

Supreme Court Case No. S232754  
2nd Civil No. B 247672  
LASC Case No. BC VC059206

SUPREME COURT COPY

# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WILLIAM JAE KIM, et al.

Plaintiffs and Appellants,

vs.

TOYOTA MOTOR CORPORATION,  
et al.,

Defendants and Respondents.

Case No. S232754

2<sup>nd</sup> Civil No. B 247672  
LASC Case No. VC 059206

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From a Decision of the Second District  
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[2<sup>nd</sup> Civil No. B 247672]  
Los Angeles County Superior Court  
Hon. Raul A. Sahagan, Judge Presiding  
[LASC Case No. VC 059206]

APPELLANTS' CONSOLIDATED REPLY TO *AMICUS CURIA* BRIEFS  
OF (1) CHAMBER OF COMMERCE OF THE UNITED STATES  
OF AMERICA; (2) INTERNATIONAL ASSOCIATION OF DEFENSE  
COUNSEL; (3) THE PRODUCT LIABILITY ADVISORY COUNCIL,  
INC.; (4) THE CALIFORNIA CHAMBER OF COMMERCE AND  
CIVIL JUSTICE ASSOCIATION OF CALIFORNIA; AND  
(5) ALLIANCE OF AUTOMOBILE MANUFACTURERS

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## 1. INTRODUCTION

The Briefs of Toyota's *Amici* suffer from the same indiscriminate use of the term "industry custom" that mars the opinion of the Court of Appeal and the brief of Respondent Toyota. Appellant's Opening Brief on the merits was devoted to distinguishing the various legitimate *Barker* factors<sup>1</sup> which may conceivably have *influenced* the custom of an industry – and which can always be proven directly - from factors which are not properly considered under a risk-benefit test, but which may be the real reasons the industry has failed to adopt superior technology. Appellants' point was that bare "industry custom" of the sort adduced by Toyota - that every model on the market incorporates the same excessive preventable risk – does not by itself support an inference that such custom reflects the result of industry-wide balancing of *Barker* factors, rather than factors like a desire to maximize sales or profits, or lack of competitive pressure.

The proof that no inference can be drawn that other models are the result of an objective industry-wide balancing of risk-benefit factors lies in *Amici*'s Briefs themselves. In every instance, they concede that marketing considerations, competitive disadvantage and the customers' lack of enthusiasm or knowledge about a superior design alternative is reflected in industry custom – which it surely is. Having conceded that custom is as likely to be the result of marketing decisions or profitability concerns as of safety and feasibility, *Amici* argue that such concerns should in fact be taken into account by the jury simply because that is what "reasonable" manufacturers do.

This case is the poster child for an "industry custom" unrelated to feasibility, industry experience with alternative design or valid risk-benefit criteria. ESC had

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<sup>1</sup> *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 430, 434.

already become standard on passenger vehicles and would be standard industry-wide in a year or two on trucks: the decision to make it only optional in 2004-2005 was purely a decision to place marketing concerns over the recommendations of Toyota's own engineers.

What Toyota's *Amici* are advocating in reality is not the probative value of industry custom evidence in products liability cases, but the revision of California product liability law to allow – as one *Amici* puts it – an “optional standard” which is indistinguishable from a “reasonable manufacturer” or negligence standard. Under this “option,” product liability defendants would be allowed to defend a design which incorporates excessive preventable risk on the basis that customers have not demanded the innovation, that it might require a price increase which places that manufacture at a price disadvantage, and that “reasonable manufacturers” make their decisions based on market factors which have nothing to do with the objective safety characteristics of the product.

*Amici* urge that the risk-benefit test of *Barker* be supplanted by a marketing-benefit test under which the cost of injuries is no longer placed on those best situated to avoid dangerous products, but rather on the injured customer wherever customers have not demanded the alternative design, and whenever manufacturers act on the basis of that lack of demand – a return of *caveat emptor*.

Finally, *Amici* do not genuinely dispute that the “custom” claimed by Toyota was not adduced to show feasibility or industry experience, or for any purpose other than to persuade jurors that doing what everyone else did was “good enough,” whether it resulted in an optimum balance of safety and cost or not. They tacitly concede that this was turned into a standard-of-care case, arguing instead that doing so was permissible.

2. **THE BARE ABSENCE OF ESC ON OTHER TRUCKS DOES NOT QUALIFY AS A “CUSTOM OR PRACTICE” WHICH MIGHT POTENTIALLY REFLECT FEASIBILITY, INDUSTRY EXPERIENCE OR A CONSIDERED DESIGN CHOICE**

*Amici* assume without much discussion that evidence that “nobody puts ESC on their trucks ” is same as “custom” in the sense that term is used in negligence actions and commercial litigation – *i.e.*, a practice that is the result of some rational experience and reflecting acceptance in a trade or industry. Modernly, custom is defined as

[a] usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates. It results from a long series of actions, constantly repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a tacit and common consent.

[*Black's Law Dictionary* (5th ed. 1979) at 347]

See also *Jones v. Robertson* (1947) 79 Cal.App.2d 813, 818.

But what Toyota adduced was not custom in this sense, but a snap-shot of the industry in 2005 at a time when ESC had been generally adopted for passenger vehicles and was imminent on light trucks. There was no stable practice or “industry custom.” That fact dispels the mystical implications with which *Amici* seek to endow the fact that other manufacturers had not yet put ESC on their light trucks.

Even in negligence cases, or where custom or practice is used to explain implied or assumed terms of a transaction, the custom must have duration and stability, so that it is the product of a matured practice whose utility has gained acceptance. See Abraham, *Custom, Noncustomary Practice, and Negligence*, 109 Colum.L.Rev. 1784 (2009): “evidence of the incidence of practices that are not sufficiently widespread to qualify as customs is not admissible to prove negligence.”<sup>2</sup> What we have here is the *absence* of custom, not an industry consensus based on experience or on an engineering judgment that ESC should not be installed on light trucks. To the contrary, the industry recognized that ESC was of such extraordinary value that it would in the near future be installed on all vehicles.

Indeed, there was no genuine dispute that ESC was the most important safety innovation in decades.<sup>3</sup> It was sufficiently important that it was mandatory as of the

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<sup>2</sup> “Of course, evidence of the availability of an untaken precaution is almost always admissible in a negligence action to show what should have been done. Unless the practice of taking the precaution is sufficiently widespread to qualify as a custom, however, evidence of the incidence of the practice – regardless of how many actors follow the practice – is not admissible.” Abraham, 109 *Colum.L.Rev.* at 1804.

<sup>3</sup> In 2004, the National Highway and Traffic Safety Administration concluded that ESC reduces crashes by 35%. Sport Utility Vehicles with stability control are involved in 67% fewer accidents than those without the system. Dang, *Preliminary Results Analyzing the Effectiveness of Electronic Stability Control (ESC) Systems*, DOT HS 809 790, 2004, at <http://www.nhtsa.gov/cars/rules/regrev/evaluate/809790.html>

The Insurance Institute for Highway Safety issued its own study in June 2006 showing that up to 10,000 fatal US crashes could be avoided annually if all vehicles were equipped with ESC. The IIHS study concluded that ESC reduces the likelihood of all fatal crashes by 43%, fatal single-vehicle crashes by 56%, and fatal single-vehicle rollovers by 77–80%. IIHS News Release, June 13, 2006, at <http://www.iihs.org/iihs/news/desktopnews>.

See also Ferguson, *The Effectiveness of Electronic Stability Control in*

time of trial on all vehicles under 10,000 pounds (RT 2508, 2719-2720), following the NHTSA finding that it was highly effective in preventing single vehicle loss of control run-off-the road crashes, and highly cost-effective. See FMVSS No. 126, *Final Regulatory Impact Analysis – Electronic Stability Control Systems* (NHTSA March 2007), available at [https://www.nhtsa.gov/DOT/NHTSA/ Rulemaking/.../ESC\\_FRIA\\_03\\_2007.pdf](https://www.nhtsa.gov/DOT/NHTSA/Rulemaking/.../ESC_FRIA_03_2007.pdf).

At trial, this dramatic rate of accident reduction was unchallenged. (RT 2130-2131; 2477) The recommendation of Toyota’s own engineers that ESC be made standard in 2005 (RT 3312-3313) was overruled by the marketing department on the grounds that customers didn’t understand ESC and so didn’t want it. (RT 3337-3340, 3354-3356; 3310-3315, 3328) A Toyota study reported that ESC was “obviously effective for ordinary drivers” in preventing spinning. (App. 841-843) Toyota’s lead engineer on ESC could identify no benefit from not having it on the Tundra (App. 845-846), and said the “consensus” decision to make it optional was based on market conditions, user demand and the trend in competitors’ vehicles. (App. 847)

Given this background of *actual* evidence bearing on risk and benefits, the progressive adoption of ESC, and the admitted absence of any engineering or design reason to leave it off the Tundra, an industry “custom” consisting of nothing but inaction had no probative value.

In a classic statement as to the ambivalence of industry practice as evidence of due care, Learned Hand made the point that there is no genuine “industry

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*Reducing Real-World Crashes: A Literature Review – Traffic Injury Prevention*. 8 *Traffic Injury Prevention*, Issue 4, June 2007 (abstract at <http://www.tandfonline.com/doi/abs/10.1080/15389580701588949>) collecting the numerous studies confirming ESC’s effectiveness.

custom” allowing an inference of care where some participants have adopted the more prudent measure.<sup>4</sup> Finding that the failure to equip coastal tugs with radio receivers to receive storm warnings established the unseaworthiness of a vessel, Judge Hand observed:

Is it then a final answer that the business had not yet generally adopted receiving sets? There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. [Citations] Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; *a whole calling may have unduly lagged in the adoption of new and available devices*. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. [citations] ***But here there was no custom at all as to receiving sets; some had them, some did not; the most that can be urged is that they had not yet become general.*** Certainly in such a case we need not pause; when some have thought a device necessary, at least we may say that they were right, and the others too slack. [The *T.J. Hooper* (2d Cir. 1932) 60 F.2d 737, 740, cert. den. 287 U.S. 662 (1932) (emphasis added)]

Custom has value only if it actually expresses some sort of relevant

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<sup>4</sup> For the diminished role of custom even in the medical malpractice field, see Peters, *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 Wash. & Lee L.Rev. 163, 164-165 (2000), noting that the sentiment that “a whole calling may have unduly lagged in the adoption of new and available devices.” is “so widely shared that there is no minority rule.”

experience. “Evidence of conduct in a particular situation or in a few instances is not sufficient to establish custom. *Hercules Powder Co. v. Automatic Sprinkler Corp.* (1957) 151 Cal.App.2d 387, 400, citing *Longuy v. La Societe Francaise* (1921) 52 Cal.App. 370, 375 (“such evidence, to be competent, must amount to something going to establish the general custom and practice in the business under investigation.’)

Characterizing the general absence of ESC as custom is particularly unwarranted in an industry whose members tout themselves as offering the most advanced technology, rather than as conforming to a static and established industry standard.<sup>5</sup> Indeed, the state-of-the-art is, as a rule, more advanced than custom, and therefore far more probative of what risks are practicably avoidable. “Industry standards are the practices common to a given industry. . . often set forth in some type of code, such as a building code or electrical code, or they may be adopted by the trade organization of a given industry. State of the art is a higher standard because scientific knowledge expands much more rapidly than industry can assimilate the knowledge and adopt it as a standard.” *Lohrmann v. Pittsburgh Corning Corp.* (4th Cir. 1986) 782 F.2d 1156, 1164. Since the entire auto industry was familiar with ESC, the “custom” as to passenger trucks plainly incorporated avoidable risk.

A similar situation is found where industry or government have not adopted a relevant technical standard. That absence is deemed immaterial, misleading and prejudicial.

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<sup>5</sup> See Epstein, *The Path to The T. J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 *J. Legal Stud.* 1 (1992), describing the history of custom in tort law.



Testimony concerning the absence of government standards should not be admitted since the absence of such standards is no proof that the product in question is safe or that no warning is necessary. Where the government is neither a party to the litigation nor a witness, no cross-examination is possible considering the absence of such regulations and the jury can only speculate as to why there are no standards.

[*American Law of Products Liability 3d* (1998) §34:17]

See also 63A *Am.Jur.2d, Products Liability* §1122, and 63B *Am.Jur.2d, Products Liability* §1927 (“It is error to admit testimony in a products liability action concerning the absence of government standards, since the absence of such standards does not prove that the product in question is safe and that no warning as to its use is necessary; such testimony is therefore neither relevant nor material.”)

Where, as here, the industry or technology is in flux, there is likewise no relevant custom or standard, and the optimal balance of safety and practicality can only be judged on the basis of the available technology.

3. **CONFORMITY WITH CUSTOM IS IMMATERIAL SINCE JURORS ARE REQUIRED TO EVALUATE CUSTOM UNDER THE SAME RISK-BENEFIT ANALYSIS APPLIED TO THE PRODUCT**

The assumption that conformity with custom somehow demonstrates that the product does not embody excessive preventable risk is not simply conjectural, as explained below, but rests on circular reasoning inconsistent with a risk-benefit analysis.

If the product in fact conforms with a genuine industry custom, then the jury's duty to is *evaluate the custom*, not to defer to it. Customary practice must be analyzed under the same *Barker* factors as the product itself to determine whether the custom embodies excessive preventable risk: and that analysis must be based on the objective characteristics and alternative design possibilities of the products. Introducing custom adds nothing but confusion and circularity of reasoning.

The standard of reasonableness is analytically distinct from the test of conformity to custom, such that there is no rational ground on which one should expect all conforming acts to be reasonable acts. Whether conformity is reasonable depends on whether the practice itself is reasonable. There is nothing about the existence of a customary practice, *per se*, that makes it reasonable. Each practice must be judged on its own merits.

[Hetcher, *Creating Safe Social Norms in A Dangerous World* (1999)  
73 S.Cal.L.Rev. 1, 12]

Even in negligence, custom must be examined to assess whether it conforms with due care. If a design – even if universally adopted – retains readily and economically avoidable risk, then industry custom only serves to undermine the risk-benefit test by distracting jurors. This is the situation described by Judge Hand, where

a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must, in the end, say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

[*The T.J. Hooper*, 60 F.2d at 740]

Judge Hand's holding that the law may require innovation when the benefit society will derive clearly outweighs the cost of making the innovation now ingrained in product liability jurisprudence, as is his presciently observation that an industry "may never set its own test, however persuasive be its usages." (60 F.2d at 740) See *Complete Serv. Bureau v. San Diego Cty. Med. Soc.* (1954) 43 Cal. 2d 201, 214.

4. **THE BARE FACT THAT OTHER MANUFACTURERS HAVE NOT YET ADOPTED AN ALTERNATIVE DESIGN SUPPORTS NO INFERENCE AS TO ANY FACTOR COGNIZABLE UNDER *BARKER* AND HENCE IS IRRELEVANT**

*Amicis* argue that industry custom is probative of feasibility, cost-effectiveness, customer indifference, price competition, a supposed industry-wide evaluation of the value of alternative design, and a number of other factors.

The argument is self-defeating. *Amici* posit an array of factors which account for a particular industry custom without demonstrating that any particular factor is a *probable* cause, without addressing by what means a jury might find that, for example, feasibility was the reason for a particular custom, and without demonstrating that anything in the record of this case would support any particular inference. That so many possible inferences are suggested for the purported custom is a tacit admission that no particular inference is more likely than not.

As one author notes, under a rule allowing custom as "some evidence" of due care. "the important task is to determine the criteria for deciding when conformity is probative of due care. As we will see, neither courts nor

commentators have displayed a good grasp of these criteria, characteristically saying very little of substance as to why a particular custom should or should not be accorded evidentiary weight, or what the relevant custom is.” Hetcher, *Creating Safe Social Norms in A Dangerous World*, 73 S.Cal.L.Rev. at 1. Some evidence beyond sheer custom is required before custom become probative of either due care or the absence of excessive preventable danger.

It is striking, however, that while the evidentiary rule has won out over its rival, courts and scholars have been content to rely on the negative arguments of Holmes and Hand, but have not offered a positive justification as to why the mere evidence of a practice made up of the actions of non-parties to a lawsuit have anything whatsoever to do with whether a particular defendant's actions in some particular circumstances constitute negligence? *If a whole industry can lag behind, then in order to know whether or not the particular industry at issue is lagging, a judge seemingly must make an independent evaluation of the particular act of conformity involved in the situation. But if the act is evaluated independently, then the practice is analytically posterior and apparently irrelevant to the evaluation of the particular act.* In other words, why should compliance with custom have any role to play in the negligence determination? The silence of Holmes and Hand may not be surprising, as courts are not required to give a rationale for the rules they apply if they apply them more or less correctly. This, however, leaves scholars with the task of articulating the evidentiary connection between conformity to custom and non-negligence. [Hetcher, *Creating Safe Social Norms in A Dangerous World*, 73 S. Cal. L. Rev. at 18-19]

The issue of custom's relevance in strict liability accordingly cannot be resolved without examining the legitimacy of the inferences advocated by Toyota and its *Amici*.

**A. While Custom May Be Directly Relevant in Negligence, Its Relevance in Strict Liability is at Best Circumstantial and Dependent Upon Assumptions Which Are Frequently Unsupported**

Essential to any discussion of custom is the distinction between its use in negligence and its potential relevance in a strict liability action.

In negligence, custom may be of direct relevance given the 'reasonable person' standard. What is done is deemed some evidence of what should be done in a given trade or profession since practitioners are presumably reasonable, and "ordinary care" is that practiced by ordinary persons in the field. *Bouse v. Madonna Construction Co.* (1962) 201 Cal.App.2d 26, 29-30 ("What others do is some evidence of what should be done, but custom is never a substitute for due care.") Custom may therefore furnish evidence of a standard of care without the necessity of inference. *Perumean v. Wills* (1937) 8 Cal.2d 578, 583.

In strict liability, custom is at best only indirect or circumstantial evidence, as both *Amici* and the Court of Appeal's Opinion demonstrate. What others do is not in itself probative, but becomes relevant only if it supports an inference with regard to the objective factors enumerated in *Barker*: e.g., feasibility, practicability, cost-effectiveness. Whether any particular evidence of purported "custom" has any value or supports any inference with regard to *Barker* factors depends upon assumptions— and usually a preliminary factual showing — that need not be examined in a negligence case,

but are essential in a strict liability action.

**B. Because Even Genuine Industry Custom Results From Innumerable Factors, Standing Alone It is Not Relevant nor Probative of *Barker* Factors**

*Amici* argue that Appellants identified a number of factors which are often subsumed under the loose term “industry custom” and which might be relevant under *Barker*: industry technical standards, state of the art, and technological feasibility as reflected in actual experience (all of which can naturally be shown by direct evidence.) They argue from this that Appellants have conceded the relevance of custom. But, as noted, the fact that only Toyota offered ESC only as part of an option package was not the result of technical experience, feasibility, an engineering decision that it was unnecessary, or an objective standard developed by industry research. What plaintiffs conceded was the relevance of the direct and objective evidence of experience, not that custom was inherently probative of experience or other *Barker* criteria. On the contrary, custom standing alone is so equivocal as to render any such inference speculative and conjectural.

**(1) Any Inference from Custom as to *Barker* Factors is Pure Conjecture**

Evidence that others in the industry have not adopted an alternative or superior design does not in itself support an inference as to feasibility, safety benefits, an objective industry technical standard, or any factor suggested by the Court of Appeal. Like other circumstantial evidence, custom *per se* becomes relevant only when the circumstances support an inference that it is the result of experience bearing on *Barker* factors. "The most accepted test of relevance is whether the evidence tends ‘logically, naturally, and by reasonable inference’ to establish material facts. . .” *People v. Garceau*

(1993) 6 Cal.4th 140, 177. *Evidence Code* §210. Because custom arises from a multitude of factors, most of which have no bearing on *Barker* factors (as Toyota's own evidence demonstrates), by itself it has no logical tendency to demonstrate that the absence of ESC was for any reason that factors into the balancing process.

Industry custom invariably reflects considerations of costs, profits, or marketing strategies wholly separate from product safety. *Ward v. Hobart Manufacturing Co.* (5<sup>th</sup> Cir. 1971) 450 F.2d 1176, 1184.

That evidence is "circumstantial" does not mean it is admissible or relevant. *People v. Zismer* (1969) 275 Cal.App.2d 660, 664–65; *People v. Morgan* (2005) 125 Cal.App.4th 935, 942–943 ("Merely characterizing the evidence as circumstantial does not make the evidence admissible.") Circumstantial evidence must be "such as will furnish a reasonable foundation for an inference . . . or whether it 'leaves only to conjecture and surmise the conclusion . . .'" *People v. Anderson* (1968) 70 Cal.2d 15, 25.

Evidence which produces only speculative inferences is irrelevant. *People v. Memro* (1985) 38 Cal.3d 658, 695; *In re David M.* (2005) 134 Cal.App.4th 822, 828 (inferences must be "a product of logic and reason" and "must rest on the evidence.") "Evidence is properly excluded when the proponent fails to make an adequate offer of proof regarding the relevance or admissibility of the evidence." *People v. Blacksher* (2011) 52 Cal.4th 769, 819-820.

That no other manufacturer offered ESC on trucks does not imply that the omission of ESC was due to experience or a valid engineering decision, much less that a truck without ESC was a non-defective or safety-optimized product, even were this a true "industry custom." Even real custom is the result of so many possible influences as to preclude any inference that it is the product of a particular factor, whether it is technical feasibility, lack of competitive pressure, a reluctance to innovate, inertia, a

desire to maintain profitability, or lack of customer demand for unknown technology.

“A possible cause only becomes ‘probable’ when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury.” *Whitmire v. Ingersoll–Rand Co.* (2010) 184 Cal.App.4th 1078, 1084; see also *Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1438, and *Shiffer v. CBS Corp.* (2015) 240 Cal.App.4th 246, 251, noting that “rejecting such an inference is all the more appropriate” where a party failed to present evidence supporting the inference despite his extensive knowledge of the subject and ability to present technical evidence,” and *Isner v. Falkenberg/Gilliam & Associates, Inc.* (2008) 160 Cal.App.4th 1393, 1398 (“An inference is reasonable if, and only if, it implies the existence of an element more likely than the nonexistence of that element.”)

Where “custom” merely evidences inaction by manufacturers, rather than a considered decision not to adopt a design alternative, its probative weight is particularly speculative. *Helvering v. Hallock* (1940) 309 U.S. 106, 121, 60 S.Ct. 444 (no inference can be drawn from congressional inaction given the many possible explanations); *Poulos v. Caesars World, Inc.* (9th Cir. 2004) 379 F.3d 654, 667-668 (where there are multiple explanations for gambling [“it may be an addiction, a form of escape, a casual endeavor, a hobby, a risk-taking money venture, or scores of other things”] other than risk assessment, causation could not be inferred through circumstantial evidence); *Strnod v. Abadie* (1960) 181 Cal.App.2d 737, 740 (in the absence of evidence as to driver’s state of mind, and multiple possible reasons why he was inattentive, no inference of willful misconduct could be drawn.)

In the case of a technically sophisticated product like a vehicle, which evolves annually, any inference about industry capability or experience from the vehicles offered



in a single model year rests on assumptions outside ordinary experience and beyond the competence of lay jurors.

Here, the reason *why* no one had ESC on their trucks was *because* no one else had ESC on trucks – there was no competitive need. It has nothing to do with *Barker* criteria.

This Court has observed that “[w]hether an inference should be drawn may be properly influenced ‘by a policy which makes the action favored or disfavored.’ [Citation] ‘[T]he paramount policy to be promoted by the rule [of strict liability] is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them.’” *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 122, quoting *Price v. Shell Oil Co.* (1970) 2 Cal.3d 245, 251. That policy is not promoted by allowing a defense based on speculative inferences from ambivalent evidence which does nothing to educate jurors as to the factors upon which the risk-benefit test rests, but instead diminishes defendants’ burden of producing real evidence.

(2) **“Custom” is Unnecessary and Misleading Given the Availability of Stronger Evidence in Any Case Where Custom Is Actually the Product of Industry Experience or a Considered Design Decision**

The test of relevancy is not strictly applied to a single item of evidence. Each item need not stand alone as proof of an ultimate fact; instead evidence may have relevance only when considered with other evidence. 1 Witkin, *Cal. Evidence* 3d ed. (1986) *Circumstantial Evidence*, §309, pp. 278–280. There is no need for evidence whose probative value rests on multiple inferences where the very evidence which renders the inference valid is direct evidence of the matter to be inferred. If industry

custom is a product of experience with feasibility, that experience can be shown. *Amici* do not dispute this.<sup>6</sup>

That direct evidence illuminating the technical issues is placed before the jury is particularly important in products liability. Public policy places the burden as to defect on the manufacturer precisely because the manufacturer is deemed to have access to the specifics which contribute to the design decision and the expertise to evaluate optional designs. *Barker* at 431; *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1671; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 571-572. Purported custom which is offered merely for the conclusory inference that there may be reasons justifying a less safe design is of no value to a jury which is charged with balancing the *Barker* factors, since it does not equip them to do that balancing. Only the details of relevant experience and feasibility help the jury in that exercise.

“Probative value and prejudice obviously are not commodities subject to quantitative measurement. Nonetheless, we may identify some of the guidelines which courts follow in performing the balancing process described generally above. The chief elements of probative value are relevance, materiality and necessity.” *People v. Schader* (1969) 71 Cal.2d 761, 774. “Within this context, ‘probative value’ refers to . . . the relative reliability of the inadmissible evidence and its necessity to the jury's understanding of the credibility and bases for the expert opinion.” *People v. Dean* (2009) 174 Cal.App.4th 186, 199.

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<sup>6</sup> For instance, “[s]tate of the art may be established without resort to evidence of what other manufacturers were doing. The defendant need only present expert testimony that the characteristic of the product which caused the injury could not have been avoided in light of the technology then available.” Robb, *A Practical Approach to Use of State of the Art Evidence in Strict Products Liability Cases*, 77 Nw. U.L. Rev. 1, fn. 11 (1982).

“[How] much ‘probative value’ proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity).” *People v. Thompson* (1980) 27 Cal.3d 303, 318, fn. 20, quoting *People v. Delgado* (1973) 32 Cal.App.3d 242, 249 (overruled on another point in *People v. Rist* (1976) 16 Cal.3d 211, 22.)

The defendant seeking to justify the non-adoption of the alternative design always has an alternative (a better alternative) to arguing an inchoate industry custom: calling a witness to explain the reason for the custom, or adducing objective evidence of actual industry experience. “Courts will find this option attractive when the object bears both probative value and prejudice; the witness can be asked to describe the probative features but omit those that would prejudice the opponent.” *22A Fed. Prac. & Proc. Evid.* (2d ed.) §5214.2.<sup>7</sup>

It is, moreover, a fundamental principle that “if weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.”

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<sup>7</sup> “We might also say that prejudice becomes ‘unfair’ when the proponent could prove the same point with less prejudicial evidence but for the fact that this seems like a kind of ‘double-counting.’” *22A Fed. Prac. & Proc. Evid.* §5214.2. *U.S. v. Borja-Antunes* (11th Cir. 2013) 530 Fed.Appx. 882, 884 (in assessing probative value of other crimes evidence, court must consider entire context including need, similarity of two offenses, and temporal remoteness); *State v. Martinez* (N.M.App. 1980) 94 N.M. 50, 607 P.2d 137 (probative value of prejudicial evidence offered to prove fact greatly diminished if other evidence exists to prove it); *Moreno v. State* (Tex.App. 2013) 409 S.W.3d 723, 729 (“‘probative value’ refers to inherent probative force; – how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation” coupled with the proponent's need for evidence.)

*Evidence Code* §412; *Masterson v. Pig 'n Whistle Corp.* (1958) 161 Cal.App.2d 323, 338; *Maaso v. Signer* (2012) 203 Cal.App.4th 362, 371 (“[a]n inference may be drawn from a party's failure to produce available evidence”.)

None of Toyota's *Amici* claim that there was any necessity for “custom,” or that direct evidence would not exist were the custom actually the result of industry wide-research or experience. Rather, custom was offered because *there was no such direct evidence*, and there was no direct evidence because *the purported custom was neither custom nor the result of any of the factors which supposedly made it relevant under the Court of Appeal's theory*. Custom served only to conceal the absence of risk-benefit factors, and to persuade jurors that they should follow the industry standard and thereby apply a due-care standard.

The lack of foundation for any inference is evident even from *Amici's* account of the record. The International Association of Defense Counsel asserts that, according to the Court of Appeal, the “custom” of omitting ESC from trucks was relevant to show that SUVs and trucks may not have had similar controllability problems, and trucks may not have had controllability problems requiring ESC.<sup>8</sup> (IADC Brief, pages 5-6 and fn. 7) But neither inference has a logical or factual foundation. It was pure supposition that the industry's failure to universally equip trucks with ESC by 2005 was due to peculiar controllability problems presented by trucks, and any such inference was refuted by the fact that Toyota's own engineers had recommended making ESC standard by 2005, and that ESC was optional on Tundras in 2004-2006 and standard by 2007. It was thus indisputable that there was a stability problem and that ESC was the answer to it. The “inferences” on which the Court of Appeal allowed the “custom” argument are

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<sup>8</sup> Since Toyota was perfectly capable of presenting evidence that peculiar truck control problems had delayed ESC past 2005 but never made such claim, the Court of Appeal's Opinion would seem to be stretching beyond reason in an effect to find some relevance for custom.

accordingly not just wildly speculative but refuted by the real evidence.

**(3) No Inference from “Custom” Was Permissible Where ESC Was Already Offered as an Option and Was Progressively Being Adopted by the Industry**

If there is any case in which industry custom functioned as a fig leaf for a product embodying unnecessary preventable risk, it is this one. This follows first from the industry’s progressive adoption of ESC in all manner of vehicle in the 1990’s, evidencing recognition of the need for and practicality of stability control. That manufacturers understood that ESC would inevitably be made standard equipment on trucks disposes of any possible inference that custom was the product of experience, lack of feasibility or excessive cost.

Similarly fatal to any inference from custom is the fact that Toyota made ESC optional in 2004 and 2005. As one writer explains in regards to optional safety equipment:

The quandary arises in the fact that the manufacturer recognized that the product could be dangerous if used in a particular manner, a recognition evinced by the offering of the safety equipment. The manufacturer possessed knowledge sufficient to recognize that the product, if used in a certain way, could cause danger, but for various reasons elected to make the safety device optional. In order to reach this conclusion, the manufacturer, either consciously or unconsciously, utilized some sort of risk-utility balance to achieve the finished product’s design, and in acting on this balance produced and offered optional safety devices.

[Powell, *Products Liability and Optional Safety Equipment -- Who Knows More?* 73 Neb. L. Rev. 843, 845]

This point has particular force as regards *Amici*'s frequent contention that the verdict was justified because evidence showed that the Tundra had *other* safety devices, or because it was rated highly on safety as against competing models. This comparative approach has been frequently rejected on the grounds that it has no tendency to show that the subject vehicle does not by itself embody excessive preventable risk. *Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 545. But surely custom has no value when the very model in question is available from the defendant *with and without* the alternative design, and hence feasibility is immaterial, the usefulness is tacitly admitted, and the relative advantages can be shown directly and without any "inferences" based on the delay of others in adopting the technology.

**D. *Amici*'s Arguments Illustrate the Necessity for Close Preliminary Screening of "Custom" Evidence**

The multitude of conjectural reason for the supposed "industry custom" of omitting ESC, and the absence of any context or evidence upon which a jury could conclude that "custom" actually supported any fact material to the risk-benefit analysis, is potent evidence of the need for screening before a party is allowed to argue to the jury that a product must not be defective because every competing product is equally dangerous. "Custom" evidence is an invitation to speculation absent some foundation rendering its relevance more than merely possible. "An inference cannot be based on mere possibilities; it has been held that it must be based on probabilities." *Sanders v. MacFarlane's Candies* (1953) 119 Cal.App.2d 497, 500.

A party bearing the burden of proof on an issue must persuade the trier of fact that the inference the proponent wishes to draw from circumstantial evidence is more likely to be true than any other possible inference. 3 Witkin, *Cal. Evidence* (4th ed. 2000) *Presentation at Trial*, § 139, pp. 198–199. As *Leslie G. v. Perry & Associates* (1996) 43

Cal.App.4th 472, 483, states, “Where, as here, the plaintiff seeks to prove an essential element of her case by circumstantial evidence, she cannot recover merely by showing that the inferences she draws from those circumstances are consistent with her theory. Instead, she must show that the inferences favorable to her are more reasonable or probable than those against her.”

Given that the manufacturer carries the burden on risk benefit precisely because it has superior access to the technical details, there seems little reason to allow the burden to be carried by mere “inference” as to technical matters, especially when the inference is so dubious.

The party proffering “custom” should be required to present as a preliminary matter (as in an *Evidence Code* §402 hearing) foundational evidence which would support the conclusion that there is a true industry custom, and that the custom is more likely than not the result of established standards or industry experience bearing on *Barker* factors.

**5. THE “HYPOTHETICAL MANUFACTURER” CONTEMPLATED BY *BARKER* IS UNCONCERNED WITH MARKETING OR COMPETING MODELS**

Averting to the “hypothetical manufacturer” posed in Appellant’s Opening Brief, the Association of Defense Counsel argues that in the real world manufactures will consider competing models and market conditions in deciding on design features, and hence the jury should consider them.

Appellant’s hypothetical manufacturer is one who makes design choices under the safety-optimization criteria of *Barker* – *i.e.* one equipped with the knowledge,

technology and intent to eliminate avoidable risks. The real world “manufacturer” proposed by Defense Counsel, by contrast, seems to be a profit maximizing manufacturer whose decision-making process is driven by marketing factors above all. The choice to place profitability over safety even, when dramatically increased safety is available at a modest cost, is not a choice sanctioned by Barker. A design decision taken merely to enhance sales or profitability and in disregard of user safety is not a defense: it is a basis for punitive damages. *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 807; *Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115, 1141, 1145-1146 (decision not to reinforced fiberglass roof with roll-bar); *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 402.

What Defense Counsel really advocate in suggesting that jurors place themselves in the position of a manufacturer is that jurors evaluate manufacturer conduct rather than the objective features of the product, and that the evaluation of conduct requires consideration of profitability and the absence of competitive pressure or customer demand for a superior design. All of this, however, contravenes *Barker*'s risk-benefit analysis, and defeats the objective of allocating the cost of avoidable injury to those best situated to engineer such risks out of their products and to spread the risk of defective products. Allowing the manufacturer to escape liability because other manufacturers offer equally unsafe products allows the industry to set its own standard, and thereby to shift the cost of avoidable injuries to customers incapable of either reforming the industry or accurately weighing costs and benefits. This reallocation of risk to consumers serves only the manufacturer's financial interests.



6. **CUSTOMER ACCEPTANCE AND COMPARATIVE COST DISADVANTAGE ARE NOT *BARKER* FACTORS AND CANNOT BE SHOWN BY EVIDENCE THAT OTHER MANUFACTURERS NEVER OFFERED THE ALTERNATIVE DESIGN**

Several *Amici* advocate the admission of custom on the theory that manufacturers should be able to defend their designs on the basis that customers are indifferent to the superior technology and/or price sensitive, so that the additional cost of the improved design might induce them to buy competing cheaper (and inferior) models not so equipped.

Allowing “customer acceptance” or price advantage to play into the risk-benefit analysis would undermine the fundamental objectives of product liability law: loss allocation to those best able to avoid defects, and spreading the cost of such avoidable injuries.

A. **Positing “Customer Acceptance” as a Factor in Risk/Benefit Analysis is Contrary to The Policies Underlying *Barker* and Would Mark a Return to *Caveat Emptor***

No weight can reasonably be given in a cost-benefit analysis based on the objective characteristics of a product to the absence of customer demand for design features of which consumers know nothing.<sup>9</sup> The risk/benefit analysis rests upon

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<sup>9</sup> Steve Job’s axiom comes to mind: “But in the end, for something this complicated, it’s really hard to design products by focus groups. A lot of times, people don’t know what they want until you show it to them.” As quoted in *BusinessWeek* (25 May 1998)

Jobs also observed “You can’t just ask customers what they want and then try to give that to them. By the time you get it built, they’ll want something new.” Interview with *Inc. Magazine*, 1 April 1989.

evaluation of the design, not the consumer's knowledge or state of mind, nor the manufacturer's motivations: "the jury's focus is properly directed to the condition of the product itself, and not to the reasonableness of the manufacturer's conduct. . ." *Barker*, 20 Cal.3d at 434. Allowing consumer ignorance as a defense shifts responsibility for adequate design from the manufacturer to users who have no role in design decisions, contrary to the principle that product liability is intended to protect "injured persons who are powerless to protect themselves." *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 63.

While the risk-benefit test allows the jury to consider "the financial cost of an improved design" (*Saller v. Crown Cork & Seal Co.* (2010) 187 Cal.App.4th 1220, 1233; *Barker*, 20 Cal.3d 431), that factor is to be balanced against technical feasibility and the risks which might be avoided by the design improvement, not against marketing considerations. *Barker*, 20 Cal.3d at 431, 435. A defective product is one that "causes injury when used or misused in a foreseeable fashion is defective if the design feature which caused the injury created a danger which was readily preventable through the employment of existing technology ***at a cost consonant with the economical use of the product.***" *Buccery v. General Motors Corp.* (1976) 60 Cal.App.3d 533, 547. The test is whether the additional cost is consistent with the economic use of the safer product, not whether a safer product impedes sales because of customer indifference or ignorance.

Given that consumers didn't understand ESC and were understandably unaware of the enormous improvement in stability and control which it offered, the decision to omit it solely on the basis of lack of consumer demand was a decision to gamble safety on the customer's ignorance. This was the antithesis of a balancing of technical, cost and safety considerations, as testimony from Toyota's own witnesses demonstrates.

The contention that the manufacturer can justify omission of important safety

equipment on the basis that competitors omit that equipment likewise undermines the public policy “to provide an economic incentive for improved product safety [and] to induce the reallocation of resources toward safer products.” *Nelson v. Superior Court* (2006) 144 Cal.App.4th 689, 696. Competitive considerations are accordingly irrelevant to whether a device is required to make the product safe. *Grimshaw, supra*, 119 Cal.App.3d at 803, 814.

If the competitive advantage gained by making a less safe vehicle is justified because a lower price increases marketability, then there will be a race to the bottom. Manufacturers will have a defense which has nothing to do with the relationship between price and safety, but only with the relationship between price and marketing. The most important safety innovations can be safely omitted simply because the buying public is unaware of the enhancement and therefore unwilling to pay even a small increase in price, irrespective of an enormous increase in safety.

What other manufacturers are doing is particularly unenlightening as to customer acceptance when almost every passenger vehicle has been equipped with ESC without customer rejection or objection, when its adoption on light trucks is imminent and would in no manner impair the functionality or desirable design attributes of the truck, and when the value of ESC is not something consumers are in a position to evaluate.

Nor does *Barker*'s admonition that jurors must consider “the adverse consequences to the product and to the consumer that would result from an alternative design” (*Barker* at 431) suggest that lack of consumer demand or a competitive disadvantage to the manufacturer adopting superior technology should be weighed against safety. First, in the case of new and unfamiliar technology, such factors will always favor a delay in adopting new technology because every manufacturer will be incentivized not to be the first so as not to add the additional cost, undermining product

improvement.

Secondly, there is no “adverse consequence to the consumer” if – as here – the new design significantly improves safety at modest cost. This is the very question to be answered by the jury under *Barker* by weighing the gravity of the danger eliminated by the improved design against the cost of the improvement – not against the consumer’s perception of a safety improvement of which they have no knowledge.

An alternative design which increases the retail price but dramatically reduces deaths and injuries has no disadvantage to consumers as a class. It imposes no additional financial burden on them where it relieves them of the much greater cost of injuries. Making customer resistance to increased cost a separate factor begs the question: is the alternative design worth it in terms of loss reduction?

**B. The Recognition of Aesthetic Factors as One Aspect of Functionality Does Not Support Adoption of Consumer Acceptance as a Risk-Benefit Factor**

Several *Amici* suggest that *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, endorsed the notion that the consumer’s lack of enthusiasm for a particular safety feature should factor into the risk-benefit calculation. This conclusion is drawn from the *Bell* court’s observation that “much of the perceived benefit of a car lies in its appearance. A car is not a strictly utilitarian product.” (*Id.* at 1131) *Bell* actually has nothing to do with industry custom, and does not stand for the proposition that either lack of competitive pressure or lack of consumer demand can justify the omission of a critical safety feature.

*Bell* dealt with convertibles – a product whose definition precludes certain safety

features deriving from a hardtop. The absence of a hard top is a form of functionality valued by the customer. The issue was neither industry custom nor marketing concerns: rather, customers demanded convertibles and convertibles cannot have hardtops. *Bell* thus found that where a specific type of product and function desired by consumers *could not be produced with the particular design feature advocated by plaintiff*, the jury could consider the absence of that feature to be a beneficial feature.

Put differently, *Bell* reads “functionality” to comprehend both aesthetic and utilitarian values. A hard-top would eliminate the functionality (the aesthetic experience) which is uniquely offered by the absence of a hard-top, and that diminution in desirability (or, rather, elimination of an entire class of product) is within the scope of *Barker* criteria. Similarly, the examples cited by the Alliance of Automobile Manufacturers at pages 14 to 16 of its Brief of products (cigarettes, for instance) which have undesirable characteristics which cannot be engineered out without eliminating the product present functionality issues which can appropriately be considered under *Barker* – not consumer knowledge issues. Those functionality considerations do not justify a rule that allows the manufacturer to defend on the basis that customers fail to demand that of which they are unaware.

*Bell* offers no solace to Toyota or its *Amici*, since (a) there is no consumer demand for a product that is less stable on the road, and (b) ESC does not impair the functionality or desirability of a Tundra in any way, functional or aesthetic. This is true of almost all safety improvements which, like ESC, are usually concealed engineering changes which in no way impair either utilitarian or aesthetic functionality, much less eliminate an entire class of product, as the installation of hardtops would have eliminated convertibles.

### C. The Consumer's Lack of Knowledge Is Not a *Barker* Factor

The Association of Defense Counsel mischaracterizes the role of consumer knowledge, asserting that “when consumers do not know how much good a product feature will do them, they will not spend their hard-earned money to obtain it. A product bearing a revolutionary new feature may appear to the uninformed consumer as an identical, yet inexplicably more expensive version of its competition, and the consumer, unappreciative of the features that make the product more expensive, will purchase from the competition instead.” (Brief at 10-11)

Consumers' lack of appreciation of the value of the safety improvement cannot be a justification for its omission by the manufacturer. Customer acceptance is largely a result of the manufacturers own promotional choices: they promote design changes (often superficial) which increase sales while neglecting those which have offer no apparent benefit or attraction in daily use, and hence do not increase sales. This is exactly what happened with the Tundra, when Toyota decided that lack of consumer enthusiasm was more important than safety. Marketability is a function of what manufacturers put on the market, and solely within their control. This is true with regard to customer knowledge, pricing, option packages. Safety innovation cannot be held hostage to the particular commercial motivations of an industry, especially when it is an industry whose members all tout themselves as leaders in innovation.

Hence, the jury cannot base a risk-benefit analysis on a lack of consumer appreciation, since the consumer's state of mind is largely due to the industry's promotional activities. *Tauber-Arons Auctioneers Co. v. Superior Court* (1980) 101 Cal.App.3d 268, 282; *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 675. “Because consumers cannot accurately rate the products for themselves, advertising, and the expectations which it engenders, becomes a significantly more

influential source of consumer beliefs than it would otherwise be.” *American Home Products Corp. v. F.T.C.* (3rd Cir. 1982) 695 F.2d 681, 698. As noted, allowing reliance on consumer ignorance – reflected in price resistance - would justify a race to the bottom: any improvement could be omitted simply because it created some cost disadvantage as compared with less safe models. Moreover, manufacturers would have an incentive not to educate the public and not to create a demand as to safety innovations which they perceive would hurt the bottom line – rather as happened in the instant case.

The argument is economically unsound as well: manufacturers adopting the better technology will *not* be at a financial disadvantage (even if sales are diminished) because the cost of accidents attributable to the absence of superior technology on competing models will fall on their competitors, and not on them.

**7. A RULE PRECLUDING PURE “INDUSTRY CUSTOM”  
EVIDENCE CREATES NO EVIDENTIARY DOUBLE STANDARD**

The Alliance of Automobile Manufacturers contends that under plaintiffs’ analysis, evidence of custom can be used to show that a product is defective but not that it is reasonably safe. This is 100% incorrect.

Evidence of objective industry standards, the state of the art, or actual industry experience can be used to show that a product is or is not defective. As stated in the Opening Brief, such evidence is not bare “custom” and bears directly upon the issue of product performance and design choices. Competing models offering markedly more or less safety can always be introduced, since they are not evidence of “industry custom” but of actual implementation and functionality. Where, for example the defendant’s model fails to contain safety devices found on competing models, that fact is admissible not because it shows a lack of due care or because it violates “custom”, but because the

competing model illustrates technical and financial feasibility. It is not custom that is shown, but superior practice. Similarly, a showing of feasibility is entirely distinction from any evidence of custom. “Unlike evidence of industry custom which is improperly offered to negate the existence of a defect, evidence that a product is designed in accordance with the existing state of the art is relevant in a risk-benefit analysis.” *Rosburg v. Minnesota Mining & Mfg. Co.* (1986) 181 Cal.App.3d 726, 735.

Nothing in our rule bars a manufacturer from adducing *Barker*-based evidence of industry experience, practicability, functionality, cost and feasibility – all of which should be readily available if custom is in fact the product of such experience. Rather, Appellants’ analysis encourages such evidence and hence encourages a better decisional process. The rule merely exclude the undigested claim that “everybody does it” and evidence or argument based on “custom” that encourages speculation and conjecture about *why* everybody does it. In so far as custom is actually the result of experience, it is the experience and not the custom which is relevant and admissible, and such direct evidence of experience, state of the art, etc. carries none of the prejudicial evidentiary potential of a doubtful industry custom which may encourage a lack of innovation.

With respect to whether there is a practicable, safer, alternative design, courts can create significant deterrence by distinguishing mere industry custom evidence from evidence of scientific and technological feasibility. The failure to do so can create major disincentives for manufacturers to seek out safer designs.

[Gerald F. Tietz, *Strict Products Liability, Design Defects and Corporate Decision Making: Greater Deterrence Through Stricter Process*, 38 Vill.L.Rev. 1361 (1993)]

As this case vividly illustrates, a manufacturer is most likely to rely upon bare “custom” in those cases in which custom is *not* the result of technical experience or a



considered design choice, since it allows (and Amici's theory) an inference which is unfounded in reality and hence likely to work the most mischief and result in an erroneous conclusion. Custom is unnecessary if the inference as to experience or feasibility is true, since far more probative direct evidence is available – and if such evidence does not exist, it is because the inference is untrue. Neither Toyota nor its *Amici* have cited any instance in which this would not be the case.

The Alliance's contention that plaintiffs advocate a one-way evidentiary rule for industry custom evidence simply illustrates the very confusion spawned by indiscriminate use of that term. That Toyota declined to make ESC standard due to lack of competitive pressure is not evidence of "industry standard" since it is not evidence that the industry has adopted a particular design choice, especially since Toyota made ESC optional and it was inevitable that other manufacturer would install it shortly.

That the subject product fell below the quality of competing products or fails to meet objective industry standards governing the risk in question is direct evidence that the product incorporates avoidable risk: it demonstrates in technical detail the existence of excessive risk. By contrast, the bare fact that some or all competing models are equally unsafe does not demonstrate that the subject risk was not avoidable through an alternative design. The difference is one of logic: the showing of a superior design through accepted technical standards or actual implementation is not "industry custom" and requires no inference as the presence of avoidable risk. Custom ("nobody does it") does not demonstrate in any way the absence of superior technology and does not educate the jury s to avoidable risk.

The distinction is recognized even in negligence cases, where compliance with industry standards or custom is met with scepticism. *Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 547-548 ("Courts have generally not looked with favor upon the use of

statutory compliance as a defense to tort liability.”); *Howard v. Omni Hotels Management Corp.*, supra, 203 Cal.App.4th 403, 420-421<sup>10</sup>,

Indeed, where the alternative design is shown to be not just theoretically feasible, but is offered as an option by the defendant manufacturer, the fact that no other manufacturer offers it has no possible relevance since its only effect is to inject an element of a “reasonable person” standard.

**8. “HINDSIGHT” EVALUATION OF ALTERNATIVE DESIGN IS APPROPRIATE UNDER RISK-BENEFIT ANALYSIS AND NECESSARY TO PRODUCT IMPROVEMENT**

The Alliance of Automobile Manufacturers asserts that a manufacturer must be allowed to show custom for it would otherwise be unfairly subjected to the hindsight evaluation of its product. This is simply another way of suggesting that an industry standard should be available as a defense, and of diverting juror attention towards the reasonableness of the manufacturer's behavior as compared with other manufacturers and away from the objective characteristics of the product and the alternative designs available at the time the product was put on the market.

“Hindsight” evaluation of a product is precisely what is called for. The risk-benefit test supplies the standard not simply for the particular manufacturer's product but for all products in the industry, and it demands the jurors assess the product in light of all the technology available to the industry at the time. Otherwise, a laggard industry defines its own standard, and the imperative to product improvement is lost.

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<sup>10</sup> “[I]n a case in which ‘the manufacturer or supplier knows of, or has reason to know of, greater dangers [above and despite its compliance with regulations],’ then the manufacturer may not be insulated from negligence liability.” *Howard* at 420-421, citing *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 407.

Barker notes that the risk benefit test is a necessary alternative to consumer expectations because “[i]n many situations . . . the consumer would not know what to expect, because he would have no idea how safe the product could be made.” *Barker* at 430, citing Wade, *On the Nature of Strict Tort Liability for Products* (1973) 44 *Miss.L.J.* 825, 829. This requires the jurors to second-guess a manufacturer who may have made a choice that was ill-informed though consistent with its competitors.

Numerous California decisions have implicitly recognized this fact and have made clear, through varying linguistic formulations, that a product may be found defective in design, even if it satisfies ordinary consumer expectations, if *through hindsight* the jury determines that the product's design embodies “excessive preventable danger,” or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design.  
[*Barker* at 431]

See also 6 Witkin, *Summary Cal. Law 10th, Torts* §1455 (2005), *Campbell v. General Motors Corp.*, *supra*, 32 Cal.3d at 118, reiterating the hindsight test associated with the manufacturer's burden of producing technical evidence, and *Soule v. General Motors*, *supra*, 8 Cal.4th at 562.

The hindsight test is a corollary to the fundamental question under *Barker*: does the design embody “excessive preventable danger” (20 Cal.3d at 430), a question that requires the jury to assess the product in view of the mechanism of the accident and the then-available design alternatives “Preventable” cannot mean “preventable with conventional industry designs,” but “preventable with the best available and practicable technology at the time of manufacture.” Nothing in the circumstances of this case – where the technology was on the shelf and offered as an option – suggests any unfairness

in basing the decision on available technology rather than merely competing models. And it is the function of the jury to second-guess the manufacturer's decision precisely because – as this case well illustrates - design choices are often more forcefully influenced by factors other than feasibility, cost, benefit and safety.

Hindsight review is also implicit in the principle that strict liability is imposed regardless of due care:

. . . the fact that the manufacturer took reasonable precautions in an attempt to design a safe product or otherwise acted as a reasonably prudent manufacturer would have under the circumstances, while perhaps absolving the manufacturer of liability under a negligence theory, will not preclude the imposition of liability under strict liability principles if, *upon hindsight*, the trier of fact concludes that the product's design is unsafe to consumers, users, or bystanders. [Barker, 20 Cal.3d at 434, citing *Foglio v. Western Auto Supply* (1976) 56 Cal.App.3d 470, 477]

**9. THE RECORD DEMONSTRATES THAT THE SOLE PURPOSE OF “INDUSTRY CUSTOM” EVIDENCE WAS TO EXONERATE TOYOTA ON THE GROUND THAT THE TUNDRA WAS NO WORSE THAN COMPETING MODELS**

Amici do not deny that “industry custom” in its generic sense (“nobody does it” or “our product is no worse than competing models”) is more than likely to induce jurors to adopt the industry standard as a proxy for their own balancing of safety and other factors – *i.e.*, it induces the jury to apply a “reasonable manufacturer” standard in derogation of the principle that an entire industry may be producing products which embody excessive preventable risk. Nor do amici deny that Toyota’s plea to the jury was that it should not

find the Tundra defective if it was no worse than other trucks.

In short, neither Toyota nor its *Amici* address the potential for misuse, or the invalidity of Toyota's actual argument to the jury.

The response of *Amici* is, first, that evidence introduced for one purpose is available for all purposes. But even evidence adduced without objection cannot be used to encourage speculation, to draw unsupported inferences, or to support a legally impermissible argument.

Secondly, the real thrust of *Amici*'s arguments are that some form of "reasonableness" should be allowed so as to permit consideration of the manufacturer's conduct, and that custom thus should play a role similar to that in a negligence case. The argument is most pronounced in the brief of the Chamber of Commerce, promoting industry custom evidence as 'cheap, accurate, but optional standard' for product defect. That "standard" is industry custom itself, essentially a negligence standard. The Chamber of Commerce makes plaintiffs' point: a defendant's use of industry custom is designed to undermine the risk-benefit test by encouraging jurors to apply a simpler and less probing standard for product quality— exactly as happened in this case.

*Amici* contends that no strict delineation between proof of negligence and proof of design defect is possible because even evaluation of the objective characteristics of a product necessarily reflects the "conduct" of the manufacturer which designs and produces it, and hence "to criticize the product is to criticize the manufacturer." (Chamber of Commerce Brief at 10)

It is fundamental that under California law a product can be found defective even if the manufacturer is found to have acted reasonably and with "due care." *Carlin v.*

*Superior Court* (1996) 13 Cal.4th 1104, 1112–1113; *Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 102. That a defect exists notwithstanding the exercise of proper care reflects the warranty origins of product liability, as to which neglect is immaterial. *Greenman v. Yuba Power Prod., Inc.* (1963) 59 Cal.2d 57, 61-62; *Klein v. Duchess Sandwich Co.* (1939) 14 Cal.2d 272. “Unlike a negligence theory of liability, a strict products liability theory does not focus on the defendant's duty to use due care; the defendant's behavior is irrelevant.” *Jenkins v. T & N PLC* (1996) 45 Cal.App.4th 1224, 1231.

This test, moreover, explicitly focuses the trier of fact's attention on the adequacy of the product itself, rather than on the manufacturer's conduct, and places the burden on the manufacturer, rather than the plaintiff, to establish that because of the complexity of, and trade-offs implicit in, the design process, an injury-producing product should nevertheless not be found defective.

[*Barker* at 432]

As *Bostick v. Flex Equipment Co.* (2007) 147 Cal.App.4th 80, 89, notes, “applying concepts of ‘fault’ in a strict products liability case would defeat the very purposes of the doctrine because it would reimpose on the plaintiff the burden of proving negligence – an obligation that the doctrine was designed to eliminate.”

The distinction between liability based on the characteristics of the product and that based on conduct of the manufacturer is the expression of a more fundamental public policy: a decision that the industry cannot be allowed to define what constitutes a proper or defective product, and that the trier of fact must make its own decision as to “defect” based upon the optimal balance of costs, safety and benefit. Put differently, the jurors make a decision which, because it is limited to the *Barker* factors, excludes certain factors which typically motivate manufacturers, such as the desire to maximize profitability, the lack of competitive pressure to adopt new safety features, and lack of

consumer appreciation of the relevant design feature. The notion of “defect” articulated in *Barker* is intended in part to prevent the industry from defining the acceptable level of product safety. And as *Far West Financial Corp. v. D. & S. Co.* (1988) 46 Cal.3d 796, 813, fn. 13, states, strict product liability “places ‘direct’ liability on an individual or entity which may have exercised due care in order to serve the public policies of a fair allocation of the costs of accidents or to encourage even greater safety efforts than are imposed by the due care standard.”

An “industry custom” standard undermines all of products liability’s objectives: “(1) to provide a ‘short cut’ to liability where negligence may be present but is difficult to prove; (2) to provide an economic incentive for improved product safety; (3) to induce the reallocation of resources toward safer products; and (4) to spread the risk of loss among all who use the product.” *Pierce v. Pacific Gas & Electric Co.* (1985) 166 Cal.App.3d 68, 83, citing *Cronin v. J. B. E. Olson Corp.* (1972) 8 Cal.3d 121, 133.

*Amici* do not deny that “industry standard” evidence is liable to be taken by the jury as evidence suggesting a fault standard: rather, they endorse that implication. This is likewise implicit in the Court of Appeal’s effort to justify such evidence by blurring the grounds between strict liability and negligence, thereby shifting the focus to manufacture conduct rather than product performance. Allowing evidence of industry custom in these circumstances encourages juries to find that an industry’s actions were reasonable despite clear evidence that the industry as a whole, or any given manufacturer, reasonably could have provided greater safety that would have prevented the plaintiff’s injury. This situation comes perilously close to allowing an industry to set its own standards of liability. Tietz, *Strict Products Liability, Design Defects and Corporate Decision Making: Greater Deterrence Through Stricter Process*, *supra*, 38 Vill.L.Rev. 1361.

For reasons discussed above, custom is not an accurate measure of design capabilities or of the optimal balance of safety and practicality. Nor is it cheap, as the Chamber of Commerce suggests – except to the defendant. Custom shifts the burden to the plaintiff to disprove problematic inferences, and specifically to show that custom is not the result of engineering analysis and not the best choice of alternative designs.

Oddly, the Chamber of Commerce contends at page 11 of its Brief that this Court rejected an “identical argument” to Appellants’ in *Barker* when it adopted a balancing test over the objection that “balancing” introduced an element which “rings of negligence.” That contention is difficult to square with the actual language of *Barker*, which affirms that the balancing is of objective technical factors, not industry behavior.

. . . an instruction which advises the jury that it may evaluate the adequacy of a product's design by weighing the benefits of the challenged design against the risk of danger inherent in such design is not simply the equivalent of an instruction which requires the jury to determine whether the manufacturer was negligent in designing the product. . . . It is true, of course, that in many cases proof that a product is defective in design may also demonstrate that the manufacturer was negligent in choosing such a design. As we have indicated, however, in a strict liability case, as contrasted with a negligent design action, the jury's focus is properly directed to the condition of the product itself, and not to the reasonableness of the manufacturer's conduct.  
[*Barker* at 433]

Nothing in *Barker* supports the argument that “if everybody does it, it can’t be defective,” nor affords any basis for allowing evidence of industry custom.



The Product Liability Advisory Council seems to be pitching the same position it advocated in *Soule*, that the risk-benefit analysis should be “geared to ‘reasonable safety.’” (*Soule*, 8 Cal.4th at 569) This Court was unpersuaded, noting that this position “would reinvest product liability claims with the requirement of ‘unreasonable danger’ that we rejected in *Cronin* and *Barker*.” (*Id.* 569)

## 10. FOREIGN DECISIONS THROW LITTLE IF ANY LIGHT UPON THE QUESTIONS BEFORE THIS COURT

While *Amici* cite a number of cases from other jurisdictions where the courts have approved introduction of custom evidence those cases are largely or entirely unhelpful to this court for at least three reasons.

First, most role of those jurisdictions have adopted some form of *Restatement of Torts* 2<sup>nd</sup> §402A which incorporates the “reasonableness” notion which this Court rejected in *Cronin* and other cases. Those cases regard compliance with the industry standard as probative because manufacturer conduct, and hence reasonableness, is a factor in their calculus. It was the pernicious tendency of the “reasonableness” notion to influence jurors to use the average product of that type as a benchmark for defect that caused the Court to repudiate it.

Thus, our rejection of the use of the “unreasonably dangerous” terminology in *Cronin* rested in part on a concern that a jury might interpret such an instruction, as the Restatement draftsman had indeed intended, as shielding a defendant from liability so long as the product did not fall below the ordinary consumer's expectations as to the product's safety. As *Luque [v. McLean]* (1972) 8 Cal.3d 136] demonstrates, the dangers posed by such a misconception by the jury extend to cases involving design defects as well as to

actions involving manufacturing defects: indeed, the danger of confusion is perhaps more pronounced in design cases in which the manufacturer could frequently argue that its product satisfied ordinary consumer expectations since it was identical to other items of the same product line with which the consumer may well have been familiar.

[*Barker*, 20 Cal. 3d at 425–426]

Secondly, in many jurisdictions, consumer expectations and the risk-benefit test have been largely conflated into one test, and industry custom is permitted on the theory that the customary quality of industry product's reflects what the consumer expects.

Thirdly, in virtually none of the cited cases is there any consideration of what actually constitutes valid evidence of an industry custom, or under what circumstances a relevant inference can be drawn from such evidence, or the tendency of industry custom evidence to mislead or throw jurors off the track. The cases are rarely if ever distinguish between the state-of-the-art, industry technical standards, and simple evidence of the average quality of industry products.

It can safely be said that this is the first court to tackle those questions in any depth.

## 11. CONCLUSION

The point made by appellants is that in every instance in which there is a legitimate *Barker* factor which contributed to the existence of a custom, it could be shown by direct evidence of feasibility, cost effectiveness, or industry experienced bearing upon *Barker* factors - rather than by a dubious inference drawn from an industry custom which is equally likely to be the result of in profitability concerns, or other factors which should play no role in the risk-benefit analysis because they have no

bearing upon safety or cost. That point remains unrebutted.

*Amici's* objective is not to improve the decisional process in which risk and benefits are weighed, but to subvert the objective character of that inquiry and to introduce a "reasonable manufacturer" standard which would diminish both the prophylactic effect on product safety and the burden-shifting function of the *Barker* test for design defect. This Court has consistently resisted such efforts to revisit and undermine *Barker*, and should continue to do so as a matter of public policy

Respectfully Submitted,

Dated: December 7, 2016

**LAW OFFICES OF IAN HERZOG**

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## **CERTIFICATE OF WORD COUNT**

Counsel of Record hereby certifies that the enclosed Brief is produced using 13-point Roman type including footnotes and contains approximately 12,180 words. Counsel relies on the word count of the computer program used to prepare this Petition.

Dated: December 7, 2016

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Evan D. Marshall

## PROOF OF SERVICE

I am over the age of 18 and not a party to this action. I am employed at 11400 West Olympic Blvd., Suite 1150, Los Angeles, CA 90064. On December 7, 2016, I served the attached APPELLANTS' CONSOLIDATED REPLY TO AMICUS CURIA BRIEFS OF (1) CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; (2) INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL; (3) THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.; (4) THE CALIFORNIA CHAMBER OF COMMERCE AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA; AND (5) ALLIANCE OF AUTOMOBILE MANUFACTURERS; PROPOSED ORDER on the parties in this action by placing a true copy in a sealed envelope with proper postage in the U.S. mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury, that the foregoing is true and correct. Executed at Los Angeles, California on December 7, 2016.

