



Heavy machinery in construction and industry

The dangerous, largely unregulated world of killer machines

BY LAWRENCE R. BOOTH

Imagine a product which has not had safety improvements in decades and regularly kills and maims scores of workers. Further, imagine that the manufacturers (and potential defendants) who dominate the market are largely self-insured, arrogant and concerned only with sales and profits. Heavy machinery used in construction and industry such as cranes, forklifts, backhoes, tractors, bobcats and all manner of digging and lifting devices are made by a handful of such manufacturers. Unlike cars and airplanes, they are not subject to government regulations in this country.

Manufacturers are not motivated to make safety changes, despite the mayhem they cause, since they are rarely successfully sued. OSHA regulations do not apply to them, but instead apply to the employers and employees who use their products. In short, the manufacturers exist in a perfect world – for them – where they can brush off the litigation which arises out of accidents with their products like so much lint. Nonetheless, with the right approach and thorough preparation, these cases can be successful for you and your client. Let's look at a few.

Pile drivers

The defendant manufactured pile drivers. These are huge machines which drill deep holes in the ground and then pound concrete pillars in place. The machine design virtually has never changed over the years. The decedent accidentally

fell into one of these holes and was crushed by the pile driver. The operator tried to stop the death from occurring by stepping on a brake which halts the pile driver in mid-air; but it failed. The reason it failed was because of a design defect in the brake mechanism. It seems that the brake assembly was metal on metal (to minimize maintenance), typically rusted and failed to connect the brake plate with ratchet teeth. This problem could have been corrected with a small bushing which literally would have cost 10 cents. My child's backyard seesaw toy had the 10-cent bushing in a similar application. The heavy machine, which cost hundreds of thousands of dollars, did not. I went back to the Midwest and took the deposition of one of the defendant's engineers who admitted that the 10-cent bushing would have saved the decedent. The case was over.

Backhoes

Plaintiff was rendered a quadriplegic when the boom on a backhoe smashed him against the body of the machine. This accident would never have occurred if a cut-off switch (required in Europe and not required here since there are no regulations here) had been designed into the machine. When we pointed out to the defendant's design expert that the defendant's own product, as sold in Europe, had the cut-off switch, we were on our way to an excellent result for our client. The defense expert did not know about the European requirements before he took the stand. To top it off, the defendant's attempt to blame the victim was

neutralized when the operating manual showed a worker standing in exactly the spot where the defendant claimed the victim should never have stood. I must have read that thick manual a hundred times before I found that little gem.

Mining the gold in manuals

Manufacturers of heavy equipment love to produce manuals, safety videos and other literature. In large measure these are designed to shift the blame away from them and onto either the operator or his employer. In one case, I took the deposition of the defendant's employee who wrote the manual. Although he knew generally what was in it, he fell on his face by not being aware of many of the statements and illustrations which completely contradicted his employer's position in the case. Safety videos are even better than manuals because there is often a disconnect between what they show and what they say. In one case, the claim was made that the decedent should not have put his body where it could be crushed by a forklift and yet the defendant's own video showed the ideal operator doing exactly the same thing.

Sales literature can be wonderful. It is created by the advertising department and not by safety engineers. It will make exaggerated statements which are completely untrue. It is very helpful, if time-consuming, to obtain all sales literature ever produced for a product. When you compare the old and new sales literature you may find changes that were made in an attempt to cover up issues that arose in past litigation.



Beware the ANSI standards defense

The American National Standards Institute (ANSI) promulgates standards and safety rules on a wide variety of products. Even though there is token representation on their committees by safety experts and engineers who are not beholden to the industry, in large measure these standards simply represent a codification of the status quo.

Unless a particular product violates some ANSI rule (highly unlikely), it is far better to either keep them out of evidence or at least have the plaintiff's expert explain that they represent minimum standards which do not comply with applicable products liability law. A product is defective if it is not as safe as it can be made within the technology that exists at the time of its manufacture. If the cause of action is for products liability, under settled California law, custom and usage is not admissible. ANSI standards are at best custom and usage. The fact that other manufacturers or even all manufacturers do the same thing does not mean that the product is within technological feasibility. (*Titus v. Bethlehem Steel Corp.* (1979) 91 Cal.App.3d 372 [154 Cal.Rptr. 122].)

Find a safer product

With enough effort, it is sometimes possible to find a better product somewhere in the world. Sometimes, these products have improved safety which would have prevented the accident in question because of stringent government safety standards. If you are successful, it is definitely worth the effort.

A patent search will sometimes result in a patent (sometimes obtained by the defendant in the case) which vastly improves safety but was never put into the product. The beauty of patent applications is that the company seeking the

patent must spell out the need and these will sometimes read like a final argument. Finding a patent is like finding a better product; it makes the "theories" of the plaintiff's expert concrete.

Blame others

Every accident with heavy machinery is an attempt by the defendant to blame the victim or often his employer. This always takes the form of pointing to some warning on the machine or in some thick manual. The problem here is that it is axiomatic in design engineering that you should never resort to warnings if the safety problem can be designed out of the product itself. All experts, including defense experts, will agree with this universal principle.

Warnings and instructions depend on whether they are communicated, the intelligence of the operator or his employer, the necessities of the moment and, most importantly, the tendency of employers and even victims to cut corners. Physical design changes eliminate all this serendipity.

Prior accidents

Whatever happens to any plaintiff injured by large machinery has probably happened before. The problem is to get this information from the defendant. There is almost no real downside for Defendant to outright lying about the numbers or details of prior accidents. Discovery is difficult and may take multiple motions. However, it should be kept in mind that the harder they fight discovery, the more likely they have something to hide. I did one case in which the defendant manufacturer instructed its dealers to make only one copy of any accident report and to send it to the home office. These reports were kept in a cardboard box under someone's desk.

The attorney who represented plaintiffs in prior accidents or litigation should always be contacted, because any information from the defendant will be spun.

Judges are reluctant to allow extended time in trial to go through prior accidents; so once the information on prior accidents is obtained, the facts have to be pinned down in precise Interrogatories or Requests for Admissions or both. This simplifies enormously the admission of this evidence. Beyond showing that the safety problem was systemic and never addressed despite accidents, evidence of prior accidents takes a tremendous amount of heat off the plaintiff who will always be characterized as the isolated victim who brought it on himself.

Final arguments

In final argument, the defense will be claiming millions of identical uses with only a handful of injuries. This makes it all the more important for the plaintiff's attorney to find a motive, usually a profit motive, for defendant not making what is often a simple fix. Then the passionate argument can be made that one preventable serious injury or death is one too many.



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Larry Booth is a member since 1973 of the Inner Circle of Advocates, a nationwide group of the 100 top trial lawyers in the United States.

His firm, Booth & Koskoff, in Torrance (www.boothkoskoff.com), has achieved over 75 million-dollar-plus verdicts and settlements, primarily in the fields of product liability and construction accidents. He graduated first in his class from USC Law School and was editor in chief of the Law Review. He is a past president of Consumer Attorneys Association of Los Angeles.