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Recognizing and Preserving Auto Product Liability Cases

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RECOGNIZING AND PRESERVING AUTO PRODUCT LIABILITY CASES

Automobile litigation is the cornerstone of most personal injury practices. Automobile cases can range in complexity from a simple rear-end collision to a multiparty products liability case involving design defect and crashworthiness issues. Many of the same considerations apply to most automobile cases although the particular facts or the recovery potential of any individual case may dictate what approach is most appropriate for that case. This paper will address some of the issues most likely to be encountered in an automobile defect claim.

I. RECOGNITION OF THE CASE

The first step in handling an auto defect or crashworthiness case is recognizing that you have one. The initial inquiry is whether something about the product caused or contributed to the injury. It is also important to recognize when a crashworthiness case is not feasible. By their very nature, design defect cases in general, and crashworthiness cases in particular, are very time consuming and expensive. Therefore, they are usually economically feasible to pursue only in instances of catastrophic injury or death. Conversely, a prudent attorney should always look closely at the circumstances surrounding any serious injury case in an effort to determine whether or not some aspect of the product increased the severity of the plaintiff's injuries or caused additional injuries that would not have occurred otherwise.

Another important element to consider is whether or not an alternate design exists that would have prevented or reduced the risk of injury. Texas law requires that a claimant who alleges a design defect must prove by a preponderance of the evidence that there was a safer alternative design. TEX. CIV. PRAC. & REM. CODE § 82.005(a)(1).

Finally, carefully consider any comparative fault issues. Even in jurisdictions in which the plaintiff's negligence is not a defense to a strict liability action, jurors tend to be much more skeptical, on both liability and damage issues, in cases involving a plaintiff driver rather than a passenger.

II. INVESTIGATION

Any successful automobile litigation case begins with a careful investigation. A thorough investigation, conducted early in the case, saves time and money later by facilitating early case evaluation and identifying potential problems.

A. Obtain Information from Initial Investigation

After the initial client interview, you need to immediately obtain the accident report prepared by the investigating officer. The report may contain measurements, diagrams, and a description of what happened. It will usually contain the officer's opinion on causation, and it may identify witnesses. The officer's field notes may contain information not included in the report, and it is often beneficial to talk to the officer in addition to reviewing the accident report. Many investigating officers also take photographs of the vehicles and scene.

At trial the portions of the report containing the officer's observations at the scene should be admissible as business records or public records. TEX. R. EVID. 803(6)&(8). Opinions, conclusions, or hearsay statements, however, are not admissible unless their admissibility is established under an appropriate rule of evidence. *Logan v. Grady*, 482 S.W.2d 313,317 (Tex. Civ. App.—Fort Worth 1972, no writ); see *Texas Dept. of Public Safety v. Nesmith*, 559 S.W.2d 443, 447 (Tex. Civ. App.—Corpus Christi 1977, no writ). But see *Hawkins v. Gorea Motor Express, Inc.*, 360 F.2d 933, 934 (2nd Cir. 1966) (not error to admit trooper's report based upon information derived from trooper's own observation and from conversations with the drivers).

B. Document the Scene

The scene of the wreck should be documented as carefully as is possible and feasible given the circumstances of the case. It should be well photographed from all directions, being careful to document any physical evidence at the scene such as skid marks, debris, scrapes, or gouge marks. Photographs of the scene should also include any traffic signs or other traffic control devices and any trees, signs, fences, or other objects which may have obstructed the drivers' views or otherwise played a role in the wreck.

Another source of photographs and other information is newspaper or television reporters who may have been at the scene. Also, it is often appropriate to obtain aerial photographs of the scene, and if the case justifies the expense, hiring a survey company to survey the scene is helpful. Finally, after you have obtained all of the available information gathered at the time of the accident, you will want your investigator/expert to thoroughly document the scene with photographs and measurements.

As part of your investigation, you need to find out whether or not the scene has been changed since the wreck. For example, if the roadway has been resurfaced, the coefficient of friction and other important factors may have changed. Information concerning resurfacing can be obtained from the Texas Department of Highways and Transportation.

C. Document the Vehicles

The nature and extent of damage to the vehicles is always important in automobile product liability cases. Each vehicle should be carefully photographed, and repair estimates or damage appraisals should be obtained. In a potential design defect or crashworthiness case, obtaining possession of the vehicle is perhaps the single most important step in your investigation. To a large degree, your product liability case begins and ends with the vehicle in which your client was injured. Without the vehicle, your chances of successfully pursuing a design defect or crashworthiness claim drop drastically.

Possession of the vehicle must be secured as quickly as possible. If your client no longer possesses the vehicle, you need to determine who does. If the vehicle has been declared a total loss, it is likely to have been sent to a salvage yard where it could be disassembled, destroyed, or auctioned. If you are unable to find out from the insurance company, the wrecker company, or your client where the vehicle is located, an inquiry to the Department of Highways and Transportation may help because salvage yards must surrender vehicle titles to the department. In addition, an inquiry to the Department of Motor Vehicles will reveal the chain of ownership of

the vehicle if that is important in your case. Once the vehicle is acquired, it needs to be stored in a safe place where it will be protected from spoliation.

D. Document Witnesses

It is always important to interview witnesses and get their authorization to obtain any statements they have given. The accident report or officer's field notes may contain the names and addresses of people at the scene. You also may wish to interview EMS personnel and wrecker drivers. Additional witnesses may be identified from news reports. Witness interviews or statements let you understand early in the case what the evidence is going to be. This information will be invaluable if an accident reconstruction is necessary.

E. Additional Sources of Information in Products Liability Cases

There is an enormous wealth of information sources which can be consulted before filing suit and initiating discovery. The more you know before filing suit, the better you will be able to prepare your case and control the flow of the litigation. Some examples of available information sources are:

- (1) American National Standards Institute (ANSI)
25 W. 43rd St., Floor 4
New York, NY 10036
(212) 642-4900 (Telephone)
www.ansi.org

ANSI is a repository for all American National Standards.

- (2) Center for Auto Safety (CAS)
1825 Connecticut Ave., NW, Suite 330
Washington, D. C. 20009
(202) 328-7700 (Telephone)
www.autosafety.org

CAS is a consumer oriented group advocating highway safety. CAS tracks government activities and, when possible, actively participates in the federal rule making process.

- (3) Highway Safety Research Center (HSRC)
University of North Carolina
730 Martin Luther King, Jr. Blvd., Suite 300, CB #3430
Chapel Hill, NC 27599
(919) 962-2202 (Telephone)
www.hsrc.unc.edu

The HSRC studies highway design and driver performance. It also tests vehicles.

- (4) Insurance Institute for Highway Safety
1005 North Glebb Road, Ste. 800
Arlington, VA 22201
(703) 247-1500 (Telephone)
www.iihs.org

The IIHS studies motor vehicle wrecks and evaluates ways to reduce injuries and damage resulting therefrom.

- (5) National Technical Information Service (NTIS)
5285 Port Royal Rd.
Springfield, VA 22161
(703) 605-6000 (Telephone)
www.ntis.gov

The NTIS is a U.S. Department of Commerce clearinghouse for government funded research and engineering studies.

- (6) National Institute of Standards and Technology
100 Bureau Drive, Stop 1070
Gaithersburg, MD 20899
(301) 975-6478 (Telephone)
www.nist.gov

As part of the Department of Commerce, the Institute promulgates standards for manufacturers of products and provides industry with information for product development.

- (7) National Highway Traffic Safety Administration (NHTSA)
400 7th St., S.W.
Washington, D. C. 20590
(888) 327-4236 (Telephone)
www.nhtsa.dot.gov

This governmental agency is involved in the enforcement of motor vehicle safety standards. NHTSA also investigates and recalls motor vehicles and their component parts and reviews pedestrian and driver safety standards.

- (8) Society of Automotive Engineers (SAE) – Automotive Headquarters
755 W. Big Beaver, Suite 1600
Troy, MI 48084
(248) 273-2455 (Telephone)
<http://automobile.sae.org>

SAE is an industry organization which compiles and publishes technical reports in all areas of vehicle design. SAE establishes voluntary standards for vehicle design and construction.

- (9) Transportation Research Board (TRB)
Keck Center of the National Academics
500 Fifth Street NW
Washington, D. C. 20001
(202) 334-2934 (Telephone)
www.trb.org

TRB is part of the National Research Council which is jointly administered by the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine. The TRB compiles and provides information concerning transportation related technology.

- (10) U.S. Department of Transportation (DOT)
400 7th St., S.W.
Washington, D.C. 20590
(202) 366-4000 (Telephone)
www.dot.gov

The DOT is a federal agency charged with administration of transportation programs and development of federal policies and programs related to transportation.

- (11) U.S. Patent and Trademark Office
Public Search Facility, Madison East, 1st Floor
600 Dulany St.
Arlington, VA 22314
(800) 786-9199 (Telephone)
www.uspto.gov

This federal agency is charged with regulating patents. It is a source of information on product design and alternative designs.

- (12) University of Michigan Transportation Research Institute (UMTRI)
2109 Baxter Road
Ann Arbor, Michigan 48109
(734) 764-6504 (Telephone)
www.umtri.umich.edu

The Institute studies highway design, vehicles, and their component parts.

III. RECONSTRUCTION

Careful investigation will pay off when you begin to reconstruct the wreck. Accident reconstruction is crucial to the successful development of any design defect or crashworthiness case, as well as many vehicular negligence cases. The plaintiff will have the burden of proving how the wreck happened and in some instances how the injuries occurred.

You must understand and be able to demonstrate how the wreck happened. Your reconstruction expert can use the physical evidence, photographs, and witness statements to determine what happened, including important issues of speed, point of impact, and angle of impact. In many instances, a reconstruction expert can take this evidence and prepare a computer reenactment of the initial crash. These animations are invaluable when trying to explain a complex accident scenario to a jury.

Reconstruction is required in a design defect or crashworthiness case to determine what happened to the occupants during the crash. To prove your crashworthiness case, you will need to pinpoint the injury causing event. If the design defect in question did not cause your client's injury, you have no case. Therefore, it is wise to involve a biomechanical engineer in the early stages of case development. This early involvement may save you money by avoiding preparation and trial of a case that cannot be won.

More importantly, when there is a case, you will have begun preparing at the very earliest stage for what is likely to be one of the most hotly contested issues at trial. Biomechanical analysis of the occupant kinematics is likely to be the manufacturer's first point of defense. Your expert will need to be prepared to illustrate to the jury how the injury occurred. Frequently, crash test film and computer reenactments can be used to demonstrate occupant movement in the crash and the mechanism of injury. This proof is vital to the success of your case. Your biomechanical engineer may need to review certain documents to analyze the mechanics of the injury(ies). Some of these records may include EMS/ambulance reports, hospital reports, death certificate, autopsy records, county coroner's report, and funeral home records. Often, these sources have taken photographs, particularly in death cases, and these evidentiary materials should also be requested. Height and weight of the injured/deceased are frequently important considerations. If the height and weight are not included in EMS, autopsy, or hospital records, you will need to obtain prior medical records that contain this information.

A. Admissibility of Reconstruction Evidence

Not all accident reconstructions are performed by engineering experts. In some instances, current or former police officers have provided the accident reconstruction; however, the investigating officer on your wreck is not necessarily qualified to render an opinion regarding how the accident occurred. *See, e.g., Pilgrim's Pride Corp. v. Smoak*, 134 S.W.3d 880, 892 (Tex. App.—Texarkana 2004, pet. denied) (officer not qualified to give opinion that defendant's lane change was cause of accident); *Lopez v. S. Pac. Transp. Co.*, 847 S.W.2d 330, 334 (Tex. App.—El Paso 1993, no writ) (officer not qualified to testify regarding cause of accident where there was no showing of specialized knowledge of accident reconstruction); *Hooper v. Torres*, 790 S.W.2d 757, 760 (Tex. App.—El Paso 1990, writ denied) (officer not qualified to testify as to cause of accident because he was not an accident reconstructionist).

If qualified, the investigating officer does make an excellent reconstruction witness in many vehicular negligence cases. In this regard, the Department of Public Safety offers an accident reconstruction school which has been attended by many DPS troopers and officers of local police departments. This training in addition to actual experience in the field can establish the investigating officer as qualified to give reconstruction testimony. Courts have held that police officers are qualified to testify regarding accident reconstruction if they are trained in the

science and possess the high degree of knowledge sufficient to qualify as an expert. *See Gainsco County Mut. Ins. Co. v. Martinez*, 27 S.W.3d 97, 104–05 (Tex. App.—San Antonio 2000, pet. dism'd by agr.); *Chavers v. State*, 991 S.W.2d 457, 460–61 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd).

Once a witness is qualified to give opinion testimony based upon the witness' specialized "knowledge, skill, experience, training, or education, the witness may express opinions even with respect to an ultimate issue to be decided by the trier of fact." TEX. R. EVID. 704. *See Louder v. De Leon*, 754 S.W.2d 148, 148–49 (Tex. 1988) (permitting a state trooper to give opinion that driver's failure to yield right-of-way was proximate cause of accident). *See also Trailways, Inc. v. Clark*, 794 S.W.2d 479, 483 (Tex. App.—Corpus Christi 1990, writ denied) (officer allowed to testify regarding speed of bus and its contribution to cause of accident); *Rainbo Baking Co. v. Stafford*, 764 S.W.2d 379, 383 (Tex. App.—Beaumont 1989), writ denied, 787 S.W.2d 41 (Tex. 1990) (officer permitted to testify regarding cause of accident).

Unlike the common vehicular negligence case, however, engineering expertise is frequently needed in automobile product liability or crashworthiness cases. Many times these engineering experts will have to perform tests or otherwise create evidence. In order for this evidence to be admissible, the tests must be conducted under conditions substantially similar to those existing at the time of the accident. *Univ. of Tex. at Austin v. Hinton*, 822 S.W.2d 197, 202–03 (Tex. App.—Austin 1991, no writ). The conditions do not have to be absolutely identical. Instead, the trial court is given broad discretion to determine whether the evidence would aid rather than confuse the jury. *See Sosa v. Koshy*, 961 S.W.2d 420, 430 (Tex. App.—Houston [1st Dist.] 1997); *Garza v. Cole*, 753 S.W.2d 245, 247 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.); *Hinton*, 822 S.W.2d at 203 (Tex. App.—Austin 1991, no writ).

IV. DESIGN DEFECT AND CRASHWORTHINESS

Most automobile product liability litigation is based upon design defect or crashworthiness theories although manufacturing defect cases are occasionally encountered in which the vehicle does not conform to the design standards established by the manufacturer. *See Henderson v. Ford Motor Co.*, 519 S.W.2d 87, 93 (Tex. 1974) (improperly placed gasket); *Cosper v. Gen. Motors Corp.*, 472 S.W.2d 552, 554 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.) (holes in the exhaust system).

The bulk of automobile product liability cases involve a design defect, in which the vehicle has been manufactured in accordance with the manufacturer's specifications, but its design renders the vehicle unreasonably dangerous. *See, e.g., Acord v. Gen. Motors Corp.*, 669 S.W.2d 111, 113 (Tex. 1984); *Turner v. Gen. Motors Corp.*, 584 S.W.2d 844, 847 (Tex. 1979); *Gen. Motors Corp. v. Hopkins*, 548 S.W.2d 344, 352 (Tex. 1977); *Guentzel v. Toyota Motor Corp.*, 768 S.W.2d 890, 892 (Tex. App.—San Antonio 1989, writ denied). In addition, design defect allegations are frequently used in conjunction with a marketing defect theory, in which the manufacturer is alleged to have failed to adequately warn of dangers or has failed to provide adequate instructions for safe use. *See Ford Motor Co. v. Durrill*, 714 S.W.2d 329, 337 (Tex. App.—Corpus Christi 1986, writ dism'd per stipulation); *Ford Motor Co. v. Nowak*, 638 S.W.2d 582, 592 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.).

