

TRIAL

Auto cases

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Power windows can kill

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Small children can easily trip the window switches in many vehicles sold today, getting caught and even killed by a swiftly closing window. Better options could and should be used.

If asked to name the deadly hazards of today's automobiles, few motorists would mention the humble power-window switch. Most people don't realize that windows equipped with rocker or toggle switches on door armrests pose a serious hazard for children who lean out the window and inadvertently hit the switch with their elbow, knee, or foot. It takes only a few seconds for the window to roll up and fatally strangle the child or cause serious injury, such as crushing the hands and fingers, abdomen, or throat and neck.

Cars made in Europe or made in the United States for export overseas have standard window safety features that cars made and sold in this country lack. Manufacturers have long resisted incorporating easy design changes for the models they sell in the United States. Instead, they continue to use rocker switches, which move the window up when one end of the switch is pressed and down when the other end is pressed, and toggle switches, which work when pushed forward and pulled back. Both can be inadvertently activated easily by a child.

Design changes that would enhance safety include moving window switches to a center console, using recessed lever-type switches that must be pulled up to raise the window, and incorporating an auto-reverse safety mechanism that causes the window to retract (like elevator doors) when it encounters an obstruction.

Kids And Cars, a nonprofit organization dedicated to preventing child injuries and death from motor vehicle incidents that don't involve traffic or crashes, has documented at least 37 children killed by power windows since 1990—most of them age three and younger. At least eight young children were strangled by windows in 2004 alone, and many other incidents may have escaped national notice.¹ A 1997 report by the National Highway Traffic Safety Administration (NHTSA) estimated that 499 people were treated in emergency rooms for power-window injuries every year in the period studied, more than 60 percent of them children, 32 percent of the children five years old or younger.²

Safer alternatives

Studies have shown that power windows can exert an upward force of 50 to 80 pounds. Only 8 to 12 pounds is needed to overcome the weight of the window, leaving the rest of the force (40 to 70 pounds) to strangle or crush a child's neck, limbs, fingers, or hands.³

In the late 1980s and early 1990s, in response to reports of deaths and injuries, some foreign automakers redesigned power-window switches and began using auto-reverse in most of their high-end vehicles. In 1993, the Japanese Automobile Manufacturers Association proposed that the Ministry of Transport require that "[power-window] switches should be constructed so that they are less prone to incorrect operation, taking into account the extent of their projection and configuration in relation to the surrounding area."⁴

Today, auto-reverse mechanisms are commonly included on cars sold in Europe. In 1997, when NHTSA posted a notice of proposed rulemaking to revise the federal rule that governs power windows, Volvo Cars of North America, Inc., responded,

Volvo basically agrees that an improved design of power-window switches to make them safer against inadvertent closure of windows could provide some added protection to unattended children in cars.

It is true that the technology of . . . recessed or lift-up switches is well established and that such switches are now becoming successively introduced in motor vehicles. One might argue that because of this trend and the effect of market forces it might not be necessary to regulate the design of switches.⁵

In February 2000, the European Union passed legislation mandating that all new cars sold in Europe be equipped with safer switches by April 2003.⁶ Currently, more than 80 percent of European models have auto-reverse mechanisms, while less than 10 percent of GM, Ford, and DaimlerChrysler models sold in the United States do. The estimated cost of installing this safety feature is as low as \$8 to \$10 per window.⁷

Federal standards continue to allow cars sold in the United States to have rocker and toggle switches for power windows, and auto-reverse technology is not required. For example, the 2004 Ford F-150 truck and Ford Freestar (formerly the WindStar) minivan were redesigned, but the dangerous rocker switches remain; they were merely made smaller. Sales of these two models alone put at least 1 million vehicles with unsafe power windows on the market in 2004.⁸ Although auto-reverse technology is standard equipment in the Ford Focus sold in Europe, the version sold in the United States does not have this feature, nor is it available as an option.⁹

U.S. manufacturers are phasing safer window switches into the models they sell stateside, but mostly in the more expensive vehicles sold under the Volvo (owned by Ford), Cadillac (owned by GM), Mercedes (owned by DaimlerChrysler), Lexus (owned by Toyota), and BMW brands. Many of these brands, which have had the safer switches for years, also have the auto-reverse feature.

According to a Ford spokeswoman, lever-type (pull-up) window switches were phased in on most Volvo and Mazda models in 2003, and they were added to the Lincoln Navigator and Aviator SUVs by 2004. She also noted that Ford offers bounce-back, or auto-reverse, windows as an option on some vehicles.¹⁰

Despite limited progress, the Big Three automakers continue to sell many U.S.-model vehicles with dangerous toggle or rocker switches. In response to NHTSA's January 2004 request for comments, Ford told the agency that it expected only 61 percent of its model-year 2007 Ford/Lincoln Mercury vehicles for U.S. sale to have pull-up switches.¹¹ General Motors responded that only about 55 percent of its 2004 model-year vehicles for U.S. sale incorporated those switches.¹² DaimlerChrysler told NHTSA that 22 of its models for the 2003-2004 manufacturing year have toggle or rocker switches; 4 models have pull-up switches.¹³

Current regulations

Federal Motor Vehicle Safety Standard (FMVSS) 118 took effect in February 1971 and sets forth the U.S. safety requirements for power windows.¹⁴ In 1996, several nonprofit safety groups, concerned over needless deaths, petitioned NHTSA to require automakers to provide safer window switches.¹⁵ For more than eight years, the agency took no action.

In August 2003, a coalition of nonprofit groups—including Advocates for Highway and Auto Safety, the Center for Auto Safety, the Consumer Federation of America, Kids And Cars, Public Citizen, the Trauma Foundation, and the Zoie Foundation—filed another petition. This petition

asked NHTSA to modify FMVSS 118 to require manufacturers to put auto-reverse technology in all vehicles, as well as window switches that are not prone to inadvertent engagement.¹⁶

In 2004, the U.S. Senate passed the Safe, Accountable, Flexible, and Efficient Transportation Equity Act, a provision of which required the federal government to issue a standard mandating child-safe windows.¹⁷ The House version of the bill, however, did not have this provision.¹⁸ The legislation went to conference committee, and no action had been taken at press time.

Passage of the Senate bill and pressure from safety advocates spurred NHTSA to act on the pending petitions and amend the standards for power windows.¹⁹ The updated FMVSS 118 becomes mandatory October 1, 2008. It does not indicate a specific design for power-window switches, but it bans any that allow windows to close when tested with a device representing the knee of a two- to three-year-old child applied with a force of not more than 30 pounds. Vehicles with auto-reverse mechanisms are exempt from this rule.

The rule does not require car makers to include auto-reverse technology. NHTSA considered and rejected a petition for this requirement in 1996, concluding that it would be too costly and that existing technology was insufficient. It found that redesigning the windows to reverse automatically, yet still close under certain common environmental conditions—for example, when ice or snow is present—was not practicable.²⁰ The agency concluded that only automatic-reversal systems using force-sensing technology, which cost about \$100 per window, were available for broad application.

In 2004, NHTSA again refused to adopt an auto-reverse requirement even though less expensive technology had been developed:

Recently, new technology has become available which could address some of the shortcomings noted [previously] regarding the then-existing force-sensing systems. . . . It appears that with these improvements, it may be feasible for such systems to comply with the requirements of [FMVSS 118] S5.

However, the cost per vehicle of these systems is significant. . . . Available information suggests that all production-ready automatic reversal systems (i.e., ones based on force-sensing) average approximately \$8 to \$10 per window (\$32 to \$40 per vehicle). . . .

In sum, we believe that mandating the installation of these systems on all new light U.S. vehicles would still involve a very high level of cost. As discussed previously, we believe that supplementing this final rule by mandating an automatic-reversal system might save one additional life per year, on average. Such a mandate would address those cases where a driver or other vehicle occupant intentionally closes a window while unaware that another occupant is in a position to become entrapped. Given the substantial cost of automatic-reversal systems and the fact that this final rule will reduce the limited benefits that could be obtained from those systems, we are denying the requests in the . . . petitions to mandate automatic-reversal systems.²¹

The government agency's talk of saving one life per year understates the number of deaths and injuries to children caused by power windows. In response to the new rule, nonprofit safety groups have petitioned NHTSA to reconsider, arguing that the agency addressed only part of the risk and did not take the actions necessary to stop child deaths and injuries.²²

The final rule also fails to ban unsafe rocker or toggle switches. It requires only that after 2008, these types of switches be recessed to reduce accidental activation. The consumer organizations argue that NHTSA weakened the final rule from an earlier version by enlarging the device that measures whether a switch can be accidentally engaged. It is now designed to approximate the

size of a child's knee, and critics say a device this size cannot test whether a child's elbows, fingers, or toes could activate the switch.²³

Selecting and trying cases

Subject potential power-window cases to the same exacting analysis you would any other case.

Know the law. You will need to understand the law that will apply and decide whether to file the case in federal or state court. You may be able to file in more than one state—for example, in the state where the family lives or the state where the auto manufacturer is located—so thoroughly research the substantive law of each state, as well as the states' choice-of-law jurisprudence.

Ask yourself:

- Is there a statute of repose that might bar the claim?
- Is there a statutory or jurisprudential presumption that a vehicle is not defective if it meets federal regulations? If so, what is the burden for overcoming that presumption?
- What damages are available for a child's wrongful death? (How do you prove lost income? Will personal maintenance expenses be deducted? Can you recover damages for loss of society and affection?)
- How will damages be apportioned? For instance, under Tennessee law, while wrongful death damages include loss of society and affection for parents, children, and siblings, the damages awarded are distributed to family members pursuant to the laws of intestate succession.²⁴
- How will the applicable law of comparative fault and/or contributory negligence affect the case?
- Does your forum state rest the wrongful death action in the estate of the deceased child, or will you be permitted to bring claims on behalf of surviving family members? Is there a parental immunity doctrine that might apply?

Follow standard procedure. As in every potential auto defect case, you must

- ensure that the vehicle is preserved
- photograph the window, the entire vehicle, and the scene
- interview all family members and witnesses (don't forget to ask about facts that could hurt the case, such as child abuse or neglect investigations or possible alcohol or drug involvement)
- examine all police or investigative reports and interview all investigating officers
- review all media coverage of the incident for statements made by your potential clients and family and to identify witnesses
- get the autopsy report.

Assess the case as a whole. Auto-defect cases are expensive, time consuming, and frustrating to pursue. Before taking a power-window case, take a hard look at the parents or other family members who will receive compensation from the claim.

In wrongful death cases, jurors usually view the child as blameless. But when the child is gone, jurors know the money will go to the parents—often the same people who momentarily left their child unrestrained and unsupervised in a running car.

In cases of catastrophic injury, jurors generally try to distinguish themselves from the plaintiffs. They want to think they will never suffer misfortune, and they seek to identify things the plaintiffs did that they think they would never do under any circumstances.

For instance, even if jurors themselves have rushed back into the house for a forgotten item, leaving the car running with a child in the back seat, they can be unforgiving—particularly if they do not identify with the plaintiffs or trust their motives.

Beating defenses

You can expect manufacturers to meet a case with defenses based on two theories: NHTSA's long inaction and its recent findings suggesting there is no need for auto-reverse technology so long as switches are redesigned to meet its safety standards, and the negligence of the parent or caregiver.

In many jurisdictions, a product's compliance with a safety standard can and will be asserted as a rebuttable presumption that it is not defective. To meet such defenses related to government regulations and the cost of the proposed changes, it is critical that you retain qualified, knowledgeable experts.

These experts can educate both the judge and the jury on the history of the industry's knowledge of the dangers of power windows and how easily and inexpensively vehicles can be made safer. The success of rollover and seat-back-failure cases demonstrates that jurors who have been well educated by the right experts will not allow manufacturers to hide behind a lack of regulations.

Your experts will also be able to provide facts needed to secure strong admissions during depositions of the manufacturer's representatives. These admissions would include the manufacturer's knowledge of the design's serious dangers, awareness of inexpensive alternative designs, and, most important, production of other vehicles that employ safer designs.

Strong expert testimony will also help you respond to claims of parental or caregiver negligence. As a practical matter, you cannot credibly argue that a parent or caregiver is faultless, so you must understand the comparative or contributory fault laws applicable in your state.

It is also important to screen cases carefully. Did the parent do something most people do on occasion or was the neglect extreme? Jurors tend to be much more understanding of a parent who ran into a friend's house "for just a minute" to pick up an item while leaving the car running to keep the heat on than they are of a parent who left the kids in the car to go into a bar for a few rounds of beer.

You may need to explain why a parent or other bystander did not respond to a choking child. A child whose throat is caught in a power window often cannot scream or cry out. The window closes on the child's throat in mere seconds, and the child can die in just a few minutes.²⁵

Power windows shouldn't kill children—not when there are safety measures U.S. auto manufacturers can implement to alleviate the problem. Government standards don't mandate every safety feature and don't take effect for several more years. Meanwhile, attorneys who take power window cases must prepare carefully to recover for the death or injury of a child.

Notes

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- BATTERIES, POWER WINDOWS, AND POWER ROOFS 31 (July 1997), *available at* ntl.bts.gov/lib/4000/4800/4850/756.pdf (last visited Mar. 3, 2005).
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 13. *Id.*
 14. Federal Motor Vehicle Safety Standard, *supra* note 7.
 15. 49 C.F.R. §571.118 (2004).
 16. Power Window Petition to NHTSA (Aug. 19, 2003), *available at* www.autosafety.org/article.php?scid=124&did=883 (last visited Mar. 3, 2005).
 17. S. 1072, 108th Cong. (2004).
 18. H.R. 2088, 108th Cong. (2004).
 19. Federal Motor Vehicle Safety Standard, *supra* note 7.
 20. *Id.* at 55.521.
 21. *Id.* at 55.528.
 22. Press Release, Kids And Cars, Power Window Rule Challenged by Consumer, Auto, and Child Safety Groups (Oct. 21, 2004), *available at* www.kidsandcars.org (from home page, scroll down to link to "Safe Power Window Campaign")(last visited Mar. 3, 2005).
 23. *Id.*
 24. Haynes v. Walker, 76 S.W. 902, 903 (Tenn. 1903); Foster v. Jeffers, 813 S.W.2d 449, 452 (Tenn. Ct. App. 1991).
 25. See, e.g., Comments of Thomas P. Flanagan, *supra* note 3, at 8.

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