



## MALFUNCTION DOCTRINE FUNCTIONING WELL IN CONNECTICUT

Proof of a specific defect not part of product liability law in state

By **JOEL T. FAXON**

If a product malfunctions, our law permits an inference that the product is defective. This policy judgment is consistent with the product liability rationale of spreading the risk of loss to the entity best able to bear it – the manufacturer of a defective product.

The “malfunction doctrine” aids a plaintiff in establishing a *prima facie* case where the product cannot be scientifically evaluated for manufacturing defects due to its destruction at the time of the plaintiff’s injury. The classic example in Connecticut jurisprudence is the case of *Liberty Mutual Insurance Co. v. Sears, Roebuck & Co.*, involving an exploding television set. One would be hard-pressed to argue that an exploding television – or any other exploding consumer product – is *not* defective.

In recognition of this basic concept our courts have fully adopted the “malfunction doctrine” as set out in the Restatement (Third) Products Liability § 3. As defined by the Restatement, the “malfunction doctrine” provides: “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.”

In a product malfunction case, expert testimony is rarely, if ever, required because the claim does not point to a specific, identifiable

defect, but rather to an inference of product defect arising from the failure or underlying event itself. As the Supreme Court noted in *Potter v. Chicago Pneumatic Tool Co.*: “Connecticut courts...have consistently stated that a jury may, under appropriate circumstances, infer a defect from the evidence without the necessity of expert testimony.”

Expert testimony would only be required if the manufacturer attempted to establish that the malfunction simply reflected the ordinary and reasonably anticipated performance of the product. For understandable reasons, this is rarely the case.

### Plaintiff’s Burden

To invoke the “malfunction doctrine, the plaintiff need not negate all other possible causes of the product failure. To the extent that the plaintiff has any burden in this area, it is only to persuade the trier of fact that a product defect is a more probable cause of the product failure than the only other possible cause of the malfunction.

Such a standard is entirely consistent with the plaintiff’s burden of proof by a preponderance of the evidence. Moreover, the plaintiff can carry this burden of proof by offering evidence of a malfunctioning product and removing from the realm of speculation the theorem that the malfunctioning product is most likely the cause of the calamity.

An interesting corollary to the “malfunction doctrine” is what I call the “incapacitation doctrine,” as announced by the classic law school case of *Ybarra v. Spangard*, where the victim was shot by one of two hunters

firing weapons simultaneously. It’s obvious that there’s got to be some liability in there somewhere – so the burden of proof shifts to the defendant where the plaintiff can show that its one of two

defendants who is certainly responsible for the harm inflicted on the plaintiff. In modern times, given gun control measures, rather than at a fox hunt, these cases often arise in the medical or surgical context.

In *Anderson v. Somberg*, the New Jersey Supreme Court addressed the malfunction and incapacitation doctrines head-on. Mr. Anderson underwent back surgery. In the course of the procedure, the tip of a metallic surgical instrument broke off and became lodged in his spine. The surgeon’s efforts to retrieve the broken part were unsuccessful. Mr. Anderson was required to undergo additional surgeries, and suffered significant and permanent injuries as a result. He sued the surgeon, the hospital and the manufacturer and distributor of the surgical instrument, all of whom disclaimed responsibility and pointed to the possible fault of others.

The case was tried, and the jury returned verdicts favoring all of the defendants. The court, noting that “at the close of evidence, it was apparent that at least one of the defendants was liable for plaintiff’s injury,” reversed, stating: “[I]n the type of case we consider here, where an unconscious or helpless patient suffers an admitted mishap not reasonably foreseeable and unrelated to the scope of the sur-



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gery (such as cases where foreign objects are left in the body of the patient), those who had custody of the patient, and who owed him a duty of care as to medical treatment, or not to furnish a defective instrument for use in such treatment, can be called to account for their default. They must prove nonculpability, or else risk liability for the injuries suffered.”

While acknowledging that the Connecti-

cut Supreme Court has not yet decided a case involving the question presented here, Judge Thomas P. Smith of the Connecticut District Court, sitting in diversity jurisdiction, has embraced the principle enunciated in *Anderson* and opined, in *Hartford Fire Insurance Co. v. Dent-X International Inc.*, a subrogation case, that our Supreme Court would be likely to adopt *Anderson's* rationale.

In furtherance of the tort concept of spreading risk to those most able to bear it, our courts have sided with the Restatement and adopted the “malfunction doctrine” and, it appears, are fully prepared to embrace the “incapacitation doctrine” as its corollary under the premise that proof of a specific defect is *not* part of the product liability law of Connecticut. ■