Demara and the consumer-expectations test in products liability

Forklift-injury case leads to important products liability ruling on when CET may be utilized

By David L. Winnett

Forklifts and other similarly powered lift vehicles can cause catastrophic injuries to their operators and other people who happen to be nearby while these lift vehicles are in operation. According to the Bureau of Labor Statistics[1], 614 workers were killed in forklift-related incidents in the United States between 2011 and 2017. In that same time period, an average of 7,000 workers a year suffered nonfatal, forklift-related injuries that required them to miss time from work.

Often, third-party liability can arise from these forklift-related incidents, whether through a third party's negligent operation of the vehicle or by way of a products-liability claim against the entities involved in the vehicle's manufacture and distribution. For these latter claims, in a tremendous victory for California consumers, a recent Court of Appeal decision has approved the use of the consumer expectation test ("CET") to prove that a powered lift vehicle's design is defective.

California utilizes the consumer expectation test in design-defect cases

California law allows plaintiffs to prove strict liability design-defect claims in two different ways – the CET (utilizing CACI 1203) and the risk-benefit test (utilizing CACI 1204). A plaintiff may elect to utilize either theory at trial or may, in fact, proceed under both theories. (*McCabe v American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1126.)

The difference between the tests is the evidence the jury hears. The risk-benefit test requires a battle of competing experts, offering their respective opinions as to the relative risks and benefits of the design at issue and alternative designs proposed by plaintiffs. By comparison, the CET requires no expert testimony whatsoever[2]; a plaintiff is simply required to produce evidence of the "objective conditions of the product" from which the jury is asked to utilize "its own sense of whether the product meets ordinary expectations as to its safety under the circumstances presented by the evidence." (*Romine, supra*, 224 Cal.App.4th at 1001, citations omitted.)

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If a plaintiff elects to proceed solely under the CET, a defendant may not present expert testimony as to risks and benefits. (*Soule v. General Motors* (1994) 8 Cal.4th 548, 566.) Thus, it usually behooves plaintiffs to proceed solely under the CET and avoid altogether both the need to present their own experts and to counter the opinions of defense experts, who will undoubtedly be well-armed with tenuous explanations as to why the benefits of the design utilized by the manufacturer outweighed its risks.

Demara applies the CET to powered lift vehicle cases

In *Demara v. The Raymond Corporation, et al.* (2017) 13 Cal.App.5th 545, one of the defendants, Raymond Handling Solutions, Inc. ("RHSI"), sold a forklift for use at a warehouse. The forklift was designed by defendant The Raymond Corporation ("Raymond"). One day, the plaintiff, Kawika Demara, was walking through the warehouse while the forklift was being operated nearby. The operator of the lift made a left turn in reverse and ran over and crushed Mr. Demara's foot as he did so, causing Mr. Demara permanent and disabling injuries. Mr. Demara had seen neither the lift nor its warning light prior to being run over.

Mr. Demara and his wife sued Raymond and RHSI, asserting causes of action for negligence and strict liability. During the litigation, the Demaras established that Raymond was aware that the lift would be used around warehouse workers, that a drive wheel on the lift could cause serious injuries if it contacted any body parts, and that there were no safety guards or other devices that would prevent people from being run over by the drive wheel. They also established that, although the lift had a flashing light on top of the driver's compartment that was intended to warn people that the lift was nearby, pedestrians who were too close to the lift could not see the light, making it an ineffective warning.

Raymond filed a motion for summary judgment, which was granted when the trial court found that the Demaras failed to establish a triable issue of material fact as to whether the lack of the wheel guard or the location of the warning light caused Mr. Demara's injuries. The trial court also ruled as a matter of law that the CET did not apply, "because the minimum safety of the [subject lift]'s design is not within the common knowledge of ordinary consumers" and the Demaras had not presented expert testimony to contradict the opinions of the defense experts that, under the risk-benefit test, the benefits of the design outweighed its risks.

The 4th District Court of Appeal reversed the trial court and remanded the case, finding that the defendants had not presented evidence that the lift's design had not been a substantial factor in bringing about Mr. Demara's injury and that, as a result, the burden of establishing a triable issue of fact had never shifted to the Demaras. Moreover, even if the defendants had shifted the burden to the Demaras, the evidence cited by the Demaras was sufficient to meet their burden, making the grant of summary judgment inappropriate.

Inherent complexity of the product not controlling factor

The Court of Appeal also found that "the inherent complexity of the product itself is not controlling" in determining whether to utilize the CET, because there can be circumstances where technically complex products perform so unsafely that defects inherent in the product could be "apparent to the common reason, experience, and understanding of its ordinary consumers." The CET is not based upon minimum safety assumptions or expectations of consumers in general, but rather those of the product's actual users. In this case, that meant people in warehouses where pedestrians are present and in which the lift in question was designed to be used. Ultimately, the court found that jurors could reasonably find that the design of the lift fell below the minimum safety assumptions and expectations of such ordinary consumers.

Finally, regarding the risk-benefit test, the court found that, although the defendants had submitted expert declarations extolling certain benefits of the challenged design elements, they had submitted no evidence of the risks attendant to those elements or other competing design possibilities. Thus, they had not met their burden of establishing that the risk-benefit test applied to defeat the Demaras' claims.

Demara will be attacked

Manufacturers of powered lift vehicles do not care for the holding in Demara and will take every possible opportunity to overrule, abrogate, and otherwise attack it. They will argue, as the defendants did in Demara, that the design of the challenged product is exceedingly complex and technical, such that ordinary consumers are not equipped to form minimum safety expectations about it. Practitioners who prosecute these cases must be ready for the onslaught of attacks Demara will face and do everything in their power to keep it viable. The best way to do that is to point out how Demara is perfectly consistent with decades of precedent, i.e., that ordinary consumers can, in fact, form minimum safety assumptions about how powered lift vehicles should perform. The author is happy to assist anyone who is having to confront these arguments.

Conclusion

The overriding significance of *Demara* is that it continues a trend of cases holding that the CET may be used to evaluate the appropriateness of the design of a broader and broader array of products. The inevitable result of this trend is a safer world, as manufacturers are held to higher standards of safety.

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Endnotes:

[1] United States Department of Labor, Bureau of Labor Statistics Fact Sheet, "Occupational Injuries, Illnesses, and Fatalities Involving Forklifts," June 2019.
[2] Expert testimony regarding causation may be necessary and is permissible. *Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1001.

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