Supreme Court Case No. S232754
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.	Case No. S232754 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]
Los Angeles County Superior Court
Hon. Raul A. Sahagan, Judge Presiding
[LASC Case No. VC 059206]

APPELLANTS' CONSOLIDATED REPLY TO *AMICUS CURIA* BRIEFS OF (1) CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; (2) INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL; (3) THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.; (4) THE CALIFORNIA CHAMBER OF COMMERCE AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA; AND (5) ALLIANCE OF AUTOMOBILE MANUFACTURERS

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1. INTRODUCTION

The Briefs of Toyota's *Amici* suffer from the same indiscriminate use of the term "industry custom" that mars the opinion of the Court of Appeal and the brief of Respondent Toyota. Appellant's Opening Brief on the merits was devoted to distinguishing the various legitimate *Barker* factors[1] which may conceivably have *influenced* the custom of an industry – and which can always be proven directly - from factors which are not properly considered under a risk-benefit test, but which may be the real reasons the industry has failed to adopt superior technology. Appellants' point was that bare "industry custom" of the sort adduced by Toyota - that every model on the market incorporates the same excessive preventable risk – does not by itself support an inference that such custom reflects the result of industry-wide balancing of *Barker* factors, rather than factors like a desire to maximize sales or profits, or lack of competitive pressure.

The proof that no inference can be drawn that other models are the result of an objective industry-wide balancing of risk-benefit factors lies in *Amici*'s Briefs themselves. In every instance, they concede that marketing considerations, competitive disadvantage and the customers' lack of enthusiasm or knowledge about a superior design alternative is reflected in industry custom – which it surely is. Having conceded that custom is as likely to be the result of marketing decisions or profitability concerns as of safety and feasibility, *Amici* argue that such concerns should in fact be taken into account by the jury simply because that is what "reasonable" manufacturers do.

This case is the poster child for an "industry custom" unrelated to feasibility, industry experience with alterative design or valid risk-benefit criteria. ESC had

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[1] *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 430, 434.

already become standard on passenger vehicles and would be standard industry-wide in a year or two on trucks: the decision to make it only optional in 2004-2005 was purely a decision to place marketing concerns over the recommendations of Toyota's own engineers.

What Toyota's *Amici* are advocating in reality is not the probative value of industry custom evidence in products liability cases, but the revision of California product liability law to allow – as one *Amici* puts it – an "optional standard" which is indistinguishable from a "reasonable manufacturer" or negligence standard. Under this "option," product liability defendants would be allowed to defend a design which incorporates excessive preventable risk on the basis that customers have not demanded the innovation, that it might require a price increase which places that manufacture at a price disadvantage, and that "reasonable manufacturers" make their decisions based on market factors which have nothing to do with the objective safety characteristics of the product.

Amici urge that the risk-benefit test of *Barker* be supplanted by a marketing-benefit test under which the cost of injuries is no longer placed on those best situated to avoid dangerous products, but rather on the injured customer wherever customers have not demanded the alternative design, and whenever manufacturers act on the basis of that lack of demand – a return of *caveat emptor*.

Finally, *Amici* do not genuinely dispute that the "custom" claimed by Toyota was not adduced to show feasability or industry experience, or for any purpose other than to persuade jurors that doing what everyone else did was "good enough," whether it resulted in an optimum balance of safety and cost or not. They tacitly concede that this was turned into a standard-of-care case, arguing instead that doing so was permissible.

2. THE BARE ABSENCE OF ESC ON OTHER TRUCKS DOES NOT QUALIFY AS A "CUSTOM OR PRACTICE" WHICH MIGHT POTENTIALLY REFLECT FEASIBILITY, INDUSTRY EXPERIENCE OR A CONSIDERED DESIGN CHOICE

Amici assume without much discussion that evidence that "nobody puts ESC on their trucks " is same as "custom" in the sense that term is used in negligence actions and commercial litigation – *i.e.*, a practice that is the result of some rational experience and reflecting acceptance in a trade or industry. Modernly, custom is defined as

> [a] usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates. It results from a long series of actions, constantly repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a tacit and common consent.
> [*Black's Law Dictionary* (5th ed. 1979) at 347]

See also *Jones v. Robertson* (1947) 79 Cal.App.2d 813, 818.

But what Toyota adduced was not custom in this sense, but a snap-shot of the industry in 2005 at a time when ESC had been generally adopted for passenger vehicles and was imminent on light trucks. There was no stable practice or "industry custom." That fact dispels the mystical implications with which *Amici* seek to endow the fact that other manufacturers had not yet put ESC on their light trucks.

Even in negligence cases, or where custom or practice is used to explain implied or assumed terms of a transaction, the custom must have duration and stability, so that it is the product of a matured practice whose utility has gained acceptance. See Abraham, *Custom, Noncustomary Practice, and Negligence*, 109 Colum.L.Rev. 1784 (2009): "evidence of the incidence of practices that are not sufficiently widespread to qualify as customs is not admissible to prove negligence."[2] What we have here is the *absence* of custom, not an industry consensus based on experience or on an engineering judgment that ESC should not be installed on light trucks. To the contrary, the industry recognized that ESC was of such extraordinary value that it would in the near future be installed on all vehicles.

Indeed, there was no genuine dispute that ESC was the most important safety innovation in decades.[3] It was sufficiently important that it was mandatory as of the

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[2] "Of course, evidence of the availability of an untaken precaution is almost always admissible in a negligence action to show what should have been done. Unless the practice of taking the precaution is sufficiently widespread to qualify as a custom, however, evidence of the incidence of the practice – regardless of how many actors follow the practice – is not admissible." Abraham, 109 *Colum.L.Rev.* at 1804.

[3] In 2004, the National Highway and Traffic Safety Administration concluded that ESC reduces crashes by 35%. Sport Utility Vehicles with stability control are involved in 67% fewer accidents than those without the system. Dang, *Preliminary Results Analyzing the Effectiveness of Electronic Stability Control (ESC) Systems*, DOT HS 809 790, 2004, at http://www.nhtsa.gov/cars/rules/regrev/evaluate/809790.html

The Insurance Institute for Highway Safety issued its own study in June 2006 showing that up to 10,000 fatal US crashes could be avoided annually if all vehicles were equipped with ESC. The IIHS study concluded that ESC reduces the likelihood of all fatal crashes by 43%, fatal single-vehicle crashes by 56%, and fatal single-vehicle rollovers by 77–80%. IIHS News Release, June 13, 2006, at http://www.iihs.org/iihs/news/desktopnews.

See also Ferguson, *The Effectiveness of Electronic Stability Control in*

time of trial on all vehicles under 10,000 pounds (RT 2508, 2719-2720), following the NHTSA finding that it was highly effective in preventing single vehicle loss of control run-off-the road crashes, and highly cost-effective. See FMVSS No. 126, *Final Regulatory Impact Analysis – Electronic Stability Control Systems* (NHTSA March 2007), available at https://www.nhtsa.gov/DOT/NHTSA/ Rulemaking/... /ESC_FRIA_03_2007.pdf.

At trial, this dramatic rate of accident reduction was unchallenged. (RT 2130-2131; 2477) The recommendation of Toyota's own engineers that ESC be made standard in 2005 (RT 3312-3313) was overruled by the marketing department on the grounds that customers didn't understand ESC and so didn't want it. (RT 3337-3340, 3354-3356; 3310-3315, 3328) A Toyota study reported that ESC was "obviously effective for ordinary drivers" in preventing spinning. (App. 841-843) Toyota's lead engineer on ESC could identify no benefit from not having it on the Tundra (App. 845-846), and said the "consensus" decision to make it optional was based on market conditions, user demand and the trend in competitors' vehicles. (App. 847)

Given this background of *actual* evidence bearing on risk and benefits, the progressive adoption of ESC, and the admitted absence of any engineering or design reason to leave it off the Tundra, an industry "custom" consisting of nothing but inaction had no probative value.

In a classic statement as to the ambivalence of industry practice as evidence of due care, Learned Hand made the point that there is no genuine "industry

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Reducing Real-World Crashes: A Literature Review – Traffic Injury Prevention. 8 *Traffic Injury Prevention*, Issue 4, June 2007 (abstract at http://www.tandfonline.com/doi/abs/10.1080/15389580701588949) collecting the numerous studies confirming ESC's effectiveness.

custom" allowing an inference of care where some participants have adopted the more prudent measure.[4] Finding that the failure to equip coastal tugs with radio receivers to receive storm warnings established the unseaworthiness of a vessel, Judge Hand observed:

> Is it then a final answer that the business had not yet generally adopted receiving sets? There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. [Citations] Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; ***a whole calling may have unduly lagged in the adoption of new and available devices***. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. [citations] ***But here there was no custom at all as to receiving sets; some had them, some did not; the most that can be urged is that they had not yet become general.*** Certainly in such a case we need not pause; when some have thought a device necessary, at least we may say that they were right, and the others too slack. [*The T.J. Hooper* (2d Cir. 1932) 60 F.2d 737, 740, cert. den. 287 U.S. 662 (1932) (emphasis added)]

Custom has value only if it actually expresses some sort of relevant

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[4] For the diminished role of custom even in the medical malpractice field, see Peters, *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 Wash. & Lee L.Rev. 163, 164-165 (2000), noting that the sentiment that "a whole calling may have unduly lagged in the adoption of new and available devices." is "so widely shared that there is no minority rule."

experience. "Evidence of conduct in a particular situation or in a few instances is not sufficient to establish custom. *Hercules Powder Co. v. Automatic Sprinkler Corp.* (1957) 151 Cal.App.2d 387, 400, citing *Longuy v. La Societe Francaise* (1921) 52 Cal.App. 370, 375 ("such evidence, to be competent, must amount to something going to establish the general custom and practice in the business under investigation.')

Characterizing the general absence of ESC as custom is particularly unwarranted in an industry whose members tout themselves as offering the most advanced technology, rather than as conforming to a static and established industry standard.[5] Indeed, the state-of-the-art is, as a rule, more advanced than custom, and therefore far more probative of what risks are practicably avoidable. "Industry standards are the practices common to a given industry. . . often set forth in some type of code, such as a building code or electrical code, or they may be adopted by the trade organization of a given industry. State of the art is a higher standard because scientific knowledge expands much more rapidly than industry can assimilate the knowledge and adopt it as a standard." *Lohrmann v. Pittsburgh Corning Corp.* (4th Cir. 1986) 782 F.2d 1156, 1164. Since the entire auto industry was familiar with ESC, the "custom" as to passenger trucks plainly incorporated avoidable risk.

A similar situation is found where industry or government have not adopted a relevant technical standard. That absence is deemed immaterial, misleading and prejudicial.

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[5] See Epstein, *The Path to The T. J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 *J. Legal Stud.* 1 (1992), describing the history of custom in tort law.

> Testimony concerning the absence of government standards should not be admitted since the absence of such standards is no proof that the product in question is safe or that no warning is necessary. Where the government is neither a party to the litigation nor a witness, no cross-examination is possible considering the absence of such regulations and the jury can only speculate as to why there are no standards. [*American Law of Products Liability 3d* (1998) §34:17]

See also 63A *Am.Jur.2d, Products Liability* §1122, and 63B *Am.Jur.2d, Products Liability* §1927 ("It is error to admit testimony in a products liability action concerning the absence of government standards, since the absence of such standards does not prove that the product in question is safe and that no warning as to its use is necessary; such testimony is therefore neither relevant nor material.")

Where, as here, the industry or technology is in flux, there is likewise no relevant custom or standard, and the optimal balance of safety and practicality can only be judged on the basis of the available technology.

3. CONFORMITY WITH CUSTOM IS IMMATERIAL SINCE JURORS ARE REQUIRED TO EVALUATE CUSTOM UNDER THE SAME RISK-BENEFIT ANALYSIS APPLIED TO THE PRODUCT

The assumption that conformity with custom somehow demonstrates that the product does not embody excessive preventable risk is not simply conjectural, as explained below, but rests on circular reasoning inconsistent with a risk-benefit analysis.

If the product in fact conforms with a genuine industry custom, then the jury's duty to is *evaluate the custom*, not to defer to it. Customary practice must be analyzed under the same *Barker* factors as the product itself to determine whether the custom embodies excessive preventable risk: and that analysis must be based on the objective characteristics and alternative design possibilities of the products. Introducing custom adds nothing but confusion and circularity of reasoning.

> The standard of reasonableness is analytically distinct from the test of conformity to custom, such that there is no rational ground on which one should expect all conforming acts to be reasonable acts. Whether conformity is reasonable depends on whether the practice itself is reasonable. There is nothing about the existence of a customary practice, *per se*, that makes it reasonable. Each practice must be judged on its own merits.
> [Hetcher, *Creating Safe Social Norms in A Dangerous World* (1999) 73 S.Cal.L.Rev. 1, 12]

Even in negligence, custom must be examined to assess whether it conforms with due care. If a design – even if universally adopted – retains readily and economically avoidable risk, then industry custom only serves to undermine the risk-benefit test by distracting jurors. This is the situation described by Judge Hand, where

> a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must, in the end, say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.
> [*The T.J. Hooper*, 60 F.2d at 740]

Judge Hand's holding that the law may require innovation when the benefit society will derive clearly outweighs the cost of making the innovation now ingrained in product liability jurisprudence, as is his presciently observation that an industry "may never set its own test, however persuasive be its usages." (60 F.2d at 740) See *Complete Serv. Bureau v. San Diego Cty. Med. Soc.* (1954) 43 Cal. 2d 201, 214.

4. THE BARE FACT THAT OTHER MANUFACTURERS HAVE NOT YET ADOPTED AN ALTERNATIVE DESIGN SUPPORTS NO INFERENCE AS TO ANY FACTOR COGNIZABLE UNDER *BARKER* AND HENCE IS IRRELEVANT

Amicis argue that industry custom is probative of feasibility, cost-effectiveness, customer indifference, price competition, a supposed industry-wide evaluation of the value of alternative design, and a number of other factors.

The argument is self-defeating. *Amici* posit an array of factors which account for a particular industry custom without demonstrating that any particular factor is a *probable* cause, without addressing by what means a jury might find that, for example, feasibility was the reason for a particular custom, and without demonstrating that anything in the record of this case would support any particular inference. That so many possible inferences are suggested for the purported custom is a tacit admission that no particular inference is more likely than not.

As one author notes, under a rule allowing custom as "some evidence" of due care. "the important task is to determine the criteria for deciding when conformity is probative of due care. As we will see, neither courts nor

commentators have displayed a good grasp of these criteria, characteristically saying very little of substance as to why a particular custom should or should not be accorded evidentiary weight, or what the relevant custom is." Hetcher, *Creating Safe Social Norms in A Dangerous World,* 73 S.Cal.L.Rev. at 1. Some evidence beyond sheer custom is required before custom become probative of either due care or the absence of excessive preventable danger.

> It is striking, however, that while the evidentiary rule has won out over its rival, courts and scholars have been content to rely on the negative arguments of Holmes and Hand, but have not offered a positive justification as to why the mere evidence of a practice made up of the actions of non-parties to a lawsuit have anything whatsoever to do with whether a particular defendant's actions in some particular circumstances constitute negligence? ***If a whole industry can lag behind, then in order to know whether or not the particular industry at issue is lagging, a judge seemingly must make an independent evaluation of the particular act of conformity involved in the situation. But if the act is evaluated independently, then the practice is analytically posterior and apparently irrelevant to the evaluation of the particular act.*** In other words, why should compliance with custom have any role to play in the negligence determination? The silence of Holmes and Hand may not be surprising, as courts are not required to give a rationale for the rules they apply if they apply them more or less correctly. This, however, leaves scholars with the task of articulating the evidentiary connection between conformity to custom and non-negligence. [Hetcher, *Creating Safe Social Norms in A Dangerous World,* 73 S. Cal. L. Rev. at 18-19]

The issue of custom's relevance in strict liability accordingly cannot be resolved without examining the legitimacy of the inferences advocated by Toyota and its *Amici*.

A. While Custom May Be Directly Relevant in Negligence, Its Relevance in Strict Liability is at Best Circumstantial and Dependent Upon Assumptions Which Are Frequently Unsupported

Essential to any discussion of custom is the distinction between its use in negligence and its potential relevance in a strict liability action.

In negligence, custom may be of direct relevance given the 'reasonable person" standard. What is done is deemed some evidence of what should be done in a given trade or profession since practitioners are presumably reasonable, and "ordinary care" is that practiced by ordinary persons in the field. *Bouse v. Madonna Construction Co.* (1962) 201 Cal.App.2d 26, 29-30 ("What others do is some evidence of what should be done, but custom is never a substitute for due care.") Custom may therefore furnish evidence of a standard of care without the necessity of inference. *Perumean v. Wills* (1937) 8 Cal.2d 578, 583.

In strict liability, custom is at best only indirect or circumstantial evidence, as both *Amici* and the Court of Appeal's Opinion demonstrate. What others do is not in itself probative, but becomes relevant only if it supports an inference with regard to the objective factors enumerated in *Barker: e.g.*, feasibility, practicability, cost-effectiveness. Whether any particular evidence of purported "custom" has any value or supports any inference with regard to *Barker* factors depends upon assumptions– and usually a preliminary factual showing – that need not be examined in a negligence case,

but are essential in a strict liability action.

B. Because Even Genuine Industry Custom Results From Innumerable Factors, Standing Alone It is Not Relevant nor Probative of *Barker* Factors

Amici argue that Appellants identified a number of factors which are often subsumed under the loose term "industry custom" and which might be relevant under *Barker*: industry technical standards, state of the art, and technological feasibility as reflected in actual experience (all of which can naturally be shown by direct evidence.) They argue from this that Appellants have conceded the relevance of custom. But, as noted, the fact that only Toyota offered ESC only as part of an option package was not the result of technical experience, feasibility, an engineering decision that it was unnecessary, or an objective standard developed by industry research. What plaintiffs conceded was the relevance of the direct and objective evidence of experience, not that custom was inherently probative of experience or other *Barker* criteria. On the contrary, custom standing alone is so equivocal as to render any such inference speculative and conjectural.

(1) Any Inference from Custom as to *Barker* Factors is Pure Conjecture

Evidence that others in the industry have not adopted an alternative or superior design does not in itself support an inference as to feasibility, safety benefits, an objective industry technical standard, or any factor suggested by the Court of Appeal. Like other circumstantial evidence, custom *per se* becomes relevant only when the circumstances support an inference that it is the result of experience bearing on *Barker* factors. "The most accepted test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts. . ." *People v. Garceau*

(1993) 6 Cal.4th 140, 177. *Evidence Code* §210. Because custom arises from a multitude of factors, most of which have no bearing on *Barker* factors (as Toyota's own evidence demonstrates), by itself it has no logical tendency to demonstrate that the absence of ESC was for any reason that factors into the balancing process. Industry custom invariably reflects considerations of costs, profits, or marketing strategies wholly separate from product safety. *Ward v. Hobart Manufacturing Co.* (5th Cir. 1971) 450 F.2d 1176, 1184.

That evidence is "circumstantial" does not mean it is admissible or relevant. *People v. Zismer* (1969) 275 Cal.App.2d 660, 664–65; *People v. Morgan* (2005) 125 Cal.App.4th 935, 942–943 ("Merely characterizing the evidence as circumstantial does not make the evidence admissible.") Circumstantial evidence must be "such as will furnish a reasonable foundation for an inference . . . or whether it 'leaves only to conjecture and surmise the conclusion . . ." *People v. Anderson* (1968) 70 Cal.2d 15, 25.

Evidence which produces only speculative inferences is irrelevant. *People v. Memro* (1985) 38 Cal.3d 658, 695; *In re David M.* (2005) 134 Cal.App.4th 822, 828 (inferences must be "a product of logic and reason" and "must rest on the evidence.") "Evidence is properly excluded when the proponent fails to make an adequate offer of proof regarding the relevance or admissibility of the evidence." *People v. Blacksher* (2011) 52 Cal..4th 769, 819-820.

That no other manufacturer offered ESC on trucks does not imply that the omission of ESC was due to experience or a valid engineering decision, much less that a truck without ESC was a non-defective or safety-optimized product, even were this a true "industry custom." Even real custom is the result of so many possible influences as to preclude any inference that it is the product of a particular factor, whether it is technical feasibility, lack of competitive pressure, a reluctance to innovate, inertia, a