

New Jersey Law Journal

VOL. CLXX – NO. 10 – INDEX 810

DECEMBER 9, 2002

ESTABLISHED 1878

PRODUCT LIABILITY & TOXIC TORTS

Untying the *Laidlow* Knot

Shifting liability from machine manufacturers to employers that continue to use machines that have known design defects

By William A. Dreier
Lawrence N. Lavigne

The scenario is all too common. A worker is injured when his hand is pulled into an in-running nip point of a conveyor or the descending ram of a press. Although the manufacturer of the machine is almost always a targeted defendant, in many cases, the injury is caused in large measure by an action or inaction on the part of the employer.

What are the present responsibilities of the manufacturer's product liability insurer, the employer's general liability carrier and the employee's workers' compensation insurer? Can the parties' responsibilities be realigned for a more efficient allocation of liability?

The Supreme Court's recent decision in *Laidlow v. Hariton Machine Co., Inc.*, 170 N.J. 602 (2002), has begun to redefine the relationship between the machine manufacturer and the employer of an injured worker.

In *Laidlow*, the Court redefined the

Dreier is a partner with Norris, McLaughlin & Marcus of Somerville and presiding judge, Superior Court of New Jersey, Appellate Division (retired). He is co-author, along with John E. Keefe Sr. and Eric D. Katz, of New Jersey Products Liability & Toxic Torts Law (Gann 2002 ed.). Lavigne is a partner with the firm.

intentional conduct exception to the Workers' Compensation Act and found that if an employer acts with knowledge that its conduct is substantially certain to result in serious injury, the employer may be held liable for the injury.

This recognition of the interplay between a manufacturer and an employer — and their insurers — should be only the beginning of a redefinition of responsibility.

Three Scenarios

We start with the proposition that the injured worker has a right to payment for his or her injuries. Workers' compensation is a floor to benefits, and the existing system permits greater benefits if a third party, such as a machine manufacturer, can be held liable for the accident. (The discussions in this article deal only with liability issues. For suggestions on how the system might be modified to reduce damage awards, see Dreier, "Reform of the Personal Injury Damages Delivery System," 48 Rutgers L. Rev. 799 (1996).)

When it comes to industrial machinery, three basic scenarios present themselves, the liability from which might vary significantly.

The first scenario is where the manufacturer did not provide a guard or other protective device, or otherwise

designed a defective product. Clearly, the manufacturer would be a targeted defendant, and it is very likely that the machine will be found defective.

It has been recognized that there is no per se rule — the analysis must be on a case-by-case basis. For the sake of brevity, we will only address guard/protective device cases. The concepts embodied herein will have equal application in any case where an injured employee alleges product defect and the employer's conduct might be a contributing cause of the injury.

For example, a mislocated power switch, which is beyond the reach of an operator who is endangered by the machine, can be the basis of a product liability claim, compare *Ramos v. Silent Hoist and Crane Co.*, 256 N.J. Super. 467 (App. Div. 1992). An employer that has recognized this danger, but does nothing to correct it, might be subject to a *Laidlow*-like liability. This, of course, does not include those cases where the manufacturer successfully argues that a guard is not necessary, for example, where the nip point is "guarded by location."

In the second scenario, the manufacturer designed and supplied the machine with a noninterlocked guard. The employer removes the guard or permits the guard to be removed and the employee is injured. The employee sues the machine manufacturer, alleging that the machine is defective since it is reasonably foreseeable that the machine would be operated without the guard. See *Cepeda v. Cumberland Eng'g Co., Inc.*, 76 N.J. 152 (1978).

In the past, the employer would not be found liable for removal of the guard. After *Laidlow*, it is possible, if

not probable, that the employer would bear some responsibility for the injury.

Lastly, change the scenario slightly to include an interlocked guard. The employer bypasses the interlock or permits it to be bypassed. The employee is injured and again sues the machine manufacturer, contending that the machine is defective. The most likely result is the employer alone will be found liable. Compare *Calderone v. Machinenfabriek Bollegraaf Appingedam*, 285 N.J. Super. 623 (App. Div. 1995).

Employer Indemnity

Until recently, the Workers' Compensation Act, N.J.S.A. 34:15-1 to 128, virtually rendered the employer impervious to a successful suit by the employee or by third parties such as product manufacturers. *Ramos v. Browning-Ferris Indus., Inc.*, 103 N.J. 177 (1986). After the Supreme Court's decision in *Laidlow*, the employee's claim can now be recognized in egregious cases, and a logical corollary is that the product manufacturer's claim should be subject to the same rules.

The facts of an older case are useful in analyzing the change in the law and the course we believe the law should take.

In *Stephenson v. R. A. Jones & Co. Inc.*, 103 N.J. 194 (1986), a manufacturer of a cartoner machine sent its customers pressure guards costing \$300 each to be installed on a rotating flap pin in the machines after it became aware of a number of injuries caused by the machines. (A cartoner is a machine that folds and assembles pre-cut cardboard into boxes.)

The manufacturer sent 86 guards to its customers, and 12 to the plaintiff's employer, which installed them on most of its machines. Three were intended for the plant where the plaintiff worked, but for some reason, the guards were not installed on the machines in that plant.

Although the manufacturer was able to prove that it sent the guards to that facility, the employer could not find them. The manufacturer offered to send new guards and to assist in their installation.

Two months prior to the plaintiff's accident, a representative of the manufacturer noticed that the guards had not been installed at the facility. The representative called the missing guards to the attention of the plant management, and the manufacturer promptly wrote another letter urging the plaintiff's employer to install them. The guards still were not installed, and a week later the plaintiff suffered a severe injury when she attempted to clear a jam in the machine and an ace bandage she was wearing got caught and caused her hand to be drawn into the machine.

The plaintiff sued the manufacturer of the machine. The manufacturer in turn filed a third-party complaint against the employer and its workers' compensation carrier for contribution and implied indemnity. The trial court, relying on the exclusive-remedy provisions of the workers' compensation act (N.J.S.A. 34:15-1 and N.J.S.A. 34:15-7), dismissed the third-party claim against the employer. The manufacturer then dismissed its claim against the workers' compensation carrier.

The case proceeded to trial against the manufacturer and a verdict against it was entered. At the manufacturer's request, the jury was asked via a special interrogatory to apportion liability between the manufacturer and the employer.

This procedure was employed before the 1995 amendment of N.J.S.A. 2A:15-5. 2a(2), which limited jury apportionment to parties, including those who had settled with a plaintiff, but excluding nonparties. See *Higgins v. Owens-Corning Fiberglass Corp.*, 282 N.J. Super. 600, 607-10 (App. Div. 1995). The jury found that the manufacturer was five percent at fault while the employer was 95 percent liable. The Appellate Division affirmed the trial court's denial of the manufacturer's claim for contribution and indemnification.

The Supreme Court held that because the employer was immune from the injured plaintiff's suit, the third-party claims of the manufacturer were likewise barred. The Court stated that there was no reason to distinguish the case where the manufacturer was found to be only five percent liable

from one where it would be found 95 percent liable. The Court stated "To permit the third-party tortfeasor to recover indemnification from the employer would subvert the immunity granted to the employer by the [Workers' Compensation] Act."

Strange Inconsistency

In what now seems like a prophetic dissent, Justice Gary Stein stated that had the relationship between the manufacturer and the plaintiff's employer been contractual, the manufacturer's indemnity claims would have survived dismissal; the same should hold true for the implied indemnity claims.

Stein examined the duty of a manufacturer to correct defects discovered after the sale of a product, and aptly stated: "There would be a strange inconsistency in our products liability law were we to impose a duty on manufacturers to correct a defect discovered after sale and simultaneously insulate from liability an employer who refuses to install a safety device provided by a manufacturer to make the machine safe."

In *Laidlow*, the Court revisited the intentional act exception to the Workers' Compensation Act, N.J.S.A. 34:15-8, which provides in relevant part:

If an injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong. (emphasis added).

The *Laidlow* Court found that if an employer acts with knowledge that an injury is substantially certain to occur, the exception would apply.

After *Laidlow*, if an injury was one that was substantially certain, the holding in *Stephenson* should be relegated to the trash heap of product liability legal history.

Today, after the warnings described in *Stephenson*, an employer could not

argue with a straight face that it was not substantially certain that a serious injury would occur if the guard were not affixed to the machine. The manufacturer had determined the need for the guard based on real life experience of workers being injured, had sent the guards to the employer, and when it was determined that the guards were not installed, the manufacturer followed up with a letter. The employer was thus aware of all the facts required by *Laidlow* for recovery by the worker.

In a good example of the dynamic nature of the common law, the unfair allocation of responsibility in *Stephenson* would be corrected if the case were decided today. The apportionment of liability under N.J.S.A. 2A:15-5. 2a would now have a far different effect as well. N.J.S.A. 2A:15-5.2a provides:

a. In all negligence actions and strict liability actions in which the question of liability is in dispute, including actions in which any person seeks to recover damages from a social host as defined in section 1 of P. L. 1987, c. 404 (C.2A:15-5. 5) for negligence resulting in injury to the person or to real or personal property, the trial of fact shall make the following as findings of fact:

(1)The amount of damages which would be recoverable by the injured party regardless of any consideration of negligence or fault, that is, the full value of the injured party's damages.

(2)The extent, in the form of a percentage, of each party's negligence or fault. The percentage of negligence or fault of each party shall be based on 100 percent and the total of all percentages of negligence or fault of all the parties to a suit shall be 100 percent.

Note that negligence encompasses product liability. N.J.S.A. 2A:15-5.2c(1). Likewise, strict liability encompasses product liability. N.J.S.A. 2A:15-5.2c(2).

Under N.J.S.A. 2A:15-5.3, the manufacturer would only be required to pay five percent of the verdict and the employer 95 percent. The statute reads:

Except as provided in subsection d. of this section, the party so recovering may recover as follows:

a. The full amount of the damages from any party determined by the trier of fact to be 60 percent or more responsible for the total damages.

b. (Deleted by amendment, P.L. 1995, c. 140.)

c. Only that percentage of the damages directly attributable to that party's negligence or fault from any party determined by the trier of fact to be less than 60 percent responsible for the total damages.

If the manufacturer turned out to be insolvent, the employer could wind up paying the entire verdict. When *Stephenson* was decided in 1986, however, the manufacturer was required to pay 100 percent of the verdict. Had it been insolvent, the plaintiff would have received no compensation other than what could be collected under the workers' compensation law.

Different Standards

Laidlow, however, raises the potential for, in Stein's words in his dissent in *Stephenson*, another "strange inconsistency in our product liability law." The standard to be applied against a product manufacturer is different from that to be applied against the employer. In the case where a product is found to be "not reasonably fit, suitable or safe for its intended or reasonably foreseeable purposes," (that is, defective), the jury is told to determine if it was reasonably foreseeable that the design of the product would cause injury. (There is no problem here with the issue of a reasonable alternative design, as the missing safety guard satisfies this element of proof.)

As to the employer, the jury would be instructed to determine if it was substantially certain that the employer's

action would cause injury. See *Suter v. SanAngelo Foundry & Machine Co.*, 81 N.J. 150 (1979); N.J.S.A. 2A:58C-2, eliminating the foreseeable language, but interpreted to include it (Dreier, Keefe & Katz, *New Jersey Products Liability and Toxic Torts Law*, §8:2-1 (Gann 2002 ed.)).

Again, applying this potential inconsistency between the two standards, we look at the second scenario described above. The machine is manufactured and supplied with a noninterlocked guard. The employer removes the guard and the worker is injured. For the jury to find the manufacturer liable, it must determine that it was reasonably foreseeable that the guard would be removed and that injury would occur. The jury must find that the design of the machine, that is, the fact that the guard was removable and not interlocked, was a proximate cause of the injury.

Could a jury then legitimately find that the conduct of the employer was not substantially certain to result in harm to the worker? Could the employer feign ignorance regarding the consequences of its acts in the face of the trial judge's expected instruction that the manufacturer is an expert in its field and is charged with constructive knowledge of the dangers posed by the design? See *Feldman v. Lederle Labs*, 97 N.J. 429, 452 (1984).

Will juries be confused by the different standards to be applied to the co-defendants before them? Should there be different standards?

As discussed below, we suggest a single standard in such cases, even if there is to be a case-by-case analysis based on the certainty and seriousness of the expected harm and, as the *Laidlow* Court put it, the "facts of life of industrial employment."

To this potential for confusion, add the additional problems caused when there are negligence defendants and product liability defendants in the same action. The situation occurs with some frequency. See *Ryan v. Muskin Corp.*, 94 N.J. 169 (1984). Besides the problems inherent in the *Ryan* formula for apportionment of damages, the employer might be permitted to argue the employee's comparative negligence, while the manufacturer may not.

Suter and its progeny preclude the assessment of a worker's own negligent conduct when working on a job reasonably assumed to be required by the employer. But the application of *Ryan* has been somewhat ameliorated by the execution of the *Suter* rule beyond product liability cases. See *Tobia v. Cooper Hosp.*, 136 N.J. 335 (1994), *Green v. Sterling Extruder*, 95 N.J. 203 (1984) and *Ramos v. Silent Hoist & Cable Co.*, 256 N.J. Super 467 (App. Div. 1992).

These cases are of broad application. Although there is no direct authority in a case of an employer defending a tort action, if the *Tobia* reasoning is followed, the *Suter* rule limiting claims of an employee's comparative fault most likely will be extended to apply *Suter* to a claim where the employer is the defendant.

Expanding Exceptions

The law is ripe for change beyond *Laidlow*, blending it into the general rules affecting product liability. Although a per se rule might be established to provide greater consistency and predictability, the Court has signaled that it will not take this course of action.

The employer's conduct still must be assessed against the substantial certainty standard. Nonetheless, a number of other compelling areas exist in which this exception to the Workers' Compensation Act might be expanded.

Much of our tort law is predicated on the concept of risk spreading. This is especially true in the product liability area, starting with the seminal case of *Hennigson v. Bloomfield Motors, Inc.*, 32 N.J. 258 (1960). The *Laidlow* expansion of the intentional act exception to the act fits within this tradition.

It is clear that an employer and its workers' compensation insurance carrier are in a better position than a manufacturer — distant in time and space — to know precisely how a machine is being used at a given facility.

The employer almost always has superior knowledge of the condition of its own industrial equipment, knowledge the manufacturer loses as time passes. The maintenance history of a

given machine is often critical in product liability trials. The employer would normally have more information and better access to information concerning modifications made to the machine.

The employer's workers' compensation carriers, and even its liability carriers, routinely conduct compliance audits and could compel employers, through insurance policy language, to take steps to keep employees safer.

If a per se rule were adopted, these carriers would have greater incentive to do so. But even without such carrier compulsion, the same effect can be achieved if liability is made dependent on factors such as the seriousness of the expected injury and the likelihood of its occurrence — two of the *Laidlow* factors. (Although the Court consistently uses the word injury, it couples the terms "injury or death" and implies that a serious injury need be proved.)

The third factor — the Legislature's inherent acceptance of or recognition of certain risks (the facts of every day industrial life) — provides a check on runaway liability. Not all risks are correctable; not all injuries are due to defective products or employer disregard of safety. This gap is where workers' compensation is needed.

But now faced with potential liability, and the commensurate increase in insurance premiums to prod their actions, employers might very well become more responsible and responsive to the safety needs of their employees. When employers knew or believed that it was highly unlikely that they could have been sued by their employees or by product manufacturers, they had little impetus to ensure that the safety aspects of their machines were operable or in good repair.

One might argue that potential increases in workers' compensation insurance premiums for unsafe facilities might have prompted employers to take action, but safety devices were repeatedly disabled and injuries still occurred. The specter of lawsuits and possible civil judgments is more of a sword of Damocles over an employer's head.

As noted by Stein in his *Stephenson* dissent, the noninstallation of the guard was not just an act that caused the employee's injury, it also fostered lia-

bility upon the manufacturer, harm that, until now, remained uncompensated.

Changing Directions

Changes can come from the Legislature. And it is too early to determine if the courts will restrict *Laidlow* to its facts. *Crippen v. Central Jersey Concrete Pipe Co.*, 350 N.J. Super. 313 (App. Div. 2002), and a companion case currently on appeal before the Supreme Court, give the Court further opportunity to define the direction of law.

In *Crippen*, the plaintiff claimed that repeated Occupational Safety and Health Act violations fell within the workers' compensation exception. The Appellate Division had affirmed the grant of summary judgment to the plaintiff's employer. 342 N.J. Super. 65 (App. Div. 2001). Certification was granted, 171 N.J. 440 (2002), and the Supreme Court remanded in light of *Laidlow*.

On remand, the Appellate Division held that "*Laidlow* does not alter our prior analysis." 350 N.J. Super. 315. The court found that since there had been no reported similar accidents or "close calls," the "extreme circumstances" of *Laidlow* had not been established. 350 N.J. Super. 316. *Laidlow*, of course, does not require evidence of prior accidents. "[T]he absence of a prior accident does not mean that the employer did not appreciate that its conduct was substantially certain to cause death or injury." 170 N.J. 621.

It is still uncertain whether plaintiffs and product manufacturers will get past the workers' compensation bar if facts not as egregious as those in *Laidlow* and *Mabee* exist (where the employer activates guards only when OSHA will be inspecting, or where there has been a history of injuries or near-misses).

What the Court in *Crippen* appears to have overlooked, however, is that the result in *Mabee v. Borden, Inc.*, 316 N.J. Super. 218 (App. Div. 1998), was specifically accepted by the Supreme Court in *Laidlow*: "We fully subscribe to *Mabee's* conclusion that removal of a safety guard can meet the intentional wrong standard; that such a determination requires a case-by-case analysis."

In *Mabee*, denial of the employer's motion for summary judgment was affirmed. The employer had removed safety guards and installed a plexiglass enclosure on a labeling machine with a bypass switch which allowed the machine to run while being cleaned. An employee was injured while attempting to clean glue from the machine.

The *Crippen* court's attempt to dis-

employers and their insurance carriers.

The shift will be from a machine manufacturer to an employer who has both the current control of the problem and the best opportunity to avert the danger. The only change will be which insurer will pay for the same liability.

Another possible approach was described in Dreier, "Injuries to Production Workers: Reform of the

rect it.

The manufacturer has no control over its product when it has been placed into commerce for a significant number of years. At the present time, if a manufacturer has a defective product on the market, even if it has corrected the defect for current products, it has an unknown potential liability that presents a rating nightmare to its carrier. If the claim period is fixed, there need not be a constant stream of unwarranted increased premiums.

The employer and its insurers know precisely the condition of the machine, the wear it may have incurred and the maintenance that may be required. Insurers regularly do safety audits. Hence, the liability burden is properly placed on the employer for the danger, and it behooves both the employer and its insurers to reduce those dangers faced by the employees.

Safety is thus served. A system such as shifting the burden to the employer should, therefore, reduce the number of injuries and hold down the expense for all. The increased insurance premiums for the employer should be offset by a decrease in premiums for the manufacturer, and reflected in the cost of industrial machinery. The total system should, therefore, be less expensive and safer.

Laidlow is the first — but we hope not the only — step in correcting an inequity that has existed for many years in the allocation of compensation of injured employees. To date, most of the cost has been foisted on machine manufacturers. There is a better way to handle this problem. ■

Recognition of the interplay between a manufacturer and an employer — and their insurers — in *Laidlow* should be only the beginning of a redefinition of responsibility.

tinguish *Laidlow* only looked to *Laidlow*'s facts while the facts in its case more closely resembled (or even surpassed) those of *Mabee*.

Legislative Action

In *Stephenson*, the Supreme Court recognized that the workers' compensation bar often creates harsh results that affect third parties whose rights of contribution or indemnity have been thwarted. The Legislature should now take notice of this inherent inequity created by the act and establish a system that legitimately shifts some of the undeserved burden of employee safety from machine manufacturers to

Workers' Compensation Product Liability Interface" 48 Rutgers L. Rev. 813 (1996). It suggested that a statute of repose could be enacted at, for example, 10-20 years after the sale or distribution of production machinery, following which the machine manufacturer would be relieved from design defect liability if the product was kept in use by an employer.

Liability for design defects would shift to the employer, which has made the choice to continue to use the older product and not correct such a defect. This pre-supposes that the defect is made public by the manufacturer or a successor so that the employer, or its insurer, will have an opportunity to cor-