

**"Nobody Used This Design Back Then:" Getting Evidence of Industry Practice
Admitted in Product Liability Litigation**

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“Over the past decade private sector innovators have taken the lead in developing and commercializing [vehicle] automation technologies.”

— *National Highway Traffic Safety Administration*¹

“No good deed goes unpunished.”

— *Clare Booth Luce.*

In the past two decades, product manufacturers have rolled out dazzling new technologies to prevent accidents and minimize injuries. More are on the way. But product-liability lawyers know the iron law of safety innovation: Introduce a feature that saves lives, and you will be sued for not introducing it earlier.

Such “lack-of ____” or “no-____” cases (with the blank filled with the emerging technology of the day) haunt industry after nearly every major safety advance. Circumstances conspire to propel these cases forward. Manufacturers with many different products cannot redesign every product at the same time to include a given safety feature. Often a technology is expensive at the start and consumers do not want to pay for it, so the manufacturer makes it optional or starts by installing it on premium models where consumers are less price-sensitive. Plaintiffs predictably respond that the technology could just as easily have been included in plaintiff’s inexpensive model, it was feasible (since it was an option) or the manufacturer knew it was needed (since the manufacturer installed it on the expensive vehicle). Further, these cases frequently come to trial years after the technology was introduced. Often in the meantime, the technology has become widely available, consumers have come to expect it, regulators may have mandated it, and the price has come down.

When a feature is readily available, cheap and effective at the time of trial, how do you take jurors back in time to convince them that it was not feasible, too expensive and anathema to consumers a decade earlier?

Part of the answer can be to show the jury that when the product at issue was built, competitors did not offer the technology on their similar products. This kind of evidence, called industry custom and practice evidence, can help validate in the jury’s eyes that the obstacles cited by the manufacturer were real and substantial, and are not just a litigation argument. Not every U.S. jurisdiction allows such evidence, and getting it admitted in evidence can be a challenge.

This paper describes how “lack-of” litigation frequently follows after safety technology is introduced and how industry custom and practice evidence can help.

The Problem: Lawsuits Based On Lack Of A Newly-Introduced Safety Feature

From at least the late 1980s, significant safety advances have regularly spawned suits by injured plaintiffs who claim that their product is defective because it does not have the newly-introduced safety feature.

¹ *Automated Vehicles 3.0: Preparing for the Future of Transportation* 25 (2018), <https://www.transportation.gov/sites/dot.gov/files/docs/policy-initiatives/automated-vehicles/320711/preparing-future-transportation-automated-vehicle-30.pdf>.

For example, the introduction of motor-vehicle airbags in the 1980s led to innumerable suits by plaintiffs injured in crashes, or by survivors of decedents. Plaintiffs alleged that the vehicles were defective without airbags, and that providing airbags would have averted or lessened their injuries. *See, e.g., Drattel v. Toyota Motor Corp.*, 699 N. E. 2d 376, 379-386 (N.Y. 1998); *Tebbetts v. Ford Motor Co.*, 665 A.2d 345, 347-348 (N.H. 1995); *Taylor v. General Motors Corp.*, 875 F. 2d 816, 825-827 (11th Cir. 1989); *Wood v. General Motors Corp.*, 865 F. 2d 395, 412-414 (1st Cir. 1988). Eventually the United States Supreme Court held that such “no-airbag” suits were preempted by federal regulations governing passive restraints in motor vehicles. *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). *Geier* mostly ended no-airbag suits, but relied on regulations specific to motor-vehicle passive restraints such as airbags.

“Lack of” suits have continued to proliferate on the heels of other safety advances. For example, electronic stability control (ESC) was introduced in the late 1990s and 2000s. ESC automatically helps to steer the vehicle and restore traction in certain situations, by braking individual wheels or cutting engine power. Following introduction of ESC, a wave of “no-ESC” suits claimed that plaintiffs’ crashes would have been prevented if their vehicles had had ESC. *See, e.g., Kim v. Toyota Motor Corporation*, 424 P.3d 290 (Cal. 2018) (affirming defense verdict in case alleging that pickup truck was defectively designed because it did not have ESC); *Green v. Ford Motor Co.*, 2012 WL 10670462 (N.D. Miss. 2012) (denying motion to exclude plaintiff’s expert’s opinion that vehicle was defective because, *inter alia*, it did not have ESC); *Vincent v. American Honda Motor Co., Inc.*, 2011 WL 13202185 (S.D. Ga. 2011) (similar).

“Lack-of” claims also challenge designs of other consumer products. To take one example, some electric saws, if used incorrectly, can amputate the user’s fingers. In the late 1990s, technology was developed to detect when the saw blade contacts flesh and immediately stop and retract the blade, saving the user’s fingers. The technology, however, would roughly double the cost of a tabletop power saw. *See Osorio v. One World Technologies, Inc.*, 659 F.3d 81, 83, 86 (1st Cir. 2011). Many saw manufacturers did not incorporate the technology. Some have faced suits over lack of flesh-detection technology from consumers who suffered hand injuries. *E.g., Osorio*, 659 F.3d 81 (affirming \$1.5 million plaintiff’s judgment based on lack of flesh-detection technology); *Stollings v. Ryobi Technologies, Inc.*, 725 F.3d 753 (7th Cir. 2013) (reversing defense judgment in lack-of-flesh-detection-technology suit); *Santella v. Grizzly Industrial, Inc.*, 286 F.R.D. 478 (D. Or. 2012) (addressing procedural issue in claim by injured worker that saw was defective because it did not include flesh-detection technology).

Looking forward, we are in the midst of tremendous advances in automobile safety. In the last several years, motor-vehicle manufacturers have introduced vehicles with automated emergency braking, forward collision warning, lane departure warning, lane keeping assist, and a host of other technologies to reduce the chance of a collision. “Lack of” suits are sure to follow. Plaintiffs’ counsel have already filed lawsuits claiming that a crash occurred because a vehicle did not include one or another of these features and that the lack of this feature made the vehicle defective. *See, e.g., Dashi v. Nissan North America, Inc.*, 445 P.3d 13 (Ariz. App. 2019) (affirming dismissal, on federal preemption grounds, of lawsuit claiming that vehicle manufacturer should have installed forward collision warning and crash imminent braking); *Brewer v. PACCAR, Inc.*, (Ind. 2019) (reversing manufacturer’s summary judgment on claim that truck cab was defective because it lacked backup camera and other equipment).

A Partial Solution: Industry Custom and Practice Evidence.

A recent California Supreme Court case, *Kim v. Toyota Motor Corporation*, 424 P.3d 290 (Cal. 2018)², illustrates how industry custom and practice evidence can help defend against such “lack-of” claims in a setting where the technology was just emerging when the product was made. *Kim* defines industry custom and practice as “the use of the challenged design within the relevant industry—‘what *is* done’—as opposed to so-called ‘state of the art’ evidence, which concerns ‘what *can* be done’ under present technological capacity.” 424 P.3d at 296. *Kim* provides a thorough legal and practical roadmap of how to get such evidence admitted in evidence and its role in responding to claims that a product lacked an emerging safety technology.

In *Kim*, plaintiff was severely injured after he lost control of his 2005 pickup truck and drove off an embankment. He and his wife sued the manufacturer in strict products liability, claiming that the pickup truck was defective because it did not include electronic stability control (again, ESC). The manufacturer, Toyota, had offered ESC optionally on Kim’s model of pickup, but Kim bought it without ESC. Plaintiffs claimed that ESC should have been standard equipment and that omitting it was a design defect.

Plaintiffs moved in limine to preclude evidence comparing the Kim vehicle to competing vehicles and designs. 424 P.3d at 293. The trial court denied the motion, and at trial both sides introduced custom and practice evidence (in addition to other evidence bearing on causation and the design’s benefits and risks). Thus plaintiffs introduced evidence that Toyota had included ESC on some passenger cars in the 1990s and some SUVs starting in the early 2000s. They elicited from a Toyota employee that market research indicated that pickup truck consumers were price sensitive and uninterested in ESC, and that no competitors were offering ESC as either standard or optional equipment on 2005 pickups. Toyota introduced testimony that the 2005 Toyota Tundra, Kim’s model, was the first pickup truck to offer it as optional equipment. And Toyota introduced one other kind of industry-practice evidence that the Supreme Court specifically called out as admissible and is relevant directly to “lack of” claims: evidence that offering ESC as optional equipment “was consistent with the industry practice of a phase-in, in which a manufacturer first offers expensive, emerging technology as an option rather than as standard equipment.” 424 P.3d at 294.

The jury found that the pickup was not defective under the risk/benefit test. Plaintiffs appealed, arguing that the trial court erred by admitting the industry custom and practice evidence.

The California Supreme Court upheld admission of the industry custom evidence, elaborating in detail the test that governs admissibility and why the evidence in that case met the test. Its reasoning may be portable to many other U.S. jurisdictions, many of which apply similar rules of evidence and apply a risk/benefit test for design defect.

The court started with the test for strict liability under the risk/benefit test. Under this test, a design is defective “if through hindsight the jury determines that the product’s design embodies ‘excessive preventable danger.’” 424 P.3d at 296 (citation omitted). In California, the plaintiff

² The author was lead appellate counsel for Toyota in *Kim*. However, all of the views expressed in this paper are the author’s and not necessarily those of Toyota. The facts of *Kim* are taken from the California Supreme Court and California Court of Appeal opinions.

must initially prove that the design proximately caused her injury. If plaintiff does so, the defendant must prove that the design's benefits outweigh its risks, taking into account the so-called *Barker* factors, a nonexhaustive list of considerations including "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." 424 P.3d at 296.

Kim explained that "ordinary rules of evidence" determine whether industry-practice evidence is admissible in a risk/benefit case. 423 P.3d at 300. Under these rules, evidence must be relevant to be admitted; relevance means that the evidence "ha[s] any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action"; and relevant evidence is admissible unless made inadmissible by statute. 424 P.3d at 296. Under these principles, *Kim* held, the "critical question" was "whether evidence of industry custom and practice has a tendency to prove or disprove any fact that is of consequence to the proper weighing of the risks and benefits of the challenged design." 424 P.3d at 296.

The California Supreme Court held that industry custom and practice can meet this test, and thus be admissible, because other manufacturers' design decisions can shed light on the appropriate balance of safety, cost and functionality under the risk/benefit test. "*Barker's* risk-benefit test calls on juries to consider whether a design is safe enough, given 'the relative complexity of design decisions and the trade-offs that are frequently required in the adoption of alternative designs.'" 424 P.3d at 298. "The evidence is relevant to the *Barker* inquiry if it sheds light on whether, objectively speaking, the product was designed as safely as it should have been, given 'the complexity of, and trade-offs implicit in, the design process.'" 424 P.3d at 301. "Whether the evidence serves this purpose depends on whether, under the circumstances of the case, it is reasonable to conclude that other manufacturers' choices ... 'reflect legitimate, independent research and practical experience regarding the appropriate balance of product safety, cost, and functionality.' If the proponent of the evidence establishes a sufficient basis for drawing such a conclusion, the evidence is admissible" 424 P.3d at 301. *Kim* held that industry custom evidence "cannot be dispositive" because the entire industry might have "unduly lagged" in adopting feasible safety technologies, but "[e]vidence that all product designers in the industry balance the competing factors in a particular way clearly is relevant to the issue before the jury." 424 P.3d at 299-300.

Kim is particularly helpful because it specifically endorses use of industry-custom evidence when plaintiff alleges failure to install an emerging safety technology. *Kim* concluded that the industry custom evidence introduced by plaintiffs there "was relevant, and therefore admissible ... insofar as it illuminated the decisionmaking process that resulted in the Tundra's design." 424 P.3d at 301-302. Toyota's evidence similarly "*explain[ed] how Toyota decides whether and when to implement emerging safety technologies. In so doing, it shed light on 'the relative complexity of design decisions and the trade-offs that are frequently required in the adoption of alternative designs.'*" 424 P.3d at 302 (emphasis added). The court then specifically held that the evidence that new technologies are phased in was admissible: "[E]ven if the Kims had not first put Toyota's decisionmaking process at issue, '*testimony about how new safety technologies evolve and are phased in to vehicles in general, first as an option and then as standard equipment, is relevant to the risk-benefit analysis ...*' and thus admissible." 424 P.3d at 302 (emphasis added). *Kim* also suggests that when plaintiff sues for lack of a safety technology that no competing

product had adopted at the time of manufacture, defendant can legitimately point out to the jury that plaintiffs' theory means every competing model is defective too. 424 P.3d at 302 (apparently approving manufacturer's argument that jury could validly consider that plaintiffs' theory meant "every 2005 pickup was defective.").

Of course, while industry-practice evidence is relevant to help evaluate the defendant's balancing of risks and benefits, it is not a blank check, as *Kim* also explained. The opinion cautioned that relevance does not always make industry custom evidence admissible. The evidence cannot be introduced simply for the purpose of showing the manufacturer was acting no worse than its competitors; that fact does not itself shed light on whether the manufacturer's risk/benefit calculus was appropriate. 424 P.3d at 301. As with any evidence, a court has discretion to exclude it as more prejudicial or time-consuming than probative. *Kim*, 424 P.3d at 301. And if the party opposing admission of industry-practice evidence makes a timely request, the trial court must instruct the jury on how the evidence may and may not be considered under the risk-benefit test. 424 P.3d at 301.

Lessons For How to Industry Custom Evidence Can Help.

Kim exemplifies how industry-custom evidence can help answer a claim that a manufacturer should have installed an emerging technology (such as ESC was in 2005) earlier. Not all courts allow admission of industry custom evidence in strict liability actions. *See Products liability: admissibility of defendant's evidence of industry custom or practice in strict liability action*, 47 A.L.R. 4th 621 §§ 3, 4 (citing cases holding that industry custom and practice is admissible or inadmissible in strict liability); 1 Owen and Davis on Product Liability § 6:9 (4th ed. 2019) (explaining that a "great majority of courts allow applicable evidence of industry custom," but "a few courts" hold it inadmissible) (citing cases).

But *Kim*'s analysis may be portable to many other U.S. courts, and could convince courts that currently exclude industry practice evidence to give the question another look. *Kim* is largely just an application of ordinary rules of evidence to a case governed by the risk/benefit test. Similar rules of evidence hold in federal court and most state courts. *See, e.g.*, Fed. R. Evid. 402, 401. Many other U.S. jurisdictions apply a risk/benefit test for design defect. *See* Restatement (Third) of Torts: Product Liability § 2 and cmt. d. And *Kim*'s central insight is just to marry the two: evidence of other manufacturers' design decisions can help the jury understand the practical trade-offs in designing the product, and thus may shed light on whether the product's design correctly balanced the relevant considerations. 424 P.3d at 298. Such evidence meets the test of relevance because it makes more or less probable a fact of consequence to the outcome of the action: whether the design correctly balances safety, functionality and cost.

Kim's approach is particularly helpful to defendants in cases alleging failure to install an emerging technology. The opinion unreservedly endorses admissibility of evidence about how and why emerging technologies are phased in over time, and suggests that the court found this evidence particularly persuasive. It mentions this evidence three times and directly holds that the evidence is relevant. (424 P.3d at 294, 302) Such evidence should be available in many cases alleging failure to install an emerging technology.

Kim also appears to mean that a manufacturer can legitimately point out to the jury that if plaintiff's defect theory is right, then every vehicle (or whatever the product) from plaintiff's model year was defective. Many jurors are understandably reluctant to reach that conclusion.

And while *Kim* requires the defendant manufacturer to establish that other manufacturers' decisions not to use the technology yet reflected independent research and practical experience with balancing safety, cost, and functionality, this requirement does not appear onerous. The *Kim* opinion upholds admission of the industry-practice evidence even without identifying any evidence specifically directed to the other manufacturers' independent research and experience. Presumably it was sufficient that the evidence showed that other manufacturers knew about ESC in 2005 and had not installed it on pickup trucks. Once in evidence, the industry-practice evidence can make even more credible the defendant's expert testimony that the technology was legitimately being phased in and the costs and benefits did not warrant installing it on plaintiff's product.

Conclusion

The coming decade will see a revolution in bringing safety technology to market in motor vehicles and other products. Claims of failure to install this technology earlier have already started and will increase. In response, defendants should consider using industry-practice evidence to explain how safety technology is phased in, why a phase-in is appropriate, and why the phase-in of the particular technology at issue legitimately caused that plaintiff's product not to have it. Where true, defendants should also consider using industry-practice evidence to show that few if any other manufacturers had adopted the technology when plaintiff's product was made. In this way, proving industry practice can help ensure that the very good deed of installing potentially life-saving technology will not be punished by liability for failing to install it unrealistically early.