



Strictly Speaking

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Product Liability Prevention Substantial Modification Defense: New Case Law and Its Implications

by Kenneth Ross



One of the strongest defenses a manufacturer has in product liability litigation is that the plaintiff or someone else substantially modified the product after it left the control of the manufacturer and that this modification proximately caused the accident. This defense was embodied in Section 402A of the *Restatement (Second) of Torts* when it said that the manufacturer can only be liable if the defective product "does reach the user or consumer without substantial change in the condition in which it is sold."

The *Restatement (Third) of Torts: Products Liability* also confirmed this defense when it said:

Foreseeable product misuse, alteration, and modification must also be considered in deciding whether an alternative design should have been adopted. The post-sale conduct of the user may be so unreasonable, unusual, and costly to avoid that the seller has no duty to design or warn against them. When the court so concludes, the product is not defective within the meaning of subsection (b) or (c). §2, *cmt. p.*

The question that always arises is whether the "substantial change" is foreseeable or unforeseeable, an issue that is sometimes answered by examining whether the manufacturer during the design phase performed a risk assessment and concluded that it is reasonably foreseeable or even likely that the change, which often constitutes misuse, will occur.

Manufacturers, who have enough to worry about when designing safe products, also have to try to anticipate whether a user or third party will change the product by removing safety devices or allow the devices to become inoperable.

Consistent with the law above, many courts have held manufacturers not liable for injuries caused by an employer's alteration of safety devices on the grounds that it constitutes a "substantial change." Other courts have concluded that the change was foreseeable and refuse to relieve the manufacturer of liability.

In 1980, the N.Y. Court of Appeals issued one of the best decisions for manufacturers on this subject in *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 403 N.E. 2d 440. The same court in April 2014 distinguished and, in some people's view, weakened this opinion and defense.

This article will discuss *Robinson*, the new 2014 opinion, and any lessons these cases provide to manufacturers when designing their products and providing warnings and instructions.

Robinson v. Reed-Prentice

Reed-Prentice sold the machine to the plaintiff's employer, Plastic Jewel, with a safety gate in place. If it had been in place at the time of the accident, it would have prevented plaintiff's injury. But Plastic Jewel cut a hole in the safety gate which "destroyed the practical utility of the safety features incorporated into the design of the machine..."

The N.Y. Court of Appeals said that the record contained evidence that Reed-Prentice knew, or should have known, that the employer could not use the

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machine for the purposes intended with the safety gate in place. In fact, Reed-Prentice visited the plant and saw two identical machines with holes cut in the safety gates. And, the employer asked Reed-Prentice to modify the gates and they refused.

At trial, plaintiff's expert opined that there were two modifications that the manufacturer could have made that would allow the employer to use the machine as intended without making the machine dangerous.

Under these facts, the court ruled that the manufacturer was not liable as a matter of law. The court said:

Principles of foreseeability, however, are inapposite where a third party affirmatively abuses a product by consciously bypassing built-in safety features. While it may be foreseeable that an employer will abuse a product to meet its own self-imposed production needs, responsibility for that willful choice may not fall on the manufacturer. Absent any showing that there was some defect in the design of the safety gate at the time the machine left the practical control of Reed-Prentice (and there has been none here), Reed-Prentice may not be cast in damages for strict products liability. (403 N.E.2d 440, 443).

In holding that the plaintiff's complaint should be dismissed, the court concluded on this issue:

Material alterations at the hands of a third party which work a substantial change in the condition in which the product was sold by destroying the functional utility of a key safety feature, however foreseeable that modification may have been, are not within the ambit of a manufacturer's responsibility. (Id. at 444).

Judge Fuchsberg dissented and recited somewhat persuasive facts as to why a jury should be allowed to at least consider whether Reed-Prentice was negligent in not providing a machine that was unreasonably dangerous for the use to which it was going to be put.

Since *Robinson* was issued in 1980, many courts, especially in New York, have ruled for manufacturers in cases where the products were altered. In addition, some courts did not follow *Robinson* and some created exceptions. This month, the New York Court of Appeals again considered the viability of this decision.

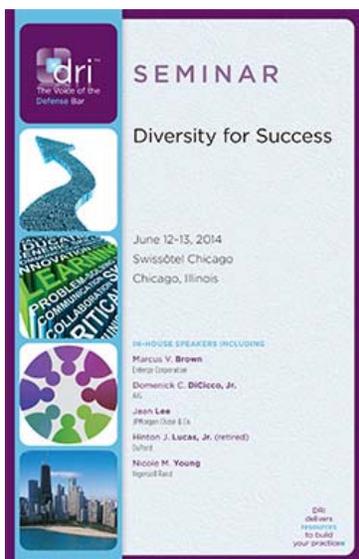
Hoover v. New Holland North America, Inc.

The New York Court of Appeals, on April 1, 2014, decided (presumably seriously) the case of *Hoover v. New Holland North America, Inc.*, 2014 NY Slip Op 02215. In this case, the court was asked to decide whether defendants were entitled to summary judgment in dismissing plaintiff's design defect claims. This dismissal would have been based on the substantial modification defense articulated in the *Robinson* case referenced above. The court concluded that the plaintiff raised triable issues of fact concerning defective design and that these were sufficient to defeat summary judgment based on this defense.

The product involved a post-hole digger which is connected to a tractor driveline. The digger has several safety guards and shields made of durable high density polyethylene. The digger has numerous warning labels concerning keeping all shields in place and in good condition. The manual, likewise, contains many warnings concerning keeping shields in place.

The owner of the digger testified that when he was using the digger, the shield and driveline would contact the ground allowing the entire auger and part of the gearbox assembly to submerge into the ground. The manual instructed operators not to submerge the auger beyond the flighting because that could cause binding and overloading. Two to three years after he purchased the digger, the safety shield broke and was torn off due to regular wear and tear. The owner would continually reattach it to the gearbox. After four years of use, the owner decided to remove the broken shield from the digger and not replace it.

Defendant's employees testified that it is a misuse to operate the digger without all of the shields installed and the farmer should replace the shield if it becomes broken. There are numerous warnings concerning this hazard. However, the employees acknowledged that it was a possibility that a user would not reattach



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the shield after it was removed. That is no big revelation as that could be said about any safety device, even one fully integrated into the product.

There was also testimony that the post-hole digger manufacturer first was going to utilize a metal shield around the gearbox but instead used a plastic shield. In addition, there was testimony that the plastic shield was never tested to see whether it could withstand contact with the ground because this was not considered normal operation. And, no field tests were conducted to determine how many times the shield could contact the ground before becoming damaged nor was any durability testing of the shield performed.

Defendants argued that they could not be held liable as a matter of law because the owner made post-sale modifications to the digger and that these modifications proximately caused plaintiff's injuries. The basis of this argument was the rationale in *Robinson*.

Plaintiff argued that the digger had two design defects and that the substantial modification defense could not be the basis of a summary judgment motion. To support this argument, the plaintiff's expert argued that a safety shield must be designed to last the life of the product and to withstand foreseeable use and misuse and its environment of use. On that basis, the plaintiffs argued that the plastic shield was "inadequately tested" and "not reasonably safe."

Plaintiff's expert also argued that it was foreseeable that the average farmer would not replace a broken shield and therefore the manufacturer should have implemented an alternative design such as a metal shield which was less likely to break.

At trial, the judge charged the jurors on the substantial modification defense.

However, the jury returned a verdict in favor of the plaintiff in the amount of \$8.8 million. Defendants moved for a JNOV, which was denied and the verdict was appealed. The Appellate Division affirmed the trial court decision and this case was appealed to the New York Court of Appeals.

After reviewing the facts and holding in *Robinson*, the Court of Appeals stated that a defendant will not automatically prevail on summary judgment "simply because that safety feature was modified post sale." Summary judgment is not warranted under *Robinson* where the product was dangerous "because of a defectively designed safety feature and *notwithstanding* the modification by the third party."

Differentiating the *Robinson* facts from *Hoover*, the court said that the owner removed the shield because its functional utility had been destroyed rather than in *Robinson* where the modification was meant to adapt the product to meet the customer's own needs.

The court thankfully said that they do not agree with the plaintiff's argument that all safety devices must be designed to last the lifetime of a product on which they are installed. However, the court went on to say that they do not believe that defendants adequately refuted plaintiff's claims that the shield failed prematurely.

The court summarized one of the defendant's arguments by stating:

Defendants urge that the owner of a machine is responsible for replacing all parts that become damaged or worn, including safety devices, and that a contrary rule would place an onerous burden on manufacturers to design accident-proof products that are incapable of wearing out.

In response to that argument, the court ruled that a manufacturer should not automatically avoid liability when the safety device is removed post-sale and not replaced because it would lessen the manufacturer's duty to design effective safety devices that make products safe for their intended use and unintended yet reasonably foreseeable use.

According to the court, plaintiffs raised a question of fact as to whether the owner's habit of driving the shield into the ground was foreseeable. Therefore, the question was whether this was truly abuse of the product which ultimately resulted in the shield breaking and being removed. The court concluded that:

Without definitive evidence that such "abuse" occurred here, defendants could not prevail on summary judgment based on Smith's failure to replace the shield.

The court affirmed the lower court ruling and the \$8.8 million verdict was upheld.

The dissent in this case referred to the majority's opinion as a kind of "soak-the-rich fact-finding" and argued that if the farmer who removed the guard had deep pockets, the jury probably would have held the farmer liable for the plaintiff's injuries. The dissent felt that the holding in *Robinson* was clear and that the manufacturer should not be liable for dangers created by substantial alterations to the product after sale.

The Product Liability Advisory Council, an organization of over 100 manufacturers, filed an amicus brief in support of the appellant's position. It said, in part:

We submit that the decisions below are entirely incompatible with *Robinson*, that the material alteration doctrine confirmed in *Robinson* is a critical bulwark against virtually unfettered guarantor liability against manufacturers, and that sound policy requires application of that doctrine here, and reversal of the courts below.

Referring to *Robinson* as a "foundational decision," the amicus brief discussed the history of the substantial modification defense in New York jurisprudence and the cases decided subsequent to *Robinson* which, despite several inapplicable exceptions, upheld its primary holding as it pertains to design defects. The brief concluded by arguing:

Sustaining the courts below would severely undermine *Robinson* and place upon all manufacturers impossible burdens - - to design products with safety mechanisms that will never wear out and which are incapable of being removed.

Some commentators believe that this decision is a loss for manufacturers but not a disaster. *Robinson* was not overturned, but merely distinguished. While the language in the opinion, when combined with the facts, will not be helpful to manufacturers in future cases, at least manufacturers have more guidance about future actions they can take to increase the chance that they will benefit from such a defense.

So what should manufacturers do going forward?

Implications for giving preventive advice

The basis of this analysis is what is "reasonably foreseeably" and what does the manufacturer have to do about it. Manufacturers are not liable for misuse, alteration, or modification unless they are "reasonably foreseeable." But everything is foreseeable. What makes it "reasonably foreseeable?"

One of the great quotes in a judicial opinion is, in my opinion, contained in a very early product liability case and relates to this definition. The judge in this case said that "reasonably foreseeable" does not "encompass the far reaches of pessimistic imagination..." *Jamieson v. Woodward & Lothrop*, 247 F.2d 23 (D.C. Cir.), cert. denied, 355 U.S. 855 (1957).

While I can imagine a product user removing all of the safety guards and not reading the instruction manual and warnings, that doesn't make it reasonably foreseeable. If it did, then no product could be reasonably safe if it relied on guards and warnings and instructions for safe use. But what is "reasonably foreseeable?" Unfortunately, each jury and judge gets to decide. So what do we do?

While hindsight is very perceptive, and it is difficult to know what each of us would do when advising a client during the design process, manufacturers need to anticipate some of these unintended actions and do what they can to create defensible evidence.

Certainly, providing warnings and instructions warning about misuse and about operating without the guards is an easy first step. That should include warnings on the product next to or under the guard warning that if they can see the label, it means that the guard is removed and the product shouldn't be used. Putting a warning on the guard doesn't do much good if the guard is removed.

Next, if possible and practical, the safety devices need to be attached so they cannot easily be removed. The harder it is to remove them, the less likely they

will be removed. However, that won't work if the guard needs to be removed for maintenance or certain uses of the product. In that case, making it difficult to remove the guards will make it more likely that they will be removed for good.

In *Hoover*, the court didn't like the fact that the shield manufacturer didn't test the relative durability of the plastic guard over the metal guard. And the plastic guard was selected because they did not consider submerging the shield as a normal operation. Obviously, no one considered that it might contact the ground and should be able to withstand such abuse for a certain period of time.

If the manufacturer had considered contact with the ground as a real possibility and tested the plastic shield for such contact, I suspect that they would have sold the product with a metal shield. Of course, the owner could still have removed the shield if it got in the way of normal operation, but if it didn't get in the way and the guard was still operable, then the plaintiff's argument would have been significantly diminished.

In addition, safety shields, as well as virtually all parts of most products, don't have to last the life of the product. The law is clear that parts can wear out, whether it is during normal use or reasonably foreseeable use. That's why we provide parts manuals and sell replacement parts.

The *Robinson* facts illustrate another dilemma. Assume that the purchaser asks for a modification to be made by the manufacturer to accommodate their needs or the purchaser tells the manufacturer that it will modify the equipment once it is delivered by removing safety devices. What should the manufacturer do?

While the sales department never likes this answer, selling a product under these facts is dangerous and there are very few ways to protect the manufacturer. The modification is, by definition, reasonably foreseeable. So maybe not selling the product to that purchaser is the best answer. Possibly that's what Reed-Prentice should have done.

Trying to get the employer to sign a contractual indemnification agreement is another approach. It may not be enforced by a judge, but if the employer removes safety devices from the machine, the employer might try to do a better job of training and supervising its employees if they think that they would be liable if an employee is hurt.

Since the plaintiff in most of these cases is an employee, and the purchaser (and product modifier) is the employer, in most jurisdictions, the manufacturer will usually be the only defendant. And it will be difficult to blame the employer for modifying the equipment unless that state allows the manufacturer to blame an "empty chair" or allows the jury to assess a percentage of liability against an absent party.

It is difficult to use the facts in cases and decisions by juries and judges to design and market products. But manufacturers should consider the facts in both *Robinson* and *Hoover* and try to avoid the actions that were of concern to both jurors and judges. But they also need to design, manufacture and sell products that meet the needs of the vast majority of their customers. Therefore, adding unnecessary safety devices at significant extra cost does a disservice to careful customers and users.

However, the few users who will misuse, abuse and modify your equipment also need to be considered, and within reason, to be protected. How far a manufacturer goes to accomplish that protection is a critical decision. Lawyers should certainly be consulted when they are making that decision. And, the rationale for the decision and any supporting analysis and testing needs to be documented.

Like all design decisions, you do your best to produce a reasonably safe product and then create evidence that will help defense counsel prove it to the litigants and possibly the jury. And then you hope that a judge and jury will agree with your position and hold you not liable. That's all you can do. And, in most situations, that should be enough.

Kenneth Ross is a former partner and now Of Counsel in the Minneapolis, Minnesota office of *Bowman and Brooke LLP* where he provides legal and practical advice to manufacturers and other product sellers in the area of design, warnings, instructions, safety communications, recalls and all areas of product

safety and product liability prevention. Mr. Ross can be reached at 952-933-1195 or kenrossesq@comcast.net. Other articles on these subjects can be accessed at www.productliabilityprevention.com.

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