

Bifolck v. Philip Morris, Inc. (SC 19310)

Brief Summary: Plaintiff, the executor of his wife's estate, sought damages from the defendant alleging that the cigarettes manufactured by the defendant were defectively designed and this defective design was responsible for the decedent's cancer and death. The court declined to adopt the Restatement (Third) standard in favor of the dual tests based on § 402A of the Restatement (Second) of Torts. Further, it held that although all product liability claims require proof of a defective condition unreasonably dangerous to the user or consumer, unreasonably dangerous is not determined by consumer expectations under comment (i) to § 402A when such a claim is brought under a theory of negligence. Lastly, it held that statutory punitive damages are not measured by Connecticut's common-law punitive damages rule.

The plaintiff, Vincent Bifolck, as executor of the estate of his wife, Jeanette D. Bifolck (decedent), commenced an action in the District Court against the defendant, Philip Morris, Inc., after the decedent died of lung cancer at the age of forty-two. The plaintiff alleged that the cigarettes manufactured by the defendant were defectively designed and this defective design was responsible for the decedent's cancer and death. One count asserted a product liability claim but set forth separate allegations in support of theories of strict liability and negligence. For strict liability, the plaintiff alleged the cigarettes were defective and unreasonably dangerous in that their design rendered the cigarettes unnecessarily addictive and unnecessarily carcinogenic. For negligence, the plaintiff alleged that the defendant failed to conform to the standard of care by knowingly designing cigarettes in a manner that enhanced their addictive and cancer causing nature and by failing to reduce the cigarettes' addictive, toxic and cancer causing ingredients.

While the case was ongoing, judgment was rendered in a case with similar allegations, *Izzarelli v. R.J. Reynolds Tobacco Co.* The Second Circuit in *Izzarelli* certified a question to the

Supreme Court of Connecticut and the trial in the present case was postponed to await the court's response. In the intervening period the District Court certified two additional questions to the Supreme court: (1) Does § 402A of the Restatement (Second) of Torts (and comment i to that provision) apply to a product liability claim for negligence? And (2) Does Connecticut's rule of punitive damages articulated in *Waterbury* apply to an award of statutory punitive damages, pursuant to General Statutes § 52-240b? A concurring Justice in *Izzarelli* argued that the court should adopt and apply to the first question the standards for design defects under the Restatement (Third) of torts. In light on all this, the court issued an order to the parties in this case to submit briefs on the following question: (1) whether, for product liability actions premised on design defects, the court should abandon the ordinary consumer expectation test/modified consumer expectation test and adopt §§ 1, 2 (b) and 4 of the Restatement (Third), with or without the associated commentary? The court declined to adopt the Restatement (Third) standard and held that § 402A of the Restatement (Second) of Torts does not apply to a product liability claim for negligence and that the common law punitive damages rule does not apply to an award of statutory punitive damages.

Connecticut applies a strict liability standard for product liability actions under § 402A of the Restatement (Second), under which a plaintiff need not establish the manufacturer's fault. Under this standard a manufacturer or seller may be held liable if the product is unreasonably dangerous. There are two tests to determine whether a product is unreasonably dangerous. The primary test is the modified consumer expectation test. Under this test, a product is unreasonably dangerous if a reasonable, informed consumer would conclude that its risks outweigh its utility—there are several factors the court considers when determining this. The ordinary consumer expectation test is reserved for cases where the product failed to meet the consumers' legitimate,

commonly accepted, minimum safety expectation. With this test the defect is so obvious that expert testimony is not needed to establish it and the utility of the product is not an excuse for the undisclosed defect. Simply, the unreasonably dangerous element is determined by minimum safety expectations in one test, and by balancing risks and utility in the other.

Unlike § 402A's unreasonably dangerous standard, which applies to any type of product defect, § 2 of the Restatement (Third) prescribes different standards for each of the three categories of product defects—design defects, manufacturing defects and defects due to inadequate instructions/warnings. A product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by adopting a reasonable alternative design. Further, this standard adopts a risk-utility balancing test to judge defectiveness. Section 2 (b) imposes two requirements that are not mandated under the § 402A tests: (1) proof that the harm was foreseeable; and (2) proof that a reasonable alternative design existed that would have reduced or avoided the danger.

The court declined to adopt the Restatement (Third) standard. First, the court noted that Connecticut has followed the § 402A standard for over five decades and no case has demonstrated that juries have difficulty applying the law or that its yielded bizarre results. Second, there is no indication that any action has been undertaken to change the current dual test rule. Third, other jurisdictions apply a similar standard and the most recent jurisdictions that considered this issue declined to adopt the Restatement (Third) standard. Fourth, the court was concerned that the reasonable alternative design requirement in the new standard precludes valid claims for products with no alternative design. This was concerning because as long as a product has some appreciable utility, the plaintiff has to prove that a reasonable alternative design was available. Thus, the court noted such a rule would immunize certain classes of products, like

novel products for which there is no alternative design. For these reasons, the court declined to adopt the Restatement (Third) standard for product liability claims.

Prior to moving onto the certified questions, the court clarified the rules regarding § 402A. To distinguish the tests the court opted to call them the consumer expectation test and the risk-utility test. The court added a requirement that the plaintiff put the defendant on notice, whether the product is claimed to be unreasonably dangerous because a reasonable alternative could have reduced the danger or because the risks outweigh the utility. The court also clarified each test. Under the risk utility test, a product is in a defective condition unreasonably dangerous to the consumer if: (1) a reasonable alternative design was available that would have avoided or reduced the risk of harm and the absence of that alternative design renders the product unreasonably dangerous or (2) the risk of harm so clearly exceeds the product's utility that a reasonable consumer, informed of those risks and utility, would not purchase the product. Under the consumer expectation test, a product is in a defective condition unreasonably dangerous to the consumer or user only if it is 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 product must fail to meet legitimate, commonly held, minimum safety expectations.

After clarifying § 402A the court considered whether comment (i) of it applies to a product liability claim for negligence. Comment (i)'s definition of unreasonably dangerous is limited to products that are 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 defendant argued that the "ordinary knowledge" definition of unreasonably dangerous applies to all product liability claims. The court rejected

this argument citing *Izzarelli*, which deemed the legislative intent behind the rule as not to preclude recovery due solely to the product's danger being open and obvious. The court supported this claim by noting that comparative and contributory negligence (which become relevant if a product's danger is open and obvious) were explicitly rejected by the legislature as a bar to recovery in a strict liability action. Thus, the court held that comment (i) to § 402A does not provide a unitary definition of unreasonably dangerous that governs all product liability claims and does not apply to negligence claims.

The court then addressed the final issue of whether Connecticut's common-law rule of punitive damages applies to statutorily punitive damages pursuant to § 52-240b. The court concluded that it does not. The common-law rule of punitive damages limits punitive damages to the expense of litigation less taxable costs. Section 52-240b provides: punitive damages may be awarded if the claimant proves that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers or others who were injured by the product. If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages not to exceed an amount equal to twice the damages awarded to the plaintiff. Under both punitive damages are awarded based on a reckless disregard of another's rights. However, the statutory damages are measured in relation to the compensatory damage, not litigation costs.

The court stated that if it were to construe the act to equate the statutory damages to litigation expenses, in some cases the statute would have no effect or frustrate the purpose of the common-law rule. If the litigation expenses are less than two times the damages the statute has no impact. Also, if the plaintiff's compensatory damages are low in comparison to their litigation costs, the cap limiting punitive damages to twice compensatory damages would frustrate the

purpose of common-law damages—to fully compensate the victim for the harm. Thus, the court concluded that statutory punitive damages are not measured by the common-law rule.

The concurrence agreed with the majority's answers to the two certified questions. However, Justice Zarella argued that Connecticut should adopt the approach used for design defect cases in §§ 1, 2 and 4 of the Restatement (Third) of Torts.

The dissent argued that the court must interpret the statute as incorporating the common-law limitation on punitive damages because the statute does not plainly and unambiguously abrogate the common-law rule.

The key takeaway from this case is the clarification of the rules surrounding product liability. The court clearly established the two tests that a plaintiff may use to demonstrate that a product is unreasonably dangerous and clarified that statutory punitive damages are not limited by the common-law rule. This is salient because it provides a clear framework of what a plaintiff must demonstrate to prevail on a product liability claim, thus, leading to more efficient litigation.