WEST, J., dissenting. I respectfully disagree with the majority's determination that the plaintiff, Roland Todd White, did not raise the "malfunction theory" before the trial court and, therefore, would reach the merits of this claim. On appeal, the plaintiff argues that there is sufficient circumstantial evidence to establish a prima facie case against the defendants, Mazda Motor of America, Inc., and Cartwright Auto, LLC, under the malfunction theory, a products liability doctrine that applies where direct evidence of a specific defect is unavailable and permits a jury to infer that the vehicle was defective through circumstantial evidence, with or without expert testimony. See *Metropolitan Property & Casualty Ins. Co.* v. *Deere & Co.*, 302 Conn. 123, 133, 25 A.3d 571 (2011). The court concluded that the plaintiff could not establish a prima facie case under the Connecticut Product Liability Act (act), General Statutes § 52-572m et seq., absent expert testimony concerning a product defect. Implicit in the court's holding is that the plaintiff must identify a specific design or manufacture defect, and must do so with expert testimony. Because I believe that the plaintiff may establish a prima facie case through circumstantial evidence under the malfunction theory and need not present expert testimony regarding the allegedly defective condition of the vehicle, I would reverse the judgment of the trial court granting the defendants' motion for summary judgment. Accordingly, I respectfully dissent.

I

At the outset, the majority declined to consider the application of the malfunction theory on the ground that the plaintiff did not raise this claim before the trial court. In particular, the majority concluded that the plaintiff based his opposition to the defendants' motion for summary judgment on the theory that he had "provided sufficient evidence that the vehicle at issue harbored a defective design and/or improper installation of automotive parts that ultimately caused a car fire and, subsequently, the [p]laintiff's injuries." In doing so, the majority cites the longstanding authority that "an appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court . . . to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Emphasis in original; internal quotation marks omitted.) *Przekopski* v. *Zon-*

ing Board of Appeals, 131 Conn. App. 178, 189, 26 A.3d 657, cert. denied, 302 Conn. 946, 30 A.3d 1 (2011).

Although the plaintiff did not refer to the malfunction theory by name, he did raise before the trial court the argument that his case could be proven through circumstantial evidence. In his memorandum in opposition to the defendants' motion for summary judgment, the plaintiff argued, in the alternative, that if his expert, Richard E. Morris, did not qualify as an expert witness, the proximate cause of the plaintiff's harm could still be proven through circumstantial evidence. As part of this argument, the plaintiff cited *Lewis* v. *North American Philips Corp.*, Superior Court, judicial district of New Haven, Docket No. CV-91-0315792-S (April 6, 1994), where the court denied the defendant's motion for summary judgment after determining that there was a genuine issue of material fact as to whether the plaintiff's television set was defective and whether such a defect was the proximate cause of the plaintiff's harm on the basis of the plaintiff's own eyewitness testimony that the television self-ignited. Interestingly, the defendants addressed this argument in their reply brief in further support of their motion for summary judgment by first labeling it as a red herring, but subsequently contending that the "[p]laintiff's argument ignores black letter law by suggesting that a jury should be allowed to speculate, without . . . expert testimony to guide them, as to the alleged defect with the [v]ehicle."[1]

In its memorandum of decision, the court did not expressly address the plaintiff's argument that the proximate cause of his harm could be proven through circumstantial evidence. Rather, the court concluded that "[w]ithout . . . expert testimony, a jury would be unable to determine whether the allegedly defective condition of the vehicle was the proximate cause of the plaintiff's harm." The plaintiff filed a motion to reargue, in which he claimed that the court misapplied the case law when it determined that expert testimony was required to establish a product defect. The plaintiff then cited additional Connecticut cases where courts permitted a jury to infer a product defect from circumstantial evidence without expert testimony. The court denied the plaintiff's motion to reargue. Because I believe that the trial court was fairly apprised of the full nature of the plaintiff's alternative claim, which fundamentally concerned the application of the malfunction theory for purposes of establishing a prima facie case under the act, I would reach the merits of this claim.

II

Review of whether the plaintiff may establish a prima facie case under the act by way of circumstantial evidence of a product defect is plenary.[2] Our Supreme Court recently has adopted the malfunction theory in *Metropolitan Property & Casualty Ins. Co.* v. *Deere &*

Co., supra, 302 Conn. 123. "To recover under the doctrine of strict liability in tort, a plaintiff must prove that: (1) the defendant was engaged in the business of selling the product; (2) the product was in a defective condition unreasonably dangerous to the consumer or user; (3) the defect caused the injury for which compensation was sought; (4) the defect existed at the time of the sale; and (5) the product was expected to and did reach the consumer without substantial change in condition. . . . For a product to be unreasonably dangerous, it must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. . . .

"Although most product liability cases are based on direct evidence of a specific product defect, there are cases in which such evidence is unavailable. For example, a product malfunction may result in an explosion, a crash or a fire that damages or destroys much, if not all, of the product's components. See, e.g., *Liberty Mutual Ins. Co.* v. *Sears, Roebuck & Co.*, 35 Conn. Sup. 687, 689, 406 A.2d 1254 (components of television set destroyed in fire), cert. denied, 177 Conn. 754, 399 A.2d 526 (1979). The product also may be lost when it has been discarded or destroyed after the incident such that the parties are no longer able to examine it. See, e.g., *Fallon* v. *Matworks*, 50 Conn. Sup. 207, 210, 918 A.2d 1067 (2007) (product discarded after accident but before it could be examined by experts). In such cases, the plaintiff is unable to produce direct evidence of a defect because of the loss of essential components of the product.

"The absence of direct evidence of a specific product defect is not, however, fatal to a plaintiff's claims, and a plaintiff, under certain circumstances, may establish a prima facie case using circumstantial evidence of a defect attributable to the manufacturer. . . . In addition, a plaintiff need not present evidence to establish a specific defect, [as] long as there is evidence of some unspecified dangerous condition." (Citations omitted; internal quotation marks omitted.) *Metropolitan Property & Casualty Ins. Co.* v. *Deere & Co.*, supra, 302 Conn. 131–33.[3]

"The malfunction theory of products liability permits the plaintiff to establish a prima facie product liability case on the basis of circumstantial evidence when direct evidence of a defect is unavailable. Most states have adopted some form of the malfunction theory. . . . Although this theory does not relieve a plaintiff of the burden to prove all elements of a product liability claim . . . it does help to establish a prima facie product liability case by permitting the jury to infer the existence of a defect attributable to the manufacturer. According to § 3 of the Restatement (Third) of Torts, Products Liability, in a product liability action, the malfunction

theory permits a jury to infer that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff . . . was of a kind that ordinarily occurs as a result of product defect . . . and . . . . was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution. . . . This theory is based on the same principles underlying the doctrine of res ipsa loquitur, which permits a fact finder to infer negligence from the circumstances of the incident, without resort to direct evidence of a specific wrongful act. . . . Indeed, when a relatively new product fails to perform its intended function, the fact that the product failed may be said to speak for itself and provide support for an inference that the product was defective." (Citations omitted; internal quotation marks omitted.) Id., 133–35.

After setting forth the background principles, the court in *Metropolitan Property & Casualty Ins. Co.* summarized the adoption of the malfunction theory in Connecticut: "[W]hen direct evidence of a specific defect is unavailable, a jury may rely on circumstantial evidence to infer that a product that malfunctioned was defective at the time it left the manufacturer's or seller's control if the plaintiff presents evidence establishing that (1) the incident that caused the plaintiff's harm was of a kind that ordinarily does not occur in the absence of a product defect, and (2) any defect most likely existed at the time the product left the manufacturer's or seller's control and was not the result of other reasonably possible causes not attributable to the manufacturer or seller. These two inferences, taken together, permit a trier of fact to link the plaintiff's injury to a product defect attributable to the manufacturer or seller. A plaintiff may establish these elements through the use of various forms of circumstantial evidence, including evidence of (1) the history and use of the particular product, (2) the manner in which the product malfunctioned, (3) similar malfunctions in similar products that may negate the possibility of other causes, (4) the age of the product in relation to its life expectancy, and (5) the most likely causes of the malfunction." (Internal quotation marks omitted.) Id., 139–41.[4]

Additionally, the court in *Metropolitan Property & Casualty Ins. Co.* laid out the evidentiary burden that a plaintiff must establish: "[N]ot only must there be sufficient evidence to support each required inference, but the evidence also must be sufficient for the trier of fact to conclude, after considering all of the evidence presented and all reasonable inferences to be drawn therefrom, that the manufacturer is more likely than not responsible for the plaintiff's harm. [63 Am. Jur. 2d 96, Products Liability § 54, (2010)] ('Although proof may be made by circumstances alone, the plaintiff is

required to establish that the facts and circumstances, together with all appropriate inferences, give rise to the conclusion with reasonable certainty that the defect in a product [attributable to the manufacturer] proximately caused the plaintiff's injury. That is, the evidence must be sufficient to tilt the balance from possibility to probability.'). When the evidence is not sufficient to support such a finding, and such a finding essentially would require speculation by the trier of fact, the case cannot properly be submitted to the jury." *Metropolitan Property & Casualty Ins. Co.* v. *Deere & Co.*, supra, 302 Conn. 149.

In *Metropolitan Property & Casualty Ins. Co.*, the court stated that "[w]hether a plaintiff in this state may use the malfunction theory when the product is still available for inspection but the plaintiff nevertheless is unable to produce direct evidence of a specific defect is a question we need not resolve . . . ." Id., 132 n.4. Although the vehicle in the present case was physically available for inspection, most of the engine compartment and many critical components were destroyed by the fire. Morris' report illustrates the condition of the plaintiff's vehicle upon his inspection. Morris stated that the engine compartment was "badly consumed by fire . . . . [T]he engine manifold was completely burnt away . . . as well as the fuel rail and all associated parts that went along with that area were damage[d]. The hoses were all burned away as well as the injectors were very loose and just sitting on top of the engine. . . . [T]he top of the injectors, even in the engine housing, are melted away. . . . [T]he positive and negative battery cables were compromised . . . . [T]he area where the battery and fuse box would be housed was completely destroyed as well."

I believe that the fire that consumed the plaintiff's vehicle is the type of malfunction our Supreme Court described as "that [which] damages or destroys much, if not all, of the product's components." *Metropolitan Property & Casualty Ins. Co.* v. *Deere & Co.*, supra, 302 Conn. 131–32. Because of the missing engine components in the engine compartment, Morris went to a Mazda dealership to examine a similar model for purposes of comparison. On the basis of the extensive damage to the part of the vehicle that allegedly malfunctioned, it would be especially difficult for the plaintiff to present direct evidence of a specific defect. Accordingly, I would consider whether the plaintiff has presented sufficient evidence for a jury to infer (1) whether the vehicle fire was the type of harm that ordinarily does not occur in the absence of a product defect and (2) whether the alleged defect most likely existed at the time the product left the defendants' control. See id., 139–40.

In *Metropolitan Property & Casualty Ins. Co.*, our Supreme Court noted that the first element of the mal-

function theory is based on the doctrine of res ipsa loquitur, stating that "when a relatively new product fails to perform its intended function, the fact that the product failed may be said to speak for itself and provide support for an inference that the product was defective." (Internal quotation marks omitted.) Id., 135. The plaintiff testified in his deposition that he purchased the vehicle only a month before the fire and that he did not have any mechanical issues prior to the fire. Significantly, the vehicle had less than 3000 miles on its odometer. "The occurrence of an accident a short time after sale is circumstantial evidence of product malfunction." 2A American Law of Products Liability (3d Ed. 2008) § 31:25, p. 34. Jurors could use their common knowledge that new automobiles, in normal use, do not self-ignite to infer that such self-ignition would not occur in the absence of a product defect. See *Liberty Mutual Ins. Co.* v. *Sears, Roebuck & Co.*, supra, 35 Conn. Sup. 691 (inference of defect in television set permitted when witness saw flames emanating from television set because "television sets, in normal use, do not self-ignite"). The inference of a malfunction can "also be established with circumstantial evidence of a malfunction, such as difficulties with the product at or near the time of the accident . . . ." *Metropolitan Property & Casualty Ins. Co.* v. *Deere & Co.*, supra, 302 Conn. 141–42. Here, immediately prior to the fire and explosion, the plaintiff smelled gasoline inside the cabin of the vehicle, prompting him to pull the vehicle over to the side of the highway. Again, jurors could infer that the strong odor of gasoline detected in the passenger compartment immediately preceding the engine fire would not occur absent a product defect. In *Metropolitan Property & Casualty Ins. Co.*, our Supreme Court lists five types of circumstantial evidence that can be used to establish the elements of the malfunction theory. Id., 141. In the present case, the evidence of the history and use, the manner of the alleged malfunction, and the age of the vehicle, all could be used by a jury to infer that the vehicle fire would not have occurred absent a defect. Therefore, I believe that there is a genuine issue of material fact as to whether the vehicle fire was of a kind that ordinarily occurs as a result of a product defect.

For the second element of the malfunction theory, the plaintiff must present evidence that any defect most likely existed at the time the product left the manufacturer's or seller's control and was not the result of other reasonably possible causes not attributable to the manufacturer or seller. The plaintiff must "negate other factors that might account for an alteration of the product after sale, including improper use, modification, tampering or improper maintenance . . . . A plaintiff need not conclusively eliminate all possible causes of a product defect but must only negate reasonably possible secondary causes." (Citations omitted; internal quo-

tation marks omitted.) Id., 143. In the present case, there are no apparent secondary causes for the fire that would require the plaintiff to present evidence to negate them, such as modification to the vehicle after it was purchased.[5] The plaintiff stated that after purchasing the vehicle he had not opened the hood until the time of the fire. The plaintiff testified that he drove the vehicle under normal conditions to commute to and from his place of employment. The vehicle had been purchased only a month prior to the fire and had only 2800 miles on the odometer. "When a product malfunctions when it is new, the inference that the malfunction resulted from a defect attributable to the manufacturer is likely to be stronger than when the product is older because of the diminished possibility of other causes in the case of the newer product." Id., 144. "[C]ase law generally supports limiting the [malfunction theory] to new or nearly new products, in the absence of additional evidence linking the product defect to the manufacturer." Id., 147 n.15. In the present case, there is circumstantial evidence that would allow a jury to infer that any defect most likely existed at the time the vehicle left the defendants' control. Therefore, I believe that there is a genuine issue of material fact as to whether the alleged defect existed at the time the vehicle left the defendants' control.

For the foregoing reasons, I believe that the plaintiff has established a prima facie case under the malfunction theory.[6] At trial, the court should be permitted to determine whether the evidence is sufficient to "support each inference by a preponderance of the evidence before submitting [the] case to the jury . . . ." Id., 148.

III

I further believe that the plaintiff need not present expert testimony regarding the allegedly defective condition of the vehicle. Review of whether expert testimony is required is plenary.[7] Our Supreme Court has recognized that expert testimony is not required in all product liability actions. *Potter* v. *Chicago Pneumatic Tool Co.*, 241 Conn. 199, 217–18, 694 A.2d 1319 (1997). "Connecticut courts . . . have consistently stated that a jury may, under appropriate circumstances, infer a defect from the evidence without the necessity of expert testimony." Id., 218. In *Metropolitan Property & Casualty Ins. Co.*, our Supreme Court stated that in malfunction theory cases, "[i]f lay witnesses and common experience are not sufficient to remove the case from the realm of speculation, the plaintiff will need to present expert testimony to establish a prima facie case." *Metropolitan Property & Casualty Ins. Co.* v. *Deere & Co.*, supra, 302 Conn. 141.

Our Supreme Court has also recognized that "*expert testimony . . . is required only when the question involved goes beyond the field of the ordinary knowledge and experience of the trier of fact.* . . . The trier

of fact need not close its eyes to matters of common knowledge solely because the evidence includes no expert testimony on those matters. . . . We note that expert testimony has not been required to show: negligent boat operation . . . or detrimental effects of marijuana. . . . see also *Ciarlelli* v. *Romeo*, 46 Conn. App. 277, 283, 699 A.2d 217 (citing cases concluding expert testimony not required to prove: effect of operating gasoline station on traffic safety; injuries sustained on plaintiff's property were caused by defendant's blasting; negligence in failing to erect porch railing; fence erected around blasting area insufficient to prevent injuries; obscenity of certain materials for minors), cert. denied, 243 Conn. 929, 701 A.2d 657 (1997). Indeed, in *Marquardt & Roche/Meditz & Hackett, Inc.* v. *Riverbend Executive Center, Inc.*, 74 Conn. App. 412, 426, 812 A.2d 175 (2003), the Appellate Court concluded that expert testimony was not required to demonstrate the difficulty of backing a vehicle out of a parking space, noting instead that that question is one which our legislature expects all operators of motor vehicles to consider on a regular basis when using public streets." (Citations omitted; emphasis added; internal quotation marks omitted.) *Allison* v. *Manetta*, 284 Conn. 389, 405–406, 933 A.2d 1197 (2007).

In support of the proposition that expert testimony was necessary in automobile defect cases like the present one, the trial court cited *Predom* v. *Hadfield*, Superior Court, judicial district of New Haven, Docket No. 419156 (January 26, 2001), in which the court granted the defendant's motion for summary judgment because the plaintiff failed to produce an expert witness about the "exceptionally complicated nature and regulatory requirements regarding air bags . . . ." Id. Other decisions of the Superior Court, however, have denied summary judgment after determining that, in the absence of expert testimony, the nature of some alleged defect is within the common knowledge and experience of ordinary consumers. See, e.g., *Debartolo* v. *Daimler Chrysler Corp.*, Superior Court, judicial district of New Haven, Docket No. CV-03-0482725-S (December 22, 2005) (40 Conn. L. Rptr. 503) (holding that plaintiff was entitled to present defect claim to jury without expert testimony where airbag failed to deploy upon moderate frontal impact and seatbelt shoulder harness failed to restrain plaintiff); *Vaccarelli* v. *Ford Motor Co.*, Superior Court, judicial district of Waterbury, Docket No. CV-99-0153308-S (July 6, 2001) (holding same where airbag deployed without impact).[8]

Although automobile engines are complex, I believe that the nature of the facts in the present case fall within the common knowledge and experience of ordinary consumers. A juror, using only his or her common knowledge and experience could infer that a new vehicle that self-ignited under normal driving conditions was the kind of incident that ordinarily occurs as a

result of a product defect attributable to the manufacturer or seller. To make such an inference, a juror need not understand the complexity of an automobile engine but can merely rely on his or her knowledge and experiences of the way motor vehicles operate. Because the malfunction theory alleviates the burden of the plaintiff to identify a specific malfunction, it is unnecessary for a juror to pinpoint exactly what mechanism or mechanisms within the engine caused the fire.

For the foregoing reasons, I would reverse the judgment of the trial court. Accordingly, I respectfully dissent.

[1] The defendants further argued that *Lewis* v. *North American Philips Corp.*, supra, Superior Court, Docket No. CV-91-0315792-S was distinguishable.

[2] See *John H. Kolb & Sons, Inc.* v. *G & L Excavating, Inc.*, 76 Conn. App. 599, 605, 821 A.2d 774 ("whether the plaintiff has established a prima facie case is a question of law, over which our review is plenary" [internal quotation marks omitted]), cert. denied, 264 Conn. 919, 828 A.2d 617 (2003).

[3] In *Metropolitan Property & Casualty Ins. Co.*, our Supreme Court indicated that it had not yet "examined the precise contours of those circumstances in which this principle might apply" but recognized that this court and decisions of the Superior Court "have used the 'malfunction theory' of products liability to permit a jury to infer the existence of a product defect that existed at the time of sale or distribution on the basis of circumstantial evidence alone." *Metropolitan Property & Casualty Ins. Co.* v. *Deere & Co.*, supra, 302 Conn. 133.

[4] The court in *Metropolitan Property & Casualty Ins. Co.* also stated that the plaintiff in a malfunction theory case must, as a threshold matter, "present sufficient evidence to support a finding that the product, and not some other cause apart from the product, was more likely than not the cause of the plaintiff's injury." *Metropolitan Property & Casualty Ins. Co.* v. *Deere & Co.*, supra, 302 Conn. 140 n.9. In the present case, based on the nature of the alleged malfunction, there is sufficient evidence for a jury to determine that the product itself caused the plaintiff's injuries, not some other independent cause.

[5] When asked in his deposition by the defendants whether he could rule out arson as the cause of the vehicle fire, Morris replied in the negative. The defendants argue that because the plaintiff has not offered evidence to negate arson as the cause of the fire, he cannot satisfy the second element of the malfunction theory. Morris' answer to that question in the negative does not mean that arson is a reasonably possible secondary cause of the fire. At trial, if the evidence presented suggests that arson was such a cause, then the plaintiff has the burden of presenting sufficient evidence to negate it. See *Metropolitan Property & Casualty Ins. Co.* v. *Deere & Co.*, supra, 302 Conn. 142–43.

[6] The defendants argue that the plaintiff must establish sufficient evidence of the five types of circumstantial evidence listed by the Supreme Court in *Metropolitan Property & Casualty Ins. Co.*, namely, the history and use of the vehicle, the manner in which the product malfunctioned, similar malfunctions in similar products, the age of the product in relation to its life expectancy and the most likely causes of the malfunction. See *Metropolitan Property & Casualty Ins. Co.* v. *Deere & Co.*, supra, 302 Conn. 140–41. In that case, the court explicitly states that "[a] plaintiff *may* establish these elements through the use of various forms of circumstantial evidence, *including* evidence of . . . [listing five types of circumstantial evidence]." (Emphasis added.) Id. It is clear therefore that a plaintiff is not required to present evidence of *each* type of circumstantial evidence, but merely enough evidence from *any combination* of the five types from which a jury could make both inferences under the malfunction theory.

[7] See *Ackerly & Brown, LLP* v. *Smithies*, 109 Conn. App. 584, 587–88, 952 A.2d 110 (2008) ("The determination of whether expert testimony is needed to support a claim of legal malpractice presents a question of law. . . . Accordingly, our review is plenary." [Citation omitted.]); *Vanliner Ins. Co.* v. *Fay*, 98 Conn. App. 125, 136–37, 907 A.2d 1220 (2006) ("we note that the court's determination of whether expert testimony was needed to support the plaintiff's claim of negligence . . . was a legal determination, and, thus,

our review is plenary"); *St. Onge, Stewart, Johnson & Reens, LLC* v. *Media Group, Inc.*, 84 Conn. App. 88, 92, 851 A.2d 1242 ("because the defendant's challenge to the trial court's refusal to direct a verdict raises a question of law about the necessity for expert testimony, our review is plenary"), cert denied, 271 Conn. 918, 859 A.2d 570 (2004).

[8] Although this authority is not binding, I agree that the nature of some alleged defects in automobile defect cases is within the common knowledge and experience of ordinary consumers.