



The Owner's Manual, Warranty And Advertising Can And Should Be Used To Support Consumer Expectations Claims

by John D. Rowell

Those of us who handle automobile products liability cases ordinarily ask the manufacturers and dealers for copies of the owner's manual, any warranties and product advertising. There are a number of reasons to make such a request. In a warnings case, inadequate or misleading owner's manual instructions and warnings can provide an independent basis for liability as can inadequate or misleading on-vehicle notices. Placement and wording are crucial to such claims. Advertising, promotional material and even warranty language can provide helpful context and explain why a warning buried in the owner's manual would be ignored. Of course, breach of any express warranty affords an independent basis for liability, albeit contractual.

We are also familiar with the manufacturer's use of the owner's manual to impeach, suggest comparative fault or suggest a use of the product that it claims could not be anticipated.

However, all of this material is significant for another, equally important reason. Even when the nature of the accident or complexity of the product would suggest otherwise, such evidence

can be used to show that an everyday consumer can have reasonable minimal performance expectations. This, in turn will warrant the giving of the first prong of the design defect test set forth in *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d413 [143 Cal.Rptr. 225].

Expert testimony is ordinarily not admissible to show what the ordinary consumer would expect of a product. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567 [34 Cal.Rptr.2d 607].) However, descriptions of how the product should operate contained in the owner's manual will support the conclusion that ordinary everyday users may form minimal safety expectations about a product. (*McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111,1124-1125 [123 Cal.Rptr.2d 303] [description of air bag deployment in a "frontal collision zone"].) Because the consumer expectations theory is rooted in warranty heritage, similar results should obtain when the product's performance is described in a warranty. (*See, id.*)

One area where this analysis may be fruitfully applied are tread separation cases. Passenger and light truck tire warranties are

commonly based upon tread wear rather than mileage. The language and holding of *McCabe* supports the conclusion that if the tread has not worn enough to take the tire out of warranty, an everyday user could reasonably conclude that, absent impact damage or abuse, the tire should not come apart during foreseeable operation. Further, the holding and reasoning of *McCabe* supports the conclusion that evidence of broadly disseminated manufacturer representations concerning operation and performance may also be provided to the court and jury in support of a consumer expectations instruction.

Design defect, consumer expectations and the user's everyday experience

Before discussing the evidence which may be used to support a consumer expectations claim, some background is needed to provide context.

The two alternative legal tests for design defect were set forth by our Supreme Court in *Barker v. Lull Engineering Co.*,

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supra, 20 Cal.3d at 429-430:

"First, our cases establish that a product may be found defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner

When a product fails to satisfy such ordinary consumer expectations as to safety in its intended or reasonably foreseeable operation, a manufacturer is strictly liable for resulting injuries.

"[Second,] a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design."

The first of these tests is referred to as the "consumer expectations" test. The second as the "risk/benefit" test. The *Barker* Court applied both tests to a 23-foot-long 4-wheel-drive loader, weighing 17,500 pounds and equipped with forks similar to those of a forklift. (*Id.* At 419,435.)

Four years after *Barker* was decided, our Supreme Court applied the consumer expectations test in another design defect case. In *Campbell v. General Motors Corp.* (1982)

32 Cal.3d 112 [184 Cal.Rptr. 891], the plaintiff, Florence Campbell, was injured when she was thrown from her seat on a bus during a sharp turn. She alleged defective design because the seats lacked "handrails or guardrails within reasonable proximity." (*Id.* at 116.) She offered her testimony as to the circumstances of the accident and some photographs of the interior of the bus. General Motors' motion for nonsuit was granted. The Supreme court reversed, finding sufficient evidence had been presented to go to the jury on the consumer expectation theory.

"Since public transportation is a matter of common experience, no expert testimony was required to enable the jury to reach a decision" (*Id.* at 126.)

Thus, the "common experience" necessary to form a consumer expectation of safety was simply riding in public transportation, not the experience of having been injured on a sharp turn because there was no grab bar. As a result, the jury did not need any expert testimony.

Thereafter, in *Akers v. Kelley Co.* (1985) 173 Cal.App.3d 633 [219 Cal.Rptr. 513], the Court of Appeal applied the test to a loading dock accident. In *Akers*, a complex piece of machinery, a dockboard, which allowed forklifts to move from the loading dock to and from trucks backed up to the dock, had been foreseeably damaged during ordinary use as a result of what was alleged to be design and/or manufacturing defects. The damaged dockboard

was blocking a gate from closing over the dock area. A dockworker, Akers, pulled the release cable on the dockboard so that he could move it and shut the gate. When he did so, failed spring and hinge loops caused the surface portion of the dockboard to unexpectedly catapult about fifteen feet. One of the components of the dockboard struck Akers on the head, causing catastrophic injury.

The manufacturer argued that both the consumer expectations and the risk/benefit instructions should have been given. The trial court gave only the consumer expectations portion of the instruction and after a plaintiffs verdict, the manufacturer appealed arguing the consumer expectations instruction should not have been given because no one was familiar or could be familiar with how safely the damaged board should operate. The Court of Appeal disagreed and held that under the circumstances of that accident, *no* prior experience was necessary because a juror could reasonably conclude that the product failed to meet consumer expectations of its safety. (*Id.* at 651.)

Despite the above case, both before and after *Campbell*, manufacturers argued that the "consumer expectations" design defect test should not be applied when the performance of a product is beyond the everyday experience of a consumer. Examples of cases where the consumer expectations test was rejected on this basis are *Lunghi v.*

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Clark Equipment Co. (1984) 153 Cal.App.3d 485 [200 Cal.Rptr. 387] (operation of a Bobcat front end loader); *Bates v. John Deere Co.* (1983) 148 Cal.App.3d 40, 52 [195 Cal.Rptr. 637] (commercial cotton picking machine); and *Morson v. Superior Court* (2001) 90 Cal.App.4th 775 [109 Cal.Rptr.2d 343] (natural rubber latex gloves).

On the other hand, consumer expectations instructions were given both with and without the risk/benefit portion of the *Barker* test in other cases, including crashworthiness cases, such as *Fierro v. International Harvester Co.* (1982) 127 Cal.App.3d 862, 867 [179 Cal.Rptr. 923] (truck fuel tank); *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 801-803 [174 Cal.Rptr. 348] (gas tank design and placement in a Pinto); and *Akers v. Kelley Co.*, *supra* [dockboard failure].

***Soule* limits the use of the Consumer Expectations Design Defect Test**

In 1994, the Supreme Court seemed to afford the defense ammunition with which to defeat requests for the consumer expectations instruction:

"[T]he 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.,

supra, 8 Cal.4th at 567, (emphasis in original).

Soule involved a claim of lack of crashworthiness in that, when struck in a particular manner near the left front wheel, the plaintiffs Camaro wheel bracket assembly failed, causing the left front wheel to shift backward into the toe pan and, as a result, to cause the toe pan to deform into the passenger compartment injuring the plaintiff. (*Id.* at 557.) In *Soule*, the Court found the consumer expectations jury instruction should not have been given because the accident was too "esoteric," and involved details of the performance of products in the course of an accident which were unfamiliar to the general public. (*Id.* at 570.)

However, the manufacturers did not secure anything close to a complete victory in *Soule*. While upholding the trial court, the Supreme Court in *Soule* held that the consumer expectations test is not precluded simply because a case may involve "crashworthiness," a complex product, or technical questions of causation. (*Id.* at 568.) Instead,

"[t]he crucial question in each individual case is whether the circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers."

Id. at 568-569; see also *Akers v. Kelly Co.*, *supra*, 173 Cal.App.3d at 651 (consumer expectations test appropriate even where

"complex machinery is involved"); *Bresnahan v. Chrysler Corp.* (1995) 32 Cal.App.4th 1559, 1568 [38 Cal.Rptr.2d 446] (*Bresnahan I*) ("Nor does the alleged technical novelty of the air bag preclude resort to consumer expectations."); *Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 475-476 [38 Cal.Rptr.2d 739]; *Arnold v. Dow Chemical Co* (2001) 91 Cal.App.4th 698, 727 [110 Cal.Rptr.2d 722] (rejecting argument that the test was inappropriate because the product and the claims were complex).

Consumer expectations and air bag deployment cases

As the above indicates, the courts have struggled with the issue of under what factual circumstances the consumer expectations instruction is to be given to the jury. This struggle is no more glaring than in cases involving claims that air bag systems defectively deployed or failed to deploy.

In 1995 and 1998, the Second District Court of Appeal held the consumer expectations test may apply (*Bresnahan I* and *II*); then, a year later, broadly stated that the consumer expectations test should not apply (*Pruitt v. General Motors Corp.* (1999) 72 Cal.App.4th 1480, 1483 [86 Cal.Rptr.2d 4]).

In the first of these *Bresnahan* air bag cases, the Court of Appeals followed the holding of *Soule* but

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distinguished *Soule's* "murky" factual context:

"Plaintiffs theory here does not pose the consumer unawareness that attended the design defect claim in *Soule*. In contrast to *Soule's* complex and murky situation regarding the crashworthiness of wheel brackets and frames, ordinary experience may well advise a consumer what measure or safety to expect from her car's side windshield assembly and air bag in a minor rear-end collision."

(*Bresnahan I, supra*, 32 Cal.App.4th at 1568.)

In *Bresnahan I*, Mary Bresnahan was driving her 1988 Chrysler LeBaron when she rear-ended another vehicle at low speed. When the impact occurred her air bag deployed, forcing her left arm and hand upward. Her hand struck the windshield, cracking it, and her elbow apparently impacted the windshield's side pillar. She suffered a fractured elbow. The Court of Appeal directly addressed the issue of whether the consumer expectations test should be part of the case:

"Plaintiff proposed to prove that under the foreseeable circumstances of the accident..., her vehicle's design, specifically the air bag feature in conjunction with the placement of the windshield, performed in a manner below the safety expectations of an ordinary consumer, when it forced plaintiffs arm into a series

of injurious 'internal' collisions with the interior of the car (the same nature of impacts the air bag was intended to avert). We believe that, on the showing before us, an ordinary consumer would be capable of forming an expectation, one way or the other, about whether the design of the highly publicized and by now commonplace product of an air bag-equipped automobile satisfied minimal safety expectations in causing that result (assuming that it was the cause)." (*Id.* at 1568.)

Chrysler argued that the consumer expectations test was inappropriate because relatively few consumers ever experienced the occurrence at issue and that the technical novelty of a product precludes use of the consumer expectations test. These arguments, which appear with regularity in products cases, were rejected by the *Bresnahan* court. (*Bresnahan I*, at 1568-1569.) The Court of Appeal reversed and remanded the case for trial and the Supreme Court denied Chrysler's Petition for Review.

After the plaintiff prevailed at trial, Chrysler appealed. In *Bresnahan v. Chrysler Corp.* (1998) 65 Cal.App.4th 1149 [76 Cal.Rptr.2d 804] (*Bresnahan II*), the Court of Appeal affirmed the general verdict, and in so doing reiterated its earlier holding that the consumer expectations test was proper under the circumstances.

A year after *Bresnahan II*,

Division Six of the same District held that the consumer expectations test could not be applied. *Pruitt v. General Motors Corp., supra*, 72 Cal.App.4th at 1483.

Characterizing the discussion in both *Bresnahan* decisions as *obiter dicta*, the *Pruitt* court held that experience with air bag deployment was a necessary predicate to forming a reasonable consumer expectation as to under what circumstances air bags should deploy. The *Pruitt* court based its holding on an *ipsa dixit* assertion that:

"Minimum safety standards for air bags are not within the common knowledge of lay jurors."

(*Pruitt, supra*, 12 Cal.App.4th at 1483.)

Pruitt involved injury to a belted driver of a 1991 Chevrolet Beretta. She turned left at an intersection and collided with an oncoming car at a "low-speed." The driver's side air bag deployed, breaking her jaw. The jury returned a defense verdict. *Pruitt* appealed and argued that the trial court erred when it refused to instruct the jury on the "consumer's expectation" theory of defect. In 2002, Justice Perluss valiantly attempted to harmonize the seemingly all or nothing holdings of *Pruitt* and *Bresnahan* in *McCabe v. American Honda Motor Company, supra*, 100 Cal.App.4th 1111. As discussed below, for our purposes, Justice

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Perluss' effort to harmonize is less important than the remainder of the *McCabe* opinion.

The owner's manual and beyond: evidence that a consumer expectation is reasonable and evidence establishing that standard

It is the *McCabe* case which explains the significance of the owner's manual, warranties and, by implication, advertising material. *McCabe* should be closely read and carefully studied. The facts of *McCabe* are as follows:

Lucille McCabe was attempting to make a left turn when her 1995 Honda Accord was struck by an oncoming Cadillac. Her air bag did not deploy and she was injured. She claimed the air bag should have deployed and that, had the air bag deployed, she would not have been as severely injured in the accident as she was.

Honda asserted the air bag correctly failed to deploy and moved for summary judgment. Honda submitted the declaration of an engineer in support of the motion which asserted that the system had performed as intended; the air bag should not have deployed because the impact was outside the "30 degree frontal collision range" required for the air bag to deploy; and that there was "no evidence of a defect." (*Id* at 1117-1118.)

McCabe declared that the Cadillac collided with her Civic "head on" and attached

photographs of the Civic showing extensive damage to the left front hood area and to the left side of the car. (*Id* at 1118.) McCabe claimed the collision occurred *within the frontal collision range identified in the owner's manual*. She pointed to those portions of Honda's owner's manual containing Honda's diagram of the "frontal collision zone;" and Honda's language stating that the air bag would deploy if the vehicle was in a collision equivalent to a 25 mph collision with a parked vehicle. McCabe also provided witness testimony, including her own and that of the Cadillac's driver, that the Cadillac was traveling at a speed at or in excess of 35 miles per hour when it collided with her Civic. (*Id* at 1117-1118.)

Honda argued that the consumer expectation test did not apply to the question of whether or not an air bag should deploy in an accident which, it maintained, involved sophisticated technology and was outside the ordinary experience of the consumer. (*Id* at 1118.)

The trial court granted summary judgment for Honda, reasoning that, by omitting from her opposition any expert testimony contravening the Honda engineer's declaration, McCabe had failed to produce evidence sufficient to raise a triable issue of fact as to whether the air bag should have deployed under the circumstances of the accident. The trial court concluded that

the consumer expectation test was inapplicable under the circumstances of the case. (*Id.* at 1118.)

Even though the plaintiff had offered no expert testimony on the issue of defect, the Court of Appeal reversed, holding that the plaintiff had raised triable issues of fact under both the consumer expectations test and the risk-benefit test. In *McCabe*, the trial court and Honda had relied on *Pruitt* for the general proposition that the consumer expectations test did not apply to air bag cases. The plaintiff, on the other hand, argued that the *Bresnahan* decisions were controlling. The *McCabe* court attempted to harmonize these holdings by emphasizing that they involve factually different scenarios. The *McCabe* court rejected any attempt at a general statement that the functioning of any automobile air bag lends itself in every circumstance to the consumer expectations test, as well as Honda's suggestion that it never lends itself to application of the consumer expectations test.

Instead, the Court of Appeal emphasized that the test is not whether the product, when considered in isolation, is beyond the ordinary knowledge of the consumer, but whether the product *in the context of the facts and circumstances of its failure* is one about which ordinary consumers can form minimum safety expectations. (*Id.* at 1124.)

This factual inquiry should

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generally be left to the jury unless there is no basis from which the jury can conclude that the ordinary consumer could form reasonable minimum assumptions as to safety performance of the product under the factual circumstances. (*Id.* at 1125, fn 7.) If a factual dispute is presented and the court finds that there is sufficient evidence to support a finding that the ordinary consumer can form reasonable minimum safety expectations, the court should instruct the jury, consistent with Evidence Code section 403(c), to determine whether the consumer expectations test applies to the product at issue under the circumstances of the case, and to disregard the evidence about consumer expectations unless the jury finds that the test is applicable. (*Id.*) The *McCabe* court envisioned an inquiry similar to that employed in a *res ipsa* case.

Expert testimony as to what consumers ordinarily expect is generally improper. (*Soule, supra*, 8 Cal.4th at 567.) An exception exists when the product is in specialized use with a limited group of consumers. In such cases, "if the expectations of the product's limited group of ordinary consumers are beyond the lay experience common to all jurors, expert testimony on the limited subject of what the product's actual consumers *do expect* may be proper." (*Soule, supra*, 8 Cal.4th at 568, fn. 4, emphasis in original.)

However, *McCabe* held that

the contents and representations contained in the owner's manual are both relevant and admissible to support a finding that the ordinary consumer can form reasonable minimum safety expectations:

"In this case, drawing all inferences and resolving all conflicts in favor of the non-moving party, we find summary judgment was improperly granted because numerous triable issues of material fact exist as to the circumstances of the accident. Relying on its expert's 'reproduction' of the accident, Honda maintains the accident occurred at a speed and at a collision range outside that required for the air bag to deploy. *McCabe, on the other hand, provided evidence that the accident was a 'head-on' collision, occurring within the 'frontal collision range' depicted in Honda's owners manual.* McCabe also provided testimony that the Cadillac was traveling at a speed in excess of 25 miles per hour when it hit her Civic, the speed identified in the owner's manual as the minimum necessary for the air bag to deploy Thus, there is conflicting evidence as to the circumstances of the accident and whether the air bag performed in accordance with the representations made in the owner's manual." (Emphasis added.)

(*McCabe, supra*, 100 Cal.App.4th at 1124-1125.)

The underlying rationale of this holding is key to reaching the conclusion that not only the owner's manual, but warranty information and advertising material should be marshaled to support a request for a consumer expectations instruction:

"McCabe provided sufficient evidence for a jury to infer that the non deployment of an air bag, in the context of the high speed, 'head-on' collision described by McCabe, violates minimum safety expectations of the ordinary consumer. Indeed, the consumer expectations theory, rooted as it is in a warranty heritage (see *Barker, supra*, 20 Cal.Sd at p. 430 ...) would seem necessarily to encompass a case in which it is alleged the product failed to perform in accordance with the representations contained in its own owner's manual. At a minimum, triable issues of fact as to the circumstances of the accident preclude a determination that the consumer expectation test of design defect is inapplicable as a matter of law."

(*McCabe, supra*, 100 Cal.App.4th at 1125.)

In a last ditch effort, Honda argued the plaintiff had failed to show she had ever read the owner's manual and asserted

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that she admitted she had not relied upon any information in the owner's manual in forming her consumer expectation. The *McCabe* court rejected these arguments:

"Whether McCabe actually relied on the owner's manual in forming her expectation is irrelevant. The consumer expectations test considers the 'expectations of a hypothetical reasonable consumer, rather than those of the particular plaintiff in the case.' (*Campbell v. General Motors Corp.*, *supra*, 32 Cal.3d at p. 126, fn. 6....)"

(*McCabe*, *supra*, 100 Cal.App.4th at 1125, fn. 6.)

Conclusion

The owner's manual and product warranties, particularly warranties as to product performance and operation, are of tremendous assistance when trying to convince a trial court that the consumer expectations theory should go to the jury. While the determination of whether to give the instruction is fact dependent, statements by the manufacturer as to performance and safety enable ordinary users to form minimal safety expectations. Every effort should be made to carefully prospect for such nuggets.

Summary of Article:

This article discusses the consumer expectations test of design defect, and the use of materials such as the owner's

manual and warranty information to support a request for an instruction on that theory.

Biography:

John D. Rowell is a partner in the firm of Cheong, Denove, Rowell & Bennett, specializing in major personal injury, products liability, and professional negligence. He has served on plaintiffs committees in federal MDL air disaster and heart valve cases; as class counsel in national wind turbine insurance actions; and is currently serving on the plaintiffs committee in the Ford/Firestone Tire Litigation Coordination. John is a long-time Master of the ABOTA Inn of Court, and a Finalist in the State of California Chess Championship.

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