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PERSPECTIVE

Autonomous vehicles: the new frontier in products liability automotive litigation

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Last month, in *Hsu v. Tesla*, a plaintiff asked a Los Angeles jury to hold Tesla liable for injuries that she sustained as a result of alleged defects in her Model S's autopilot feature. After hearing from numerous witnesses, including three design engineers from Tesla, the jury returned a verdict in favor of Tesla, finding that the autopilot feature did not fail to perform as safely as an ordinary consumer would expect when used as intended. The jury also determined that Tesla did not make a false statement of fact – or intentionally fail to disclose a fact – to Ms. Hsu.

This case is the first of its kind to go to trial against Tesla. Although Hsu involved Tesla's autopilot feature specifically, as autopilot and other advanced self-driving cars become more ubiquitous, the number of accidents involving such cars will presumably increase. And if past precedent with emerging technologies is any guide, lawsuits will follow closely behind. Thus, Hsu provides valuable insight into the claims that are being pursued by injured drivers of autonomous vehicles and defenses that may carry the day at trial.

Products liability claims: design of the autonomous technology

In *Hsu*, the plaintiff brought claims for strict products liability based on a design defect, negligence, negligent failure to warn, breach of warranty, negligent misrepresent-

ation, and fraudulent concealment. Though the complaint alleged various issues with the Model S's autopilot feature, the complaint alleged that the autopilot feature lacked a "properly designed system for crash avoidance" because it would seek out ordinary road obstacles; did not have sufficient cameras/sensors to detect ordinary road obstacles; and did not stay within

its driving lane. Thus, though traditional automotive cases typically center on specific, tangible safety features in the car itself – such as a seatbelt or a brake system – the underlying allegations likely to predominate autonomous car litigation is that the technology or algorithm incorporated into the car's autonomous software is defective. Accordingly, autonomous car manufacturers should be prepared to defend against lawsuits alleging defects with not only the hardware of the car, but also any software incorporated into the car as part of the autopilot or other self-driving system.

Under California law, a plaintiff must satisfy either one of two tests to prove that the design of an autonomous car's software is defective: (1) the risk-benefit test; and (2) the consumer expectations test. Under the risk-benefit test, if a plaintiff has proven that a defendant's product was a substantial factor in causing harm to the plaintiff, the jury may consider whether

a plaintiff to show that a feasible alternative design existed at the time of manufacture that was safer than the technology used in the car in question. By contrast, because autonomous cars are still novel, the average juror might have unrealistic expectations about what to expect of the car's capabilities. Regardless of the test employed, manufacturers should be mindful of explaining the realities and limitations of the technology at issue while touting its improvements and benefits over existing automotive technology. Ultimately, however, the facts and circumstances of the particular technology at issue may dictate whether one or both tests are employed. Indeed, "[t]he two theories are not mutually exclusive, and depending on the facts and circumstances of the case, both may be presented to the trier of fact in the same case." *Demara v. The Raymond Corp.*, 13 Cal. App. 5th 545, 554 (2017). And in some instances, like with novel technology, the jury may be asked first to determine whether the product is one about which an ordinary consumer can form reasonable minimum safety expectations before applying that test. Thus, manufacturers should keep these considerations in mind when crafting jury instructions and verdict forms prior to trial.

Available defenses: clear instructions and plaintiff's misuse

A key defense for Tesla in *Hsu* was that the plaintiff ignored Tesla's instructions and misused the autopilot feature. Based on the verdict and juror statements, it appears the

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the benefits of the product's design outweighs the risk of the design – including the feasibility of an alternative design. By contrast, the consumer expectations test turns on whether the product performed as safely as an ordinary consumer would have expected it to perform – and, if not, if the failure to do so was a substantial factor in causing the plaintiff's harm.

Although the verdict form in *Hsu* employed the consumer expectations test, the risk-benefit test also has intuitive appeal. That is because self-driving technology is new and constantly evolving – thus, it may prove difficult for a

jurors found persuasive that Tesla cautioned that it was the driver's responsibility to take control of the vehicle, even while using autopilot. Based on these instructions, the jury interpreted Tesla's autopilot feature as "assisting" in driving, with the driver having ultimate control over the vehicle's path. Therefore, whether manufacturers seek to incorporate the autopilot feature similar to Tesla's or are working toward a fully self-driving car, they should provide clear instructions to drivers. Such instructions should adequately communicate the driver's role in operating the car and any other instructions that ade-

quately explain proper use of the technology.

Although lawsuits against autonomous car manufacturers are likely to allege traditional products liability claims, the way in which those claims are alleged may no longer implicate or be limited to the hardware of the car itself. Instead, the cases may focus on the software incorporated into the car. If *Hsu v. Tesla* is any guide, with accurate and precise instructions and effective testimony from the defendants' engineers, car manufacturers have tools at their disposal to successfully defend against the new frontier of automotive litigation.

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