The continuing viability of the consumer expectation test in defective seat back cases

By David L. Winnett

The hazards of defectively-designed automobile seat backs can be devastating, particularly to children who, while riding in back seats, are crushed by the heads and bodies of front seat occupants whose seat backs collapse on impact. A 2016 study commissioned by the Center for Auto Safety found that, between 1990-2014, nearly 900 children died in rear impacts while riding in the back seats of cars manufactured in 1990 and later. Remarkably, however, government standards for seat back strength have not been upgraded since 1967.[1]

Yet again, it is left to consumer attorneys to force change.

To that end, California consumers scored a tremendous victory in 2014 with the Second District's opinion in *Romine v. Johnson Controls, Inc.* (2014) 224 Cal. App.4th 990, which held that a plaintiff could utilize the consumer expectation test ("CET") to prove that a car's seat back was defectively designed.

Not surprisingly, both during the litigation and appellate briefing of *Romine* and since, the auto industry has attacked the legitimacy of the *Romine* holding and sought to preclude the use of the CET in defective seat back cases. This is because the industry has worked for decades to weave a mythology that the benefits of particular designs outweigh the attendant risks of those designs and train a cadre of engineers to appear as experts in cases around the country, extolling the mythology as scientific fact and thereby creating problematic precedent for consumers, many of whom have suffered unimaginable losses.

The good news is that *Romine* remains good law; the bad news is that the auto industry hates it and continues to challenge it at every turn.

Soule allows the CTE to be used in auto defect cases

Seat back cases assert strict liability design defect claims. California law allows plaintiffs to prove such claims in two different ways – the consumer expectation test (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 consumer expectation test 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*, at 1001, citations omitted.) If a plaintiff elects to proceed solely under the consumer expectation test, 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 consumer expectation test and avoid altogether both the need to present their own experts and to counter the opinions of defense experts, who are very slick and well-versed in the above-described industry mythology.

In *Soule,* an auto defect case in which the subject car's left front wheel broke free and smashed through the floorboard into the plaintiff's feet, GM argued "at length that the consumer expectations test is an 'unworkable, amorphic, fleeting standard' which should be entirely abolished as a basis for design defect." (*Id.* at 569.) GM cynically argued – as all auto manufacturers do in all of these cases – that the circumstances of the event at issue were simply too complicated for a lay jury to comprehend and that the CET should not be used "whenever 'crashworthiness,' a complex product, or technical questions of causation are at issue." (*Id.*)

But the California Supreme Court refused to take the bait, observing,

> [W]e cannot accept GM's insinuation that ordinary consumers lack any legitimate expectations about the minimum safety of the products they use. In particular circumstances, a product's design may perform so unsafely that the defect is apparent to the common

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> reason, experience, and understanding of its ordinary consumers. In such cases, a lay jury is competent to make that determination.

(*Id.*) Thus, the Court held that the CET could be utilized in auto defect cases, depending on:

> whether the circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers.

(*Id.* at 568-569.)

Romine applies the CET to seat back cases

In *Romine*, Raymond Gallie fled a hit-and-run freeway accident and exited onto a surface street, where several vehicles were stopped for a red light ahead of him. Mr. Gallie's car slammed into the back of a stopped car at nearly 85 MPH, killing its driver and forcing it into the rear of plaintiff Jaklin Romine's stopped Nissan Frontier at close to 45 MPH. This caused Ms. Romine's Frontier to crash into the car stopped in front of her, which was itself pushed into yet another car at the front of the line. As the result of the initial rear impact to her Frontier, Ms. Romine's seat back broke, causing devastating injuries she would not have suffered had her seat back remained intact.

At trial, Ms. Romine proceeded solely under the CET on her strict liability design defect claim. The defendant objected, arguing, as in *Soule*, that the circumstances of the crash were too complicated for lay jurors to comprehend and that the interplay of the various complicating factors was "not within the realm of the average consumer's experience or expectation." (*Id.* at 1003.) Over the defendant's objection, the trial judge allowed Ms. Romine to proceed on the CET alone and precluded the defendant from introducing evidence related to the risks or benefits of the seat's design. The jury agreed with Ms. Romine that the seat was defective and returned a verdict in her favor. The defendant appealed.

The appellate court specifically found that the jury was properly instructed on the consumer expectation test:

> Under the consumer expectations test, "a plaintiff is required to produce evidence of the 'objective conditions of the product' as to which the jury is to employ its 'own sense of whether the product meets ordinary expectations as to its safety under the circumstances presented by the evidence.'" [Citations.] "The consumer expectations test is reserved for cases in which the everyday experience of the products' users permits a conclusion that the product's design violated minimum safety assumptions, and is 'defective regardless of expert opinions about the merits of the design.' [Citation.] Therefore, if the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer may expect. Nonetheless, the inherent complexity of the product itself is not controlling on the issue of whether the consumer expectations test applies; a complex product 'may perform so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers.'"

(*Id.* at 1001.)

> Between 1990-2014, nearly 900 children died in rear impacts while riding in the back seats of cars manufactured in 1990 and later.

Despite the defendant's argument that the CET was inappropriate due to both the complexity of the product and the complexity of the accident, the court found that "[c]onsumers have expectations about whether a vehicle's driver's seat will collapse rearward in a rear-end collision," (*id.* at 1003) held that the jury had been properly instructed (*id.* at 1004), and affirmed that portion of the judgment, reversing and remanding the case for retrial solely to apportion fault.

The defendant's petition for review by the California Supreme Court was denied.

It is worth noting that the Alliance of Automobile Manufacturers and the Association of Global Automakers, Inc., together sought – for obvious reasons – to have the California Supreme Court de-publish the Court of Appeal's opinion, but those requests were denied.

To date, no appellate authority has overruled or abrogated *Romine*'s holding.

Romine remains very unpopular with the auto industry

The auto industry takes every possible opportunity to delegitimize and overrule *Romine*.

In *Edwards and R.S.A. v. Ford Motor Company*, 2016 WL 389878 (9th Cir.), for instance, the plaintiffs, citing *Romine*, sought to use the CET to evaluate the crashworthiness of a Ford Explorer after a fatal single vehicle rollover crash. The trial court had not allowed them to do so, and they lost at trial after a risk-benefit presentation. They sought a remand on appeal to allow them a new trial utilizing the CET.

> Even in a non-seat back case, an automaker went out of its way to attack the legitimacy of *Romine*.

In its appellees' brief, 2016 WL 1746887 (Cal.App. 9th Dist.), Ford – not surprisingly – opposed this effort, arguing first that *Romine* was distinguishable. But it went further:

> *Romine* is also, frankly, an outlier case that was wrongly decided. As *Soule* made clear, there may be some common accident scenarios where consumers do have expectations about how certain parts of the vehicle will perform, but that does not include the way that a vehicle's design structure will perform in an unusual accident such as the one here and even the one in *Romine*. [Citation.] The highspeed, catastrophic chain collision in *Romine* lies outside the ordinary user's everyday experience; even if minor fender-benders may be counted as common, rear-end accidents as severe as the one in *Romine* are not.

(*Id.* at 39-40.)

Thus, even in a non-seat back case, an automaker went out of its way to attack the legitimacy of *Romine*.

Romine also figured prominently in *Doe*[3] *v. Mazda Motor of America, Inc.*, 2017 WL 537885 (Cal.App. 1st Dist.). In that case, the plaintiff's Mazda Protégé was stopped on the interstate because of a multi-vehicle crash ahead of her. Without noticing that traffic had stopped, Jose Alfresco crashed his Chevrolet Cheyenne pickup truck into the Protégé at 55 mph. As a result of the impact, Ms. Doe's seatback broke, causing her body to ramp up the broken seat into the back seat area of the car, where the intruding truck and the crushed rear portions of the Protégé impacted the falling headrest and clam-shelled her between the head rest, seat back, and seat bottom. She suffered catastrophic injuries.

Over Mazda's objections, the case was tried solely on the CET in accordance with *Romine*. Mazda argued that most consumers had not experienced crashes as severe as Ms. Doe's and that, as a result, they could not form expectations of the product under the circumstances. (*Id.* at 12.) The jury disagreed, found that the seat back was defective, and returned a verdict in favor of Ms. Doe. Mazda appealed.

On appeal, the Product Liability Advisory Council, Inc.,[4] and the Alliance of Automobile Manufacturers[5] filed *amicus* briefs in support of Mazda. The Alliance wrote that it was:

> deeply concerned about *Romine's misguided expansion of the consumer expectations test*, especially as applied in situations involving vehicle crashworthiness (as in *Romine* and the case at bar). The *everyday experience of vehicle consumers provides no basis for them to evaluate how the various components of a vehicle should perform* in the rare circumstances of a high-speed collision. *Consumers may form suppositions* about what should occur in these situations, but those suppositions may actually be *contrary to performance standards developed by regulators and by safety engineers* through research and testing. If jurors are allowed to impose liability because a vehicle fails to comply with lay consumers' uninformed suppositions, then the *courts would effectively be encouraging automakers to adopt designs that are not as safe as other alternatives*, but are more in line with consumer expectations.

(2017 WL 2979471 at 9, emphasis added.)

For its part, the PLAC argued that,

> there is a *fundamental flaw* in the Court's reasoning *in Romine* .... If ordinary consumers do have expectations with regard to how a seat back should perform in a rear-end collision like the one that occurred here, those *expectations are necessarily uninformed* by the host of considerations that must go into designing any vehicle.

(2017 WL 2979472 at 8, emphasis added.)

Conclusion

The auto industry remains incensed by the holding in *Romine* and will continue to take every possible opportunity to overrule, abrogate, and otherwise attack it. Practitioners who prosecute these cases must be ready for the onslaught of attacks *Romine* will face and do everything in their power to keep it viable. The best way to do that is to point out how *Romine* is perfectly consistent with the Supreme Court's holding in *Soule,* i.e., that ordinary consumers can, in fact, form minimum safety assumptions about how seat backs should perform in rear end crashes and that seat backs collapsing on impact at highway speeds is not consistent with those assumptions. The author is happy to assist anyone who is having to confront these arguments. ■

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[1] "NHTSA Urged to Warn Parents of Seat Back Failure Dangers to Children in Rear Seats," www.autosafety.org, Mar. 9, 2016.

[2] Expert testimony regarding causation may be necessary and is permissible. *Romine, supra*, 224 Cal.App.4th at 1001.

[3] The plaintiff has asked privately that her name not be publicized any more than absolutely necessary.

[4] "PLAC is a non-profit association with 89 corporate members representing a broad cross-section of American and international product manufacturers." 2017 WL 2979472 at 2.

[5] "The Alliance is a nonprofit automotive trade association formed in 1999. Its members account for approximately 70 percent of all car and light truck sales in the United States, and include the BMW Group; FCA US LLC; Ford Motor Company; General Motors Company; Jaguar Land Rover; Mazda; Mercedes-Benz USA; Mitsubishi Motors; Porsche; Toyota; Volkswagen Group of America; and Volvo Car USA." 2017 WL 2979471 at 6.