Washington Law Review

Volume 60 | Number 1

12-1-1984

Relevance of Industry Custom in Strict Product Liability

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RELEVANCE OF INDUSTRY CUSTOM IN STRICT PRODUCT LIABILITY

In *Lenhardt v. Ford Motor Co.*,[1] the Supreme Court of Washington held that evidence of industry custom is inadmissible in a strict product liability case. The Washington court held that the custom of the industry is not always a relevant factor in determining the reasonable expectations of the ordinary consumer.[2] The court reasoned that admitting evidence of industry or manufacturers' customs and practices would improperly shift the inquiry from the reasonableness of the buyer's expectations to the reasonableness of the seller's conduct. The court recognized that this shift in focus would introduce concepts of fault that are relevant in a negligence, but not in a strict liability, action.[3]

I. BACKGROUND

In product liability actions, Washington has adopted the theory of strict liability in tort.[4] Liability is imposed on a manufacturer when its product is found to be not reasonably safe. This determination is made by inquiring into the reasonable expectations of the ordinary consumer.[5] The trier of fact is permitted to conclude that a product is not reasonably safe if it would not meet the ordinary consumer's expectations of reasonable safety.[6]

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1. 102 Wn. 2d 208, 683 P.2d 1097 (1984). This cause of action arose prior to the 1981 Tort Reform Act, which makes evidence of industry custom admissible in design defect strict liability cases. WASH. REV. CODE § 7.72.050 (1984).

2. *Id.* at 209, 683 P.2d at 1098.

3. *But see* Powers, *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777 (1983).

4. Ulmer v. Ford Motor Co., 75 Wn. 2d 522, 452 P.2d 729 (1969). For a general discussion of strict product liability, see R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW (1980); L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY (1960); R. HURSH, AMERICAN LAW OF PRODUCTS LIABILITY (Cum. Supp. V-A 1973); W. KEETON, PROSSER & KEETON ON TORTS, ch. 17 (5th ed. 1984); Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Rheingold, *Products Liability—The Ethical Drug Manufacturer's Liability*, 18 RUTGERS L. REV. 947 (1964); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973); Wade, *Strict Liability of Manufacturers*, 19 SW. L.J. 5 (1965). For a discussion of the origins of strict liability and its relationship to the present day economy, see Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225 (1971).

5. Lenhardt v. Ford Motor Co., 102 Wn. 2d 208, 683 P.2d 1097 (1984); Ulmer v. Ford Motor Co., 75 Wn. 2d 522, 452 P.2d 729 (1969). *See also* Eickelberg v. Deere & Co., 276 N.W.2d 442 (Iowa 1979); Ulrich v. Kasco Abrasives Co., 532 S.W.2d 197 (Ky. 1976) (reasonable expectations of the ordinary consumer); Roach v. Kononen, 264 Or. 457, 525 P.2d 125 (1974); Cantu v. John Deere Co., 24 Wn. App. 701, 603 P.2d 839 (1979). *But see* Keeton, *supra* note 4, at 37 (the test is "nebulous, vague and . . . imprecise . . . because the ordinary consumer cannot be said to have expectations as to safety regarding many features of the complexly made products").

6. Ulmer v. Ford Motor Co., 75 Wn. 2d 522, 530–32, 452 P.2d 729, 733–34 (1969).

The Washington court has adopted the *Restatement (Second) of Torts* section 402A doctrine of strict liability as a basis for a manufacturer's liability,[7] and has applied section 402A to cases where the plaintiff alleged defective design.[8] Under this theory, a plaintiff must show only that a product is not reasonably safe and that the product caused injury or damage.[9] Proof of lack of due care on the part of the defendant is not an element of strict liability.[10]

The degree of safety that a consumer may reasonably expect is a relative, not an absolute concept.[11] Therefore, the Washington court has stated that many factors bear on the reasonable expectations of the ordinary consumer.[12] Such factors include "[t]he relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk."[13] In some cases "the

7. *Id.*; RESTATEMENT (SECOND) OF TORTS § 402A (comment) (1965) (states that a manufacturer of a defective product is liable for harm to the consumer even if the manufacturer has "exercised all possible care in the preparation and sale of the product").

8. *See* Connor v. Skagit Corp., 99 Wn. 2d 709, 664 P.2d 1208 (1983); Seattle-First Nat'l Bank v. Tabert, 86 Wn. 2d 145, 154, 542 P.2d 774, 776 (1975). There are three general categories of strict liability claims: manufacturing defects; design defects; and failure to warn. A manufacturing defect exists when a product deviates from the manufacturer's own standards, while a design defect exists when the whole product line is defective. Design defects, such as the one alleged by the *Lenhardt* plaintiff, occur as the result of a conscious design choice by the manufacturer. The product functions exactly as intended by the manufacturer, but nevertheless may be "not reasonably safe" because it does not meet the consumer's expectation of reasonable safety. Liability for failure to warn results when the manufacturer does not warn of known or discoverable risks.

Some commentators have criticized the application of the strict liability standard in design defect cases. They reason that the trier of fact cannot make the multiple, delicate, and marginal determinations that would be required in an evaluation of a design defect. *E.g.*, R. EPSTEIN, *supra* note 4, at 84; Henderson, *Judicial Review of Manufacturer's Conscious Design Choices: The Limits of Adjudication*, 73 COLUM L. REV 1531 (1973); Twersk, Weinstein, Donaher, & Piehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV 495 (1976). At least one court has criticized this argument on the grounds that, regardless of the difficulties involved in the balancing process, consumers are entitled to compensation for injuries caused by improper design. Wilson v. Piper Aircraft Co., 282 Or. 61, 577 P.2d 1322 (1978).

Proponents of this type of decisionmaking maintain that the court is not entering the domain of the design engineer because the court's emphasis is on safety, while the engineer focuses on many other factors such as cost, feasibility, and marketability. *See* Bowman v. General Motors Corp., 427 F. Supp. 234 (E.D. Pa. 1977) (noting that a conscious design choice involves a trade-off among safey, utility, and cost).

9. Seattle-First Nat'l Bank v. Tabert, 86 Wn. 2d 145, 148, 542 P.2d 774, 775–76 (1975).

10. A manufacturer does not exercise due care if he has knowledge of the defective nature of the product, yet sells it anyway. In strict liability, knowledge of the harmful condition (scienter) is imputed to the manufacturer. Wade, *On the Nature of Strict Tort Liability for Products*, *supra* note 4, at 834; *see, e.g.*, Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974). For a criticism of strict liability, see *infra* note 26.

11. Seattle-First Nat'l Bank v. Tabert, 86 Wn. 2d 145, 154, 542 P.2d 774, 779 (1975).

12. *Id.*; *see also* Wash. Pattern Jury Instruction (civil) 110.01.

13. 86 Wn. 2d at 154, 542 P.2d at 779.

nature of the product or the nature of the claimed defect may make other factors relevant to the issue."[14]

II. THE *LENHARDT* DECISION

The plaintiff, Lenhardt, left the motor running in his Ford van and was injured when he tried to stop the runaway van after it slipped from park into reverse. Lenhardt sued the Ford Motor Company for defective design in the transmission system. Ford attempted to introduce evidence of the custom of the industry as to transmission design. The majority defined industry custom as "a practice or custom regarding a particular design or manufacturing technique used by most manufacturers in that industry."[15] The majority held that this type of evidence is not always relevant to the reasonable expectations of the ordinary consumer.[16]

The majority concluded that a defendant should not be permitted to introduce evidence of industry custom unless the plaintiff presents evidence that puts the custom of the industry or the feasibility of the alternative design in issue.[17] Justices Dimmick and Dolliver dissented, stating that the degree of safety that a consumer can expect is inherently a reasonableness determination, which requires the trier of fact to balance the benefit of the defendant's actions against the foreseeable harm arising from these actions. The dissenters concluded that industry custom is relevant to the assessment of the relative harms and benefits of a product's design.[18]

III. DISCUSSION

The central issue in this case involves the orientation of the trier of fact. Under the Washington consumer expectation test, the question for the jury in the *Lenhardt* case could be framed as "whether an ordinary consumer would reasonably expect a running car to slip from park to reverse?" The majority reasoned that evidence of industry custom (which might show that vans of other manufacturers also slip from park to reverse) would shift the jury's focus from the consumer's expectations to the manufacturer's actions.[19] A focus on the reasonableness of the

14. *Id.*

15. Lenhardt v. Ford Motor Co., 102 Wn. 2d 208, 210, 683 P.2d 1097, 1099 (1984). The Washington court distinguished evidence of industry custom from state of the art evidence. It defined the latter as "the technological feasibility of alternative safer design in existence at the time the product was originally manufactured."

16. *Id.* at 209, 683 P.2d at 1098.

17. *Id.* at 213, 683 P.2d at 1100.

18. *Id.* at 215, 683 P.2d at 1101 (Dimmick, J., dissenting).

19. 102 Wn. 2d 208, 212, 683 P.2d 1097, 1100.

manufacturer's actions is appropriate in a negligence action, but not a strict liability action.[20] The court therefore concluded that admissible evidence must be probative of the condition of the product, not the reasonableness of the manufacturer's conduct.[21] The majority's position is consistent with strict liability theory in Washington.[22]

The dissent's position is that the difference in orientation (consumer's expectation versus manufacturer's actions) is not significant enough to warrant exclusion of the evidence[23] because in both negligence and strict liability actions the jury considers the same factors in determining liability.[24] In both causes of action the jury balances the risk of the product against its utility. Because evidence of industry custom is admissible in negligence actions,[25] the dissent would allow the trial court to admit it in strict liability cases.

The dissent is implicitly questioning the content and distinctivenesss of strict liability theory in general by stating that because the degree of safety expected by a consumer is inherently a reasonableness determination, it is comparable to negligence analysis.[26] One way of maintaining

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20. *Id.*

21. *Id.*

22. *See generally* Seattle-First Nat'l Bank v. Tabert, 86 Wn. 2d 145, 542 P.2d 774 (1975); Ulmer v. Ford Motor Co., 75 Wn. 2d 522, 452 P.2d 729 (1969).

23. However, the dissent stated that conformity with industry custom should not be a conclusive defense. *Lenhardt*, 102 Wn. 2d at 218, 683 P.2d at 1103; *see also* Olson v. A.W. Chesterton Co., 256 N.W.2d 530 (N.D. 1977) (conformity with industry-wide practices will not protect a manufacturer from liability). Instead, this type of conformity is treated as one factor in the balancing process. Additionally, the dissent stated that the relevance of industry custom should not depend on the plaintiff's tactical decision to raise the feasibility of an alternative design.

24. *Accord* Raney v. Honeywell, Inc., 540 F.2d 932, 935 (8th Cir. 1976) (strict liability "requires a balancing of the probability and seriousness of harm against the cost of taking precautions." The trier of fact may consider factors similar to those considered in Washington strict liability cases.); Raleigh, *The "State Of The Art" In Product Liability: A New Look At An Old "Defense,"* 4 OHIO N.U.L. REV 249, 252 (1977) (regular industry practice should create a strong presumption of sound design in design defect cases). *But see* J. BEASLEY, PRODUCT LIABILITY & THE UNREASONABLY DANGEROUS REQUIREMENT 393 (1981) (industry standards are "dictated by self-interest and reflect an indisposition to spend sufficient resources to reduce hazards or to eliminate slothful quality control").

25. Hayson v. Coleman Lantern, 89 Wn. 2d 474, 487, 573 P.2d 785, 792 (1978) (evidence of a general industry standard or custom is relevant to show negligence, in this case defective labeling, although evidence of the practices of a single other business or person is inadmissible); *see generally* Meyers v. Meyers, 81 Wn. 2d 533, 503 P.2d 59 (1972) (practices of other notaries are probative of whether the procedures used by the plaintiff are reasonable, but mere conformity with custom is not necessarily to be equated with the exercise of reasonable care, because the custom of the industry itself may not meet the "reasonable man" standard).

26. *See also* Garrison v. Rohm & Haas Co., 492 F.2d 346, 351 (6th Cir. 1974) (quoting Jones v. Hutchinson Mfg., 502 S.W.2d 66 (Ky. 1943)) (the distinction between the so-called strict liability principle and negligence is of no practical significance so far as the standard of conduct required of the defendant is concerned); Balido v. Improved Mach. Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973) (holding that negligence and strict liability are essentially the same in design defect cases); Ulrich v. Kasco Abrasives Co., 532 S.W.2d 197, 200 (Ky. 1976) (a degree of kinship exists

the subtle distinction between the reasonable consumer's expectations and the reasonable manufacturer's actions is to disallow evidence of industry custom in strict liability cases. Evidence as to what other manufacturers are doing is not probative of the defectiveness of the product in question in the sense that the ordinary consumer could expect a degree of safety that no manufacturer has attained.[27] As long as the policy of Washington is to have a strict liability cause of action, this distinction should be maintained.

The Washington court has not yet dealt with the admissibility of state of the art evidence (technological and scientific feasibility) in strict product liability actions.[28] This type of evidence should be admissible because it is clearly relevant to the feasibility factor in the balancing test used to determine reasonable consumer expectations. Defendant manufacturers may wish to introduce evidence of industry custom to show the technological feasibility of a product, but this back door approach should not be allowed.[29]

As a practical matter, a plaintiff in a product liability action will often introduce evidence on five different theories of liability: breach of express warranty, breach of implied warranty, misrepresentation, negligence, and strict liablity.[30] The evidence of industry custom will be relevant and admissible in the negligence action; hence, the trier of fact will be exposed to it. Despite this practical problem, there is a difference between state of the art evidence and evidence of industry custom. This distinction should

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between strict liability and negligence when "unreasonably dangerous" language is used); Jones v. White Motor Corp., 61 Ohio App. 2d 162, 401 N.E.2d 223 (1978); Phillips v. Kimwood Mach. Co., 269 Or. 581, 525 P.2d 1033, 1039 (1974) ("whether the doctrine of negligence, ultrahazardousness, or strict liability is being used to impose liability, the same process is going on in each instance"); Rheingold, *Proof of Defect in Product Liability Cases*, 38 TENN. L. REV. 325, 326 n.6 (1971) ("Also, there is virtually no difference between a traditional res ipsa loquitur negligence case and the modern strict liability case where there is an obvious flaw in construction and the proof of defect is circumstantial.").

27. *Lenhardt*, 102 Wn. 2d at 218, 638 P.2d at 1103 (Dimmick, J., dissenting).

28. *See* Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973) (Strict liability and negligence merge in design defect cases because the unreasonableness of the danger must necessarily be derived from the state of the art at the time of the design. The court reasoned that a danger is unreasonable when it is foreseeable. An unforeseeable danger would therefore not be unreasonable, and would not be subject to action in strict liability theory.); Raleigh, *supra* note 24, at 252 (the manufacturer is not required to design the safest possible product and the law is topsy-turvy when a manufacturer is unable to decide before a product is made whether it will meet the appropriate standards).

29. Defendant could introduce evidence of technological feasibility by expert testimony instead of by state of the art evidence.

30. H. MCGOUGH, III WASHINGTON COMMERCIAL DESKBOOK. 31–32 (1982).

be recognized and maintained in the strict liability context through the use of a limiting instruction.

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