CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

ERNEST A. LONG
Alternative Dispute Resolution
❖ Resolution Arts Building ❖
2630 J Street, Sacramento, CA 95816
ph: (916) 442-6739 • fx: (916) 442-4107
elong@ernestalongadr.com • www.ernestalongadr.com

Collins v Navistar, Inc. 3/29/13

Products Liability; Jury Instructions; Risk-Benefit Test; Instructional Error

On December 4, 1997, Joshua Daniel threw pieces of concrete and asphalt at passing vehicles on Interstate 5. In 15 minutes he struck a few vehicles. He then threw a chunk of concrete weighing about 2 ½ pounds at a Navistar tractor pulling two trailers, driven by plaintiff William Collins. The rock penetrated the windshield, struck William in the forehead, and caused severe brain injuries. William lost control of the vehicle and crashed. Daniel was convicted of three counts of assault with a deadly weapon and sentenced to 12 years in prison.

William and Barbara Collins sued Navistar, and several other defendants. Against Navistar they included products liability allegations that the truck's windshield was defective because it failed to keep the rock that Daniel threw from penetrating into the driver's compartment. Plaintiffs contended the type of glass was defective in that it was not, but could have been made of bi-laminated glass known as glass-plastic. Plaintiffs also claimed the rake angle of the windshield should have been less steep, a more swept-back design, to deflect the rock. Two defendants, the manufacturer and the supplier of the windshield successfully moved for summary judgment asserting pre-emption by Federal law which authorized the type of glass in the subject windshield. In light of these rulings, Navistar moved in limine to exclude any evidence of glass-plastic, and the trial court granted the motion.

The case was submitted to a San Joaquin Superior Court jury, which found Navistar could not "have known or reasonably foreseen that a person would be likely to take advantage of the situation created by Navistar's conduct to commit" an act like Daniel's rock throwing. The court entered judgment on the

verdict in favor of Navistar. Following the denial of a motion for new trial, plaintiffs filed a notice of appeal.

On appeal, plaintiffs argued that Navistar had a duty to design its trucks to withstand common road debris, even intentionally thrown rocks and concrete chunks. They contend the jury was improperly instructed that heightened foreseeability was required to prove a design defect claim just because it involved third-party criminality. CACI 1203 sets forth the consumer expectation test and 1204 provides the risk-benefit test. At trial, plaintiffs pursued only a design defect theory for which the trial court gave the risk-benefit test found in CACI 1204:

> (1)That Navistar manufactured, distributed or sold the vehicle;
> (2) That the vehicle was used in a way that was reasonably forseeable to Navistar;
> (3) That the vehicle's design was a substantial factor in causing harm to plaintiffs;
>
> If plaintiffs have proved these three facts, your decision must be for plaintiffs unless Navistar proves that the benefits of the design outweigh the risks of design.
>
> In deciding whether the benefits outweigh the risks, consider:
>
> (A) The gravity of the potential harm resulting from the use of the vehicle;
> (B) The gravity of the potential harm from the use of the vehicle;
> (C) The feasibility of an alternate safer design at the time of manufacture;
> (D) The cost of an alternative design;
> (E) The disadvantages of an alternative design.

The court further instructed that the precise nature of the harm to plaintiffs does not need to be forseeable to Navistar for a finding of liability. The court also gave two additional negligence instructions, over plaintiffs' objections. The first, a modified version of CACI 433 on negligence:

> Navistar claims it is not responsible for plaintiffs' harm because of the later

criminal conduct of Joshua Daniel. Navistar is not responsible for the harm if it proves each of the following:

(1) That the criminal conduct of Joshua Daniel happened after the conduct of Navistar;
(2) That Navistar did not know and could not reasonably foresee that another person would be likely to take advantage of the situation created by Navistar's conduct to commit this type of act.

The court also gave a modified version of CACI 411:

"Every person has a right to expect every other person will use reasonable care and will not violate the law unless he or she knows or should know that the other person will not use reasonable care or will violate the law. "

As an alternative, plaintiffs had suggested in the conference on jury instructions that the trial court modify CACI 411 and quote portions of *Bigbee v Pacific Tel. &Tel. Co.* (1983) 34 Cal.3d 49 that states: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." (*Bigbee* at p. 58, quoting Rest.2d Torts Section 449) Navistar objected to plaintiffs' proposed modification. The trial court gave CACI 411 as proposed by Navistar.

In the verdict form the trial court added the undisputed fact that the conduct of Joshua Daniel occurred after Navistar manufactured the vehicle. The form next asked:

Could Navistar have known or reasonably foreseen that a person would be likely to take advantage of the situation created by Navistar's conduct to commit this type of act?

By a vote of 11 to 1, the jury answered "No." As a result the jury did not reach the questions on the risk-benefit test in CACI 1204. Taking the case on appeal, the Third District Court of Appeal noted that when a party challenges a

particular jury instruction as being incorrect or incomplete, the reviewing court evaluates the instructions as a whole, not in isolation. (*People v Rundle* (2008) 43 Cal.4th 76) For ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction. (*Cristler v Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72)

The California Supreme Court has explained that a manufacturer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way. (*Soule v General Motors Corp.* (1994) 8 Cal.4th 548) Truck manufacturers must consider collision safety when they design and build their products. The foreseeability required is of the risk of harm, not of the particular intervening act. In other words, the defendant may be liable if his conduct was a substantial factor in bringing about the harm, though he neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred. (*Torres v Xomox Corp.* (1996) 49 Cal.App.4th 1)

At trial, the plaintiffs argued that the criminality of the rock throwing did not require a different standard of foreseeabilty than if the rock had been cast negligently or by an act of nature. Navistar contended that product manufacturers need not anticipate third-party criminality when designing products. In *Soule,* the California Supreme Court announced that whatever the cause of an accident, a vehicle's producer is liable for specific collision injuries that would not have occurred but for a manufacturing or design defect in the vehicle. (*Cronin v J.B.E. Olson Corp.* (1972) 8 Cal.3d 121)

In *Bigbee*, in which a car operated by a drunk driver injured a man in a telephone booth, defendants, including the manufacturer of the phone booth sought summary judgment on the grounds they had no duty to protect phone booth users from a car veering off the road into the booth, since that risk was unforeseeable as a matter of law. They argued the conduct was a superseding cause. On appeal, the Supreme Court held that a telephone booth manufacturer owes a duty to design even against reasonably forseeable criminal acts. "Forseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct." (*2 Harper & James, Law of Torts(1956) section 18.2*)

It is settled that what is required to be forseeable is the general character of the event or harm—being struck by a car while standing in a phone booth—not its precise nature or manner of occurrence. (*Taylor v Oakland Scavenger Co.* (1941) 17 Cal.2d 594) It is of no consequence that the harm to plaintiff came about through the negligent or reckless acts of the drunk driver. If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act, whether innocent, negligent, intentionally tortious, or criminal, does not prevent the actor from being liable for harm caused thereby. (*Bigbee* at p. 58-59)

The Justices explained that windshields must be designed in anticipation of road hazards. The purpose of a windshield is to protect occupants of a motor vehicle from the elements and road debris. So long as the road hazard is reasonably foreseeable, the manufacturer must take steps to address common risks caused by negligent drivers, debris thrown onto roads by acts of nature, and even third-party criminal acts. (*Bunton v Arizona Pacific Tanklines* (1983) 141 Cal.App.3d 210) In the case of a rock hitting a windshield, liability for a defective design does not depend on whether the projectile falls from a rock outcropping, a passing gravel truck, or the hands of a juvenile delinquent. A windshield is not any less defective because it is pierced by an intentionally, rather than an unintentionally, thrown rock.

To deny recovery to an injured user of an otherwise defective product simply because a common road hazard was caused by criminal behavior would negate the manufacturers' duty to design products to account for reasonably foreseeable risks. Strict products liability does not depend on the criminal or noncriminal nature of the source of the risk but on its foreseeability. (*Soule*, at p. 650) Here, it is a question for the trier of fact whether the object in this case—specifically a 2.5 pound chunk of concrete—is a reasonably foreseeable road hazard for a big rig to encounter.

Navistar asserts that if the crime is not forseeable, the defendant is relieved of responsibility by the intervention of a third person. To prove a risk was unforeseeable, a manufacturer must show that the intervening act produced harm of a kind and degree so far beyond the risks that the original tortfeasor

should have foreseen, that the law deems it unfair to hold them responsible. The product in this case failed to provide exactly the protection for which it was designed, namely to protect a driver of the truck from road hazards. The alleged defect directly concerns its use—to shield truck occupants from wind and other road hazards.

The 3rd DCA then addressed the effort by the trial court and the parties to apply the CACI definition of premises liability to a cause of action for strict products liability based on design defect. An action for strict products liability for design defect may be defeated by showing the risk is one for which there is no duty to account. The manufacturer may tender the defense that it did not have a duty to avoid being the cause of injury to another. Additionally, proof that "on balance the benefits of the challenged design outweigh the risk of danger inherent in such design defeats liability. (*Saller v Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220)

In the area of premises liability there is also a duty to avoid being the cause of injury, and a defendant in such an action is not liable for failing to anticipate criminal conduct that is bizarre or too rare to be reasonably foreseen. (*Wiener v Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138) That case involved a car driven through a chain link fence onto a school playground which injured several children. The involvement of criminal conduct was relevant in that premises liability case because the landlord has a duty to take reasonable steps to secure the common areas from forseeable criminal activity.

Here, by contrast, it does not make sense to ask whether a product's design invited criminal conduct against the product's user. Joshua Daniel did not act to take advantage of the windshield rake on plaintiffs' truck; he engaged in reckless, juvenile behavior. Thus, the definition of risk to be avoided in premises liability does not apply to strict products liability cases. Plaintiffs thus challenge the trial court's decision to give CACI 433. That instruction sets forth the heightened foreseeability that is required before an intervening criminal act will relieve a defendant of liability for negligence. The Appellate Court noted that Navistar's attempt to defend the use of 433 ignores the long established rule of tort liability that it is not "necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an

accident was clear to the ordinarily prudent eye." (*Palsgraf v Long Island R. Co.* (1928) 248 N.Y. 339) Allowing 433 was error, and it allowed Navistar a complete defense based on a heightened standard of forseeability which is inapplicable to plaintiffs' design defect claims.

Plaintiffs also contend the trial court committed further instructional error by giving Navistar's version of CACI 411. The Justices carefully explained that the instruction contains an accurate presentation of the law, but as a negligence instruction in a products liability case, it is misplaced. It asked the jury to focus on the criminal nature of Daniel's acts, rather than determine whether it was reasonably forseeable that a big rig truck would meet a projectile the size and shape of concrete that pierced the windshield. Rather than focus on whether Navistar could expect law-abiding behavior to surround the operation of its trucks, the jury should have been asked whether the allegedly defective design violated the risk-benefit test for products liability. With CACI 411, the court allowed the jury to believe the criminal nature of Daniel's acts relieved Navistar of the duty to manufacture a non-defective product. Instructions are misleading and incorrect if they allow a jury to avoid the risk-benefit analysis in a case where it is required. (*Soule*, p. 568) This instruction should not have been given.

After identifying two instructional errors, the Justices explained that a judgment may not be reversed for instructional error in a civil case unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. (Cal. Const., art. VI, section 13) The Court must consider (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled. (*Soule*, at p. 580-581) Prejudice appears where it seems probable that the jury's verdict may have been based on the erroneous instruction. (*LeMons v Regents of University of California* (1978) 21 Cal.3d 869)

Here, the jury was properly instructed with CACI 1204, which sets forth the applicable law for products liability, but the errors in giving CACI 411 and 433 were prejudicial because they prevented the jury from engaging in the risk-benefit test that applies to design defect cases. As such, the jury never reached the central issue of whether the windshield was defectively designed. Instead,

the two negligence instructions allowed Navistar to shift the blame entirely to Daniel. Defense counsel argued that Navistar could not foresee that another person would be likely to take advantage of the situation created by Navistar's conduct. Counsel also argued that everyone has a right to expect that every other person will obey the law, "and we know that Joshua Daniel violated the law."

CACI 411 and 433 were erroneously given because a product must be designed to account for foreseeable risks even if they happen to result from criminal conduct. The 3rd DCA found the jury relied on the erroneous instructions because of its answer on the special verdict form that Navistar could not have known or reasonably foreseen that a person would be likely to take advantage of a situation created by Navistar's conduct to commit this type of act. Due to the order of questions on the special verdict form, the answer prevented the jury from ever addressing the question of whether the truck's windshield design was a substantial cause of plaintiffs' injuries. The jury also did not consider whether the benefits of the truck's windshield design outweighed the risks of the design. The jury clearly relied on misleading and incorrect instructions concerning the effect of third-party criminal conduct on the standard of reasonable foreseeability for strict products liability claims.

The judgment is reversed and remanded for a new trial. Plaintiffs are to recover their costs on appeal.

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