

US LAW



ATTORNEY-CLIENT PRIVILEGE

Is the Attorney-Client Privilege Under Attack?

pg20



LOCKING THE PLAINTIFF IN

Accident Demonstrations in Product Liability Litigation

pg28



BEFORE YOU SEAL THE DEAL

Multiemployer Pension Plan Can Impact An Asset Purchase

pg26



MESSAGING APPS

Don't Let the Disappearing Act Catch You by Surprise in Discovery

pg18

35 MILLION REASONS TO HEED NEW SEC GUIDANCE ON CYBERSECURITY DISCLOSURE REQUIREMENTS

pg 2





LOCKING THE PLAINTIFF IN ACCIDENT DEMONSTRATIONS IN PRODUCT LIABILITY LITIGATION

J. Michael Kunsch Sweeney & Sheehan, P.C.

Understanding a plaintiff's use of or exposure to a product, and documenting how an accident happened, is the foundation to the successful defense of all product liability litigation. To defend the manufacturer or distributor of a product, it is critical to use the product (if available) or an exemplar as part of the discovery process to explore the plaintiff's knowledge (and later, their liability expert) about the product, and to have the plaintiff demonstrate during their deposition how the product was being used at the time of the accident. In order to do this effectively, product defense counsel must possess personal knowledge of the product, its warnings and instructions, components and use. Through this process, the facts of the case are locked in and defense themes are revealed.

In this article, we explore best practices for conducting discovery to set up and secure an accident demonstration. Often, the plaintiff's deposition is the first time an in-

jured person and their attorneys are faced with understanding the complete intended use and operation of the product and whether plaintiff's version of the accident is consistent with all of the evidence. Properly done, an accident demonstration will reveal evidence of plaintiff's conduct as causative of the accident rather than any claimed defect in design, manufacture or warning. While the deposition may not end the plaintiff's case, it locks them into a set of facts for the defense to target to defeat any defect allegations.

PRODUCT KNOWLEDGE IS THE KEY

Counsel must possess superior knowledge in order to properly defend the product, its design and use. To that end, there is no substitute for using the product to understand its design, function, capabilities, and limitations. Only through this process can safe operation be learned, and instructions and warnings given proper context.

The simple task of turning on a product provides knowledge of the properties of the product, including its power, sounds and obvious dangers. These factors are critical when questioning an experienced user, as the plaintiff is likely to be.

Depending on the type of product, it may also be helpful to watch an experienced user operate it in its environment of intended use. An in-house engineer or safety professional can explain the operation of the product, demonstrate its use, and highlight hazards inherent in that use.

INITIAL DISCOVERY TO IDENTIFY FACTS AND ALTERNATE VERSIONS

In discovery, the plaintiff must be required to specify knowledge and experience with the particular product, and other similar products owned or used. Interrogatories should be drafted seeking a complete picture of the environment of use of the product, prior uses by the plaintiff and its use on

the date of the incident. Specific questions should be asked about any material or object the plaintiff was working with/on at the time of the accident so that, if these were not preserved, there is sufficient information to obtain or create exemplars. Changes or modifications of the product should be documented so the product, or the exemplar, can be placed in the same condition as the time of the accident. The validity of a reenactment is increased when the facts are fully documented.

In addition, obtaining all relevant documents regarding the accident (accident reports, witness statements, EMS and medical records, etc.) provides an understanding of the circumstances of the accident and allows the defense attorney to question the plaintiff about the manner in which the accident happened orally before the demonstration. Often these records also contain a myriad of alternate accident scenarios for the defense to analyze, question the witnesses about and determine which could have conceivably led to the claimed injuries.

The in-house engineer and/or outside expert should be involved in all phases of discovery, to provide background and operational knowledge of the product, assist in drafting discovery to the plaintiff, and outline areas of inquiry and questions for the deposition. They will also have insight on prior accidents, and successful past defense strategies. The liability expert will know what information is needed later to analyze the accident and defect claims to prepare her/his opinions.

THE DEPOSITION AND ACCIDENT DEMONSTRATION

The accident sequence involving any product is not easily captured through oral testimony alone. Many factors required to reconstruct the accident are involved, including:

- warnings, instructions and manuals;
- service/maintenance history;
- power source and location;
- body position in relation to the product;
- position of the injured body part(s) on or in relation to the product;
- the dimensions of any material, workpiece or object involved in the accident;
- location of guards, interlocks or other safety devices; and
- specific task being performed at the time of the accident.

Using the product (if available) or an identical exemplar while questioning a plaintiff at deposition or trial allows the defense attorney to specifically and completely

interrogate the witness. In light of the foregoing, it is important to notice the deposition to be videotaped. Fed. R. Civ. P. 30(b)(3) explicitly permits depositions to be recorded by audio, audiovisual, or stenographic means. Further, the notice should include a request for a demonstration of the accident so that the parties can reach an agreement on the parameters of the deposition or, if necessary, litigate the request prior to the deposition. Although not critical in every case, if possible, the deposition, or at least the reenactment, should occur in the accident location.

Although the federal rules of civil procedure permit a deposition to be videotaped, the rules are silent regarding whether a plaintiff can be compelled to demonstrate how the accident occurred. Surprisingly, there is also relatively little case law on this subject. However, the reported decisions acknowledge the value of requiring the plaintiff to reenact or demonstrate the accident to enhance the value of the testimony. See *Gillen v. Nissan Motor Corp.* in U.S.A., 156 F.R.D. 120 (E.D. Pa. 1994) (seat belt); *Kiraly v. Berkel, Inc.*, 122 F.R.D. 186 (E.D. Pa. 1988) (meat slicer); *Roberts v. Homelite Div. of Textron, Inc.*, 109 F.R.D. 664 (N.D. Ind. 1986) (lawn mower); *Carson v. Burlington Northern, Inc.*, 52 F.R.D. 492 (D. Neb. 1971) (steel press); *Carotenuto v. Emerson Electric Co.*, 1990 WL 198220 (E.D. Pa. Dec. 3 1990) (radial arm saw); *Grayson v. Emerson Electric Co.*, 16 Cal.4th 1101 (1997) (radial arm saw).

Courts are likely to impose some practical limitations on the demonstration. These include requiring that the product remain unpowered and safety protocols be following. These limitations are minimal in comparison to the benefits of obtaining video of the plaintiff demonstrating the accident.

Defense counsel should arrange to have the in-house engineer present during the deposition. The expert can assist with organizing the location and product and make sure all conditions are documented during the deposition. More importantly, the expert can watch the demonstration and ensure that it is complete and captured the testimony so it will be useful later.

It is important to walk the plaintiff through the accident verbally before the reenactment. This allows a complete understanding of the circumstances and facilitates an efficient demonstration. Once counsel is prepared to conduct the demonstration, the conditions and accident sequence must be documented on the record as completely as possible, including:

- the physical location of the deposition;
- a description of the product being used for the demonstration;
- any differences between the product being used at the deposition and the condition of the product being used at the time of the accident (exemplar v. actual);
- where the product was located at the time of the accident;
- how the product was set up at the time of the accident;
- presence and location of any witnesses or others at the scene;
- what else was happening in the area at the time of the accident;
- what operation the plaintiff was performing at the time of the accident;
- description of the material, workpiece or object being used;
- body, feet and hand position in relation to the product;
- how the product was powered;
- as precisely as possible, how the accident happened;
- description of any parts of the product that contacted the plaintiff and where; and
- what happened to the product following the accident.

Once complete, the plaintiff is locked into an accident sequence. This limits their experts. It also provides a game plan for further discovery to support the defense themes, and may help prevent the plaintiff from demonstrating substantial similarity and offering evidence of other accidents at trial.

CONCLUSION

Thorough knowledge of the product and the facts of the case are key for the defense attorney, with the input of in-house and outside experts. With preparation, the accident demonstration becomes the centerpiece and seminal moment in the defense of product liability litigation.



J. Michael Kunsch, a shareholder in the Philadelphia office of Sweeney & Sheehan, is an AV-rated attorney who concentrates his practice in the defense of product liability and general litigation, including complex torts and catastrophic injuries. He is a 1988 graduate of the University of Arizona and a 1991 graduate of the Villanova University School of Law, and has been recognized from 2011-2018 as a Pennsylvania Super Lawyer - Product Liability Defense.