

# Hot Topics in Products Liability Law: Data Can be Used in Products Liability Cases as a Sword and as a Shield



Devin Bates

dbates@mwlaw.com

(501) 688.8864

04/03/2023

In a past blog post, we predicted that data is arguably *the* products liability issue of the [future](#). Dealing with data is already often a critical part of products liability lawsuits, but with the rise of artificial intelligence (AI) and automation, product manufacturers must deal with the reality that there is more data being generated than ever before. This blog post will discuss the reality that data can be a double-edged sword in products liability lawsuits.

On the one hand, it can be used as a shield to protect manufacturers from liability by demonstrating that they took reasonable steps to ensure the safety of their products. Using data in this fashion could help to establish facts to support counter narratives that usually emerge in response to a plaintiff's case. On the other hand, data can be used as a sword by plaintiffs in ways that are worth pointing out because of the need for more thought to develop on how to combat these tactics.

## Using Data as a Shield:

- **Product Testing:** Manufacturers can use data from product testing to demonstrate that they took reasonable steps to ensure the safety of their products. This can come into play when looking at product testing throughout all stages of the product lifecycle. This can include data on how the product functions, its performance under different conditions, and any issues that arise during use and the designs built in to proactively deal with those issues. Data could be used to show the alternative, less safe, designs considered and rejected before arriving at the design ultimately produced and sold. Proving these points could go a long way to show what product manufacturers did right, and to bolster the narrative of corporate responsibility.
- **Compliance with Regulations:** Data can be used to demonstrate compliance with regulatory requirements. Manufacturers can collect data on product performance and compare it to regulatory standards to demonstrate that their products meet or exceed these standards. Demonstrating to jurors that a product manufacturer followed the rules given to it by the government could prove to be useful defensive evidence on the issue of standard of care.
- **Quality Control:** Data can be used to demonstrate that manufacturers have implemented effective quality control measures. This can include data on inspections, audits, and corrective actions taken in response to quality issues. This could be used to combat reptile tactics and the narrative that a manufacturer put a product out without continuing to ensure quality.

## Using Data as a Sword:

- **Establishing Knowledge of a Problem:** Plaintiffs have tried to use data to establish that a manufacturer knew or should have known about a product issue due to other similar incidents. Of course, this can become the subject of an intensely fact specific motions in limine practice on what is, or is not, similar and worthy of being presented to the jury. This can include data on previous incidents involving the same or similar products, as well as data on the manufacturer's knowledge of potential risks or defects. But regardless of how it plays out, data is, and will continue, to be used by plaintiffs in products cases to build the narrative that a manufacturer knew about something but did nothing.
- **Failure to Analyze Data Collected:** A plaintiff may argue that a manufacturer had so much data at their finger tips that they had constructive knowledge of a developing product trend, and that they would have known about a defect and taken action had they only analyzed the data. This argument should be particularly concerning to manufacturers that collect mass amounts of data as a matter of habit, or due to the belief that *more data is better*. For example, a salesperson may want to collect and keep data on a product attribute on the theory that *it might be useful someday in making a sale*. That is not necessarily flawed thinking, but it does come with the risk that more data leads to potentially more opportunities for a creative plaintiff's lawyer to later say that a manufacturer had data that showed a problem and would have compelled action if someone had analyzed it.
- **Failure to Collect Data:** Consider the problems posed by the inverse of everything in the previous bullet point, that is—*data is so readily collectible these days that the manufacturer could have collected data, and would have collected data if they cared*.
- **Establishing Causation:** Data can be used to establish that a product defect caused an injury or damage. Especially in a case where there are multiple possible and competing causes, it is conceivable that a plaintiff's counsel would use data about this particular incident, or other similar incidents, to attempt to show that their theory of causation is more likely due to the quantitative proof marshalled. Whether such a theory of establishing causation would be colorable under a particular jurisdiction's law is likely an issue that would be fought through *Duabert* motions, motions in limine, and potentially motions for summary judgment.

In conclusion, data can be a powerful tool in products liability lawsuits, both as a shield and a sword. By using data to demonstrate compliance with regulations, quality control measures, and reasonable steps to ensure product safety, manufacturers can protect themselves from liability. Plaintiffs can use data, or the absence of data, to give new life to their old narratives, making data an essential aspect of their case. How data is used in each case is a case by case determination, and will vary depending on many factors. Selecting products liability counsel that is well versed in the issues surrounding data use can be a critical and outcome determining factor.