

FALL 2012 NEWSLETTER

PRODUCTS LIABILITY UPDATE

By Rocky Little

***Tidwell v. Terex Corp.*, No. 01-10-01119-CV (Tex. App. – 1st Dist. Houston, August 30, 2012).**

Plaintiff Larry Tidwell, a crane operator, sued Terex Corporation, the manufacturer of a Terex RT230 crane. As Tidwell was performing tests of the crane, he stepped outside the cab to remove debris from underneath a pedal and the crane tipped over, causing Tidwell to fall about 15 feet to the cement below. As a result of the fall, Tidwell suffered a broken leg and injured his neck and brain. The crane is equipped with an Axle Oscillating Lockout System (AOLS), which helps stabilize the crane by keeping the rear tires on the ground under certain conditions. The AOLS was not connected at the time of the incident and appeared to have been disconnected for about 30 days before the accident. Among other things, Tidwell claimed that the crane had a design defect as well as a marketing defect, both of which were allegedly producing causes of the accident.

Design Defect

To prove a design defect, Tidwell had to show that:

1. There was a safer alternative design,
2. The safer alternative design would have prevented or significantly reduced the risk of injury, without substantially impairing the product's utility, and
3. The safer alternative design was both technologically and economically feasible when the product left the control of the manufacturer.

Tidwell had the burden to demonstrate that the safety benefits from his proposed design are foreseeably greater than the resulting costs, including any diminished usefulness or diminished safety. In other words, the alternative design not only would have reduced the risk of harm in this case, but also would not, under any circumstances, impose an equal or greater risk of harm. Therefore, Tidwell had to prove that an economically and technologically feasible alternative was available and would have prevented or significantly reduced the risk of Tidwell's injury without substantially reducing the utility to the intended users of the product.

Tidwell's expert testified that the crane contained six design defects relating to the AOLS that were producing causes of the accident. However, Tidwell failed to offer evidence of the economic feasibility of the proposed alternative designs for five of the six purported design defects. Therefore, with respect to these five alleged design defects, Tidwell's claim failed as a matter of law. With respect to the sixth alleged design defect, the failure to include a warning light, there was conflicting evidence whether the warning light would have made the product safer. Therefore, the court held that the evidence was sufficient to support the jury's finding that there was no design defect that was a producing cause of the incident.

Marketing Defect

To recover under a marketing defect claim, a plaintiff must establish that:

1. A risk of harm is inherent in the product or may rise from the intended or reasonably anticipated use of the product,
2. The product supplier actually knows or reasonably foresees the risk of harm at the time the product is marketed,
3. The product possesses a marketing defect,
4. The absence of the warning or instructions renders the product unreasonably dangerous to the ultimate user or consumer of the product, and
5. The failure to warn causes the injury.

Tidwell argued that the seven-step instruction for the recommended daily check of the AOLS in the Service and Adjustments Section of Terex's Operator Manual did not constitute a warning as a matter of law. Specifically, Tidwell argued that the instructions were not prominent enough to constitute a warning, were not comprehensible to the average user, and did not specify that there was a risk of crane tip over. Additionally, Tidwell claimed that he was entitled to a presumption that he would have heeded any warning, had one been included in the Operator Manual. The court stated that the issue is not whether Terex could have placed its instructions to perform a daily check of the AOLS in a different, more prominent location in the Operator Manual, but rather whether the warning's actual placement was sufficient to give reasonable notice to a user of the crane to check the AOLS daily. Although Tidwell had the opportunity to read the entire Operator Manual, he chose to read only the first three chapters, which did not include the Service and Adjustments Section regarding performing a daily check of the AOLS. The court found that if Tidwell had heeded the instructions to check the AOLS daily, he would have discovered that the AOLS was not operational, and the accident would have been avoided. The court noted that if a warning was given which, if heeded, would have prevented the accident, there is no presumption that a better warning would have been followed. Therefore, Terex's failure to include a different, better warning could not have been a cause in fact of the accident. As a result, the court held that there was no marketing defect.

***Gann v. Anheuser-Busch, Inc.*, No. 08-11-00017-CV (Tex. App. – El Paso, July 25, 2012).**

This case arose from injuries sustained by Gann when she was struck in the face by a patron at a bar wielding a longneck glass beer bottle as a weapon. Gann brought a design defect claim under strict products liability law. In determining whether the longneck bottle was defectively designed so as to render it unreasonably dangerous, the court applied a risk utility analysis that required consideration of the following factors:

1. The utility of the product to the user, and to the public as a whole weighed against the gravity and likelihood of injury from its use,
2. The availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive,

3. The manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its cost,
4. The user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions, and
5. The expectations of the ordinary consumer.

The court noted that the risk-utility analysis does not operate in a vacuum, but rather in the context of the product's intended use and its intended users. The court held that Gann failed to produce evidence raising a genuine issue of fact that the risk of injury from the longneck bottle outweighs its utility. There was, therefore, insufficient evidence that the bottle was defectively designed so as to render it unreasonably dangerous, and the court upheld the summary judgment in favor of Anheuser-Busch.