An Overview

Today most states (twenty-seven) in the U.S. apply the consumer expectation test of the Restatement to evaluate the existence of a claimed product defect. Twelve states have adopted some form of the risk-utility balancing test of the Third Restatement. California is among the nine states that have incorporated a combination of the risk-utility balancing test and the consumer expectation test. Two recent California appellate cases, McCabe v. American Honda Motor Co., (2002), and Morson v. Medline, (2001), rendered very different results in determining which test to apply.

Consumer Expectation Test

The consumer expectation test provides that a product is defective in design if it fails to perform as safely as an ordinary consumer would expect. The main advantage to applying this test includes its simplicity and amenability to application of everyday experiences of jurors. Expert testimony is often not required. In a recent California appellate case of McCabe v. Honda, the unsuccessful deployment of a side air bag resulted in McCabe suffering damage to her face and teeth as she hit her head against the steering wheel. Honda Motor moved for summary judgment, asserting that the air bag did perform in accordance with its intended design. The trial court granted summary judgment for Honda, reasoning that plaintiffs failed to produce any expert evidence to refute Honda’s expert testimony. The judgment for Honda Motor Co. was later reversed by the California appellate court, which held that the consumer expectation test should be applied.

The appellate court in the McCabe case held that “the critical question in assessing the applicability of the consumer expectation test, is not whether the product, when considered in isolation, is beyond the ordinary knowledge of the consumer, but whether the product, in the context of the facts and circumstances of its failure, is one about which the ordinary consumers can form minimum safety expectations.” Therefore, the appellate court agreed that plaintiff raised triable issues of fact as to whether a driver’s side air bag is the kind of product about which consumers can form minimum safety assumptions. The court held that the test was what the reasonable consumer would have expected.

Risk/Utility Test

In seeming contradiction to the appellate court holding in McCabe, another recent California appellate court in Morson v. Superior Court had a different outcome. In this case, the court applied the risk/utility balancing test. The case involved latex gloves where plaintiffs sued various glove manufacturers and distributors for product design defect and failure to warn claims. The plaintiffs alleged that manufacturers and distributors of natural rubber latex gloves placed products into the stream of commerce which were defectively designed, which caused allergies to certain individuals. The trial court concluded that the allergenicity of the latex glove product was a matter that was beyond the understanding and common experience of ordinary consumers. The appellate court upheld the trial court’s decision against application of the consumer expectation test, holding, “the alleged circumstances of the product’s failure involve technical and mechanical details about the operation of the manufacturing process, and then the effect of the product upon an individual plaintiff’s health.” Both the trial and appellate courts held that the alleged creation or exacerbation of allergies by a product, such as the presence of certain levels of proteins on the surface of latex gloves, to which the consumer is exposed, are not subjects of common knowledge for ordinary consumers.

Section 2(b) of the Third Restatement of Torts adopts a risk/utility balancing test as the standard for judging the definitiveness of product designs. According to the Restatement, a product is generally deemed defective if its design embodies excessive preventable danger. More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product. Soule, 8 Cal. 4th at 562; Voss v. Black & Decker Manufacturing Co., 450 N.E.2d 204 (N.Y. 1983). This test method was first established by the California Supreme Court in Barker v. Lull Engineering Co., 20 Cal. 3d 413, 573 P.2d 443, 34 Cal. Rptr. 2d 443, 34 Cal. Rptr. 2d 607 (1978).
The test was initially established because courts felt that consumer expectation was not broad enough to allow adequate recovery for plaintiffs in product liability cases. Thus, the risk/utility test was perceived as a way of alleviating plaintiff’s burden of proof. In reality, however, this test’s use has evolved so that plaintiffs now usually prefer the application of the consumer expectation test, a more simplistic method, often without the need for expert evidence, while defendants generally prefer the risk/utility test. Defendants’ preference is due to the fact that products have become so complex that the ordinary consumer has no “reasonable” idea of what to expect from the product.3

Conclusion/Reconciliation

In the past, states were more sharply divided on which test methods they applied. However, current research suggests that absent codification, courts generally apply a case by case analysis to determine which test will be applied. In other words, there is no clear indication that one test method is being used more than the other test. The consumer expectation test presumes that the ordinary consumer is familiar with the product and is aware of how the product should perform in a given situation. In most products liability cases focal point is whether there exists a “defective product design.” Therefore, the focus of a test should be on the product itself, as it is in the risk/utility test. With advances in technology, many new product designs are simply too complex for the ordinary consumer to understand.

The McCabe court’s application of the consumer expectation test may well be an anomaly. As is seen in the court’s reasoning in Morson, one could easily argue that the complexity of a product design and mechanics is generally beyond the common knowledge of the ordinary consumer. Since the designs of consumer products are becoming more complex, we should expect to see a more limited use of the consumer expectation test in deciding future product design defect cases.

California judges continue to be charged with the responsibility of applying either the consumer expectation or risk utility test to each case. The parties must be mindful of the arguments to be made in assisting the court to make the correct application of the law to the particular circumstances of each case.

2 In addition to California, the other states are Georgia, Louisiana, Maine, Massachusetts, Minnesota, Missouri, New Jersey, New York, North Carolina, Texas, and West Virginia.

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