Comparative fault does not reduce a judgment based on a breach of warranty

Both express and implied warranties can be used to defeat the defense of comparative fault

By Louis S. Franecke

Numerous products sold and utilized in the state of California have both express and implied warranties associated with them. Aside from issues of privity, warranties are generally overlooked by most practitioners because the manufacturers have become very careful about excluding any and all express and implied warranties associated with their products. However, careful review of documents, advertising, letters and other materials may reveal sufficient evidence to convince a jury that a warranty may apply to the injuries in the case.

The most powerful evidence of breach would be related to an express warranty because specific wording can be used, shown to the jury, and shown how it covers the situation in the trial. For instance, in the case referenced above, one of the aircraft manuals, specifically the Operations Manual, had wording in it that specifically told the user that this manual contains all the information they would need to fly the aircraft under normal and emergency circumstances. The proof was that it did not contain all such information, and the jury found that this express warranty was breached.

The author recently received a verdict in Federal District Court for $12 million based upon a breach of express warranty regarding a business jet crash in Santa Barbara, California. The jury also found that the pilot was substantially contributorily negligent and that negligence was a substantial factor in the cause of the crash. However, the court entered judgment for the full $12 million because comparative fault does not serve to reduce a breach of express warranty judgment in California.

On the other hand, implied warranties of merchantability or fitness for a particular purpose may also be shown to apply in the case. Implied warranties are generally that the product was fit for the ordinary purposes for which such goods are sold. The jury will determine whether the product had the expected quality and if that lack of such quality was a substantial factor in causing the injury. This proof may be more difficult as it is very similar to strict product liability defect of the consumer expectation test or risk benefit analysis.

Prior to the adoption of comparative fault in product liability litigation in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, a warranty could be voided if the product was not used in a reasonable manner appropriate to the purpose for which it was intended, or the party utilizing the product was aware of the defect or condition claim to constitute a breach of their warranty and used the product anyway. BAJI 9.83 and 9.71 sets forth the various conditions generally revolving around what the user actually knew or should have known about the defect in the product and how far did the express warranty actually go. The essential question was whether the plaintiff used the product in such a way as to come within the scope of the warranty.

However, it was previously distinguished that the defense of contributory negligence did not apply in actions based on breach of warranty. (*Crane v. Sears Roebuck and Company* (1963) 218 Cal.App.2d 855, 860; *Vassallo v. Sabatte Land Company* (1963) 212 Cal.App.2d 11; *Kassouf v. Lee Brothers* (1962) 209 Cal.App.2d 568.)

Comparative fault

The doctrine of comparative fault, which was adopted in California in *Li v. Yellow Cab Co.,* 13 Ca1.3d 804 (1975), allows a negligent defendant to reduce his liability to an injured plaintiff based on the plaintiff's proportionate share of fault in causing the injury. In *Daly v. General Motors* (1978) 20 Ca1.3d 725, the California Supreme Court approved the application of the doctrine of comparative fault to strict liability cases. The *Daly* case addressed whether the defense of comparative fault is applicable where the defendant is found liable on theories of strict liability or negligence only.

Fifteen years after *Daly,* the California Court of Appeal in *Shaffer* expressly rejected the application of the comparative fault defense to Breach of Warranty cases:

> We likewise reject defendants' argument that an additional 5 percent must be deducted to give effect to the jury's comparative negligence calculations. The special verdicts are far from clear that the collective 5 percent comparative negligence; figure (21/2 percent for both Charles and Betty) is not at least to some extent duplicative of the 25 percent mitigation-of-damages reduction. **In any event, we are persuaded that comparative negligence is not a defense to a breach of express warranty action.** (See, e.g., *Hensley v. Sherman Car Wash Equipment Company* (1974) 33 Colo.App. 279 [520 P.2d 146, 148]; 2 Shapo, The Law of Products Liability (2d ed. 1990), 20.01[15], p. 20-15.) Assuming the negligence special verdict should result in an additional 5 percent reduction as to that theory, the judgment would nonetheless reflect the greater amount attributable to the breach of warranty theory.

(*Shaffer v. Debbas* (1993)17 Cal.App.4th 33, 42 (emphasis added); *see also* James Acret, Architects and Engineers § 9:17 (Thomson/West 4th ed. 2007) (citing *Shaffer* for proposition that comparative fault doctrine does not apply to Breach of Warranty claims); Ann T. Schwing, California Affirmative Defenses § 48:16 (Thomson/West 2011 ed.) (same); James Acret, Cal. Constr. L. Manual § 5:42 (Thomson/West 6th ed. 2005) (same); James Acret, Construction Litigation Handbook § 14:1 (Thomson/Wet 2d ed. 2008) (same); 11 Miller & Starr, Cal. Real Est. § 29:9-29:10 (Thomson/West 3d ed. 2008) same).)

Express or implied warranties

If plaintiffs are found to have contributed to their own damages, plaintiffs' comparative fault does not reduce defendants' ultimate liability to plaintiffs, except as to any items of damages awarded to plaintiffs solely because of defendants' negligence, and not because of defendants' breach of express warranty.

Also, if the jury finds that defendants' manuals were defective and were a substantial factor in causing the accident and were an integral part of the aircraft which did not cause damage to property other than the aircraft, plaintiffs suffered only economic harm. Plaintiffs' **tort recovery** is therefore limited under the Economic Loss Rule. (*Jimenez* v. *Superior Court* (2002) 29 Cal.4th 473,482.) However, **plaintiffs can still recover for purely economic damages on its Breach of Warranty claims,** because the Economic Loss Rule does not apply to Breach of Warranty claims. (*See generally Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979 (plaintiff suffering only economic loss in products liability case can recover full damages on warranty claims).)

It may be argued that the case of *Milwaukee Electric Tool Corporation v. Superior Court* (1993) 15 Cal.App.4th 547, 558 is in contradiction to the *Shaffer* case, *supra.* That is not so on numerous grounds. First, the same panel of judges decided *Shaffer* after the *Milwaukee* case. Second, the *Milwaukee* case dealt with implied warranties, not express warranties under the facts and circumstances of that case. The California Supreme Court in *Knight v. Jewett* (1992) 3 Cal.4th 296 noted, "in cases involving personal injuries resulting from defective products, the theory of strict liability in tort virtually superseded the concept of implied warranties." (*Grinnell v. Charles Pfizer and Company* (1969) 274 Cal.App.2d 424, 432.) The California Supreme Court did not say that express warranties are superseded.

It will really only come down to what that express warranty actually states. For instance, if a car manufacturer warranted that you would not be injured in a crash of less than 25 mph and you run a red light and are injured in a 20 mph crash, the warranty has been breached. Your running the red light is a foreseeable use which was warranted against injury. No comparative fault should apply.

It is the author's opinion that should the California Supreme Court be asked to evaluate if some form of comparative fault should apply to either express or implied warranties, they will review the question in light of the prior existing criteria found in BAJI 9.83 and 9.71. That is:

(1) The product must be used in a reasonable manner appropriate to the purpose for which it was intended. However, such unintended use, excluding foreseeable use, misuse or negligent maintenance, must be the sole cause of the injury.

(2) Knowing use of the product after learning of the defect or condition which is claimed to constitute a breach of the warranty would void the warranty unless a person of ordinary prudence would have used the product despite knowledge of such defect or condition. In other words, it will be determined if a person of reasonable prudence should have discovered or needed to investigate to discover a defect which would void the warranty.

Of course, if the warranties, especially express warranties, specifically warranted that the product involved had a certain quality or attribute regardless of the manner in which it was used, there would be a breach of such a warranty regardless of knowledge of the defect.

It is unlikely that the California Supreme Court would apply comparative fault to both express and implied warranties. As referenced above, the history of voiding warranties in California only embraces knowing use of a product when the defect has already been discovered. Comparative fault, on the other hand, is a question of negligence or fault in the use of a product not knowing that a defect in fact exists. If a manufacturer warrants, in some manner, that the product is free from such defects, it has been the public policy of the state of California that a consumer is not under a duty or obligation to investigate, test, evaluate, deconstruct or in any other manner put themselves in the position of the designer or manufacturer of the product to discover a defect for the protection of their own safety. Consumers, in this day and age of complicated products, cannot be expected to have sufficient knowledge to determine if a product contains a defect or not until it manifests itself.

Many complicated products sold in the United States have manuals, instructions, and other materials supplied with them. These manuals and instructions contain many different items — some of which may amount to warranties. Statements about the quality of the product, how it is to be used, and what the emergency or other use of the products are may constitute warranties. Typically, such complicated products are not accompanied with disclaimers. Careful discovery of such manuals, instructions, service letters, service bulletins or other material may permit a viable breach of warranty claim even if there are substantial comparative fault under negligence or pure product liability theories.


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