Fastener Litigation

by Thomas Doppke

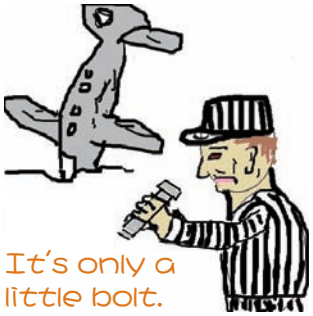
Wait! What does a fastener guy have to do with litigation? While the duties of a fastener designer or engineer are what the average worker with bolts and nuts has been trained to do, there is another, occasionally and hopefully rarely, chore that he may be burdened with. That is litigation! Just as the old sage about losing the nail that lost the shoe that lost the horse and so on applies to lost wars, a failed, wrong or lost fastener is one of the top causes of accidents. Few beyond the fastener expert (we will refer to the fastener designer, the engineer who adds and specifies the joining, the person who sells and handles parts, and any other person who specifies what fastener and how it is applied anywhere as an "expert" here) understand the functioning and application technology of fastening. Therefore, it is not unusual for the fastener "expert" to be called to explain to attorneys, judges, and in some cases, juries, the how's and why's of the failure of the fastened joint. Being considered in a safe occupation with respect to legalities, it was a surprise when I had received my first subpoena in a law suit.

While I am not an attorney and I make this very clear now that what I will be talking about is not to be construed as legal gospel (that's an oxy-moron isn't it?), the types and classes of litigation that I mention here are close to being correct. There are major differences in the legal systems of each country and a consultation with a licensed legal expert is necessary in any specific litigation case involving you and your company. However, that being said, the following is a Law 101 course which will cover the basics of most legal precedents. We'll cover the basic tenets of law since few of us ever got into law trials beyond Saturday night TV shows. Following that we'll go over what things will occur when you have to show up in court.

The type of litigation that you, fastener expert, will probably be involved in usually fall into several classes in two major areas of law.

Thomas Doppke, an esteemed fastener expert with over sixty years of in depth experience in the fastener industry and a long time contributing author to Fastener World Magazine, passed away at the end of October 2017. Jane Doppke, married to Thomas, said, "Tom was man who loved his family and friends. He was a wonderful husband, father and grandfather. There is a great hole in our hearts. We will work on filling it with wonderful memories." Fastener World Magazine would like to pay homage to him for his decades long contribution to the fastener industry.

The first area is criminal law in which a wrongful action or component has caused damage or other consequences that are forbidden by law. Criminal suits are brought by a governmental unit (federal, providence or local unit) against an individual or corporation or group. The outcome of a criminal suit may be fines or imprisonment. You will be called upon to prove or deny the allegation that the part or its application was wrongfully used. Typical examples are a distributor that knowingly imports or exports mismarked fasteners and sells them or a maker that knowingly falsifies certificates of compliance. Luckily there are few criminal cases involving the technical knowledge of fastener experts, laboratory technicians or engineers, most being a paperwork matter between the lawyers and dis-satisfied customers.



The second major type of litigation that will fill most of the fastener expert's court time is civil litigation. Civil law suits are actions that are brought by a person, group or governmental unit to enforce private rights. Fastener experts are involved in many actions in this area, mostly in those involving product liability. Product liability suits are divided into three basic concepts. They are those based on the principal of negligence, on those of warranty, and those on strict liability in tort. Again, every country has their own interpretation of these principals and their legal actions may or may not be legally enforced under that country's legal system. The fundamental basis of product liability law actions is founded in the idea that there is a liability of the manufacturer that stems from mis-actions either in contract law or tort law.

A contract is a binding agreement, in fastener terms, relating to either the sale or use of a product or design between the seller (maker/designer/component manufacturer who uses the fasteners) and the customer (user). It may also apply to the component maker when he buys the fastener or agrees to the designer if done as a service). The two areas that are involved are Privity of Contract and Warranty. Privity of Contract means that a relationship between seller and customer exists. This relationship is only valid between the supplier/seller and the immediate Customer DEF. Privity exists only between ABC and XYZ and XYZ and DEF, not ABC and DEF. This sound familiar, suing an automotive company for a dealership's error? Not so if Privity of Contract exists. But it is used to involve as many parties as possible in the legal suit, true or not, to maintain the maximum number of possible collectees.

Warranty suits may be based on either expressed warranties or implied warranties. Both operate the same, as if the seller had made an expressed commitment. In express warranty the statement is written, printed, or oral but part of the sale (certificate of compliance is an example). Implied warranty is not made directly as a part of the purchase of the goods or service but is implied by law. It is of nature that the service/parts are being offered as reasonably safe for use. Safety is always an implied warranty, that the service or goods will not cause harm or fail when used reasonably. The crux is the definition of reasonable.

The other fundamental basis of product liability suits is based in tort law. A Tort is a wrongful act or failure to exercise due care from which a civil action results. A tort theory of negligence is the basis of many suits. Negligence is the failure of a part or service due to the action, lack of action, or mis-action by another to fulfill an owed duty with less care than a reasonable and prudent person or company would do under the circumferences (right now you are probably confused and bewildered by all this legal talk. As an engineer and scientific person this area is a strange land without logical merit or basis- Correct! It's lawyer land!). A significant characteristic of negligence is the absence of intent to cause harm. For negligence claims to be successful two conditions must be present- the presence of a standard or care recognized by law and the breach of that standard and the fact that that breach was the cause of the harm or failure. The important point that is the center of most suits is what a reasonable and prudent person should or shouldn't have done.

In recent years the term product liability has become synonymous with strict liability in tort. The plaintiff injured by a product and seeking compensation usually brings suit in tort. This states that an unreasonable conduct or the lack of due care by another caused the failure of the product to perform as required. However, under strict tort, the conduct or due care of the manufacturer is irrelevant. To recover damages the plaintiff only has to prove that the product was defective, unreasonably dangerous, and the proximate cause of harm, not that the maker or

the product was negligent. The suit rests on proving that the fault was in the product not the maker of the product. The maker is said to be strictly liable because his liability does not depend on his own conduct and due care. This makes defense difficult for the maker of the product. However, strict liability in tort is not the same as absolute liability. Under absolute liability the existence of injury and failure is sufficient proof for recovery of damages. Strict tort requires the plaintiff to prove that the product was defective in the sense of being unreasonably dangerous.

The three ideas under which liability is imposed upon the makers of product and/or services are not mutually exclusive. Negligence, breach of warranty (either express or implied) and strict tort may contribute some part to any theory of liability.

Now that we have an explanation of what will be going on, legally, although not really a part of our duties as the designer/maker /handler of the fastener or design in question let's see what applies to the fastener part of this issue. Fasteners and fastening are suspect in several areas in a liability action. These are Design, Manufacture and Materials, Packaging, Installation and Application, and Warning and Labels. This is where you will probably be questioned and the plaintiff's attorney will try to get you to admit anything that can be used to prove a misappropriate action on your part as either designer or as representative of your company.

A review with your side's attorney should take place before trial. Often a disposition may take place before any trial. This is a meeting with the plaintiff's attorney (yours will be present) in which you are asked questions which are recorded by an official court reporter. The questions may be relative to the issue and may even seem inappropriate at times. This meeting is to get you to admit or say something relative the case that the plaintiff may use in trial. Discuss the disposition with your attorney prior to the disposition.

The plaintiff may claim that the design was not done with the exercise of due care (negligence) or that the product was defective (strict tort). The fastener expert should have reviewed beforehand if there might have been a concealed danger created by the design in any manner. Were needed fail-safes not included in the design via conscious thought (management direction to reduce cost, save materials, reduce labor) or by uneducated process (ignorance). Did the design employ inadequate strength materials and/or fail to follow recommended and/or mandated standards of design (example, government seat belt bolt standards)? Did the design fail to consider possible unsafe conditions of abuse or use to which the product or component might reasonably be expected to encounter during its cycle life?

Application and installation concerns are somewhat self-evident. Was the assembly plant reasonably expected to build the component as designed every time? Were the chosen parts, the fasteners, correct for the application and conditions of service?

If the expert is to give his opinion of the cause of the failure or non-conformance of the part, he should be allowed to view the failure and its remains. Although it is emphasized in law school from the first week that nothing should be touched, disturbed or moved from the accident scene or component, the lessons are often forgotten. Often the issue is clouded by the accident's or failures termination. The device failed, causing catastrophic damage but what caused the failure? The prime cause, the lost horseshoe nail, is a fastener failure in a great percentage of the cases. While both parties to the suit may look at and photograph the failure and its pieces, if any, they are not allowed to disturb any part and move or remove anything without permission. The presence of scratches, flakes of metal, rub spots mean little to the layman (meaning attorneys), they may be able to tell an expert how the part was assembled, what went wrong and how the joint came apart.

In addition to proving a design or part was incorrect because of any of one or more of the reasons above, the expert may be called upon to disprove claims against the manufacturer. Since the expert is probably an employee of a design shop or fastener manufacturer, this is probably the position that he will find himself in the most. Makers of industrial objects are targets for legal action because of their presumed "deep pockets". Coupled with most juries' prejudice against companies being sued by the "little guy", it is very difficult to invalidate a claim unless the fastener expert can substantiate the fastening scheme or processing as correct, safe, and reasonable.

Can a maker of a part be liable even when he doesn't have input into a design? A fastener manufacturer sold parts to a design shop who used them in their design. The parts failed, causing a costly recall. The design shop sued to recover recall costs. The case involved the point of; Did the maker have knowledge of the intended usage? Unless the designer had conversation with the maker as to the part's usage, the maker is only liable for the parts being manufactured to the specified requirements. However, the fine legal points are the arguable fodder of the attorneys.

The advent of a warning label is a way of insuring that expressed warranty is given. The common off-road SUV is often equipped with brush guards on the front bumper. They are heavy looking tubing structures about 2-3 inches in diameter, designed to present a "macho" look to the vehicle. In most cases these are of thin wall aluminum and designed for cosmetic appearance only. Implied by their appearance, is that they can be used to push another vehicle, an action that would collapse the guard, damage the front end of the vehicle and could even have more serious consequences. Warnings either by label or included in the owner's manual must state that they are not to be used for pulling or pushing.

What do you have to do when you receive an official notice to appear in a fastener related legal action? A meeting with the attorneys is the first and important step. They should explain the legal theories that both sides are expected to use. Thanks to the above discussion you should have some idea of what it is all about. You are expected to give opinions, based on evidence available is possible, as to the probable and possible causes of the failure. Your testimony should be structured in such a manner as to be understood by laymen. It must be true, to the best of your knowledge and ability to understand the factors involved. Why and how the design contributed to the failure and what could have been done to make it safer might be discussed with the attorney if such concepts are possible. The possibility of you giving a disposition requires care in writing, if so ordered, and giving testimony as to the exact wording and meaning of statements. For example, in legal terms the word "probable" means that it (whatever) is more likely to occur than not (51% is a probable cause). This does not mean the same to most engineers, who use "probable" in the same context that is covered by the legal word "possible" (meaning less than 50% chance of occurrence).

With luck, you may never have to appear in court. Most matters are settled by negotiations before any jury involvement. Your expert testimony is vital in this process also. Prior statements of facts and professional opinions are weighted. Only an expert may present opinions. All others must only answer to facts! If your opinions do not fit the theory being championed by the attorney you may be dismissed with thanks. All information will be sealed and remains confidential. You may return to your job, hoping never to have another sojourn into the legal world.