



# Between the Lines

## Mark Your Calendars

**National TSRP Training**  
Denver, CO  
July 15–16, 2014

**NAPC Summer Meeting**  
Denver, CO  
July 16–18, 2014

**NDAA Summer Board & Committees Meeting**  
Denver, CO  
July 18–20, 2014

**IACP – DRE Section  
20th Annual Training  
Conference on Drugs,  
Alcohol and Impaired Driving**  
Phoenix, AZ  
July 28–30, 2014

**2014 GHSA Annual Meeting  
Mapping out the Future:  
Highway Safety after MAP-21**  
Grand Rapids, MI  
September 6–10, 2014

**Upcoming NDAA Courses**  
for a listing of all upcoming  
NDAA courses, please go to:  
[www.ndaa.org](http://www.ndaa.org)

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## Discouraging the Dubious Mechanical Failure Defense

by John Kwasnoski

**T**he defendant's vehicle yaws off the paved roadway and tumbles into an adjacent field, the front seat passenger is ejected and fatally injured. The defendant is positively identified as the operator of the vehicle by eyewitnesses, which is confirmed by forensic evidence in the interior of the vehicle. The defendant exhibits several clues on the standardized field sobriety tests and provides a blood sample for analysis. Police reconstruct the speed of the collision using road evidence, and there seems to be no way the defense can reduce the estimated speed of the defendant's vehicle.

You've turned over to defense your reconstruction and toxicology reports, and you're feeling pretty good about the strength of your case when the defense attorney approaches you in the corridor of the courthouse and drops a bomb on your case — he has retained a products liability expert and plans to claim that a mechanical failure or defect was the cause of the crash. So what can you do about this defense now? But even more important, what could you already have done to discourage the mechanical causation defense? Something that investigators should do in every vehicular case — check for recalls, technical service bulletins, and complaints for all involved vehicles filed with the National Highway Traffic Safety Administration (NHTSA). Further, when a prosecutor reviews the police paperwork in making a charging decision on crash cases, he or she should make sure that a search has been done for information on mechanical failures. In a recent case that was brought to my attention, a prosecutor had researched recalls on a

2006 Chevrolet Silverado pickup truck that had gone off the road and crashed, causing the death of a passenger. Only a few weeks before trial, and based on training the prosecutor had attended, she found a recall on the defendant's vehicle. The NHTSA recall campaign number was 07E106000, and read:

**Summary:** THE INBOARD RETENTION NUT USED TO MAINTAIN HUB BEARING ASSEMBLY CAN LOOSEN RESULTING IN AN ABS LIGHT INDICATION, NOISE, AND/OR WHEEL SEPARATION.

**Consequence:** WHEEL SEPARATION CAN RESULT IN A VEHICLE CRASH.

The recall info was immediately turned over to the defense, and now, a few weeks before trial, it may result in the MV homicide charge being downgraded to a DWI unless the State can show that such a failure did not occur and cause the crash.

So you know what a recall is, but what are the other levels of reporting mechanical problems that do not rise to the level of recalls? A Technical Service Bulletin (TSB) is a notice of a recurrent vehicle problem that is made known to the mechanics and technicians at the local dealership; they have their own database of these problems which in some cases is made available to them through a service called Alldata. TSBs can be researched on the NHTSA web site, or by a visit to the local dealership. NHTSA complaints are just that — complaints that owners have made to NHTSA, which are catalogued on the NHTSA web site [www.NHTSA.dot.gov](http://www.NHTSA.dot.gov)

A recent case that I reviewed involved a 2002 Ford vehicle that crossed the center line and collided with an oncoming vehicle, causing serious personal injury. One of the photographs of the defendant's vehicle showed the right front wheel toed in severely, with no evidence of any impact damage to the right front of the car. It was hard to imagine why the wheel would be in this configuration when the impact had occurred on the left front of the vehicle. In a quick search of the [www.NHTSA.dot.gov](http://www.NHTSA.dot.gov) site, I found 845 complaints on this vehicle model. Reading through approximately the first 400 complaints, there were at least 42 reports of the right front tire suspension failing due to excessive corrosion of the right front of the vehicle. Many of the complaints contained a description of the right front wheel severely toed in or "broken" from the axle. However, since the crash was not a fatality, the police had not done a mechanical inspection as part of their investigation, and they had not checked for recalls or other reported problems. The mechanical failure defense could be legitimate in this case, and might be supported by evidence gathered during a vehicle mechanical inspection.

The lesson: as part of any investigation, investigators should check the NHTSA website for recalls, TSBs, and complaints to ensure that there is no legitimate mechanical failure defense. Every prosecutor understands the duty to disclose exculpatory information (in their possession — including law enforcement) nevertheless judges often criticize prosecutors for failing to obtain information that may be exculpatory even when the defense has access to the same information, such as recalls, TSBs, and complaints on a government website. Moreover, prosecutors seek to advocate for the truth. If a defect caused a particular crash, the prosecutor should want to know that to guarantee that the defendant is truly guilty of the charges. At trial, when the officer, deputy, or trooper testifies that he or she looked for potentially exculpatory evidence as a routine part of the investigation, it may bolster his or her credibility and demonstrate the State's desire to be fair and bring about justice. Lastly, investigating mechanical failures will likely avoid the experience of finding a potentially critical problem with the State's case a few weeks before trial.

At the scene before the vehicles are removed, investigators should inspect the tires and note any damage, deflation, unusual tire pressures, indications on the tires of braking, etc. The vehicle should be photographed to document not only damaged areas, but those areas of the vehicle where there is no damage as well.

The ability to do a forensic mechanical inspection of vehicles as well as the capability to download the EDR in vehicles are two tools that collision investigators should have in their toolbox, or be able to get assistance with from another agency. A forensic mechanical inspection might address the following areas:

- Brake system operability
- Steering and suspension systems integrity
- Tire and wheel damage, or failure
- Lamp examination

Forensic vehicle examination is a topic of training that is becoming more available as the mechanical failure defense grows in popularity. A national source on "vehicle autopsy" training is Brian Chase, retired New Hampshire State Police ([www.vehicleautopsy.com](http://www.vehicleautopsy.com)), who also does expert witness work on mechanical issues in crashes.

The amount of civil litigation involving mechanical defects and failures is evidence of the fact that these causes are real, but an incomplete investigation can leave open the door for a dubious mechanical failure defense. Moreover, a complete investigation sends a message that law enforcement has "covered the bases" and has made every effort to find the true cause of the crash.

#### About the author

John Kwasnoski is Professor Emeritus of Forensic Physics at Western New England College, after 31 years on the faculty, and member of the NDAA Lethal Weapon faculty. He is one of the most sought after accident reconstructionists and police-prosecutor trainers in the country. He has served as an expert in numerous cases, several of national significance, co-authored three best-selling books: *Investigation and Prosecution of DWI and Vehicular Homicide*, *Officer's DUI Handbook*, and *Courtroom Survival: Making the Traffic Officer a Powerful Witness*, and created the *Crash to Courtroom DVD Library* and *CRASH! - The Science of Collisions*, a science and math program for reducing teenage traffic fatalities. He has written and lectured extensively on the subjects of "Accident Reconstruction" and "Effective Courtroom Testifying." He can be reached at [kwasnoski@aol.com](mailto:kwasnoski@aol.com)



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