Products-liability jury instructions: Blurred lines

The consumer-expectation test versus the risk-benefit test in design-defect cases

By Thomas H. Peters

In a products liability design-defect case under California law, the court is allowed to provide the jury with either of two liability instructions. California plaintiffs' attorneys generally prefer that the jury receive the relatively simple consumer-expectations-test instruction. It is found in CACI No. 1203. Under this test, the jury is asked to evaluate whether an ordinary consumer would have expected the product to perform as it did under the circumstances at issue. CACI No. 1203 asks the jury to undertake a straightforward evaluation of the product and ask: Did it perform as safely as one would have anticipated? If it did not, the product was defective. This instruction requires no more from the jury than the application of common sense. Without expressly requiring it, the instruction invites the fact-finder to step into the plaintiff's shoes and evaluate whether, from that perspective, the product's failure and the consequent injuries were reasonably foreseeable.

Knowing this, defense attorneys almost always argue for the jury to be instructed with the more complicated risk-benefit test found in CACI No. 1204. That instruction requires the jury to undertake a balancing test, in which the product's positive aspects are compared to its negatives. Under this test, evidence of the benefits of the product, the frequency and severity of past failures, the cost and mechanical feasibility of a safer alternative design, and even the product's history of safe performance become relevant. Thus, the range of witnesses, particularly experts, is much broader under CACI No. 1204 than under No. 1203, meaning the length and cost of trial is much greater than under the consumer-expectations test. More significantly, because the focus is placed on the pros and cons of the product in the abstract as opposed to its performance at the time it injured the plaintiff, the risk-benefit test tilts the fact finder's thinking towards a negligence-like analysis rather than the strict-liability evaluation that the law claims to require.

Courts have provided clear definitions of each test, and those definitions are fairly encapsulated in CACI. Yet, whether it is appropriate for the court to apply No. 1204 instead of No. 1203 must be decided on a case-by-case basis, with the court enjoying abuse-of-discretion-level deference. Thus, even if the trial court gives the wrong instruction, such is not considered to be reversible error per se.

That said, when is it improper to give CACI No. 1203 and when may a defendant succeed in requiring the use of No. 1204?

The consumer-expectations test

CACI No. 1203 states:

> **1203. Strict Liability – Design Defect – Consumer Expectation Test – Essential Factual Elements**
> [*Name of plaintiff*] claims the [*product*]'s design was defective because the [*product*] did not perform as safely as an ordinary consumer would have expected it to perform. To establish this claim, [*name of plaintiff*] must prove all of the following:
> 1. That [*name of defendant*] [manufactured/distributed/sold] the [*product*];
> 2. That 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. That [*name of plaintiff*] was harmed; and
> 4. That the [*product*]'s failure to perform safely was a substantial factor in causing [*name of plaintiff*]'s harm.

In connection with the consumer expectations test, the California Supreme Court has sated:

> At a minimum . . . a product *is* defective in design if it *does* fail to perform as safely as an ordinary consumer would expect. This principle . . . acknowledges the relationship between strict tort liability for a defective product and the common law doctrine of warranty, which holds that a product's presence on the market includes a representation "'that it [will] safely do the jobs for which it was built. [Citations omitted] Under this [minimum] standard . . . an injured plaintiff will frequently be able to demonstrate the defectiveness of the product *by resort to circumstantial evidence, even when the accident itself precludes identification of the specific defect at fault*.
> [Citation.] (*Soule v. General Motors Co.* (1994) 8 Cal.4th 548, 562.)

The consumer expectations test thus sets a floor on product performance: the product must perform as safely as an ordinary consumer would expect it to perform when used in an intended or reasonably foreseeable manner, including a reasonably foreseeable misuse. The jurors may look to their own life experiences and consider how they would have expected the product in question to behave, and, of course, to do so with the benefit of hindsight.

CACI No. 1204 presents a tougher path to a plaintiff's verdict.

The risk-benefit test

CACI No. 1204 states:

> **1204. Strict Liability – Design Defect – Risk-Benefit Test – Essential Factual Elements – Shifting Burden of Proof**
> [*Name of plaintiff*] claims that the [*product*]'s design caused harm to [*name of plaintiff*]. To establish this claim, [*name of plaintiff*] must prove all of the following:
> 1. That [*name of defendant*] [manufactured/distributed/sold] the [*product*];
> 2. That [*name of plaintiff*] was harmed; and
> 3. That the [*product*]'s design was a substantial factor in causing harm to [*name of plaintiff*].
>
> If [*name of plaintiff*] has proved these three facts, then your decision on this claim must be for [*name of plaintiff*] unless [*name of defendant*] proves that the benefits of the [*product*]'s design outweigh the risks of the design. In deciding whether the benefits outweigh the risks, you should consider the following:
>
> (a) The gravity of the potential harm resulting from the use of the [*product*];
> (b) The likelihood that this harm would occur;
> (c) The feasibility of an alternative safer design at the time of manufacture;
> (d) The cost of an alternative design;
> (e) The disadvantages of an alternative design;
> [and]
> (f) [*other relevant factor(s)*].

While the instruction does saddle the defendant with the burden to prove that the product's benefits outweighed its risks, the risk-benefit test involves a much more complicated analysis for the jury and shifts the arena of dispute away from the specific incident at issue and towards a more academic inquiry concerning the product in general. As the California Supreme Court states:

> [A] product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design. [Citations.] . . . [A] jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.

(*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 430-31.)

Rather than looking to their own everyday experience, jurors engaged in the weighing process required by the consumer expectations test must ascribe comparative value to often arcane pros and cons, many of which will have nothing whatsoever to do with the particulars of how the product acted at the time it injured the plaintiff.

The blurred lines: When to apply each test

The California Supreme Court sets forth a deceptively easy mechanism for determining whether a jury should be instructed on the consumer expectations or risk-benefit test. "The crucial question in each individual case 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 assumptions of its ordinary consumers." (*Soule*, *supra*, 8 Cal.4th at p. 568.)

Unfortunately, applying this analysis to any given situation is much harder than it sounds. Indeed, the courts draw seemingly indiscriminate lines. For example, one court held:

> The deployment of an air bag is, quite fortunately, not part of the 'everyday' experience of the consuming public. Minimum safety standards for air bags are not within the common knowledge of lay jurors. Jurors are in need of expert testimony to evaluate the risks and benefits of the challenged design.

(*Pruitt v. General Motors Co.* (1999) 72 Cal.App.4th 1480, 1484.)

In *Pruitt*, the plaintiff alleged that the air bag deployed in a low-speed collision, causing her injuries. The jury was instructed on the risk-benefit test; the plaintiff lost at trial and appealed, contending that the jury should have been instructed on the consumer-expectations test. Yet in *Pruitt*, the Court of Appeal, Fourth District, held that the trial court correctly refused to give the consumer-expectations instruction.

A reasonable attorney with a design-defect case involving an air bag might therefore think, after reading *Pruitt*, that the jury could only be instructed on the risk-benefit test in her case. Yet, in reversing a trial court's decision to grant a defense summary judgment in another air bag case, the Court of Appeal, Second District held:

> [The plaintiff] provided sufficient evidence for a jury to infer that the non-deployment of an air bag, in the context of the high-speed, 'head-on' collision described by [plaintiff], violates minimum safety expectations of the ordinary consumer. Indeed, the consumer expectation theory, rooted as it is in a warranty heritage . . .would seem necessarily to encompass a case in which it is alleged the product failed to perform in accordance with the representations contained in the owner's manual.

(*McCabe v. American Honda Motor Co., Inc.* (2002) 100 Cal.App.4th 1111, 1125.)

The trial court had granted summary judgment, reasoning that the plaintiff did not present any triable issue of fact as to whether, in the context of a frontal collision, an air bag is the kind of product about which consumers can form minimum

safety assumptions. Therefore, the consumer expectations test could not apply. But the Court of Appeal disagreed, holding that the consumer expectations test did in fact apply, reversing the judgment. (*Id*. at p. 1127.)

Pruitt and *McCabe* demonstrate that an attorney cannot automatically place even common, everyday products into the consumer-expectations category. Indeed, a different test may be applied to the same product, under different factual circumstances.

Generally, neither drug manufacturers nor manufacturers of implanted prescription medical products may be held strictly liable for injuries caused by such products. "[A] manufacturer is not strictly liable for injuries caused by a prescription drug so long as the drug was properly prepared and accompanied by warnings of its dangerous propensities that were either known or reasonably scientifically knowable at the time of distribution." (*Brown v. Superior Court* (1988) 44 Cal.3d 1049, 1069.) "[A] manufacturer is not strictly liable for injuries caused by an implanted prescription medical product which has been (1) properly made and (2) distributed with information regarding risks and dangers of which the manufacturer knew or should have known at the time." (*Hufft v. Horowitz* (1991) 4 Cal.App.4th 8, 11).)

In order to figure out which test should apply to your case, it is useful to follow these considerations:

1. Is the plaintiff able to demonstrate the products' defects through circumstantial evidence (see *Barker v. Lull Engineering Co.*, *supra*, 20 Cal.3d at p. 430)?

If so, then use the consumer-expectations test. In other words:

> If the facts permit an inference that the product at issue is one about which consumers may form minimum safety assumptions in the context of a particular accident, then it is enough for a plaintiff, proceeding under the consumer expectation test, to show the circumstances of the accident and 'the objective features of the product which are relevant to an evaluation of its safety' leaving it to the fact finder to 'employ "[its] own sense of whether the product meets ordinary expectations as to its safety under the circumstances presented by the evidence."'

[Citations.] (*McCabe*, *supra*, 100 Cal.App.4th at p. 1120.)

2. Even if the product is complex or used uncommonly, is the accident particularly bizarre or unexpected?

Akers v. Kelly Co. (1985) 173 Cal.App.3d 633 (disapproved on another ground in *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5) involved a "dockboard," which is a spring-loaded plate that attaches to a loading dock and adjusts to form a bridge between the dock and truck beds of different elevations. The prongs of a forklift struck the dockboard, and several hours later the dockboard collapsed and injured a worker. (*Id*. at pp. 641-44.) The court held that the consumer expectations test

> …is entirely appropriate in a case such as this one. There are certain kinds of accidents – even where fairly complex machinery is involved – which are so bizarre that the average juror, upon hearing the particulars, might reasonably think: 'Whatever the user may have expected from that contraption, it certainly wasn't that.' Here, a dockboard flew apart and injured [plaintiff]. A reasonable juror with no previous experience of dockboards could conclude that the dockboard in question failed to meet 'consumer expectations' as to its safety.

(*Id*. at p. 651.)

In other words, even if a product is outside of the typical juror's experience, if the accident is so unusual that it does not pass the "smell test," then the consumer-expectations test should apply.

3. The use of expert testimony does not preclude the consumer-expectations test

While defense counsel may try to argue otherwise, the use of expert testimony does not preclude the consumer expectations test. Many attorneys interpret a certain case, *Campbell v. General Motors Corp*. (1982) 32 Cal.3d 112, as prohibiting the use of expert testimony regarding consumer expectations in cases proceeding under what is now CACI No. 1203. The Supreme Court itself has noted that such an interpretation of *Campbell* is cryptic, stating that, "dictum in . . . *Campbell* injected ambiguity." (*Soule, supra*, 8 Cal.4th at p 564.) The Court further noted that "*Campbell* does not preclude the consumer expectations test in complex cases involving expert testimony." (*Id.* at p. 565, citing with approval *West v. Johnson & Johnson Products, Inc.* (1985) 174 Cal.App.3d 831, 867.)

Thus, in *Rosburg v. Minnesota Mining & Mfg. Co.* (1986) 181 Cal.App.3d 726, for example, the court held that breast implant performance is beyond common experience, and that expert testimony on what the consumer should expect was therefore relevant and admissible. (*Id.* at p. 733, fn. 4.)

Similarly, *West v. Johnson & Johnson Products, Inc*. involved a case where a plaintiff became seriously ill during her menstrual period. (*West*, *supra*, 174 Cal.App.3d at pp. 841-43.) At the time, doctors were only just realizing that tampon use sometimes causes toxic shock syndrome (TSS). (*Id*. at pp. 843-44.) At trial, numerous experts testified regarding the nature of the plaintiff's illness and whether the product had a causal link to TSS. (*Id.* at pp. 848-53.) The appellate court nonetheless upheld the use of the consumer-expectations test. (*Id.* at pp. 866-67.) As the Supreme Court stated in *Soule*:

> *West* agreed with *Akers* that *Campbell* does not preclude the consumer expectations test in complex cases involving expert testimony. In a time before general awareness and warnings about TSS, the court reasoned, plaintiff 'had every right to expect' that use of this seemingly innocuous product 'would not lead to a serious (or perhaps fatal) illness. . . .' Hence, the consumer expectations instruction was appropriate.

(*Soule, supra*, 8 Cal.4th at p.564, citing *West*, *supra*, 174 Cal.App.3d at p. 867.)

The California Supreme Court thus sanctions the use of expert testimony concerning what an ordinary consumer would expect even in cases proceeding under CACI No. 1203.

4. Technically or mechanically-detailed products require the risk-benefit test

In *Soule*, the court held that because the plaintiff's theory of design defect was one of technical and mechanical detail, the risk-benefit test should have applied. (*Soule*, 8 Cal.4th at p. 570.) As the Court stated:

> [The plaintiff's theory] sought to examine the precise behavior of several obscure components of her car under the complex circumstances of a particular accident. . . . An ordinary consumer of automobiles cannot reasonably expect that a car's frame, suspension, or interior will be designed to remain intact in any and all accidents. Nor would ordinary experience and understanding inform such a consumer how safely an automobile's design should perform under the esoteric circumstances of the collision at issue here. . . . Therefore, injection of ordinary consumer expectations into the design defect was improper. (*Ibid*.)

Therefore, in cases that will involve detailed, technical expert testimony regarding obscure parts, the risk-benefit test is more appropriate.

Giving the wrong instruction is not reversible error per se

What happens when a jury is instructed on the consumer-expectations test, but should have been instructed instead on the risk-benefit test, or vice-versa? This issue was presented in *Soule*, and the Court held that erroneously giving the consumer expectations instruction was harmless because it was not reasonably probable that the defendant would have obtained a more favorable result under the risk-benefit test. (*Id.*at p. 583.) The Court noted that "it does not follow that courts may 'automatically and monolithically' treat a particular category of civil instructional error as reversible per se. Article VI, section 13 of the California Constitution requires examination of each individual case to determine whether prejudice actually occurred in light of the entire record. [Citations.]" (*Id*. at p. 580.) Therefore, improperly giving CACI No. 1204 instead of No. 1203 does not render the verdict automatically reversible; the traditional analysis of whether actual prejudice occurred must be performed.

Conclusion

Determining whether to use the consumer-expectations or risk-benefit test requires an in-depth analysis on a case-by-case basis. Generally speaking, however, the consumer-expectations test is typically applied in situations where the jury can decide whether the product was defective based upon their ordinary experiences as consumers.


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