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Complex Product Liability: The Plaintiff's Perspective of Evaluating and Preparing a Winning Case.

LaBarron Boone
Beasley, Allen, Crow, Methvin Portis & Miles, P.C.
218 Commerce St.
Montgomery, AL 36104
(334) 269-2343
labarron.boone@beasleyallen.com
www.beasleyallen.com

Kendall C. Dunson
Beasley, Allen, Crow, Methvin Portis & Miles, P.C.
218 Commerce St.
Montgomery, AL 36104
(334) 269-2343
kendall.dunson@beasleyallen.com
www.beasleyallen.com

Rodney Barganier
Lucas, Wash, Petway, Tucker & Stephens, P.C.
2 Chase Corp. Dr, Ste. 460
Birmingham, AL 35244
(205) 733-1595

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I. PRODUCT LIABILITY – The Rule of Law. What must you prove?

Product liability cases usually involve death and/or serious bodily injury. From case intake to case resolution can last as many as three years. The time and financial commitment required can reach astronomical levels. Before filing a product liability case, one must have a solid grasp of the law of the jurisdiction. Although product liability statutes differ from state to state, there are common essential elements that must be proven in any case.

ESSENTIAL ELEMENTS OF A PRODUCT LIABILITY CASE

A. A plaintiff must prove he suffered injury or damages to himself or his property by one who sold a product in a defective condition unreasonably dangerous to the plaintiff as the ultimate user of consumer, if

(1) the seller was engaged in the business of selling such a product, and

(2) it was expected to, and did, reach the user or consumer without substantial change in the condition in which it was sold.

B. Definition of defective and unreasonably dangerous:

(1) Defective means the product does not meet the reasonable expectations of an ordinary consumer as to its safety.

(2) Unreasonably dangerous means not fit for its intended purpose and its foreseeable misuse.

C. Different types of defects.

(1) Manufacturing Defect: means the final product differs unreasonably from its intended design.

(2) Design Defect: means the intended design itself is defective and unreasonably dangerous. The Hierarchy of Design Engineering is the key to understand the measures to be taken to identify and eliminate hazards. First, Design defect out. Next, guard against hazard and warn and finally warn. Warning is the least you can do and least effective.

(3) Guards should be effective and interlocked.

(4) Warnings should comply with recognized standards: signal words, color and language warns user of hazard, tells him how to avoid and consequences of not avoiding.

D. Affirmative Defenses.

(1) Contributory Negligence vs. Comparative Negligence
(2) Assumption of Risk
(3) Open and Obvious danger
(4) Misuse
(5) No causal relation defense is available to sellers only.

II. HOW TO ACCESS A PRODUCT LIABILITY CASE.

Because of the amount of time and money that must be dedicated to a product liability case it is extremely important to properly access the case before it is filed. The attorney must conduct a thorough investigation. A proper investigation will reduce the possibility of filing a case that will be resolved with a dispositive motion instead of a settlement or favorable jury verdict.

The first step in a product liability investigation is to identify the product and ensure its security. Let's assume the potential client is involved in a rollover accident in a Toyota 4-Runner. When the client or representative of the deceased contacts your office, ask the location of the vehicle. If the vehicle is not in the client's possession, identify the location and the person/entity responsible for its security. Immediately send the custodian/insurance company a protection letter informing them of your intent to pursue a product liability action against the vehicle manufacturer. Additionally, instruct the custodian to maintain the vehicle in its immediate post-accident condition and to protect it from the elements. The investigating attorney should then send a professional investigator to conduct a detailed analysis and photograph the evidence extensively. Finally, arrange to purchase the vehicle for your own safekeeping.

It is important to take the steps above for two specific reasons. First, it is almost impossible to maintain a product liability case without the product itself! Next, if the vehicle is destroyed or salvaged, there may be a cause of action against the wrongdoing party for spoliation of evidence.

After securing the evidence, the investigating attorney should interview as many witnesses as possible. All other physical evidence be documented and examined by the appropriate experts. It is wise at this point to contact other attorneys who have pursued the same or similar cases to discuss your case with them. More often

than not, other plaintiff attorneys are extremely helpful in providing insight and advice. Occasionally, an attorney will bless you with documents and deposition testimony. Access to this type of information before actually filing a case is invaluable.

After completing your investigation, it is time to evaluate the case to determine if it should be filed. The evaluation should include analysis of liability issues and damages. Liability questions include whether the product was defective; whether an economically and technologically feasible alternative design existed that would have eliminated or lessened the hazard; and finally, whether the case will survive a motion for summary judgment. A firm grasp of the law of the jurisdiction is necessary to properly evaluate liability issues.

After answering the liability question, you must turn to damages. The cost of a typical product liability case, including preparation and trial, can range from approximately $25,000 to $300,000. It is economically insensible to file a case that costs $150,000 to get the case to trial when the damages only total $50,000. Most product liability cases require a death or a serious bodily injury to satisfy the damages threshold. For those fortunate clients who survive an encounter with a defective product, look for a permanent injury, paralysis, severed body parts, the inability to maintain gainful employment and/or high medical bills.

Once you have determined that the case has satisfied the liability and damages threshold, it is time to file the case.

III. HOW TO PREPARE A PRODUCT LIABILITY CASE.

A. Discovery

After filing the case, the discovery period begins. Discovery from the defendant manufacturer in a product liability case usually centers around a few important issues: design drawings, alternative designs, testing procedures and results, prior lawsuits, standard compliance or noncompliance, other similar incidents and knowledge of the defect.

1. Written Discovery.

Interrogatories and Requests for Production, the most common forms of written discovery must be used wisely in product liability cases. A proper investigation of the case before filing as well as consultation with your expert witnesses can lead to useful and effective discovery requests. Interrogatories and Requests for Production should be focused and specific. Broad requests will only be met with objections that will force you to waist time filing motions to compel. The more specific the request, the better you will appear before the judge.

While Interrogatories and Requests for Production are the more common forms of written discovery, do not forget Requests for Admissions. Requests for Admissions are most effective when your investigation or other discovery requests

has disclosed crucial information. For example, a Request for Production for and all lawsuits filed where an employee lost a limb while operating the subject machinery might disclose cases filed 10 years or more before you client's injury. A Request for Admission asking the defendant manufacturer to admit that it had notice of the defect on the date the first lawsuit was filed could be effective. Affirmative responses to Requests for Admissions are powerful tools for briefs opposing summary judgment and are more powerful when shown to a jury.

From time to time, you might encounter a case where the machine or device is in the control of the defendant manufacturer or an uncooperative third party. Either a Request for Inspection or a Request for Pre-filing discovery are useful tools in this situation. Remember, the allegedly defective machine must be inspected and secured before filing.

2. Depositions.

Although cases can differ, each product liability case normally begins with the deposition of a corporate representative of the defendant manufacturer. 30(b)(5) and (6) depositions are useful tools to introduce yourself to the defendant manufacturer. Counsel noticing a corporate representative have the right to list broad areas of inquiry that require the defendant manufacturer to designate the corporate employee best suited to respond to the questions. 30(b)(5) and (6) depositions should also be used to identify documents to be requested later and

other individuals to be deposed later. Following are examples of categories of inquiry on a 30(b)(5) and (6) deposition notice:

1. Testimony and documents concerning the designer and manufacturer of the machine referenced in the Complaint and specifically the design of guards or safety devices to protect users from injury on the machine.

2. Testimony and documents relating to any lawsuits, claims, notices or complaints of injuries sustained in operating the subject machine or any similar meat grinder manufactured by this defendant.

3. Testimony and documents concerning the general corporate structure of this Defendant.

4. Testimony and documents concerning the names of the designer(s) of the subject machine, in particular the area of the machine where plaintiff was injured.

5. Testimony and documents concerning any communication, written or oral, between this Defendant, the designer/manufacturer of the subject meat grinder and any other Defendant in this case regarding injuries sustained in the use of the subject machine or similar meat grinders manufactured by this defendant.

6. Testimony and documents concerning the sale, sale price, date of manufacture, and place of manufacture for the subject machine and other meat grinders manufactured by this defendant.

7. Testimony and documents concerning this defendant's membership in any manufacturing, trade or sales organizations dealing with meat grinding machines.

8. Testimony and documents regarding predecessor and next generation designs of the subject meat grinder marketed and distributed by this Defendant.

9. Testimony and documents regarding other meat grinder models and safety features of those models marketed and/or distributed by this defendant.

10. Testimony and documents concerning the contractual and business relationship between this defendant and Allied Kenco and the designer/manufacturer of the subject machine.

11. Testimony and documents regarding the marketing and distribution of the subject machine.

The type of case involved, manufacturing defect vs. design defect, will dictate the areas of inquiry.

After completing the 30(b)(6) deposition, counsel should follow up with interrogatories, requests for production and/or requests for admission. Under some circumstances, it is prudent to videotape the corporate representative's deposition for future use at trial.

Following the corporate representative, attention should then turn to the engineer designers of the product. Thus, the technical part of the case begins. Most product

liability cases are design defect cases. One must understand the concept of safety engineering to effectively depose design engineers. Hazard identification and elimination/control are paramount issues in product liability cases. The Order of Design Precedence is the guide to follow:

1. ***DESIGN FOR MINIMUM RISK***. From the very beginning, the top priority is that hazards are to be eliminated in the design process. If an identified hazard cannot be eliminated, the associated risk is to be reduced to an acceptable level through design selection.

2. ***INCORPORATE SAFETY DEVICES.*** As a next course of action, if hazards cannot be eliminated or their attendant risks adequately reduced through design selection, reduce the risks to an acceptable level through the use of fixed, automatic, or other protective safety design features or devices. Make provisions for periodic maintenance and functional checks of safety design features or devices.

3. ***PROVIDE WARNING DEVICES.*** When identified hazards cannot be eliminated or their attendant risks reduced to an acceptable level through initial design decisions or through the incorporated safety devices, provide systems that detect the hazardous conditions and include warning signals to alert personnel of the hazards. Design warning signals and their application to minimize the probability for incorrect personnel reactions and standardize within like types of system.

4. ***DEVELOP AND INSTITUTE OPERATING PROCEDURES AND TRAINING.*** When it is impractical to eliminate hazards or reduce their associated risks to an acceptable level through design selection, incorporating safety devices, or warning devices, relevant operation procedures, training, and written warning advisories, signs and labels shall be used. However, do not use operating procedures and training, or other warning or caution signs and labels, or written advisory forms as the only risk reduction method for critical hazards. Acceptable procedures may include the use of personal protective equipment. Certain tasks and activities judged to be essential to safe

operation may require special training and certification of personnel proficiency.

Familiarity with the Order of Design Precedence is essential to effectively probing the defendant manufacturer's design process. Know it and know it well. Many of the issues discussed in the design engineers' depositions will resurface in the depositions of the defendant's experts.

3. OSI (Other Similar Incidents)

One of the most effect evidentiary tools in a product liability is the identification of other parties who have sustained injury from a defective product under circumstances similar to your client's. There are numerous options available to product attorneys to identify OSI's. During the investigation stage of the case when consulting other attorneys, ask them to provide you with OSI information they have gathered. Every product liability lawyer should be a member of ATLA and AIEG. These organizations are a great source for OSI information. Once the case is filed, propound interrogatories for OSI information. More often than not, defendant manufacturers, mindful of the usefulness of OSI's, will object and fight you tooth and nail to withhold such information. Be sure to follow up when they object. Be prepared to have to seek court intervention, via a motion to compel, to force the defendant to disclose the information. Finally, expert witnesses are good sources for OSI information. Expert witnesses can refer to old files or other attorneys for OSI information.

Once the OSI's are identified, contact them and discuss their case. Choose as many as possible who are willing to testify in your case. OSI witnesses at trial are powerful tools and are very persuasive to jurors. OSI testimony is admissible to show a defect and to show the defendant's knowledge of the defect.

B. Experts

Qualified and effective experts are essential to any product liability cases. Choose your experts wisely. Do a background search and speak with attorneys how have used them in the past before hiring them. Experts with too much "baggage" are not desirable. You want experts who know how to work up the case and who are effective and persuasive in trial.

1. Types of Experts.

There are countless areas of expertise. The experts chosen for a particular product liability case could make or break the case. Almost every case requires a Mechanical, Electrical or Safety engineer. These experts will examine the product design and identify the defect. They are also responsible for offering testimony on alternative designs, testing procedures, warnings and standards.

Biomechanical experts and Forensic Pathologists are responsible for explaining the relationship between the defect and the injury sustained by the client. These experts commonly have a medical and engineering background. Remember, once

the defect is identified, it must be tied to the injury sustained. Many complex automobile cases are lost or won on the testimony of these experts.

Vocational Rehabilitation, Economists and Life Care Plan experts interact with the injured client to identify and quantify her injuries. Oftentimes, a product liability plaintiff requires assistance to live out the remainder of her life. The injury sustained in most product liability accidents prevents the individual from gainful employment for the rest of his life. And even if they can return to work, they normally lose some capacity to earn a living. These experts will offer testimony to convey to the jury the quality of life the plaintiff can expect. They must do a good job at comparing the client's life with a monetary recovery and without a monetary recovery.

2. Cost Factors.

Simply put, experts are very expensive. Approximately 90% of all expenses in a complex product liability case can be attributed to paying experts. As stated earlier, expenses can balloon to six figures very quickly. So, choose your experts wisely and more importantly, be sure the case you're filing is worth filing.

3. Daubert Issues.

With the Supreme Court's decision in *Dauert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786 (1993),* the admissibility of expert testimony has come to the forefront of product liability cases. According to *Daubert*, an expert must be

qualified to testify on the subject matter and his testimony must sufficiently be reliable and based on generally accepted standards to be admissible. In and of itself, the *Daubert* standard is equitable. However, the trial court judge makes the determination. And as we all know, trial court judges today are just as politically motivated as they are judicially motivated.

Be sure your experts are qualified either by education or experience to testify. Next, make sure their opinions are based on sound principles and accepted science. Testing can be a useful tool in product liability cases. If your expert has conducted or participated in testing of the subject product, he is a solid choice. Even if your expert has not conducted her own testing, they can rely on other's tests, even testing conducted by the defendant.

In summary, be mindful of *Daubert* when choosing your expert and continue to be mindful of *Daubert* throughout case preparation. Ask your expert if she has ever been the subject of a *Daubert* challenge and find out the result of the challenge. Experts who have been through a *Daubert* challenge are often better equipped to address the issue in the future.

C. Standards

In all product liability cases, counsel for plaintiff will face one or more standards. Standards are generally accepted performance requirements. Standards are generally created by the industry and the government. Very rarely will you

encounter a case where the defendant's product fails to meet the recognized standard. More often than not, we deal with cases where the defendant's product meets the requirements of the standard.

In cases where the product complies with the applicable standard, defendant's counsel will waive it in the courtroom like it's the Bible itself. In these cases, you must attack the standard. Remember, standards are commonly created by the industry; therefore, the very defendant you're suing help set that standard. One fact they cannot deny is any standard is a minimum standard. It states the minimum that must be done to comply. There is no rule against doing more.

It helps to find other standards that also apply. For example, European standards for automobile manufacturers are much more strict and demanding than American standards. We've often found situations where a particular product saleable in the United States would be outlawed in Europe. Thus you have an American manufacturer selling cars in Europe with safety features that would save lives in the United States; however, they knowingly and willingly sell the same car here without the safety device exposing Americans to unreasonable risks.

Don't be discouraged when the defendant manufacturer responds to a discovery request that it complied with the accepted standard. Most products comply with the applicable standard. Simply have your expert prepared to respond in kind.

IV. Trial

Everything done so far is in anticipation of trial. Product Liability cases will generally go beyond a week to accommodate the number of witness and the complex nature of the issues. We generally try product cases with at least two experienced attorneys, most times three.

Counsel should always be mindful of her venue. Sometimes, venue can be as important as the case facts. The judge is also important. Remember, the judge will be making the decision on whether your expert's opinions are admissible or not. Additionally, the judge will make other admissibility decisions that could greatly impact your case. You must be prepared for unfavorable rulings on evidentiary matters.

Jury selection is extremely important. Retrieve the jury list as soon as it is prepared and hire local counsel to review the list with you. In high profile cases, it might be wise to hire a jury consultant. Effective jury consultants can offer useful information and advice on picking favorable jurors.

The usefulness of technology in product liability cases cannot be overstated. Complex issues are better understood with visual assistance. Legal technology like trial director or power point presentations should be used as much as possible. Jurors can get lost in the details so do everything you can to keep them interested.

