

## What's Your Malfunction?

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Case law suggests that the malfunction theory places its own additional burden on a plaintiff to undertake an analysis that rules out other potential explanations for an incident.

# Defending a Defect Allegation Based on Circumstantial Evidence

At what point is a product liability plaintiff relieved of the burden of showing that a specific defect was the cause of an accident? Courts generally permit a plaintiff to prove a defect without direct evidence if the plaintiff can provide

some circumstantial evidence of a defect. However, a plaintiff must also eliminate potential alternative causes and demonstrate that the product user did not abuse, alter or misuse a product. Defending a product defect case premised upon circumstantial evidence, therefore, presents certain unique considerations and challenges for a defense attorney.

### Restatement (Third) Torts, Product Liability §3

Restatement (Third) Torts, Product Liability §3, finalized in 1998, provides guidance in litigating a nonspecific defect case and specifies the standard for proving a strict product liability claim. Section 3, entitled "Circumstantial Evidence Supporting Inference of Product Defect," enumerates the means for plaintiffs in strict liability actions to meet their burden of proving a defect through circumstantial evidence or through inference of a defect, stating:

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

- (a) was of a kind that ordinarily occurs as a result of product defect; and
- (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

Section 3 is also commonly referred to as the "malfunction theory," "indeterminate defect theory" or "general defect theory."

### Background on Section 3

The drafters of Section 3 explained in comment a that Section 3 is derived in part from Restatement (Second) Torts §328D entitled "*Res Ipsa Loquitur*." The doctrine of *res ipsa loquitur* was born on the streets of England when a barrel of flour fell out of the second floor window of a barn of



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the flour manufacturer, striking a passerby. The English court in *Byrne v. Boadle*, 159 Eng. Rep. 299 (Exch. of Pleas 1863), adopted the principle of *res ipsa loquitur*, which in Latin means “the facts speak for themselves.” The *Byrne* court found that although the passerby could not point to a specific negligent act by the manufacturer, the only just cause for the incident must have been the conduct of the flour manufacturer.

Although similar reasoning applies to both, Section 3 is in no way a strict liability version or twin of *res ipsa loquitur*. The court in *Metropolitan Property and Cas. Ins. Co. v. Deere and Co.*, 302 Conn. 123, 136, 25 A.3d 571 (Conn. 2011) stated:

[U]nlike in *res ipsa* cases, the defendant in a product liability action ordinarily does not have control of the instrumentality that causes the plaintiff’s injury at the time the injury occurs. When the product is out of the control of the manufacturer, the likelihood of other potential causes of the accident that are not attributable to the manufacturer necessarily increases.

In fact, numerous courts have refused to apply *res ipsa* to strict liability claims. See *Myrlak v. Port Auth.*, 157 N.J. 84, 723 A.2d 45 (1997) (citing *Whitted v. General Motors Corp.*, 58 F.3d 1200, 1208 (7th Cir. 1995) (applying Indiana law and holding that *res ipsa loquitur* charge may not be given, but circumstantial evidence may be used to prove a product defect); *Welge v. Planters Lifesavers Co.*, 17 F.3d 209, 211 (7th Cir. 1994) (applying Illinois law and declaring that *res ipsa loquitur* is not applicable to products liability cases); *Brooks v. Colonial Chevrolet-Buick, Inc.*, 579 So. 2d 1328, 1333 (Ala. 1991) (stating that “*res ipsa loquitur* is not applicable in products liability cases”); *Tresham v. Ford Motor Co.*, 275 Cal. App. 2d 403, 407, 79 Cal. Rptr. 883 (Cal. Ct. App. 1969) (stating that “an instruction embodying the doctrine of *res ipsa loquitur* in strict liability cases is not legally supportable”); *Ford Motor Co. v. Reed*, 689 N.E.2d 751, 754 (Ind. Ct. App. 1997) (stating that “products liability and the doctrine of *res ipsa loquitur* are antithetical”); *Brothers v. General Motors Corp.*, 202 Mont. 477, 658 P.2d 1108, 1110 (Mont. 1983) (stating that *res ipsa* is applied to human conduct, not defective products); *Fulton v. Pfizer Hosp. Products*

*Group, Inc.*, 872 S.W.2d 908, 912 (Tenn. Ct. App. 1993) (holding that the doctrine “has application only to the law of negligence and does not apply in a products liability case”).

In a *res ipsa loquitur* claim, the incident must have resulted from the assumed negligent conduct of the defendant due to the lack of any alternative explanations. To that end, the element of “control” is introduced into the factors to be accounted for in a determination of liability. The distinction between Section 3 and *res ipsa loquitur* requires accounting for those factors that may alter the product from the time when it left the manufacturer until the occurrence of the incident. Comment d to Section 3 states:

Evidence may permit the inference that a defect in the product at the time of the harm-causing incident caused the product to malfunction, but not the inference that the defect existed at the time of sale or distribution. Such factors as the age of the product, possible alteration by repairers or others, and misuse by the plaintiff or third parties may have introduced the defect that causes harm.

The distinction between a *res ipsa loquitur* claim and a malfunction theory claim must be kept in mind in defending a malfunction theory case. In a day and age when products are increasingly resold, refurbished or modified, close attention must be paid to the entire life span of the product and not merely to how it was initially made. From the defense perspective, it is imperative to scrutinize exactly what happened to a product after it left the manufacturer’s control, up until the time of the incident in question. But to do so, a defense attorney must often start with the present and work backward.

### All Available Evidence at the Scene of the Incident Must First Be Preserved

An important part of the life span of a product for litigation purposes obviously is the condition in which the product was found or observed at or immediately after the time of the incident. Moreover, the nature of the incident will have a direct effect on the defense of the case, and therefore, the condition of the product itself should not only be examined closely, but also the precise details of the incident must

be closely investigated, *i.e.* the who, what, when, and where.

For example, cases involving fires or catastrophic events present significant challenges to the plaintiffs and the defendants alike, since often, much of the evidence has been destroyed or compromised. Without all available data gathered from the scene of an incident, the end hypothesis about what

## Testimonial evidence

or other findings may show that a product was misused, altered or used past its normal lifespan.

occurred may be inherently flawed. In many cases, what the defense considers valuable evidence is overlooked, either intentionally or unintentionally, by a plaintiff’s experts.

For example, a fire in a garage may compromise every potential ignition source and hinder the defense attorney from collecting evidence regarding alternative causes in the garage. In *Allstate Ins. Co. v. Daimler Chrysler Corp.*, 2006 U.S. Dist. Lexis 70686, the plaintiff’s experts alleged that a fire started in the engine compartment of a van parked in a garage. The plaintiff’s experts admitted, however, that they found no evidence of an electrical malfunction in the vehicle, despite their opinion that an electrical malfunction caused the fire. Defense experts argued that the fire started outside of the vehicle and that several inconsistent statements shed doubt on the plaintiff’s ignition scenario. The defendants pointed to specific statements by the homeowner to detectives immediately after the incident that the homeowner had smoked a cigarette in the garage earlier that day. There were also numerous potential ignition sources located in the garage, such as a gas lawnmower, a propane tank and grill, an electric garage door opener, a gas can and spray cans. Despite these other potential ignition sources, the court found that the plaintiff’s nonspecific defect theory was sufficient to withstand summary judgment.

ment. The court cited both the homeowner's subsequent denial of having smoked in the garage and the testimony of the fire department lieutenant who, based on a visual analysis, ruled out the other potential ignition sources.

Significantly, in *Allstate v. Daimler Chrysler*, however, there was no evidence in the record that the fire department lieutenant inspected the remnants of the garage door opener, gas can, propane tank or gas lawn mower to evaluate whether they were potential sources of ignition. Careful analysis of a fire investigator's opinions and bases for those opinions must be scrutinized in the event that a plaintiff cannot point to a specific defect. For example, if the fire department fails to document a scene properly before discarding evidence or removing it from the area of origin, then a proper analysis cannot be conducted.

Distinguishable from *Allstate* is the case of *Aetna Cas. and Sur. Co. v. General Elec. Co.*, 758 F.2d 319, C.A. 8 (Mo. 1985). In this case, Aetna sought to show that a ballast, a small transformer located in a light fixture, caused a fire in the plaintiff's insured's warehouse. The plaintiff's experts testified that they collected all the evidence from the scene, which included several GE light ballasts. The plaintiff further stated that one of the ballasts showed signs that it had overheated and likely caused the fire. Defense experts however, pointed out that the evidence collected from the scene indicated that not all the ballasts and components were accounted for. They further stated that the observations made by the plaintiff's experts about the GE ballasts were consistent only with exposure to a fire and that the failure to collect the other ballasts cast doubt on whether a GE ballast was in fact the cause of the fire. The Eighth Circuit, upholding the district court decision and entering a verdict for the defendant, cited the district court's opinion, which stated, "[I]n this case a range of products not manufactured by defendant may have ignited the fire. Plaintiffs have identified only defendant's ballast as the defective product. This claim is based on incomplete and doubtful circumstantial evidence." *Id.* at 323.

Identifying potential alternative causes starts with the defense. Once a claimant or a plaintiff's counsel submits notice to a product manufacturer, the manufacturer

must ensure that all parties tied to the alternative sources are notified. Response to notice should refer to standards for the preservation of evidence and notification of all interested parties and standards and applicable law with respect to spoliation of evidence. ASTM International in particular promulgates standards for the preservation of evidence in many different scenarios.

### Age and Use of a Product

Turning to a product itself, if it was preserved and to the degree that forensic analysis can be conducted, physical evidence of previous use, misuse or alteration must be carefully evaluated by a defense investigator. Section 3 addresses age and usage of a product as factors to consider when evaluating the strength of a malfunction theory. Comment d of Section 3 states that

evidence may permit the inference that a defect in the product at the time of the harm-causing incident caused the product to malfunction, but not the inference that the defect existed at the time of sale or distribution. Such factors as the age of the product, possible alteration by repairers or others, and misuse by the plaintiff or third parties may have introduced the defect that causes harm.

*Id.*

To conduct a thorough examination and analysis of a product, you will need to request the original manufacturing specifications and drawings from your client. In addition, you should obtain several exemplar products for comparison. Even if you have a third-party expert examine a product, the people most knowledgeable about the product are often your own client's long-time engineers and scientists, who may have been involved in the original research and design. Use them as resources and ask them questions.

In addition to physical evidence, circumstantial evidence may be used not only to support a finding under the malfunction theory, but also to refute the same. Testimonial evidence or other findings may show that a product was misused, altered or used past its normal lifespan. As explained in one decision, "Although the amount of time between purchase and injury is a significant factor in the inferential equation, it is not the only one. To it must be added other factors that might

account for an alteration of the product after sale, including improper use, modification, tampering or improper maintenance." *Living and Learning Centre, Inc. v. Griese Custom Signs, Inc.*, 3 Conn. App. 661, 666–667, 491 A.2d 433 (Conn. App. 1985). Such circumstantial evidence may include testimony from family, friends and neighbors about how and how long a product at issue had been used and maintained by the claimant in the past.

In *Walker v. General Elec. Co.*, 968 F.2d 116, 120 (3rd Cir. 1992), for example, the Walkers won a GE toaster as a door prize at a company party in 1983. The Walkers used the toaster daily, without incident for approximately seven years when the toaster was destroyed in a house fire at the Walkers' home. An official with the Maine Office of the State Fire Marshall and an origin and cause investigator for the homeowner's insurance company found that the area of origin for the fire was at or near the toaster. The Walkers' expert testified at trial that he could not locate a specific defect at the toaster. The expert further testified that the solenoid mechanism in a toaster could simply wear out and require replacement. The defense stressed the fact that the toaster had been used for six years without incident. Finding in favor of the defense, the district court stated that the "plaintiffs failed to meet their burden of proof in establishing the element of defect since they failed to exclude other reasonable explanations for the malfunction. Indeed, both plaintiffs' and defendant's testimony suggested that normal wear and tear could be another reasonable explanation for the toaster's alleged malfunction." *Id.* at 120.

### Is Expert Testimony Necessary in a Malfunction Theory Case?

If circumstantial evidence is enough, and a plaintiff need not point to a specific defect in a product malfunction case, does that mean that a plaintiff does not need to present expert testimony? Some cases support the proposition that no expert testimony is required in a malfunction theory case. Those cases are not numerous, however, and typically involve an incident in which individuals directly witnessed an accident. For example, in *Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199, 217–18, 694 A.2d 1319 (1997), the court held

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that the plaintiffs, who alleged that they sustained injuries as a result of excessive vibration from power tools used during their employment, did not need expert testimony to prove a design defect because “a jury may, under appropriate circumstances, infer a defect from the evidence.” *Id.* Likewise, the court in *Metropolitan v. Deere* indicated that expert testimony may not be necessary in a malfunction theory case, stating:

A plaintiff may establish these elements through the use of various forms of circumstantial evidence, including evidence of (1) the history and use of the particular product, (2) the manner in which the product malfunctioned, (3) similar malfunctions in similar products that may negate the possibility of other causes, (4) the age of the product in relation to its life expectancy, and (5) the most likely causes of the malfunction. If lay witnesses and common experience are not sufficient to remove the case from the realm of speculation, the plaintiff will need to present expert testimony to establish a prima facie case. *Metropolitan v. Deere*, 302 Conn. at 140–41.

More often, how a product malfunctioned and whether the malfunction caused or could have caused the injury are the important issues. Even if a plaintiff cannot pinpoint a specific defect, courts find that a product can be tested to determine the feasibility that a product could have caused an accident or injury under the circumstances of an incident. If an expert’s theory is that a product is unreasonably dangerous for consumer use, the product must be tested as a consumer would ordinarily use the product. Underwriters Laboratories, “UL,” for instance, has established specific standards to which certain categories of products must adhere before obtaining UL certification. See UL Standards, <http://ulstandardsinfo.net.ul.com> (last visited Sept. 27, 2013). From a practical perspective, an expert’s credibility can be damaged in front of a jury if he or she did not test a product as it was allegedly operating or situated at the time of an incident.

From a legal perspective, however the juxtaposition between acceptance of the malfunction theory and adherence to the scientific method has received little attention from courts.

The *Daubert* court delineated four non-exclusive factors to evaluate the reliability of an opinion. Whether the opinion has been (1) tested, (2) subjected to peer review and publication, (3) analyzed for known or potential error rate, and (4) is generally accepted within the specific scientific field. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593–94, 113 S. Ct. 2786, (1993). The question, therefore, becomes, how can a hypothesis that a product was defective under a malfunction theory based upon circumstantial evidence pass muster under *Daubert*?

Recent opinions in malfunction cases focus on the testing of a hypothesis. The courts specifically evaluated expert testimony through the lens of *Daubert* and FRE 702 in excluding such testimony when the experts failed to test their hypotheses. In addition, “[t]esting, which is actually performed, must be appropriate and must analytically prove the expert’s hypothesis.” *Presley v. Lakewood Engineering and Mfg. Co.*, 553 F.3d 638 (8th Cir. 2009). In *Presley*, the plaintiff’s expert sought to admit testimony regarding a fire spread theory within an electric space heater. The district court, after conducting a *Daubert* hearing on the issues, excluded the plaintiff’s expert’s opinion “because [the plaintiff’s expert] failed to apply reliably the standards of NFPA 921 to his theory.” Defense counsel must consult experts, consultants and technically knowledgeable individuals that work for a client early and often to determine which types of tests an expert from either side can conduct, thereby allowing counsel to feel confident that he or she knows the scientific analysis that an expert must perform to meet the plaintiff’s burden.

At first glance, the malfunction theory seems to provide plaintiffs with an “out” when one cannot pinpoint a defect. The case law suggests, however, that the malfunction theory places its own additional burden on a plaintiff to undertake an analysis that rules out other potential explanations for an incident. It is a defense counsel’s job to ensure that a plaintiff’s analysis in excluding all other causes is grounded in truth and fact and based on all the available data and the scientific method.

