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Supreme Court Case No.
2nd Civil No. B 247672
LASC Case No. BC VC059206

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

WILLIAM JAE KIM, et al. Plaintiffs and Appellants, vs. TOYOTA MOTOR CORPORATION, et al., Defendants and Respondents.	2nd Civil No. B 247672 LASC Case No. VC 059206

From a Decision of the Second District
Court of Appeal – Division Seven
[2nd Civil No. B 247672]

PETITION FOR REVIEW

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1. ISSUES FOR REVIEW

1. In a product liability action based on the risk-benefit test of *Barker v. Lull Engineering* (1978) 20 Cal.3d 413, under what circumstances is a defendant entitled to introduce evidence of industry standards or practices, or argue that such evidence is probative of the absence of excessive preventable danger in a product?

2. In a product liability action based on the risk-benefit test, may evidence of industry standards or practices be introduced by defendant on the premise it reflects industry research and experience bearing on safety, practicality, technical or financial feasibility?

3. Where a previously unknown evidentiary rule is announced on appeal, is it proper to affirm based upon appellant's failure to pose objections or instructions in conformity with that rule, or is a new trial required to allowing appellant to object pursuant to that rule?

4. Are drivers capable of forming reasonable expectations as to how a vehicle will behave in emergency maneuvers, and is a plaintiff therefore entitled to the consumer expectations test where it is alleged that a vehicle lacks a stability control system designed to conform the vehicle's behavior to the driver's expectations by reducing the risk of over- or under-steering?

5. In assessing the applicability of the consumer expectations test to vehicle stability, do the consumers' "reasonable expectations" of product behavior refer to expectations as to the vehicle's behavior, or expectations as to the behavior of stability control technology?

2. INTRODUCTION

Almost since the inception of strict products liability, the decisions have recognized that evidence of industry standards or customs is inappropriate since it shifts the jury's attention away from the objective features of the product and the relative benefits of alternative designs towards the manufacturer's behavior and hence a negligence standard: *i.e.,* the product must be safe because "everybody in the industry does it." The effect is not just to divert juror attention from risk/benefit factors, but to undermine product improvement by ratifying designs that are "no worse" than what others are doing, as well as the burden-shift function of product liability doctrine.

In the last decade, some cases have departed from this strict rule, suggesting that a defendant's reliance on industry standards is a legitimate consideration in risk-benefit cases. This Opinion, recognizing a split in authority, attempts to reconcile the cases by a "middle ground" which jettisons the heretofore strict preclusion of "reasonable manufacturer" evidence in favor of a "discretionary ruling" standard which, judging by the Opinion, allows it whenever it is arguably the result of industry research and experience – in other words, almost always.

This new standard – and the Opinion's view that the evidentiary divide between negligence and strict liability actions is outmoded – rests in part on confusion between true industry-standard evidence – the equivalent of "standard of care" evidence – and evidence of specific instances of competing designs which might demonstrate feasibility of a design or refute claims about cost-effectiveness, and which hence represent direct evidence of true *Barker* factors. The Opinion thus seeds confusion and undermines burden-shifting and safety enhancement for a completely illusory benefit.

The Opinion also illustrates uncertainty as to the application of the consumer expectations test in cases involving vehicle stability, and more generally where new technology is available to correct users' operation of a product or limit misuse by making the product behave more closely to what the user intends and expects. Contrary to most decisional law holding that consumers have reasonable expectations as to vehicle stability even in emergency situations, the Court of Appeal affirmed refusal to give the instruction because the devices which would have made the vehicle behave as the driver intended was relatively new, its operation was not a matter of common knowledge among consumers, and its effect required expert explication.

The Opinion thus holds that the relevant consumer expectation is not about the behavior of the vehicle but rather about the behavior of the electronic stability control system – of which consumers are naturally ignorant. This contradicts cases holding that the complexity of the design or the need for expert testimony as to causation is no barrier to the consumer expectations test, and that the ultimate test is whether the consumer may form a reasonable expectation as to the behavior of the product as an integrated whole.

3. SUMMARY OF THE CASE

This case presents a classic example of the ordinary driver who, faced with a sudden threat, tries to maneuver the vehicle back to the intended direction of travel. Since the 1990s, the automotive industry has had technology to assist drivers by correcting over-steer and under-steer (*i.e.*, vehicle failure to respond as expected to steering input) and traction slippage. That technology, known as Electronic Stability Control (ESC) or Vehicle Stability Control (VSC) – was standard on many vehicles by the late 1990's or early 2000's, and was ultimately

made mandatory by federal regulation on all vehicles under 10,000 pounds.

Toyota offered ESC on a passenger vehicle in 1995, and offered it in an option package with other devices in the 2004 and 2005 Tundras, despite the urging of its engineers that ESC be made standard immediately because of the dramatic reduction in accidents. Toyota offered it only as an option because few customers understood ESC, so it offered no marketing advantage.

William Kim was in his 2005 Tundra traveling north on Angeles Forest Highway when he was forced into an evasive swerve. As Kim descended the highway, he saw an on-coming SUV about a quarter of the way into his lane: he reacted by steering right. Feeling the right wheels on the gravel edge, he steered leftward back onto the lane, barely avoided collision. Kim fought the wheel to get back into his lane, then started to panic as the Tundra didn't respond. Reentering the roadway by a right steer as it entered a curve, the Tundra lost traction and went out of control

Witnesses traveling south or uphill saw the Tundra round a bend, apparently out of control as the back end came across the line slightly. It then seemed to straighten out and stabilize. A witness who saw the truck go off the highway in her rearview mirror was shocked because the skid had not looked severe and the driver deemed to have regained control.

Other witnesses had observed many other cars coming around the bend drift or wiggle but then straighten out, or pass by the acc8ident location like "a bunch of race cars." Those vehicles showed similar slippage or wiggle and then straightened out.

Plaintiffs' reconstruction expert calculated Kim's speed at the point of the earliest tire marks as 42 mph, with his speed around the curve a bit faster. Witness descriptions were consistent with this, and with Kim effectively catching the first clockwise yaw as he came around the corner by turning the wheel into the slide.

Automotive engineer Michael Gilbert described ESC as a system to correct for driver error in extraordinary maneuvers. ESC senses when tires start slipping or when the vehicle is in over-steer (*e.g.* fish-tailing) and corrects vehicle movement in situations which are counter-intuitive or beyond the capacity of the driver. In this case, when the back end started coming out, ESC would have detected the motion before the driver noticed and put brake input into the front wheels to keep the rear from sliding out. On wet pavement, ESC detects tire slippage and adjusts braking to eliminate oversteer and improve cornering. Because ESC takes into account both vehicle movement and driver input, it adjusts vehicle direction according to the driver's intent.

Gilbert said the instant accident presented the typical scenario in which the driver's reaction lags behind the vehicle motion: the driver who needs to steer into the slide will input too much steer by the time the rear end comes around, causing it to swing around in the other direction, as happened with Kim. ESC instantly adjusts to the driver's overreaction and calculates how fast the rear is coming back before rear tires begin slipping, so that the driver doesn't have to overcompensate. ESC practically eliminated spins in some vehicles and speed ranges and reduced single vehicle accidents from 30% for passenger cars to 88% for passenger trucks.

Automotive engineer Murat Okcuoglu testified that there was a working ESC system by 1993, and by 2000 the technology was fully mature and well understood. For a company like Toyota, the incremental cost of putting ESC on

the Tundra was $300 to $350 per vehicle.

Toyota's PMK on stability control Akira Nagae, had worked on development of VSC for cars and trucks from 1997 to 2003, with oversight for the 2004 and 2005 Tundra. ESC had been put on Toyota models in the Japanese market in 1995. Nagae said ESC was designed to suppress side sliding and support driver steering efforts so that the vehicle would go in the direction of the driver's input in unstable conditions, so that even an average driver would be able to handle the vehicle to recover its intended path.

A Toyota study found that ESC eliminated spin-outs and vastly reduced drift where drivers entered a curve at a speed beyond their driving ability, and was "obviously effective for ordinary drivers" in preventing spinning. It was effective in sudden movements or cornering in slippery conditions, with a 70% reduction in serious single car accidents. Nagae could identify no benefit from not having VSC on the Tundra, and said the "consensus" decision to make it optional was based on market conditions, user demand and the trend in competitors' vehicles.

Sandy Lobenstein, Corporate Manager for Product Planning with Toyota Motor Sales USA, testified that Toyota had ESC on the Lexus in the 1990's. As of 2001 it was on the Sequoia and the 4Runner SUV as standard equipment. It was standard in the Highlander SUV in 2004, and in the FJ Cruiser SUV in 2007. ESC was optional in the Tundra for 2004 to 2006 models, and became standard when the second generation Tundra appeared in 2007. The 2005 ESC option was available only as part of a package including traction control, brake assist, daytime running lights and limited slip differential, and retailed at about $950.

Lobenstein recommended that ESC be optional for 2005-2007 model years,

disregarding the extent to which it enhanced safety and despite a recommendation by the engineering department in Japan that it immediately be made standard on the Tundra and Tacoma. His reason was lack of customer interest: less than 5% of customers chose ESC, though there was no evidence they understood the safety enhancement. "No one else had VSC at the time in a full-size truck, so we didn't have any expectations." (RT 3338:13-17)

Toyota accident reconstructionist Lee Carr testified that Kim was traveling at 45 to 50 mph, that the combination of speed and road moisture led to control problems leading Kim to skid off the roadway; that the Tundra had features that would have prevented the accident had Kim used them, and that even with ESC, he still would have gone off the cliff given his control commands. Carr asserted that the fundamental cause was Kim's inappropriate steer to the left; that ESC would not rescue a driver from an irreparable situation; and that the narrowness of the roadway and unimproved shoulder made the accident curve an "unforgiving" area for high-speed accidents.

The jury was given defendant's proposed verdict form, on which the initial question was "Did the Toyota Tundra contain a design defect when it left Toyota's possession?" (App. 554) The second question asked if the defect was a substantial factor in causing the accident, and the remainder dealt with comparative fault and damages. (App. 554-557) The jury answered only the first question, in the negative. (App. 554)

Plaintiffs moved for new trial on grounds of errors in instructions, admission of "industry standard" evidence, prejudicial termination of rebuttal argument, and other grounds. (App. 569-631) The motion was denied. (App. 808)

4. REVIEW IS NECESSARY TO RECONCILE CONFLICTING DECISIONS REGARDING ADMISSIBILITY OF "INDUSTRY STANDARD" EVIDENCE IN RISK/BENEFIT CASES

Plaintiffs' motion *in limine* 4 sought to preclude argument or testimony comparing the Tundra's performance to competing vehicles lacking ESC, or suggesting that the Tundra was not defective because it was equivalent or superior to competing models. (App. 84-92) Motion *in limine* 9 sought to foreclose any claim that compliance with Federal Motor Vehicle Safety Standards (FMVSS) satisfied Toyota's design obligations or demonstrated the subject vehicle was safe for its intended use. (App. 410-420) The court denied both motions. (RT 312)

The Court also refused plaintiffs' special instructions 19, 20, 21 and 22 (App. 545-548) which advised the jury that industry and federal motor vehicle standards did not demonstrate that the product was not defective, and that the jury must follow the risk-benefit test as set forth in the instructions rather than evidence of industry standards or compliance with federal standards. (RT 4218:19-21)

Toyota never offered a technical reason not to make ESC standard in every vehicle, nor denied it extraordinary benefit in emergency maneuvers. Rather, it argued that no federal regulation required ESC, that Toyota was the "industry leader," and that since no other manufacturer had made ESC standard on light trucks, the Tundra met or exceeded industry standards.

> Well, we know that the truck could be driven safely at even higher speed based on the testing of Mr. Carr. But we also know that no pickups had standard VSC in 2005. We also know that no pickups had VSC in any way before that, before 2004. So we know that

literally hundreds, if not thousands of pickups, Toyota, Ford, G.M.'s, and other types of vehicles without VSC have driven that stretch of road countless times over the last 10 years.

But Toyota did what none of the other big three pickup makers did in 2005. They gave the customer the choice. They made it optional equipment. That black Ford F150 that Mr. Herzog has got there, if it's a 2005, it's defective. If you believe the plaintiffs' position in this case, that 2000 Ford F150 is defective because it doesn't have standard V.S.C. It doesn't even have optional V.S.C. available. Toyota gave customers the choice.

. . . .

But what the plaintiffs would have you do in this case is force standard VSC on all vehicles back in 2004/2005 time period. Well, that's something the government has done after considerable study in model year 2013.

The plaintiffs would have you penalize Toyota for making it an option and then for putting it in standard six years ahead of when the government said it was required. That is not fair and that's not justice. [RT 4507-4510]

Tundra is a safe pickup with or without VSC. Excellent scores in the new car assessment program that's done by the NHTSA. . . The International Institute for Highway Safety, which is a private organization, sort of a watchdog organization that does all sorts of testing on vehicles. Tundra was rated best in its test. J.D. Power, customer satisfaction and

> reliability. Consumer Reports, if any of you seen consumer reports, they love to do hatchet jobs on vehicles. They love to criticize vehicles. Consumer Reports said it was the best pickup in its class. It complied with all Federal Motor Vehicle Safety Standards and there are a bunch of them. You've only heard about maybe one or two is the new standard. That doesn't take effect until 2013, but it complied with all the other standards.
> [RT 4517-4518]

Toyota did ***not*** argue that the increased risk posed by the absence of ESC was outweighed by cost or any design benefit.

A. The Cases Are in Disarray Concerning the Admissibility of Industry Standard Evidence in a Risk/Benefit Case

As the Opinion observes, most cases have strictly prohibited "industry standard" evidence in products cases. *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 803; *Foglio v. Western Auto* Supply (1976) 56 Cal.App.3d 470, 477; *Heap v. General Motors Corp.* (1977) 66 Cal.App.3d 824, 831; *Titus v. Bethlehem Steel Corp.* (1979) 91 Cal.App.3d 372; *McLaughlin v. Sikorsky Aircraft* (1983) 148 Cal.App.3d 203, *Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 545. These cases regard "industry standard" evidence as inconsistent with the risk/benefit test's focus on technical feasibility, cost, alternative designs, etc. – not on what other manufacturers are doing. 1 Witkin, *Cal. Evidence 5th* "Circumstantial Evidence" §111; 6 Witkin, *Summary Cal. Law 10th* "Torts" §1456. As 50A *Cal.Jur.3d* "Products Liability" §123 states:

> Admission of evidence that manufacturer met industry customs or standards on safety is reversible error in products liability actions; issue is not whether manufacturer exercised reasonable care, but whether the product fails to perform as the ordinary consumer would expect.

Grimshaw summarizes:

> The *Barker* court's enumeration of factors which may be considered under the risk-benefit test not only fails to mention custom or usage in the industry, the court otherwise makes clear by implication that they are inappropriate considerations.
> [*Grimshaw*, *supra*, 119 Cal.App.3d at 803]

Conflicting cases include *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, and *Howard v. Omni Hotels Mgmt. Corp.* (2012) 203 Cal.App.4th 403, 426. *Howard* reviewed a summary judgment in a strict liability and negligence case where plaintiff had framed his case in terms of due care and both sides offered "industry standard" evidence, mainly ASTM standards for friction coefficients. The decision is ambivalent about how that evidence actually bears on alternative design or on "whether the product's design is an acceptable compromise of competing considerations."

> . . . Howard has brought not only the "issue of whether the product failed to perform as the ordinary consumer would expect " before the court, but also design defect and due care issues, since his expert discussed them and all theories were pursued against Kohler. (*Buell–Wilson*, *supra*, 141 Cal.App.4th 525, 545.) Thus, Kohler's reliance on industry standards is a factor

> legitimately to be considered in the summary judgment proceedings. Properly read, the rule that a manufacturer is not entitled to a complete defense that it complied with industry standards applies to negligence cases and also, to some extent, applies to product liability cases. (Compare 50A *Cal.Jur.3d*, "Products Liability," §§90, pp. 676–677, on federal preemption issues ["The California courts of appeal have split on the issue of whether a manufacturer's compliance with federal motor vehicle safety standards, as set by the National Traffic and Motor Vehicle Safety Act, is a defense in a products liability action."].)
> [*Id.* 425]

Howard cites the rule against industry standard evidence stated in *Buell-Wilson*: "[A] manufacturer cannot defend a product liability action with evidence it met its industry's customs or standards on safety." Yet *Howard* held that the admission of industry standard evidence in the case at bar was "not inconsistent with" *Buell-Wilson's* statement, concluding that such evidence "should be taken into account through expert testimony as part of the design defect balancing process." (*Id.* 426)

O'Neill, *supra*, 147 Cal.App.4th 1388, involves FDA standards for pharmaceutical manufacturing, not an "industry norm" employed to show that the product was no worse than others on the market, and is *sui generis* given the unique role of the FDA as described in *Ramirez v. Plough* (1993) 6 Cal.4th 539, 556, which acknowledged that there is room for a compliance defense in such cases "where the evidence shows only the ordinary situation contemplated by the statute or administrative rule." (*Id.* 547–548)

The instant Opinion attempts a "middle ground," further confusing the

issue. It asserts that industry standards may be the result of research or reflect practical experience in balancing safety, feasibility, cost and functionality. (Opinion 13) It concedes that probative value for such purposes is debatable, "but that does not make it inadmissible."

> Evidence of compliance with industry custom may tend to show that a product is safe for its foreseeable uses, while evidence of noncompliance with industry custom may tend to show that a product is unsafe for its foreseeable uses.
> [Opinion 14]

The Opinion cites foreign authorities indicating that industry custom may be admissible, notably *Rest 3d Products Liability* section 2, comment d: "industry practice may also be relevant as to whether the omission of an alternative design rendered the product not reasonably safe." (Opinion 15) Many of these foreign cases do indeed import "reasonableness" into their products law, in contrast with California law, which firmly rejects "reasonably safe" as a criterion for the risk/benefit test. *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 134 (rejecting "unreasonably dangerous" language); *Barker v. Lull*, *supra*, 20 Cal.3d at 430-431.

As *Hansen v. Sunnyside Products, Inc.* (1997) 55 Cal.App.4th 1497, 1515, observes, "*Cronin*'s holding – that a plaintiff need only prove a defect and need not also prove the defect made the product 'unreasonably dangerous' – was based on two reasons: (1) requiring a consumer to prove the 'defect' caused the product to be 'unreasonably dangerous' 'rings of negligence;' and (2) such a requirement would permit a manufacturer to escape liability simply because of the low expectations the ordinary consumer might have for the product."

Even more radically, the Opinion decrees a general trend away from the premise that products liability should exclude negligence notions, claiming that this very Court "continue[s] to incorporate negligence concepts" into product liability doctrine. It cites *Daly v. General Motors* (1978) 20 Cal.3d 725, which applied comparative fault to products cases, and *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, allowing defendants in failure to warn cases to show that the particular risk was neither known nor knowable by application of available scientific knowledge.

> Following the Supreme Court's direction in this area, we depart from those cases stating that evidence of industry custom is irrelevant to the risk benefit analysis and always inadmissible in a strict products liability case involving the risk-benefit test . . . We conclude that evidence of industry custom may be relevant to the risk-benefit analysis and admissible in a strict products liability action, depending upon the nature of the evidence and the purpose for which it is offered. [Opinion 17]

Having announced this nebulous principle, the Opinion then gives examples which *do not in fact illustrate industry standard*, but particular alternative designs.

B. Review is Necessary to Distinguish "Industry Standard" Evidence from Evidence Genuinely Probative of Cost-Effectiveness, Feasibility or Other *Barker* Factors

To illustrate admissible "industry standard" evidence, the Opinion suggests evidence that competitors tried to produce a safer alternative design but the design malfunctioned, imposed unsustainable costs, or made the product less efficient.

None of these examples involve "industry-standard evidence." They are evidence as to specific experiences, or the feasibility or cost of *particular design alternatives* which were actually implemented. Industry custom evidence is entirely unnecessary for such purposes.

The court then suggests that evidence of a decision by Ford not to put ESC on its trucks was admissible to rebut the Kims' claim that Toyota planned to put ESC on its trucks until it learned that Ford had decided not to do so. Putting aside the logic of this reasoning, this also is not evidence of "industry standards" bearing on design safety, but of a particular competitor and of the "competitive pressure" issue which the Opinion itself deems irrelevant. (Opinion 18)

The Opinion thus conflates true "industry-standard" evidence ("nobody does it") which was the subject of plaintiffs' motions and the focus of Toyota's argument to the jury with *direct evidence* of feasibility, cost effectiveness, and other technical concerns legitimately considered under *Barker*. None of the examples in the Opinion justify evidence of prevailing practice in the industry: each can and should be proven with evidence of specific instances in which the design alternative is implemented or has proven impossible to implement.

The Opinion thereby fails to disprove the *Grimshaw* principle that evidence as to what prevails in the industry is both unnecessary and counter-productive.

C. Review is Necessary to Address the Scope of the Problematic New Rule of Admissibility Announced in the Opinion

The impact of the "middle ground" on product cases is enormous given the nebulous claim that industry standards may be admissible simply because they may

result from industry research or practical experience which may (or may not) reflect technological or economic realities. Under this rule, any defense expert willing to testify that the industry norm is the result of experience and research will now be allowed to place it before the jury, with the imputation that defendant is a "reasonable manufacturer."

The result is that "industry standard" substitutes for the technical evidence of *Barker* factors. Because jurors are allowed to assume that the industry has competently weighed *Barker* factors, and that it knows feasibility, safety and cost/effectiveness better than anyone, they are induced to rely on industry practice and custom without themselves analyzing and balancing design evidence.

This is particularly pernicious since "industry standard" evidence is no more than a hearsay conclusion as to risk and benefits, not an explanation. *Whitfield v. Roth* (1974) 10 Cal.3d 874, 894-895 (expert may not introduce hearsay opinions in the guise of reasons for his opinion); *Cates v California Gambling Control Comm'n* (2007) 154 Cal.App.4th 1302, 1309 (value of expert opinion lies in its reasoning, not conclusions.) The "middle ground" thus encourages evidence which will influence jurors without enlightening them, diminishing defendants' burden of showing the lack of a safer alternative design in technical detail.

Underlying the *Grimshaw* rule is the considerations that true "industry standard" evidence is inherently prejudicial. Because it is indistinguishable from standard-of-care evidence, it guarantees that jurors will be distracted from the details of feasibility, cost and relative safety to a "reasonable manufacturer" standard, allowing defendants to successfully argue that the product must be safe because "everybody does it." This undermines the objective of improving product safety by allowing existing standards as a substitute for evaluation of the best