COMMENTS

Recall Letters as Evidence of a Defect in an Automobile

This comment will explore the controversy over whether an automobile recall letter, warning owners of a particular make and model automobile of dangerous conditions in their automobiles, should be admissible as evidence of such defect in a products liability suit against an automobile manufacturer for alleged defective design.[1] The comment will examine the reasons for issuing recall letters, the effect on recall campaigns of §116 of the National Traffic and Motor Vehicle Safety Act of 1966,[2] and the trend toward allowing such letters into evidence for limited purposes.[3]

Prosser outlines three elements that a plaintiff in a products liability case must establish: "The first is that he has been injured by the product . . . . The second is that the injury occurred because the product was defective, unreasonably unsafe . . . . The third is that the defect existed when the product left the hands of the particular defendant."[4] To put it another way, a plaintiff must establish defectiveness twice; defectiveness at the time of the accident and defectiveness at the time the product left the defendant's hands. This distinction has an important effect on the issue of introduction of a recall letter.[5]

Prior to 1966, there was no law requiring automobile manufacturers to issue recall letters or even warnings when a defect was discovered. It was fairly well settled that a manufacturer had a duty to warn a consumer of known dangers in a product.[6] Soon such duty was expanded to warnings of dangers discovered after the sale of the product.[7] The Supreme Court of Michigan stated in *Comstock v. General Motors Corp.*:[8]

---

1. This is intended as a complete collection of cases to date dealing with this issue.
2. 15 U.S.C.A. §1402 (1974).
3. For a discussion on the recall campaign's impact on substantive areas of products liability law, mainly the manufacturer's affirmative defenses, see Ramp, *The Impact of Recall Campaigns on Products Liability*, 44 INS. COUNSEL J. 83 (1977).
4. W. PROSSER, LAW OF TORTS §103 at 671-672 (4th ed. 1971). On the general requirement of proving a defect, see Freedman, *"Defect" in the Product: The Necessary Basis for Products Liability in Torts and in Warranty*, 33 TENN. L. REV. 323 (1966); Keeton, *Products Liability - Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855 (1963).
5. *See* notes 20-22, *infra*, and accompanying text.
6. W. PROSSER, LAW OF TORTS §96 at 646-647 (4th ed. 1971). *See also* Annot., 86 A.L.R. 947 (1933).
7. W. PROSSER, LAW OF TORTS §96 at 647 (4th ed. 1971).
8. 358 Mich. 163, 99 N.W.2d 627 (1959).

> If such a duty to warn of a known danger exists at the point of sale, we believe a like duty to give prompt warning exists when a latent defect which makes the product hazardous to life becomes known to the manufacturer shortly after the product has been put on the market. This, General Motors did not do.[9]

Thus the automobile recall campaign became a necessity.

Seven years after *Comstock*, Congress passed the National Traffic and Motor Vehicle Safety Act of 1966.[10] The purpose of the act was to provide a national program of automotive safety in an effort to "reduce traffic accidents, and the deaths, injuries, and property damage which occur in such accidents."[11] As part of such effort, mandatory procedures to insure notification and correction of manufacturing defects were established in §116 of the Act.[12] No longer was a manufacturer forced to institute a recall campaign out of fear of being held negligent in a civil suit; it was now required by law.[13] The courts therefore turned their attention to the proper evidentiary purpose a recall letter was to serve in proving the existence of a defect, either at the time of manufacture or at the time of the accident.

The first case to rule directly on the admissibility of recall campaign evidence was *Gauche v. Ford Motor Co.*,[14] decided in 1969. Plaintiff contended that the brake failure in his 1965 Lincoln was due to a "possible weakness" in the master brake cylinder, a defect which had caused Ford to recall all 1965 Lincolns for "brake modification."[15] This particular vehicle had been modified, but plaintiff contended that the modification did not solve the problem.

The court ruled that the evidence of recall could be considered as corroborating other evidence of the existence of a defect in the braking system

---

9. *Id.* at ____, 99 N.W.2d at 634. Incidentally, the court decided that General Motors could be held negligent even though the owner of the vehicle had discovered the defect.

10. Pub. L. No. 89-563, 80 Stat. 852 (1966) (current version at 15 U.S.C.A. §§1381-1431 (1974)).

11. S. REP. No. 1301, 89th Cong., 2d Sess. ____, *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2709, 2709.

12. 15 U.S.C.A. §1402 (1974). This section reads in part: "(a) Every manufacturer of motor vehicles or tires shall furnish notification of any defect in any motor vehicle or motor vehicle equipment produced by such manufacturer which he determines, in good faith, relates to motor vehicle safety, to the purchaser (where known to the manufacturer) of such motor vehicle or motor vehicle equipment, within a reasonable time after such manufacturer has discovered such defect."

13. 15 U.S.C.A. §1398 (1974) provides for civil penalties not to exceed $1,000 for each violation of §1397, with a maximum of $800,000 for any related series of violations. 15 U.S.C.A. §1397 (1974) states that no person shall fail to furnish notification or fail to remedy any defect as required in §1402.

14. 226 So. 2d 198 (La. App. 1969).

15. The brake modification consisted of replacing the existing brake fluid with a fluid having a higher boiling point and replacing the front brake hoses. The reason for such modification was that persons who rode the brakes were experiencing some difficulty because the fluid was boiling. *Id.* at 203-204.

of this particular automobile. But the court failed to say whether such evidence was admitted to show the existence of a defect at the time of manufacture or at the time of the accident. If the court used the evidence to prove the existence of a defect at the time of the accident, its use was incorrect. The existence of a defect in a substantial number of like automobiles does not prove the existence of such defect in any particular automobile.[16] If the court used the evidence to prove the existence of a defect at the time of manufacture, it was also wrong. Pursuant to the dealer's recall, this vehicle had been modified to Ford's specifications. Such modification breaks the chain of causation between the manufacture and the subsequent accident.[17]

The next major case to consider the admissibility of a recall campaign letter was *Landry v. Adam*,[18] decided in 1973. In this case, an injured driver of the front vehicle in a three vehicle "rear-ender" sued General Motors, the manufacturer of the third vehicle, which had struck the rear of the second vehicle after the second vehicle had struck the rear of plaintiff's vehicle. Plaintiff alleged that the third vehicle, a 1965 Pontiac, suffered brake failure caused by a latent defect in the brake hose. The trial ended in a jury verdict against General Motors.

General Motors' final contention for reversal of the lower court's judgment was that admission of a recall letter, issued to owners of 1965 and 1966 Pontiacs, had an inflammatory and prejudicial effect upon the jury. Its argument closely paralleled the argument made to exclude evidence of subsequent repairs. First, it was argued that the letter was not relevant, since subsequent precautions are not relevant to determine the existence of a prior defect. Second, it was argued that a person should not be discouraged from repairing a defective condition by the admission of evidence of such repairs, which tends to be looked upon as an admission of liability.[19]

As to the issue of defectiveness at the time of the accident, the court held that evidence of the recall program was irrelevant. The fact that some 1965 Pontiacs contained defective brake hoses proved nothing about the brake hose in the particular vehicle at the time of the accident.[20] "The danger

16. *See* notes 21 and 33, *infra*, and accompanying text.

17. *Gauche* was later criticized as deviating from the correct rule on subsequent repairs in Trahan v. Liberty Mut. Ins. Co., 273 So. 2d 331 (La. App. 1973). A 1971 case, Kane v. Ford Motor Co., 450 F.2d 315 (3d Cir. 1971), ruled on the admission of a service letter issued to dealers. There the court held the letter irrelevant since the defect plaintiff contended had caused the accident was different from the defect described in the letter. Plaintiff presented no testimony that the condition described in the letter existed in his vehicle.

18. 282 So. 2d 590 (La. App. 1973).

19. On the rationale behind the subsequent repair doctrine, see C. McCORMICK, EVIDENCE §275 at 666 (2d ed. E. Cleary 1972); J. WIGMORE, EVIDENCE §283 at 151 (3d ed. 1940). On how the doctrine applies specifically to products liability, see Annot., 74 A.L.R.3d 1001 (1976); Note, 1972 DUKE L.J. 837.

20. *Cf.*, Gauche v. Ford Motor Co., 226 So. 2d 198 (La. App. 1969), *supra*, notes 14-17 and accompanying text. (Court failed to say whether evidence was used to prove defect at time of accident.)

. . . is that such evidence might be misconstrued as proof of some fact which the evidence does not in fact tend to prove."[21]

As to the issue of defectiveness at the time the vehicle left the manufacturer's hands, the court reasoned that since this fact can be proven only by circumstantial evidence, the recall program was relevant. It showed circumstances which tended to raise an inference that the defect existed at the time of manufacture. But the court, agreeing with General Motors, compared the recall letter to a subsequent repair of a defective product and held that the letter was inadmissible on public policy grounds. The rationale employed by the court was that admission of such evidence would penalize a well-meaning person from trying to prevent an accident.[22]

Another case which held recall campaign letters inadmissible was *Vockie v. General Motors Corp.*,[23] decided in 1975. In that case, a 1969 Chevrolet driven by plaintiff went out of control on a curve and hit a telephone pole. Plaintiff alleged that the accident was the result of "the negligent design of, and a defective condition in, the engine mounts in the plaintiff's vehicle."[24] The jury returned a verdict for the defendant, and the plaintiff sought a new trial, claiming that the court's refusal to admit the recall letter was error.

Plaintiff first argued that the recall notice was an admission by the defendant. The court summarily rejected this contention by pointing out that an admission is not of sufficient probative weight to be competent unless it is voluntary.[25] Since an automobile manufacturer is required under §116 of the National Traffic and Motor Vehicle Safety Act of 1966 to issue such notices, and failure to do so subjects the manufacturer to penalties under §109,[26] the notice is far from voluntary.

The court also discussed the public policy rationale behind excluding the letter. "If such statements are admissible on a wholesale basis, manufacturers will be reluctant to come forth and make a full unqualified disclosure of any potential safety hazards which they discover."[27] The court reasoned that this alone was sufficient to hold the letter inadmissible, but concluded that a more important reason for exclusion was the letter's minimal probative value. Citing *Landry*, the court agreed that recall notices do not prove that a particular automobile contained the defect to which the recall letter was directed. In a footnote, the court stated that it felt that the court in *Landry* confused the issue of relevance with the weighing of relevance against possible prejudice and confusion, but that

21. 282 So. 2d at 596.
22. *Id.*
23. 66 F.R.D. 57 (E.D. Penn. 1975).
24. *Id.* at 59.
25. *Id.* at 60, 61; *citing* J. WIGMORE, EVIDENCE §1050(2) at 11-12 (3d ed. 1940); 29 AM. JUR. 2D *Evidence* §597 (1967); 31A C.J.S. *Evidence* §278 (1964).
26. 15 U.S.C.A. §1398 (1974). *See* note 13, *supra.*
27. 66 F.R.D. at 61.

the proper result was achieved.[28] The evidence of the recall campaign and notice was properly ruled inadmissible.

Recent cases, however, have revealed a trend toward admission of manufacturer's recall letters. This has been spurred mainly by the changing public policy rationale behind the analogous subsequent repair doctrine. But more importantly, courts are also recognizing the relevance of evidence to the proof of the existence of a possible defect at the time the product left the manufacturer's hands.[29]

In *Nevels v. Ford Motor Co.*,[30] a recall letter which was not in compliance with §116 of the Act was admitted into evidence, and the statute was charged to the jury. The court stated that the letter was relevant "not only with respect to the statutory duty of Ford, but also in regard to plaintiff's contention of negligent assembly."[31] The court here was primarily concerned with Ford's negligence in not issuing a statutorily correct defect notice, but this passage has been used by subsequent courts to rationalize admission of recall letters to prove the existence of a defect.

Nevels was cited as authority for admission of recall letters in *Fields v. Volkswagen of America, Inc.*[32] In *Fields,* a letter to plaintiff, owner of a 1971 Volkswagen, stated that a guide pin in the steering column of some vehicles had been damaged during assembly and as a result problems could arise in unlocking the steering column. The letter was admitted as relevant to prove plaintiff's contention that the steering column locked while he was driving, causing the vehicle to miss a curve and overturn.

The court's reasoning behind admission of the letter seemed to draw support from the fact that, in this case, plaintiff had shown independently that such a defect existed. Through testimony indicating that the guide pin in the lock was defective, and that the defective pin could have caused the steering wheel to lock, plaintiff proved the relevance of the recall letter.

> The recall letter by itself does not make a prima facie case or shift the burden of proof. It does not prove that the defect existed at the time of the accident . . . . But if a defect contributing to or causing the accident

28. *Id.* at 61 n. 5. C. McCORMICK, EVIDENCE §184 at 433 (2d ed. E. Cleary 1972), states that relevance is "probative worth," and that "if evidence is logically probative, it should be received unless there is some distinct ground for refusing to hear it." *But see, id.*, §185 at 438-439: "There are several counterbalancing factors which may move the court to exclude relevant evidence if they outweigh its probative value," and the most important of these factors is "the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy." The court in *Vockie* is saying that the court in *Landry* viewed recall evidence as having no probative worth. The court in *Vockie* disagreed, believing instead that there was probative worth, but that such worth was outweighed by the dangers of prejudice and confusion of the jury.

29. *See generally* Rheingold, *Proof of Defect in Product Liability Cases,* 38 TENN. L. REV. 325 (1971).

30. 439 F.2d 251 (5th Cir. 1971).

31. *Id.* at 258.

32. 555 P.2d 48 (Okla. 1976).

> is the defect that is the subject of the recall letter, then the letter would be some evidence that the defect existed at the time the product left the manufacturer.[33]

The court agreed with Volkswagen that policy considerations point to the exclusion of such evidence by analogizing to the subsequent repair doctrine. But the court decided that, with the existence of the other evidence tending to prove the defect, the prejudice from admission of the evidence was small.

The most well-reasoned case dealing with the admissibility of recall letters is *Barry v. Manglass*,[34] decided in 1976. The plaintiff, who had lost control of a 1972 Chevrolet Nova, sued General Motors, basing his claim on an alleged defect in the motor mount securing the engine to the frame of the vehicle. As part of plaintiff's case, there was admitted into evidence two recall letters issued to Chevrolet owners. General Motors, arguing an analogy to evidence of subsequent repairs, claimed error.

The court, after quoting from *Wigmore* at length on the rationale behind the subsequent repair doctrine,[35] decided that it should not be applied in strict products liability cases. The emphasis is not on the manufacturer's conduct, but on the character of the product itself. "[W]e are not dealing with *fault* or *negligence* or *culpability*, but, regardless of any of them, with a defect which existed in the product."[36] The court cited *Ault v. International Harvester Co.*[37] for the proposition that, unlike the situation in a typical negligence case, it is unrealistic to believe that a mass producer of goods would forego making repairs and improvements in his goods out of fear that evidence of such repair would be admitted in an action based on injury prior to the repair. To do so would risk numerous lawsuits for injuries from the unimproved product. Therefore, the court concluded that the policy argument in favor of exclusion was not convincing.

In this light, the court decided that the relevancy of the letter outweighed any possible prejudice. "[A] jury is entitled to know that the existence of the defect in a particular model of vehicle was likely and that such likelihood was greater as to such model than it was as to other models."[38] In fact, the court went so far as to say that if the existence of the recall letters were not mentioned to the jury, plaintiff would be prejudiced by possibly causing jurors to believe no such letters were issued and that the defect in the plaintiff's vehicle was uncommon.

---

33. *Id.* at 58.

34. 55 App. Div. 2d 1, 389 N.Y.S.2d 870 (1976).

35. *Id.* at ____, 389 N.Y.S.2d at 874, *citing* J. WIGMORE, EVIDENCE §283(4) at 151-152 (3d ed. 1940).

36. 55 App. Div. 2d at ____, 389 N.Y.S.2d at 875 (emphasis by the court).

37. 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974). This case presents an argument against applying the subsequent repairs exclusion rule to products liability cases in general.

38. 55 App. Div. 2d at ____, 389 N.Y.S.2d at 876.

The most recent case to deal with the issue of admission recall letters was *Manieri v. Volkswagenwerk A.G.*[39] In this case plaintiff was injured when, in a rain and snow storm, his windshield wiper stopped due to the stress of heavy slush on the windshield. His vision was thus impaired and the car left the road. Plaintiff sued the manufacturer of the automobile, alleging that the windshield wiper was defective. Plaintiff offered into evidence defendant's recall campaign relating to the failure of windshield wipers on Volkswagens manufactured from 1949 through 1969.[40]

The court held that such evidence was admissible to prove that the defect arose while the vehicle was in the control of the defendants.[41] Even though New Jersey had codified the subsequent repair exclusion,[42] the court stated that such evidence is admissible to prove that a defect existed at a particular point in time. "Here, the recall letters were not offered to establish the negligence or culpability of defendants, but only to show that the defect established by expert testimony had its origin while the vehicle was in defendant's control."[43] The court then proceeded to quote *Fields* and *Barry* at length as supporting the result reached.

The congressional purpose of the recall campaign provisions of the National Traffic and Motor Vehicle Safety Act of 1966 was not to provide additional evidence to plaintiffs in cases such as these. The policy behind the Act, as is the policy behind the whole field of products liability, is to reduce the number of defective consumer products and thereby reduce the number of injuries caused by such products. The law has developed on the premise that a person who markets a defective product should be liable for the injuries caused thereby so that, subsequently, the person will make an effort to market a safe product and avoid more liability.

The more recent cases, which admit the evidence of automobile recall campaign notices, seem to be more attuned to this policy goal. Exclusion of the evidence merely takes away one more evidentiary weapon in an injured plaintiff's arsenal. The policy of holding a manufacturer liable for injuries caused by his defective products would be thwarted by exclusion

---

39. 151 N.J. Super. 422, 376 A.2d 1317 (1977).

40. The letter issued to customers warned them of impaired windshield wiper operation on these Volkswagens due to loosening of set screws holding the wiper arms. The letter stated that the loosening occurred when the vehicle was operated "during periods of freezing or heavy rain or snow when the wiper is subject to unusual stress." The service letter issued to dealers stated that during heavy rain or snow "the wiper arm could become inoperative resulting in impairment of vision." *Id.* at ____, 376 A.2d at 1320-1321.

41. The court held that the existence of the defect was proven by expert testimony tending to prove that the wiper assembly on the Volkswagen plaintiff was driving was defectively designed because the method of attachment of the wiper arm was such that improper torquing of the set screw would result in slippage or failure under the weight of slush. *Id.* at ____, 376 A.2d at 1322.

42. N.J. STAT. ANN. §2A:84A-51 (1976) states that evidence of subsequent remedial or precautionary measures is not admissible to prove negligence or culpable conduct.

43. 151 N.J. Super. at ____, 376 A.2d at 1323.

of evidence which aids the injured plaintiff. Introduction of such evidence is not going to cause automobile manufacturers to be any less zealous in their discovering and warning consumers of possible defects in their vehicles. Unlike subsequent repairs, automobile recall campaigns are mandatory.

The recall notices are relevant to the issue of whether a defect existed in the vehicle at the time it left the manufacturer's hands. Cases holding such evidence irrelevant are either wrong or, as *Vockie* suggests, confusing the issue of relevance with the weighing of relevance against prejudice.[44] A recall campaign is initiated when a motor vehicle or component part is subject to a significant number of failures in normal operation, excluding normal deterioration due to wear and tear.[45] A recall campaign evidences that, provided no modifications or repairs are done pursuant to the recall, in a particular model car, such a significant number of failures has occurred. Once it has been proven that the particular defect which is the subject of the recall existed in the car at the time of the accident,[46] that evidence logically has a tendency to make the existence of a defect at the time of manufacture more probable.[47] This is compounded by the fact that the only way to prove such a defect at the time of manufacture is through circumstantial evidence. More weight therefore must be given to inferential conclusions.

In conclusion, there is no logical reason not to allow admission of automobile recall campaign notices into evidence to prove the existence of a defect in an automobile at the time of manufacture. The policy reasons for exclusion are inapplicable in this situation, and the evidence is relevant. The end result will be that manufacturers will be more careful and therefore fewer people will be injured.

W. TERRELL WINGFIELD, JR.

---

44. *See* note 28, *supra.*

45. United States v. General Motors Corp., 518 F.2d 420, 427 (D.C. Cir. 1974), the leading case on the meaning of "defect" under 15 U.S.C.A. §1402.

46. Note that it is not suggested that recall campaign evidence is relevant to prove the existence of a defect in the particular vehicle at the time of the accident. This is provable through direct evidence which should be established prior to introduction of the recall evidence.

47. FED. R. EVID. 401; C. MCCORMICK, EVIDENCE §185 at 435 (2d ed. E. Cleary 1972).