

## WINTER 2019 NEWLETTER

### PRODUCTS LIABILITY UPDATE

By Rocky Little

***Kleppel v. Hunter's Manufacturing Company, Inc. d/b/a TenPoint Crossbow Technologies, No. 4:16-CV-03715, 2018 WL 6436269 (S.D. Tex – Houston, December 7, 2018)***

Kathy Kleppel lost part of her thumb while using a TenPoint crossbow. A crossbow is a device that uses a bowstring to propel an arrow when the user pulls a trigger. The user pulls the bowstring back along a center rail until a latch attaches and holds the cocked bowstring in place. When the user pulls the trigger, the bowstring speeds forward along the center rail and propels an arrow. While holding the crossbow with the butt against her shoulder, Kleppel's left thumb was partially positioned above the center rail. When Kleppel pulled the trigger, the bowstring severed part of her thumb. This is a products liability and negligence lawsuit brought in Federal District Court based on diversity jurisdiction in which Texas law applies. The defendant, TenPoint, moved for summary judgment on the Kleppel's strict liability claim based on an alleged design defect, as well as on Kleppel's negligence and gross negligence claims.

Under Texas law, the three elements of a strict products liability claim based on design defect are:

- (1) the product was defectively designed so as to render it unreasonably dangerous;
- (2) a safer alternative design existed; and
- (3) the defect was a producing cause of the injury for which the plaintiff seeks recovery.

With respect to the first element of a design defect claim, a product is "unreasonably dangerous" when its risks outweigh its utility. When weighing risk and utility, Texas courts consider five 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 costs;
- (4) the user's anticipated awareness of the dangers inherent in the product and their avoidability because of the general public's 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.

Whether a product is unreasonably dangerous in light of its risk and utility is generally a question of fact for the jury, but a court may decide it as a matter of law if reasonable minds cannot differ on the risk-utility analysis, i.e. unless the evidence allows but one reasonable conclusion.

With respect to the second element of a design defect claim, “safer alternative design” is statutorily defined as a product design other than the one actually used that in reasonable probability:

- (1) Would have prevented or significantly reduced the risk of the claimant’s personal injury without substantially impairing the products utility; and
- (2) Was economically and technologically feasible at the time the product left the manufacturer or seller by the application of existing or reasonably achievable scientific knowledge. The design need not be actually built and tested as a plaintiff must show only that the alternative design was capable of being developed.

With respect to the third element of a design defect claim, a “producing cause” is something that is a substantial and but-for cause of the event at issue.

Expert testimony is generally encouraged, and sometimes required, to establish a products liability claim, including that a safer alternative design existed and for causation. Expert testimony is required when an issue involves matters beyond jurors’ common understanding. Whether expert testimony is required depends on whether the issue involves matters beyond the general experience and common understanding of laypersons. Proof other than expert testimony will be legally sufficient only when the jurors’ common understanding and experience will allow them to make that finding with reasonable probability. Whether expert testimony is required is a question of law, not of fact.

The crossbow at issue is a model TL-4 which was manufactured in 2006. On some of its subsequent models, TenPoint made two separate safety features available: (1) a Safety, and (2) a Guard.

The Safety is a button on the crossbow’s foregrip that the user must press and hold down when the user pulls the trigger. By requiring users to press and hold the button on the foregrip, the Safety encourages users to keep their thumbs or fingers on the foregrip and below the center rail. The Safety was available on some TenPoint bows as early as 2003, but was not available on the 2006 TL-4. The court noted that it is the Plaintiff’s burden to show that a safer alternative design was feasible, and it is not the defendant’s burden to show that a certain potential alternative design was not feasible. Kleppel asserted that the lack of a Safety on the TL-4 was a design defect, but offered no expert testimony in support. On the other hand, TenPoint, offered expert testimony by way of an affidavit of a mechanical engineer that the TL-4 includes a foregrip that is ergonomically designed to keep the forehead away from the top rail of the assembly. The foregrip provides a natural hold spot for the hands which encourages the finger and thumbs to remain away from the bowstring path during use. The design also provides tactile feedback to the user so that the user may understand the location of their hand on the foregrip. TenPoint’s mechanical engineer also stated that it was not feasible to incorporate the Safety button mechanism into the TL-4 crossbow because it was incompatible with the trigger assembly. More specifically, the trigger needs to be free to move in the firing direction during the cocking sequence. The court determined that the mechanics of crossbow triggers and the interaction of the trigger mechanism with the Safety button are beyond the general experience and common understanding of laypersons. Consequently, the court held that expert testimony, which Kleppel

failed to provide, was required to show that a TL-4 crossbow with a Safety was an economically and technologically feasible safer alternative design.

The Guard is a shield that fits over the crossbow's foregrip under the center rail. The "wings" that extend out from the Guard keep the user's fingers below the center rail by putting a small ceiling between the foregrip and the center rail. TenPoint's President and CEO filed an application for a patent for the Guard in 2005 which states: It is known that during discharge of the crossbow and bowstring respectively certain operators have placed a thumb or finger in the path of the moving bowstring, causing injury. What is needed is a device that maintains the appendages of the operator's hand that grasps the stock of the crossbow in a safe location during discharge of the crossbow. The patent application subsequently states that the Guard can be retro-fitted to work on TenPoint's 2006 TL-4 crossbow.

TenPoint argued that without expert testimony Kleppel cannot make an adequate showing that the TL-4 with a Guard is a safer alternative design. The Court noted, however, that the Guard was an especially simple potential safer alternative design: a piece of plastic to keep the user's finger safely shielded for the speeding bowstring. This nearly unique degree of simplicity distinguishes this case from much of the case law on the need of expert testimony in products liability cases. Consequently, the Court held that even without expert testimony, with respect to the Guard, there was a fact issue as to whether a safer alternative design existed. Likewise, the Court decided that the basic simplicity of Kleppel's injury eliminated the need for expert testimony to support the producing cause element of a design defect claim.

A cause of action for negligence requires three elements:

- (1) There must be a legal duty owed by one person to another;
- (2) There must be a breach of that duty; and
- (3) Damages caused by the breach.

In this case, Kleppel failed to produce expert testimony to show what a reasonably prudent crossbow manufacturer or seller would have done under the same or similar circumstances. Likewise, there was no evidence setting out the appropriate standard of care or demonstrating that TenPoint failed to conform to the appropriate standard of care. Consequently, the claim for negligence fails. Because Kleppel cannot establish a negligence claim, she also cannot establish a gross negligence claim. As stated by the Court, a defendant cannot be grossly negligent without being negligent.