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Connecticut Supreme Court Updates Design Defect Standards in "Good Tobacco" Litigation

In a decision officially released this week, the Connecticut Supreme Court altered the legal landscape in Connecticut for design defect product liability claims. The case, *Izzarelli v. R.J. Reynolds Tobacco Co.*, No. SC 19232, 2016 Conn. LEXIS 100 (Conn. Apr. 25, 2016), is receiving a lot of media attention for its holding that strict liability lawsuits against cigarette manufacturers in Connecticut are not precluded by a 1965 comment to a restatement of law about "good tobacco." This holding, while important in its own right, may have less general impact than the *Izzarelli* court's modification and clarification of the standards for a strict product liability claim based on a defective design. In *Izzarelli*, the court established that the primary and default test to be used in strict liability claims is now a modified consumer expectations standard, not the ordinary consumer expectations standard, regardless of the complexity of the underlying product.

The *Izzarelli* plaintiff started smoking at the age of 12, and later developed cancer of the larynx requiring removal of her voice box. She filed a lawsuit in federal court claiming that R.J. Reynolds had intentionally manipulated the additives and nicotine content in its Salem brand of cigarettes to make the cigarettes more addictive and, consequently, more carcinogenic. After a jury trial, the plaintiff was awarded a \$28 million judgment.

The case was appealed to the Second Circuit, which in turn asked the Connecticut Supreme Court to decide whether the claim was barred under Connecticut law limiting strict liability to "unreasonably dangerous" products in light of a pertinent comment to section 402A of the Restatement (Second) of Torts that states "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous."

In holding that the case was not precluded under Connecticut law, the court took the opportunity to express strong sentiments about public policy and consumer safety, noting that manufacturers should not be shielded from liability based on a consumer's knowledge or expectations of a known risk if the manufacturer readily could have reduced or eliminated a product's danger.

In reaching its decision, the *Izzarelli* court focused on Connecticut's two standards for strict liability product claims based on design defects: a consumer expectations test, in which a determination of whether a product is unreasonably dangerous is based on what an ordinary consumer would understand about the risks of the product, and a modified consumer expectations test, which involves a multifactor weighing of the risks and utilities of the product to determine whether an ordinary consumer with full knowledge would consider the product unreasonably dangerous. Prior to *Izzarelli*, there was confusion about when each test should be applied, with many courts and commentators assuming that cases involving simple products should use the consumer expectations test and cases involving products so complex that an ordinary consumer could not form reasonable expectations about safety should use the modified consumer expectations test.

Izzarelli resolved this ambiguity by rejecting a simple/complex distinction and making the modified consumer expectations test the default and primary standard to be used in virtually all strict liability design defect product liability cases in Connecticut. The consumer expectations test is now relegated to a lesser position to be used only in cases in which the product failed to meet a consumer's legitimate, commonly accepted, minimum safety expectations. In other words, the consumer expectations test is only appropriate in *res ipsa*-like situations in which a defect can be inferred from the accident itself or when the event causing injury is so bizarre or unusual that the jury would not need expert testimony to conclude that the product failed to perform as expected. All other design defect cases in Connecticut will use the modified consumer expectations test and will generally require expert testimony.

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