Product Liability Litigation Tests Jurors' Perspectives

By Andrew L. Shapiro

WHEN THE PHRASE PRODUCT liability comes to mind, most people envision Takata's exploding airbags, Philip-Morris's cancer-causing cigarettes, many companies' asbestos-laden building materials triggering mesothelioma, and General Motors' fiery automobile deaths. But product liability law covers much more than these huge cases, and the practice protects millions of consumers across the nation.

So how does all of this work in California? Clients pursuing damages for defective products in California may generally make one of three arguments—strict liability, negligence, or breach of warranty. In a defective design lawsuit, a claim would be subject to one of two tests, the Consumer Expectations Test or the Risk-Benefit, also known as the Risk-Utility Test.

Consumer Expectations Test[1]

If the average consumer can expect a product to function safely and it fails to do so, the court will apply the Consumer Expectations Test, in which it must be demonstrated that 1) the defendant manufactured/distributed/sold the product (typically, multiple defendants are made party to the suit; 2) the product did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way; 3) the plaintiff was harmed; and 4) the product's failure to perform safely was a substantial factor in causing the plaintiff harm.

The defendant in the case may argue that the consumer plaintiff misused a product in an unforeseen manner. For example, a car manufacturer can reasonably expect drivers to speed. But if the driver loses power steering at 95 miles per hour on a freeway, that is probably going to fall under the reasonable expectation of misuse umbrella, and can still leave the defendant strictly liable.

It doesn't matter if minor or reasonable alterations such as adding a cold-air intake or high performance air filters were made to the vehicle. However, carmakers may not expect buyers to tweak drivetrains with increased performance aftermarket parts or inject speed inducing nitrous oxide into their carburation systems. In that type of situation a defendant would probably have a good argument for stupidity, if not plaintiff misuse.

Risk-Benefit Test[2]

If the defect is caused by factors beyond the scope of the average consumer's understanding, the

Andrew L. Shapiro is the Chair of Lewitt Hackman's Personal Injury Practice Group in Encino. He can be reached at ashapiro@lewitthackman.com.

Risk-Benefit Test is usually applied by defense attorneys.[3] Slightly more complicated, here the plaintiff must initially prove 1) that the defendant manufactured/distributed/sold the product; 2) the plaintiff was harmed; and 3) the product's design was a substantial factor in causing harm to the plaintiff.

If the plaintiff can prove all three of these points are true, the jurors are then instructed they should then find for the plaintiff. However, if the defendant can prove that the design of the product has benefits that outweigh the risks, jurors are provided with further instruction to consider:

- Gravity of the potential harm resulting from the use of the product
- Likelihood that the harm would occur
- Feasibility of an alternative safer design at the time of manufacture
- Cost of an alternative design
- Disadvantages of an alternative design
- Other relevant factor(s)

In the Risk-Benefit Test scenario, jurors are in essence asked to think in terms of cost-benefits, much like the Chief Executive Officer of a business, while under the Consumer Expectations Test, jurors are effectively asked to think like a person risking serious injury by using the allegedly defective product.

Both sides tend to lose a bit when the Risk-Benefit Test is employed, as it generally leads to significantly more research into the history of the product in question, engaging more expert witnesses, and investing more valuable time in trial prep and at court.

For defendants, however, getting the court to agree to a Risk-Benefit Test has value as the more complicated the jury deliberation—asking those hearing the case to think like CEOs—the better the chance any injury claims will be denied.

Practical Application

In some defective products lawsuits, the question of which test to apply becomes highly contentious. A detailed analysis of the two tests was done by the court in the recent case of *Demara v. Raymond Corporation*.[3]

In *Demara*, the plaintiff was walking through a warehouse where a narrow-aisle forklift was being used. A forklift driver was backing up and changing direction when Demara's foot was crushed. After numerous surgeries, he was deemed permanently disabled and suffered continual pain. The plaintiff alleged he did not see the forklift—the subject lift—or observe a warning light. Demara and his wife filed claims under the theories of strict liability and negligence.

Originally designed in 2006 by the Raymond Corp., the forklift was later customized for Seltzer Chemicals, later known as Glanbia Nutritionals, the company which operated the warehouse where Demara was injured. The Raymond Corp. was aware that the moving drive wheel on the subject lift could cause serious injuries if body parts came into contact with it. Further, the drive wheel lacked safety guards, bumpers or other features that could stop people from coming into contact with the drive wheel, although the subject lift was equipped with a top-mounted warning light.

The trial court granted Raymond Corp.'s motion for summary judgment, finding that 1) the plaintiffs had not established a triable issue of fact as to causation; 2) the Consumer Expectations Test did not apply as a matter of law; and 3) the defendants established the requisite elements for the application of the Risk-Benefit Test while the plaintiffs had not established a triable issue of fact as to whether the benefits of the design outweighed the risks of injury due to the design.

As for the applicability of the appropriate test, the defendants argued that the Consumer Expectations Test did not apply, as a matter of law, since the subject lift is a "complex piece of industrial equipment . . . beyond the typical understanding of the consumer."[4] As such, and based on not having experience or an understanding of the design, the consumer could not have an expectation as to the safety of the design.[5]

The appellate court disagreed and found that "the inherent complexity of the product itself is not controlling" in determining whether the Consumer Expectation Test applies.[6] "For example, in certain circumstances, where a technically complex product performs 'so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers,' a lay jury is competent to determine whether the product's design is unsafe. Accordingly, the critical question is whether the 'circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety standards of its ordinary consumers.'"[7]

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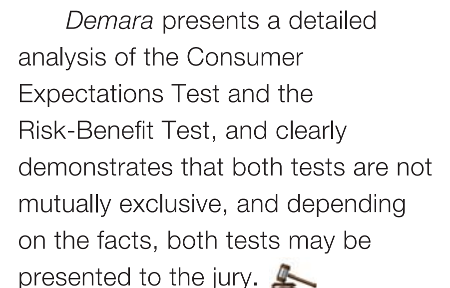
The court further reasoned that the Consumer Expectation Test is not based on minimum safety assumptions or expectations of consumers in general regarding a product, but rather on the minimum safety assumptions of the product's users. In the *Demara* case, the court focused on the minimum safety assumptions or expectations of those present in a warehouse with pedestrian traffic in which the subject lift was designed for use.[8] In other words, the complexity of the product does not necessarily determine which test is to be administered. Consumers, after all, can reasonably expect to travel safely when boarding a jetliner, getting into a car, or riding a bicycle.

Further, the Court of Appeal found that the Superior Court should not have applied the Risk-Benefit Test, which requires that the defendant bears the burden of establishing that alternative, safer designs would not offset the costs of implementing those designs. Due to the complexity of the analysis involved in the Risk-Benefit Test, unlike the Consumer Expectations Test, expert testimony is necessary.

Although the defendants' expert provided testimony of certain benefits of the design, they presented no evidence of either the risks of those design features or other competing design possibilities.[9]



Demara presents a detailed analysis of the Consumer Expectations Test and the Risk-Benefit Test, and clearly demonstrates that both tests are not mutually exclusive, and depending on the facts, both tests may be presented to the jury.

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[1] California Jury Instructions (CACI) (2017) 1203.
[2] California Civil Jury Instructions (CACI) (2017) 1204.
[3] *Demara v. Raymond Corporation*, 13 Cal App. 4th 545 (2017).
[4] *Id.* at 558.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 559.
[8] *Id.*
[9] *Id.* at 563.