

Trial  
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### **Litigating the Power Tool Case**

Manufacturers of power tools used in the construction trades have gone to great lengths to minimize the perception that their products pose serious safety risks. But the reality is that these tools are inherently hazardous.

Also, with sophisticated technology and competitive pricing, these tools are no longer limited only to the workplace. Untrained “do-it-yourselfers” look to these products to get the job done, often oblivious to the sometimes permanent and disfiguring injuries associated with their use. When someone wrongfully harmed by a power tool comes to you for help, you should be aware of the steps necessary to successfully litigate a products liability case.

The initial interview should be as thorough as possible. Obtain from the client the name of the manufacturer of the power tool and its serial number and model numbers, make, style, and date of manufacture. Retail sales data, such as receipts and circumstances of the sale, should also be obtained so that you can decide if the retailer should be included in the complaint.

Be alert for any disclaimers of liability or optional safety devices that could mitigate the defendant’s liability. Determine the product’s design and manufacturing process, including testing, assembly, warnings, and packaging. Ascertain any maintenance requirements or modification notices that the client may be aware of.

### **Preserving the product**

Typically, when a power tool case is brought to your attention, a considerable amount of time has lapsed since the incident. If possible, you should act immediately to preserve the product because you will need the original or duplicate tool for the demonstrative evidence that is so crucial to the case.

If the client has the tool, take possession of it, photograph it, and have it examined by an expert, such as a metallurgist, an engineer, or a human factors expert, immediately. If the tool is not available, go with your client to purchase an identical model complete with all product literature. If the plaintiff is unavailable, seek the assistance of a coworker, neighbor, or family member who witnessed the incident.

Other people who may be able to identify the tool are police officers, firefighters, and medical personnel who responded to the emergency call; government safety investigators; the plaintiff's employer; insurance adjusters; and workers' compensation representatives.

If another person or entity has the tool, send them a letter early on asking them to preserve it. Fax the letter, and then send it by certified mail or have it hand delivered.

Also, motion the court for a protective order to preserve the product in its post-accident state. For example, in Illinois, an attorney may request production of documents and physical objects, examination of the product, and identification of the responsible parties before filing a suit against the manufacturer.<sup>1</sup>

To learn about the power tool, submit a Freedom of Information Act request to the Consumer Product Safety Commission. Also, check the index of Government Printing Office publications for an industry's own reports on a product's performance. The Exchange, ATLA's computerized research service; federal agencies; and other public entities are also excellent sources of information.<sup>2</sup>

Because these cases will generate reams of discovery, keep separate files on patent searches, literature searches, government regulations, union materials, production requests, interrogatory answers, requests to admit answers, advertising and promotional materials, and information gathers from your opponent.

Before issuing discovery, determine the customary trade usage regarding the power tool. Similarly, check whether there have been any prior incidents involving the tool to show that the defendant knew of a defect or other unreasonably dangerous conditions.

### **Proving inadequate warning**

A typical claim in power tool cases is that the manufacturer failed to adequately warn the user of potential risks. The plaintiff must establish a causal link between the lack of warning and the injury.<sup>3</sup> The manufacturer will quickly point out that the warning was adequate – if the plaintiff had only read it.

Often, the manufacturer will argue that the plaintiff did not read the warning or that the plaintiff cannot show that a better warning would have changed the course of his or her conduct. Through expert testimony, demonstrate that the plaintiff did not read the warning because its size, format, and color did not catch his or her attention. The manufacturer may also argue that the plaintiff's misuse of the products caused the injury.

Often, the warning will wear off the tool. There is a rebuttable presumption that the user would have read an adequate warning and heeded its instructions.<sup>4</sup>

It is also important to retain the services of a human factors expert in a warning case. The expert can testify to the need and adequacy of hazard warnings in power tool cases. The expert can also rely on literature that addresses the impact of warnings and the need for users to have warnings.<sup>5</sup>

Trials, of course, are unpredictable. But much of the unpredictability can be minimized by preparation. Focus groups are an invaluable asset. They can help you discover pertinent information and explore different themes before the case actually goes to trial.

Also, advanced computer technology can create persuasive demonstrative evidence. Computer simulations, laser disks, CD-ROM displays, and computer-assisted design can all support an expert witness's opinion and make the trial more interesting from the perspective of the judge and jury.

Most important, however, are your instincts and understanding of jurors' reactions to evidence in the courtroom. Although focus groups and computer technology can be essential components of your decision-making process, trust your own experience in the courtroom.

Power tools cases are both challenging for the attorney and beneficial to the public. Success depends on your diligence in investigating all the facts about the power tool, preserving the tool, conducting extensive discovery, and using technology and experts to demonstrate the tool's safety risks.

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<sup>1</sup> See Ill. SUP. CT. R. 224 (1996).

<sup>2</sup> Richard H. Porter, Voluntary Disclosure to Federal Agencies: Their Impact on the Ability of Corporations to Protect from Discovery Materials Developed During the Course of Internal Investigations, 39 CATH. U.L. REV. 1007 (1990).

<sup>3</sup> Riley v. American Honda Motor Co., 856 P.2d 196, 198-99 (Mont. 1993).

<sup>4</sup> Coffman v. Keene Corp., 608 A.2d 416, 420 (J.J. Super. Ct. App. Div. 1992), aff'd 628 A.2d 710 (N.J. 1993).

<sup>5</sup> See e.g., W. Kip Viscusi, Toward a Proper Role for Hazard Warnings in Products Liability Cases, 13 J. PROD. LIAB. 139 (1991).