

Allen v. Minnstar: Strict Liability's Quiet Assassin?

By Jeffrey D. Eisenberg

It used to be that in Utah federal courts a plaintiff suing a product manufacturer for injuries caused by a faulty product design did not have to prove that a safer design was available at the time the defendant's product was sold. This is no longer true. Over the last five years, several tenth Circuit cases purporting to "interpret" Utah law now require a plaintiff to establish the availability of a safer design as part of the plaintiff's *prima facie* case. There is, however, no Utah state appellate law supporting this position, and the Tenth Circuit's position is arguably at odds with the Utah Product Liability Act. My purpose here is to review these changes, put them in their historical perspective and explain why the Utah Supreme Court should reject the Tenth Circuit's position.

At the root of the debate is the question: how "strict" should strict liability be when it comes to proving the manufacturer's liability for an allegedly faulty product design?

Way back in ancient history, before the Contract with America and before Jazz playoff tickets cost more than a college education, strict liability was a popular legal doctrine. In the early 1980's the Restatement 2d of Torts adopted Section 402A. That section provides that a manufacturer of a defectively-designed product which causes injury is liable to the injured user even if "the seller has exercised all possible care in the preparation and sale of the product." This was a revolutionary change in the law. The drafters of the Restatement 2d reasoned that the manufacturer who profits from the sale of the product is normally in a better position than the injured victim to pay for the cost of injuries resulting from the product's hazard, at least when the product is used in a normal and proper way. The drafters of the Restatement 2d also predicted that imposing strict liability on product manufacturers would motivate manufacturers to work harder to design better and safer products.

Of course, the drafters of the Restatement 2d were right about this. The evidence is all around us. For instance, compare the interior crashworthiness of a 1985 station wagon with your family's current minivan. Which would you rather put your kid in?

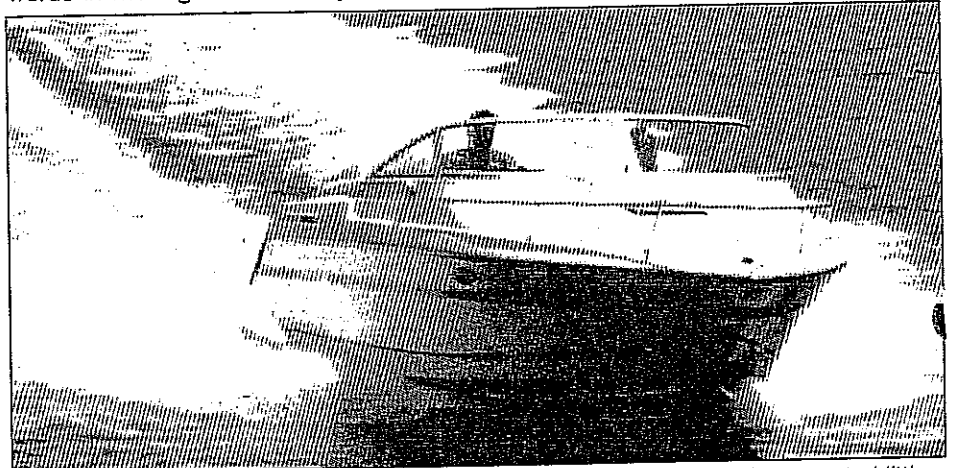
Nevertheless, strict liability has been

an expensive proposition for product manufacturers. Not so much because of the direct cost of product liability suits (contrary to widely espoused propaganda), but because safety design and engineering is an expensive and time-consuming process. Therefore, to no one's surprise, soon after the advent of Section 402A product manufacturers began mounting a campaign against strict product liability. In recent years, with the conservative bent of the federal courts, this campaign has started to bear fruit.

Regrettably the drafters of Section 402A used an unfortunate choice of words in naming the tort. They called it

questionable whether, as a matter of good public policy, the state of the art defense even if proven should excuse a manufacturer from liability. If a product is unreasonably dangerous, shouldn't the manufacturer either develop the technology to make it safer or withdraw the product from the marketplace?

Not very long ago, this was actually the prevailing view. According to the authors of a leading product liability treatise published in 1989, "The vast majority of courts recognize(d) the imposition of strict liability on manufacturers regardless of the 'state of the art' at the time the product was designed." *Frumer & Friedman*,



The Minnstar case involved a serious injury on a boating excursion. It generated little publicity when handed down in 1993.

"strict liability." In today's world, where the President of the United States can be excused for serious "moral lapses" if (but only if) there are no lapses in the U.S. economy, most people don't want the law to be too "strict" on businesses. Even though "strict liability" has never imposed absolute liability on product manufacturers, the idea of holding product manufacturers responsible for injuries caused by their products has become increasingly unpopular in the federal courts.

One inroad against a manufacturer's strict liability has been the "state of the art" defense which reasons that a manufacturer should not be liable if its product is dangerous but is the best technology available at the time of sale. The defense is arguably inconsistent with the legal standard of strict liability outlined in Section 402A which imposes liability even if "the seller has exercised all possible care in the preparation and sale of the product." Moreover, it is

PRODUCTS LIABILITY 2.26(8) at 2-1673 to -1674 (1989).

Frumer & Friedman noted that some states allowed the state of the art defense to be considered. *Id* at 2-1678 and -1679. These courts reasoned that the state of the art in the industry was relevant to the question of whether the product was unreasonably dangerous. However, nearly all cases allowing the state of the art evidence held that it was the manufacturer's affirmative defense and not a necessary element of the plaintiff's *prima facie* claim. Moreover, nearly all cases allowing the defense held that even if the manufacturer proved that its product conformed to the state of the art, the jury could still find for the plaintiff. These courts reasoned that state of the art evidence was only one factor for the jury to consider in determining whether the product was defective and unreasonably dangerous.

Allen v. Minnstar, Inc. 8 F.3d 1470 (10th Cir. 1993) changed all that.

Perhaps you have never heard of the case. It generated relatively little attention when it was handed down nearly five years ago. It has yet to be adopted (or for that matter rejected) by Utah appellate courts, but it has been followed in the Tenth Circuit and the U.S. District Court for the District of Utah. It changes and increases what the plaintiff must prove to win a design defect case. Its precise legal implications are not clear, but manufacturers are now using the decision to argue that a plaintiff's product design case fails as a matter of law unless the plaintiff can prove that a safer alternative design was available in the marketplace at the time the defendant manufactured its unsafe product. This interpretation overstates what the court intended in *Minnstar* and would have disastrous anti-consumer implications. If *Allen* is stretched to this extent and becomes the law in Utah and elsewhere, it will stifle the motivation of product manufacturers to design for safety as well as profit.

In *Minnstar*, the plaintiff was injured when he fell into the water during a boating excursion and his leg was severely mangled by the boat's propeller. The plaintiff argued that the boat should have been designed with a guard to shield the propeller blades. The plaintiff's expert testified that such guards were technologically feasible as of the time of trial. However, he expressed no opinion concerning whether the propeller guard was within the "state of the art" when the boat was sold in 1977.

The manufacturer moved for summary judgment, arguing that it should not be liable because the plaintiff had failed to prove that it was feasible to eliminate the hazard at the time the boat was manufactured. Judge Sam granted the defendant's summary judgment motion, and the Tenth Circuit affirmed. The Tenth Circuit stated, "Now in making our best effort to ascertain and apply Utah law, we conclude that the District Court did not err in holding that the plaintiff did bear the burden of showing that an alternative, safer design, practicable under the circumstances, was available at the

time the boat and engine were sold." 8 F.3d at 1479. Unfortunately, in attempting to "ascertain" Utah law, the Tenth Circuit cited no Utah case authority to support its position.

Arguably, *Minnstar* misinterpreted Utah law. Utah adopted Section 402A of the Restatement 2d of Torts in *Ernest W. Hahn, Inc. vs. Armco Steel Co.*, 601 P.2d 152 (Utah 1979). The court in that case also recognized two defenses to strict product liability: product misuse and assumption of risk. 601 P.2d at 158. Subsequent cases have reaffirmed that Section 402A is the law in Utah. See, e.g. *House v. Armours of Am., Inc.* 929 P.2d 340, 343 (Utah 1996). Although those cases have shown some willingness to recognize other defenses to a strict products liability claim, see *id.* at 343-56 (finding that fact issues precluded an "open and obvious danger" defense and a "sophisticated user" defense in a defective warning case), the court has never expressly adopted the "state of the art" defense.

The Utah Product Liability Act, UTAH CODE ANN. 78-15-1 through -6 (1996) does not directly address state of the art evidence either, but it seems consistent with cases allowing the trier of fact to consider the evidence as one factor in determining whether a product was defective but not dispositive by itself. Section 78-15-6 of the act provides that even when the product conforms with legally imposed governmental safety standards the manufacturer is entitled only to a rebuttal presumption that his product is not defective.

Questions still remain after *Minnstar*. Suppose, for instance that the plaintiff's expert testified that at the time the defendant's product was manufactured, technology was available from other industries which easily could have been adapted to make the defendant's product safer. Suppose, however, that the plaintiff's expert is unable to present evidence that there were any competitor's products in the marketplace on the date of manufacture actually using the suggested safety improvement. On the basis of this testimony, is a plaintiff entitled to present his claims to a jury under *Minnstar*? The answer is probably yes, but it is not completely clear. *Minnstar* does not clearly answer the question of exactly what a plaintiff must prove to get a jury in a design defect case. However, footnote 9 of *Minnstar* suggests that the plaintiff's expert must at a minimum present evidence of "an alternative which was technically feasible and practicable in terms of cost in the overall design and operation of the product." 8 F.3d at 1480. In *Minnstar*, the court clearly stated that the relevant time frame is the date of the manufacture, not the date of injury or of trial.

Minnstar has been followed in *Staley v. Bridgestone, Firestone, Inc.*, 106 F.3d 1504 (10th Cir. 1997) (interpreting Colorado law) and in *English v. Suzuki Motor Co.*, 120 F.3d 270, 1997 WL 428565 (10th Cir. 1998, unpublished disposition). In the *English* case, the 10th Circuit reviewed a decision from Magistrate Judge Ronald Boyce of the District of Utah. The plaintiff in that case claimed that an ATV was defectively designed because it was not equipped with a rollover protection system. Magistrate Judge Boyce found that the testimony of plaintiff's expert was "merely theoretical" and that the expert had presented no competent evidence that his rollover protection system could actually have been adapted for a production ATV. The Tenth Circuit upheld a summary judgment for the manufacturer because there was no evidence of an alternative feasible design "capable of being adapted in the ATV market." This language suggests that it is enough if the plaintiff's expert can prove that it was technologically and economically feasible to adapt an

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engineering design used in another industry or product to make the defendant's product safer.

Product manufacturers and their attorneys are not satisfied with this interpretation of *Minnstar*. In recent years, they have argued that under *Minnstar* and its progeny it is not enough to simply prove that an alternative design was technologically feasible and could have been implemented in a cost-effective manner. Stretching *Minnstar* to its extreme, defendants have argued that *Minnstar* requires the plaintiff to show that a safer alternative design was already in the marketplace at the time a defendant's product was manufactured.

This interpretation of *Minnstar* could have disastrous implications. Product manufacturers would be encouraged to avoid developing new safety innovations. Why? Because as long as no manufacturer develops a safer product, all manufacturers are immune from design defect claims. This gives manufacturers a tremendous incentive to act together. If no manufacturer ever acts alone, then no injured plaintiff can point to a competitor's safer design to support his or her product liability claim. If no manufacturer acts alone, then all manufacturers can claim that their product conformed to the "state of the art." But if no manufacturer acts alone, the industry safety effort is stifled, and product users will continue to be injured.

Could this really happen, or is the idea of a cartel and collusion between product manufacturers a mere figment of a paranoid lawyer's imagination? Consider the case of *Johnson vs. Bradford White*, a case I recently

handled in the Utah federal court, and you will see how real this danger is.

In *Johnson vs. Bradford White*, my client was terribly burned when vapors from a can of contact cement he was using were drawn into a Bradford White heater and were explosively ignited by the water heater's pilot light. The defect in the water heater was that it required outside air for its gas burner and sucked in the air from ground level, like a silent vacuum cleaner. Flammable vapors are heavier than air and can migrate great

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distances along the ground, and water heaters are often stored in basements and garages where flammable fluids are often used or stored. As a result, the current gas water heater design used by all water heater manufacturers today, including Bradford White, has taken a tragic toll on human health and life. In 1993, the Consumer Product Safety Commission concluded that at least 300 persons per year are severely burned or killed when flammable vapors are drawn into pilot lights and explosively ignited.

Why had no manufacturers ever designed a solution to eliminate this terrible hazard? The American water heater companies joined the Gas Appliance Manufacturers Association (GAMA). Since that time, on most safety design issues, no water heater manufacturer has ever acted alone; all

proposed safety design changes were discussed, decided and acted on (or not) through GAMA. For many years, GAMA insisted that there was no need to change the design of gas water heaters. It was not until the Consumer Product Safety Commission intervened in the early 1990's that the water heater manufacturers finally began a joint industry effort to design a water heater which did not suck in and explosively ignite flammable vapors from ground level.

Some of the suggested solutions were as simple as merely elevating the water heater on a stand so that the water heater burner and pilot light were at least 18 inches off the ground. Long ago, GAMA's members recognized that this elementary design change would prevent many flammable vapor fires. For reasons that remain obscure GAMA never endorsed this design change. As a result, no manufacturer ever built a water heater with an attached stand.

Another proposed design change was to surround the burner on the water heater with a device known as a flash arrestor. The flash arrestor has been used successfully in industry for more than 100 years to prevent explosive ignition of flammable vapors.

The evidence developed in *Johnson v. Bradford White* and other water heater cases strongly suggests that water heater manufacturers acting through GAMA made a conscious decision never to go it alone on safety design issues. And while GAMA fiddled, people burned—literally thousands of them.

The experience of the U.S. water heater industry illustrates why a plaintiff should never have to prove that a better

safety design was "commercially available" at the time the defendant sold its defective and unsafe product. That standard would reward an industry for its joint inattention to safety. As Judge Learned Hand stated more than 65 years ago:

Is it then a final answer that (a) business has not yet generally adopted (a safety measure)? There are, no doubt, cases where courts seem to make the general practice of calling the standard of proper diligence...Indeed in most cases reasonable prudence is in fact common prudence but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

Utah courts should not endorse *Minnstar* and make it the plaintiff's burden to show that a better safety design was technologically and economically feasible at the time the defendant sold its product. There are many products which should not be sold at all if they cannot be made safe.

Strict liability under Section 402A of the *Restatement 2d of Torts* is the law in Utah. It imposes liability even if the product is unreasonably dangerous, regardless of the manufacturer's care in designing the product. While arguably the state of the art is a factor which the jury should consider, *Minnstar* effectively abolishes strict liability in product design cases by making it an absolute defense. Strict liability is then replaced with something like a negligence standard of proof. There is no indication in any existing Utah appellate case that the Utah courts are ready to abandon strict liability.

The world may be becoming ever more dangerous, but at least today's consumer products are considerably safer than in years past. This is the legacy resulting from the tort of strict liability. The burden on product manufacturers is not unreasonable, and Utah courts should not eviscerate the tort as the Tenth Circuit has done.

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