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Is it time to re-think the consumer expectation test in liability defect cases?

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In California, "[t]rial by jury is an inviolate right and shall be secured to all." Cal. Const., Art. I, § 16. Moreover, parties have a fundamental right to present evidence on their behalf to a jury. *Elkins v. Superior Court*, 41 Cal. 4th 1337, 1357, 1359 (2007). Seems straightforward but doesn't paint the full picture for some civil defendants in California.

For instance, if a plaintiff claims she was injured because a product was defectively designed, you might assume the defendant will be able to present any evidence demonstrating there was no defect. It turns out, that's not necessarily the case —at least in some product liability cases involving vehicle manufacturers. In *Romine v. Johnson Controls, Inc.*, 224 Cal. App. 4th 990 (2014), the 2nd District Court of Appeal held that in product liability design defect cases applying the consumer expectations test, defendants cannot present expert evidence analyzing the merits of the product design. For the past decade, the ruling has left some attorneys defending clients with their arms tied behind their backs.

How can that be?

To begin, the California Supreme Court has held that "a product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors discussed below, the benefits of the challenged design do not outweigh the risk of danger inherent in such design." *Barker v. Lull Engineering Co.* 20 Cal. 3d 413, 418 (1978). These two standards, known as the "consumer expectations test" and the "risk-benefit test," respectively, are not mutually exclusive. Rather, the dual tests "assure[] an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety, or that, on balance, are not as safely designed as they should be. At the same time, the standard permits a manufacturer who has marketed a product which satisfies ordinary consumer expectations to demonstrate the relative complexity of design decisions and the trade-offs that are frequently required in the adoption of alternative designs." *Id.*

Our Supreme Court also has determined that "the consumer expectations test is reserved for cases in which 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.*, 8 Cal. 4th

548, 567 (1994) (emphasis added). For example, what if the driver's seat in my car randomly collapses while I'm sitting in traffic on the 405 and I'm injured? No accident, the seat just collapses. I drive down the highway regularly without my seat collapsing—that is, my everyday experience tells me that there must be something defective about the seat. In such situations, where "the minimum safety of a product is within the common knowledge of lay jurors, *expert witnesses may not be used* to demonstrate what an ordinary consumer would or should expect." *Id.* (emphasis added).

However, the Supreme Court in *Soule* found that the trial court improperly allowed the jury to be instructed on the consumer expectations test in the context of a high-speed collision involving "considerable" forces being applied to the vehicle and its component parts. In that case, an allegedly defective wheel became detached during the collision and crushed the plaintiff's feet. The Court found that it was error to give an "ordinary consumer expectation" instruction in such a "complex" case, stating that "[a]n 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." Id. at 556, 570. Indeed, in many situations, even those involving widely used products, "the [ordinary] consumer would have *no idea* how safe the product can be made." *Id.* at 566-67 (citing *Barker*, 20 Cal. 3d at 454) (emphasis added).

But California courts seem to have forgotten *Soule* and the idea that ordinary consumers cannot be expected to know how products, like a car seat, will perform every time they are involved in a complex accident.

Enter *Romine*.

Romine involved a high-speed collision in which the plaintiff was struck from behind resulting in the driver's seat collapsing backward. The considerable forces exerted on the plaintiff by the high-speed collision caused him to suffer fatal injuries. The plaintiff's family sued the manufacturer of his pickup truck, Nissan, for design defect product liability using the consumer expectations test. The appellate court in *Romine* referred to *Soule* in holding that Nissan could not present expert evidence regarding the design of the truck under the consumer expectations test. But the *Romine* court shrugged off *Soule*'s finding that consumers cannot reasonably expect that a car's "frame, suspension, *or interior*" will remain intact during a high-speed accident involving considerable forces. Rather, *Romine*looked past our Supreme Court and instead looked to the Supreme Court of Illinois' ruling in *Mikolajczyk v. Ford Motor Co.*, 231 Ill.2d 516, 556 (2008), for the proposition that a rear-end collision is part of the everyday experience of driving a car—despite *our* Supreme Court's ruling in *Soule*. That nonbinding, out-of-state case, however, also noted that whether the consumer expectations instruction would be given "will depend . . . *on the evidence presented at trial.*" *Id.* at 569 (emphasis added).

It is time for California courts and/or our Legislature to rein in the Court of Appeal's ruling in *Romine* and return to the logic outlined in *Soule*. For too long now, manufacturers, including vehicle manufacturers, facing design defect product liability claims have been at an unfair disadvantage when the consumer expectations test is applied—even when the cases involve complex collisions and substantial forces. Critical evidence regarding the safety of the product design is excluded, including expert witnesses, testing, and the engineering reasons why the product was designed in the way it was. Ordinary lay jurors cannot be presumed to know how a vehicle's various components will perform in a serious accident, yet attorneys are seriously handicapped in their ability to properly defend their clients in front of a jury in such cases. In this way, *Romine* is violative of defendants' inviolate right to present evidence on their own behalf to a jury as guaranteed by the California Constitution.

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