

CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Pannu v Land Rover North America (1/19/11)

Products Liability; Design Defect; Failure to Warn

On December 14, 2003, Plaintiff was driving his 1998 Land Rover Discovery on the freeway at 65 miles per hour when a vehicle driven by a teenager approached from behind at 75 mph driven and collided with him. Witnesses saw the Discovery veer across several lanes, strike another car, and eventually roll over several times before coming to a stop. Plaintiff, a 47 year old business owner, husband, and father of three, was rendered a quadriplegic, with limited use of his arms.

The CHP investigated the incident and recorded the available physical evidence. Plaintiff's reconstruction expert asserted that the Discovery rolled three and a half times because of a tire slip, not a "tripping" mechanism. Another plaintiff expert devised a test protocol using outriggers to test the vehicle for stability. He demonstrated the test vehicle's wheels lifted with consecutive left-right steering inputs. With a slight modification to extend track width, and the use of lower profile tires, the Discovery did not lift up during similar exercises. Finally, plaintiff's stability and handling expert opined that when a vehicle on a smooth surface rolls over as the result of steering input and not a tripping mechanism, the vehicle is defective.

Land Rover's expert contended the roll was caused by a tripping mechanism, in this case, the asphalt curb of the shoulder. Based on visits to the site in 2006, the expert located what he believed to be scrapes in the asphalt shoulder which he attributed to the accident. He stated that the CHP officer had erred in her report.

Plaintiff also demonstrated that the Discovery suffered 13 inches of plastic deformation at the "A-pillar" on the driver's side. The extent of dynamic deformation during the rollover ranged from 16 to 17 inches of intrusion into the occupant space. Plaintiff's expert performed a drop test on a comparable

Discovery by positioning a production Discovery 18 inches above a load plate at a pitch and angle consistent with the reconstruction expert's estimate of the position of the Land Rover at the moment of roof failure, and then dropping it. The test produced 14 inches of deformation, substantially comparable to the damage suffered by plaintiff's vehicle. The expert then reinforced the roof and pillars of a second Discovery with steel tubing in the pillars and plating in the roof, adding 109 pounds for \$116. He then dropped the reinforced vehicle and roof deformation was limited to 3 inches at the A-pillar, instead of 16 to 17 inches. Assuming economies of scale and manufacturing, the expert estimated the true cost of modification of the Discovery as \$76, and the additional weight as 72 pounds.

Finally, a medical expert opined that plaintiff's injuries were the result of hyperflexion into his chest by the deforming roof which caused the spinal injury that paralyzed him. The defendant's causation defense focused on the testimony of a medical doctor who testified plaintiff's injury resulted not from hyperflexion of the neck, but axial loading on the spine when his head was forced into the roof by centrifugal forces during the rollover, striking the ground (through the roof) in the milliseconds before roof deformation began. She opined that the injury would have happened regardless of the strength of the roof. She cited medical studies on cadaver necks, and industry studies of crash tests that included catastrophic injury in rollover crashes where injury resulted from the initial impact with the ground.

The trial court issued a proposed statement of decision in plaintiff's favor. It found more likely than not, the accident happened as described by plaintiff's expert who accepted the CHP officer's findings whereas defendant's expert rejected them and was impeached regarding the physical evidence at the scene. It also found the defense expert's opinions were too speculative. Applying the [consumer expectation test](#), the court found Land Rover liable for both stability and roof defects because the Discovery did not perform as safely as an ordinary consumer would have expected at the time of the accident. Applying the alternate [risk-benefit test](#), the court found plaintiff carried his burden of proving the roof and stability design of the vehicle was a substantial factor in causing his injury and defendant failed to establish the benefits of the design outweighed its inherent risks. Options to strengthen the roof were available at a reasonable cost.

The court found the plaintiff's injury was most likely caused by the roof crushing inward, producing flexion and vertebral fractures. The court also

found defendant was strictly liable for a [failure to warn](#) of the dangerous propensities of its vehicle. In fact, Land Rover highlighted its steel inner body cage and steel roof panel as safety features despite knowledge about the possibilities of rollovers and roof crush about which it should have warned consumers. The trial court assessed damages in the amount of \$21,654,000, including \$11,654,000 in economic damages and \$10,000,000 in noneconomic damages. Land Rover's motion for new trial was denied, and this appeal followed.

Defendant contends the trial court erred in applying the consumer expectation test and misapplied the alternate risk-benefit test by failing to undertake the considered analysis required to impose liability. It argued plaintiff failed to carry his burden to establish the injury was caused by stability and crashworthiness defects, and the court's findings were not supported by substantial evidence. The Second Appellate Court began by evaluating the court's imposition of strict liability for stability and roof defects.

The California Supreme Court has recognized two tests for proving design defect. [The consumer expectation test](#) permits a plaintiff to prove design defect by demonstrating that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Implicit in a product's presence in the market is a representation that it is fit to do safely the job for which it was intended. (*McCabe v American Honda Motor Co., Inc.* (2002) 100 Cal.App.4th 1111) The second test for design defect is known as the "risk-benefit test." Products that meet ordinary consumer expectations may still be defective if the design embodies an "excessive preventable danger." Plaintiff need only show the design proximately caused the injuries. The burden then shifts to the defendant to establish the benefits of the challenged design, when balanced against such factors as feasibility and cost of alternative designs, outweigh its inherent risk of harm. (McCabe)

The two tests provide [alternative means for a plaintiff to prove design defect](#) and do not serve as defenses to one another. A product may be defective under the consumer expectation test even if the benefits of the design outweigh the risks. It may satisfy consumer expectations, but contain excessively preventable danger in that the risks of the design outweigh its benefits. Plaintiff's theory is dependent on the facts of the case.

Land Rover asserts the trial court erred in applying the consumer expectation test to the alleged stability and roof defects. It argues the question of

defect is **far too complicated to decide based on the perceptions of the ordinary driver**. The consumer expectation test is reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions and is thus defective regardless of expert opinion about the merits of the design. (*Soule v General Motors Corp.* (1994) 8 Cal.4th 548)

The Justices observed that the critical question in assessing the applicability of the consumer expectation test is not whether the product is beyond the knowledge of the consumer, but whether the product, in the context of the facts and circumstances of its failure, is one about which the ordinary consumer can form minimum safety expectations. Cars should not be built just to coincide to normal driving conditions. Situations of peril do arise daily requiring heroic turning maneuvers. Vehicle manufacturers must take accidents into consideration as reasonably foreseeable occurrences involving their products. (*Culpepper v Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510)

Still, the DCA found that although the trial court's observation about the foreseeability of accidents is true, the applicability of the consumer expectation test to the alleged stability defect under the circumstances of this case is an exceedingly close question. Would a reasonable consumer expect the roof of the Discovery to intrude so dramatically on the occupant in a rollover at freeway speed? The Third District once rejected General Motors' contention "the subject of roof collapse is esoteric and only amenable to proof by an analysis of the physical forces acting upon the roof by means of expert testimony involving a calculation of the forces acting upon the driver's side roof and the impact of such forces upon the vehicle in its defective condition. As the court responded, "We see no reason why the mode of proof must be so constrained. There is a saying that, according to the science of aeronautical engineering, a bumble bee cannot fly. But if that were an issuable fact, the defects of the theory could be shown by the observations of a beekeeper or an entomologist." (*Douppnik v General Motors Corp.* (1990) 225 Cal App.3d 849)

The Justices concluded by indicating that they did not need to resolve these difficult questions because of their analysis of the risk-benefit test. The defendant claims the trial court failed to consider the necessary factors in applying the test. Here the plaintiff proved the Discovery would tip under evasive steering maneuvers, and with slight modifications the vehicle could be dramatically improved for rollover resistance. Plaintiff proved that modest enhancements of

the roof support yielded substantial gains in roof strength. Land Rover did not rebut these showings. In fact, its senior engineer acknowledged these modifications were available and could have been made. Despite attempting to describe the specialized needs for off-road capability, the engineer did not state these goals precluded implementing these safety modifications. The DCA Justices stated *the Discovery's design presented an "excessive preventable danger" and the benefits of the design did not outweigh the risk of danger inherent in the design.* (*Barker v Lull Engineering Co.* (1978) 20 Cal.3d 413)

The defendant's main challenge to the trial court ruling of strict liability on the risk-benefit theory of design defect is based on the issue of causation. Land Rover asserts the absence of skid marks refutes the finding of a stability defect, and the accident must have been caused by a tripping mechanism. Without evidence of skid marks it argues plaintiff has failed to carry his burden of causation. The trial court found the defendant failed to prove weather and continual driving over the area over the two years between the accident and the accident reconstruction expert's inspection could not have obliterated any skid marks. Defendant argues the trial court eliminated plaintiff's burden of proving causation because without skid marks, the plaintiff expert's reconstruction is total speculation.

The Second DCA opined that Land Rover fundamentally misperceived the plaintiff's burden with this argument. *Plaintiff did not need to prove the skid marks were present; instead, he had the burden of proving that to a "requisite degree of belief" –meaning more probable than not—his injury was caused by a design defect.* (*Barker*, at p. 431) Witness testimony concerning the event was at least as probative as the unresolved question of the presence of skid marks. All conflicts in the evidence are resolved in favor of the prevailing party. (*Hasson v Ford Motor Co.* (1982) 32 Cal.3d 388) The trial court's finding plaintiff carried his burden of proving his injury was caused by a stability defect is unquestionably supported by substantial evidence. Additionally, defendant's attack on injury causation and the roof defect seeks a re-weighting of the evidence. The trial court's ruling was supported by substantial evidence and may not be disturbed.

In sum, substantial evidence supports the trial court findings of strict liability on plaintiff's claims of stability and roof defects. The same is true of the findings on failure to warn. Manufacturers are held strictly liable for injuries caused by their failure to warn of dangers that were known to the scientific community at the time they manufactured and distributed their product.

(Johnson v American Standard, Inc. (2008) 43 Cal.4th 56) Here, plaintiff proved not only that defects existed, but also that Land Rover knew of the dangers of rollover by the time his vehicle was manufactured in 1998 and corrected them in the redesign of the Discovery Series II. Rather than warn of the dangers, the window sticker informed plaintiff of a “steel inner body cage” and “steel roof panel” which led him to believe the vehicle was not defectively designed. Nothing more was required to establish defendant’s liability under this additional theory.

Defendant also challenged several evidentiary rulings that it claimed were reversible error. The Justices rejected each claim. Finally, Land Rover questioned the award of economic damages. The defendant had questioned the plaintiff’s role as nothing more than a manager, akin to an employee who could be readily replaced by family members. The Appellate Court pointed out that plaintiff had introduced compelling evidence of the devastating impact the injuries would have on his ability to work and the length of time he would likely work. “Contrary to Land Rover’s grudging argument, there was ample evidence of Pannu’s entrepreneurial skills, his work ethic and his consistent success in growing his businesses.” He was deprived of more than the ability to earn a salary; there was ample evidence to support the trial court’s award of economic damages.

The judgment is affirmed. Plaintiff is to recover his costs on appeal.

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