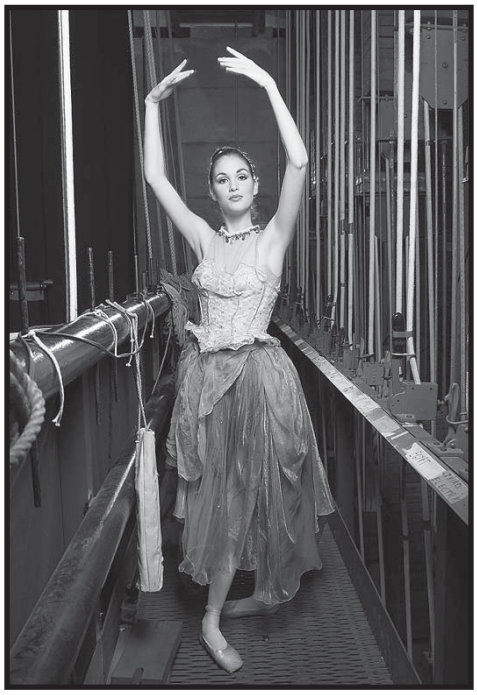
The Safety Dance

California Courts Swing Back And Forth On Whether A Plaintiff Alleging A Design Defect Must Produce Evidence Of A Feasible Safer Alternative Product Design

By Dean Bochner



Accidents happen – and sometimes injured consumers sue, arguing their accidents were the result of a product's ill-conceived design. But what if no better design existed or could reasonably have been developed at the time the product was made?

The California Supreme Court's seminal decision in *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413 (*Barker*) allocated the parties' burdens of proof in a design defect case premised on a "risk-benefits" theory. *Barker* held that a plaintiff is required to make a prima facie showing that his injury was proximately caused by the product's design. (*Id*. at p. 431.) If the plaintiff makes this showing, the burden shifts to the defendant to prove that the benefits of the challenged design outweigh the risk of danger inherent in such design, in light of one or more factors identified in *Barker*. (*Id*. at pp. 431-432.)

Barker arguably left unresolved the question whether the plaintiff must produce evidence of a feasible safer alternative product design as part of his prima facie case. In the 30 years since *Barker* was decided, California courts have struggled with this question. The courts of appeal have issued conflicting decisions on the subject, and the Supreme Court has not yet resolved the conflict. This article briefly examines the split among the courts of appeal on the issue and offers some suggestions to defense lawyers facing the uncertainty in this area of the law.

Eight months after the *Barker* decision came down, the Second District Court of Appeal held that the plaintiff bears an initial burden of showing the existence of a feasible safer alternative design. (*Garcia v. Joseph Vince Co.* (1978) 84 Cal.App.3d 868, 879 (*Garcia*), hearing denied Nov. 9, 1978.) In Garcia, the plaintiff's eye was injured during a fencing bout when his opponent's sabre broke through the plaintiff's face mask. (*Id*. at p. 871.) The plaintiff sued the manufacturer of the sabre and the manufacturer of the mask on a design defect theory. (*Id*. at pp. 871-872.) The trial court entered a non-suit in favor of both defendants. (*Ibid*.) The court of appeal affirmed, holding that the plaintiff did not offer sufficient evidence of a design defect to go to the jury. (*Id*. at pp. 879-880.) As to the claim against the mask manufacturer, the appellate court explained that the plaintiff had "failed to present any evidence that the state-of-the-art or existing technology is capable of perfecting a mask which cannot be penetrated by a sharp-edged sabre." (*Id*. at p. 879.)

Garcia observed that, even after *Barker*, an initial burden of showing the existence of a feasible alternative design rests with the plaintiff:

> Requiring an injured plaintiff . . . to show that alternative designs for the product could reasonably have been developed does not enlarge plaintiff's burden of proof. An injured plaintiff has always had the burden to prove the existence of the defect. The reasonableness of alternative designs . . . is part of that burden. . . . [¶] . . . [¶] . . . *Barker* . . . did not alter the need for demonstrating the availability of reasonable alternate design, but simply shifted to defendant the burden of proving the unreasonableness

> of requiring an alternative in terms of such items as cost of producing the alternative product.
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> (*Garcia, supra,* 84 Cal.App.3d at p. 879 & fn. 3, internal citation and quotation marks omitted.)

Almost nine years later, the same court that decided *Garcia* did an about-face on the issue. (*Pietrone v. American Honda Motor Co.* (1987) 189 Cal. App.3d 1057 (*Pietrone*), review denied May 21, 1987.) In *Pietrone*, a motorcycle passenger was seriously injured when her leg came into contact with the exposed spokes of the motorcycle's rear wheel. (*Id.* at pp. 1059-1060.) She filed a products liability action against the motorcycle manufacturer. (*Ibid.*) At trial, the plaintiff argued that the "open, exposed rotating wheel" of the motorcycle was a design defect and offered evidence that this design feature proximately caused her injuries. (*Id.* at p. 1060.) The defendant then rested without offering any evidence. (*Ibid.*) After the jury returned a verdict for the plaintiff, the defense moved for a new trial on the ground that the plaintiff had not offered any testimony that the motorcycle could have been designed in a manner that would have prevented her injuries. (*Id.* at pp. 1060, 1062-1063.) The trial court denied the motion, concluding that the plaintiff presented sufficient evidence to submit the issue of design defect to the jury. (*Id.* at pp. 1061, 1063.)

The Court of Appeal affirmed in a split decision, in which one justice reluctantly concurred and another vociferously dissented. (*Pietrone, supra,* 189 Cal.App.3d at pp. 1063-1071.) The majority opinion explained that under *Barker*, the plaintiff need prove only a causal link between a design feature and the injury before the burden shifts to the defendant to prove that the benefits of the product's design outweigh its risks:

> In the instant case the evidence conclusively established that a design feature of [defendant's] product – the open, exposed, rotating rear wheel in close proximity to the passenger's foot pegs – was a proximate cause of plaintiff's injury. Without more, the burden then shifted to [defendant] to justify its adoption and utilization of that particular design.

(*Id.* at p. 1061.) The majority did not mention, let alone distinguish, its earlier decision in *Garcia*.

In dissent, Justice Roth said he believed *Barker* required the plaintiff to produce evidence of a feasible safer alternative design in order to satisfy her prima facie case. (*Pietrone, supra,* 189 Cal.App.3d at pp. 1066-1067.) He explained:

> The heart of the problem is this: one simply cannot talk meaningfully about a risk-benefit defect in a product design until and unless one has identified some design alternative (including any design omission) that can serve as the basis for a risk-benefit analysis. . . . [¶] In my opinion, *Barker* holds, and common sense and pragmatic fairness dictate, that a plaintiff must set forth, through legally competent evidence, one or more proposed alternatives to the attacked design. . . . Given that, [a] defendant does have something tangible to rebut and is able to show plaintiff's proposals would either entail unreasonable cost, be practically unfeasible, interfere with the product's performance, or create (other) increased risks. . . . Following such a presentation by defendant, the trier of fact can then meaningfully engage in the balancing process known as the risk-benefit analysis to decide whether or not the product was defectively designed. [¶] Absent such an approach, the defendant becomes an absolute insurer of the product. But strict liability has never been and is not now absolute liability.
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> (*Id.* at pp. 1067-1068 (dis. opn. of Roth, J.) (internal citations and quotation marks omitted).)

Three years later, the Fourth District Court of Appeal sided with

the majority in *Pietrone*. (*Bernal v. Richard Wolf Medical Instruments Corp.* (1990) 221 Cal.App.3d 1326 (*Bernal*), overruled on another point in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.) In *Bernal*, the plaintiff was undergoing knee surgery when a blade from a pair of arthroscopic scissors broke off inside his knee joint and "floated away." (*Id*. at p. 1329.) His entire knee joint had to be opened in order to find the blade. (*Ibid*.) The plaintiff sued the distributor of the arthroscopic scissors, alleging a design defect. (*Ibid*.)

At the defendant's request, the trial court instructed the jury that the plaintiff had the burden of proving the feasibility of a reasonable alternative scissor design that would have "avoided the breakage complained of." (*Id*. at p. 1330.) The jury returned a defense verdict. (*Id*. at p. 1329.) The Court of Appeal reversed, concluding the instruction was erroneous because a plaintiff in a design defect case is not required to prove the existence of a feasible reasonable alternative design. (*Id*. at pp. 1333-1336.) Rather, under *Barker*, "a plaintiff is required to prove only that the design of the product was a proximate cause of the injury." (*Id*. at p. 1332.) The court expressly declined to follow *Garcia*, suggesting that *Garcia's* reasoning was based on *Baker v. Chrysler Corp.* (1976) 55 Cal.App.3d 710, which *Barker* overruled "by implication." (*Bernal, supra,* 221 Cal.App.3d at p. 1332.)

Four years later, the Sixth District Court of Appeal suggested that *Garcia*, not *Bernal*, got it right. (See *McGinty v. Superior Court* (1994) 26 Cal.App.4th 204, 206.) In *McGinty*, the plaintiffs brought a products liability claim against the manufacturer of an engine of a private aircraft that had crashed. Plaintiffs' expert opined that the engine failed because an internal bolt had malfunctioned due to stress fatigue. (*Ibid*.) The trial court disqualified the expert and ruled that certain discovery he provided to the plaintiffs had to be returned to the defendant because the expert obtained the discovery from another lawsuit in Illinois, where it was subject to a protective order. (*Id*. at pp. 206-208.) Plaintiffs petitioned the Court of Appeal for a writ of mandate vacating the trial court's order. (*Id*. at pp. 206, 216.) They argued it would be impossible to prove their case without the discovery, which included engineering drawings of revisions to the bolt design, because the discovery went "to the heart of [their] design defect and negligence causes of action." (*Id*. at p. 209.) The Court of Appeal agreed and issued the writ, concluding that the plaintiffs were "clearly entitled" to the discovery. (*Id*. at pp. 215-216.) The court also noted that "[o]ne element of petitioners' product liability action is to show the existence of an alternative feasible design for the product which would have been safer" and cited *Barker* for this proposition. (*Id*. at pp. 209-210.)

Most recently, the First District Court of Appeal, citing *Bernal*, stated "it is not the plaintiff's burden in a design defect case to prove the existence of a feasible alternative design." (*Ford v. Polaris Industries, Inc.* (2006) 139 Cal.App.4th 755, 772, fn. 11, 776.) But the plaintiff in *Ford* had offered evidence of three feasible alternative product designs as part of her case in chief, and the appellate court noted that at least one of these alternatives was feasible, inexpensive, and might have prevented the plaintiff's injuries. (*Id*. at pp. 761, 772, fn. 11, 776.) The statement was also not necessary to the court's holding that the primary assumption of risk doctrine did not bar the plaintiff's design defect claim. (*Id*. at pp. 766-777.)

This conflict in California law leaves unsettled the question whether the plaintiff in a design defect case bears an initial burden to produce evidence of a feasible safer alternative design. The Restatement of Torts, while not controlling in California courts, is accorded persuasive value where California law is not clear. (Cf. *Standard Oil Co. v. Oil, Chemical etc. Internat. Union* (1972) 23 Cal.App.3d 585, 589.) The Third Restatement of Torts has adopted the view that the plaintiff must produce evidence of a feasible safer alternative design: "[t]o establish a prima facie case of defect, the plaintiff must prove the availability of a technologically feasible and practical alternative design that would have reduced or prevented the plaintiff's harm." (Rest.3d Torts, Products Liability, § 2, com. f, p. 24; see also id. § 2, com. d, p. 19 ["Under prevailing rules concerning allocation of burden of proof, the plaintiff must prove that such a reasonable alternative was, or reasonably could have been, available at the time of sale or distribution"].) Several other jurisdictions have also adopted this view. (See, e.g., *General Motors Corp. v. Sanchez* (Tex. 1999) 997 S.W.2d 584, 588; *Wright v. Brooke Group Ltd.* (Iowa 2002) 652 N.W.2d 159, 169; *Wilson v. Piper Aircraft Corp.* (Or. 1978) 577 P.2d 1322, 1326; *Voss v. Black & Decker Mfg. Co.* (N.Y. 1983) 450 N.E.2d 204, 208-209; *Hurley v. Motor Coach Industries, Inc.* (7th Cir. 2000) 222 F.3d 377, 380 [Illinois law]; *Peck v. Bridgeport Machines, Inc.* (6th Cir. 2001) 237 F.3d 614, 617-618 [Michigan law]; *Jacobs v. E.I. Du Pont De Nemours & Co.* (6th Cir. 1995) 67 F.3d 1219, 1242 [Ohio law]; *Wankier v. Crown Equipment Corp.* (10th Cir. 2003) 353 F.3d 862, 866-867 [Utah law].)

The burden of proof question is an important one. If the trial court is persuaded that the plaintiff bears this burden, defense counsel may be able to win summary judgment in the marginal case where the plaintiff can-

not offer evidence of a feasible safer design. A motion for summary judgment, even if unsuccessful, might have the collateral benefit of educating the defense as to what evidence of alternative designs, if any, a plaintiff may offer at trial. Armed with this information, defense counsel may be better prepared to respond with evidence showing that the plaintiff's alternatives "would either entail unreasonable cost, be practically unfeasible, interfere with the product's performance, or create (other) increased risks." (*Pietrone, supra,* 189 Cal.App.3d at p. 1068 (dis. opn. of Roth, J.).)

If the design defect claim survives summary judgment, defense counsel should nonetheless argue at trial that the plaintiff bears an initial burden to produce evidence of a feasible safer design. Proposing a special jury instruction to that effect will be critical. CACI No. 1204 sets forth the parties' shifting burdens of proof in a design defect case premised on a "risk-benefits" theory. This instruction is silent, however, on the issue whether the plaintiff bears an initial burden to produce evidence of a feasible safer alternative design. Although the "Sources and Authority" commentary to CACI No. 1204 states that "[t]he plaintiff does not have to prove the existence of a feasible alternative design," it cites only *Bernal* in support of this proposition. Defense counsel should urge that this statement does not accurately reflect the current state of California law in light of the conflicting authority discussed in this article.

If the special instruction is refused, defense counsel should make a sufficient record on the issue for appeal. Jury instruction conferences often occur in chambers, so counsel should ensure that a reporter is called into the conference to transcribe the proceedings or that a summary of any adverse ruling by the trial court is placed on the record in front of the court reporter later. Counsel should also make sure that a copy of the refused jury instruction is lodged in the court's file, and should not agree to any boilerplate stipulation stating that counsel agreed upon the instructions as given. Defense counsel should also consider raising the issue in a post-trial motion, although it is usually not necessary to raise instructional error in a new trial motion to preserve the claim for appeal. Finally, if an appeal is pursued, counsel should ensure that the adverse ruling, the refused instruction, and any pertinent motions are included in the appellate record, in order to preserve the issue for appeal.

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