

## A Criminal Act Severs The Chain Of Causation

*Law360, New York (August 21, 2012, 1:08 PM ET)* -- Country music fans may recall the Garth Brooks' song "Longneck Bottle." That tune, from his CD "Sevens," reached No. 1 on the country charts in 1997. In it, the singer pleads for the longneck bottle to stay clear of his hand. Today's post might be subtitled, "longneck bottle stay clear of my face."

In *Gann v. Anheuser-Busch Inc.*, No. 11-00017 (Tex. App. 7/26/12), a plaintiff asserted liability against the maker of a longneck glass beer bottle for injuries allegedly suffered when she was struck in the face by a bar patron wielding the bottle as a weapon.

While celebrating a friend's birthday "at a bar known for its violence," according to the court, Gann was assaulted by a patron wielding a Budweiser "longneck" glass beer bottle. She sued for an alleged design defect in the bottle, with the typical strict liability and negligence counts. The trial court granted summary judgment to defendants, and plaintiff appealed.

In a strict products liability action in which a claimant alleges a design defect, a Texas claimant must prove by a preponderance of the evidence that:

1. The defect renders the product "unreasonably dangerous;"
2. The defect was a producing cause of the personal injury, property damage or death for which the claimant seeks recovery; and
3. There was a safer alternative design.

TEX.CIV.PRAC.&REM.CODE ANN. § 82.005(a)(West 2011); *Timpte Indus. Inc. v. Gish*, 286 S.W.3d 306, 311 (Tex. 2009).

To determine whether a product was defectively designed so as to render it unreasonably dangerous, the courts apply a risk-utility analysis that requires 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 costs;
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.

Defendant made an interesting threshold, no-duty argument that rings true. As a matter of law, Anheuser-Busch had no legal duty to design the longneck bottle against purposeful and criminal misuse because it satisfied its one and only legal duty: to design the bottle to ensure that the bottle was safe for its intended and ordinary use — storing beer.

In support of its argument, Anheuser-Busch cited to *Venezia v. Miller Brewing Co.*, 626 F.2d 188 (1st Cir. 1980), a case we used when teaching products liability in law school.

In *Venezia*, the federal appeals court applied Massachusetts state law to hold that the plaintiff, who was injured by the broken shards of the beer bottle he deliberately threw against a pole, could not recover from Miller Brewing Co. under a theory of negligent design because the deliberate misuse of the beer bottle could not be characterized as an intended or ordinary use of the beer bottle. 626 F.2d at 189, 191-92.

The court of appeals felt that it need not address this issue of duty, however, given the other fatal flaws in plaintiff's case.

Gann argued that beer bottles are used commonly in assaults in the local community, that the longneck portion of the bottle is cosmetic and that Anheuser-Busch also can use stubby glass bottles and plastic bottles as containers for beer.

However, contrary to her assertion, Gann failed to produce evidence raising a genuine issue of fact that the risk of injury from the longneck bottle outweighs its utility and therefore that the bottle was defectively designed so as to render it unreasonably dangerous.

Specifically, plaintiff failed to adequately address:

1. Whether manufacturing a stubby glass bottle or plastic bottle is economically feasible;
2. Whether eliminating the allegedly unsafe character of a longneck bottle significantly impairs its usefulness or significantly increases its costs; and
3. What the expectations of the ordinary consumer are.

Turning to the negligence count, the threshold inquiry in a negligence case is duty. *Centeq Realty Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). Generally, no person has a legal duty to protect another from the criminal acts of a third person. *Timberwalk Apartments, Partners Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998). (One exception to this rule may apply when a person controls the premises where the criminal acts occur.)

Whether a duty exists under either theory is a question of law for the court to decide from the facts surrounding the occurrence at issue.

Plaintiff argued that because defendants did not contest that the use of longneck bottles as weapons in bars has happened and thus was foreseeable (cue "Friends in Low Places"?), the defendants then had a legal duty to protect her from being assaulted in such a situation.

Even conceding that it is reasonably foreseeable that a longneck bottle might be used as a weapon, plaintiff failed to show why the general principle that no person has a legal duty to protect another from the criminal acts of a third person is inapplicable in this case. Mere foreseeability that a legal product might be used in a crime does not create a duty that overshadows the intervening criminal act.

Summary judgment affirmed.

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