

ADMISSIBLE EVIDENCE OF "CONSUMER EXPECTATIONS"

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*This article appeared in the Winter 2003-04 issue of
the Oregon State Bar's Products Liability Section's Newsletter*

The "consumer expectations" test is the law of the land in design defect cases since *McCathern v. Toyota Motor Corp.*, 332 Or 59, 23 P3d 320 (2001) in which the Oregon Supreme Court held that the Legislature intended, by adopting comment i to Restatement (Second) § 402A, that the "consumer expectations" test be exclusive.¹ 332 Or at 75. After *McCathern*, "courts no longer may instruct juries according to the reasonable manufacturer test instruction approved in *Phillips [v. Kim-wood Machine Co.]*, 269 Or [485] at 501 n!6, 525 P2d 1033 [1974]." 332 Or at 75.

What *McCathern* did not clarify is, what evidence is admissible to prove or disprove consumer expectations? Fortunately, the Supreme Court provided some hints, and the case law interpreting comment i provides some further guidance.

Generally, Evidence Must be Helpful to Jury's "Informed Decision"

One hint is this:

"Whether a product is dangerous to an extent beyond that which would be contemplated by the ordinary consumer is a factual question to be determined by the jury. *Heaton*, 248 Or at 472-73, 435 P2d 806. It is the trial court's role, however, to ensure that the evidence is sufficient for the jury to make an informed decision about what ordinary consumers expect. *Id.*

"As noted in *Heaton* in some cases, consumer expectations about how a product should perform under specific conditions will be within the realm of jurors' common experience. *Id.* at 472, 435 P2d 806." *McCathern*, 332 Or at 77-78 (emphasis supplied).

¹ Four years before *McCathern*, The American Law Institute concluded that in most jurisdictions, "consumer expectations do not constitute an independent standard for judging the defectiveness of product designs." Restatement (Third) Products Liability § 2, comment g. The ALI based that conclusion in part upon a review of case law in which "courts talk of reasonable consumer expectations as the test for liability but define consumer expectations in risk-utility • terms." Restatement (Third) Products Liability § 2 at p. 74. *See also Halliday v. Sturm, Ruger & Co., Inc.*, 368 Md 186, 792 A2d 1145 (Mary Ct App 2002) (discussing in detail the development of the "consumer expectations" and "risk/utility" tests). The holding in *McCathern* is based upon the text of comment i to Restatement (Second) § 402A, rather than the interpretation of that language in adopting jurisdictions. Nonetheless, the *McCathern* court itself acknowledged that when a jury is unequipped to decide whether a product performed as safely as the ordinary consumer would have expected, evidence that the "magnitude of the product's risk outweighs its utility, which often is demonstrated by proving that a safer design alternative was both practicable and feasible" is admissible. 332 Or at 78. *See*, D. Vetri, "Reflections on Product Liability in Oregon," published in OADC Annual Convention materials (June 2003).

Based on that hint, "consumer expectations" evidence, if offered, must assist the jury in making an informed decision about what ordinary consumers expect. But *McCathern* does not explain, in the case of a simple product, (1) whether a plaintiff *must* offer "consumer expectations" evidence, or (2) whether a defendant *may* offer such evidence.

Test is Objective

In any event, case law from other jurisdictions indicates that any proffered evidence of "consumer expectations" must be objective, not subjective. D. Owen, "Manufacturing Defects," 52 Defense L J 199, 324 n324 (Summer 2003) (discussing the law relating to food); *Conde v. Velsicol Chemical Corp.*, 804 F Supp 972, 979 (SD Ohio 1992), *aff'd* 24 F3d 809 (6th Cir 1994); *Pruitt v. General Motors Corp.*, 74 Ohio App 3d 520, 599 NE2d 723, 725 (10th Dist Ct of App 1991); *Delk v. Holiday Inns, Inc.*, 545 F Supp 969, 971 (SD Ohio 1982) ("This test utilizes an objective standard and not the subjective expectations of a particular user or consumer."); Annot., "Products Liability: Consumer Expectations Test," 73 ALR 5th 75 (1999). Because *McCathern* uses the words "average" and "ordinary" (332 Or at 78), as does comment i², this would appear to be the rule in Oregon as well.

Plaintiffs Own Expectations Are Not Admissible

A corollary to that rule is that "consumer expectations" are not equal to plaintiffs own subjective expectations. In *Gibson v. Wal-Mart Stores, Inc.*, 189 F Supp 2d 443 (WD Va. 2002), *aff'd* 2003 US App LEXIS 10890 (4th Cir 2003) the court granted summary judgment, in part on the following reasoning:

"Mrs. Gibson also alleges that the product [charcoal lighter fluid] falls below reasonable consumer expectations. She does so by stating in her affidavit that Easy Start Charcoal Starter did not meet *her* expectations, supported by her husband reiterating the same sentiment. . . . This court is not surprised that a plaintiff against a manufacturer would assert as much. However, more is required than a plaintiffs personal opinion of a product that allegedly injured her. This court has previously required a factual examination of what society expects or demands from a product, [citations omitted.] Mrs. Gibson's conclusory statement regarding the lighter fluid is insufficient as a matter of law to meet this standard."

See also, Brown v. Sears, Roebuck & Co., 328 F3d 1274, 1279 (10th Cir 2003) ("The state of mind of the product's actual user, or victim, is irrelevant. The issue, roughly speaking, is whether an ordinary person would think the product [here, a riding lawnmower without "motion in reverse" protection] is less dangerous than it is."); *Greene v. Boddie-Noell Enterprises, Inc.*, 966 F Supp 416, 418 (WD Va 1997) (plaintiffs own testimony that a coffee cup lid was too loose

² Comment / states that for a product to be unreasonably dangerous, "[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with ordinary knowledge common to the community as to its characteristics." Some courts supplement the "ordinary consumer's" expectations with "any actual knowledge, training, or experience possessed by that particular buyer, user or consumer." *Brown v. Sears, Roebuck & Co.*, 328 F3d 1274, 1281-82 (10th Cir 2003).

"does not substitute for evidence of a generally applicable standard or consumer expectation . . .")

Whose Expectations Are At Issue?

Nothing in *McCathern* seems to disturb the holding in *Ewen v. McLean Trucking Co.*, 300 Or 24, 32, 706 P2d 929 (1985) that "[t]he word 'consumer,' as used in Comment i does not include everyone whom the product might affect." See, *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F3d 613, 624 (10th Cir 1998) ("As plaintiffs acknowledge, the ordinary consumer of AN branded as fertilizer is a farmer. There is no indication that Id's AN was less safe than would be expected by a farmer.") and *Brown v. Sears, Roebuck & Co.*, 328 F3d 1274, 1281 (10th Cir 2003) ("For discussion, we will even assume that Plaintiff is correct in arguing that the statute's subjective test requires looking at the state of mind of the victim, even if the victim, as in this case, was not a buyer, user or consumer."); Annot, "Products Liability: Consumer Expectations Test," 73 ALR 5th 75 § 10 (1999).

Absence of Any Evidence of Consumer Expectations

When the product or the relevant circumstances are not within the jurors' common knowledge or experience, then additional evidence must be offered about consumer expectations. *McCathern*, 332 Or at 78. "Such evidence may - but is not required to - consist of evidence that the magnitude of the product's risk outweighs its utility, which itself may be proved by demonstrating that a safer design alternative was both 'practicable and feasible.'³ *Id.* Other evidence relevant to the issues includes, for example, evidence of advertising and promotional materials demonstrating what the ordinary consumer was led to expect in regard to the product's performance. *Id.* at 79, 23 P3d 320." *Benjamin v. Wal-Mart Stores, Inc.*, 185 Or App 444, 461, 61 P3d 257 (2002) *rev. denied* 118 Or 479 (2003).

The holdings of *McCathern* and *Benjamin, supra.*, provide the following guidance: "If the product or the circumstances of the injury are such that jurors would not know what a consumer would expect, more evidence is required."⁴ Because both cases affirmed a verdict for a plaintiff, we were not told what happens if the plaintiff needs, but fails to offer, more evidence. We are also not given much guidance on what additional evidence can be offered. For each of those questions, we must look elsewhere.

As to the first question, because both *McCathern* and *Benjamin* say that the plaintiff "must" produce additional evidence, we can conclude that summary judgment or a directed

³ *Osborne v. International Harvester Co.*, 69 Or App 629, 688 P2d 390 (1984) *rev. denied* 298 Or 335, 691 P2d 483, extended product liability law to bystanders. *Ewen*, on the other hand, holds that it is the consumer whose expectations are examined.

⁴ See also, *Soule v. General Motors Corp.*, 8 Cal. 4th 548, 882 P2d 298, 308 (1994) and *Morson v. Superior Court*, 90 Cal App 4th 775, 109 Cal Rptr 2d 343, *aff'd without opinion* 2001 Cal LEXIS 6949 (declining to apply consumer expectations test to cases involving latex gloves because the allergenicity of natural latex gloves is beyond the common experience and understanding of health care workers).

verdict should be granted absent such evidence. *Delk v. Holiday Inns, Inc.*, 545 F Supp 969, 971 (SD Ohio WD 1982) (directed verdict granted because plaintiff failed to offer any evidence that carpeting or wall covering manufacturers represented that products were fire or smoke resistant). That position is further supported by the fact that the mere happening of an accident is not sufficient proof of liability in a products case. *Greene v. Boddie-Noell Enterprises, Inc.*, 966 F Supp 416, 418 (W.D. Va. 1997). *But compare*, ORS 30.910 (product disputably presumed not unreasonably dangerous) and 1 Torts § 19.14 (OSB CLE 1992 Rev) (indeterminate defects, typically a theory in a case alleging a manufacturing flaw).

As to the second question, neither *McCathern* nor *Benjamin* contains an express limitation of consumer expectations evidence. In fact, *Benjamin* says only that consumer expectations evidence may, "but is not required to" consist of manufacturer representations, or risk/utility evidence. 185 Or. App. at 461. When "consumer expectations" evidence is offered, it would seem that the manufacturer's representations must be "substantially similar" to the circumstances of the products alleged nonperformance. *McCathern v. Toyota Motor Corp.*, 160 Or App 201, 224, 985 P2d 804 (1999) *aff'd on other grounds* 332 Or 59, 23 P3d 320 (2001).

Open and Obvious Danger

Outside the scope of this article is the treatment of consumer expectations in the face of an open and obvious danger. That issue is complicated by Oregon's formulation of comparative fault in products liability cases (*see*, UCJI 48.09), and other factors.⁵ *Compare Maneely v. General Motors Corp.*, 108 F3d 1176, 1181 (9th Cir 1997) (applying California law to support a holding that "ordinary consumers would recognize that riding in a pickup cargo bed is dangerous") and J. Phillips, "Consumer Expectations," 53 SC L Rev 1047 (Summer 2002) (arguing that open and obvious danger should not bar a "consumer expectations" claim, and that the consumer expectations test should apply to simple and complex products).

Advertisements, Brochures, Promotional Materials

One of the key forms of evidence relied upon by the plaintiff in *McCathern*, and accepted by the court, consisted of the manufacturer's own representations. The Court of Appeals' "representational" approach, under which the manufacturer's statements created a separate "theory of liability" under the consumer expectations test, was rejected. But evidence of advertisements, brochures, and the like was found to be admissible, subject to the following *caveat*:

"Although advertising and promotional materials may be sufficient to demonstrate what the ordinary consumer expects from a product in some cases, such evidence

⁵ For example, Restatement (Third) Products Liability, § 2, comment g states that "[t]he mere fact that a risk presented by a product design is open and obvious, or generally known, and that the product thus satisfies expectations, does not prevent a finding that the design is defective." However, that statement is made on the basis that consumer expectations are not an independent basis of liability (in contrast to the *McCathern* holding) and on the basis that risk/utility is the primary defect theory, rather than a way of determining consumer expectations (as is the case in Oregon after *McCathern*)

by itself rarely will demonstrate that a product is defective." 332 Or at 79.⁶

Because the Supreme Court's discussion of advertisements and brochures as a source of consumer expectations is scant, we are not given much guidance as to the type of representation that is sufficient. However, the Court of Appeals' decision on this point seems to have been accepted:

"A representation that a car is 'safe' does not support a reasonable expectation that the vehicle can negotiate and withstand all foreseeable road hazards any more than does a representation that a pick-up is 'rugged.' Conversely, to restrict the representational approach to those circumstances where the manufacturer's representations correspond exactly with the circumstances of the accident would effectively insulate manufacturers from liability. The circumstances of accidents are so variable that a manufacturer will rarely, if ever represent that the product will perform safely under precisely those conditions.

"In truth, it is difficult, if not impossible, to define a principled point of evidentiary sufficiency on that continuum. We also acknowledge that a standard of 'substantial similarity' may seem to be so indefinite as to describe a result rather than an analysis. Nevertheless, we believe that is the correct standard. A plaintiff's proof under the representational theory is legally sufficient if a reasonable juror could find that there is such a relationship between the manufacturer's representations and the circumstances of the product's nonperformance that a reasonable consumer would have believed that the product could perform safely under those circumstances."

McCathern v. Toyota Motor Corp., 160 Or App 201, 224, 985 P2d 804 (1999) (emphasis supplied). Compare *Redman v. John D. Brush and Co.*, 111 F.3d 1174, 1180-81 (4th Cir 1997) (a representation that a safe was 'burglar-deterrent' was not specific enough to establish "how much burglary protection reasonable consumers would expect from a burglar-deterrent safe. The only evidence he offered on this point was his own testimony.") and *Conde v. Velsicol Chemical Corp.*, 804 F Supp 972, 979 (SD Ohio ED 1992) (ordinary consumer would be entitled to conclude that chlordane would be lethal to termites, but not harmful to humans).

Expert Testimony

Expert testimony can likely be used to explain words in advertising and promotional materials. *Redman, supra* (expert testified in order to explain terms like "burglar-deterrence," but such evidence found to be inadmissible because of an improper foundation). But what is less clear is whether evidence of the opinion of other users is admissible either to establish or refute consumer expectations. In *Melton v. Deere & Co.*, 887 F.2d 1241 (5th Cir 1989),⁷ for example, the court rejected the testimony of six persons who were familiar with the combine that injured plaintiff.

⁶ See also, Restatement (Third) Products Liability, § 2, comment g: "Such expectations are often influenced by how products are portrayed and marketed and can have a significant impact on consumer behavior."

⁷ Disavowed on other grounds in *Sperry-New Holland v. Prestage*, 617 S2d 248, 1993 Miss LEXIS 124 (1993).

"[E]ach witness stated his opinion that the combine's cleanout area was more dangerous than expected." 887 F.2d at 1243. But that evidence was rejected because it was "unsupported by any other facts." *Id.* Whether evidence of the same type would be admissible if supported by a proper foundation was not answered.

Focus Groups and Surveys

Some focus group or survey evidence may possibly be admissible to establish or refute consumer expectations. In other contexts, courts permit "focus group" and survey evidence on a topic that has some similarities - consumer confusion for purposes of finding violations of the Lanham Act. *See The Scotts Co. v. Pursell Ind.*, 315 F3d 264 (4th Cir 2003) (rejecting focus group evidence where moderator guided discussion with leading questions, and ignored contrary information; rejecting survey answers because questions were ambiguous). *But see, The Proctor & Gamble Co. v. Colgate Palmolive Co.*, 1998 US Dist LEXIS 17773, *171 (SD NY 1998) (finding survey evidence to be scientifically obtained).

Other Evidence

There is some authority for the proposition that statutes and regulations, industry standards and customs, and information on product life expectancy, are each admissible as evidence of consumer expectations. J. Phillips, "Consumer Expectations," 53 SC L Rev 1047, 1063 (Summer 2002). However, because the authority for that proposition is scant, only this brief mention will be made.

Risk/Utility and Alternative Design Evidence

Under the clear holding of *McCathern*,

"When a jury is 'unequipped, either by general background or by facts supplied in the record, to decide whether [a product] failed to perform as safely as an ordinary consumer would have expected,' this court has recognized that additional evidence about the ordinary consumer's expectations is necessary. *Id.* at 473-74, 435 P2d 806. That additional evidence may consist of evidence that the magnitude of the product's risk outweighs its utility, which often is demonstrated by proving that a safer design alternative was both practicable and feasible. *See id.* at 471, 435 P2d 806 (user has right to expect reasonably safe design)." 332 Or at 78 (citing *Heaton*).

However, because the parties did not dispute that evidence relating to risk/utility balancing was necessary in *McCathern*, the Supreme Court did not decide whether risk/utility evidence is admissible only when there is an absence of evidence of consumer expectations, or whether both types of evidence may be offered. Both types of evidence are likely admissible.

Conclusion

Although the Supreme Court decided in *McCathern* that the consumer expectations test is the sole basis for a jury instruction in a products liability case, it did not answer all of the related evidentiary questions. The answers to some of those questions can be inferred from *McCathern*. Some additional questions can be answered by looking to the law of other states. But

many of the questions are still unanswered.