**07.03 DEFECTIVENESS DEFINED**

A product is defective if:

(1) the product differed from the manufacturer's intended result; or the product differed from other units of the same product line; or

(2) the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner; or

(3) if the use of the product in a manner that is reasonably foreseeable by the defendant involves a substantial danger that would not be readily recognized by the ordinary user of the product and the manufacturer fails to give adequate warning of such danger. An adequate warning is a warning that clearly indicates the scope of the risk or danger posed by the product, reasonably communicates the extent or seriousness of harm that could result from the risk or danger, and is conveyed in a manner that would alert a reasonably prudent person; or

(4)(A) the plaintiff proves that the product's design legally caused injury, and

 (B) the defendant fails to prove, in light of the relevant factors, that, on balance, the benefits of the design outweigh the risk of danger inherent in such design.

In determining (B), you may consider, among other things:

(a) the gravity of the danger posed by the challenged design;

(b) the likelihood that such danger would occur;

(c) the adverse consequences to the product and to the user that would result from an alternative design;

(d) the mechanical feasibility of a safer alternative design; and

(e) the financial cost of an improved design.

In considering the mechanical feasibility and financial cost of other designs, you may consider how other manufacturers design similar products.

Use Note

Use all or part of this instruction after Instruction 07.01 and 07.02. Dependent on the evidence, the plaintiff may propose one or more of the definitions of defect set out in paragraphs (1)-(4). Heritage v. Pioneer Brokerage & Sales, 604 P.2d 1059, 1062 n.5 (Alaska 1979). The instruction sets out these definitions without identifying each as a manufacturing, design or warning defect. This is consistent with the Supreme Court's recognition that the categories of "defect" may overlap, and that rigid delineation is neither necessary nor desirable. Colt Industries Operating Corp. v. Frank W. Murphy Manufacturer, Inc., 822 P.2d 925 (Alaska 1991).

Paragraph (1) should be used in cases where manufacturing defect is at issue. Paragraph (2) sets forth the consumer expectations test.This test has been directly held appropriate in design cases. Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 886 (Alaska 1979). It has also been used in cases where both defect in manufacture and design were at issue. Lamer v. McKee Industries, Inc., 721 P.2d 611, 613 (Alaska 1986). The Alaska Supreme Court has not expressly held that the consumer expectation test is appropriate where only manufacturing defects are at issue.

Paragraph (3) establishes the test where failure to warn is at issue. Prince v. Parachutes, Inc., 685 P.2d 83 (Alaska 1984). The factors determining the adequacy of warnings are stated in Shanks v. Upjohn Co., 835 P.2d 1189 (Alaska 1992).

Paragraph (4) is appropriate to the issue of design defect. Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 886 (Alaska 1979).

In appropriate cases, Instruction 07.03(A) concerning scientific unknowability should be used with 07.03. It is clear that scientific unknowability of the danger defeats liability under Paragraphs (3) and (4) of 07.03. See Heritage v. Pioneer Brokerage & Sales, Inc., 604 P.2d 1059, 1063-64 (Alaska 1979), in which scientific unknowability was held to be relevant to Paragraph (4) of 07.03, and Shanks v. Upjohn Co., 835 P.2d 1189 (Alaska 1992)(scientific unknowability is a defense to strict liability for failure to warn).

The Alaska Supreme Court has not expressly held that scientific unknowability is a defense to liability under paragraph (2), the consumer expectations test. In Caterpillar Tractor Co. v. Beck, 624 P.2d 790, 792 (Alaska 1981) (Beck II), the sole allegation of defect was based on the theory set forth in Paragraph (4) of 07.30. However, in addressing the issue of scientific unknowability, the Alaska Supreme Court treated the issue as a defense to strict liability generally.

This instruction should not be used in cases involving claims for strict liability relating to prescription drugs. See Shanks v. Upjohn Co., 835 P.2d 1189 (Alaska 1992)(describing alternative tests that must be used in prescription drug cases),

In the event that evidence of customs or practices followed by other manufacturers in the industry is admitted for some purpose other than to demonstrate the mechanical feasibility or financial cost of alternative designs, the final sentence of the instruction must be modified to refer to the purposes for which the evidence has been admitted.

Comment

The Alaska Supreme Court once stated that in many cases, the instruction approved in Clary v. Fifth Avenue Chrysler Center, Inc., 454 P.2d 244, 245 (Alaska 1969), is adequate. See Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 886 (Alaska 1979). In Clary the court instructed that a manufacturer (seller) is strictly liable when an article he places on the market proves to have a defect that causes an injury to a human being. However, in those cases where the meaning of "defect" will be unduly vague, particularly in design defect cases, the trial court may give instructions which define the legal concept of "defect." Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 886 (Alaska 1979). This approach is followed here.

Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979) (Beck I), follows Barker v. Lull Engineering Co., Inc., 573 P.2d 443, 454 (California 1979). Barker notes that manufacturing defect can be proved by divergence from the manufacturer's intended results or from other ostensible identical units of the same product line. These are two separate tests, one depending upon proof of the manufacturer's intended result through establishing his design or manufacturing specifications. The second method allows proof of defect simply by comparing the instant product to other units of the same model. This deviation from the norm test provides a simple, inexpensive and easily understood method for proving manufacturing defect. The test has been recognized as reliable in manufacturing defect cases. Beck I, 593 P.2d at 881.

Consumer expectations, while not the exclusive test, has been recognized as a valid test in Caterpillar Tractor Co. v. Beck, 593 P.2d 871 at 882, n.35 (Beck I). Consumer expectations are evaluated objectively, not by the subjective expectations of the plaintiff. Keogh v. W.R. Grasle Inc., 816 P.2d 1343 (Alaska 1991). By its terms the consumer expectations test obviates any requirement on the part of the plaintiff to categorize the defect between manufacturing, design, or warning defects or defects in rented goods arising out of proof maintenance such as the muffler in Bachner. The second prong of the Barker-Beck test of design defect appears as Paragraph (4).

In Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 887 (Alaska 1979), the court held that state of the art or conformance to industry-wide practices will not protect a manufacturer from liability. However, evidence of industry custom and state of the art may be considered in a product liability case if the evidence is relevant to a material issue in the case. Keogh v. W.R. Grasle Inc., 816 P.2d 1343, 1349 & n.12 (Alaska 1991).

Consistent with the general rule, when the court determines that no jury question is presented on the issue of whether the benefits of a design outweigh the risk of danger inherent in the design, refusal to give the second part of the second prong of the Barker test (here, paragraph 3(B)) is proper. Sturm, Ruger & Co., Inc. v. Day, 594 P.2d 38, 45-46 (Alaska 1979).

While the plaintiff could not or would not want to rely upon all tests in all cases, it is plaintiff's option, within reasonable limits, to choose the tests upon which plaintiff wishes to proceed before the jury. Because it is plaintiff's burden to prove defect, plaintiff can prove it however plaintiff wants, subject to the requirement that sufficient evidence support whichever test or tests the plaintiff chooses. Heritage v. Pioneer Brokerage & Sales, 604 P.2d 1059, 1062, n.5 (Alaska 1979).

No effort has been made to interject the terms "manufacturing" and "design" in the tests for defect. Beck I recognized that manufacturing and design defects are not mutually exclusive. Notably, the consumer expectations test can apply to defects from either cause or both. By eliminating the unnecessary intermediate definitional step, the various tests for defect can be combined in one instruction greatly simplifying the matter for the jury.

The same is true of defects arising from failure to warn appearing in Paragraph (3). Warning defects may arise in conjunction with other types of defects. In that event, the test for defective failure to warn is combined on one instruction with the other appropriate defect tests. This again simplifies jury understanding.