STRICT PRODUCTS LIABILITY AND DESIGN DEFECTS IN ARIZONA

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A. INTRODUCTION—PRODUCT LIABILITY THEORIES AND POLICIES

Product liability litigation is a field of law which has come to encompass theories of strict liability as well as those of fault. The evolutionary process was fascinating as the courts engaged in a ritual of embracing, in turn, contract notions and tort notions to achieve the desired results in deciding cases in this volatile field.[1] This evolutionary process has resulted in most jurisdictions recognizing two basic liability theories for product cases: (1) negligence and (2) strict liability. The former is illustrated by the common law negligence theory that was the basis of the cause of action in the celebrated case of *MacPherson v. Buick Motor Co.*,[2] while the latter has involved various formulations of warranty concepts, express and implied,[3] as well as strict tort liability.[4] The warranty theories, however, are steadily giving way in many jurisdictions to the argument that they should be limited to loss of bargain situations involving pure economic loss and that tort law is the exclusive province for strict liability for physical harm to persons and tangible things. This is the situation in Arizona since *Rocky Mountain Fire & Casualty Co. v. Biddulph Oldsmobile.*[5]

The development of strict tort liability for certain product cases is said to be based on essentially three policy arguments: (1) the costs to the victims of accidents attributable to defectively dangerous products can and should be distributed through the market mechanism by first charging those costs to sellers and manufacturers of the product who, in turn, will pass those costs on to purchasers;[6] (2) the imposition of strict liability will

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1. *See* Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 109-10 (1970).

2. 217 N.Y. 382, 111 N.E. 1050 (1916).

3. W. PROSSER & W.P. KEETON, LAW OF TORTS § 95 (5th ed. 1984) [hereinafter cited as W. PROSSER & W.P. KEETON].

4. *Id.* at § 98.

5. 131 Ariz. 289, 640 P.2d 851 (1982).

6. Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 63, 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901 (1962).

serve the cause of accident prevention by inducing improvements in products and in the information provided about those products;[7] and (3) the burden of proving fault or negligence, which is often present in defective product situations, is too difficult and expensive where the manufacturing process is not open to public view and, in many cases, not readily understandable without expert testimony.[8] These policy arguments led the American Law Institute to adopt strict liability for dangerously defective products under the rule set out in Section 402A of the Second Restatement of Torts.[9] Arizona, along with most states, has also endorsed this rule for product liability cases.[10] Thus, one can generalize that modern product liability litigation involving physical harm to persons and tangible things really involves the two tort theories of negligence and strict liability. It would seem simple enough to be able to distinguish between those two theories in product cases, but the legal world has not been so blessed. Arizona is no exception.

B. Distinguishing Between Negligence and Strict Liability Theories

The reason for the confusion in discerning whether a particular product liability theory involves a standard of negligence or one of strict liability stems from the difficulty that courts have experienced in defining the standard for determining when a product is defective in the sense of being unreasonably dangerous.[11] It is said that there are three types of defects that can make a product unreasonably dangerous.[12] One of the three always involves a standard of strict liability. Another, under orthodox case law, always involves a standard of negligence. The third can involve either strict liability or negligence, depending on what is expected of the product or the point in the time when some or all of the elements of the standard are measured.

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7. Phillips v. Kimwood Machine Co., 269 Or. 485, 503-04, 525 P.2d 1033, 1041-42 (1974).

8. Phipps v. General Motors Corp., 278 Md. 337, 351-53, 363 A.2d 955, 962-63 (1976).

9. Restatement (Second) of Torts § 402A. Special Liability of Seller of Product for Physical Harm to User of Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

10. O.S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968).

11. *See* W.P. Keeton, Manufacturer's Liability: *The Meaning of "Defect" in the Manufacture and Design of Products*, 20 Syracuse L. Rev. 559 (1969); Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973) [hereinafter cited as Wade].

12. *See* W. Prosser & W.P. Keeton, *supra* note 3, at § 99.

1. *Manufacturing Defects*

The first and easiest type of defect to define and recognize is commonly called a manufacturing defect. This involves an abnormality or condition that was unintended, i.e., a flaw, and can be readily identified in most cases by comparing the allegedly defective product with other products in the same line, in most instances from the same manufacturer.[13] If there is an abnormality or flaw and if this condition caused physical harm, the product is unreasonably dangerous. Even though the defect may have occurred because of negligence, care in manufacturing and marketing is irrelevant and not part of the inquiry. The manufacturer is subject to liability without regard to care or diligence employed to prevent defects. Thus, the standard for manufacturing defects is clearly one of strict liability.

2. *Informational Defects*

The second type of defect deals with information about a product—warnings, instructions, and similar communications. Here one needs to distinguish between known and unknown risks or hazards associated with the product. Strict liability for informational deficiencies concerning known product risks or hazards is justified. For example, where a manufacturer's instructions or warnings are erroneous or omitted, in the sense of not communicating what was intended to be communicated, a plaintiff should not have to prove that the error or omission occurred as the result of negligence. This situation may be viewed as a manufacturing defect and ought to be so treated, i.e., as a flawed product. The unknown product risk or hazard, however, would seem to call for different treatment. Although it is possible to hold a manufacturer or seller liable without regard to fault for inadequate information concerning unknown hazards, it does seem somewhat incongruous to do so.[14] The orthodox view seems to require a showing of fault.[15] This view seems sensible in the manufacturing defect case because the former permits a pyramiding of liability counts which is unnecessary. It is enough to sustain liability that there was a manufacturing defect. To entertain an additional count that the manufacturer should be strictly liable for failing to warn about an unknown defect is unnecessary. It permits the claimant to double-up on the same defect, a classic case of beating a dead horse. This is also true in the context of the third type of defect which is next discussed.[16]

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13. *See, e.g.*, International Harvester Co. v. Chiarello, 27 Ariz. App. 411, 555 P.2d 670 (1976) (involving allegation that vehicle's master brake cylinder contained metal chips when it left the manufacturer).

14. *See, e.g.*, Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982).

15. W. PROSSER & W.P. KEETON, *supra* note 3, at 678.

16. For cases which appear to hold that strict tort liability exists for failure to warn with regard to unknown design defects, see, in addition to Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982), Phillips v. Kimwood Machine Co., 260 Or. 485, 525 P.2d 1033 (1974); Jackson v. Coast Paint and Lacquer Co., 499 F.2d 809 (9th Cir. 1974); Little v. PPG Industries, Inc., 19 Wash. App. 812, 579 P.2d 940 (1978), *modified*, 92 Wash. 2d 118, 594 P.2d 911; Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 432 A.2d 925 (1981). Once the test for strict tort

3. *Design Defects*

The most troublesome and controversial area encountered by the courts in defining what is meant by a defective product involves design defects.[17] A design defect, unlike a manufacturing defect, is not self-proving because there is no abnormality. The particular product is just like every other product in the line. The product is manufactured exactly as it was intended. However, the entire product line may prove to be unreasonably dangerous because of the design. Essentially two different, but somewhat related, tests have been employed to evaluate whether a product design is unreasonably dangerous.[18]

The first test, referred to as the "consumer expectation" test, is based on Comment (i) of Section 402A of the Second Restatement of Torts. The comment states that the product must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics. The second test is referred to as the "risk-utility" test and contemplates that a product is defective as designed if, but only if, the magnitude of the danger outweighs the utility of the product.[19]

The "consumer expectation" test has been seriously criticized as being inadequate for design defect cases.[20] As a result, some courts have adopted the "risk-utility" test, either exclusively[21] or in conjunction with the "consumer expectation" test,[22] for this type of defect. In any event, both tests can embody strict liability because the manufacturer-designer may be held liable in situations where due or even utmost care would not have prevented the design hazard. However, there is still considerable ambiguity, if not confusion, in the area of design defects as the courts come to grips with the problem of the appropriate standard or standards to be applied. In some instances it is not clear whether a negligence or a strict tort liability standard is being employed even though a court may say that it is utilizing the latter.[23] This happens under either of the two tests mentioned, as shown below.

One of the criticisms of the "consumer expectation" test is that the meaning is ambiguous and that it is very difficult of application to discrete problems.[24] More specifically, the ambiguity stems from the inability of a

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liability for design defects is understood, strict liability for failure to warn and similar informational deficiencies concerning unknown design hazards would seem to be unnecessary.

17. For an excellent catalog of the many articles discussing the appropriate test for design defects, see footnote 1 in Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982).

18. W. PROSSER & W.P. KEETON, *supra* note 3, at 679.

19. *See* W.P. Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973) and Wade, *supra* note 11.

20. *See* W. PROSSER & W.P. KEETON, *supra* note 3, at 680.

21. *See, e.g.*, Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979).

22. *See, e.g.*, Barker v. Lull Engineering Co., 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978).

23. *See generally*, Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980).

24. W. PROSSER & W.P. KEETON, *supra* note 3, at 680.

jury to ascertain what an ordinary consumer would expect about a product. It has been pointed out that, in a sense, the ordinary consumer cannot reasonably expect anything more than that reasonable care in the exercise of the skill and knowledge available to the manufacturer-designer has been utilized.[25] Implicit in this formulation is the notion that the manufacturer-designer did all that was reasonable *at the time of manufacture-design.* If this is the actual standard that the jury applies in deliberations under a charge employing the "consumer expectation" test, it would seem to be nothing more than the familiar negligence standard.

It is even more clear that the "risk-utility" test is merely one of negligence when that test is confined to information or knowledge regarding the product as of the date of manufacture-design as compared to a later date such as the date of sale, accident or trial. To inquire whether the risks associated with a product line outweigh its utility and benefits and then to limit the jury's consideration to that information known about the product, including reasonably forseeable dangers, at the date of manufacture-design is to ask whether an ordinarily prudent manufacturer-designer would have produced and sold the product as it was produced and sold. Negligence by any other name is still negligence.

Despite the many references in cases that manufacturers of products containing design defects are subject to strict liability, the cases where the court of last resort has clearly articulated such a standard are sparse. In fact, there are only a handful.[26] As pointed out, the "consumer expectation" test does not necessarily embody a strict liability standard and the courts have not always articulated just what it is that causes the "risk-utility" test to be one of strict liability. In fact, the situation in Arizona aptly reflects the confusion in the area.

C. Has Arizona Adopted True Strict Liability for Design Defects?

The answer to whether Arizona has adopted true strict liability for design defects lies in the reading of *Byrns v. Riddel, Inc.*,[27] decided by the Supreme Court of Arizona in 1976. Even though the Court embraced Section 402A in 1968,[28] it was not until the *Byrns* case that explicit mention was made of an actual standard to be employed in Arizona to determine when a product contained a defect that would give rise to strict liability.[29] Even though the Court did not leave the matter free from ambiguity in

25. Schwartz, *Foreword: Understanding Products Liability,* 67 CAL. L. REV. 435, 479 (1979).

26. *See* Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 876-86 (Alaska 1979); Barker v. Lull Engineering Co., 20 Cal. 3d 413, 435, 143 Cal. Rptr. 225, 239, 573 P.2d 443, 457 (1978); Cepeda v. Cumberland Engineering Co., 76 N.J. 152, 171-76, 386 A.2d 816, 825-27 (1978). Phillips v. Kimwood Mach. Co., 269 Or. 485, 501, 525 P.2d 1033, 1040, n.16 (1974); Turner v. General Motors Corp., 584 S.W. 2d 844, 847, n.1 (Tex. 1979).

27. 113 Ariz. 264, 550 P.2d 1065 (1976).

28. O.S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968).

29. For example, in Adroit Supply Co. v. Electric Mutual Liability Ins. Co., 112 Ariz. 385, 542 P.2d 810 (1975) there is implicit recognition of the Comment (i) test, but there is no opinion by the court explicitly adopting such a test. The trial and intermediate appellate courts, however, were using the Comment (i) test during the interim. *See, e.g.,* Stroud v. Dorr-Oliver, Inc., 112 Ariz. 403, 542 P.2d 1102 (1975), *reh'g denied,* 112 Ariz. 574, 544 P.2d 1089 (1976).

Byrns, it has subsequently confirmed that the "consumer expectation" test of Comment (i) is one test that will be recognized.[30] A fair reading of *Byrns* also indicates that a "risk-utility" test affords an alternative theory to plaintiffs.

There seems to be little debate that the "consumer expectation" test is one of strict liability insofar as the evidence permits a jury to so find in a design defect case.[31] There are two Arizona Court of Appeals decisions so holding;[32] however, these same cases also take the position that Arizona has not adopted a standard of strict liability under the "risk-utility" test. It is submitted that on a closer examination these cases are incorrect and that the Supreme Court of Arizona did adopt a standard of strict liability under the "risk-utility" test announced in *Byrns*.

The key language in the *Byrns* case regarding the standard of liability under the "risk-utility" test is as follows:

> The United States District Court, Eastern District of Pennsylvania, adopted the following test of "unreasonable danger": "whether a reasonable manufacturer would continue to market his product in the same condition as he sold it to the plaintiff *with* knowledge of the potential dangerous consequences the trial just revealed." *Dorsey v. Yoder Co.*, 331 F. Supp. 753, 759-760 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3rd Cir. 1973). The court went on to state: "And in measuring the likelihood of harm one may consider the obviousness of the defect since it is reasonable to assume that the user of an obviously defective product will exercise special care in its operation, and consequently the *likelihood* of harm diminishes." *Dorsey v. Yoder Co.*, *supra*, at page 760.
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> The court in *Dorsey, supra*, subscribed to the following factor analysis prepared by Dean Wade to determine if a defect is unreasonably dangerous:
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> > '(1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.'
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> We must add a note of caution at this point. No all-encompassing rule can be stated with respect to the applicability of strict liability in tort to a given set of facts. Each case must be decided on its own merits. The foregoing analysis is offered as an approach to the

30. *See* Rogers v. Unimac Co., Inc., 115 Ariz. 304, 565 P.2d 181 (1977) and Amburgery v. Holan Division of Ohio Brass Co., 124 Ariz. 531, 606 P.2d 21 (1980).

31. *See supra* text accompanying note 25.

32. Brady v. Melody Homes Mfr., 121 Ariz. 253, 589 P.2d 896 (Ct. App. 1978) and Moorer v. Clayton Mfg. Corp., 128 Ariz. 565, 627 P.2d 716 (Ct. App. 1981).

question of whether a defect is unreasonably dangerous.[33]

That this is a standard of strict liability can be demonstrated with a simple hypothetical.

Assume that a drug manufacturer exercises the greatest diligence possible in testing and meeting all government and other standards with regard to a new miracle drug. The drug is marketed and it has wonderful results. However, ten years later it is discovered that the drug, under certain conditions, produces a horrible side effect -- blindness. Assume further that had the manufacturer known of this dangerous side effect at the time of manufacture, utilizing the state of the art then available, the horrible side effect could have been reasonably avoided. Under the test articulated in the *Dorsey* case and adopted by the Supreme Court of Arizona in *Byrns*, the manufacturer is subject to liability because the later acquired knowledge about the hazard is imputed back to the manufacturer at the time of manufacture. Further, a prudent manufacturer who knew of the dangerous side effect and had the ability to reasonably eliminate it would not have marketed the product in the same way. That is strict liability under a "risk-utility" test because the manufacturer, in fact, could not have foreseen the hazard and therefore could take no precautions. The manufacturer is still subject to liability. The specific operative language of the opinion is found in the first quoted paragraph: "whether a reasonable manufacturer would continue as he sold it to the plaintiff *with knowledge of the potential dangerous consequences the trial just revealed.*"[34]

The fact that there is confusion about the actual standard of liability under the "risk-utility" standard is easy to understand once the test is understood. Like the "consumer expectation test," the proof adduced at trial will determine whether the jury actually applies a negligence or strict liability standard. This can be illustrated with reference to a recent case involving an ice making machine that was manufactured without a guard to prevent the user from being injured by a guillotine-like metal gate.[35] There was little, if any, knowledge acquired after manufacture with regard to the hazard involved. The danger was obvious. Thus, in employing the "risk-utility" standard, the jury would use a test of whether an ordinarily prudent manufacturer would have marketed the machine without a guard. In the absence of "after acquired" knowledge to impute to the manufacturer, the jury would merely balance the evidence introduced with regard to the factors listed in the *Byrns* case. By definition, that turns out to be the same process used under a negligence standard. As an aside, it is understandable why the "risk-utility" test is to be preferred by plaintiffs in this situation. The obviousness of the danger is merely one factor in the "risk-utility" analysis[36] whereas it looms much larger in the "consumer expectation" test.

Finally, it is worth observing that the Arizona statutes pertaining to

33. Byrns v. Riddel, Inc., 113 Ariz. 264, 267, 550 P.2d 1065, 1068 (1976).
34. *Id.* (emphasis added).
35. *See* Turner v. Machine Ice Co., 138 Ariz. 329, 674 P.2d 883 (Ct. App. 1983).
36. *Id.* at 333, 674 P.2d at 887.

products liability[37] do not prohibit strict liability for design defects. Section 12-683(1) dealing with the affirmative defense of "state of the art" addresses only one of the factors--the seventh--listed in the *Byrns* case as relevant considerations under the "risk-utility" analysis.[38] Although the plaintiff is prevented from introducing evidence of technological, mechanical or scientific knowledge that develops after the sale date of the individual product which is the subject of the action,[39] there is no statutory prohibition in Arizona against introducing evidence of all post sale changes, for example, in knowledge about the likelihood of injury and its probable seriousness. The same is true of the other factors listed in *Byrns*. Only time and the ingenuity of plaintiff's counsel will tell what other information that did not exist prior to sale will be admissible under the second prong of the *Byrns* case. In the meantime, the *Byrns* case should be recognized for what is actually does in adopting the two standards discussed for strict tort liability with regard to defectively designed products.

37. ARIZ. REV. STAT ANN. §§ 12-681 to -686 (1978).

38. *See supra* text accompanying note 33.

39. The definition of "state of the art" in Section 12-681(6) uses a time of manufacture test. However, the operative section of the statute describing the affirmative defenses uses a time of sale cut-off point. *See* ARIZ. REV. STAT. ANN. § 12-683(1) (1978).