

COPY

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

Case No.  
**S  
2  
3  
2  
7  
5  
4**

---

**WILLIAM JAE KIM, et al.,**  
*Plaintiffs and Appellants,*

vs.

**TOYOTA MOTOR CORPORATION, et al.,**  
*Defendants and Respondents.*

SUPREME COURT  
**FILED**

OCT 18 2016

Jorge Navarrete Clerk

---

Deputy

---

ON REVIEW FROM THE COURT OF APPEAL, SECOND APPELLATE DISTRICT,  
DIVISION SEVEN, CASE NO. B247672; LOS ANGELES COUNTY SUPERIOR  
COURT, NO. VC059206, THE HONORABLE RAUL A. SAHAGUN

---

**AMICI CURIAE BRIEF OF THE CALIFORNIA CHAMBER  
OF COMMERCE AND THE CIVIL JUSTICE ASSOCIATION OF  
CALIFORNIA IN SUPPORT OF DEFENDANTS AND RESPONDENTS**

---

**\*FRED J. HIESTAND**  
Fhiestand@aol.com  
State Bar No. 44241  
3418 Third Ave., Suite 1  
Sacramento, CA 95817  
Tel.: (916) 448-5100  
Fax.: (916) 442-8644

**ERIKA C. FRANK, SBN 221218**  
**HEATHER L. WALLACE, SBN 205201**  
California Chamber of Commerce  
1215 K Street, Suite 1400  
Sacramento, CA 95814  
Tel.: (916) 444-6670  
Fax.: (916) 444-6685

Counsel for *Amici Curiae*

# TABLE OF CONTENTS

## Page

TABLE OF AUTHORITIES .....	ii
INTRODUCTION: INTEREST OF AMICI AND IMPORTANCE OF ISSUE .....	1
SUMMARY OF ARGUMENT .....	4
SUMMARY OF PROCEEDINGS BELOW .....	5
ARGUMENT .....	10
I. THERE IS NO BRIGHT-LINE DISTINCTION BETWEEN NEGLIGENCE AND STRICT LIABILITY WHEN IT COMES TO “BALANCING” THE RELEVANT FACTORS TO CONSIDER IN DECIDING WHETHER TO IMPOSE LIABILITY ON A MANUFACTURER FOR A DESIGN DEFECT IN ITS PRODUCT. . .	10
II. THE MAJORITY OF JURISDICTIONS AND THE RESTATEMENT THIRD RECOGNIZE THAT “CUSTOM” EVIDENCE MAY BE CONSIDERED IN APPLYING THE “RISK-BENEFIT” TEST TO DETERMINE IF A PRODUCT IS DEFECTIVE. ....	13
III. THE MOST SENSIBLE APPROACH TO DETERMINING THE ADMISSIBILITY OF INDUSTRY CUSTOM EVIDENCE WHEN CONSIDERING WHETHER A PRODUCT IS DEFECTIVE UNDER THE RISK-BENEFIT TEST IS CASE-BY-CASE BASED ON THE NATURE OF THE EVIDENCE AND THE PURPOSE FOR WHICH IT IS BEING PROFFERED. ....	16
CONCLUSION .....	20
CERTIFICATE OF WORD COUNT .....	21
PROOF OF SERVICE	

## TABLE OF AUTHORITIES

Cases	Page
<i>Barker v. Lull Engineering Co.</i> (1978) 20 Cal.3d 413 .....	11-13
<i>Carter v. Massey–Ferguson, Inc.</i> (5th Cir.1983) 716 F.2d 344, 348 .....	13
<i>Daly v. General Motors Corp.</i> (1978) 20 Cal.3d 725 .....	13
<i>Escola v. Coca Cola Bottling Co.</i> (1944) 24 Cal.2d 453 .....	3
<i>Howard v. Omni Hotels Management Corp.</i> (2012) 203 Cal.App.4th 403 .....	12
<i>Lambert v. General Motors</i> (1998) 67 Cal.App.4th 1179 .....	11
<i>Perry v. Robertson</i> (1988) 201 Cal.App.3d 333 .....	15
<i>Saller v. Crown Cork &amp; Seal Co., Inc.</i> (2010) 187 Cal.App.4th 1220 .....	11
<i>Sanchez v. Hitachi Koki, Co.</i> (2013) 217 Cal.App.4th 948 .....	16
<i>Thibault v. Sears, Roebuck &amp; Co.</i> (1978) 118 N.H. 802, 395 A.2d 843 .....	13
<i>United States v. Carroll Towing Co</i> (2 <sup>nd</sup> Cir. 1947) 139 F.2d 169 .....	11

## Articles, Texts, Treatises and Miscellaneous

1 Owen & Davis on Products Liability (4th ed. 2014) Nature and Proof of Defectiveness, § 6.9 .....	14
Aldisert, <i>LOGIC FOR LAWYERS</i> (3 <sup>rd</sup> ed. 1997) .....	19
Comment, <i>Custom's Proper Role in Strict Product Liability Actions Based on Design Defect</i> (1990) 38 <i>UCLA L. REV.</i> 439 .....	3, 12, 15
Hutchinson & Monahan, <i>Law Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought</i> (1984) 36 <i>STAN. L. REV.</i> 199 .....	3
Note, <i>Perpetuating Negligence Principles in Strict Products Liability: The Use of State of the Art Concepts in Design Cases</i> (1985) 36 <i>SYRACUSE L. REV.</i> 797 .....	12
Owen, <i>Rethinking the Policies of Strict Products Liability</i> (1980) 33 <i>VAND. L. REV.</i> 681 .....	15
OXFORD AMERICAN DICTIONARY (1980) 169 .....	18
Redish, <i>Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix</i> (2005) 57 <i>STANF. L. REV.</i> 1329 .....	3
REST.3RD. TORTS, <i>Products Liability</i> , § 2, com. d .....	14
Schwartz, <i>Foreword: Understanding Products Liability</i> (1979) 67 <i>CALIF. L. REV.</i> 435 .....	12, 15
Spradley, <i>Defensive Use of State of the Art Evidence in Strict Products Liability</i> (1982) 67 <i>MINN. L. REV.</i> 343 .....	10
<i>TIMES LITERARY SUPPLEMENT</i> , Oct. 7, 2016 .....	15

Vetri, *Order Out of Chaos: Product Liability Design-Defect Law*  
(2009) 43 U. RICH. L. REV. 1373 ..... 12

Wooden, *WOODEN* (1997) 144 ..... 18

**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.*

---

**INTRODUCTION: INTEREST OF AMICI  
AND IMPORTANCE OF ISSUE**

The Civil Justice Association of California (CJAC) and the California Chamber of Commerce (CalChamber) welcome the opportunity as *amici curiae*<sup>1</sup> to address the issue this case presents — May the trier of fact in a product liability design defect action based on the “risk-benefit analysis” consider evidence of “industry custom and practice”?

Both the trial and appellate courts answered “yes” to this question. In doing so, the appellate opinion recognized “two lines of [case] authority” bearing on this issue: one that precludes the admission of any evidence of industry custom and practice on the ground it is irrelevant in a strict product liability design defect case, and the other holding that compliance with technical safety standards by an industry is an appropriate factor to consider under the risk-benefit test and is admissible. Instead of accepting this “all or nothing” approach between the two competing positions and choosing one as

---

<sup>1</sup> By separate application accompanying the lodging of this brief with the Court, *amici* seek permission for it to be filed.

controlling, the appellate court here adopted a “middle ground” common sense solution. “[W]e hold that evidence of industry custom and practice *may* be admissible in a strict products liability action, depending on the *nature* of the evidence and the *purpose* for which the proponent seeks to introduce the evidence.” (197 Cal.Rptr.3d 647, 651; italics added.) Having added a third, compromise answer to that of other courts to have considered this question undoubtedly influenced this Court’s decision to grant review and provide “uniformity of decision.”

How this Court ultimately resolves this long-standing question is of vital interest to *amici* because it directly affects our primary organizational purposes. CJAC, a 40-year-old nonprofit organization representing businesses, professional associations and financial institutions, is dedicated to educating the public about ways to make our civil justice laws more fair, economic, certain and uniform. Toward this end, CJAC regularly petitions the government for redress of grievances when it comes to determining who owes, how much and to whom when the wrongful acts of some occasion injury to others. This is just such a case.

CalChamber is a nonprofit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state. For more than a century, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75% of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state’s economic and employment climate by representing business on a broad range of legislative, regulatory, and legal issues. CalChamber

participates as *amicus curiae* only in cases, like this one, that have a significant impact on businesses.

California was the pioneer jurisdiction for fostering strict product liability law beginning with the seminal opinion of Justice Traynor in *Escola v. Coca Cola Bottling Co.* (1944) 24 Cal.2d 453.<sup>2</sup> Since then, “there has been a definite trend from negligence to strict liability,”<sup>3</sup> and, not surprisingly, “the increase in class action litigation and the modern expansion of products liability law have substantially increased the economic stakes for defendant corporations.” (Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix* (2005) 57 *STANF. L. REV.* 1329,1333.) Precluding evidence of industry custom and practice where, as here, “few manufacturers . . . adopt[ed] the alternative” design proffered by plaintiffs, prevents the jury from inferring “that consumers did consider the alternative ungainly or too expensive, and thus . . . not feasible.” (Comment, *Custom’s Proper Role in Strict Product Liability Actions Based on Design Defect* (1990) 38 *UCLA L. REV.* 439, 466.) Conversely, indiscriminately allowing in evidence of industry custom and practice as relevant to design defect will, as plaintiffs argue, “undermin[e] risk-benefit evaluation by a ‘standard of care’ drawn from an industry which may well be universally producing [products] with excessive preventable danger.”<sup>4</sup> In other words, the bright line “either-or” rule between admitting “no evidence” or “all evidence” of industry custom and practice when it comes to the

---

<sup>2</sup> *Escola* involved a bottle of Coke handled normally that exploded and seriously injured a waitress. The majority applied the doctrine of *res ipsa loquitur*. Justice Traynor concurred, however, arguing that strict liability principles should apply.

<sup>3</sup> Hutchinson & Monahan, *Law Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought* (1984) 36 *STAN. L. REV.* 199, 210, fn. 46.

<sup>4</sup> Reply Brief on the Merits, p. 10.

risk-benefit test for product defect absolutely favors either plaintiffs or defendants, but unwisely and unfairly removes discretion from the trial courts to determine admissibility based on the *nature* and *purpose* of the evidence proffered. The “middle ground” approach adopted by the appellate court in this case is the preferred one for achieving justice.

### **SUMMARY OF ARGUMENT**

Industry custom and practice (“custom”) should, based on its nature and the purpose for which it is offered in evidence, be admissible in product design defect cases because it is relevant to the risk-benefit test. Moreover, custom should have the same weight with respect to the risk-benefit prong of California’s design defect test that it has in negligence law: not conclusive but probative on the issue of defect. Custom is relevant to the risk-benefit test because it places the feasibility of alternative designs in perspective and serves as an often reliable collective judgment of the industry that the product has been designed properly. Evidence of custom checks hasty acceptance of an expert’s suggestion that an alternative design is feasible and necessary. There is no reason to limit this function to negligence law.

Custom can – again, depending on its nature and purpose – provide a cheap, accurate, but optional standard for determining “defect.” Giving custom nonconclusive influence will help risk-benefit fact-finders make determinations that scholars have suggested the judicial system is fundamentally incapable of making unaided and that are often simply too technologically complex for lay judges and juries to make without some point of reference. An industry’s common custom and practice represents a valuable opinion regarding the proper balance of all the risk-benefit factors.

Nongovernmental codes produced by an industry are likely more probative than a single learned treatise or an expert opinion, as they represent the consensus of an entire industry. Despite concerns that an industry will set intentionally low standards, this collective opinion has significant value. Manufacturers do have an interest in making their products as safe as possible. If a customary product poses a significant danger, a competing manufacturer will gain an advantage by manufacturing a product with well-advertised improved safety features at an acceptable price. Finally, evidence of industry custom is provable as a fact, and thus is considerably stronger than an “expert’s” opinion that a product is of a defective design.

### **SUMMARY OF PROCEEDINGS BELOW<sup>5</sup>**

In 2010, plaintiff drove his 2005 Toyota Tundra truck northbound on the Angeles Forest Highway. The road was wet and plaintiff was descending a curve at approximately 45 to 50 miles per hour when a car driving toward him in the opposite direction crossed part way over the center line. According to plaintiff, he steered right to avoid the other vehicle and his truck’s two right tires veered onto the gravel shoulder. Plaintiff then steered left to return to the asphalt, but his truck turned too far to the left and his tires slipped. Steering right again, plaintiff lost control of his truck and drove off the highway and over an embankment. The truck rolled onto its roof and back onto its wheels, coming to rest near the bottom of the embankment. Firefighters removed plaintiff from the vehicle. He suffered a serious neck injury and damage to his spinal cord.

---

<sup>5</sup> This description is taken primarily from the appellate opinion and set forth herein to provide a self-contained context for limning the issue presented. Accordingly, citations to the appellate opinion are omitted.

Plaintiffs filed a complaint against Toyota alleging causes of action for strict products liability, negligence, breach of express and implied warranties, and loss of consortium. They alleged the accident occurred because plaintiff's Tundra lacked Vehicle Stabilization Control (VSC), also known as Electronic Stabilization Control (ESC), which Toyota engineers decided to offer only as an option rather than equipping all 2005 Tundra trucks with VSC as standard equipment. Plaintiffs alleged the absence of VSC was a design defect.

Before trial, plaintiffs filed several motions in limine, including one asking the court to preclude Toyota from introducing any evidence "comparing the Tundra to competitor's vehicles and designs," which effectively excluded all evidence of custom and practice in the pickup truck industry, and any evidence that Toyota's "design choices were not defective . . . because they were equivalent or superior to those of its competitors." Plaintiffs filed a companion motion, in limine No. 9, which sought to preclude "any argument, evidence or testimony" that the 2005 Tundra was not defective because it complied with Federal Motor Vehicle Safety Standards (FMVSS). The trial court denied both motions, but stated plaintiffs could request an appropriate limiting instruction, which they did not do.

At trial, plaintiffs presented the testimony of several percipient and expert witnesses. Steven Meyer, a mechanical engineer and accident reconstructionist, described the sequence of events preceding the accident, stated that the tires were worn, but the treads were adequate. Michael Gilbert, a mechanical engineer, testified that ESC senses when the rear of a vehicle begins to swing out and responds by applying the brakes to a front tire in order to avoid fishtailing and to help the driver

maintain control. ESC also senses when the front tires are slipping and applies rear braking to correct the vehicle's rotation. ESC takes the driver's steering input into account and helps to keep the vehicle in alignment. Gilbert stated his opinion that ESC would have prevented plaintiff's accident. Yiannis Papelis, a computer engineer plaintiffs called to give an opinion about whether VSC would have prevented the accident, testified that ESC helps to correct oversteering, and that ESC was designed to prevent exactly the kind of loss of control that occurred in this case. He stated his opinion that, despite the wet roadway and the worn tire treads, ESC would have prevented plaintiff from losing control of his truck. Murat Okcuoglu, a mechanical engineer, testified that the incremental cost to include ESC in a Tundra in 2005 was \$300 to \$350 per truck.

Plaintiffs also called Sandy Lobenstein, Toyota's product planning manager, as an adverse witness. He stated Toyota's product planning group made recommendations, based on information and research from customers, dealers, and field offices, regarding what features Toyota should make available on its vehicles. Lobenstein testified that Toyota offered VSC as standard equipment in some sport utility vehicles beginning in 2001 or 2004, and made VSC available as an option for the Tundra in the 2004 and 2005 models, "so the customer[s] had the choice whether they had VSC on their vehicle or not." He acknowledged that Toyota engineers had recommended making VSC standard equipment for the Tundra. Lobenstein stated that no other manufacturer offered ESC as standard equipment in full-size pickup trucks at that time and that customers prioritized other features.

Toyota also presented the testimony of several percipient and expert witnesses. Percipient witnesses testified that the roadway was moderately wet and there was wet gravel in places contributing to poor driving conditions. Dale Dunlap, a civil engineer, testified that the maximum speed for driving comfortably on the curve under the applicable guidelines was approximately 35 miles per hour. Lee Carr, an engineer, testified that plaintiff caused the accident by driving at an excessive rate of speed given the conditions of his truck and the road. Carr stated that VSC responds to the driver's steering inputs and that, given plaintiff's steering to the left, VSC would not have prevented his loss of control. Douglas Young, a kinesiologist, challenged Papelis's analysis and refuted Papelis's conclusions regarding the effectiveness of VSC in these circumstances.

In response to questioning by counsel for Toyota, Lobenstein again stated that no other manufacturer offered ESC as standard equipment for pickup trucks in 2005 and testified that the Tundra was the first pickup truck with ESC available as an option. He stated that truck manufacturers first offered other safety features involving expensive emerging technologies, such as backup cameras and pre-collision sensors, as options rather than as standard equipment.

After nine days of trial, the trial court instructed the jury on plaintiffs' strict products liability claim. The court gave the jury an instruction on the design defect risk-benefit test, CACI No. 1204, but refused plaintiffs' proposed instruction on the consumer expectations test, CACI No. 1203. The court also refused plaintiffs' proposed special instruction that it was "no defense that the design of the Tundra complied with Federal Motor Vehicle Safety Standards, or that the design met the

standards of the motor vehicle industry at the time the Tundra was produced, or that Toyota's competitors sold vehicles that were no safer than the Tundra, or had the same design defects, or lacked the same safety equipment.”

The jury found that the Toyota Tundra did not have a design defect; and the trial court entered a judgment in favor of Toyota based on the jury verdict. Plaintiffs moved for a new trial, arguing that the trial court erred by admitting certain evidence, excluding other evidence, rejecting their proposed jury instructions, and cutting off their rebuttal argument without giving their attorneys adequate warning. The trial court denied the motion. Plaintiffs timely appealed from the judgment.

After briefing and oral argument, the appellate court affirmed the judgment, stating, *inter alia*, that:

Industry custom may reflect legitimate, independent research and practical experience regarding the appropriate balance of product safety, cost, and functionality. [Citations] The parties in a strict products liability action probably will dispute whether and to what extent industry custom actually reflects such considerations and whether it strikes the appropriate balance. But that does not make the evidence 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. Thus, whether offered by the plaintiff or the defendant, such evidence may be relevant in a strict products liability action in determining whether a product embodies excessive preventable danger, which is the ultimate question under the risk-benefit test. [Citations.] Evidence of industry custom also may be relevant to the feasibility of a safer alternative design, and to the consequences that would result

from an alternative design, two of the *Barker* risk-benefit factors.

(197 Cal.Rptr.3d at 658-659.)

Plaintiffs petitioned for, and this Court granted, review defining the issue it will decide.

## ARGUMENT

### I. THERE IS NO BRIGHT-LINE DISTINCTION BETWEEN NEGLIGENCE AND STRICT LIABILITY WHEN IT COMES TO “BALANCING” THE RELEVANT FACTORS TO CONSIDER IN DECIDING WHETHER TO IMPOSE LIABILITY ON A MANUFACTURER FOR A DESIGN DEFECT IN ITS PRODUCT.

Plaintiffs contend that admitting evidence of “industry custom and practice” in a product “design defect” action based on the “risk-benefit” test is inconsistent with strict products liability doctrine. “The proposition [in the appellate opinion] that exclusion of negligence concepts is ‘out-moded’ implies that fault plays a role in determining design defect, eroding the core principle that defect rests on the objective characteristics of the product, not the conduct of the manufacturer.”<sup>6</sup> This is wrong for two reasons. First, the assertion of a distinction between the “objective characteristics of the product” and the “conduct of the manufacturer” is a nice sound bite that does not withstand scrutiny. As one legal scholar astutely points out, “The manufacturer’s conduct produces the product; to criticize the product is to criticize the conduct.” (Spradley, *Defensive Use of State of the Art Evidence in Strict Products Liability* (1982) 67 *MINN. L. REV.* 343, 351.) Compliance with custom will show that the defendant’s product has the same design as other products, as well, perhaps, as showing that the manufacturer engaged in the same “conduct.”

---

<sup>6</sup>“ Opening Brief on the Merits (OBM), p. 40.

Second, and most important, “[w]here liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge.” (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1185.) This fundamental truism is underscored by the language of the “risk-benefit” test as defined by *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 418: “[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 . . . , the benefits of the challenged design do not outweigh the risk of danger inherent in such design.*” (*Id.* at 418; italics added.)

The “relevant factors” to consider and “balance” when applying the risk-benefit test are “the likelihood such danger would occur [from use of the product], the feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the consumer resulting from an alternative design. ‘In such cases, the jury must consider the manufacturer’s evidence of competing design considerations . . . , and the issue of design defect cannot fairly be resolved by standardless reference to the “expectations” of an “ordinary consumer.” ’” (*Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233, quoting *Barker*.) Indeed, scholarly commentaries on *Barker* have remarked on the similarity of its risk-benefit test and the famous test for “negligence” expressed by Judge Learned Hand in *United States v. Carroll Towing Co* (2<sup>nd</sup> Cir. 1947) 139 F.2d 169, 173:

[T]he *Barker* risk-benefit test has great similarities to a test for negligent manufacture. It practically matches the classic Hand formula, which finds negligence if the magnitude of potential harm multiplied by the probability of harm outweighs the burden of prevention. [Citation.]

“Gravity of danger” in the *Barker* test is equivalent to magnitude of harm. “Likelihood” of harm is equivalent to its Hand counterpart. One can easily construe the remaining three factors in the risk-benefit test, (3) “feasibility” of safer designs, (4) “cost of improved design,” and (5) “adverse consequences” of alternative designs, to compose the burden of prevention part of the Hand formula. Indeed, commentators have pointed out the analytic similarities of risk-benefit defect tests to negligence tests [and] *Barker*’s risk-benefit test . . . [to] strict liability’s negligence heritage. (See, e.g., Schwartz, *Foreword: Understanding Products Liability* (1979) 67 *CALIF. L. REV.* 435, 444-45; Note, *Perpetuating Negligence Principles in Strict Products Liability: The Use of State of the Art Concepts in Design Cases* (1985) 36 *SYRACUSE L. REV.* 797.)

(Comment, 38 *UCLA L. REV.* at 457. *Accord*: Vetri, *Order Out of Chaos: Product Liability Design-Defect Law* (2009) 43 *U. RICH. L. REV.* 1373, 1366: “[D]esign-defect cases that require risk-utility evidence to establish defectiveness . . . require a balancing of competing considerations in determining whether the product was reasonably safe, and they are essentially indistinguishable from applying negligence law.”)

Accordingly, “expert evidence about compliance with industry standards can be considered on the issue of defective design, in light of all other relevant circumstances, even if such compliance is not a complete defense. An action on a design defect theory can be prosecuted and defended through expert testimony that is addressed to the elements of such a claim, including risk-benefit considerations.” (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 426.) The balancing necessary for application of the risk-benefit test in determining if a product is defective is not fundamentally different from the application of negligence doctrine (where custom and practice is routinely considered) but analogous to it.

When *Barker* enunciated the risk-benefit test for determining if a product is defective, it acknowledged that risk-benefit balancing in some ways may resemble a negligence inquiry (20 Cal.3d at 434), and stated that “most of the evidentiary matters which may be relevant to the determination of the adequacy of a product’s design under the ‘risk-benefit’ standard—*e.g.*, the feasibility and cost of alternate designs—are similar to issues typically presented in a negligent design case.” (*Id.* at 431.) Nonetheless, *Barker* stated that the two inquiries are not identical, because risk-benefit balancing focuses on shifting the burden of proof to the defendant, reducing the plaintiff’s burden consistent with strict liability principles. (*Id.* at 433.) The Court thus rejected the argument that risk-benefit balancing was inappropriate in a strict products liability action. (*Ibid.*)

*Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, decided the same term as *Barker*, recognizes that principles of comparative negligence apply to strict products liability cases. (*Id.* at 742.) “While fully recognizing the theoretical and semantic distinctions between the twin principles of strict products liability and traditional negligence, we think they can be blended or accommodated.” (*Id.* at 734.)

## **II. THE MAJORITY OF JURISDICTIONS AND THE RESTATEMENT THIRD RECOGNIZE THAT “CUSTOM” EVIDENCE MAY BE CONSIDERED IN APPLYING THE “RISK-BENEFIT” TEST TO DETERMINE IF A PRODUCT IS DEFECTIVE.**

A majority of jurisdictions generally support the view that it is appropriate to consider compliance or noncompliance with industry custom in a risk-benefit analysis in strict products liability design defect cases. (See, *e.g.*, *Carter v. Massey–Ferguson, Inc.* (5th Cir.1983) 716 F.2d 344, 348 (*Carter*) (applying Texas law); *Thibault v. Sears, Roebuck*

*Co.* (1978) 118 N.H. 802, 395 A.2d 843, 850; 1 *Owen & Davis on Products Liability* (4th ed. 2014) *Nature and Proof of Defectiveness*, § 6.9, pp. 578–580 [stating that the majority view is that evidence of applicable industry custom is admissible in strict products liability cases, and predicting that “[a]s an outmoded holdover from early, misguided efforts to distinguish strict liability from negligence, it may be expected that the few courts still clinging to the minority view will in time swing over to the more logical majority perspective”].)

Evidence of industry custom, of course, cuts both ways. Defendants who violate custom are very likely to assume liability in torts; defendants who comply with custom will likely go scot-free. Custom, in other words, may “be relevant [in determining] . . . whether the omission of an alternative design rendered the product” defective. (*REST.3RD. TORTS, Products Liability*, § 2, com. d, p. 20.) Whichever way custom evidence cuts in a particular case, however, the reporters in comment c to section 2 of the Restatement 3<sup>rd</sup> make clear agree that “[a]n overwhelming majority of American jurisdictions rely on risk-utility balancing in design cases . . . . [T]hey rely on risk-utility balancing in determining whether designs are defective.” (*Id.* § 2 cmt. c, at 39-40.) In a note, the reporters further explain that the risk-utility balancing test described in comment c for design defect is in fact a return to negligence: “The balancing process requires a comparison . . . from the viewpoint of a reasonable person. The objective reasonable person standard is also used in administering the traditional reasonableness standard in negligence.” (*Id.* §2, reporters’ note, at 16.)

Plaintiffs dispute this because their minds refuse to accept it, perhaps believing that while industry custom can theoretically “cut” both ways it will, in most instances,

as it did here, favor defendants. As with the universal perception of Wittgenstein’s “duck-rabbit” drawing,<sup>7</sup> one “may see alternately a duck and a rabbit, but . . . cannot merge them together (to create a Carroll-like portmanteau creature, perhaps: the durabbit or rabduck).” (*TIMES LITERARY SUPPLEMENT*, Oct. 7, 2016, p. 1.) Thus, plaintiffs argue that principles of negligence “balancing” when applying the risk-benefit test are incompatible with the two principal goals of strict products liability doctrine: loss spreading and accident prevention. This phenomenon of “clinging” to a rigid bright-line binary legal perception, however, must give way when reason, “circumstance and further evidence proves us to be in error.” (*Id.*) So while evidence of industry custom does not further these two goals, it’s important to understand that neither does it impede them.<sup>8</sup> With respect to loss-spreading, for instance,

Allowing custom influence in favor of the defendant effectively curtails the definition of defect. Because this curtailment reduces the number of plaintiff verdicts, it works against loss spreading. However, allowing custom influence does not contradict the loss spreading theory because the theory itself does not supply any definition of defect. Thus by adjusting the defect definition, custom does not contradict any principle of loss spreading.

(Comment, *supra*, 38 *UCLA L. REV.* at 480.)

Similarly, admitting evidence of industry custom in the context of the risk-benefit test has the same kind of relation to the accident prevention goal of strict liability as it does to the loss-spreading goal. The rationale of accident prevention is

---

<sup>7</sup> *Perry v. Robertson* (1988) 201 Cal.App.3d 333, fn. 1 — ☹).

<sup>8</sup> For a criticism of the loss spreading rationale, see *e.g.*, Owen, *Rethinking the Policies of Strict Products Liability* (1980) 33 *VAND. L. REV.* 681, 703-07; Schwartz, *Foreword: Understanding Products Liability* (1979) 67 *CALIF. L. REV.* 435, 444-45.

that placing liability for defective products on the manufacturer regardless of fault provides an incentive for the manufacturer to design safer products. Thus the more plaintiff victories there are, the greater the incentive for manufacturers to design safer products; and, conversely, the fewer plaintiff victories, the more limited the scope of accident prevention. “But again, as with loss-spreading, the accident prevention goal does not itself define any defect test; thus allowing custom influence . . . is not inconsistent with the goal’s underlying premises.” (*Id.*)

Moreover, loss-spreading and accident prevention would, by parity of reasoning, be furthered even more via application of “absolute liability” over “strict liability,” but “strict liability has never been, and is not now, absolute liability. As has been repeatedly expressed, under strict liability the manufacturer does not thereby become the insurer of the safety of the product’s user.” (*Sanchez v. Hitachi Koki, Co.* (2013) 217 Cal.App.4th 948, 956.)

### **III. THE MOST SENSIBLE APPROACH TO DETERMINING THE ADMISSIBILITY OF INDUSTRY CUSTOM EVIDENCE WHEN CONSIDERING WHETHER A PRODUCT IS DEFECTIVE UNDER THE RISK-BENEFIT TEST IS CASE-BY-CASE BASED ON THE NATURE OF THE EVIDENCE AND THE PURPOSE FOR WHICH IT IS BEING PROFFERED.**

Plaintiffs ask the Court to spell out the kinds of evidence relating to industry custom that may be admissible under the risk-benefit test for determining if a product is defective as well as evidence that should be inadmissible. Not surprisingly, they do not like the evidence admitted here by the trial court and affirmed by the appellate court because they believe its admission improperly influenced the jury to render a defense verdict finding the product not to be defective. (OBM at 21-30.)

But plaintiffs' result-oriented approach does not wash. The appellate opinion explains why, through numerous examples in the context of this case, the *nature* and *purpose* of the evidence proffered by the parties makes more sense than plaintiffs' plea for a judicially imposed prescription of categories of industry custom evidence admissible or not. The opinion instructs, for instance, that "evidence a manufacturer's competitors tried to produce a safer alternative design for a product, but the alternative design malfunctioned or functioned only at an unsustainable cost, would be relevant to the mechanical feasibility factor, as would evidence that such a design by a competitor was functional and cost-effective." (197 Cal.Rptr.3d at 661.) It teaches that when evidence other truck manufacturers included ESC on their pickup trucks, it would be admissible as relevant to the feasibility factor of the risk-benefit analysis. (*Id.*) Similarly, the opinion explains that evidence a competitor's alternative design made the product less efficient or desirable to the consumer would be relevant to the adverse consequences factor, as would contrary evidence. (*Id.* at 661-662.)

The opinion also apprises readers where evidence of industry custom and practice may not be admissible, referencing examples from Toyota's brief. When Toyota argued that evidence "competing trucks did not offer ESC," the opinion found such evidence relevant to the circumstances of this case because it "demonstrated that making ESC standard would have put the Tundra at a competitive disadvantage" and "made the Tundra less marketable and less attractive to consumers," a point bearing on "adverse consequence[s] to the product and consumer" in the risk-benefit analysis, the opinion disagreed. "That is not," it explained, "what this factor means. Putting the product at a 'competitive disadvantage' is an adverse consequence to the manufacturer,

not to the consumer or the product.” (197 Cal.Rptr.3d at 662.) While Toyota argued that evidence pickup trucks of its competitors did not have ESC was relevant to the “gravity posed” and “likelihood the danger would occur” risk-benefit factors, the opinion rejected this notion because “[t]he fact that all of the manufacturers in an industry make the product the same way is not relevant because it does not tend to prove the product is not dangerous: All manufacturers may be producing an unsafe product.” (*Id.*)

Plaintiffs dismiss this case specific approach of the opinion by asserting it “offers little guidance as to how [custom] evidence should be used or when its value is outweighed by its tendency to undermine product liability principles. Rather, it offers examples.” (OBM, p. 21.) This argument runs afoul of the second of John Wooden’s “four laws of learning”: “explanation, *demonstration*, imitation and repetition.” (Wooden, *WOODEN* (1997) 144.)<sup>9</sup> “Demonstration,” of course, means to describe and explain by the help of . . . *examples*.” (*OXFORD AMERICAN DICTIONARY* (1980) 169 (*italics added*)). In other words, “examples” provide excellent “guidance,” better in fact than abstract categorical constructs.

Neither does plaintiffs’ characterization of the evidence admitted in this case accurately portray its nature and purpose. By derogating the industry custom evidence admitted here as nothing more than evidence that “nobody does it” (*i.e.*, installs ESC

---

<sup>9</sup> Wooden, who coached the UCLA men’s basketball team to win the most games and championships in the history of the NCAA, was a former English teacher who applied his laws of learning to all knowledge, including basketball.

on trucks manufactured in 2005),<sup>10</sup> as opposed to “true industry custom evidence,” plaintiffs set up a “straw person” for them to easily knock down. This, however, is nothing more than the fallacy of irrelevance, or *ignoratio elenchi*. “Often we see the fallacy of the straw person in which the arguer knocks down a misstated argument and concludes that the original argument was bad. The name comes from supposition that a straw person would be light and flimsy, and therefore much easier to demolish than a real person.” (Aldisert, *LOGIC FOR LAWYERS* (3<sup>rd</sup> ed. 1997) 170-171.)

What actually occurred at trial is plaintiffs “acknowledged . . . the admissibility of industry custom evidence,” about which defense counsel questioned its expert and plaintiffs’ counsel made no objection, “would depend on the purpose for which Toyota offered it.” (197 Cal.Rptr.3d at 665.) At the hearing on plaintiffs’ in limine motion to then exclude all evidence of industry custom, which the court denied as overly broad, plaintiffs’ “asked for a limiting instruction as to a reason why it’s being offered [and] to explain why [defendants] did or didn’t do what they did under the risk benefit doctrine.” (*Id.*) The trial court responded by “welcoming” plaintiffs’ preparation of such a limiting instruction. Yet, when defendant’s expert testified about the availability of ESC on other pickup trucks in the market, [plaintiffs’ counsel ] did not object, ask for the reason Toyota was offering the evidence, or request or propose a limiting instruction.” (*Id.*) This is a far cry from the contention made now that the trial and appellate courts blithely admitted industry custom evidence that in 2005 “nobody” installed ESC on pick-up trucks.

---

<sup>10</sup> OBM at 28-30.

## CONCLUSION

California courts should, based on the nature and purpose for which it is offered, admit evidence of a defendant's compliance with custom because the evidence is relevant to the risk-benefit test for design defect and places the feasibility of alternative designs in perspective.

For these and all the aforementioned reasons, *amici* urge the Court to affirm the judgment.

Dated: October 7, 2016

Respectfully submitted,

---

Fred J. Hiestand  
Civil Justice Association of California

Erika C. Frank  
Heather L. Wallace  
California Chamber of Commerce

Counsel for *Amici Curiae*

## **CERTIFICATE OF WORD COUNT**

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, less than 5,600 words.

Date: October 7, 2016

---

Fred J. Hiestand

## PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On October 7, 2016, I served the foregoing document(s) described as: *Amici Curiae* Brief of the California Chamber of Commerce and the Civil Justice Association of California in Support of Defendants and Respondents in *William Jae Kim, et al. v. Toyota Motor Corporation, et al.*, S232754 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

Ian Herzog, Esq.  
Thomas F. Yuhas, Esq.  
Evan D. Marshall, Esq.  
LAW OFFICES OF IAN HERZOG  
11400 West Olympic Blvd., Suite 1150  
Los Angeles, CA 90064  
**Attorneys for Plaintiffs and Appellants**

Patrick Rogan, Esq.  
20406 Seaboard Rd.  
Malibu, CA 90265  
**Attorney for Defendants and Respondents**

Robert A. Brundage, Esq.  
Nicolette L. Young, Esq.  
MORGAN, LEWIS & BOCKIUS LLP  
One Market, Spear Street Tower  
San Francisco, CA 94105  
**Attorneys for Defendants and Respondents**

David P. Stone, Esq.  
BOWMAN AND BROOKE LLP  
2501 North Harwood, Suite 1700  
Dallas, TX 75201  
**Attorneys for Defendants and Respondents**

Clerk, California Court of Appeal  
Second Appellate District, Div. 7  
300 S. Spring Street, 2<sup>nd</sup> Floor, North Tower  
Los Angeles, CA 90013  
**Appellate Court**

Clerk, Los Angeles County Superior Court  
Attn: Hon. Raul Sahagun, Judge  
Courtroom D, Room 310  
12720 Norwalk Blvd.  
Norwalk, CA 90650  
**Trial Court**

[X](BY MAIL) I am readily familiar with our practice for the collection and processing of correspondence for mailing with the U.S. Postal Service and such envelope(s) was placed for collection and mailing on the above date according to the ordinary practice of the law firm of Fred J. Hiestand, A.P.C.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 7<sup>th</sup> day of October 2016 at Sacramento, California.

---

David Cooper