**07.03A SCIENTIFIC UNKNOWABILITY**

A product is not defective under paragraphs 2, 3 or 4 of the preceding instruction with regard to any particular danger if the defendant proves it is more likely true than not true that that particular danger was not scientifically knowable when the product left the defendant's possession.

Use Note

This instruction should follow 07.03 when scientific unknowability is in issue. As explained in the Use Note to 07.03, the supreme court has not expressly applied the defense of scientific unknowability to design defects established by Paragraph (2) of 07.03 (the consumer expectations test). See Heritage v. Pioneer Brokerage & Sales, Inc., 604 P.2d 1059, 1063-64 (Alaska 1979); Caterpillar Tractor Co. v. Beck, 624 P.2d 790, 792 (Alaska 1981) (Beck II).

If the trial court rules that the defense of scientific unknowability does not apply to design defects proved by the consumer expectations test, the reference to paragraph 2 in the instruction should be omitted. Also, if failure to warn is not in issue, the reference to paragraph 3 should be omitted.

Comment

In Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979), the Alaska Supreme Court adopted a two-pronged test for defectively designed products. Quoting Barker v. Lull Engineering Co., Inc., 20 Cal. 3d 413, 431, 143 Cal. Rptr. 225, 237, 573 P.2d 443, 455 (1978), the supreme court held that the fact-finder, in deciding the risk/benefit question (in the second definition of a design defect), must:

consider and compare a number of competing factors, including but not limited to, "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, the adverse consequences to the product and to the consumer that would result from an alternative design."

Caterpillar Tractor Co. v. Beck, 593 P.2d at 885-86.

In Heritage v. Pioneer Brokerage & Sales, Inc., 604 P.2d 1059 (Alaska 1979) the court approved consideration of the "scientific knowability" of the danger inherent in the product. The court has indicated in a second prong design defect case that scientific unknowability is a defense. Beck II, 624 P.2d at 793 n.4. Scientific unknowability is also a defense in a failure to warn case. See Shanks v. Upjohn Co., 835 P.2d 1189 (Alaska 1992).