

DON'T OVER A PRODUCT

By || **BRETT A. EMISON**

When a catastrophic injury arises from a typically minor occurrence, consider whether a product defect may be at play—this can be the key to recovering just damages for your client.

Your initial focus in a personal injury case may be on the question of negligence: Did someone act carelessly and did that carelessness cause harm? However, this kind of tunnel vision can prevent attorneys from recognizing a critical product defect. Every case—whether an at-home injury, work injury, automobile collision, or medical negligence claim—should be screened for a product defect claim.

In a case involving a home fire that killed someone, my firm determined that a defective motor in a small oscillating fan caused the fire. We were able to obtain a verdict against the product's seller under strict products liability. And in an auto crash case when the negligent driver had only the state's minimum liability insurance coverage, our investigation led us to a defect in the vehicle. We held the manufacturer accountable and obtained the medical care and other support our client needed—a negligence claim against the driver alone would not

have adequately addressed our client's injuries.

A common factor in product defect cases is a catastrophic injury arising from a typically minor occurrence. During intake, question whether the client's injuries are more severe than would be expected based on the description of the incident. If so, look carefully to see whether a product defect could be at issue.

DEFECTS TO LOOK FOR

Injury-causing defects can be wide-ranging—in water heaters, coolant canisters, propane tanks, furniture, deer stands, dolly carts, infant slings, children's toys, and more. In cases involving consumer products, examine the product for warnings or guards and look for recalls or other proof of a defect.

Vehicles, for example, contain thousands of components, many of which are designed to provide critical protection during a collision. Occupants

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can suffer catastrophic injuries when these components fail. In collision cases, look at common automotive components—the fuel system, roof structure, seatback, tires, restraint system, and air bags—for signs of a defect. Auto defect cases often meet one or more of these criteria:

- collision is minor but results in catastrophic injury or death
- one or more occupants is severely injured while others have minor or no injuries
- severe damage to or failure of a localized area of the vehicle (such as a roof crush, tire failure, or seatback collapse)
- seat-belted occupants who are seriously injured or who are partially or fully ejected.

Defects also may arise in a wide variety of other products—industrial machinery, agricultural equipment, medical devices, electrical transformers and power lines, road construction equipment,

construction vehicles, semi-trucks, scaffolding, warehouse equipment, and farm machinery. Regardless of the product at issue, proper investigation requires preserving and acquiring the product. Do not allow the insurance company to take possession of the product, and do not allow the product to be sold or destroyed.¹

WORKING WITH EXPERTS

It is critically important to find experts who can identify the product defect, assist in testing the product and proving the defect, and explain the defect to the jury. Frequently, the most useful expert is one who will honestly explain why there is *not* a product defect to pursue. Because of the expense and resources product defect cases consume, it is important to trust your expert to identify not only provable claims but also claims that should not be pursued.

Once the expert has confirmed the defect, be sure that he or she is able to

explain why a certain component failed and how the defect caused the injury. Depending on the defect and nature of the injury, several experts may be necessary, including mechanical, biomechanical, accident reconstruction, chemical, electrical, safety, material science, and metallurgical engineers.

Liability experts. Determine whether the expert has designed a product in the marketplace. Product manufacturers frequently have teams of product designers (both in-house and retained experts) at their disposal. Nearly every product defect case requires the plaintiff's attorney to retain an expert to testify about the design defect, negligence in developing the final product design, and identification of reasonably feasible alternative designs. Whether addressing a design defect or manufacturing defect, real-world marketplace experience will strengthen the expert's credibility with the jury and help to insulate the expert on cross-examination.

Medical experts. You need these experts to explain injuries, to give a prognosis, and to review medical records. Treating physicians can be excellent advocates for patients. A retained medical expert can bridge gaps that may arise in the treatment record and prepare medical illustrations or virtual 3D models for use with treating physicians and the jury to explain the nature and extent of the injury. Other medical experts can include physicians, nurses, toxicologists, medical specialists, and medical billing experts.

Life care planners. In any serious injury claim, you must also address your client's future medical and support needs. Life care planners can detail the medical care and support that your client will require over his or her lifetime. Failure to investigate future needs will leave your client without the resources required for long-term recovery and care.

DISCOVERY

Appropriate discovery is critical in proving any design or manufacturing defect. Critical documents and information to obtain include

- identification of the release engineer who signed off on the final product design
- design drawings and blueprints
- subsequent design changes
- product testing
- failure mode and effects analyses (FMEA)
- notice of other similar incidents (OSI)
- reasonably feasible alternative designs.

There may be industry-specific nuances that you are not aware of, so be sure your experts assist in drafting discovery requests. Experts can help identify industry terms of art to use in interrogatories and requests for production. They also may be aware of defendant-specific or industry-specific studies, testing, or other specialized information that will be critical in proving your case. Consulting experts early in discovery helps ensure you're requesting all necessary information from the product manufacturer.

In addition to written discovery and depositions, consider a site visit to the manufacturer. Some manufacturers may have an internal document repository or "reading room"—if so, conduct an in-person search of this library. This may lead you to discover critical documents that would not have been produced otherwise.

Similarly, an in-person inspection of the manufacturing facility or plant operations could expose failures that led to a manufacturing defect. Experts can be critical resources in these inspections—request their participation in the site inspection. Federal Rule of Civil Procedure 34(a)(2) and similar state rules provide for discovery requests

to permit entry to land or other property for inspection, measuring, surveying, photographing, and testing.²

Failure mode and effects analyses.

Evidence of FMEA, or lack thereof, is often underused in product defect claims. FMEA is part of the product design process in which the design team works to identify the different ways the product can fail and inflict harm before the product design is complete and the product is on the market. Design engineers must eliminate a hazard or risk if possible, guard against hazards that cannot be eliminated, and adequately warn of additional hazards that remain. The more severe the harm identified, the more crucial it is to eliminate the hazard. Your engineering experts should identify whether the product manufacturer used and documented an FMEA process and, if so, whether the FMEA was adequate.

In one case, my client lost both legs in a horrible tire shredder incident—the shredder was powered on as my client was inside cleaning the blades in the cutting chamber. Our design expert reviewed the engineering design documents and found the manufacturer never conducted an FMEA to determine the various ways the shredder could fail



in a manner that could lead to injury or death. I worked with the expert to identify critical documents to use in deposing the defendant's design engineers. The expert also helped to craft questions designed to obtain information to prove our defect theory.

Other similar incidents. In many jurisdictions, OSI evidence is admissible

For example, in one case involving an allegedly defective helicopter, the federal district court noted the fact that the defendant had used the wrong component in the helicopter was not, in itself, sufficiently outrageous to warrant punitive damages.⁷ However, evidence at trial showed that the defendant—after more than 50 similar incidents—never

options or design iterations. In an auto defect case, be prepared for a discovery battle on information regarding prior and subsequent model vehicles as well as non-platform vehicles designed by the manufacturer. Manufacturers often seek to limit the scope of discovery to the product model series at issue, but alternative designs are frequently found

YOUR EXPERT MUST EXPLAIN WHY A CERTAIN COMPONENT FAILED AND HOW THE DEFECT CAUSED YOUR CLIENT'S INJURY.

to prove the existence of a particular physical condition or defect, to show that the defect or dangerous situation caused the injury, to show the risk that the defendant's conduct created, or to prove the defendant had notice of the danger.³ A manufacturer may defend a case by claiming that failures of the product are rare or that the subject occurrence represents the only time the product has failed. Use OSI evidence to refute these arguments.

To be sufficiently similar, the occurrence need not be identical, but it must be of like character, occur under substantially the same circumstances, and result from the same cause.⁴ Keep in mind that if OSI evidence is admitted only to show notice to the defendant (as opposed to proving the defect itself), courts have generally demanded a lower degree of similarity. For example, some Missouri courts have held that *any knowledge or warning* the defendant had of the type of product failure in which the plaintiff was injured aids the jury.⁵

OSI evidence also is admissible to prove punitive damages. It can be used to show the defendant's disposition, intention, or motive in the commission of the acts for which punitive damages are claimed.⁶


ordered an inspection of the components on other helicopters, never examined the components it knew had failed, and never tested the component to determine the problem. The court found that the defendant "acted outrageously and with callous, conscious and reckless disregard for the safety of persons flying in its helicopters."⁸

Reasonably feasible alternative design. Some jurisdictions require evidence of a reasonably feasible alternative design, but others do not.⁹ *The Restatement (Third) of Torts* also includes an alternative design requirement, and states that have adopted it likely will require proof of a feasible alternative design. But regardless of the requirements of your jurisdiction, jurors will want to see evidence of a reasonably feasible alternative design. It is difficult for jurors to hold a manufacturer accountable without evidence that a safer product either existed or could have existed if the manufacturer valued safety. Without evidence of an alternative design, the jury may conclude the plaintiff is simply trying to litigate the product out of existence.

Often a product manufacturer defendant will have reasonably feasible designs available in the form of product

in other product models and later iterations of the product.

Other times, the manufacturer's competitors will have feasible alternatives in the marketplace. Use experts to identify reasonably feasible alternative designs in the marketplace. In the rare event that an alternative design is not yet available, your expert should be prepared to lay the foundation for proving that an alternative could have been available on the market at the time the original product was manufactured.

Too often, product defect claims are overlooked in favor of other potential sources of causation and liability. Screen every case at intake for a potential product defect claim—it can be the key to recovering what your clients need and deserve. 



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NOTES

1. Special considerations must be given when taking possession of some products or components. For example, vehicles should be stored at a location that is secure and

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protected from the elements to preserve the condition of the vehicle at the time of the crash. Other components, such as medical devices, may need to be preserved subject to biohazard precautions. If you cannot locate a proper storage facility, your design expert can assist you.

2. See, e.g., Cal. Civ. P. Code §2031.010 (2017); Fla. R. Civ. P. 1.350(a)(3); Mo. R. Civ. P. 58.01(a)(2); 231 Pa. Code §4009.32 (2020); Tex. R. Civ. P. 196.7.
3. See, e.g., *Govreau v. Nu-Way Concrete Forms*, 73 S.W.3d 737, 741–42 (Mo. Ct. App. 2002); *Bass v. Cincinnati, Inc.*, 536 N.E.2d 831, 832 (Ill. App. Ct. 1989); *Holmes v. Sahara Coal Co.*, 475 N.E.2d 1383, 1387 (Ill. App. Ct. 1985); *Davis v. Int'l Harvester Co.*, 521 N.E.2d 1282, 1289 (Ill. App. Ct. 1988); *Herbert v. Sivaco Wire Corp.*, 289 A.D.2d 71 (N.Y. App. Div. 2001).
4. See, e.g., *Thornton v. Gray Auto. Parts Co.*, 62 S.W.3d 575, 583 (Mo. Ct. App. 2001); *Newman v. Ford*, 975 S.W.2d 147, 151 (Mo. 1998) (en banc); *Doyle v. White Metal Rolling & Stamping Corp.*, 618 N.E.2d 909, 919–20 (Ill. App. Ct. 1993); *White v. Ford Motor Co.*, 312 F.3d 998, 1009 (9th Cir. 2002); *Jackson v. H.L. Bouton Co.*, 630 So. 2d 1173, 1177 (Fla. Dist. Ct. App. 1994); *Jones v. Laughlin Steel Corp. v. Matherne*, 348 F.2d 394, 400–01 (5th Cir. 1965); *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1248 (10th Cir. 2000); *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1313 (11th Cir. 2000).
5. See, e.g., *Govreau*, 73 S.W.3d at 742; *Stacy v. Truman Med. Ctr.*, 836 S.W.2d 911, 926 (Mo. 1992) (en banc).
6. See, e.g., *Benedict v. Northern Pipeline Constr.*, 44 S.W.3d 410, 422 (Mo. Ct. App. 2001); *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 640 (Ga. 1993); *Lovick v. Wil-Rich*, 588 N.W.2d 688, 699 (Iowa 2000); *McNeill v. Rice Eng'g & Operating, Inc.*, 70 P.3d 794, 805 (N.M. Ct. App. 2003); *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1113 (8th Cir. 1988); *Bemer Aviation, Inc. v. Hughes Helicopter, Inc.*, 621 F. Supp. 290, 299 (E.D. Pa. 1985).
7. *Bemer Aviation*, 621 F. Supp. 290.
8. *Id.* at 299.
9. Missouri, for example, does not require a plaintiff to show a reasonably feasible alternative design and has consistently rejected the imposition of an alternative design/risk-utility test. See *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 65 (Mo. 1999); *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 89–90 (Mo. Ct. App. 2006). Alabama, on the other hand, requires proof that "a safer, practical, alternative design was available to the manufacturer at the time it manufactured the product." See *Gen. Motors Corp. v. Jernigan*, 883 So. 2d 646, 662 (Ala. 2003).