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The newsletter of the Product Liability Committee

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From the Chair

Passing the Baton

By Nick Pappas

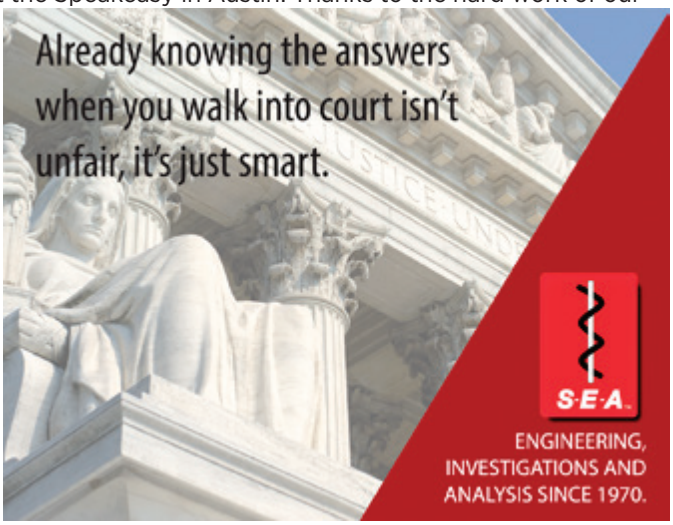
It's hard to believe that my term as Product Liability Committee chair is already drawing to a close. Since becoming chair at the 2017 DRI Annual Meeting, our committee hosted the 2018 Product Liability Conference (San Diego), 2019 Product Liability Conference (Austin), two fly-in meetings (Chicago), the 2018 Fire Science Seminar (Washington, DC) and my last seminar as chair of the committee will be the September 12–13 Strictly Automotive Seminar (Columbus, Ohio). Each seminar was successful thanks to countless non-billable hours of the seminar chairs, vice-chairs, marketing chairs, networking chairs, and countless others. The most gratifying part of chairing this committee, other than the friendships made and strengthened with lawyers from all over the country, was watching each seminar committee start with a blank sheet of paper, develop topics and identify speakers, and eventually create, market and host an outstanding seminar.

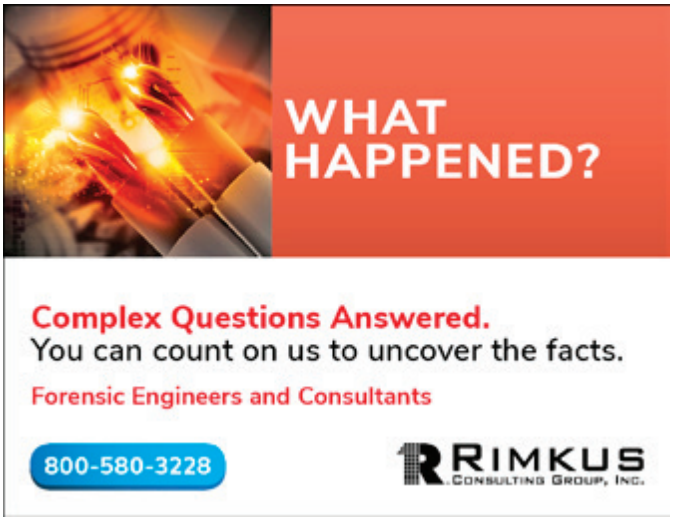
We've had a lot of ups and downs over these two years. Programming at the Fire Science Seminar in DC was excellent, but Mother Nature decided it was a good time for a hurricane to hit the east coast, making it impossible for some people to attend. Seminar attendance in general has been down, but year over year attendance at our Annual Product Liability Conference from 2018 to 2019 was up by thirty attendees, and post-seminar surveys were very positive. We took seminar networking events to a whole new level, first on the USS Midway in San Diego, and then at the Speakeasy in Austin. Thanks to the hard work of our membership chairs, we exceed our DRI membership goal by ten percent last year.

The future is bright for the Product Liability Committee. Committee Vice Chair James Weatherholtz has been a great leader and friend. 2020 Product Liability Seminar Lynne Blain and her committee are putting the finishing touches on the 2020 New Orleans program (don't forget to put February 5, 6, and 7 on your calendar.) And Jodi Oley and her committee are have just completed another successful Strictly Automotive Seminar, which featured a field trip to a state-of-the-art test facility and a live crash involving autonomous vehicles. I enjoyed seeing many of you September 12–13 in Columbus.

Thanks to all our steering committee members for a great two years!

Nicholas C. (Nick) Pappas is a trial lawyer who concentrates his practice in product liability and commercial litigation. Nick serves as national lead trial counsel for a major construction and agricultural equipment manufacturer. He represents clients in lawsuits in state and federal courts throughout the United States and has tried cases to successful defense verdicts in Alabama, Indiana, Iowa, Kentucky, South Dakota, and Wisconsin. Nick also advises clients regarding Medicare reporting issues. Nick is also the chair of the DRI Product Liability Committee, which is DRI's largest substantive law committee and has over 3,300 members.





Feature Articles

Optimizing Your Use of Local Counsel

By Lorianne Hanson

National complex litigation cases require engaging local counsel in multiple jurisdictions. As national counsel, you may view this an administrative chore. But, if you are retaining local counsel only to "check the box," you are not getting full value for your client's money and missing out on an often-underutilized resource. While any good lawyer can research law and procedure in most jurisdictions, there is no substitute for having boots on the ground when it comes to understanding local culture, relationships and norms of practice, particularly if your case is in a specialized industry. This article explores ways to optimize your use of local counsel and to select the best local attorneys to fit your team.

Highest and Best Use

Filing services and pro hac sponsorships are table stakes when hiring local counsel. In critical jurisdictions, billable dollars should also buy you substantive, tactical and strategic insights. Critical jurisdictions might include venues with a particularly high volume of cases in the relevant area or locations where key parties are located. Don't just hire a name to put on your papers; leverage the specific experience and skills of the local firm to establish a strategic partnership for that jurisdiction.

Tapping into Relationships and Local Culture

Every jurisdiction has its own legal culture, and some can be harder to break into than others. Having a partner immersed in the local community can be invaluable to a foreign firm, not just to leverage relationships and credibility but also to navigate the inevitable quirks specific to that jurisdiction.

Local counsel can pull you into what is often a small circle of repeat players, helping you to read and form relationships with other counsel. Your local may have institutional, if not personal, knowledge of a particular plaintiff's firm's typical discovery tactics, credibility, propensity to try cases and approach to settlement negotiations. And the opposing attorneys may have not-so-secret idiosyncrasies that you can potentially exploit. Sometimes your local can offer insight into how the plaintiff's counsel views your client in relation to other defendants, helping you to decide how aggressively to mount your defense and the most opportune time to attempt resolution. They can often advise as to what level of cooperation you can expect from your co-defendants. Indeed, their relationships with other defense counsel may gain you cooperation that you wouldn't otherwise enjoy as an unknown foreigner.

Your local can help you not only establish credibility with the judiciary, but gain valuable insight into the best way to present issues to particular judges. Does your judge tend to be swayed by intellectual or emotional appeals? Is he likely to dig into a knotty issue and make a difficult decision or defer? Does she fear reversal? What's his overall temperament? Impulsive? Analytical? Thoughtful? Patient? Such advice might change your motion and trial strategy and ultimately tip the balance.

Finally, local quirks are often a mystery to foreign firms. For example, unwritten local conventions may substantially differ from the published civil rules. There may be avoidable procedural tricks deployed by plaintiffs' counsel that can severely hamper your discovery efforts or unduly delay your path to summary judgment. For example, you will need to know what qualifies as "meeting and conferring" and how serious that requirement is weighed in your jurisdiction. (In some states, motions can be lost on that basis alone.) When to extend professional courtesy and when to take a hard line often depends on the expectations of the judiciary. At trial, you may see a potential juror as a buttoned-down accountant, but perhaps they live in an area of town that tells a different story.

Tuning into Jurisdictional Trends

Strong local counsel will be invested in staying current on jurisdictional trends, a key component to meaningful case evaluation. Trends might include the latest tactics and arguments being tested by the plaintiff's bar in a particular industry and the receptivity of the local judiciary. Locals may also be able to share keys to the latest defense verdicts or significant pre-trial wins or losses that shaped a recent trial or forced a settlement. In some cases, they may even be able to share what the local defense bar has been seeing in settlement expectations from particular plaintiff's

firms. Even old dogs can learn new tricks and you should know the latest moves before you're blindsided.

Adding to Substantive Strategy

National counsel is the boss of the battle plan but should not be afraid to tweak strategy as circumstances dictate. Just as national counsel have the 50,000-foot view of multi-district litigation, local counsel are expert in the day-to-day of their jurisdiction. For example, anyone can do on-line research, but that does not always show you the underlying story of how the law developed and why. At a minimum, your local likely has a good bank of previous motions across many topics, which have evolved over time not only as the law has developed but as arguments are tested with varying degrees of success. And maybe there are local experts who would play better at trial than your national favorites. The local lens may not be determinative, but it is a perspective that is too often ignored.

Finding the Right Fit

Most of us can fairly easily acquire a list of recommended attorneys in any jurisdiction, whether it be through a list-serve request, informal word of mouth or on-line research. But a good lawyer is not necessarily the right lawyer when it comes to partnering on a case. Like any other hire, the measure of success is often in the fit.

Communication

Similar to most relationships, the foundation of any good local counsel relationship is communication. Find someone who welcomes a direct discussion of expectations, if not initiates it. This should include not only rates and billing practices, but what you envision your respective roles to be. Is this person accustomed to simply following orders or will they take ownership and responsibility for deadlines and decisions? Who will lead the case investigation and discovery? Who will appear at what types of hearings? What level of discretion will you afford to your local in reaching discovery and other agreements with other counsel? Help them to find the balance between keeping you informed and not overwhelming you with minutia.

Be the Client

Hire a local counsel who treats you like a client. You should be timely notified of significant case developments and deadlines with proactive recommendations as to next steps as appropriate. If you have communicated well, you will have a shared understanding of what is "timely" and "significant." If not, refine your communications.

Look for someone with an appetite to learn not only your practices and values, but also the business and products of your client, as applicable. If you have repeat litigation in a particular jurisdiction, plan to invest in training your local as you would a new associate and expect your investment to pay off over time. You will want to educate them as to potential minefields and issues to avoid given your broader perspective and exposure.

Ultimately, your local's number one job should be to advance your case while making you look good to your client. This means being proactive yet deferential, owning oversights and avoiding surprises.

Make Sure They Know the Lines

During your initial discussions, get a sense of your candidate's malleability to adapt to your practices and balance that against their confidence to push back if you are crossing local lines (and their ability to know the difference). You need someone capable of championing your case while respecting boundaries based on the differentiation of your roles and your relationship with the client.

You want someone who will take ownership and partner with you on the case; you do not want someone who is looking to replace you. This can be a difficult line. Look for an attitude of respect and deference toward you and your role, with the drive to add value whenever possible.

Conclusion

I have long subscribed to the theory that you get what you expect from people. Expect your local counsel to act merely as an administrative assistant and you will get precisely that—a capable assistant at an attorney's billable rate. But if you welcome them onto your team, expect them to own the case as much as you do, and listen to and respect their guidance . . . now you have a true value-added partner.

Lorianne Hanson, of counsel in the Seattle office of Bullivant Houser Bailey PC, is a member of the firm's Casualty Law practice, with a primary focus on complex litigation. She thrives on getting to know her clients and their businesses and excels at distilling complicated issues into actionable strategies. Ms. Hanson represents and advises businesses as to a wide variety of areas, including contracts, indemnity, insurance coverage, shareholder disputes, product injury,

professional negligence and unfair competition. She brings deep experience spanning pre-litigation negotiation through trial and appeal. She has enjoyed successfully defending multi-million-dollar cases at trial in both state and federal court.

Carbon Monoxide: A Changing Landscape

By Emma E. Jacobson, Natalie L. Holden, and Dennis Paustenbach

Executive Summary

On May 13, 2018, the New York Times (NYT) published an article entitled "Deadly Convenience: Keyless Cars and Their Carbon Monoxide Toll."[1] The NYT reported that at least 28 people have died of Carbon Monoxide (CO) poisoning in their homes since 2006 after inadvertently leaving keyless vehicles running in garages.[2] The in-depth article inspired a Senate Hearing concerning National Highway Traffic Safety Administration's alleged "inaction" to prevent CO deaths from keyless vehicles.[3] Since this article was published, the NYT and other media outlets began printing articles that chronicle deaths and injuries purportedly attributable to CO poisoning and allege keyless ignitions are to blame.[4]

But are keyless ignitions the issue? No.

Data show that the rate of CO poisoning deaths from vehicle exhaust per 10 million US population is not increasing with the introduction of "smart key" vehicles.[5] It is known that both rotary key and smart key vehicle drivers leave the engine running in enclosed areas.[6] This finding, in combination with the lack of increase in accidental CO-related fatalities seen in the annual CPSC data, indicates that the inadvertent behavior of leaving a vehicle running has not changed over time despite evolving technology in turning on/off the vehicle engine.[7]

Examples of accidently leaving the engine running may include distraction or absent-mindedness when leaving the vehicle, inebriation, impaired hearing, and/or forms of dementia.[8] In fact, results show that the rate of CO poisoning deaths from vehicle exhaust in enclosed areas is two (2) times higher for drivers over the age of 60 than all other ages.[9]

What Is Carbon Monoxide Poisoning

CO is an odorless gas produced by combustion sources: generators, motor vehicles, and other engine-driven tools, such as power lawn mowers, garden tractors, portable pumps, power sprayers and washers, snow blowers, and concrete saws.[10] Each year in the United States, approximately 400 persons die of unintentional CO poisoning.[11]

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1 David Jeans & Majlie De Puy Kamp, Deadly Convenience: Keyless Cars and Their Carbon Monoxide Toll, New York Times (May 13, 2018), https://www.nytimes.com/2018/05/13/business/deadly-convenience-keyless-cars-and-their-carbon-monoxide-toll.html?module=inline.

2 *Id.*

3 David Jeans, Senator Grills Nominee on Deadly Carbon Monoxide Risk in Keyless Cars, New York Times (May 16, 2018), https://www.nytimes.com/2018/05/16/business/carbon-monoxide-keyless-cars.html.

4 See e.g., David Jeans, 'Very Smart People,' but a Keyless Car's Downside Killed Them, New York Times (June 28, 2019), https://www.nytimes.com/2019/06/28/business/keyless-carbon-monoxide.html; Jake Peterson, Firefighters warn about keyless cars after Davis Island man dies from carbon monoxide poisoning, ABC News (Jan. 9, 2019), https://www.abcactionnews.com/news/region-hillsborough/firefighters-warning-about-keyless-cars-after-davis-island-man-dies-from-carbon-monoxide-poisoning; Jeans, supra note 3; Jeans & De Puy Kamp, supra note 1.

5 Jeya Padmanaban, Frequency of Accidental CO Deaths Due to Vehicle Exhaust in Enclosed Areas, 1 (2014), https://saemobilus.sae.org/content/2015-01-0264/.

6 Id. at 5.

7 Id.

8 Id. at 2.

9 Id. at 4; see also Neil B. Hampson, Residential Carbon Monoxide Poisoning From Motor Vehicles 76 (2011).

10 Committee on Carbon Monoxide Episodes in Meteorological and Topographical Problem Areas, The Ongoing Challenge of Managing Carbon Monoxide Pollution in Fairbanks, Alaska: Interim Report 19 (2002), https://www.nap.edu/read/10378/chapter/3.

11 QuickStats: Number of Deaths Resulting from Unintentional Carbon Monoxide Poisoning, by Month and Year — National Vital Statistics System, United States, 2010–2015. MMWR

It is among the most common sources of unintentional poisonings due to exposure gases/vapors in the U.S.[12]

The most widely recognized adverse effect of CO is death. The risk of illness is due to both the airborne concentration of CO and the duration of exposure. In short, exposure to 2,000 ppm for 1 hr (2,000 ppm-hr) or exposure to 500 ppm for 4 hrs (2,000 ppm-hr) produce roughly the same likelihood of dying.[13] The mechanism by which toxicity occurs is that CO binds to hemoglobin preferentially to oxygen.[14] Persons usually fall asleep or faint due to inadequate oxygen to their brains.

Over the past 10-20 years, there have been concerns that when a person has a near death experience due to CO exposure, there are long term effects on concentration, short term memory, logical thought processes and long term memory. Not only is it difficult to assign a particular CO poisoning event to these changes, but many prescription and non-prescription drugs can cause these effects as well as excessive alcohol intake, chronic smoking, diabetes, dementia, and Alzheimer's disease. [15] As such, these claims present challenges in CO related litigation.

NHTSA Testing and Recommendations

In 2011, NHTSA published a Notice of Proposed Rulemaking (NPRM).[16] The NPRM focuses on perceived safety issues arising from different variations of keyless ignition controls.[17] The NPRM, among other things, proposed to standardize the operation of controls used to stop the vehicle engine or other propulsion system and that do not involve the use of a rotary key.[18] Specifically, it proposed to require an audible warning be given to any driver who: (1) attempts to shut down the engine without first moving the gear selection control to the "park" position; (2) exits a vehicle without having first moving the gear selection control to "park," or (3) exits a vehicle without first turning off the engine.[19]

As it relates to CO incidents with keyless ignition vehicles, there were four (4) Vehicle Owner Questionnaires (VOQ) submitted to NHTSA in the ten years preceding the NPRM's introduction.[20] NHTSA detailed two of the reports. In each instance, the driver did not turn off the engine, and became alerted to the engine running from their in-house CO detector after the vehicle had been running for an extended period of time in an attached garage.[21] As a result, both parties were able to shut down their vehicle engines without reported injuries.[22]

The NPRM made a number of recommendations, including but not limited to, requiring audible alerts to sound outside the vehicle if the engine is running, the door closest to the driver's designated seating position is opened, and the smart key is not in the vehicle.[23] The proposed alert time is one second (because a person walking an average pace of three miles per hour will cover three feet in less than one second).[24] NHTSA admitted this requirement will not have the intended result of preventing CO poisoning if the driver does not take the smart key from the vehicle.[25] It further admits a driver may be especially prone to leave the smart key in the vehicle when it is locked in a garage at home.[26]

The NPRM also considers a requirement to shut down the engine after a specified period of time.[27] However, it recognizes there are many situations in which a driver intends to leave the engine running without the driver present.[28] For example, a driver may leave a passenger with heat or air conditioning while on an errand, or keep the engine running to prevent the inability to restart the engine in a very cold climate.[29] Thus, there are many reasons that a

Morb Mortal Wkly Rep 2017;66:234. DOI: http://dx.doi.org/10.15585/mmwr.mm6608a9

12 David D. Gummin, James B. Mowry, Daniel A. Spyker, Daniel E. Brooks, Krista M. Osterthaler & William Banner (2018): 2017 Annual Report of the American Association of Poison Control Centers' National Poison Data System (NPDS): 35th Annual Report, Clinical Toxicology, DOI: 10.1080/15563650.2018.1533727

13 Hayes, A.W. (2007): Principles and Methods in Toxicology, 5th ed., Taylor & Francis, Boca Raton, FL.

14 See Jason J. Rose, Qinzi Xu, Ling Wand, and Mark Gladwin, Shining a Light on Carbon Monoxide Poisoning, 192 American Journal of Respiratory and Critical Care Medicine 1145, 1145 (2015)(describing the process of hemoglobin binding to oxygen).

15 Greim, H and R. Snyder (2019): Toxicology and Risk Assessment, 2ND ed., Section 6.8.2., pages 686–89, John Wiley, New York, New York.

16 Federal Motor Vehicle Safety Standards Notice of Proposed Rule Making, 76 Fed. Reg. 77183 (proposed December 11, 2011).

17 Id. at 77183.

18 Id.

19 Id. at 77184.

20 Id. at 77187.

21 Id.

22 Id.

23 Id. at 77192.

24 Id.

25 Id. at 77193.

26 Id.

27 Id.

28 Id.

29 Id.

driver may decide to leave the engine running without the driver present.

The NPRM has not yet been adopted, and NHTSA is still collecting comment. However, on February 25, 2019, Senator Richard Blumentahl (Democrat from Connecticut) of the Commerce, Science, and Transportation Committee introduced the "Protecting Americans from the Risks of Keyless Ignition Technology Act" ("PARK IT Act").[30] The PARK IT Act would require NHTSA to finalize the NPRM discussed above.[31]

According to a recent article in the *New York Times* (June 28, 2019), Ford and General Motors have announced their support for the legislation. [32] Hyundai also reportedly backs it and plans to install automatic shut-off technology in new models.[33]

No Increase of CO Deaths with Introduction of Keyless Ignitions

To determine the trends of accidental CO poisoning deaths due to vehicle exhaust (in total, and in enclosed areas), Jeya Padmanaban performed a study of JP Research and published by SAE International.[34] The study presented the number of accidental CO deaths due to vehicle exhaust for two time periods: 1990-1998 and 2000-2011.[35]

Between 1990 and 1998, annual accidental CO related deaths from vehicle exhaust ranged from 280 to 377 fatalities per year.[36] In contrast, between 2000 and 2011, the average ranged from 170 to 91 fatalities with a total of 1,553 fatalities during this period.[37] Between 2004 and 2011, 748 of the fatalities were associated with accidental CO poisoning due to vehicle exhaust in enclosed areas. Information on victim and location was identified for 650 of these records.[38] After further investigation, for 257 of the deaths, the study was able to identify vehicle information.[39] Interestingly, five (5) deaths involved vehicles equipped with smart key system and 233 deaths involved vehicles with rotary key systems.[40] For nineteen (19) deaths, the vehicle make was known but not the model year and thus, it was not possible to identify the type of ignition system for those vehicles.[41] In sum, the study shows that there is no evidence that the rate of accidental CO poisoning deaths from vehicle exhaust in an enclosed area is increasing with the introduction of keyless ignitions.[42]

Older populations have a much higher rate of accidental CO poisoning deaths due to vehicle exhaust in an enclosed areas. Over the 12 year period covered by the study, people age 60 and above made up only 17 percent of the U.S. population, but accounted for over 34 percent of vehicle exhaust fatalities in an enclosed area. The rate for people over 80 is almost four (4) times higher than the rate for the entire population.

Regardless of the evolving method to turn on/off the vehicle, drivers have a history of inadvertently leaving their vehicles running.[43] The best way to prevent this type of accident is to pay attention when exiting a vehicle, and install CO detectors in the home, especially in homes with an enclosed garage connected to the household.

Challenges Defending CO Actions

Plaintiffs argue that keyless ignition systems ignore decades of imbedded behavior operating a rotary key to start and stop an engine.[44] They further argue modern engines are too quiet to prompt a consumer to turn off a vehicle. Plaintiffs argue their carelessness in exiting the

30 PARK IT Act, S. 543, 116th Congress (2019).

31 Id.

32 David Jeans, 'Very Smart People,' but a Keyless Car's Downside Killed Them, New York Times (June 28, 2019), https://www.nytimes.com/2019/06/28/business/keyless-car-bon-monoxide.html

33 Id.

34 Padmanaban, supra note 5.

35 Id. at 3–4.

36 Id. at 3.

37 Id. at 4.

38 Id. at 5.

39 Id. at 5.

40 Id.

41 Id.

42 Id.

43 Id.

44 See e.g., Bonnie Eslinger, Judge Balks At Class Cert. In Toyota 'Smart Key' Suit, Law 360 (March 13, 2017), https://www.law360.com/articles/901351/judge-balks-at-class-cert-in-toyota-smart-key-suit; Bonnie Eslinger, Ford, Kia, Others Near Dumping of 'Deadly' Keyless Fob Suit, Law 360 (June 27, 2016), https://www.law360.com/articles/811632?scroll=1&related=1; Alex Wolf, Automotive Cases to Watch in 2016, Law 360 (December 24, 2015); Jody Godoy, Ford, BMW, Others Seek Toss of Suit Over Risky Keyless Fobs, Law 360 (November 10, 2015), https://www.law360.com/articles/725413/ford-bmw-others-seek-toss-of-suit-over-risky-keyless-fobs; Dani Meyer, Suit Demands Toyota, Ford Fix Keyless Fobs' Deadly Risk, Law 360 (August 26, 2015), https://www.law360.com/articles/695492?scroll=1&related=1; Greg Ryan, Toyota, Ford, Others Face NHTSA Electronic Key Probe, Law 360 (March 11, 2014), https://www.law360.com/articles/517364/toyota-ford-others-face-nhtsa-electronic-key-probe.

vehicle is not to blame. They argue manufacturers should be responsible for alerting a driver of his/her basic obligation to turn off the vehicle. Some plaintiffs even argue the manufacturer should be accountable for turning off the engine when the consumer forgets to.

Plaintiffs argue that the cost of equipping vehicles with an audible warning would be minimal. This point is echoed in the NPRM by NHTSA, too. Further, in some cases, Plaintiffs claim there are no warnings of carbon monoxide poisoning risks in the owner's manual.

A significant challenge defending these actions is combatting the media's coverage of the issue, which generally have a consumer slant, and as a result, prime potential jurors against the manufacturer before they even enter the courtroom.

As with all matters, it is important to involve experts early in the investigation. At the initial investigation stages, the team should document the property and/or vehicle; search for alternative CO sources; consider modifications, if any, to the CO source(s) to determine if the event was staged/intentional; look for CO detectors at the property; evaluate warnings concerning the risk of CO exposure; review local, state, and federal regulations regarding CO detectors; and analyze methods by which CO may travel within the property and/or vehicle.

Emma E. Jacobson is a senior associate of Squire, Patton, Boggs (US) LLP in the firm's Los Angeles office. Her practice focuses on products liability. She has successfully defended a wide variety of claims against automobile manufacturers, including carbon monoxide cases. She looks forward to sharing her experience and providing insight on the unique challenges defending these particular claims in today's modern world.

Natalie Holden is a partner of Squire, Patton, Boggs (US) LLP in the firm's San Francisco office, where she specializes in the defense of manufacturers and distributors of various products from wrongful death, catastrophic injury and major property loss claims.

Dennis J. Paustenbach, PhD, CIH, DABT, is a board-certified toxicologist and industrial hygienist with nearly 35 years of experience in risk assessment, environmental engineering, ecotoxicology, and occupational health. He is currently an independent consultant. He was the President of ChemRisk, both before and after the merger with Cardno, which is a consulting firm which specializes in human and ecological risk assessment, as well as and risk analysis of consumer products, contaminated sites, pharmaceuticals and medical devices. He was also for several years a Vice President of Exponent, and prior to that, President and Chief Executive Officer (CEO) of McLaren-Hart Environmental, a nationwide consulting firm of 600 persons. Dennis specializes in the areas of industrial and environmental toxicology, occupational health, historical state-of-knowledge regarding environmental issues, and ecological and human risk assessment. He has directed the scientific aspects of toxic tort cases. He has also provided expert witness testimony in public meetings and trials concerning the health effects of chemicals in sediments, air, soil, consumer products, groundwater, and the workplace.

The Law Never Stands Still

Aerial Platforms (ASC A92) Standards Update

By John J. Stamm

In the United States, the Accredited Standard Committee for Aerial Platforms (ASC A92) is the consensus body approved by the American National Standards Institute (ANSI) for standard development. The A92 consensus body "develop[s] safety guidelines for design, construction, testing, maintenance, inspection, training, use and operation of elevating and rotating aerial devices, work platforms and vertical lift devices primarily used to position personnel" and has the Scaffold & Access Industry Association (SAIA) as its Secretariat. See https://www.saiaonline.org/a92faqs. The previous (but still effective) A92 standards for Aerial Work Platforms (AWP) are broken up by equipment classification including A92.3 (Manually Propelled Elevating Aerial Platforms), A92.5 (Boom-Supported Elevating Work Platforms), A92.6 (Self-Propelled Elevating Work Platforms), and A92.8 (Vehicle-Mounted Bridge Inspection and Maintenance Devices). On December 10, 2018, SAIA pub-

lished three new standards for the equipment outlined above (effective December 2019), and now refer to the various types of mobile personnel lifting equipment as Mobile Elevating Work Platforms (MEWPs). These new standards are no longer equipment classification specific and are titled, ANSI/SAIA A92.20 (2018): Design, Calculations, Safety Requirements and Test Methods for Mobile Elevating Work Platforms (MEWPs); ANSI/SAIA A92.22 (2018): Safe Use of Mobile Elevating Work Platforms (MEWPs), and ANSI/SAIA A92.24 (2018): Training Requirements for the Use, Operation, Inspection, Testing and Maintenance of Mobile Elevating Work Platforms (MEWPs). Consistent with the ISO 16368 (2010) and CSA B354.6 (2017) standards, MEWPs are classified into two groups with respect to platform location and three types with respect to travel limitations.

ANSI/SAIA A92.20 (2018): Design, Calculations, Safety Requirements, and Test Methods for Mobile Elevating Work Platforms (MEWPs)

The A92.20 (2018) standard applies to all MEWPs manufactured/remanufactured on or after the effective date (December 2019) and "specifies safety requirements and preventive measures, and the means for their verification, for certain types and sizes of mobile elevating work platforms (MEWPs) intended to position personnel, along with their necessary tools and materials, at work locations. It contains the structural design calculations and stability criteria, construction, safety examinations and tests that shall be applied before a MEWP is first put into service."

The standard includes a number of new and/or modified requirements for the manufacturer. This includes but is not limited to a platform load/moment sensing system, wind ratings, travel and elevation interlocks, stability tests, structural requirements, and operator's manual requirements. These requirements vary between MEWPs and depend on the Group and Type of the MEWP. Specifically, a Group A MEWP is a MEWP for which the platform is always within the tipping lines and a Group B MEWP is a MEWP for which the platform is allowed outside the tipping lines. A Type 1 MEWP only allows traveling in the stowed position, a Type 2 MEWP allows traveling from an elevated position when it is controlled from a point on the chassis, and a Type 3 MEWP allows traveling from an elevated position when it is controlled from a point on the work platform. A MEWP can be both Type 2 and Type 3.

These new requirements will not be applicable to MEWPs manufactured before December 2019, and most of the MEWPs in the field (for years to come) were designed to the previous A92 standard. When litigation occurs involving a pre-2019 unit, the new standard may be analyzed to determine if any of these new manufacturing requirements would have prevented or mitigated an accident. It is likely that this new standard will be used in an attempt to support an alleged defect claim for a MEWP that was manufactured before the effective date. A thorough understanding of the new requirements and how they are being implemented is necessary to determine their potential effect on mitigating or eliminating an accident. This makes a comprehensive engineering investigation into the cause of the accident extremely important. It will also be necessary to consider the historical industry consensus and the feasibility of the new requirements for the group, type and vintage of MEWP.

ANSI/SAIA A92.22 (2018): Safe Use of Mobile Elevating Work Platforms (MEWPs)

The A92.22 (2018) standard becomes effective in December 2019 and applies to all MEWPs, regardless of their manufactured date. "This standard specifies the requirements for application, inspection, training, maintenance, repair and safe operation of MEWPs. It applies to all types and sizes of MEWPs as specified in ANSI/SAIA A92.20." The standard includes a number of additional and/or modified "responsibilities for manufacturers, dealers, owners, users, supervisors, operators, occupants, lessors, lessees and brokers for both new and existing units delivered by sale, lease, rental or any form of beneficial use on or after that effective date." In addition, any entity that acts in the capacity of another entity assumes the responsibilities of that entity.

An example of an additional user responsibility is the requirement to develop a safe use program that includes a site risk assessment and to determine the proper MEWP for a specific application. This includes considering the condition and maintenance of the worksite and the requirements of the MEWP to accomplish the task. Another additional user responsibility requirement is having a qualified person trained under A92.24 to supervise, evaluate, and document the performance of MEWP operators. Examples of when retraining is required are provided in the standard. An example of a responsibility modification for the dealer is that the dealer is no longer required to provide familiarization upon delivery, unless requested by the user.

While these additional and/or modified requirements will not be applicable to MEWPs operated before December

2019, they will likely be implemented to some extent before that date by the responsible entity. Some of these requirements can be implemented quickly and some will take more time to develop. The effect of these requirements on mitigating or eliminating an accident will need to be analyzed on a case by case basis.

ANSI/SAIA A92.24 (2018): Training Requirements for the Use, Operation, Inspection, Testing, and Maintenance of Mobile Elevating Work Platforms (MEWPs)

The A92.24 (2018) standard becomes effective in December 2019, and applies to all MEWPs, regardless of their manufactured date. "This standard provides methods and guidelines to prepare MEWP training materials, defines administrative criteria, and delivers elements required for proper training and familiarization. It applies to all types and sizes of MEWPs as specified in ANSI/SAIA A92.20." This standard requires training on every group and type of MEWP. In addition, supervisor training is required and includes proper MEWP selection, identification of hazards and risk management, and compliance with manufacturer's operating manuals. The operator is required to ensure all occupants have a basic level of knowledge to work safely on the MEWP.

While these new and/or modified requirements will not be applicable to training provided for MEWPs before December 2019, they will likely be implemented to some extent before that date by the training provider. Similar to the safe use standard (ANSI/SAIA A92.22), some of these requirements will be incorporated quickly and some will take more time to develop. The effect of these requirements on mitigating or eliminating an accident will need to be analyzed on a case by case basis.

John Stamm, P.E., received his Bachelor of Science Degree in General Engineering from the University of Illinois, Urbana-Champaign, in 2009 and is licensed in the state of Illinois as a professional engineer in the mechanical field. Mr. Stamm is a Senior Engineer at Fusion Engineering where he specializes in the areas of accident reconstruction, mechanical systems and equipment, and machine design. This includes work related to aerial work platforms (or mobile elevating work platforms) and their industry standards. Fusion Engineering serves industrial, insurance, and litigation clients across the country and throughout the world by providing technical expertise across a range of subject matters including design analysis, post-accident investigation and reconstruction, failure analysis, and intellectual property matters. These materials were created to accompany Mr. Stamm's presentation during the 2019 DRI Product Liability Conference.

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lmokry@dri.org or at 312.698.6259.