiting Web sites of relevant organizations.[7] Trial attorneys' databases, information exchanges, and list servers also are excellent resources.

Since it may take two or three years for a case to go to trial, photographs and videotape of the plaintiff should be taken as soon as possible after the accident to document his or her injuries. Increasingly, hospital emergency or operating rooms maintain file photographs of injuries taken in the first few hours after they occur. Videotape of early physical therapy sessions is invaluable. Closely document the progression of the client's treatment and recovery.

PRODUCTS LIABILITY

The best way to start considering potential third-party claims is to look at the industrial products involved in either causing or worsening the injuries. The doctrine of products or strict liability, although it differs from state to state, provides that the manufacturer and distributor of a defective product should be held strictly liable for all injuries caused by the product's defects.[9] Liability attaches even if the product manufacturer exercised all possible care, and even if the injured user was not the purchaser. Strict liability is said to promote the public policy that the burden of accidental injury caused by defective products should be placed on those who manufacture and supply them rather than on those who are injured by them.[10]

In contrast to traditional negligence, strict liability focuses on the product, not on the parties' conduct. The key question is whether the product "lacked any element needed to make it safe for use."[11] In a strict liability action, any alleged negligence by the injured employee, his or her coworkers, or the employer has limited relevance, and in most jurisdictions it does not bar recovery.[12] In some jurisdictions, the negligence of a plaintiff-employee, coworkers, or the employer is considered irrelevant to a strict products liability claim,[13] and evidence of it is inadmissible.[14]

Some defenses are available in a strict liability case. Where the worker can be said to have voluntarily and unreasonably exposed himself or herself to a known risk posed by a defective product, the "assumption of risk" defense may apply.[15] However, the national trend is toward eliminating this defense from strict liability actions, especially for workplace injuries.[16] Some courts reason that, because the doctrine is based on a voluntary assumption of risk—and industrial workers generally have no choice about the products they use and the risks to which they are exposed—assumption of risk is not applicable.[17]

Defendants also may claim that an employee's own misuse of the product, rather than any alleged defect, caused the injury This defense requires an inquiry into whether the use was reasonably foreseeable to the manufacturer. Even if the plaintiff used the product for a purpose the manufacturer did not intend, the manufacturer will be held liable if the use was reasonably foreseeable.[18] Many unintended uses have been considered reasonably foreseeable, including use beyond the intended life of the product,[19] installing the product backwards,[20] misassembly,[21] alteration,[22] and improper attachment of the product.[23]

An employer's alleged failure to purchase an optional safety device should not be a defense to a strict liability action. A manufacturer of a dangerous product should not make safety an option, and the employer's purchasing decision should not be

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admitted into evidence. For example, in a Pennsylvania case, the manufacturer of a *23 steel shear that amputated a worker's fingers claimed that the absence of a safety guard was the employer's choice, made in violation of OSHA rules. The court barred the manufacturer's argument.[24]

In the case of Jim's head injury, the investigation revealed he had been thrown out of the operator's compartment, thrusting his head between the sideloader's frame and a protruding I-beam of the storage shelves. He brought a products liability claim against the sideloader manufacturer, based on the equipment's unsafe design.[25] The sideloader did not have a barrier enclosing the operator's compartment, despite its being specifically intended for use in narrow aisles. A door—a feature on other manufacturers' sideloaders—would have safely confined Jim within the vehicle.

Here are more examples of workplace injuries that gave rise to products liability claims against third-party manufacturers:

· Tom was a blast furnace operator at a lead foundry. A pot of molten metal fell over, and the metal exploded when it hit a pool of water, splattering Tom. His supposedly flame-retardant cotton uniform caught fire and, rather than self-extinguishing, burned for longer than a minute, causing burns over 67 percent of Tom's body.

Although the uniform was not preserved, fortunately, Tom's other uniform was safe in his locker. The uniforms had to be washed daily because of lead exposure at the plant, but testing revealed that washing the fabric had removed its flame-retardant qualities. Uniforms made from synthetic fabrics—such as Nomex—that are inherently flame retardant can withstand endless washing.

The uniform manufacturer knew that the fabric should not be used in a setting where frequent washing was needed. Since the company never instructed its salespeople to ask customers, including Tom's employer, how often they would wash the uniforms or how knowledgeable they were about flame-retardant fabrics, the manufacturer sold the wrong fabric. These facts supported a third-party claim against the uniform manufacturer.[26]

· Dave was drenched in 220-degree steam when the side of a large pressurized vessel was ripped open by the buildup of excess pressure. More than 97 percent of his *25 body was burned, and he died 42 days later.

Dave had been cleaning one of a series of tanks in the steel mill's boiler room—a process that required a "backwash" of pressurized water to run through the vessels at 800 gallons per minute. Dave had failed to open one of the vessel's manual relief valves, causing the pressurized water to build until the vessel ruptured. The manufacturer had devised a complicated 17-step procedure— involving the opening and closing of 14 valves—to complete the backwash cleaning procedure, making Dave's mistake not only foreseeable but likely. A viable third-party claim existed against the manufacturer for failing to equip the vessel with automatic pressure-relief valves in the event of the predictable mistake.[27]

INADEQUATE WARNINGS

Inadequate warnings or instructions can also support a products liability claim. If a product has an inherent hazard that cannot be eliminated from the design—perhaps because doing so would reduce the product's functionality—a warning must be included.[28]

For example, Andy worked at a plant that treated metal parts with a chemical bath to render them rust-proof, but the chemicals

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were sold to his employer without adequate safety instructions. The metal parts were dipped into large tanks of heated water saturated with corrosive industrial salts.

Shortly before the incident, Andy's employer put a large new tank into use, requiring the one-time addition of a large amount of the salts. When a substantial quantity of chemicals unexpectedly poured into the water, Andy was engulfed by a cloud of burning mist and suffered second- and third-degree alkaline burns to his face, neck, arms, and torso.[29]

The supplier knew that the highly corrosive salts reacted with water and that when they were added quickly to water a violent reaction—generating heat, splashing, and misting—could occur. The supplier was familiar with Andy's workplace and knew that none of the workers used personal protective equipment such as goggles or face shields.

Despite that knowledge, the supplier did not provide Andy's employer any warnings about the potential for a violent reaction. If it had, Andy could easily have avoided injury. In the jurisdiction where Andy was injured, as in many others, courts afford plaintiffs a "heeding presumption" that they would have read and followed any warnings that were supplied.[30]

CONTRACTOR NEGLIGENCE

Many outside contractors contribute to a workplace. An injured worker's employer may have hired one company to design the layout of the workstations, another to determine what equipment would best suit its needs, and another to customize and assemble the equipment. These companies must know the employees' working conditions intimately and therefore are potentially liable if the conditions create an unreasonable risk of harm.

Returning to Jim's case, an outside contractor custom-designed the storage system at his workplace. Investigation revealed that the contractor had incorporated several hazardous features. Guide rails were mounted along the base of the I-beam shelves so the operator could control the sideloader within the narrow aisles. Guide rollers, mounted on the sideloader a few inches above the ground and facing the rails, were supposed to fit snugly against the rails on both sides, safely positioning the sideloader between the shelves. Although the designer knew the width of the sideloader models that would be used, it made the aisles and guide rails too wide. As a result, the sideloaders would fishtail and rebound as they traveled down the aisles.

The designer also did not set the guide rails far enough from the protruding I-beams that formed the shelving brackets. The sideloader's specifications required three inches of space between the guide rail and the end of the I-beam. The designer provided only one inch of clearance, creating a dangerous shear point between the I-beam and the moving sideloader—precisely where Jim's head got caught. These facts supported a claim against the designer of the storage shelf system.

Because of the designer's errors, the employer had hired a local sideloader distributor to customize and extend the guide rollers to fit the oversized aisle. It turned out that the distributor made two major mistakes. First, it reversed the sideloader's directional controls. Moving the directional control lever to what should have been "forward" caused the sideloader to move in reverse, and vice versa. Second, the distributor-installed guide rollers were too close to the sideloader's body to fit the extra-wide aisles, and too high to ride the guide rails. The sideloader rebounded back and forth down the aisle and got stuck on top of the rail.

Having participated in their installation, the distributor knew the dimensions of the aisles and guide rails, but it placed the customized sideloader into service without notifying anyone that it was not safe for use. These facts supported a strong negligence claim against the local distributor.

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PREMISES LIABILITY

When a person is injured at a site controlled by an entity other than his or her employer, dangerous conditions there may give rise to a premises liability claim.

For example, Michael was a delivery driver for a dairy company. He was injured when a fully loaded milk cart weighing 1,200 pounds toppled onto him as he unloaded the cart from his truck onto a supermarket loading dock. Michael's injury was caused, in part, by the supermarket's unsafe dock, which was significantly lower than the truck bed. Michael was forced to roll the loaded cart down a dangerously steep slope to get it into the store. As he *26 maneuvered the cart down the slope, it toppled forward onto him, causing severe injuries to his spine and head.

Safety standards require a dock's design to be consistent with the anticipated types of deliveries and the equipment that will be used on it.[31] The dock where Michael was unloading milk was designated as the "dairy hallway." The store knew that refrigerated trailers, whose average bed height is 55 inches, would be unloaded there. But the loading dock was only 48 inches high, and the store, in order to bridge the seven-inch height difference, provided a very short dock plate, only 27 inches long This ensured that the minimum slope from the trailer bed to the dock would be a 35-degree drop—well in excess of standards promulgated by the National Building Officials and Code Administrators International, an association of code enforcement officials and others in the building industry. The store's clear responsibility for creating the dangerous condition that caused Michael's injuries made it a viable defendant in a premises liability claim.[32]

In another case, Nate was a truck driver who delivered bulk powdered lime for a chemical supply company. He was assigned to deliver a tanker full of lime to a storage silo at the defendant's concrete plant. A flexible hose was used to connect the tanker to a 100-foot steel pipe that runs along the outside of the defendant's silo. A blower in the truck propelled the powdered lime through the hose and up the silo through the steel pipe. In the piping system installed by the defendant, there was no mechanism to prevent the lime from falling back down and out of the pipe if it clogged.

When he uncoupled the hose after making his delivery, Nate was immediately engulfed in lime that fell several stories from the point in the pipe where it had clogged. The lime got in his eyes and burned them. Nate stumbled around until another worker discovered him. The defendant's facility did not have a safety shower or an eye-wash station with a permanent water supply The defendant had only a small-capacity portable eye-wash station— normally used in field operations—and, through neglect, the station was practically empty. With insufficient water to wash the lime out of his eyes, Nate's corneas were severely scarred, blinding him in one eye.

The plant's numerous failings—including the dangerous lime-delivery system and the insufficient emergency eye-wash station—supported Nate's premises liability claim.[33]

As these cases show, a worker who suffers a catastrophic injury on the job may be able to seek compensation outside workers' compensation. Careful investigation of the circumstances surrounding a workplace injury can identify potential third-party defendants in many different types of civil actions.

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Notes:

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1 See ARTHUR LARSON, WORKERS' COMPENSATION LAW § 1.01 (2002).

2 See id. § 100.01; see, e.g., 77 PA. STAT. ANN. § 481 (2002).

3 See LARSON, supra note 1, § 100.01.

4 See, e.g., 77 PA. STAT. ANN. § 481.

5 See LARSON, supra note 1, § 117.01.

6 John C. Philo, Internet Tools and Research for Products Liability Cases, ATLA ANNUAL CONVENTION REFERENCE MATERIALS 2345 (2002). The following Web sites can be used to research defendants: www.internet-prospector.org/ company.html; www.virtualchase.com/coinfo/index.htm; www.thomasregister.com; www.sec.gov/edgar.shtml.

7 See Injury Control Resource Information Network Internet Library: www.injurycontrol.com/icrin/index.html; The Safety Link: www.safetylink.com; National Center for Injury Prevention and Control: www.cdc.gov.ncipc/default.htm; National Safety Council: www.nsc.org; National Institute for Occupational Safety and Health: www.cdc.gov/niosh/homepage.html.

8 The ATLA Web site, www.atla.org, includes member access to section list servers and the Exchange, ATLA's case-preparation resource.

9 See RESTATEMENT (SECOND) OF TORTS § 402A (1965); AMERICAN LAW OF PRODUCTS LIABILITY 3d § 16:1 (Timothy E. Travers et al. eds., 2002). The vast majority of states have adopted § 402A. AMERICAN LAW OF PRODUCTS LIABILITY 3d § 16:8.

10 See RESTATEMENT (SECOND) OF TORTS § 402A cmt. c.

11 Berkebile v. Brantly Helicopter Corp., 337 A.2d 893, 902 (Pa. 1975).

12 See AMERICAN LAW OF PRODUCTS LIABILITY 3d, supra note 9, § 40:37.

13 See id. § 40:44 (identifying Nevada, Ohio, Oklahoma, Pennsylvania, and South Dakota as states where the doctrine of comparative negligence is inapplicable to strict liability actions).

14 See, e.g., Kimco Dev. Corp. v. Michael D's Carpet Outlets, 637 A.2d 603 (Pa. 1993).

15 See AMERICAN LAW OF PRODUCTS LIABILITY 3d, supra note 9, § 41:1-41:40.

16 Id. §§ 41:1, 41:29. See also Larsen v. Pacesetter Sys., Inc., 837 P.2d 1273 (Haw. 1992) (abolishing the concept of primary implied assumption of risk in strict products liability cases).

17 Jara v. Rexworks, Inc., 718 A.2d 788 (Pa. Super. Ct. 1998); Cremeans v. Willmar Henderson Mfg. Co., 566 N.E.2d 1203 (Ohio 1991); Varilek v. Mitchell Eng'g Co., 558 N.E.2d 365 (Ill. App. Ct.), appeal denied, 561 N.E.2d 709 (Ill. 1990).

18 AMERICAN LAW OF PRODUCTS LIABILITY 3d, supra note 9, § 42:11.

19 Bell Helicopter Co. v. Bradshaw, 594 S.W.2d 519 (Tex. Civ. Ct. App. 1979).

20 McNeal v. Hi-Lo Powered Scaffolding, Inc., 836 F.2d 637 (D.C. Cir. 1988).

21 Hart-Albin Co. v. McLees, Inc., 870 P.2d 51 (Mont. 1994).

22 Brown v. U.S. Stove Co., 484 A.2d 1234 (N.J. 1984).

23 Katz v. Swift & Co., 276 F.2d 905 (2d Cir. 1960).

24 Sheehan v. Cincinnati Shaper Co., 555 A.2d 1352 (Pa. Super. Ct. 1989).

25 Galbraith v. Arbor Handling Servs., Inc., No. 1320 (Pa., Philadelphia Ct. Common Pleas 1995).

26 Sterley v. Todd Uniform, Inc., No. 2062 (E.D. Pa. 1995).

27 DeLuise v. Cochrane Corp., No. C7951 (Pa., Northampton County Ct. Common Pleas 1993).

28 AMERICAN LAW OF PRODUCTS LIABILITY 3d, supra note 9, § 32:1.

29 Scully v. Frankford Hosp., No. 1850 (Pa., Philadelphia Ct. Common Pleas 1998).

30 RESTATEMENT (SECOND) OF TORTS § 402A cmt. j; see Reyes v. Wyeth Labs., 498 F.2d 1264, 1281 (5th Cir.), cert. denied, 419 U.S. 1096 (1974).

31 NAT'L BLDG. OFFICIALS & CODE ADM'RS § 1016.3 (12th ed. 1993); AMERICAN NATIONAL STANDARD FOR THE SAFETY, PERFORMANCE, AND TESTING OF DOCK LEVELING DEVICES, MH30.1-1993 (Am. Nat'l Standards Inst. 1993).

32 Rocus v. Cannon Equip. Co., No. 4401 (E.D. Pa. 2001).

33 Cannedy v. Certainteed Corp., No. 4028 (Pa., Philadelphia Ct. Common Pleas 1990).

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