Case Summary: Modisette v. Apple Inc.

Defence + Indemnity

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In the context of a motor vehicle accident where the at-fault driver was distracted by using his cell phone, the claim against Apple Inc. for marketing the cell phone without technology to disable its use while the user is driving was summarily dismissed.

***Modisette v. Apple Inc*., 2018 Cal. App. LEXIS 1158 (C.A. Cal., Sixth Appellate District), per Danner, J. [4301]**

FACTS AND ISSUES:

Bethany and James Modisette were injured, and their daughter Isabella was killed in a motor vehicle accident on a highway on 24 December 2014. They had been forced to stop because of police activity when a vehicle operated by Wilhelm collided with the Modisette vehicle at highway speed. Wilhelm was using the FaceTime application on his iPhone 6 Plus at the time.

The Modisettes alleged that in December 2008 Apple had applied for a patent on lockout technology to disable the ability of a driver to perform certain functions on the iPhone while driving. Apple was granted the patent in April 2014. Apple issued the iPhone 6 Plus in September 2019 with FaceTime installed as a non-optional application, without the lockout technology installed. The Modisettes relied on submissions in the Apple patent application to the effect that 80% of auto accidents are caused by driver distractions such as applying makeup, eating and text messaging on handheld devices.

The Modisettes sued Apple alleging negligence, strict products liability, negligent or intentional application of nervous shock, loss of consortium and public nuisance. They alleged that Apple was negligent for failing to design the iPhone to preclude or "lock out" the ability of a person to utilize FaceTime while driving. They also alleged that Apple had failed to warn iPhone users that it was dangerous to use FaceTime while driving.

Apple successfully filed a demurrer, asking the trial court to dismiss the action against it. The trial court also refused to allow the Modisettes to amend their pleadings to allege that Apple's more recent implementation of Do Not Disturb While Driving technology established a causal relationship between the phone and the Modisettes' injuries.

The Modisettes appealed.

HELD: For Apple, appeal dismissed.

The Court held that Apple did not owe the Modisettes a duty of care in the circumstances because of "the tenuous connection between the Modisettes' injuries and Apple's design of the iPhone 6 Plus without lockout technology" and "the burden to Apple and corresponding consequences to the community that would flow from such a duty" (p. 7).

a. The Court held that a duty of care arises where (1) the harm in question was reasonably foreseeable and (2) there are no public policy considerations that mitigate against recognizing such a duty of care (at p. 8):

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California law establishes the general duty of each person to exercise, in his or her activities, reasonable care for the safety of others. (*Civ. Code*, § 1714, subd. (a).)"4 (***Kesner*** [***v. Superior Court***], 1 Cal.5th at p. 1142, internal quotation marks omitted.) However, "[c]ourts … invoke[] the concept of duty to limit generally the otherwise potentially infinite liability which would follow from every negligent act … . The conclusion that a defendant did not have a duty constitutes a determination by the court that public policy concerns outweigh, for a particular category of cases, the broad principle enacted by the Legislature that one's failure to exercise ordinary care incurs liability for all the harms that result." (***Kesner***, *supra*, at p. 1143, internal citations and quotation marks omitted.)
...

In ***Rowland v. Christian***, the California Supreme Court articulated the factors to be considered when determining whether public policy supports the creation of an exception to the statutory presumption of duty set forth in Civil Code section 1714.5 (***Rowland v. Christian***(1968) 69 Cal.2d 108, 112–113 [70 Cal. Rptr. 97, 443 P.2d 561] (***Rowland***).) The central factors identified by ***Rowland*** are "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (Id. at p. 113.)

[footnotes omitted]

b. However, the Court held that public policy mitigated against recognizing a duty of care in this case.

   i. Danner, J. held that "[a]ccepting the Modisettes' non-conclusory allegations as true, we determine that ***Rowland***'s foreseeability factor weighs in favor of imposing a duty of care on Apple because "the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced … ." (***Ballard v. Uribe*** (1986) 41 Cal.3d 564, 573, fn. 6 [224 Cal. Rptr. 664, 715 P.2d 624].)" but "even if it were foreseeable that cell-phone use by drivers would result in accidents, "foreseeability is not synonymous with duty; nor is it a substitute." (***O'Neil***, *supra*, 53 Cal.4th at p. 364.))(pp. 8 – 9)

   ii. Danner, J. held that some of the other public policy factors supported the finding of a duty of care, "including the certainty that the Modisettes suffered injury, the policy of preventing future harm, and "moral blame." [footnotes omitted] (p. 9).

   iii. The Court held that the remaining public policy factors outweighed those supporting recognition of a duty of care because "first, that there was not a 'close' connection between Apple's conduct and the Modisettes' injuries and, second, that 'the extent of the burden to [Apple] and consequences to the community of imposing a duty to exercise care with resulting liability for breach' would be too great if a duty were recognized. (***Rowland***, *supra*, 69 Cal.2d at p. 113.) (p. 9).

   iv. The Court noted that cases finding a sufficiently close connection so as to recognize a duty of care notwithstanding the involvement of a third party like Wilhelm were situations where "the relationship between the defendant's actions and the resulting harm was much more direct" (p. 9)

   v. The Court held that "Apple's design of the iPhone, in contrast, simply made Wilhelm's use of the phone while driving possible, as does the creator of any product (such as a map, a radio, a hot cup of coffee, or makeup) that could foreseeably distract a driver using the product while driving" and that "Apple's design of the iPhone did not put the danger in play" (p. 10):

For the Modisettes to be injured, they had to stop on a highway due to police activity; Wilhelm had to choose to use his iPhone while driving in a manner that caused him to fail to see that the Modisettes had stopped; and Wilhelm had to hit the Modisettes' car with his car, an object heavy enough to cause the Modisettes' severe injuries. It was Wilhelm's conduct of utilizing FaceTime while driving at highway speed that directly placed the Modisettes in danger. Nothing that Apple did induced Wilhelm's reckless driving." [footnotes omitted]

   vi. Danner, J. referred to case law holding that "simply placing a product in the stream of commerce, without more, is insufficient to create a legal duty on the part of a seller"", and was not "willing to make 'a baseline assumption' that iPhone users will ordinarily

use their phones in a dangerous manner while driving" (p. 10). [footnotes omitted]

vii. The Court concluded that to recognize a duty of care on Apple's part would impose an unacceptable burden on cell phone manufacturers and the community (at p. 11):

In addition to concluding that the connection between the Modisettes' injuries and Apple's design of the iPhone weighs against a duty of care on the part of Apple, we determine that the burden a contrary conclusion would place upon cell-phone manufacturers and the consequences to the community strongly militate toward finding that Apple had no duty to the Modisettes even if their injuries were foreseeable. "A duty of care will not be held to exist even as to foreseeable injuries … where the social utility of the activity concerned is so great, and avoidance of the injuries so burdensome to society, as to outweigh the compensatory and cost-internalization values of negligence liability." (***Kesner***, *supra*, 1 Cal.5th at p. 1150, internal quotation marks omitted.)...

viii. Danner, J. noted that with 396 million cell phone accounts for the U.S. population of 326 million people and that the Supreme Court of the United States described such devices as "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." (***Riley v. California*** (2014) U.S. [189 L.Ed.2d 430, 134 S.Ct. 2473, 2484].)"

ix. The Court noted that the California Legislature did not prohibit cell phone use while driving entirely, allowing for hands-free use, emergencies and situations where the driver need simply tap the phone or swipe a finger over it to engage or disengage an application.

The Court also held that the Apple design of the iPhone was not the proximate cause of the accident so as to attract liability in strict products liability, infliction of nervous shock or negligence. While the Apple design was a contributing cause in fact, being a necessary antecedent for the accident (passing the "but for" test), it was not a proximate cause in law:

Although Apple's manufacture of the iPhone 6 Plus without the lockout technology was a necessary antecedent of the Modisettes' injuries (as was the police activity that slowed traffic on the interstate that day), those injuries were not a result of Apple's conduct. Rather, Wilhelm caused the Modisettes' injuries when he crashed into their car while he willingly diverted his attention from the highway. (See ***Durkee***, *supra*, 765 F.Supp.2d at p. 750 ["[t]he alleged accident in this case was caused by the driver's inattention, not any element of the design or manufacture of the [in-truck texting] system that has been alleged"].)

The Court upheld the trial court's refusal to allow the Modisettes to amend their pleading to include allegations that Apple had recently implemented it's Do Not Disturb technology in iPhones as this does not establish either a duty of care on Apple's part or that Apple's design was a proximate cause of the Modisettes' injuries.

COMMENTARY:

The Court draws a persuasive analogy between cell phones and other ordinary items in everyday use (such as makeup) so as to find that simply putting a product on the market which a driver may allow himself/herself to be distracted by does not establish the necessary duty of care. Canadian law has a similar two-part approach to considering whether or not a duty of care arises: (1) foreseeability and proximate cause; and (2) the lack of policy considerations mitigating against the recognition of a duty of care: ***Anns v. Merton London Borough***, [1977] 2 All E.R. 492 (H.L.); ***Kamloops (City) v. Nielsen*** [1984] 2 S.C.R. 2.