MY CLIENT SAYS THE AIRBAGS FAILED. WHAT DO I DO NOW?

RECOGNIZING AND EVALUATING PRODUCT LIABILITY CLAIMS IN AUTO CASES IN NORTH CAROLINA

By Michael W. Patrick
Chapel Hill, North Carolina

I. INTRODUCTION

Lawyers who handle auto crash cases may have decent products liability claims right in their own caseloads without even knowing it. This discussion is directed at those lawyers. It is not intended to be an exhaustive primer on products liability law. Rather, it is intended to help you identify potential product liability claims and understand some of the issues important to early evaluation of a case.

No other type of tort litigation is potentially more time consuming and expensive than products liability claims. Like other complex tort litigation, products liability suits require extensive use of expert witnesses, many depositions, and voluminous documentary review. These suits can also require expensive testing and extensive demonstrative trial exhibits. A "low cost" products liability case may have expenses running into the tens of thousands of dollars and may require hundreds of attorney hours. A "high cost" case can easily run into the hundreds of thousands of dollars in case expenses and can require thousands of attorney hours.

Despite this complexity, with only a few hours' study, you should be able to make an initial decision on whether the case merits a more extensive investigation.

II. COMMON TYPES OF AUTO DEFECT CASES

- Stability
    - Rollovers on dry, flat roads
    - SUV's, 15 passenger vans
- Passenger Restraint Failures
    - Seat belts
        - Center rear lap belt
        - False or inertial unlatching of belts
        - Web failures
        - Retractor defects

  - Air bag failures

    - No deployment in severe crashes
    - Deployment in low speed crashes causing injury
    - Injuries or death to children/small adults

- Structural Integrity problems: intrusion into passenger areas

  - Inadequate or no side impact protection
  - Roof Crush
  - Weld failures

- Passenger ejection case

  - Lift gates
  - Door latch failures
  - Side and rear window ejections

- Vehicle fires

  - Tank position
  - Post collision fires

- Seat failures

  - seat track lock failures
  - seat back failure
  - inadequate head rest or no head rest – pickup trucks, center rear passengers

- Conversion Vans

- Tire defects

III. BASIC TYPES OF CLAIMS IN PRODUCT LIABILITY CASES

A. WHAT IS A PRODUCTS LIABILITY CLAIM?

Definition. "Product liability action" includes any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling of any product. N.C. Gen.

Stat. § 99B-1(3).

The definition of products liability action is broad and covers nearly all types of claims arising from product failure. Some cases may involve negligent repairs to vehicles after their initial sale. These are not necessarily "product liability" actions.

B. THEORIES OF RECOVERY

1. NEGLIGENCE CLAIMS:

Negligence is a breach of the standard of reasonable care owed by a reasonably prudent person in similar circumstances. Negligence is judged from the perspective of the reasonably prudent manufacturer.

(a) Manufacturer's duty.

A manufacturer has a duty to those who use its products to exercise that degree of care in design and manufacture that a reasonably prudent person would use in similar circumstances. See *McCollum v. Grove Mfg. Co.,* 58 N.C.App. 283, 293 S.E.2d 632 (1982), *aff'd,* 307 N.C. 695, 300 S.E.2d 374 (1983).

(b) The extent of the duty.

The duty to use reasonable care extends throughout the manufacturing process, including a duty to make the product free of any potentially dangerous defect in manufacturing or design. See *Red Hill Hosiery v. Magnetek, Inc.,*138 N.C. App. 70, 530 S.E. 2d 321 (2000).

2. TYPES OF NEGLIGENCE ACTIONS:

(a) Negligence in design or formulation.

(1) Design vs. manufacturing defects.

A "design defect" is an injury-producing hazard accompanying normal use of a product that was intentionally manufactured according to design; a "manufacturing defect" occurs when a miscarriage in the manufacturing process produces an unintended result. *Boudreau v. Baughman,* 322 N.C. 331, 368 S.E.2d 849 (1988).

(2) The duty to design to lessen injury.

Manufacturers have a duty to anticipate foreseeable accidents and to design vehicles to avoid unreasonable risk of injury. Recovery may be allowed when defects in a vehicle enhance or increase plaintiff's injuries in an accident, even though the defect did not cause the accident. In most states, this is referred to as the "crashworthiness" theory. North Carolina has recognized a limited version of the crashworthiness theory. In *Warren v. Colombo*, 93 N.C.App. 92, 377 S.E.2d 249 (1989), the North Carolina Court of Appeals rejected several federal decisions that predicted that North Carolina would not allow crashworthiness cases. Instead, the court held that a claim that a manufacturer's negligent design of a product had enhanced a user's injuries was cognizable in North Carolina. In so ruling, Judge (later Justice) Orr stated:

> "Negligence, in order to be actionable, must be shown to have been the proximate causes or one of the proximate causes of the plaintiff's injuries. There must be some causal relationship between the breach of duty and the injury." *Reason v. Sewing Machine Co.,* 259 N.C. 264, 267, 130 S.E.2d 397, 399 (1963).
>
> The theory advanced by plaintiff alleging enhanced injuries does not, however, focus on *one* injury caused by concurring sources. Instead, the focus is allegedly on an injury caused by the negligence of the tractor trailer driver *and* the enhancement of that injury proximately caused by the negligence of the manufacturer of the bus.
>
> Relying on the logic and law of joint and concurrent negligence that more than one proximate cause can result in one injury, it follows that there is nothing in our law that would preclude more than one proximate cause that results in an original injury and the enhancement of that injury. Thus, as in the case *sub judice,* the allegation that the injuries sustained in this accident were proximately caused by both the impact with the truck and enhanced by the alleged negligence of the manufacturer is sufficient to withstand a 12(b)(6) motion.

93 N.C.App. at 100-101.

(b) Negligence in assembly/processing/handling

(1) in selecting materials

(2) in failing to make reasonable inspection

(3) manufacturer liability for defect caused by the supplier or assembler.

3. Failure to warn.

N.C. Gen. Stat. § 99B -5 provides for claims based on failure to warn of dangers of which the defendant had reason to know or should have known. There is a duty to give notice of concealed dangers. N.C. Gen. Stat. § 99B-5(b) codifies the open and obvious risk rule for failure to warn claims. The section provides that defendants will not be liable for failing to warn of open and obvious risks or of risks that are a matter of common knowledge. See, e.g. *Douglas v. W.C. Mallison & Son*, 265 N.C. 362, 144 S.E.2d 138 (1965); *Nationwide Mut. Ins. Co. v. Don Allen Chevrolet Co.*, 253 N.C. 243, 116 S.E.2d 780 (1960). This doctrine minimizes the incentive for product sellers to protect the user against some of the most dangerous risks of products. Prior cases held that whether a risk was open and obvious enough to require a warning would usually be a jury issue. See *Bryant v. Adams*, 116 N.C. App. 448, 448 S.E. 2d 832 (1994), *cert. den.*, 339 N.C. 736, 454 S.E. 2d 647 (1995). Since this provision merely codified the common law, these cases should still be considered good law.

The statute and case law both recognize that a duty to warn exists both at the time of sale and post-sale if the manufacturer or seller learns of new information. These provisions do not appear to alter prior N.C. law and seem to codify prior case law. See *Millikan v. Guilford Mills, Inc.*, 70 N.C. App. 705, 320 S.E.2d 909 (1984); *Smith v. Selco Products, Inc.*, 96 N.C. App. 151, 385 S.E.2d 173 (1989).

4. Negligence in quality control, inspection or testing.

A manufacturer has a duty to inspect or test components from other manufacturers. *Red Hill Hosiery v. Magnetek, Inc.*, 138 N.C.App. 70, 530 S.E.2d 321 (2000). This duty to inspect is qualified by the so-called “sealed container defense,” which holds that a “mere conduit” seller has no duty to inspect or test. See *Crews v. W.A. Brown & Son, Inc.,* 106 N.C.App. 324, 416 S.E.2d 924 (1992). N.C. Gen. Stat. § 99B-2 codifies this defense. There is no negligence if a reasonable inspection misses the defect. See *Goodman v. Wenco Foods, Inc.,* 333 N.C. 1, 423 S.E.2d 444 (1992).

5. Negligence in providing inadequate instructions (different from failure to warn)

Driver v. Burlington Aviation, Inc., 110 N.C.App. 519, 430 S.E.2d 476 (1993) recognized a claim for relief based on a theory of negligence against the aircraft manufacturer in the preparation and publication of the information manual. In this case the instruction manual was purchased separately and was considered the product, rather than the airplane that crashed as a result of the use of the faulty maintenance manual.

C. IMPLIED WARRANTY CLAIMS

1. FITNESS FOR A PARTICULAR PURPOSE:

The elements of the claim are that the seller knows or should know of buyer's particular, non-ordinary purpose and the buyer relies upon seller to supply products that are suitable and safe for particular purpose.

2. MERCHANTABILITY

In North Carolina, where strict liability claims are unavailable and many negligence claims are difficult to prove, a claim for breach of implied warranty of merchantability is often the best claim available to those injured by defective vehicles. A seller breaches the warranty if a product at the time of sale is not fit for an ordinary purpose for which it is intended. Under *Goodman v. Wenco Foods, Inc.,* 333 N.C. 1, 423 S.E.2d 444 (1992), the courts have applied the reasonable expectation of consumer to establish the suitability of the product. The implied warranty of merchantability applies to equally to manufacturers under the UCC. *Gillespie v. Bottling Co.,* 17 N.C.App. 545, 195 S.E.2d 45, *cert. denied*, 283 N.C. 393, 196 S.E.2d 275 (1973). The failure to adequately warn renders the product unmerchantable. *Nicholson v. American Safety Utility Corp.,* 124 N.C.App. 59, 476 S.E.2d 672 (1996), *rev'd on other grounds,* 346 N.C. 767, 488 S.E.2d 240 (1997).

D. EXPRESS WARRANTY CLAIMS

When a product fails to conform to the seller's promises, this failure constitutes a breach of express warranties arising under the common law or the UCC under N.C. Gen. Stat. § 25-2-313. While there is a reliance requirement, *Bernick v. Jurden,* 306 N.C. 435, 293 S.E.2d 405 (1982) held that reliance on express warranty can often be inferred from allegations of mere purchase if the natural tendency of representations is to induce purchase. Reliance may inferred from manufacturer's express warranty in advertisement & other promotions in catalogs sent to seller. Defendant has burden of proof as to nonreliance.

E. STRICT LIABILITY CLAIMS

To establish a breach in strict liability claim, you must prove that the product was unreasonably dangerous. While the overwhelming majority of jurisdictions allow strict liability claims, N.C. Gen. Stat. § 99B-1.1 and N.C. case law specifically reject them. Despite this, North Carolina courts will entertain strict liability claims if the injury occurs in another state that has strict liability. See *e.g. Terry v. Pullman Trailmobile,* 92 N.C.App. 687, 376 S.E.2d 47 (1989).

In *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988) in a case that involved a chair manufactured in North Carolina that had caused injury in Florida, the North Carolina Supreme Court applied one choice of law test to the negligence and strict liability claims and a

different choice of law rule to the claims for breach of implied warranty of fitness and implied warranty of merchantability. As to the negligence and strict liability claims, the Court adhered to the traditional *lex loci* rule that the place of injury governs the choice of substantive law. Since the injury occurred in Florida, the substantive law of Florida applied to the negligence and strict liability claims. As to the warranty claims, the Court applied the choice of law rule provided by the Uniform Commercial Code--the most significant relationship test. Finding that the injury occurred in Florida and the place of sale, distribution, delivery and use were all in Florida, the court held that the substantive law of Florida should govern those claims as well.

F. YOUR CHOICE OF CLAIM OR THEORY CAN MAKE A DIFFERENCE

While you are not limited to basing your case to a single claim or theory, there are important differences between the type of claims. Generally, cases based on defective design cost more and require more experts that manufacturing defect cases.

Proof of negligence requires specific evidence that is often hard or impossible to obtain about what the defendant did wrong in manufacturing the product. Merely proving the product malfunctioned is rarely sufficient to prove negligence on the part of the manufacturer or seller. Proof of product malfunction, however, may be sufficient to prove that a product was defective and establish a claim for breach of warranty. In *Red Hill Hosiery Mill, Inc. v. MagneTek, Inc.*, 138 N.C. App. 70, 530 S.E. 2d 321 (2000), the Court of Appeals indicated that, in a case where the product had been destroyed by a fire, the circumstantial evidence of product malfunction was sufficient to prove product defect to support a breach of warranty claim. In *DeWitt v Eveready Battery Co., Inc.*, 355 N.C. 672, 565 S.E. 2d 140 (2002), the N.C. Supreme Court approved this approach and dealt extensively with what is sufficient circumstantial proof of a product defect in a breach of implied warranty of merchantability claim. This circumstantial evidence may include such factors as: (1) the malfunction of the product; (2) expert testimony as to a possible cause or causes; (3) how soon the malfunction occurred after the plaintiff first obtained the product and other relevant history of the product, such as its age or prior usage by the plaintiff or others, including evidence of misuse, abuse or similar relevant treatment before it reached the plaintiff; (4) similar incidents, “when accompanied by proof of substantially similar circumstances and reasonably proximity in time”; (5) elimination of other possible causes of the action; and (6) proof tending to establish that such an accident would not occur absent a manufacturing defect. In both *Red Hill* and *DeWitt*, the plaintiff’s evidence was not sufficient to support a negligence claim but the circumstantial evidence of product defect was sufficient to support a implied warranty claim.

As noted above, choice of law issues may be resolved differently depending on the legal theory being utilized.

IV. BASIC CONSIDERATIONS IN YOUR EARLY ANALYSIS

A. ACCESS TO AND PRESERVATION OF THE VEHICLE AND OTHER EVIDENCE

Do you have access to the product? In many cases, having access to the product is absolutely essential to success. It may be impossible to identify the product manufacturer of an automobile component or to prove the nature of the product defect if your client isn't the owner of the car or if your client no longer has the car and has no access to it. Take immediate steps to preserve the car. A sample letter giving notice to third parties about preserving the vehicle is enclosed in the appendix. If your client has the car, you will need to take steps to store and protect the vehicle until the investigation is completed and so that the defendant cannot accuse you or others of evidence spoilation. If your client does not have the car you may need to locate and purchase the car before it is junked or repaired.[1]

As noted above, products liability claims can be premised on several theories – e.g. manufacturing defect, failure to warn, design deficiencies. Regardless of the theory that you use for your products liability claim, you will need access to the vehicle to determine the mechanism of injury.

It is also important to retain an engineer experienced in vehicle inspection and accident analysis as soon as possible after the accident. The engineer can assist in the preliminary evaluation of the claim. A good engineer is invaluable in preserving and avoiding destruction of evidence from the vehicle.

The accident scene also needs to be inspected as soon as possible after the accident in order to document debris, on and off road gouge marks, and other physical evidence. It is important that the engineering consultant be familiar with the extra level of detail needed to analyze fully the accident sequence. Many local accident reconstructionists may not be up to the task.

B. HOW CATASTROPHIC ARE YOUR CLIENT'S INJURIES?

The type of product defect – design or manufacturing defect – greatly affects the cost of proving the case. It is usually much easier or cheaper to prove that a vehicle or a vehicle component was defectively manufactured or assembled than to prove that it was improperly designed. For example, if your case involves a part, for a few thousand dollars you may be able to have the vehicle inspected and obtain a metallurgical analysis to establish that the reason the part failed. On the other hand, if winning your case depends on proving a design failure, you will typically spend much more in order to establish your claim. N.C. Gen. Stat. § 99B-6 requires you

---

[1] I have enclosed in the appendix a Products Liability – Motor Vehicle investigative checklist. It is provided courtesy of Jerome Trehy.

prove that the manufacturer "failed to adopt a safer, practical, feasible or otherwise reasonable alternative design or formulation that . . . would have prevented or substantially reduced the risk of harm without substantially impairing the usefulness, practicality or desirability of the product." Where your case depends upon proving that there was a safer design for a complex machine - as in a roof crush case, for example- you may have to spend hundreds of thousands of dollars to prove your inadequate design claim.

If your client has modest damages, with only a few thousand dollars in medical expenses and no permanent impairment, even a simple products liability suit with strong liability will not be worth litigating. To justify litigation, your case requires fairly substantial damages. A difficult design case requires truly catastrophic injuries to justify the expense.

C. IS YOUR CASE DEAD DUE TO AN INSURMOUNTABLE DEFENSE?

1. The Six Year Statute of Repose

In North Carolina, the statute of repose, N.C. Gen. Stat. § 1-50(6), bars filing a products liability claim more than six years after the product is initially sold. Your very first question in most cases has to be: How old is the vehicle? According to the recent statistics available from the federal Bureau of Transportation Statistics, the median age of automobiles in the United States was 8.9 years and 6.4 years for light trucks in 2004 .[2] Thus the N.C. statute of repose will bar products liability claims against automobile manufacturers for most vehicles on the road.

Even in cases involving older cars, occasionally a claim can be based on a replacement part or a negligent or defective repair made after the car was initially purchased. Check the vehicle's history. You may find that the vehicle has undergone significant crash repair work or repair to the system that failed in your crash.

In cases where the accident and injury occurred outside North Carolina, North Carolina will not apply its own statute of repose since N.C. applies the lex loci rule on this question. See *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988).

2. Federal preemption

Because federal law regulates certain parts of vehicles, the doctrine of federal preemption can eliminate one or more theories of relief in auto cases. Consider whether the federal rule and statute regulate the component of the vehicle involved in the case. If so, research the possibility that federal law preempts some or all of your claims. If federal preemption bars your most attractive theories, you may be left with a difficult or impossible case.

---

[2] See http://www.bts.gov/publications/national_transportation_statistics/2005/html/table_01_25.html

The danger of federal preemption is pronounced in cases involving restraint systems required by federal law. The National Traffic and Motor Vehicle Safety Act, ("the Act") expressly pre-empts state common-law tort claims based on a manufacturer's failure to provide an automobile with air bags. However, a savings clause in Act assures that common-law claims based upon manufacturer's failure to act with reasonable care are not exempted. Congress intended that federal law dictate the boundaries of manufacturers' legal duties with respect to certain aspects of motor vehicle design and manufacture. State law, however, is permitted to set the standard of care in exercise of that legal duty. Accordingly, federal law controls whether a manufacturer has a legal duty to install air bag in vehicle. Once a decision in favor of air bag installation is made, state common law, however, judges whether a manufacturer exercised reasonable care in implementing airbags.

In 2000, the United States Supreme Court in *Geier v. American Honda Motor Co.,* 529 U.S. 861 (2000), held that a common-law claim alleging that a 1987 car was defective because it lacked a driver's air bag was preempted by a federal regulation that gave manufacturers a choice on whether to install air bags or some other form of passive restraint *in* the front seats of cars. The 5-to-4 decision overturned the holdings of five state supreme courts. The U.S. Supreme Court held that "no-air bag" claims were preempted because the federal regulatory option at issue in the case reflected the federal government's highly unique goal of affirmatively fostering a diverse array of passive restraint technologies. Since *Geier*, a number of other cases have dealt with the issue of whether federal law pre-empts other types of air bag claims, such as the provision of side air bags.

3. Problems with Privity.

Lack of privity may be a problem for some implied warranty claims.[3] Two statutes have explicitly relaxed privity requirements. As to claims against "sellers", the Uniform Commercial Code generally relaxed the privity requirement in suits against sellers by buyers and the buyer's guests and family members. See N.C. Gen. Stat. § 25-2-318. In suits against manufacturers, N.C. Gen. Stat. § 99B-2(b) eliminates the privity requirement in suits by "buyers", employees of buyers, guests and family members of buyers. Thus, on the face of these statutes, injured employees may sue manufacturers but not sellers using an implied warranty theory.

This statutory formula may leave some gaps in where it may not be possible to bring an implied warranty claim. One large gap involves claims from injuries caused by leased products, such as leased automobiles. Since the consumer is not the "buyer" of the leased automobile, the injured person is unlikely to be the family member, employee or guest of the "buyer". Another gap may exist where the defective product injures someone who is a bystander to the use of the

[3]The requirement that an injured plaintiff be in privity with the defendant was long ago relaxed in North Carolina products liability claims based on negligence. Corprew v. Geigy Chemical Corp*.,* 271 N.C. 485, 157 S.E.2d 98 (1967).

product – such as a pedestrian or occupant of another vehicle injured by a defective automobile.

Decisions in North Carolina have not directly addressed the question of privity in a case involving leased automobiles or involving defective vehicles that injured "bystanders". On the one hand, a decision from the North Carolina Court of Appeals suggests that the privity requirement will bar suits against manufacturer where the injured party is not covered by §99B-2(b). For example, in *Crews v. W.A. Brown & Sons, Inc.*, 106 N.C. App. 324, 416 S.E.2d 924 (1992), a church member was injured when she was trapped inside a walk-in refrigerator. The Court of Appeals upheld the dismissal of the implied warranty claim against the seller because the church member was not a family member or guest of the buyer. In *dicta*, the court also suggested that privity was still required in suits against manufacturer by those persons not listed in N.C. Gen. Stat. § 99B-2(b).[4] There is a single decision from a federal district court in North Carolina that suggests that privity will not bar a lessee's suit for breach of implied warranty. In *Travelers Ins. Co. v. Chrysler Corp*., 845 F.Supp. 1122 (M.D.N.C. 1994), the court ruled that no privity was required where *both* the buyer and the lessee of a vehicle sued a component manufacturer. Cases have also held that privity may be implied where the injured party is a third party beneficiary of the contract between the seller and buyer. See *Coastal Leasing Corp. v. O'Neal*, 103 N.C. App. 230, 236, 405 S.E. 2d 208, 212 (1991); *Metric Construction, Inc. v. Industrial Risk Insurers,* 102 N.C. App. 59, 63-64, 401 S.E. 2d 126, 128-29, *aff'd per curiam*, 330 N.C. 439, 410 S.E. 2d 392 (1991).

D. WAS YOUR CLIENT NEGLIGENT IN CAUSING THE CRASH?

THE PROBLEM OF CONTRIBUTORY NEGLIGENCE

Where the injured person was operating the defective vehicle, you must consider the contributory negligence defense in making your analysis. By statute, the contributory negligence defense is available to the defendant regardless of whether you will proceed on a negligence or warranty theory. See N.C. Gen. Stat. § 99B-4.

Contributory negligence includes not only negligence in the use of the safety device, but also negligence in the user's overall conduct. The North Carolina Supreme Court has indicated that all of the facts surrounding the plaintiff's conduct at the time of the injury may be considered in determining whether the plaintiff was contributory negligent. In *Nicholson v. American Safety Utility Corp.,* 124 N.C. App. 59, 476 S.E.2d 672 (1996), *modified on appeal*, 346 N.C. 767, 488 S.E.2d 240 (1997), defectively insulated gloves allowed an electrical worker to be electrocuted when his head came close to a high voltage line. Shortly before the accident, the worker's safety helmet blew off but the worker continued to work. The Plaintiff argued that because there was no

[4] But note that in a pre-Products Liability Act case, *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405(1982), the North Carolina Supreme Court judicially abolished the requirement of privity in implied warranty claims against manufacturers.

evidence that the worker had been negligent in using the defective gloves, he was not contributorily negligent. The Superior Court disagreed and granted summary judgment on the ground that the plaintiff was negligent as a matter of law. In reversing, the Court of Appeals and the Supreme Court in *Nicholson* both reiterated the well established principle that reasonable care in a negligence case is almost always a jury issue. The Supreme Court, however, rejected the plaintiff's argument that he could not be contributorily negligent because there was no evidence that he improperly used the defective product – the insulated gloves. Instead, the Supreme Court indicated that the jury could consider all circumstances surrounding the use of the product, including the plaintiff's failure to replace his safety helmet, in making its determination.

Before the Products Liability Act was enacted in 1979, contributory negligence was recognized as a defense only to plaintiff's negligence claims in North Carolina. *Smith v. Fiber Controls Corp.,* 300 N.C. 669, 268 S.E. 2d 504 (1980). Three provisions were enacted in 1979 in N.C. Gen. Stat. § 99B-4 to cement contributory negligence defense in this area of the law. These provisions protect manufacturers and sellers from liability where the product was used (1) contrary to instructions, (2) after the discovery by the user of a defect or dangerous condition, or (3) where the claimant failed to take reasonable care in the use of the product. The North Carolina courts have consistently interpreted these provisions as a codification of the doctrine of contributory negligence. See e.g. *Champs Convenience Stores v. United Chemical Co.*, 329 N.C. 446, 406 S.E.2d 856 (1991); *Smith v. Fiber Controls Corp*., *supra*. Because these statutory provisions apply both to negligence claims and implied warranty claims, the 1979 Act extended the contributory negligence doctrine to both implied warranty and negligence claims.

Because N.C. Gen. Stat. § 99B-4 codifies the doctrine of contributory negligence, general negligence principles apply in interpreting the provisions. Most importantly, proximate cause principles and the general rule that reasonableness of conduct is usually a jury issue apply with the same force in products liability cases as in other tort cases. These familiar rules have defeated defense efforts in several cases where defendants used the statutory provisions to argue that a plaintiff's claims were barred as a matter of law.

For example, in *Smith v. Selco Products, Inc*., 96 N.C. App. 151, 385 S.E.2d 173 (1989), the Court of Appeals reversed a defense summary judgment where a worker's arm was amputated when he reached into a closing cardboard box baler. Plaintiff worked directly in front of a warning sign telling him not to reach into the machine. The Court of Appeals indicated that it was up to a jury to consider all the facts of the case in deciding whether the worker was negligent. The manufacturer or seller's gross negligence can also overcome the plaintiff's contributory negligence. In *Morgan v. Cavalier,* 111 N.C. App. 520, 432 S.E.2d 915 (1993), the Superior Court entered summary judgment for the defendants in a case where a high school student died when a soda vending machine tipped over on him. The Court of Appeals reversed. It first found that whether the student acted negligently in trying to retrieve a soda from the machine was a question for the jury. The Court of Appeals further indicated that the evidence was sufficient to establish gross negligence where the defendants knew that similar machines had a history of similar accidents and the defendants did nothing to install inexpensive safety devices.

How contributory negligence works is problematic in the crashworthiness – enhanced injury case. Can a driver who was negligent in causing a crash and who suffered catastrophic injuries only because a defective air bag failed to deploy recover for these enhanced injuries? No appellate decision has answered this question. *Nicholson* suggests that the driver's negligence can be interposed as a defense to the enhanced injury claim. *Selco Products* suggests that the contributory negligence issue is a jury issue. *Morgan* suggests that in the right case, the manufacturer's gross negligence would override the driver's contributory negligence.

V. CONCLUSION: SO SHOULD I SUE FOR MY CLIENT'S AIR BAG INJURIES?

As is evident from the above discussion, it depends. How catastrophic are your client's injuries? Do you have the vehicle available for inspection? Did your client's injuries happen because the air bag functioned as designed or because it malfunctioned? How old is the vehicle? Have the air bags been repaired or replaced before the accident? Did your client's negligence cause the accident? Did the accident happen in North Carolina? Was the vehicle owned or leased by your client, your client's employer, or your client's family member?

“DO NOT DESTROY” LETTER

Auto Insurance Company Adjuster
Address
(Also send to Send to anyone who may have or come into possession of the vehicle)

<u>VIA CERTIFIED MAIL &</u>
<u>FACSIMILE TRANSMISSION</u>

Re: Claimants : _____________
Your Claim No: _____________
D/Accident : _____________
Vehicle Description : _____________

Dear __________:

My firm has been retained by _____________ to represent them to investigate the facts surrounding the above referenced accident.

The purpose of this letter is to request that no evidence in your possession be destroyed or discarded before we have an opportunity to inspect the evidence. We request that you take possession of the vehicle involved in this accident and preserve it in its current condition until all parties involved in this accident have had a reasonable opportunity to inspect and test the vehicle.

We request an opportunity to have the subject vehicle inspected by independent experts before any alterations or destruction occurs.

In addition, we request that the vehicle not be inspected, moved, or operated in anyway without express notice to the undersigned so that we will have an opportunity to have a representative in attendance. Please provide this letter to the appropriate person in your office who is charged with the custody of any evidentiary items concerning this incident. Please note that this request is not limited to the specific vehicle identified above but includes all evidentiary items pertaining to this matter which are in your possession.

Upon your receipt of this letter, please contact me immediately so we can discuss this matter. In my absence, please speak with my assistant, ___________ .

Sincerely yours,

xxx