

Supreme Court No. S 232754

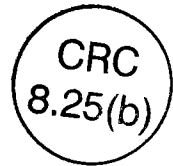
2nd Civil No. B 247672

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. S 232754



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[2nd Civil No. B 247672]
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Hon. Raul A. Sahagan, Judge Presiding
[LASC Case No. VC 059206]

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1. INTRODUCTION

In the Opening Brief, Appellants distinguished the true “industry custom” evidence and argument which was the subject of their motion *in limine* from the varieties of evidence which are often lumped under that term, including technical standards, specific instances of alternative designs, and state of the art or industry capability. As Appellants observed, each of the latter instances are legitimate *Barker* factors which can and should be proven with the type of specific and objective evidence that allows jurors to themselves weigh feasibility, risks and benefits.

By contrast, the “industry custom” relied upon by Toyota amounts to no more than a remote and factually unfounded inference that the fact that nobody in the industry has adopted a given safety feature is the result of industry experience, that the industry has based its custom on a weighing of risks and benefits, and hence its omission cannot render the product defective. That inference serves as a proxy for the jury’s own weighing of factors, though in truth it may reflect nothing more than industry inertia or the fact that – as here – the manufacturer felt no competitive pressure to adopt the design and so overrode engineering recommendations.

Indeed, Lobenstein’s testimony demonstrates that the omission of ESC had nothing to do with risk/benefit considerations or industry experience and research: it was pure marketing. And the fact that ESC had been generally implemented on passenger vehicles and was scheduled to made standard on trucks establishes that there was no industry consensus that ESC was impractical or cost-prohibitive, or that its omission from passenger trucks was justified by *Barker* factors.

Toyota’s Brief proves the danger of the indiscriminate use of the term. It fails to distinguish authorities which condemn industry custom from those which allow

evidence of specific competing models to show the feasibility of alternative and safer designs, and it fails to refute the inevitable effect of such evidence – to influence jurors to decide based on an industry “standard of care” instead of themselves weighing risks and benefits.

Nor does Toyota refute the central point of the Opening Brief: if the existing practice of the industry actually reflects research or experience bearing on cost, feasibility, benefit or detriment to product utility, than that research or experience can be placed before the jury with far greater edifying effect than the smoke-screen of mere custom. In not one instance does Toyota demonstrate that the inference of industry “balancing” which is its justification for custom evidence cannot be far better served by showing exactly how that “balance” is the result of real risks and benefits rather than irrelevant competitive factors or mere lethargy.

Respondent’s contention that objection to industry custom was not preserved because only a limiting instruction can afford relief for misuse of evidence properly admitted ignores the fact that instructions were in fact submitted and refused, and that a principal purpose of *in limine* motion is to prevent the misuse of even properly admitted evidence, as well as to preclude arguments which are not legally sustainable. Plaintiff’s motion *in limine* gave the court the opportunity and duty to do exactly that.

Finally, while Toyota argues that there were “holes in plaintiff’s causation case,” the jury never reached causation due to Toyota’s improper verdict form. Toyota ignores the rule of substantial evidence and the jury’s right to accept plaintiffs’ evidence irrespective of the rather tepid defense arguments.

2. **TOYOTA OFFERS NO TENABLE JUSTIFICATION FOR TRUE INDUSTRY CUSTOM EVIDENCE IN RISK BENEFIT CASES**

None of Toyota's arguments for relevance detract from the fact that it had only one purpose in eliciting "custom and practice" evidence - to sway jurors into believing that if nobody made a truck with standard ESC, a truck without ESC could not be defective. That use was plainly intended to induce the jury to rule on a negligence standard rather than apply the rigor of the risk-benefit test.

A. **Toyota's Reliance on Consumer Demand Distorts the Role of Consumer Knowledge and Choice and Undermines the Manufacturer's Duty to Make Design Choices**

Throughout its Brief, Toyota harks upon lack of consumer demand for ESC, the supposed unwillingness of consumers to pay a few hundred dollars for the device, and the industry's supposed adherence to the consumer's supposed rejection of the ESC's benefits, allegedly reflected in the general failure to have it on 2005 trucks. The argument is that consumers rejected ESC and manufacturers' deference to such a decision is a valid expression of risk-benefit. This has dangerous public policy implications.

First, it offends the policy of driving safety improvement based on an objective and informed balancing of risks and benefits by a well-informed jury. Contrary to Toyota's claim that jurors should not apply hind-sight, it is exactly their role to second guess the manufacturer's design decision (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 430), not the customer's choice. Consumer demand for unknown technology is nil, and manufacturers themselves create or retard the demand for product innovation; it is their role in creating consumer demand which calls for

imposition of strict liability. *Taylor v. Elliott Turbomachinery Co., Inc.* (2009) 171 Cal.App.4th 564, 576; *Kasel v. Remington Arms Co.* (1972) 24 Cal.App.3d 711, 725; *Bay Summit Community Ass'n v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 771-776

Second, the policy of allocating the costs of product defects and improving product safety rests on the manufacturer's superior knowledge and ability to weigh and avoid risks, and to assess the costs of a less safe product. This is defeated if a less safe product is justified by lack of consumer knowledge and hence demand. As Justice Traynor put it:

The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks. . .

[*Escola v. Coca Cola Bottling Co.* (1944) 24 Cal.2d 453, 467-468]

“Courts should design rules of products liability to address situations in which market forces cannot be relied on to ensure the fulfillment of consumer safety demands. The goal of products liability law therefore should be to hold manufacturers to the level of safety that consumers would demand through market choices if they were adequately informed about product risk characteristics. . . Product users are entitled to the benefit of the hypothetical safety bargains that they would have struck with manufacturers, given a more textbook market setting.” Kysar, *The Expectations of Consumers* (2003) 103 Colum.L.Rev. 1700, 1749.

The marketing of a less-safe product, and advertising and marketing that does not aim to promote a safer product which does not enhance profits, means that the

manufacturer has unilaterally increased the number of persons exposed to risk of injury.

The manufacturer should bear the burden of the resulting injuries, or it will continue to promote the less safe product and the consumer will bear the cost of avoidable accidents, as happened here. *Bay Summit Community Ass'n v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 771-776; *LaRosa v. Superior Court* (1981) 122 Cal.App.3d 741, 756-757.

Consumer acceptance might be validly considered if it actually reflected the consumer's weighing of the decreased danger against the increased costs, but that is not even arguably the case with ESC. Consumer reaction might be a factor if a safety device substantially impedes the intended use or performance of the product. But "consumer acceptance" is no excuse when it amounts to nothing more than the assertion that the safety device costs marginally more, where the device has no impact on utility (in the case of ESC, it actually increases utility), and where consumer acceptance consists of no more than a lack of consumer comprehension of safety benefits.

That there was no strong consumer demand for seatbelts before they were mandated, or that there was no clamor for air bags in their early years, was no excuse for manufacturers failing to install them. Omission of devices which have zero impact on utility cannot be justified by lack of demand.

Lack of "acceptance" of obscure electronic features is readily distinguished from cases like *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1131, holding that aesthetic considerations are pertinent because the appearance of a car bears on its perceived utility. In *Bell*, the design choice had an actual impact upon the usefulness of the product: the consumer's aesthetic was one aspect of utility. *Bell* is a case of informed and actual consumer decision, not of a

marketing decision driven by lack of consumer appreciation.

Where new technology is virtually unknown to consumers, offers drastic improvement to safety, but has no impact on utility, citing “consumer acceptance” which consists of no more than lack of consumer knowledge shifts the burden of design choices from the manufacturer to a user who is simply unequipped to make that decision.

B. Industry Custom is Irrelevant to Causation

Toyota advances the theory that the absence of ESC from other trucks was probative of causation because other non-ESC equipped trucks presumptively had negotiated the curve. (RBM 29-30)

The premises for making an “absence of other accidents” argument are missing. Absent evidence that other trucks had engaged in a similar collision-avoidance maneuvers and reached loss-of control parameters in which ESC would have cut in, this is conjectural. Particularly where an accident involves multiple steering inputs, there is no basis to assume that similar prior emergency maneuver ever occurred, or to conclude that ESC wouldn’t have operated in the instant case. *Cooper v. Firestone Tire and Rubber Co.* (9th Cir. 1991) 945 F.2d 1103, 1105; *Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, 555; *Benson v. Honda Motor Co.* (1994) 26 Cal.App.4th 1337, 1345. And because this particular curve was not unique, it has no more probative value as to causation than the accident history of millions of other curves where trucks equipped or not equipped with ESC either lost or recovered control.

Even were it true that Kim was traveling faster than other ESC-equipped vehicles, or that he reacted less adroitly than other drivers, it does not follow that ESC

would not have made a difference. That issue turned on expert testing and opinion, not on a general accident history of other vehicles.

In any event, evidence that no other manufacturer offered ESC in 2005 was not used for this purpose, and Toyota was free to argue that innumerable other vehicles without ESC had navigated the turn without losing control without using the “industry custom” argument.

C. Industry Custom is Irrelevant to Risk-Benefit Factors

Citing the Opinion below, Toyota claims that Lobenstein’s admission that the failure to make ESC standard was due to lack of consumer demand, or the fact that Ford decided not to make it standard, demonstrate that “industry custom” is relevant to risk-benefit. (RB 30-31) But what that evidence showed was that Toyota’s decision was not based on risk-benefit factors. As discussed below, evidence that Toyota disregarded engineering recommendations and went with marketing considerations goes not to the merits of the design, but furnishes background evidence that there was no valid risk-benefit reason for the decision. That point is not disproven by “industry custom.”

Toyota also suggests that industry custom supports its position that ESC technology for trucks was not mature, though it had been on every other sort of vehicle for years. Since ESC was available as an option and Toyota engineers urged its implementation, it is absurd to claim it was not mature. No witness so testified.

Similarly, Toyota refers to “desirability of phase-in” as an industry practice. (RB 32-33) But given that Toyota offered ESC as an option, there was no “phase-in” issue. The technology was mature enough to put it on the Tundra in 2005, and there was no

contention that standard ESC was in any manner different than optional ESC.

That technology is generally “phased in” is not an excuse where it is already available and in use. And that other manufacturers “phased in” technology on their models is no excuse for Toyota failing to install a device it had on the shelf, since the issue before the jury is the feasibility of an alternative design *for the Tundra*, not for competitors’ vehicles. Whether or not anyone else delayed in phasing in ESC is not evidence that it posed a technical challenge to Toyota, or that it was unreasonably costly in view of the safety benefits, or that it impaired utility. If Toyota had the capability, it was irrelevant under risk-benefit whether others had that capacity.

Were there a true phase-in issue, it should have been presented in technical detail to show difficulty or impracticability in 2005, not by a tenuous inference that other manufacturer’s delay in “phasing in” represented a feasibility problem for Toyota.

The “maturity” and “phase in” arguments are not based on real feasibility or concern, but just another way of saying “nobody does it so it must be safe.”

At RB 33, Toyota claims the industry custom refutes plaintiff as to “gravity and likelihood of harm” on the theory that if ESC were really cost-effective, other manufacturers would implement it. The proper comparison is an ESC-equipped Tundra with a non-ESC equipped Tundra, and if ESC was essential to reduce the risk on the Tundra (as it was), it was immaterial whether any other manufacturer even had the capacity to install ESC on trucks. If Toyota were the only one in the industry with the technology, it was required by the risk-benefit test to adopt it. Further, there was no dispute that trucks had controllability problems, as attested to by defendant’s own engineering recommendations (OBM at 11-12), so there was no issue as to the risk

reduction offered by ESC.

The only “adverse effect” on consumers identified by Toyota (RB 33) is a cost increase of a few hundred dollars. As discussed above, and as the Court of Appeal noted, the cost is to be balanced against the improvement to safety, not against the price advantage as against other equally unsafe vehicles. It is the cost and safety of the ESC-equipped Tundra as against the non-ESC-equipped Tundra that is balanced. To allow the manufacturer to justify the absence of a crucial safety device because it keeps the price at a level with competitive models that are equally unsafe invites a race to the bottom and undermines the product improvement objective of products liability law (*Nelson v. Superior Court* (2006) 144 Cal.App.4th 689, 696), much like the negligence standard inherent in the “industry custom” evidence.

Toyota asserts that "custom helps to jurors avoid judging in hindsight" and prevents jurors from assuming that ESC was common in 2005 and Toyota was behind rather than the first to offer it. Jurors are supposed to second-guess design decisions based upon the technology available in 2005. It is irrelevant under *Barker* whether ESC was common and whether Toyota was the first to offer it. The absence of an essential safety device from other trucks cannot justify the absence of essential device from the Tundra. Again, the jury is to compare alternative available designs, not to compare various manufacturers' conduct.

In a case with abundant direct and uncontradicted technical evidence of the feasibility and effectiveness of ESC on the Tundra, the inference that the failure of other makers to put it on their trucks by 2005 undermined that evidence is a tacit admission of defendant's inability to produce real evidence on risk-benefit, and Toyota's need to resort to an standard-of-care argument. That this was the core of the defense is evident from Toyota's argument is at RB 33:

Since there was no reason the Tundra needed ESC more than other pickups, plaintiff's claim meant that every 2005 pickup was defective. Exercising common sense, the jury was entitled to look more skeptically on a claim that every design in the industry wrongly balanced risks and benefits.

This is very much the argument condemned by *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 803 and related cases as undermining risk-benefit evaluation by a "standard of care" drawn from an industry which may well be universally producing vehicles with excessive preventable danger. It is the popularity contest theory of liability.

D. "Consumer Acceptance" Is Not a Risk-Benefit Factor Where it Consists of No More Than Marketing Advantage

Toyotas "concerns about consumer acceptance" (RB 32) is indistinguishable from the assertion that ESC offers no marketing advantage. As previously noted, when it involves technology and safety benefits beyond the consumer's ability to evaluate, and no effect on utility other than to reduce accidents, it is entitled to no weight at all. The popularity or commercial success of a product (*e.g.*, the Ford Pinto or the early Explorer) is not a consideration. *Culpepper v. Volkswagen of America* (1933) 33 Cal.App.3d 510, 518 (suspension system of VW bug which enjoyed wide consumer acceptance found defectively designed); *Roy v. Volkswagen of America, Inc.* (9th Cir. 1990) 896 F.2d 1174, 1177.

E. Industry Custom is Irrelevant to Consumer Expectations

Toyota asserts that because the trial court had not yet rejected plaintiffs Consumer expectations theory, industry custom was admissible to show that ordinary

consumers would not expect ESC because they had no experience with it. (RB 48-49)

In the case of an ordinary consumer product, jurors are to look to their own experience as to how a product should behave in given circumstances. That means they assess the product as a whole (*Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 746; *Quacchia v. DaimlerChrysler Corp.* (2004) 122 Cal.App.4th 1442, 1449-1450) – i.e. look at the *truck's* behavior in an emergency maneuver. Jurors are not asked to determine how ESC performs, as Toyota suggests, and need not compare ESC and non-ESC vehicles, but only decide whether the Tundra responded as a driver would have expected in the circumstances at bar.

Since this case turns on the vehicle's response to driver input, "the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective regardless of expert opinion about the merits of the design. *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567.¹ By similar reasoning, evidence about other truck models is irrelevant since jurors are to rely on their own sense of vehicle behavior.

¹ Toyota cites *Soule* for the proposition that expert testimony is required where the performance of an "obscure component" is at issue. *Soule* was a crashworthiness case involving a structural failure under extreme stress. Ordinary drivers have experience of maneuverability and emergency maneuvers. *McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1120, citing *Soule*, 8 Cal.4th at 563, and *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126; *Buell-Wilson v. Ford Motor Co.*, *supra*, 141 Cal.App.4th 525 (applying consumer expectations test to Ford SUV roll-over); *Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1001; *Bell v. Bayerische Motoren Werke Aktiengesellschaft*, *supra*, 181 Cal.App.4th 1108, 1129 (rollover of a sports car within realm of reasonable consumer's expectations); *Culpepper v. Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510, 518 ("emergency situations requiring severe turning movements arise every day.")

Since ESC is intended it to make the vehicle perform as the driver expects (to avoid under-steer and over-steer), the consumer expectations test is perfectly suited to the lay juror's evaluation of whether the vehicle conforms with the ordinary drivers expectations. That other trucks fail to respond as drivers expect is immaterial, as is the presence or absence of ESC or other equipment in those other trucks.

F. Evidence of Custom is Not Justified As Going to "Reasonableness"

Toyota asserts that *Barker* allows evidence of "reasonableness," which it seems to equate to standard-of-care as exemplified by industry custom. (RB 58) But *Barker* defines "reasonableness" in terms of the enumerated risk/benefit factors, not in terms of a "reasonable manufacturer" standard. Even a reasonably prudent manufacturer may be held liable where the product embodies excessive preventable risk. *Barker, supra*, 20 Cal.3d at 434. The "reasonable manufacturer" is the very standard which products liability doctrine deemed inadequate to assure safe products and shift the cost of avoidable injuries to the manufacturer who is in a superior position to avoid risks.

G. Toyota's Rationales for Industry Custom Are Uniformly Speculative and Designed to Divert Juror Attention

In each instance, Toyota's explanation for the relevance of industry custom demonstrates the point made in the Opening Brief: such evidence simply invites speculation in disregard of the actual technical evidence bearing upon the *Barker* factors. In each instance, Toyota's argument is that industry-standard undermines *direct actual evidence* of feasibility and cost effectiveness of ESC because it allows a jury to conjecture that industry-wide failure to offer ESC in pickup trucks is due to lack of feasibility or consumer rejection.

3. THE AUTHORITIES DO NOT SUPPORT INTRODUCTION OF INDUSTRY CUSTOM IN A RISK-BENEFIT CASE

A. California Cases

Toyota's discussion of California authorities fails to discriminate between true industry custom, which is uniformly condemned in pure risk-benefit cases, and evidence of competing models which embody alternative designs and so are informative under *Barker* criteria.

Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal.3d 379, 383, involved a manufacturing defect – not the risk-benefit test – and used a “deviation-from-the-norm” standard which refers to like exemplars of the *same model*. It did not endorse “industry custom” or discuss risk-benefit, but affirms the right to a *res ipsa loquitur* instruction where the product failed in an unexpected fashion.

Self v. Gen. Motors Corp. (1974) 42 Cal.App.3d 1, 6 (overruled by *Soule v. General Motors, supra*, 8 Cal.4th 548), refers to industry recognition of the danger of a certain tank placement – *i.e.*, a specific engineering risk which the defendant should have designed against.² In *Garcia v. Halsett* (1970) 3 Cal.App.3d 319, an expert referred to a specific switch used in other models – a particular design choice with particular safety advantages. In *Culpepper v. Volkswagen of America, supra*, 33 Cal.App.3d 510, where a car rolled over in a normal maneuver, an expert attested to the performance of the Volkswagen as compared with domestic vehicles in particular circumstances. Each case involves specific performance and design criteria, not an

² *Self*, like *Jaramillo v. Ford Motor Co.* (9th Cir. 2004) 116 Fed.Appx. 76, discussed below, also illustrates why the admission of evidence pertaining to the manufacturer's knowledge or the reason for his design choice does not open the door to industry custom.

amorphous “industry custom” of making less safe products.

Barker likewise cites only alternative models which illustrate alternative designs with superior safety performance, affirming that “the jury's focus is properly directed to the condition of the product itself, and not to the reasonableness of the manufacturer's conduct.” (*Barker*, 20 Cal.3d at 433-434)

Hansen v. Sunnyside Prod. Inc. (1997) 55 Cal.App.4th 1497, held that warnings could be considered in assessing the product as a whole under the risk benefit test because it is relevant to “the risk that the danger would cause damage” and hence “does comply with *Barker*'s mandate to focus on the product.” (*Id.* 1516) It cites expert testimony that the manufacturer’s label “comported with industry custom and practice and with the Federal Hazardous Substances Act” (*Id.* 1520), *i.e.*, a specific technical standard presumably based on research and experience. *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, was primarily a negligence case, with uncontradicted evidence of proper design and of posted “warnings that met industry standards and all state code requirements” (*Id.* 762)

Each case involves specific design criteria. None was called upon to address the claim that “industry custom” consisting of no more than the absence of products employing the alternative design or safety feature issue was admissible or relevant. “It is elementary that cases are not authority for propositions not therein considered.” *In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388. None of these cases are remotely comparable to the claim that “you cant find every 2005 truck defective.”

It is unnecessary to linger on Toyota’s attempt to criticize or distinguish the *Grimshaw* line of cases except to note that they do in fact condemn true “industry custom” evidence (“everybody does it”) while permitting evidence of alternative

designs and state of the art – evidence that Toyota mischaracterizes as “industry custom.” They are discussed at 28-30 of the Opening Brief and they clearly condemn evidence as to the “average quality” and the “norm” for other models (*Grimshaw* at 803), conformance with an industry “custom and practice” (*Foglio v. Western Auto Supply* (1976) 56 Cal.App.3d 470, 477), and correctly distinguish between irrelevant industry custom and admissible industry capability. *McLaughlin v. Sikorsky Aircraft* (1983) 148 Cal.App.3d 203, 210.

Titus v. Bethlehem Steel Corp. (1979) 91 Cal.App.3d 372, 379, in particular, cannot tenably be distinguished since the manufacturer’s defense was that the safety guard was offered as an option pursuant to industry custom, and the court found it was necessary to disabuse the jury of the notion that the product lacking such a device was not defective if it was industry practice to make it optional.

B. Other Jurisdictions

Toyota also asserts at 35 to 38 that most jurisdictions allow “industry custom.” As the authorities cited by Toyota show, this statement obscures the distinction between industry standards which consist of particular standards based upon research and experience, and thus a considered balancing, and industry custom which consists of no more than the fact that nobody does it. Many of the authorities actually concern competing models which demonstrate alternative design³, or “state of the art” which represents a limitation on technical capacity. *Cantu v. John Deere Co.* (Ct.App.1979) 24 Wash.App. 701, 603 P.2d 839, 840; 1A L. Frumer & M. Friedman, *Products Liability* §2.26[8][b][I] n. 6 at 2–1667.

³ *Rest.3d. Torts: Products Liability*, §2 com. d: “How the defendants’ design compares with other competing designs in actual use . . .”