

Product Liability and the Malfunction Theory

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Malfunction Theory

1. Explained
2. Significant verdicts
3. Treatment in several jurisdictions
4. Modern Technology
5. Best practices



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Malfunction Theory Explained

- Also known as: “malfunction doctrine”, “indeterminate defect theory”, or the “general defect theory”
- Principle of circumstantial evidence where:
 - Plaintiff in a **product-liability** action,
 - may prove the **probability of a defect**,
 - **without** proving the **specific existence of a defect**,
 - **IF** the incident was a type that ordinarily occurs as a result of a product defect, **AND**
 - **IF** normal causes of malfunctions are eliminated.
- Operates like **res ipsa loquitur**



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Malfunction Theory Explained

- Impact on product-liability litigation can be significant:
 - Product-liability cases are plaintiff friendly
 - Courts are using this theory to lessen, or eliminate proof of causation in product liability cases.
 - Plaintiffs may present circumstantial evidence that rules out reasonable secondary causes in lieu of direct evidence of causation.

- Circumstantial Evidence vs. Direct Evidence



Verdicts Based on Malfunction Theory

- *Izzarelli v. R.J. Reynolds Tobacco Co.*
[Connecticut, 2016] –
 - **Verdict: \$7.9 million**
 - Jury determined Defendant's use of additives/manipulation increased the user's risk of cancer
- *Cancelleri v. Ford Motor Co.*
[Pennsylvania, 2015] –
 - **Verdict: \$5.9 million**
 - Plaintiff's injuries: disc herniation, spinal cord compression, and lower extremity paralysis
 - Driver's side airbag failed to deploy when Plaintiff was driving and was hit at an "offset, front angle."
 - Jury found the airbag/restraint system in the Plaintiff's vehicle was defectively designed.



Verdicts Based on Malfunction Theory

- *Wiggins v. Synthes* [Pennsylvania, 2011] –
 - **Verdict: \$2 million**
 - Surgical screws implanted during surgery into Plaintiff's hip broke causing Plaintiff's bones to displace again.
 - Court determined the jury could infer the existence of a defect through circumstantial evidence of a malfunction.
 - Testimony by Plaintiff's doctor was sufficient to demonstrate the screws were defective.
 - Further, there was no evidence that the Plaintiff engaged in activity that would have caused the defect.
- *Blumer v. Ford Motor Co.* [Pennsylvania, 2011] –
 - **Verdict: \$8.75 million (increased to \$10 million due to delay damages)**
 - Plaintiff's husband died when parking brake failed on his truck.



Verdicts Based on Malfunction Theory

- *Stackiewicz v. Nissan Motor Corp. in USA* [Nevada, 1984]
 - **Verdict: \$3.1 million**
 - The steering wheel in Plaintiff's Nissan locked, forcing the car to veer left causing Plaintiff to strike the median.
 - Court held that evidence of a steering malfunction which resulted in driver losing control could be accepted by a trier of fact without direct proof of the malfunction.
 - Notable that Plaintiff bought the care two months/2,400 miles earlier



Verdicts Based on Malfunction Theory

- *DiCosolo v. Janssen Pharm., Inc.* [Illinois, 2011]
 - **Verdict: \$18 million**
 - Patient died while using a prescription transdermal pain patch.
 - Jury found for Patient's estate for allegations for negligence, strict products liability, and manufacturing defect.
- *Nowak by & Through Nowak v. Faberge USA, Inc.* [Maryland, 1992] –
 - **Verdict: \$1.5 million**
 - Punctured can of AquaNet hairspray, where the spray itself ignited when in contact with a gas stove, injured minor Plaintiff.
 - Jury found the defects were the proximate cause of the injuries.



Food Borne Illness Claims



- Many states require destruction or absence of the product in order for a plaintiff to be entitled to rely on the indeterminate defect theory.
- Varying success
 - Plaintiff: *Schaefer v. JLC Food Systems* (2005); *Gant v. Lucy Ho's Bamboo Garden* (1984)
 - Defendant: *Hairston v. Burger King Corp.* (2000); *Burnett v. Essex Insurance Co.* (2000); *Kiessling v. Kiawah Island Inn* (2019)





Treatment of Malfunction Theory Throughout Various Jurisdictions

Majority View	Minority View
<p>Product-less plaintiff with at least some inferential structure in which to make a claim.</p>	<p>Kentucky, New Mexico, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Hawaii, Indiana, Kansas: Recognize circumstantial evidence's ability to prove prima facie case of product liability but do not offer an established inference to be made from circumstantial evidence.</p>
<p>Res ipsa loquitur only creates a permissible inference of negligence, which means the finder of facts may choose to use the facts to fill the gap</p>	<p>Res ipsa loquitur creates a presumption of negligence, which requires defendant to put on evidence to rebut liability</p>



Treatment of Malfunction Theory Throughout Various Jurisdictions

State	Malfunction theory – Generally	Pleading Requirements	Burden of Proof	Comments
 <p>CA</p>	Principle of circumstantial evidence	<p>No CA case suggests plaintiff must plead malfunction theory (or intent to rely on circumstantial evidence) in the complaint</p> <p>9th Cir. indicates plaintiff must allege product has been lost/destroyed</p>	Plaintiff must show defect, not just occurrence of an accident. Can be done through circumstantial evidence.	Circumstantial evidence may include: 1) evidence that the accident occurred after sale; 2) evidence that the plaintiff did not cause the accident; 3) expert testimony; 4) evidence eliminating other causes of the accident.
 <p>CO</p>	Principle of circumstantial evidence, but has not yet been expressly adopted.	Case law suggests that if the theory were adopted by the state supreme court, it would only apply to scenarios where the product has been destroyed and is therefore unavailable for testing.	Plaintiff bears the burden of proving elements of a product defect claim, under whatever theory is accepted by the court. Can be done through circumstantial evidence.	Conclusion of negligence may only be inferred from admitted circumstances. If the proven circumstances are consistent with absence of negligence, neither conclusion can be said to have been established by legitimate proof, or brought to jury.



Treatment of Malfunction Theory Throughout Various Jurisdictions

State	Malfunction theory – Generally	Pleading Requirements	Burden of Proof	Comments
<p>CT</p> 	<p>Based on the same principles as <i>res ipsa</i>. Permits Plaintiffs to use circumstantial evidence.</p> <p>Not a tort, evidence standard.</p>	<p>Must be pled in the complaint.</p> <p>Plaintiff is required to plead facts that put def. on notice that malfunction theory will be used.</p>	<p>Court must be satisfied that the evidence is sufficient to establish probability, not mere possibility, that injury resulted from defect.</p>	<p>Conclusion of negligence may only be inferred from admitted circumstances. If the proven circumstances are consistent with absence of negligence, neither conclusion can be said to have been established by legitimate proof, or brought to jury.</p>
<p>DE</p> 	<p>Prima facie case may be made where there is 1) malfunction; 2) evidence eliminating abnormal use or reasonable secondary causes.</p>	<p>No specific pleading requirements for plaintiff to rely on circumstantial evidence of negligence/defect to survive summary judgment in products liability</p>	<p>Necessary for the plaintiff to establish: 1) the existence of the defect; 2) defect existed when it left def's custody w/ o intervening event; 3) sole proximate cause of accident.</p>	<p>Conclusion of negligence may only be inferred from admitted circumstances. If the proven circumstances are consistent with absence of negligence, neither conclusion can be said to have been established by legitimate proof, or brought to jury.</p>


Treatment of Malfunction Theory Throughout Various Jurisdictions

State	Malfunction theory – Generally	Pleading Requirements	Burden of Proof	Comments
<p>MI</p> 	<p>In Michigan, the malfunction theory is simply a principle of circumstantial evidence, similar to <i>res ipsa</i>.</p> <p>Applies to both design and manufacturing defects.</p>	<p>No Michigan case suggests that the plaintiff must plead malfunction theory in the complaint.</p>	<p>Must prove 1) defect attributable to the manufacturer, which existed when it left def.'s control; 2) causal connection between defect and injury.</p> <p>Evidence of specific defect is not required.</p> <p>Plaintiff is not obligated to eliminate all possible causes of the accident.</p>	
<p>MO</p> 	<p>Circumstantial evidence may be sufficiently relied onto support a verdict in a products liability case.</p>	<p>Must describe the defect, manufacturing and selling the product or otherwise placing it in the stream of commerce</p>	<p>Plaintiff in products liability case against the manufacturer has the burden of proving a defect in the product and that the defect existed when the product left the manufacturer.</p>	<p>Evidence must infer the conclusion without resort to conjecture and speculation, and must exclude any other reasonable explanation.</p>

Treatment of Malfunction Theory Throughout Various Jurisdictions

State	Malfunction theory – Generally	Pleading Requirements	Burden of Proof	Comments
<p>NJ</p> 	<p>Recognized in NJ – prima facie case: 1) defect; 2) defect existed when the product left the manufacturer’s control; 3) defect proximately caused injures to plaintiff, who was a reasonable user.</p>	<p>No specific pleading requirements</p>	<p>Can be satisfied through direct and circumstantial evidence as well as by evidence negating other causes for the failure of the product for which def. would not be responsible.</p>	<p>Plaintiff need not prove a specific defect , rather need only show that something is wrong with the product</p>
<p>NY</p> 	<p>The occurrence of an accident is not proof of a defective condition, but the defect may be inferred that from proof that the product did not perform as intended by the manufacturer</p>	<p>No specific pleading requirements</p>	<p>Burden is upon the plaintiff to prove the product was defective and that the defect existed while in the custody of the manufacturer. Plaintiff is not required to prove the specific defect.</p>	<p>Plaintiff must prove that the product did not perform as intended and exclude all other causes for the product’s failure that are not attributable to defendants.</p>

Treatment of Malfunction Theory Throughout Various Jurisdictions

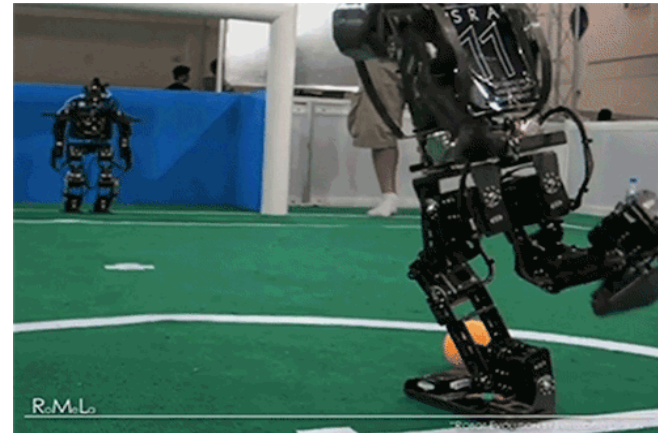
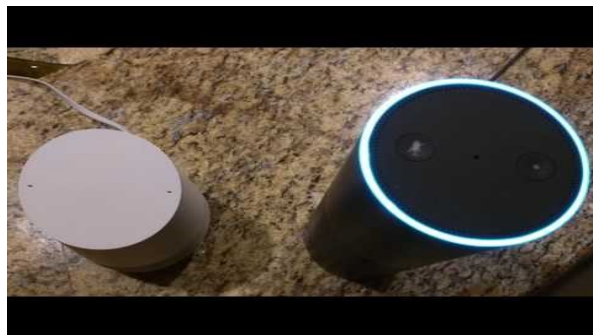
State	Malfunction theory – Generally	Pleading Requirements	Burden of Proof	Comments
 TX	<p>Plaintiffs may use product's malfunction as evidence of defect, but courts do not typically recognize product failure alone as proof of product defect.</p>	<p>Not generally recognized as a valid theory – no specific pleading requirements</p>	<p>Circumstantial evidence is permissible to establish material facts, but must transcend mere suspicion.</p> <p>Circumstantial evidence of a product malfunction may not be sufficient to raise a genuine issue of material fact to support jury</p>	<p>The inference of defect may not be drawn from the mere fact of a product-related accident.</p>

Malfunction Theory & Modern Technology – Trends in Litigation

- Technology is becoming more modern, more autonomous, and “smarter” –

- Examples include:

- Autonomous vehicles
- Smart-home products
- Wearable technology
- Electronic cigarettes



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Malfunction Theory & Modern Technology

– Lithium-Ion Batteries

- Though malfunction theory has not been argued in any reported e-cigarette cases, a plaintiff has been successful with the theory in terms of lithium-ion batteries, an essential component of e-cigarettes.
- *Sabo v. Fiskars Brands, Inc.* [Idaho, 2014]
 - Plaintiff alleged that his lithium-powered flashlight spontaneously combusted causing injuries.
 - Plaintiff argued that the combustion of the flashlight was sufficient circumstantial evidence of a malfunction.
 - Defendant failed to produce evidence indicating that the flashlight was misused.



Malfunction Theory & Modern Technology – Robotic Surgery

- *Mrack v. Bryn Mawr Hosp.* [3rd Circuit, 2010]
 - Malfunction theory denied
 - Surgeons had to switch to methods to finish Plaintiff's prostatectomy.
 - Plaintiff failed to offer any evidence to eliminate reasonable, secondary causes for the malfunction of the robot or demonstrate a malfunction caused the injury.
 - An error message was displayed on the robot during surgery.



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Malfunction Theory & Modern Technology – 3D Printing



- *3D Printing: What Could Happen to Products Liability When Users (and Everyone Else in Between) Become Manufacturers* – James M. Beck, **Minnesota Journal of Law Science and Technology**
- Product liability claims would likely involve examination of CAD files, expert testimony re: software
- If files are not available through “black box,” Plaintiffs may have to assert *res ipsa loquitur* or malfunction theories of liability



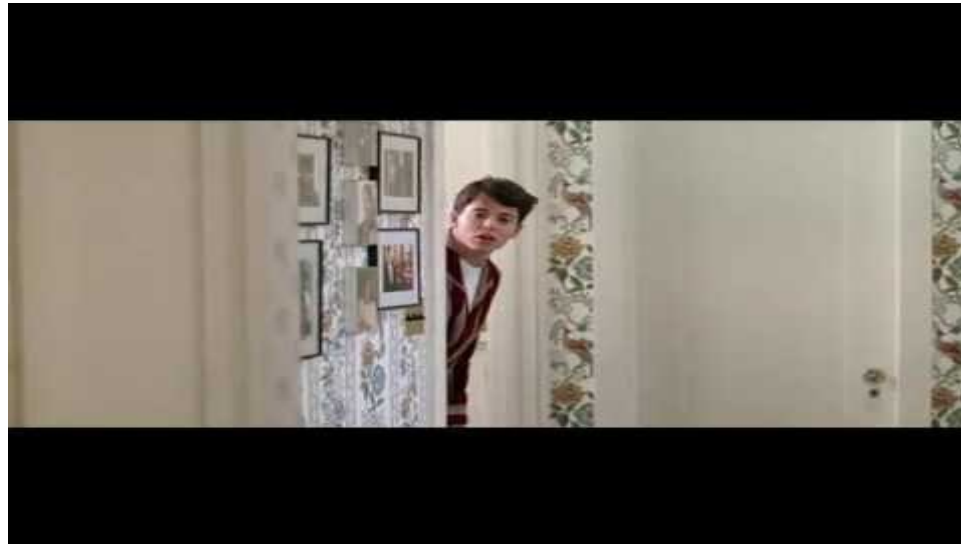
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Defense Strategies for Malfunction Theory



- Preservation Letters/ Spoliation
- Actively and affirmatively develop other causes for the injury

Thank you!



Questions?



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Tim is a faculty member for a variety of seminars dealing with issues in his areas of specialty over the years, most recently presenting on “The Drones: They Are Coming!” at the 72nd Annual Workers’ Compensation Educational Conference (Orlando, Florida), to the “LMA Under 35” group at Lloyd’s of London, U.K., to the XChanging Claims group in London, UK, at the ACE Annual Conference in Washington DC, at the RIMS Annual Conferences in New Orleans, LA, and Philadelphia, PA, and at the AmeriClaim annual conference in Grapevine, TX article entitled “Obamacare and Emerging Workers’ Compensation Trends – National Reform, Legislation and Alternative Dispute Resolution” was published in the March 5, 2012 issue of Claims Magazine

He is presently a member of the American Bar Association; Mississippi Bar Association; Madison County Bar Association; Bar Association of the Fifth Federal Circuit; Mississippi Defense Lawyers Association; Mississippi Claims Association; American Business & Insurance Attorneys; DRI (Young Lawyers’ Committee, 1991-95, Drug & Medical Device Steering Committee, 1994-95, Technology Committee, Mississippi State Liaison, 2000-Present, and Trucking and Insurance Committees, 2005 to present); Mississippi Economic Council, 1992-Present; Leadership Mississippi, 1995-96; the Claims & Litigation Management Alliance (2008-present, Insurance Extra-Contractual Claims Committee 2009-present, Mississippi State Chair 2010-present); Wholesale & Specialty Insurance Association (WSIA; formerly National Association of Professional and Surplus Lines Offices (NAPSLO)); the Trucking Industry Defense Association (TIDA); the Transportation Law Association (TLA); and, the International Association of Defense Counsel (IADC).

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David is a shareholder of Collins Einhorn Farrell PC, and has nearly 20 years of litigation experience. He has successfully defended a wide variety of professional liability claims, ranging from legal malpractice to claims against accountants, insurance agents, real estate/title agents and even fine art appraisers. He has also successfully defended numerous corporations against product liability claims, including death cases. Over those years, David has gained considerable jury trial and arbitration experience.

For more than four decades, Collins Einhorn Farrell PC has provided outstanding legal counsel to clients in diverse practice areas. Our representation of clients focuses on defense litigation in state and federal courts. We are committed to providing knowledgeable and responsive service to our clients. Since our founding in 1971, we have gained an unparalleled reputation for our work and results for both institutional and individual clients nationwide.

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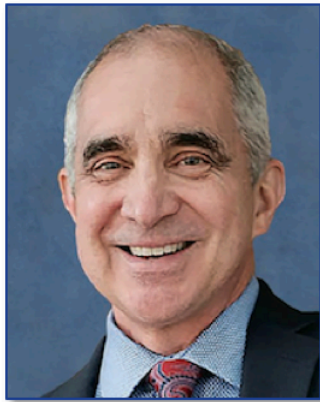


January D. Allen excels at achieving favorable outcomes in a timely and professional manner. She provides a wide range of legal expertise at OMH, from intellectual property counsel to business owners and innovators, to the defense of licensed professionals, government entities, and corporations in litigated matters.

As an invested advocate, January works closely with each client to arrive at the appropriate legal solution. Overturf McGath & Hull, P.C. is a civil litigation and trial law firm specializing in civil lawsuits, administrative hearings, and corporate matters. Our lawyers are experienced and practiced in all legal counseling needs resulting in a robust assortment of qualified practitioners.

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Brandon P. Hull's diverse law practice encompasses all phases of state and federal civil litigation and arbitrations in Colorado, Nebraska and Wyoming. His insurance defense practice includes construction defects, environmental law, mass torts, food-borne illnesses, products liability, legal malpractice, personal injury, insurance bad faith, and employment discrimination.

His construction practice involves the representation of developers, general contractors, and subcontractors in all construction trades. Brandon's professional liability defense work includes the defense of architects and engineers and other design professionals. Brandon also has a general business law practice and he has a mediation certificate from the American Arbitration Association.

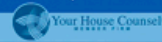
Brandon's charismatic and efficient approach to litigation allows him to quickly identify solutions to his clients' problems and provide sound options in the face of seemingly intractable issues. He considers it a privilege to take clients through litigation, from start to finish, in difficult cases and challenging circumstances.

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Howard S. Shafer is the Managing Partner of Shafer Glazer, with over 23 years of experience in the Insurance and Corporate Liability Defense field. He has received an AV Rating from Martindale-Hubbell and has been recognized as a New York Super Lawyer since 2006. Since 2009, he has been selected for the Corporate Counsel Edition. He was also selected as a New York State Chair of the Claims and Litigation Management Alliance. Howard is the current Chair of the Corporate Counsel Section of the New York State Bar Association.

His cases have been reported in both Federal and State reporters and his articles have appeared in a number of legal publications. He has lectured on various subjects in his field and Chaired the Third Corporate Counsel Institute, co-sponsored by the Corporate Counsel Section and the Committee on Continuing Legal Education of the New York State Bar Association in New York City.

Mr. Shafer is the Founder and President of Your House Counsel®, the National Consortium of Highly Regarded Insurance and Corporate Liability Defense Law Firms.

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Mr. Poelma's main areas of practice include complex commercial litigation, subrogation, and real estate. His civil trial docket has broadened his exposure to vastly different areas of the law including professional liability, product liability, construction, maritime/admiralty issues involving both property damage and personal injuries, complex issues involving oil and gas exploration and production both on land and offshore, as well as contractual interpretation and indemnity issues. His practice includes litigation in both federal and state courts.

As a direct result of working hand-in-hand with both domestic and foreign insurance carriers as well as domestic and international corporate clients, he has developed a detailed understanding of the differences in the various markets and business practices. This knowledge and experience has allowed him to establish excellent working relationships with his clients, adjusters and carriers with assorted backgrounds and goals and likewise tailoring his professional services to their respective unique needs.

Obviously, most cases settle well before or during trial. Mr. Poelma has helped his clients obtain hundreds of millions of dollars both in trial and through settlement, or helped defend against claims which could otherwise cripple a business from remaining a going concern. Mr. Poelma is licensed in state and federal courts throughout Texas, and has been admitted pro hac vice in state courts throughout the continental United States.

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Mr. Doyen is Board Certified in Civil Trial Law by the Texas Board of Legal Specialization, a distinction held by fewer than 2% of the lawyers licensed in Texas. In 2011, Mr. Doyen was named to the Super Lawyers list as one of the top attorneys in Texas in the area of personal injury defense litigation, a distinction conferred on less than 5% of the eligible lawyers in Texas. He has maintained a broad and varied trial practice and during the last 20 years Mr. Doyen has tried in excess of 60 significant cases, and handled numerous civil and criminal appeals.

Mr. Doyen routinely represents insurance carriers providing analysis and opinions in routine and complex coverage matters, as well as providing defense in bad faith claims involving personal and commercial lines of coverage. In that capacity, Mr. Doyen handled the defense of hundreds of Hurricane Ike lawsuits, and is actively involved in defending carriers across in Texas in various types of first-party cases.

He is also actively involved representing insurance carriers in umbrella and excess coverage situations ranging from coverage opinions in these areas, to monitoring litigation and even assuming the defense of the insured. Mr. Doyen has been retained to advise insurance carriers in a broad range of factual and legal circumstances and scenarios, including such areas as:

Bad faith and extra-contractual damages; Coverage disputes in various lines, including general liability, professional liability, property, business interruption, homeowners, and reinsurance.