

PRODUCT LIABILITY

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IADC CAMPAIGNS FOR INDUSTRY CUSTOM EVIDENCE IN CALIFORNIA'S DESIGN DEFECT RISK-BENEFIT ANALYSIS

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Recently, the International Association of Defense Counsel ("IADC") filed an amicus brief in support of Toyota in *William Jae Kim v. Toyota Motor Corporation* (No. S232754). *Kim v. Toyota* is currently on appeal before the California Supreme Court regarding whether evidence of industry custom is relevant to the risk-benefit test for design defect. The brief sheds light on the uncertainty currently facing manufacturers in California.

Procedural History

Plaintiff/Appellant Kim was seriously injured after driving his 2005 Toyota Tundra truck off a mountain road. Kim sued Toyota, blaming the accident on the truck's lack of Electronic Stability Control ("ESC"), a then-emerging technology that assists drivers in loss-of-control situations. ESC was an optional feature in the 2005 Toyota Tundra. The jury returned a verdict in favor of Toyota on Kim's strict product liability claim. Kim unsuccessfully moved for a new trial, arguing that industry custom evidence should never have been admitted by the trial court. Kim, however, first introduced evidence that no other car manufacturers had ESC in a full-size truck at the time.

The Second Appellate District Court of Appeal identified two ways where industry custom evidence can be relevant to the risk-benefit test: to show "the feasibility of a safer alternative design" and to demonstrate "the consequences that would

result from an alternative design."¹ The Court explained that the ESC evidence was relevant in both of those ways, noting that Kim himself conceded that "[o]ne might use other vehicles for purposes of showing alternative design or the feasibility of a given improvement."² The Court also held that the industry custom evidence became relevant as a means of rebutting Kim's argument that "Toyota was planning on making ESC standard on its trucks until it learned its competitors were not going to do so."³

IADC's Amicus Brief

IADC is an association of corporate and insurance attorneys from the United States and around the globe whose practices are concentrated on the defense of civil lawsuits. IADC supports Toyota's position that industry custom plays an important role in the design defect analysis. It argues that industry custom makes the design defect analysis more realistic, eliminating the need for jurors to decide cases in a theoretical vacuum. When used

¹ *Kim v. Toyota Motor Corp.*, 243 Cal. App. 4th 1366, 1379 (2016).

² *Id.*

³ *Id.* at 1383.

this way, evidence of industry custom can aid both defendants and plaintiffs.

IADC first relies on the test promulgated in *Barker v. Lull Engineering Co.*⁴ to provide jurors with insight into the feasibility and marketability of alternative design features proposed by plaintiffs. The Supreme Court in *Barker* set forth five nonexclusive factors for juries to consider when assessing the adequacy of a manufacturer's product design: "[1] the gravity of the danger posed by the challenged design, [2] the likelihood that such danger would occur, [3] the mechanical feasibility of a safer alternative design, [4] the financial cost of an improved design, and [5] the adverse consequences to the product and to the consumer that would result from an alternative design."⁵ The evaluation of these factors requires "the balancing or weighing of competing considerations" with the aim of achieving "reasonable and practical safety under a multitude of varying conditions."⁶

The IADC also argues that the Supreme Court's stated goal of "reasonable and practical safety" implies that the design defect determination should not be conducted in a vacuum. This Court expressly stated that the *Barker* factors were nonexclusive and that the California Civil Jury Instructions authorize considering "[o]ther relevant factor(s)." In order to fulfill their role as "hypothetical manufacturers," jurors must be able to consider the practices of the relevant industry. To use the *Barker* test, a juror must assess the risks and benefits of various product designs. After all, no rational manufacturer would create a product without knowing how it measures up against the features and costs of competing products on the market.

⁴ *Barker v. Lull Engineering Co.*, 20 Cal.3d 413 (1978).

⁵ *Id.* at 426, 431.

⁶ *Id.* at 434.

In response, Kim argues that marketability can only be relevant when consumers appreciate the value of the benefits they receive. When the alternate design consists of technology unknown to consumers, other manufacturers' designs are irrelevant to the cost of implementation. IADC counters that this argument makes no sense. Under Kim's vision of product liability, a manufacturer that invents a revolutionary but costly new safety feature will be forced to implement it in all its future products.

Additionally, when consumers do not know the value or utility of a novel product feature, they may purchase a competitor's product instead of spending money on the new product. This concern drove Toyota's decision to make ESC an **optional** feature on the 2005 Toyota Tundra. Indeed, Kim admitted that he purchased the Tundra because it was the cheapest of all available options.

IADC also refutes Kim's argument that industry custom diverts juror attention away from the risk-benefit factors and towards a "standard of care," sounding more in negligence than strict liability. According to the IADC, evidence of industry custom by itself does not satisfy a manufacturer's burden to show that there was no feasible alternative and safer design. Although the Court of Appeal has stated that this evidence can be relevant, its admissibility depends on the evidence and both sides' arguments. Kim also overlooks that industry custom evidence may ease a plaintiff's burden when a product deviates from industry custom.

Finally, the IADC urges the Supreme Court to distinguish that its holdings in *Grimshaw* and progeny are no longer good law.⁷ The *Grimshaw* Court of Appeal deemed industry custom to be irrelevant to a design defect determination simply because it did not appear on the list of factors

⁷ *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757 (1981).

enumerated in *Barker*. It should not have done so. The Supreme Court expressly stated that the *Barker* factors were nonexclusive and that the California Civil Jury Instructions authorize considering other relevant factors other than those listed in *Barker*. Additionally, the *Grimshaw* court misinterpreted *Barker's* holding that industry custom is irrelevant. The *Barker* court held that while a manufacturer's design **process** may be irrelevant in strict liability, its design **choices** are not.

The distinction is important. Without that distinction, if a product caused harm, a manufacturer who engaged in a careful and deliberate process may be just as liable as one who produced a product without thinking about the issues at all.⁸ A manufacturer's choices are synonymous with the condition of the product, because its choices produce the product.

In the California Supreme Court's Hands

As the Court of Appeals has ruled inconsistently about whether industry custom evidence is admissible in design defect cases, trial counsel on both sides will be watching the Supreme Court's decision closely. ♦

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⁸ See *Barker*, 20 Cal.3d at 434.