
What you need to know: products liability

Identifying the products liability case

by M. Bryan Slaughter

The parents of a six-year-old girl walk into your office with a horrible story. A month ago, the mother struck a tree after losing control on an icy road. At impact, her 1998 American sedan was only traveling about 25 mph. The mother was uninjured. The little girl, wearing her seatbelt in the rear seat, is rendered a paraplegic as a result of the collision. The parents own one vehicle, and carry only \$50,000 in insurance. They want to know if you can help them.

Or, you meet with a father of four who lost his arm when it got drawn into a sanding machine while working at a local furniture factory. He is receiving workers compensation payments, but they are not enough to support his family, and he cannot find another job. He wants to know if he has any other options. Finally, you sit down with the wife of a man who suffered a catastrophic brain injury when something went wrong with the anesthesia administered to him during a routine operation. There appears to be a possible medical malpractice case against the anesthesiologist, but the maximum amount allowed under Virginia's medical malpractice cap would only pay for a fraction of the husband's lifetime medical needs. She wants to know if a medical malpractice case is her only option.

Each of these scenarios have one thing in common – they all present at least the possibility of a products liability case, and are all based on cases that have been successfully litigated. A products liability action exists when any product – be it a car, industrial equipment, medical device, or household product – is not reasonably safe for its ordinary or foreseeable use.¹ A product is unreasonably dangerous if it is defective in assembly or manufacture, unreasonably dangerous in design, or unaccompanied by adequate warnings concerning its hazardous properties.²

Too often, potential cases are never investigated because an attorney may not realize that the true cause of a client's injuries is the unsafe design of a product. Often, this is because the attorney who first meets with the injured person is simply not aware of what to look for in regard to a potential products action. Many products liability cases arise out of unsafe vehicles or workplace injuries. Accordingly, attorneys who specialize in automobile personal injury, workers compensation, or social security disability law should be particularly aware of the potential products case.

Two general rules can be applied to any prospective products liability case. First, and most importantly, **SAVE THE PRODUCT**. Once the product

is lost or destroyed, so is the products liability case, with very few exceptions. Thus, in a potential automotive products case, an attorney must immediately take steps to have the vehicle stored, preferably in a covered garage, until it can be examined by an expert. In a case involving workplace injury, steps must be taken to enter the premises and inspect the machine. In cases involving consumer products, the product must be placed in a secure location where it cannot be altered. Just as with any important piece of evidence, chain of custody will likely have to be established at trial. Second, only cases involving very serious injuries or a fatality can support the costs associated with a products liability case. Costs in automotive products liability cases that are tried routinely run from at least \$200,000 to \$400,000, or even more. Thus, it does not make sense to pay the \$10,000 or so for the initial investigation if the potential damages will not support the eventual cost of the litigation.

Defective automobiles

The most likely instance when a personal injury lawyer will come across a potential products liability case is as a result of an automobile accident involving catastrophic injuries. Sometimes, serious injuries are simply the result of the tremendous forces of a collision. Far too often, however, injuries could have been prevented if the car had been designed more safely. Countless cases have been successfully litigated on the theory that a life-altering injury would never have occurred had the car manufacturer implemented a relatively inexpensive safety device. Often, the manufacturer's own documents will show that the safer design was available and considered, but rejected due to its cost. The most widely known example of this type of reasoning involved the Ford Pinto, where it was shown that Ford chose an unsafe and very dangerous design because of the reduced cost.

Many automotive safety features that we take for granted have come about at least in part due to pressure on the automotive manufacturers exerted through litigation. Examples include: padding within the passenger compartment; shoulder belts; reinforced and better located fuel tanks; and airbags. The body of current litigation continues to demand that every automobile be reasonably safe for its occupants.

While there is no hard and fast rule regarding which case constitutes an actionable automotive products liability case, when any car accident involves catastrophic injuries a products liability case should at least be ruled out. Below are examples of the most common types of automotive products liability cases that are currently being litigated.

A. Rollovers

Beginning with Ford's Bronco II, there has been a great deal of controversy, and litigation, surrounding the stability of Sport Utility Vehicles.

When SUVs roll over, occupants often die or suffer catastrophic injuries. The most common injuries are to the neck or head caused by striking a vehicle's roof, or when an occupant is ejected. National Highway Traffic Safety Administration figures show that in 2002 there were 2,448 deaths and 58,000 injuries from SUV rollover crashes in the United States. Single-vehicle rollover crashes accounted for 47 percent of driver deaths in SUVs in 2002, compared with 36 percent of deaths in pickups and 20 percent of deaths in cars.

When should an accident involving a rollover be investigated as a potential products liability action? There are a few factors that must be examined when evaluating a potential stability case. First, an expert should determine whether the rollover began on the road, or if it started after the vehicle left the paved surface. If a rollover began after the automobile left the roadway, the stability case becomes much more difficult, if not impossible, to prove. Second, an expert must determine whether the rollover was caused by a "tripping" mechanism, such as a curb or a pothole. It is very difficult to argue that car manufacturers must design a vehicle that does not roll when it is "tripped." Third, an expert must determine whether excessive speed contributed to the accident. Finally, road conditions should be examined, such as whether the pavement was dry or wet at the time of the accident.

Many automobile manufacturers are (successfully) defending SUV stability cases by essentially arguing that the plaintiff assumed the risk of a rollover. Either expressly or implied, the manufacturer will argue that its customers know that these vehicles do not handle like cars, and by their very nature, are more susceptible to rolling over. The manufacturer maintains that it should not be blamed when this happens. Plaintiff's attorneys often counter this defense by holding the manufacturers accountable for not using existing seat belt designs that are proven to hold occupants securely in their seat in the event of a rollover, or for not designing a roof structure that will provide reasonable protection for the occupants.

B. Seat Belts

The potential defects in the design of seat belts are wide-ranging. Cases that have been successfully litigated include those involving defects in the buckle, poorly positioned anchor points, poor belt geometry or "belt-fit," defective seatbelt webbing, faulty retractors, and lack of "pre-tensioners." Sometimes a seat belt will "spool out" – the retractor will fail to lock properly and keep the occupant in place during the collision. Pre-tensioners are pyrotechnic devices that actually tighten the belt in the event of a crash, thereby pulling the wearer into the seat. The predictable result in any case involving a defective seatbelt is that the occupant impacts with the vehicle's interior, or, in the worst cases, is partially or completely ejected from the vehicle.

Anytime a client has been seriously injured while wearing a seat belt, an expert should inspect that seat belt.

If a client was found unbelted, but is adamant that he put his belt on before the crash, the seat belt should also be investigated. Poorly designed buckles can unlatch during the forces of a collision, or they can “false latch” when an occupant puts his belt on. False latching occurs when a buckle sounds and feels like it is fully engaged, but actually is not, and the belt separates from its buckle when any force is applied.

Attorneys should also be aware of potential cases involving child safety seats. If a child is seriously injured while secured in a properly installed child seat, then the seat should be examined. Finally, the concept of the “forgotten child” has come to the forefront in recent years. This refers to children who are too big for a child seat, but who are too small to be protected by adult-sized seat belts. Children ranging in age from four to eight years old, or who weigh 40 to 80 pounds, are primarily at risk. In an accident, if the seatbelt does not properly fit the child, serious spinal cord injuries can result. Automobile manufacturers are well aware of the problem, and have developed various fixes. They have been slow to implement the necessary design changes, however, and instead have attempted to pass the responsibility for these children’s safety entirely onto parents and third-party booster seat manufacturers. Any spinal injury to a child who was wearing her seat belt should be investigated as a potential products liability case.

C. Defects in a Vehicle’s Roof Structure — “Roof Crush”

A products liability case may exist if the portion of a vehicle’s roof is intruding into the occupant compartment in the location where an injured person was sitting. Federal Motor Vehicle Safety Standard 216 mandates that a vehicle’s roof cannot collapse more than 5 inches in a collision. The injuries sustained as a result of a roof that collapses in excess of those five inches are predictable – serious brain or spinal cord injuries. Even though auto manufacturers are aware that SUVs have a higher propensity for rolling over, they often do nothing to reinforce the roof. The unsuspecting consumer has no idea that when his vehicle does roll over, the roof will not provide any real protection.

D. Fuel Fed Fires

If it appears a fire contributed to the death or serious injury of an occupant in a vehicle, a potential products liability case should be investigated. Since the 1970s, General Motors’ policy or goal has been that persons who survive a collision or rollover in a GM vehicle should not be burned in a post collision or post rollover fuel fed fire. GM stipulated to this policy in *David Drennan v. General Motors Corporation* on Feb. 4, 2000, before Judge Charles W. Pickering, Sr., in a trial held in the U.S. Dis-

trict Court for the Southern District of Mississippi, Hattiesburg, Mississippi. GM made this stipulation through its attorney and defense counsel William Kirk, as follows:

MR. KIRK: . . . General Motors agrees that it was a written goal of General Motors that the recommended level for fuel system performance is given for front, side and rear impacts *and rollover* premised on the concept that occupants involved in collisions which produced occupant impact forces below the threshold level of fatality should be free of the hazard of post collision fuel fed fires.

THE COURT: All right. Are you satisfied

. . . .

MR. KIRK: Since the early seventies.

THE COURT: All right. Mr. Kirk had just dictated in the record what has been a written goal of General Motors since the 1970s. Now, counsel for the plaintiff, is that satisfactory?

MR. FRAZER: Yes, sir. It certainly is.

This stipulation was made in the presence of in-house counsel for GM and other GM officials and representatives who acknowledged the stipulation when it was made. Other manufacturers have similar goals of preventing post-collision fires, and thus instances where people are seriously burned as a result of a crash must be investigated as a potential products liability case.

E. Seat Backs

To save money, car manufacturers sometimes design and install flimsy car seats. Federal regulations for seat backs are notoriously weak – some have shown that a lawn chair would meet federal standards. When a seat back fails, the front seat driver or passenger is often sent into or even through the rear window. If the occupant survives, the resulting injury is typically quadriplegia and/or severe brain trauma. Another casualty of a poorly designed seat is often the child in the backseat who is crushed by the front-seat occupant (usually their parent) when the seat collapses. These cases usually involve severe traumatic brain injury or death. The attorney should investigate the possibility of a collapsed seat back if a front seat occupant is seriously injured and found by first responders in the backseat or ejected from the vehicle, or if a child has a severe head injury that is not explained by the force of the collision.

F. Airbags

If an occupant’s airbag has deployed, and her injuries seem much more severe than expected from the force of the collision, her injuries may have been caused by the airbag. Airbags fire with great force, and can themselves cause very serious head and spinal injuries. Newer generation airbags have been designed to provide the same protection

in a crash, but deploy with less force to decrease their potential danger to occupants. In addition, sometimes airbags do not fire when they should. If a client has been critically injured in a serious collision, and no airbag deployed, an attorney should investigate why this did not occur.

G. Sudden Acceleration

Sudden acceleration is a rapid, unintended acceleration which causes the driver to lose control of the vehicle. Unintended accelerations can be caused by defective cruise control or electronic throttles. These cases are notoriously hard to prove, and often end with a judge or jury blaming the plaintiff for applying the wrong pedal. Recently, however, some cases have been prosecuted successfully. If a very credible and believable client complains that his car sped out of control, and that he was sure his foot was on the brake, investigate the possibility of a sudden acceleration case.

Workplace injuries – industrial equipment

Poorly designed industrial machinery can cause devastating injuries to workers who do not fully appreciate their dangers. In a split second, a worker can lose a limb, sustain a head injury, suffer horrendous burns, or die. A Virginia worker's only recourse against their employer is through the workers compensation system. However, if an injury is caused by a defective machine, then a potential products liability action may exist against the manufacturer and seller of the machine.

In designing machines, industrial engineers who are concerned about safety generally implement a basic "design, guard, warn" hierarchy. If an identifiable hazard can be removed through better design, that is the best solution. If the hazard cannot be addressed through design, then guards should be put in place to protect the worker. If a guard is not feasible, then proper warnings should be placed in a proper location to warn the user of the hazard. When investigating a possible products liability suit, it is helpful to keep this hierarchy in mind.

Examples of areas where preventable industrial accidents often occur are:

- Pinch-points – where wheels or conveyors intersect, and can draw a person's arm, hair, or loose clothing into moving machinery.
- Crush areas – areas where two parts of machinery collide. An example would be an industrial press.
- Saw Blades / Shear areas – Saw blades are self evident. Shear areas are where sharp edges move across each other, or a sharp edge is used to cut material.
- Pull-in points – where material is pulled into the machine. A wood chipper is an example.
- Explosions / Fires – Self-explanatory, but there can be many causes, including defective circuit breakers, improperly labeled flammable material, or a machine that overheats. It is very important to engage a fire cause and

origin expert immediately.

Two dangerous occupations where injuries are often taken as a matter of course are coal mining and farming. Workers in these industries routinely operate or are in close proximity to machinery that can cause serious injury in the blink of an eye. While some equipment has been designed more safely over the years, fatal hazards that could be eliminated through design, or improved through guarding or warning, are still commonplace.

This is not an exhaustive list of workplace hazards, but rather gives an overview of the most common types that cause serious injury. As a general rule, a products liability case should at least be considered and investigated anytime a worker is seriously injured by a machine.

Medical equipment

When a potential client has had an unexpectedly bad medical result, an attorney will obviously investigate a malpractice case against the doctors or hospital. In certain situations, a products liability case should also be considered. This is especially true here in Virginia, where the medical malpractice cap limits a catastrophically injured person's total recovery. Products used in the health care field are heavily regulated, yet will occasionally still fail if they are poorly designed. The resulting injuries can often be devastating.

Cases have been successfully litigated involving all types of medical devices. Examples include faulty vital sign monitors, electric cauterizing devices that cause burns or explosions, prosthetic implants that fail, ventilators that fail to properly breathe for a patient or do not alarm when a patient becomes disconnected, and defective anesthesia equipment. Additionally, as most attorneys are aware, some heavily marketed drugs such as Vioxx are proving to cause serious, long-term injuries. One of the most difficult aspects of a medical products liability case is securing some degree of cooperation from the doctor, who realizes he may be facing a potential malpractice action. Even if the doctor has no potential liability, he simply may not want to play any role in any type of litigation. This problem is best addressed by attempting to build a relationship with the doctor's attorney.

Consumer products

The number of potentially defective consumer products is myriad, and usually the potential products liability case is self-evident upon the initial meeting with the client. Examples of types of products that have been the subject of litigation include: exploding aerosol cans; defective cigarette lighters; bungee cords; paint-ball guns; bicycle helmets; toxic substances that are not properly child-proofed; lawn-mowers; or kitchen appliances that cause a house fire. One area that can be particularly dangerous is toys. Approximately 155,400 children, ages 14 and under, were treated at hospital emergency

rooms for toy-related injuries in 2003. Of those injuries, about 5,000 (3 percent) required hospitalization. Some toys are well made and safe. More and more, however, cheaply made toys are entering the marketplace that can cause serious injuries to the children who play with them. Most parents are not knowledgeable enough about safe design to appreciate the danger before the harm. Any case involving serious injury arising out of the use of a consumer product should be investigated as a possible products liability action.

Conclusion

When a manufacturer fails to use the care necessary to provide a product that is reasonably safe, too often the result is horrible, life-long injuries for the unsuspecting user. It is our responsibility as attorneys to identify these cases, and to ensure that our clients are properly protected and aware of their options. A successfully litigated products liability case not only benefits and protects the injured client, but will hopefully cause the manufacturer to rethink the design of its product, and prevent others from suffering similar injuries.



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Endnotes

1. *Morgen Industries, Inc v. Vaughan*, 252 Va. 60, 471 S.E.2d 489 (1996) citing *Logan v. Montgomery Ward & Co.*, 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975).
2. See *Austin v. Clark Equip. Co.*, 48 F.3d 833, 836 (4th Cir. 1995); *Bly v. Otis Elevator Co.*, 713 F.2d 1040, 1043 (4th Cir. 1983).