Dissecting automotive crashworthiness litigation

A look at some of the more sobering aspects of products-liability litigation against automakers

By Lawrence Booth

Crashworthiness litigation is potentially a mind-boggling adventure against a very sophisticated opponent with lots of money, willing to spend it. Here are some of the more sobering aspects of this high-level litigation.

The intense battlefield

Lawyers who have never sued a car manufacturer are in for a rude awakening. Without question, car manufacturers put up a defense that is highly professional, utilizes outstanding lawyers and does not give an inch to the opposition. The whole idea is to discourage the faint of heart from litigating and then follow up with a very inadequate settlement offer. If the plaintiffs' attorney has not developed a reputation for having gone the distance in these cases, at least once, he or she at first will be ignored and then offered at best a small settlement.

The plaintiff's attorney must have very, very deep pockets to take on one of these cases. There are two major areas of expense:

1. It is common to have to take depositions in Michigan and all over the country of employees of the defendant and experts on both sides. There will be huge travel expenses. In most jurisdictions, the expert depositions are taken where they reside. Even if either side can compel attendance of the expert in the place where the lawsuit is pending, the travel expenses of the expert can be worse than the costs of sending an attorney.

2. There will also be huge expenses in paying experts for their time in preparing the case, going to the scene or examining the car(s), appearing at depositions and appearing at trial. The depositions tend to be extremely lengthy. This involves large court reporter fees and fees to adverse and friendly experts. The other side will usually have to pay your expert for his or her time, but there is so much unreimbursed preparation that the numbers just skyrocket.

3. Court displays, sometimes even involving the actual cars or expensive mockups, can make the costs increase even more. In addition, there is no way to avoid most of these expenses because these cases simply do not settle, if at all, until the last moment. The bottom line is that these cases should never be attempted unless the injuries support immense costs and the goal should never be settlement.

Networking with other attorneys

Fortunately, this area of litigation is the most sophisticated when it comes to networking between attorneys and exchanging information. One of the best groups is the Attorneys Information Exchange Group, 402 Office Park Drive, Suite 200, Birmingham, AL 35223.

These groups will provide periodic bulletins, seminars and the ability to find cutting-edge experts. Perhaps of greatest value is the publication of settlements and verdicts in various categories of cases. It helps the plaintiff's attorney to get a real sense of the types of cases that have been successful and why. Examples are rollovers, seatbelts, defective seats, airbags, safety glass and roof crush.

Another excellent source is the Insurance Institute for Highway Safety, 1005 N. Glebe Rd., Arlington, VA 22201. They provide books, articles, pamphlets and crash films. Although this is not exactly attorney networking, surprisingly they have a common ground with plaintiff's attorneys in making cars safer to reduce the costs to insurance companies. Automobile manufacturers are never insured. They defend these cases with large home-office legal firms and scores of independent firms all over the country.

Typical cases where networking pays off

• *Gas tank cases:* Almost everyone remembers the Ford Pinto cases. These small cars with gas tanks in the rear went up in flames when struck from behind and the vehicles were eventually phased out. But the problem of failure to provide gas tank protection remains. Gas tanks should be situated over the rear axle, the filler pipes should be flexible and the opening in the tank should have a one-way valve.

• *Safety glass:* Many years ago, all windows in cars had laminated glass (that is a sheet of plastic between two pieces of glass). Now that is true only with respect to the front window. Tempered glass is touted as safer because it shatters into tiny pieces. The problem is that it does not prevent passengers, whether belted or not, from being ejected out of the side windows, especially in a rollover and especially with children, who notoriously do not stay in safety belts in a rollover accident.

• *Airbags:* Automobile manufacturers have determined that air bags sell cars. As a result, they now have bags all over the car, often six or eight bags. In the

opinion of some experts, air bags are useless and even dangerous. They do not offer any restraint, but merely prevent injury from contact inside the car. On the other hand, they kill and maim children and small women. The trade-off is totally unnecessary because with the most sophisticated safety belts (equipped with pretensioners, which tighten the belts on sudden change in acceleration), the passenger is fully protected except from intrusion. The claimed statistics (many critics argue) that air bags save lives are bogus because in major accidents there is no way to know.

• *Rollovers:* The advent of the SUV has resulted in an epidemic of rollover accidents. Rollovers amount to about one-third of all accidents and yet cause over half of the fatalities. An SUV is merely a light truck with a passenger area added on that makes the narrow base vehicle top heavy. Sophisticated traction devices have helped, but not much. Since the public loves them, and the profit margin is huge, the defendants keep making them and keep entering into confidential settlements when they predictably roll over.

• *Roof crush:* The rollover problem is compounded by roofs that crush. The best evidence that federal standards do not represent the state of the art is roof test standards that require only static tests with the windows up. In every rollover accident (especially with tempered glass), the windows explode and offer no support at all. These roofs are flimsy because of style (which sells cars) and attempts to reduce weight to meet mileage goals, which also sells cars.

• *Seatbelts:* There have been many cases in which the seatbelts failed. Even if they don't fail by pulling out of their anchor, they can spool out and offer no protection. Pretensioners (not to be confused with ratchet devices) that pull the passenger back into the seat like the driver of a race car and that operate on the same trigger mechanisms as air bags are in far too few cars.

• *Failed Seats:* Seats will sometimes fail because they are designed to fail. There is a lively debate between automotive engineers as to whether a seat should fail and fall back or hold the passenger rigidly in the seat. Injuries occur either way. (Note: For an in-depth discussion of this topic, see Advocate Magazine for Consumer Attorneys, November 2012).

Avoid being the lone ranger

One of the advantages of belonging to an attorney's group beyond obtaining information and experts is to avoid going out on a limb on a case that has little merit. That is not to say that someone cannot be the first to challenge a particular design or safety device. But it must be recognized that two things will happen if the theory is unique:

• The defense will be much more rigorous in defending so as not to open the door to a flood of different claims.

• The chances of settlement diminish.

Defenses and defense strategies

In general, typical defense arguments include:

• The other driver was negligent and caused the accident.

• The plaintiff's negligence caused the accident.

• The vehicle is crashworthy because it is designed and manufactured to industry standards.

• The vehicle is crashworthy because it complies with federal safety standards.

Blaming the other driver

The plaintiff may sue the manufacturer of the cars that were involved in the accident for several reasons:

• The other driver (if more than one vehicle was involved) may have inadequate insurance.

• In a big injury case, it is difficult to obtain a substantial verdict against an individual driver, regardless of his or her coverage.

• The problem with the car may be so obvious that leaving the manufacturer out of the case can be disastrous. It may be malpractice to fail to sue the manufacturer.

• It may be a one-car accident.

Nonetheless, the defense will constantly try to blame the accident on the other driver and repeatedly argue that the plaintiff is looking for a deep pocket. The plaintiff's attorney should counter this theme by arguing that the other driver may be responsible for the accident, but not the injuries, or that the injuries were made much worse by the so-called "second accident" (see below).

Blaming the driver

If the plaintiff was driving and was significantly negligent, the plaintiff's attorney should probably walk away from the case. If the negligence consists of the use of alcohol or drugs, the lawyer should always walk away.

Even when the plaintiff's or other driver's negligence is minor or nonexistent, the defense will still focus on the drivers' conduct. If there is some arguable negligence on the driver(s), your best response is typically to acknowledge it, but go on to explain that although these parties may have contributed to the *accident*, they did not contribute to the *injuries* and certainly not to the full extent of the injuries. Automobile accidents are a fact of life, but with a well-designed car, serious injuries can be eliminated or greatly reduced.

It is useful to talk about the "first accident" — the collision between two cars or between a car and another object — and the "second accident" — the failure of the automobile to protect the plaintiff during the crash. The question of who caused the "first accident" is largely academic if that accident would have (in a safe car) resulted in minor injuries or no injuries at all. What the jury should be focusing on is fault for the "second accident" because that is what caused the severe injuries and that is why everyone is in court.

If your client has substantial economic damages, you can often acknowledge some fault on the part of one or

more of the drivers without sacrificing a large verdict. If the jury finds any fault on the part of the auto-manufacturer defendant, it will be liable for *all* of the economic damages, minus any percentage of fault attributable to the plaintiff. Any fault attributable to third-party drivers will only affect non-economic damages under California law (Prop 51). And acknowledging some fault on the driver(s) can take a lot of wind out of the defendant's comparative fault argument and help prevent the jury from thinking that you're overreaching.

Designed to industry standards

The defense position is that a product is state of the art (and thus crashworthy or not defective) if it is designed or manufactured to the same standards that other manufacturers of similar products use, which could be far lower than technologically feasible.

Practice tip:

The automobile manufacturers claim that they are bitter competitors. The reality is that they work closely together and always know what the other companies are doing. Hence, they tend to all operate at a minimal level of safety and claim they are doing what everyone else is doing. Nonetheless, the plaintiff can sometimes find much improved safety coming from high-end companies. The defense argument will often be that the car involved in your case is a low- or medium-range car and these innovations are too expensive to include in it. The facts are often different, especially if you compare the costs of bells and whistles that help sell cars and do nothing for occupant safety. Manufacturers cannot sacrifice safety because of its cost just to be competitive. Otherwise, manufacturers would always have a built-in defense that they could not sell the product (whatever it is) if they had to spend the money necessary to protect the consumer.

Compliance with federal standards

One of the principal defenses to a crashworthiness case is compliance with federal motor vehicle safety standards. The plaintiff's attorney must get across to the jury that these standards do not represent the state of the art, but the lowest possible standard consistent with the political process. Automobile manufacturers and their trade groups and lobbyists spend millions of dollars each year to affect federal standards.

Practice tip:

You can request that the court instruct the jury that these standards represent minimal regulations only and the defendant manufacturer can still be liable even if it fully complied with the standards. But this is not enough. You need a top-flight plaintiff's expert who is prepared to show how the applicable regulations do not represent the safest approach and how they were lobbied into their present status. This evidence is absolutely critical to success in auto- defect litigation.


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Larry Booth is the author, along with his son Roger Booth, of the 600-page Personal Injury Handbook *(www.JamesPublishing.com) and has tried hundreds of jury trials. His firm, Booth & Koskoff, has achieved over 70 jury verdicts and settlements in excess of one million dollars. In 1974 he was selected to the Inner Circle of Advocates, whose membership is limited to the top 100 Trial Lawyers in the United States.*