13 PRODUCT LIABILITY

The Alaska Supreme Court has adopted the theory of strict product liability, holding that a manufacturer is strictly liable in tort when the manufacturer places an article on the market, knowing it is to be used without inspection for defects, and the article proves to have a defect that causes injury.[1] Since then Alaska has generally adopted the Restatement (Second) Torts section 402(A) on the issue of strict product liability.

The court has adopted a two-prong test for defect in design cases. Under this test, the finder of fact can find a product defective:

> if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner [consumer expectation test] ... or if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove ... that on balance the benefits of the challenged design outweighed the risk of danger inherent in such design [risk benefit test].[2]

The Alaska Supreme Court has adopted and applied retroactively the "continuity of enterprise" exception to the general rule that the acquiring corporation is not liable for the debts and liabilities of the selling company.[3] Under this exception, a successor corporation may be held liable for injuries caused by its predecessor's products where the totality of the transaction between the successor and the predecessor demonstrates a basic continuity of the predecessor enterprise. The successor may be held liable even though the sale of assets is for cash and there is no continuity of shareholders.

The Alaska Supreme Court has considered the argument that the "consumer expectation test" does not make sense in a complex product design case because consumers may have unreasonable or uninformed expectations, because tests may be standardless, and because consumers have no basis for forming expectations about how certain products should perform under certain conditions.[4] The court rejected this attack in the case before it (concerning the operation of seatbelts in vehicles), but left open the possibility that the "consumer expectation test" would be inappropriate in

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[1] *Clary v. Fifth Avenue Chrysler Center, Inc.*, 454 P.2d 244, 247 (Alaska 1969).

[2] *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 884 (Alaska 1979); *see also Lamer v. McKee Indus.*, 721 P.2d 611, 613 (Alaska 1986).

[3] *Savage Arms, Inc. v. Western Auto Supply Co.*, 18 P.3d 49 (Alaska 2001).

[4] *General Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1221 (Alaska 1998).

cases involving products so unfamiliar to the average consumer that it would be difficult to form any intelligent expectations about how they should perform.

Even if the product is faultlessly manufactured and designed, it can be "defective" if it is placed in the consumer's hands without an adequate warning concerning the manner in which the product is to be used safely.[5] A manufacturer does not, however, have a duty to warn of hazards or dangers that should be readily recognized by an ordinary user of the product. It is the knowledge of the ordinary user of the product that is determinative, not the knowledge of the actual user.

The Alaska Supreme Court has held that an overhauler/repairer is strictly liable for selling and installing a used, defective component part for which the overhauler/repairer had billed separately as part of a hybrid sales-service transaction.[6] The court relied on Restatement (Third) of Torts: Products Liability § 20 (1998) in reaching this holding, but specifically declined to "address the more difficult situation ... when the parties do not clearly separate the product and service components in a hybrid sales-service transaction."

Comparative negligence is a defense in a product liability action and extends to plaintiff's ordinary negligence.[7] Superseding cause may also be a defense in strict product liability. A superseding cause occurs when, after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.[8]

In a products liability action, evidence of subsequent remedial measures is admissible to prove the feasibility of alternative designs as well as to prove a defective condition.[9] While evidence of subsequent remedial measures is inadmissible to prove negligence, Evidence Rule 407 does not apply this exclusionary rule to strict liability cases.[10]

Evidence of comparative risk may be introduced in a products liability action under certain circumstances, including an effort to rebut a claim for punitive damages.

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[5] *Prince v. Parachutes*, 685 P.2d 83, 87 (Alaska 1984).

[6] *Bell ex rel. Estate of Bell v. Precision Airmotive Corp.*, 42 P.3d 1071 (Alaska 2002).

[7] *Smith v. Ingersoll-Rand Co.*, 14 P.3d 990 (Alaska 2000). For more information on comparative negligence, see Tab 7.

[8] *Dura Corp. v. Harned*, 703 P.2d 396, 402 (Alaska 1985).

[9] *See* Alaska R. Evid. 407; *see also Caterpillar Tractor Co. v. Beck*, 624 P.2d 790, 793-94 (Alaska 1981).

[10] *Dura Corp. v. Harned*, 703 P.2d 396, 411 (Alaska 1985).

In one case, the defendant manufacturer was permitted to introduce evidence comparing the risk of using its product (ATVs) with other mechanized recreational vehicles.[11] The court held that such evidence is admissible to rebut injury statistics and to refute punitive damages claims.

Finally, under Alaska's comparative fault scheme, AS 09.17.080, a third-party defendant may be sued for apportionment of fault, even though the statute of limitations on the plaintiff's underlying claim has run.[12]

Appendices:

Alaska R. Evid. 407
AS 09.17.080

[11] *Kava v. American Honda Motor Co., Inc.*, 48 P.3d 1170 (Alaska 2002).

[12] *Alaska Gen. Alarm v. Grinnell*, 1 P.3d 98, 104 (Alaska 2000) ("[T]he limitations period governing the underlying claim should not bar the liability of third-party defendants to the plaintiff for their share of fault. To hold otherwise would abandon the statute's stated purpose -- apportioning liability equitably among at-fault parties -- in favor of a defense to liability that finds no support in the language or history of the statute and is generally disfavored by courts.")

Rule 407. Subsequent Remedial Measures.

This rule is modeled on Federal Rule 407, which incorporates conventional doctrine excluding evidence of subsequent remedial measures as proof of an admission of fault.

The rule rests on three grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." *Hart v. Lancashire & Yorkshire Ry. Co.*, 21 L.T.R. N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The second ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. This assumes, however, that many repairs would not be made but for the exclusionary rule, a proposition subject to serious empirical challenge. (3) The third and perhaps most important reason for the Rule is that people who err on the side of caution and take measures to protect fellow citizens from even the possibility of injury should not bear the risk that the jury, unlike Baron Bramwell, will read more into a repair than is warranted.

The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rule is broad enough to encompass all of them. See Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 590 (1956).

The second sentence of the rule directs attention to the limitations of the rule.

Rule 407 explicitly bars the use of subsequent remedial measures to prove negligence. It also inhibits the use of the evidence to prove "culpable conduct," which may include fault other than negligence, e.g., recklessness (wantonness, willfulness). There is often no clear distinction between recklessness and gross negligence (see Prosser, Torts § 34 (4th ed. 1971)); consequently the policy arguments mentioned above apply equally to both.

In effect Rule 407 rejects the suggested inference that fault is admitted. Other inferences are, however, allowable, including defective condition in a products liability action, ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment. 2 Wigmore § 283; Annot., 64 A.L.R.2d 1296. A recent Alaska case is illustrative. In *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975), actions were brought against the State to recover for deaths of the driver of and passenger in a front-end loader which slipped off an icy highway and overturned. In reviewing the finding of negligence on the part of the State, the Supreme Court of Alaska noted that shortly after the accident, the road in question was sanded. Citing Federal Rule 407, the Court emphasized that the evidence was not used to show negligence directly, but to show feasibility of repair. Admission for this purpose was deemed proper.

There are few cases and few scholarly discussions of the applicability of this exclusionary principle in products liability cases. Unlike most rules that have been promulgated, this Rule explicitly excepts from the reach of the exclusionary rule the use of subsequent remedial measures to show a defect in a product. The reasons mentioned above for the general rule do not apply in a products liability case because,

> [T]he focus of attention in strict liability cases is not on the conduct of the defendant, but rather on the existence of the defective product which causes injuries. Liability is attached, as a

> matter of policy, on the basis of the existence of a defect rather than on the basis of the defendant's negligent conduct . . . .

Bachner v. Pearson, 479 P.2d 319, 329 (Alaska 1970).

Evidence of subsequent repairs or improvements may be highly probative as to the existence of a defect in a product at the time of an accident. In common law jurisdiction such evidence has been regarded as relevant to the issue of defectiveness in negligence-based cases and admissible, e.g., *Steele v. Wiedemann Mach. Co.*, 280 F.2d 380 (3d Cir. 1960).

Moreover, the rationale of not discouraging repairs or improvement does not justify excluding this evidence in the products liability case. The California Supreme Court appropriately observed in *Ault v. International Harvester Co.*, 528 P.2d 1148, 1152 (Cal. 1975), a decision rejecting this exclusionary rule in products liability cases, that

> [t]he contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvement in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement. In the products liability area, the exclusionary rule of section 1151 [California equivalent of Rule 407] does not affect the primary conduct of this mass producer of goods, but serves merely as a shield against potential liability.

Since the manufacturer of a product makes more of a business judgment than a humanitarian gesture in making repairs, the third rationale for the rule is not applicable either.

Of course, when evidence is admitted for any of these "other purposes," the court should instruct the jury to consider it only for the limited purpose for which it is offered, not on the issue of negligence or culpable conduct. It is important to note that the requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue is present and allows the opposing party to lay the groundwork for exclusion by making an admission. If, for example, control is not controverted, there is no reason to admit subsequent remedial measures to prove control, and there is a good reason to exclude it: evidence of subsequent remedial measures might be used by the jury as an admission of fault regardless of the limiting instruction given by the court.

It is also important to keep in mind that even if the issue is a valid one, the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403.

For comparable rules, see Uniform Rule 51; California Evidence Code § 1151; Kansas Code of Civil Procedure § 60-451; Nebraska Rule 27-407; Nevada Rule 48.095; New Jersey Evidence Rule 51; and New Mexico Rule 20-4-407.

Rule 407. Subsequent Remedial Measures.

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as impeachment or, if controverted, proving ownership, control, feasibility of precautionary measures, or defective condition in a products liability action.

(Added by SCO 364 effective August 1, 1979)

Annotations

Cases

The evidentiary rule precluding admission of post-injury accidents or design changes toward proof of negligence is inapplicable in products liability cases based on strict liability. **Caterpillar Tractor Co. v. Beck**, Op. No. 2304, 624 P2d 790 (Alaska 1981).

In a products liability action, evidence of subsequent remedial measures is admissible to prove the feasibility of alternative designs as well as to prove a defective condition. **Dura Corp. v. Harned**, Op. No. 2952, 703 P2d 396 (Alaska 1985).

In personal injury action brought against oil company for injuries suffered by plaintiff when he fell into a "seismic" hole at an oil drilling site, trial court properly denied defendant's motion in limine which sought to exclude evidence that defendant had erected barricades and flashing lights around the seismic hole following the accident, since such evidence was relevant to show who had control over the accident site. **Exxon Corp. v. Alvey**, Op. No. 2883, 690 P2d 733 (Alaska 1984).

Upon determining that evidence of remedial repairs genuinely impeaches a witness, trial court must next determine whether the impeachment value outweighs the prejudicial

implication of negligence. **Agostino v. Fairbanks Clinic**, Op. No. 3718, 821 P2d 714 (Alaska 1991).

In action for injuries sustained in fall on allegedly icy sidewalk, in which evidence of remedial repairs by defendant's employee appeared to have genuine impeachment value, trial court abused its discretion in excluding the evidence absent pretrial evidentiary hearing to determine whether the prejudicial effect of the evidence outweighed its impeachment value. **Agostino v. Fairbanks Clinic**, Op. No. 3718, 821 P2d 714 (Alaska 1991).

Sec. 09.17.080. Apportionment of damages. (a) In all actions involving fault of more than one person, including third-party defendants and persons who have settled or otherwise been released, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault that is allocated to each claimant, defendant, third-party defendant, person who has been released from liability, or other person responsible for the damages unless the person was identified as a potentially responsible person, the person is not a person protected from a civil action under AS 09.10.055, and the parties had a sufficient opportunity to join that person in the action but chose not to; in this paragraph, "sufficient opportunity to join" means the person is

(A) within the jurisdiction of the court;

(B) not precluded from being joined by law or court rule; and

(C) reasonably locatable.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each person at fault, and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault as determined under (a) of this section. Except as provided under AS 23.30.015(g), an assessment of a percentage of fault against a person who is not a party may only be used as a measure for accurately determining the percentages of fault of a named party. Assessment of a percentage of fault against a person who is not a party does not subject that person to civil liability in that action and may not be used as evidence of civil liability in another action.

(d) The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault. (§ 1 ch 139 SLA 1986; am §§ 15, 16 ch 14 SLA 1987; am 1987 Initiative Proposal No. 2, § 1; am §§ 11 — 13 ch 26 SLA 1997)

Cross references. — For effect of this section on Alaska Rules of Civil Procedure 49, 52, and 58, see §§ 5-7, ch. 139, SLA 1986, in the Temporary and Special Acts; for advance payments in medical malpractice actions, see AS 09.55.546.

For provisions relating to the effect of the 1997 amendments to subsection (a) on Rule 49, Alaska Rules of Civil Procedure, see § 50, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts.

For a statement of legislative intent relating to the provisions of ch. 26, SLA 1997, see § 1, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts. For severability of the provisions of ch. 26, SLA 1997, see § 56, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts.

Effect of amendments. — The 1997 amendment, effective August 7, 1997, rewrote subsection (a); in subsection (b), substituted "person" for "party" and deleted the former last sentence, which read: "The trier of fact may determine that two or more persons are to be treated as a single party if their conduct was a cause of the damages claimed and the separate act or omission of each person cannot be distinguished"; and, in subsection (c), deleted ", subject to a reduction under AS 09.16.040," following "with the findings" in the first sentence, added "as determined under (a) of this section" at the end of the second sentence, and added the third and fourth sentences.

Editor's notes. — 1987 Initiative Proposal No. 2, § 4 provides: "Sections 1 — 2 of this Act apply to all causes of action accruing after the effective date of this Act [March 5, 1989]."

1987 Initiative Proposal No. 2, § 5 provides: "If any provision of this Act, or the application thereof to any person or circumstances is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby."

AS 09.16.040, referred to in subsections (a) and (c), was repealed by 1987 Initiative Proposal No. 2, § 2.

Section 55, ch. 26, SLA 1997 provides that the provisions of ch. 26, SLA 1997 apply "to all causes of action accruing on or after August 7, 1997."