Keeping the comparison in comparative fault

Who's to blame and how much in a products liability case?

By Gary B. Roth and Nathan Piller

You represent an individual who was injured as a consequence of a defective product. You have irrefutable evidence that the product was defective and that the defect was the cause of the plaintiff's injuries. At trial, you present a brilliant case and establish a design defect in the product. Case over – right? Wrong.

The manufacturer likely will realize that the jury is about to hand your client a verdict finding that the product was defective; at this point, there will be a seismic shift in the nature and tone of the evidence. The manufacturer will concede to the court that everything you have just proven is true and, in fact, not in dispute. It may go so far as to offer to stipulate to liability, reserving, of course, all defenses. The real issue in the case, the manufacturer will argue, is that your client is to blame, in whole or in part, for his injuries.

This development will excite the judge with the prospect of a shortened trial. The judge will ask you for a list of witnesses and evidence that you will no longer present to the jury. Steeling yourself against the inevitable backlash from the bench, you rise and inform the judge that your client will still present his case in its entirety. Citing cumulative evidence and judicial economy, the court will demand a reason why your client should be permitted to present evidence of fault on the part of a manufacturer which has just offered to stipulate to liability.

The issue, you advise her honor, is comparative fault. While the defendant has offered to stipulate to its fault, it has reserved its affirmative defenses – including plaintiff and third-party fault. Since the jury will be asked to compare the fault of the defendant with the negligence of your client and/or a third party, the jury cannot compare the proposed stipulation to evidence of actual fault. It is, therefore, imperative that the plaintiff be permitted to prove the full extent of the fault of the manufacturer and not rely merely on a stipulation.

In response to an offer to stipulate or to overwhelming evidence of a design defect, the court may request that the plaintiff seek recovery under a single legal theory. Once again – beware. In a products liability case in which there is evidence of fault under multiple causes of action, the comparative fault doctrine permits the plaintiff to proceed under all legal theories and does not mandate that a party select merely one cause of action.

In order for the jury to compare properly the fault of the manufacturer with the purported negligence of your client, it is necessary that the jury be presented the evidence of every action or omission which comprises the fault of the defendant. Relying on merely one cause of action, or worse a stipulation void of the facts, will limit the jury's ability of to compare the fault of the parties – to the detriment of your client. Thus, it is necessary for the plaintiff to present the full range of evidence of the defendant's fault.

Beware of the stipulation

In order to preclude your client from introducing evidence of its negligence, the defendant may advise the court that it stipulates to its own negligence. Beware.

As a procedural matter, a party may not merely stipulate on its own fault. A stipulation is an agreement between two or more parties regarding a contested issue of fact. (*Spindell v. State Bar* (1975) 13 Cal.3d 253, 260.) In other words, it takes an agreement between two or more parties in order for there to be a stipulation.

The defendant is, instead, offering an admission, which is a fact or set of facts that the parties themselves agree on. (*Ibid*.) The effect of the distinction between a stipulation and an admission is that a party may decline to enter into a stipulation (*DiMaria v. Bank of California Nat. Ass'n*. 237 Cal.App.2d 254, 256-57.) But the defendant is free to stand before the jury and admit that it was negligent. (*McCray v. State Bar* (1985) 38 Cal.3d 257.)

As a substantive manner, once the defendant admits fault, opposing counsel must address the issues of plaintiff and third-party fault. The defendants will likely have raised these affirmative defenses and, in order to compare the fault of all parties, the jury must have the facts which prove the negligence or fault of a party. (*American Motorcycle Assn. v. Superior Court*, (1978) 20 Cal.3d 578, 597.) The jury cannot compare a stipulation or admission to the purported fault of your client. The jury must compare the facts supporting the fault of the defendant to the facts supporting your client's alleged negligence.

In order to admit fault, the defendant should be required to withdraw the allegations of plaintiff and third-party fault. In the absence of a withdrawal of

the affirmative defenses, it should be argued that the plaintiff must be permitted to present evidence of comparative fault and, therefore, should be permitted to present his entire case against the defendants.

Pursuit of multiple causes of action

Even when pursuing a cause of action for strict liability, a party need not choose a single theory – it may proceed under multiple or alternate causes of action. (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700.) For instance, a failure to warn claim may be argued under both a negligence and strict liability theory in the same trial, as "no valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence . . . nor does it appear that instructions on the two theories will be confusing to the jury." (*Id*. at 717.)

Plaintiffs are free to bring claims under a theory of strict liability as well as under a theory of negligence in the same trial: "negligence and strict products liability are separate and distinct bases for liability that do not automatically collapse into each other[.]" (*Conte v. Wyeth, Inc*. (2008) 168 Cal.App.4th 89, 101.)

Multiple causes of action

Evidence of a design defect will likely be dry, technical and uninspiring to the jury, while evidence of the purported fault of your client will likely be more dramatic. Was he misusing the product, albeit in a foreseeable manner, when the injury occurred? Was she speeding or failing to keep a proper lookout when the component part of the vehicle failed? Did the operator of the product disregard express written instructions or warnings? Is this the first time that he is alleged to have been injured and filed a lawsuit? The defendant will use the answers to these questions to cast your client as irresponsible, reckless or undeserving, while permitting it to argue that it was merely the victim of a bad design. This will allow the manufacturer to argue that it was merely naive, but well-intended.

A simple solution to this problem is to look beyond – well beyond – the traditional causes of action based in strict liability and negligence on the part of the manufacturer. This will involve pleading and discovering facts and evidence which exceed the mere design of the product and delving into the reasons the product was defective. Raising causes of action based in negligence is significant in the context of products liability litigation – it will assist the jury in comparing the full scope of the fault of all parties.

For instance, a sport utility vehicle roll-over crash that injures the driver may have been the result of a flawed design. A strict liability cause of action will consider the design of the product and not the negligence of the manufacturer. Indeed, if the automobile company not only allowed a defective car to leave the assembly line, but also failed to warn the consumer properly, was negligent in its recall of the defective car, or failed to see that the product performed as warranted, a jury is more likely to assess a higher percentage of the overall liability for the harm to that one entity.

As the attorney for the victim of a defective product, it is imperative to address the arguments of plaintiff and third-party fault by raising multiple causes of action against defendants like the automobile company in the above example. Such a strategy will have the effect of introducing to a jury more reasons to assess greater fault to one entity.

In a products liability trial, we offer the following causes of action which should be considered against a manufacturer.

• ***Design defect***

Products have design defects if they "fail to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner," or if "the benefits of the challenged design do not outweigh the risk of danger inherent in such design." (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 786-87.) The former is the "Consumer Expectations Test" and the latter is the "Risk-Benefit Test."

There is a strong preference to pursue application of the Consumer Expectations Test, because it focuses on the ordinary consumer's experience and the product itself, rather than on the cost of improvement to the manufacturer. (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 418.) Parties are free to assert both tests, but they operate as alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106-1107.) It should also be noted that "a product may be found defective in design though it satisfies ordinary consumer expectations," so even if a party asserts the Consumer Expectations Test unsuccessfully, it may still have a strong argument under the Risk-Benefit Test. (*Perez v. VAS S.p.A.*, (2010) 188 Cal.App.4th 658, 676.)

If a party elects to assert the Consumer Expectations Test, the court makes an initial determination of whether the test applies to the product. (*Saller, supra* 187 Cal.App.4th at 1233-1234.) The key inquiry is whether the product, "in the context of the facts and circumstances of its failure, is one about which the ordinary consumer can form minimum safety expectations." (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1311-12.) If the court finds that there is sufficient evidence of this, a jury will apply the consumer expectation test. (*Saller, supra*, at 1233-34.) The jury "must decide whether the product failed to perform as safely as an ordinary consumer would expect when the product is used in an intended or reasonably foreseeable manner." (*Ibid*.)

The Consumer Expectations Test may be applied to complex products, as long as the product performs "so unsafely that the defect is apparent to the common reason, understanding and experience of its ordinary consumers." (*Saller, supra* (2010) 187 Cal.App.4th at 1232). Even where machinery is complex, a bizarre occurrence, like a "dockboard

bl[owing] apart" is sufficient to justify this test. (*Akers v. Kelly*, (1985) 173 Cal.App.3d 633, 651.) Thus, a party should not be deterred from arguing for the test's application, even if the product in question is highly sophisticated.

However, the Consumer Expectations Test can sometimes work to the detriment of plaintiffs: in another sport utility vehicle roll-over case, the plaintiff was unable to present expert evidence about "roof crush" because "expert testimony is not relevant in a consumer expectations theory of liability," which is based on "the objective features of the product." (*Mansur v. Ford Motor Co*. (2011) 197 Cal.App.4th 1365, 1379-80.)

If the court concludes that the product is not one for which the consumer would have formed an expectation, then no consumer expectation instruction should be given and the court will provide a risk-benefit test to the jury. (*Ibid*.) To make a prima facie case under the risk-benefit analysis, the plaintiff has the initial burden of producing evidence that he or she was injured while the product was being used in an intended or reasonably foreseeable manner. (*Perez v. VAS S.p.A*. (2010) 188 Cal.App.4th 658, 678). Once the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective. (*Lunghi v. Clark Equipment Co., Inc*. (1984) 153 Cal.App.3d 485, 497-98.) A jury may consider several key factors bearing on the balance between consumer safety, cost of a safer design, and the "adverse" costs borne by consumers and the product as a result of the alternative design; it seeks to determine whether the increased cost of providing adequate safety is justified by the severity of the risk. (*Mansur v. Ford Motor Co*., (2011) 197 Cal.App.4th at 1374.)

• ***Manufacturing defect***

Under a strict liability approach, a party may raise a manufacturing defect cause of action. To be successful, a party must show that an "item [wa]s manufactured in a substandard condition." (*Gonzalez, supra* (2007) 154 Cal.App.4th at 792.) In order to show defective manufacture, it is essential to demonstrate that the product "has malfunctioned," as opposed to showing a design defect, which does not require a showing of deviation from the rest of the products in the same line. (*Khan v. Shiley, Inc*. (1990) 217 Cal.App.3d 848, 855.) In *Gonzalez, supra,* the plaintiff's claim failed because there was no evidence that "the airbag module . . . performed different from other identical units." (2007) 154 Cal.App.4th at 792; see also *Lee v. Butcher Boy* (1985) 169 Cal.App.3d 375, 383.) Therefore, a party should argue a manufacturing defect where the plaintiff's injury was caused by a single product's malfunction, rather than that of an entire line.

Failure to warn

A party may raise a claim of failure to warn under either a theory of negligence or strict liability. (*Gonzalez, supra*, 154 Cal.App.4th at 793.) Strict liability and negligence may be raised together. (*Oxford, supra*, 177 Cal.App.4th 700.) Within the strict liability framework, even a "flawlessly designed and produced" product might still be "defective" if a court determines that the nature of the product necessitates a safety warning. (*Taylor v. Elliot Turbomachinery Co., Inc*. (2009) 1171 Cal.App.4th 564, 577.) A failure to warn occurs when a defendant knows or should know, based on the "prevailing best scientific and medical knowledge available," of a particular risk posed by its product, and yet fails to adequately warn the consumer. (*Gonzalez, supra*, (2007) 154 Cal.App.4th at 793.)

Ordinarily, whether the lack of a warning makes a product defective is a question of fact for the jury. (*Oxford, supra*, (2009) 177 Cal.App.4th at 717.) The jury may consider several factors, including: the consumer's "normal expectations" about how a product will perform, how simply the product functions, the danger the product's ordinary use poses to the consumer, the probability of injury, and the "feasibility and beneficial effect of including such a warning." (*Jackson v. Deft, Inc*. (1990) 223 Cal.App.3d 1305.) For example, in *Jackson, supra*, the Court of Appeal reversed the trial court's grant of summary judgment to a paint company, because its "labels [had] changed . . . and provided less information than in previous years," which allowed the question of defectiveness to go to a jury. (*Id*. at 1320.) Thus, where they know of a risk of a particular injury, manufacturers are vulnerable to strict liability for failure to warn claims.

Failure to warn may also be argued under a theory of negligence, which rests on the contention that the defendant failed to warn of "a particular risk for reasons which fell below the acceptable standard of care [(that of a reasonably prudent manufacturer)]," rather than that "inadequate warnings rendered its product unreasonably dangerous." (*Conte v. Wyeth*, (2008) 168 Cal.App.4th 89, 101.) An additional duty to warn is activated if a manufacturer learns of the product's defective condition subsequent to its sale (*Lunghi v. Clark Equipment Co*. (1984) 153 Cal.App.3d 485, 494, construction vehicle manufacturer had duty to warn where it learned about the product's "dangerous propensities" after it had been on the market.)

In *Conte, supra*, the plaintiff argued that the defendant drug company "failed to use due care when disseminating its product information." (*Conte*, *supra* (2008) 168 Cal.App.4th. at 101.) The Court held that drug companies owe a duty of care to provide adequate warnings to the doctors who may prescribe the company's drugs to patients. (*Ibid*.) The Defense attempted to offset its liability by raising the issue of the doctor's comparative fault for failing to warn the patient himself, but the Plaintiff's attorney shifted the focus back to the manufacturer by raising the negligence claim. (*Ibid*.) Raising negligence and strict

liability in tandem can act as a valuable hedge against comparative fault offsets.

Negligence

A negligence cause of action in products liability cases is appropriate where there is evidence that the manufacturer was aware of the design defect before the plaintiff was injured. (*Balido v. Improved Machinery, Inc.* (1972) 29 Cal.App.3d 633, 640.) This requires a showing that the manufacturer owed a duty of care to the plaintiff. (*Conte, supra,* 168 Cal.App.4th at 101.) It is also possible to find a special relationship between a manufacturer and a customer giving rise to a duty to "assist and protect," which inquires into the "extent to which the transaction was intended to affect the plaintiff. . . and the closeness of the connection between the defendant's conduct and the injury suffered." (*Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194, 1229.)

If the Court does find that a duty of care is owed, a jury would assess the balance of the defendant's knowledge of the potential harm against the burden of precautions to prevent future harm, which encompass a duty to test and inspect. (*Valentine v. Baxter Healthcare Corp*., (1999) 68 Cal.App.4th 1467, 1485-86.) For example, in *Valentine, supra*, the plaintiff raised a claim of negligent failure to test in addition to raising strict liability causes of action in its case against a company that produced silicone breast implants. (*Ibid*.)

• ***Negligent failure to recall***

Where a defendant acquires knowledge of a defective condition after the sale of the product, a defendant's failure to recall or retrofit can be a basis for negligence liability totally separate from the issue of defective design. (*Ibid*.) For example, in *Hernandez, supra,* a construction worker sued a crane manufacturer, and "[t]he evidence that the manufacturer had begun adding the device to new cranes, but had decided not to retrofit older cranes, was sufficient to establish negligence." (*Id*. at 1797; see also *Lunghi v. Clark Equipment Co*. (1984) 153 Cal.App.3d 485, holding that manufacturer's subsequent knowledge of danger after product was on market could impose duty to retrofit.)

A defendant's successful recall may also render a plaintiff's claim of design defect moot; for example, Toyota's recall campaign nullified a motorist's claim that her Toyota had defective brakes. (*Winzler v. Toyota Motor Sales U.S.A. Inc*. (2012) 681 F.3d 1208.) But merely sending a recall notice to a customer does not constitute an adequate recall – indeed, "a manufacturer cannot delegate responsibility for the safety of its product to dealers, much less purchasers." (*Springmeyer v. Ford Motor Co.* (1998) 60 Cal.App.4th 1541, 1562-1563.)

Such claims, however, can be prohibitively expensive, or difficult in application. They must meet a federal standard established by the National Highway Traffic Safety Administration, which ordinarily requires the employment of a costly expert witness (see *e.g. Buell-Wilson v. Ford Motor Co.* (2008) 160 Cal.App.4th 1107.) Thus, plaintiff's attorneys might be better served to save recall or retrofit claims for situations where there is strong evidence of negligence.

• ***Negligence per se***

When a defendant violates a statute, its liability for negligence can be imputed as a matter of law. This creates the presumption of negligence – "negligence per se." (*Jacobs Farm/Del Cabo, Inc. v. Western Farm Service, Inc.* (2010) 190 Cal.App.4th 1502, 1526.) This arises where the defendant violated a statute, the violation was a proximate cause of the plaintiff's injury, the injury resulted from conduct the law endeavored to prevent, and the plaintiff was a member of the class the law was meant to protect. (*Ibid*.) The jury handles violation and causation issues, and the court decides the latter issues as a matter of law. (*Ibid*.)

Parties should raise this contention whenever a defendant violated a statute by engaging in conduct that the law meant to prevent. For example, in *Jacobs Farm, supra,* an organic farmer brought suit against a nearby pesticide applicator whose chemicals drifted into the farmer's fields and caused contamination. (*Id*. at 1502.) There, the plaintiff's attorney showed that the applicator violated a pesticides statute meant to prevent such contamination, giving the jury greater ammunition to assess liability to the defendant. (*Id*. at 1502, 1529.)

Breach of express warranty

A party should also consider a cause of action when the manufacturer has made any affirmative statement regarding the nature of a product. "A warranty relates to the title, character, quality, identity, or condition of the goods. The purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 20.) Formal words such as "warranty" or "guarantee" are not required to create a warranty. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 113.) It is also unnecessary for the manufacturer to have specifically intended to create a warranty. (*Keith, supra* (1985) 173 Cal.App.3d at 20.) A party may pursue actions for strict liability, negligence, and breach of warranty in concert with one another. (*Conte, supra* (2008) 168 Cal.App.4th at 89.)

The plaintiff must prove that the seller's statements comprised an "affirmation of fact or promise, or a description of the goods," that the statement "was part of the basis of the bargain," and that the affirmation or promise was breached. (*Weinstat v. Densply, Intern. Inc.* (2010) 180 Cal.App.4th 1213, 1227.) There is a "presumption that the seller's affirmations go to the basis of the bargain," so courts accept any affirmation as part of the agreement unless there is "clear affirmative proof" that the statement had been removed from the agreement. (*Id*. at 1227, 1229.)

While the contractual nature of the breach of warranty claim might arouse suspicion of a privity requirement, it is important to note that privity is not required. (*Hauter, supra* (1975) 14 Cal.3d at 115, fn. 8.)

A significant advantage in pursuing a breach of express warranty claim is that such claims are not vulnerable to plaintiff fault offsets – indeed, "[c]ontributory negligence is not a defense in an action based on warranty even though such warranty sounds in tort." (*Crane v. Sears Roebuck & Co*. (1963) 218 Cal.App.2d 855, 860.) Further, because such claims do not require proof of justifiable reliance by the plaintiff, they are protected against many claims of plaintiff fault, making them very attractive. (*Weinstat, supra* (2010) 180 Cal.App.4th at 1227.)

Breach of implied warranty of merchantability

Unlike the express warranty claim, breach of implied warranty bears no relationship to the expectations of the plaintiff, but provides a floor "level of quality" that must be met by the manufacturer as a matter of law. (*American Suzuki Motor Corp. v. Superior Ct. of Los Angeles Cty*. (1995) 37 Cal.App.4th 1291.)

The key test for merchantability is "fitness for the ordinary purpose for which such goods are used." (*Marisa ISIP v. Mercedes-Benz USA* (2007) 155 Cal.App.4th 19, 26.) However, the scope of "purpose" may be more expansive than it seems at first blush – for instance, a court rejected a defendant car manufacturer's claim that the purpose of its cars was solely to provide transportation. (*Id*. at 27.) The Court reasoned that just because "a vehicle provides transportation from point A to point B," it is not necessarily merchantable, particularly if it "smells, lurches, clanks and emits smoke over an extended period of time." (*Ibid*.) Therefore, plaintiff's attorneys would be well-served to add this claim to their arsenals when the defendant's product performed poorly.

While privity may be required for breach of implied warranty claims in some cases (*United States Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 1441.), in "cases involving instrumentalities dangerous because of latent defects, implied warranties apply even in the absence of privity." (*Barth v. B.F. Goodrich Tire Company* (1968) 265 Cal.2d 228, 247.)

Conclusion

Many products liability cases involve a briar patch of confused responsibility. Within the comparative fault framework, each side will do its best to cast the greatest percentage of fault on the other parties as possible.

Parties must be mindful of comparative fault and the tendency of defense attorneys to seek offsets for their own clients' liability by maximizing plaintiff and third-party fault. We can start countering this tactic by becoming knowledgeable about all the causes of action discussed above that can be raised together in a products liability action.

With some favorable facts, negligent behavior by the defendants, and some good lawyering, we can minimize our clients' shares of fault, even within the often unforgiving comparative fault system.


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Gary Roth's legal career spans more than 20 years, dedicated to personal injury law. A well-respected litigator and author of professional articles, he has a substantial track record of multi-million dollar verdicts. At Boxer & Gerson, LLP *in Oakland, California, he represents union members and others in the community that have sustained severe personal injuries as a consequence of the wrongful conduct of others.*

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