Am. L. Prod. Liab. 3d § 86:21

American Law of Products Liability 3d
Treatise
November 2016 Update
Part 19. Personal Products
Chapter 86. Personal Care Products

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III. Fragrances, Deodorants, and Antiperspirants

§ 86:21. Colognes and perfumes

Summary Correlation Table

West's Key Number Digest

West's Key Number Digest, Products Liability 221

A.L.R. Library

Products liability: perfumes, colognes, or deodorants, 46 A.L.R.4th 1197

Treatises and Practice Aids

Complaint—Against companies that bottled and sold spray cologne—Injuries sustained when bottle exploded, American Law of Products Liability 3d, Practice Aids § 98

Trial Strategy

Burn Injuries, 44 Am. Jur. Proof of Facts 2d 1
Contact Dermatitis, 34 Am. Jur. Proof of Facts 2d 639
The Use of Discovery in Product-Related Burn Injury Cases, 99 Am. Jur. Trials 141

California

In a negligence and strict liability action brought against the manufacturers and distributors of various perfumes and colognes, including Boss, Drakkar Noir, Stetson, Joop! Homme, Calvin Klein's Obsession, Davidoff's Cool Water, and Freesia, in which the plaintiff alleged that she suffered from sinus inflammation, toxic encelopathy, dysosmia, small airways disease, and multiple chemical sensitivity because of her exposure to aldehydes contained in the fragrances, summary judgment was granted for the defendants on the grounds that the plaintiff's experts' testimony failed to establish a genuine issue of fact as to causation. The testimony of the plaintiff's experts that the plaintiff's injuries were caused by aldehydes in fragrance products failed to establish that any of the defendants' products were a substantial factor in causing the plaintiff's injuries, as necessary to establish causation. The plaintiff had been exposed to countless different fragrance products, most of which she could not identify, a total of more than 16,000 times, and the experts admitted that not every exposure to aldehydes caused an injury and that aldehydes differed in their health effects. The plaintiff's sensation of pain immediately following each of her more than 16,000 exposures to fragrance products, including the defendants' products, was not sufficient to create a triable issue of material fact as to causation, as this improperly equated her symptoms with her injuries. The burden on causation did not shift to the defendants based on the theory of alternative liability, insofar as the plaintiff had not sued all potentially responsible parties, nor was

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the market share theory of liability applicable to products, such as fragrances, that were not fungible and made from an identical formula. Furthermore, the plaintiff's experts' testimony was inadmissible under Daubert, since none of them conducted any research, either before or during the litigation, regarding the health effects of the defendants' fragrances or the aldehydes they contained, and there was no published work that said that fragrance products or aldehydes were causally connected to any of the plaintiff's alleged injuries. Moreover, the testimony of the only expert who concluded that the plaintiff's exposure to the defendants' products more than doubled her risk of suffering injuries was not founded on epidemiological studies showing a relative risk of greater than two or on any other evidence that would lend a scientific foundation to this assertion. Expert testimony that the plaintiff suffered from multiple chemical sensitivity because of fragrance exposure was not based on valid scientific evidence and was also not admissible under Sanderson v. International Flavors and Fragrances, Inc., 950 F. Supp. 981 (C.D. Cal. 1996) (applying California law).

Maryland

Judgment notwithstanding the verdict was improperly granted in favor of the defendant manufacturer of Tigress cologne, and the case was remanded for entry of judgment for the plaintiff. Immediately after the plaintiff's friend poured the bottle's contents onto the lower portion of a lighted candle, somewhat below the flame, intending to add scent to the candle, a burst of fire inflicted burns on the neck and breasts of the plaintiff, who was standing nearby. The jury found the defendant negligent and awarded $27,000 to the plaintiff (the plaintiff's father was awarded $2,701.34). Although no warning of the product's highly flammable nature was attached to the bottle or otherwise given, the cologne contained 82.06% alcohol and had a flashpoint of 73 degrees Fahrenheit, the approximate temperature on the night of the accident. The plaintiff introduced testimony of the defendant's vice president and chief perfumer, and of a company aerosol chemist, each of whom indicated that the defendant was aware of the product's hazardous quality and foresaw that its product could be dangerous when placed near a flame. This evidence, along with the defendant's knowledge that, in the household environment, the product could reasonably come in contact with flame, supported the jury's finding that the defendant's failure to place a warning on the bottle constituted negligence. Moran v. Faberge, Inc., 273 Md. 538, 332 A.2d 11 (1975).

Massachusetts

Despite the absence of privity, the plaintiff was entitled to maintain a cause of action in negligence against the defendant manufacturer of perfume which caused the plaintiff to suffer a second-degree burn when she applied it to her skin. Therefore, the trial court erred in granting judgment notwithstanding the verdict in favor of the defendant. The plaintiff was properly permitted to introduce testimony of two lay witnesses and one expert witness, who stated that, when they applied perfume from the same bottle, they experienced irritation and inflammation of the skin, since that testimony was probative of the issue of whether the plaintiff's injury resulted from a harmful ingredient in the product or from her own unforeseeable susceptibility. Furthermore, the jury could infer that the skin of the plaintiff and of the witnesses was normal. The defendant also had full control over formulation of the perfume and filling of the bottle; examination by the retailer was impractical; the product purchased by the plaintiff remained in the same condition as when it was bottled; and the defendant was not aware of all of the ingredients used. Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693, 164 A.L.R. 559 (1946).

New York

Because there was no proof that the defendant manufacturer of Shalimar perfume showed recklessness or a conscious disregard for the rights of others, or improperly manufactured the product, the jury's $2,000 compensatory damages award was vacated, and the appellate court's decision that a $6,000 punitive damage award could not stand was affirmed. The plaintiff applied the product before sunbathing; the following day, red blotches appeared on the portions of her body to which the perfume had been applied. The blotches turned brown and remained for several months. The plaintiff alleged that the product was inherently dangerous and that the defendant breached an implied warranty of fitness and acted in a grossly negligent, reckless manner. Oil of bergamot, the ingredient that caused the plaintiff's reaction, was used in other cosmetic preparations. Furthermore, of the 270,000 sales of the product that had occurred

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by the time of the plaintiff's injury, the defendant received only 25 complaints. This evidence led to a conclusion that the plaintiff was susceptible to abnormal, unforeseeable consequences as a result of using the product. Hafner v. Guerlain, Inc., 34 A.D.2d 162, 310 N.Y.S.2d 141 (1st Dep't 1970).

Texas

A judgment in favor of the defendant, the manufacturer of Brut 33 Splash-On Lotion, was reversed in a strict liability action where the trial court improperly excluded evidence of a post-accident warning that the product was flammable until dry. The plaintiff suffered burns to his upper body when he accidentally dropped a match into his waistband after pouring the product over his hands and chest. The post accident warning tended to rebut the testimony of the defendant's witnesses concerning the product's flammability and the need for or practicality of a warning. Although the plaintiff's expert testified that the lotion was flammable for several minutes after it was applied, and performed in-court experiments demonstrating the product's flammability as it evaporated, experts for the defendant testified and performed several in-court experiments to show that the product would not ignite, even when moist. Other experts for the defendant testified that consumers' knowledge of the product's flammability rendered the risk too small to justify a warning. In response to special issues, the jury concluded that the defendant knew or should have known that the product could become flammable after application, but found that a failure to warn did not render the product unreasonably dangerous. Based on these findings, the plaintiff's opportunity to prove the product's post-application flammability was hampered by exclusion of the warning, since no other evidence indicated that the product could have been improved by a warning or that a warning was necessary or practical. Admission of testimony concerning the absence of governmental standards relating to the flammability of cosmetics also prejudiced the plaintiff. The defendant presented no evidence that the product was safe or that no warning was necessary, but rather, attempted to convince the jury that the absence of government standards signified that the government did not regard the product as flammable. The trial court's erroneous refusal to instruct the jury to presume that the plaintiff would have read and heeded a warning if one had been given was rendered harmless by the plaintiff's testimony that he would have read such a warning. However, an in-court experiment performed by defense counsel during closing argument, by suddenly producing an unmarked and unauthenticated bottle of what was purported to be the product, and in plain view of the jury, pouring the substance onto his arm, and passing a lighted match over his arm while stating, in an effort to advance the theory that the product was not flammable, "God, if I am wrong, burn me," was so prejudicial that no instruction by the trial court could have cured it, and no objection was required to preserve the error for appellate review. Howard v. Faberge, Inc., 679 S.W.2d 644, 46 A.L.R.4th 1185 (Tex. App. Houston 1st Dist. 1984), writ refused n.r.e., (Mar. 20, 1985).

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