**07.02 LIABILITY FOR DEFECT IN A PRODUCT**

Plaintiff's [first] theory of recovery is that plaintiff was [injured] [damaged] by a defect in a product which the defendant [made] [sold] [rented to (insert lessee)]. In order to recover, plaintiff must establish that it is more likely true than not true:

(1) that the product was defective;

(2) the product was defective when it left the possession of the defendant; and

(3) a defect in the product was a legal cause of the [injury] [damage].

I will explain what "defect in the product" means and what "legal cause" means in a moment.

Use Note

This instruction is the introductory instruction for a cause of action in strict liability in tort. It should be used with Instruction 07.01. Instruction 07.03, which defines defect in a product, may need to be given also. Instruction 07.07 must be given to explain legal cause.

Comment

The Alaska Supreme Court adopted the strict liability in tort formulation of Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963), in Clary v. Fifth Avenue Chrysler Centers, Inc., 454 P.2d 244, 248 (Alaska 1969). Quoting Greenman, the court held:

The manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d at 62, 27 Cal. Rptr. at 700, 377 P.2d.

Clary v. Fifth Avenue Chrysler Centers, Inc., 454 P.2d at 247.

The Greenman approach requires that the plaintiff prove only that the product was defective and that the defect was a legal cause of the injuries. The plaintiff is not required to prove that the defect made the product "unreasonably dangerous" to the user or, that the plaintiff was not aware of the product's defect. See, Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209, 213-4 (Alaska 1975).

The need to focus on the product, to the exclusion of the plaintiff's conduct, in determining defect has been stressed in the Alaska cases. See, e.g., Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 46 (Alaska 1976) and Prince v. Parachutes, Inc., 685 P.2d 83, 87-88 (Alaska 1984).

The requirement that a product be defective when it leaves the possession of the defendant is based on the court's decision in Bachner v. Pearson, 479 P.2d 319, 326 (Alaska 1970), where it held that a defendant was strictly liable for the injuries sustained by the plaintiffs when it was established that a defect existed, that the defect existed at the time the article left the possession of the defendant, and that the existence of the defect caused that injuries to occur. This element was reaffirmed in Hiller v. Kawasaki Motors Corp., U.S.A., 671 P.2d 369 (Alaska 1983). However, in design defect cases and some manufacturing defect cases, it is not in issue.

The Alaska Supreme Court has applied strict liability in tort against manufacturers, Clary v. Fifth Avenue Chrysler Centers, Inc., 454 P.2d 244 (Alaska 1969), retailers, Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209 (Alaska 1975), commercial lessors, Bachner v. Pearson, 479 P.2d 319 (Alaska 1970), and sellers of "used" goods in limited circumstances where the seller has done remanufacturing or extensive repairs. Kodiak Electric Association v. DeLaval Turbine, Inc., 694 P.2d 150 (Alaska 1984) and cases cited therein.

The use of an instruction which expresses that the defendant is liable without regard to "fault" was approved in Strum, Ruger & Co., v. Day, 594 P.2d 38, 42 n.2 (Alaska 1979). The pattern instruction does not use the language "strict liability" as it may confuse the jury and only can be defined in relationship to other legal doctrines unknown to the jurors. The essence of "strict liability" is captured in the instruction as to the elements of plaintiff's case.

Alaska law does not generally require that at the time of injury plaintiff was using the defective product in a reasonably foreseeable manner. But, plaintiff's use must have been foreseeable to establish defect, in the first instance, under the consumer expectations prong of the Barker-Beck test of design defect and the test for defect in failure to warn. See Lamer v. McKee Industries, Inc., 721 P.2d 611 (Alaska 1986); Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (AK 1979) (Beck I); Barker v. Lull Engineering Company, Inc., 20 Cal. 3d 413, 426-27, 143 Cal. Rptr. 225, 234, 573 P.2d 443, 452 (1978); Prince v. Parachutes, Inc., 685 P.2d 83 (Alaska 1984); and Ross Laboratories v. Thies, No. 3125 (Alaska October 3, 1986). However, it is the use, not the plaintiff's knowledge, which is relevant to this prong of the design defect test. Lamer v. McKee Industries, Inc., 721 P.2d 611 (Alaska 1986) and Prince v. Parachutes, Inc., 685 P.2d 83 (Alaska 1984).

Under the second prong of the Barker-Beck test of design defect, the plaintiff need only show that his injury was legally caused by the product's design and the burden of proof switches to the defendant to show that the benefits of the design exceeded the risks. Caterpillar Tractor Co. v. Beck, 593 P.2d 781, 885-86 (Alaska 1979). No reference is made to the nature of the plaintiff's use of the product. Likewise, the plaintiff's use is irrelevant to the determination of manufacturing defect.

The determination of defect in warning cases is made without regard to the plaintiff's knowledge. Prince v. Parachutes, Inc., 685 P.2d 83 (Alaska 1984); Ross Laboratories v. Thies, No. 3125 (Alaska, October 3, 1986). But, the use must have been foreseeable.