Trial of a Defendant's Product Liability Case

I. Direct and Cross-Examination of the Experts

In product liability cases, direct and cross-examination of expert witnesses can be the most decisive portion of the litigation. Products liability cases are unique in that many times, a entire case or the amount of damages awarded depends on whether the defense attorney has effectively examined the experts at trial.

Expert witnesses are essentially the same as any other witness, except that they discuss specialized, often technical, subjects and use a different vocabulary. The concepts that they address are often accessible with the proper foundation, but in order for the jury to understand you will first need to learn the experts language in the area of expertise so that you can be an effective translator. If you learn the language, you can understand their testimony and neutralize it. Once you understand his or her language, the validity or logic, or lack thereof, of their testimony becomes apparent. The expert is there to help the jury understand an unfamiliar subject, don't let the expert hide faulty reasoning or harmful data behind a smoke screen of complex terminology.

When expecting expert witnesses at trial it is important to prepare for Daubert or Frye motions and your motion in limine. New York State Courts employ the Frye standard. *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923). Federal Courts apply the Daubert standard. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993). Frequently, attorneys are surprised shortly before trial with disclosure of questionable experts on areas such as mechanical issues, biomechanical issues, etc. If the plaintiff presents these matters shortly before trial it may

be difficult to properly prepare a response or expose the basis of questionable foundation, studies considered or information relied on. Further, you may be able to use your motion in limine to eliminate much prejudicial or irrelevant testimony.

Expert Witness Checklist:

- ✓ Know how the subject matter of the experts testimony fits in with the case as a whole;
- ✓ Understand the language the expert will be using, know the terms and theories that the expert will use;
- ✓ Reduce the testimony of the expert to layman's terms;
- ✓ Reduce the logic of the experts opinion in the same way you would reduce that of any other witness.
- ✓ Attack overly technical analysis with common sense, but do not invite an explanation.

A. Direct Examination of an Expert

Typically, the first subject addressed during direct of an expert is the expert's qualifications. This includes the witness's educational background, specialized training, and whether they are an authority in their field. It is important to 'sell' the expert and elicit any honors, awards, or publications that may increase his credibility. Further, if the expert's field is not widely known, an explanation of what type of specialized knowledge the expert has may be warranted. Next, as a predicate for the expert's opinion, it is important to elicit what investigation or analysis was undertaken by the expert in making his assessment of the case. If there are contradictory findings these must be explained. If it is revealed that there are facts that are inconsistent with the expert's opinion, these facts should be disclosed and explained. Once

this ground work is in place, i.e., the jury knows the educational background, they understand his field, and they understand his research, they are primed to hear the expert's opinion.

B. Effective Cross-Examination of Experts

By the time you reach trial, most of the outline for your cross-examination should already be apparent to you. All of the digesting of pre-trial discovery and on-trial information has been completed and you already have an idea of where you want the cross-examination to go. A good cross-examiner studies the case from the opponent's perspective, anticipates what ground the direct examination will attempt to cover, knows generally what the expert will say, and can prepare basic topics in advance.

Rarely ask a question unless you already know the answer. The key to effective, aggressive cross-examination is disciplined interrogation. If your question is put properly, and is one in which you control all of the information the jury hears you put the expert witness in the very limited position of merely affirming or denying your question. You thereby reduce the possible answers to either a yes or no. To contain the expert witness's response, keep the questions simple and be prepared to move slowly in a measured cadence, one fact at a time. The exception to the rule of only asking questions to which you know the answer is the rare occasion when you do not care about the answer and can make an effective point using either a "yes" or a "no."

Before impeaching the plaintiff's expert, you should decide whether you need to impeach. A well executed cross-examination has the potential for accomplishing more than simply discrediting the plaintiff's expert. An opponent's expert can sometimes be made to appear supportive of your case and destruction of their credibility should be carefully considered.

Once you have done the proper preparation regarding an expert witness, you should decide the themes of attack to be used to impeach the expert witness. There are many possible themes that you may use to develop the impeachment of an adverse expert. Some of these themes are directed to the expert's opinion, while others impeach the expert himself. These include:

1. The expert has hidden or destroyed materials he used to formulate his opinion;
2. The expert's opinions may involve speculation more than expert opinion;
3. The expert's opinions are inconsistent with authority in the field;
4. The expert is biased or prejudiced;
5. The expert lacks adequate qualifications;
6. The expert is misinformed, or poorly informed, about the relevant facts of the case and
7. The expert is otherwise not credible

A cross-examiner must know when to stop, but to impress the jury with the importance of the cross-exam the last question and answer should be climatic. The last sequence should have the witness testify to something favorable to the examiner, such as a contradiction or a statement that establishes his bias or interest in the outcome. Begin with a gentle but firm approach, endeavoring to establish a rapport with the witness. As you proceed, your questions should gradually become more dramatic. Stop once you obtain the responses you were seeking. By ending the exchange with a climax the jury will remember the last answer and that will help them remember your point when you address it during your closing argument.

II. Demonstrative Evidence

Real or demonstrative evidence appeals to the senses of the trier of fact. An object or its likeness whose quality or condition is in issue is presented for inspection, allowing the judge and

jury to acquire knowledge about it through the use of their senses, most often their sense of sight. Prince, Richardson on Evidence, §4.201, Robert T. Farrell, 11th Ed. 1995. Demonstrative evidence is powerfully persuasive because, as the saying goes, seeing is believing. Demonstrative evidence appeals directly to the jurors' senses and possesses an immediacy and reality that endows it with a particularly persuasive effect that bare verbal testimony often lacks. McCormick on Evidence, 2d ed., Hornbook Series, Section 212, p. 524, 525 (1972). Even if the evidence does not immediately produce an emotional response, it may nevertheless create the impression of objective reality to the viewer or listener.

In a products liability case it is common for the first piece of demonstrative evidence introduced to be the product itself or accompanying warnings and literature. Commentator Michael Hoenig opines that the product itself is the key witness in a product liability case. He states:

> There is often a key witness in products liability litigation who is impartial and unbiased, speechless and unassertive, yet, who can testify eloquently about "defect" and "causation" issues. This witness has no motive to lie, sheds no tears for either side and will not bend the knee under a withering cross-examination. The witness is not paid to testify and will tell the truth to the best of its ability. Who is this unique witness? It is the product involved in the accident itself.[1]

When the product is small and easily moveable, such as a power tool, lawn mower or pharmaceutical, courtroom production should be expected. With larger products, like industrial machinery, the use of photographs, computerized projections or sketches may be presented instead.

[1] Frumer & Friedman, 3-18 Products Liability § 18.07 (Matthew Bender, Rev Ed. 2013).

People tend to be sight-oriented and the impact that effective use of demonstrative evidence brings to a trial is significant. The studies, below, reveal interesting statistics that support these conclusions[2]:

- In many studies, experimental psychologists and educators have found that retention of information three days after a meeting or other event is six times greater when information is presented by visual and oral means than when the information is presented by the spoken word alone.
- Studies by educational researchers suggest that approximately 83% of human learning occurs visually, and the remaining 17% through the other senses - 11% through hearing, 3.5% through smell, 1% through taste, and 1.5% through touch.
- The studies suggest that three days after an event, people retain 10% of what they heard from an oral presentation, 35% from a visual presentation, and 65% from a visual and oral presentation.

A. The Basics of Demonstrative Evidence

Demonstrative evidence is admissible if it is fairly accurate, promotes a better understanding of the issues, and if its deficiencies may be explained to the jury. Every exhibit must meet three basic requirements before it can be admitted as evidence: (1) the exhibit must be relevant; (2) the qualifying witness must be competent; and (3) the exhibit must be authenticated.

Relevance – The first obstacle to getting a piece of evidence admitted is to show that it is relevant. Fed R. Evid. 401 provides that "[r]elevant evidence means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be otherwise." Fed R. Evid. 403 provides that, even if

[2] http://www.osha.gov/doc/outreachtraining/htmlfiles/traintec.html

relevant, evidence may nevertheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

"Competent" Witness – To begin with, it is presumed that anyone offered as a witness is presumed competent to testify. Fed. R. Evid. 601. When the objection is made to the competency of a witness, the court must determine the competence issue before testimony is taken. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter to which they are testifying. Fed. R. Evid. 602.

Authentication – The proponent of an item of demonstrative evidence must demonstrate its genuineness by clear and convincing evidence. If the thing being offered is capable of being replaced or altered, the proponent must provide evidence of its identity and its integrity. This is typically done by showing a chain of custody that tracks the item from its acquisition to its presentation at trial. Prince, Richardson on Evidence, §4.201, Robert T. Farrell, 11th Ed. 1995, (*citing People v. McGee*, 49 NY2d 48). Gaps or discrepancies in the chain of custody need not require the trial judge to exclude the evidence if on the whole, the proponent's evidence provides reasonable assurance of the identity and unaltered character of the item. Rather, breaks in the chain of custody may be considered in assessing the weight of the evidence. The foundation must be technically adequate to satisfy the judge and factually persuasive to convince the jury. *See* Fed R. Evid. 901, 902. Demonstrative evidence is admissible if it fairly and accurately represents a real thing or is substantially similar to an event, and helps explain the facts of the case. *See People V. Mariner,* 147 A.D.2d 659, 538 N.Y.S.2d 61 (2d Dept. 1989).

- **Fungible v. Non-fungible items**: Where an item is fungible, the party offering the evidence needs to establish the chain of custody, describing how each item was handled and prove that it remains in an unchanged condition. Non-fungible items may be authenticated by testimony that it is the item in question and is in a substantially unchanged condition.
- **Authentication of Charts, Graphs, Models, and Medical Drawings, etc**.: Properly authenticated diagrams, maps, sketches, drawings, and architectural plans, charts and other similar visual aids are admissible. A competent witness must attest to the accuracy of the summary, depiction, representation, or reproduction of events and the absence of distortion or deletion.
- **Authentication of Recorded Exhibits** (audio recordings, movies, etc): The equipment used to record the event as well as the equipment used to show it must be in good working condition. Further, a qualified witness must be able to identify the scenes, persons, or voices on the tape. Finally, the tape itself must be securely stored so as to prevent the possibility of tampering or editing. *See People v. Goldfeld*, 60 A.D.2d 1, 400 N.Y.S.2d 229 (4th Dept. 1977).
- **Authentication of Photographs**: Properly authenticated photographs are admissible whenever relevant to describe the physical characteristics of a person, place or thing. Prince, Richardson on Evidence, §4-212, Robert T. Farrell, 11th Ed. 1995, (*citing People v. Webster* 139 NY 73). Authentication of a photograph must be made by a person who can testify that the photograph is a fair and accurate representation as of the time of the occurrence involved. *See Moore v. Leaseway Transp. Corp.*, 49 N.Y.2d 720, 426 N.Y.S.2d 259 (1980). The time and date of a photograph can be excused so long as a competent witness testifies that the photograph is an accurate representation of the scene at the time and date at issue. *See Saporito v. City of New York*, 14 N.Y.2d 474, 253 N.Y.S.2d 985 (1964).

B. Admissibility of Products That Have Been Changed or Tampered

When a product is available, and there are no issues as to whether the product proffered is "the" actual product, admissibility is usually a foregone conclusion. In many cases however, such as airplane crashes, tire blows outs or motor vehicle accidents, the entire part or product may be available but in a changed or damaged condition. In these cases, a party seeking to introduce the product must make a showing that the product introduced is the actual product and that the product is substantially unchanged for purposes of the lawsuit, despite its altered condition. *See Cover v. Cohen*, 61 N.Y.2d 261 (1984).

For example, in *Cover v Cohen*, a strict products liability action based upon an alleged design defect, the Court of Appeals held that it was a prejudicial error to admit into evidence an accelerator spring that was removed from an automobile fifteen months after the accident. The plaintiff sought to have the spring admitted despite some elongation, as evidence of what such a spring looks like. The plaintiff had no explanation for the distortion. The Court of Appeals held that absent foundational testimony as to how the spring became elongated or how it was removed from the car, the prejudice outweighed any evidence it might provide of how the spring looked at the day of the accident. *See Cover v. Cohen*, 61 N.Y.2d 261 (1984).

As a defense attorney, an important question you should ask yourself when you get a product liability case is "who has the product?" If your client has the product you should make arrangements to make sure the product is stored in an adequate place so that you can better defend against a charge of tampering. If the plaintiff has possession of the product keep in mind that he may liable for spoliation if he alters the product.

Spoliation has been defined as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2nd Cir.

1999). When a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court may dismiss the pleadings of the party responsible for the spoliation or at least preclude that party from offering evidence as to the destroyed product. *See Abulhasan v. Uniroyal-Goodrich Tire Co*., 14 A.D.3d 900, 788 N.Y.S.2d 497, 500–501 (2005), *See also Strelov v. Hertz Corp*., 171 A.D.2d 420, 566 N.Y.S.2d 646, 647 (1991).

For example, in *Abulhasan v. Uniroyal-Goodrich Tire Co*, a plaintiff had made a statement that somebody was going to "pay" immediately after an auto-accident. Further, prior to the sale of his car as scrap, the plaintiff took numerous photographs of the allegedly defective tire but was able to produce only a of the photos at the time of discovery. The court found that the manufacturer was entitled to summary judgment on spoliation grounds due to the plaintiff's actions.

C. Experiments and Other Demonstrations

The results of tests or experiments are admissible at trial to show the nature, quality or tendency of an object provided that the judge is satisfied that the conditions under which the experiments or tests were conducted were sufficiently similar to those existing at the time in question to make the result achieved by the test relevant to the issue. Prince, Richardson on Evidence, §4-219, Robert T. Farrell, 11th Ed. 1995 (citing *Goldner v. Kemper Ins*., 152 A.D.2d 936). In a products liability action involving an automobile/truck collision allegedly caused by a defect in the truck, the Sixth Circuit held that it was not an error to admit evidence of demonstrations of the accident, even though there were dissimilarities between the experiment and the accident conditions, because the evidence was not offered as an accident recreation but as an illustration of the differences between wear damage and impact damage of the allegedly

defective assembly. Evidence of demonstrations may be admitted to illustrate an expert's theory about the cause of an accident even where dissimilarities in the conditions exist. Where a party offers an experiment for the purpose of illustrating its expert's relevant testimony, not for the purpose of attempting to recreate the accident, the evidence may be admitted subject to a clear limiting instruction. Experiments designed to demonstrate general principles of physics need not be performed under circumstances similar to those prevailing at the time of the accident. *Burrows v. General Motors Corp*., 999 F.2d 539 (6th Cir. 1993); see also *Harvey v. General Motors Corp*., 873 F.2d 1343 (10th Cir. 1989).

III. Handling the Jury

A. Handling Jury Selection in Product Litigation

Proper jury selection is crucial to defending a products liability case. However, some jurors are unlikely to expose their hidden biases against defendants and finding out their true feelings can take work. Making sure your jury is composed of members that are unbiased to your defendant may require the use of different tools and tactics.

Jury Selection Checklist:

- ✓ Juror questionnaires should be utilized and reviewed as they allow a trial attorney to determine juror's attitudes on crucial issues;
- ✓ Challenges for cause should be aggressively pursued;
- ✓ Voir dire can be useful in getting information on highly personal or sensitive issues;
- ✓ Adopt a good attitude and demeanor as jurors are more likely to admit bias when they speak to someone they believe understands them.
- ✓ Make sure to pay just as much attention to an alternate juror, a product liability case can take weeks and an alternate juror will be more likely to serve as a deliberating juror.

B. Asking the Right Questions

Asking a prospective juror the right questions in the right way is crucial to uncovering their biases. The use of metaphors can be effective since many prospective jurors will seldom come out and say that they are unable to be fair. Once some level of bias has been exposed a trial attorney might ask:

1. "If this case was a race, would the defendant be starting one step behind?"
2. "Do you tend to side with the underdog? Do you see the plaintiff as the underdog in this case?"
3. "If you were representing my client, would you want a person with your views as a juror?"
4. "Based on your questionnaire, would you say the plaintiff starts with a bit of an edge?"

If a juror answers in the affirmative to any of these questions it raises the level of commitment they have to their bias. Afterwards, the attorney might be able to further raise this statement to the juror to suggest that they may have difficulty in being fair.

C. Using Opening Statements to Prime the Jury

The purpose of opening statements is to introduce the jury to the case by informing and orienting the jury, which includes educating them on the facts and disputed issues that will be presented. Attorneys are under ethical obligations to refer only to evidence that will be admissible during the trial. The opening statement should state the elements of each claim and defense and explain how such claims or defenses are going to be proven. Opening statements are a vehicle for introducing broad themes and preparing the jury for how the presentation of the case is going to proceed.

There are several topics that are improper to include in the opening statements: inadmissible evidence, unproveable evidence, argument, personal opinions and discussions of the law. Attorneys should have a good faith belief that evidence they are mentioning in the opening statement will be admissible and therefore relevant and reliable. An attorney is obligated to prove facts mentioned in their opening therefore it is improper to mention unproveable evidence. While opening statements cannot contain argument, judges vary greatly in the leeway they will allow attorneys. Attorneys cannot make statements of opinion, for example, stating that a particular witness is credible or lacks credibility.

D. Developing a Theme

While the need to develop and communicate the themes of your case may be obvious, the "how" to may be challenging. Often by the time your case goes to trial, you have warded off motions to dismiss and/or summary judgment, participated in numerous settlement conferences and possibly mediation. You have become so familiar with the facts of your case and legal strengths and weaknesses that you may have become dull to the emotional impact that your case can have. So how can you evoke emotion and thereby gain the interest of the jury from the beginning?

One thematic method that is useful in a products liability case is called the "Attribution Theory/Choice Theme." This theme emphasizes that when a Plaintiff engages in a certain behavior involving a product that the plaintiff made a choice and therefore had responsibility. To the extent that the plaintiff is seen as having a choice in their conduct, then the jurors may

feel that the plaintiff is responsible for the consequences of that choice. Examples of choices with product liability include:

- The plaintiff chose to disregard the simple and clear warning against operating without the safety guard
- The plaintiff chose not to wear the required safety gear when working with heavy machinery
- The plaintiff disregarded the instructions

Jurors tend to reach conclusions about personal responsibility when the choice theme is presented to them. In other words, the jury understands that if a person chooses to do something, he is more likely to be responsible for the results of that choice.

The development and communication of themes will in and of itself evoke an emotional response. Another common technique for evoking emotion is the use of labels to frame the themes. For example, labeling the plaintiff above as the careless, distracted, inattentive versus the careful and safety oriented company.