

Products Liability—Damages—N.J. Stat. Ann. §§ 2A:58C-1 to -7 (West 1987).

On July 22, 1987, Governor Thomas Kean signed legislation modifying certain aspects of New Jersey's law with respect to strict products liability. The legislation, when proposed, was termed modest in its goals,¹ seeking only to establish clear rules for product liability actions for damages.² The new Act does not apply to environmental tort actions³ or claims for breach of express warranty.⁴ Additionally, the legislation has no effect on the statutory and common law rules dealing with contributory negligence and comparative fault.⁵ In particular, the law is not intended to affect the holding in *Suter v. San Angelo Foundry & Machine Co.*,⁶ which precludes finding comparative negligence in workplace accidents.

The most significant reformation brought about by this legislation is the return of the "state of the art" defense.⁷ This legislation makes the state of the art defense an absolute defense rather than merely a factor for consideration.⁸ The manufacturer or seller may escape liability if there was no practical or technically feasible design other than the one used which would have prevented injury and preserved the use or function of the product at the time of purchase.⁹

The legislature has retained the judge's right to find a product defective even though at the time it was manufactured it could not have been engineered safely.¹⁰ However, the burden of proof required is clear and convincing evidence.¹¹ In addition

¹ Grayzel, *New Developments in Product Liability*, 120 N.J.L.J. 509 (1987).

² N.J. STAT. ANN. § 2A:58C-1 (West 1987).

³ *Id.* § 2A:58C-6. "Environmental tort action means a civil action seeking damages for harm where the cause of the harm is exposure to toxic chemicals or substances, but does not mean actions involving drugs or products intended for personal consumption or use." *Id.* § 2A:58C-1(b)(4).

⁴ *Id.* § 2A:58C-1(b)(3).

⁵ SENATE JUDICIARY COMM. STATEMENT, SENATE NO. 2805—L.1987, c.197.

⁶ 81 N.J. 150, 406 A.2d 140 (1979); see SENATE JUDICIARY COMM. STATEMENT, SENATE NO. 2805—L.1987, c.197.

⁷ Grayzel, *supra* note 1, at 543, col. 1.

⁸ *Id.*

⁹ N.J. STAT. ANN. § 2A:58C-3(a)(1) (West 1987).

¹⁰ Grayzel, *supra* note 1, at 543, col. 1.

¹¹ N.J. STAT. ANN. § 2A:58C-3(b) (West 1987).

to this heavy burden, before finding a product defective the judge must determine: whether the product can be classified as egregiously unsafe or ultra-hazardous; whether the consumer of the product could reasonably be expected to know that the product poses a risk of serious injury to third persons; and whether the product has limited utility.¹²

The new Act provides that no liability can attach to the manufacturer or seller of a product where the consumer is aware of unsafe aspects of the product.¹³ This provision provides that the use of many products involves some risk of harm.¹⁴ Therefore, if any injury occurs while using an inherently unsafe product, the proximate cause of the injury cannot be the product. This section does not apply to injuries sustained by an employee in a work place setting, even if the product is inherently unsafe.¹⁵

The Act further provides that the manufacturer or seller shall not be liable for harm caused by an unavoidably unsafe product if the product contained an adequate warning.¹⁶ An adequate warning, as defined in the Act, applies a reasonable person standard to provide adequate information on the dangers and unsafe use of the product.¹⁷ The definition takes into account the common knowledge of persons by whom the product's use is intended. A question arises here as to whether a product which is inherently dangerous requires an adequate warning. A close reading of the Act appears to require such a warning on all products.

The Act creates a rebuttable presumption that warnings and instructions are adequate if the warnings or instructions given in connection with a drug, device, food, or food additive have been approved or prescribed by the Federal Food and Drug Administration (FDA),¹⁸ under the Federal Food, Drug and Cosmetic Act¹⁹ or the Public Health Service Act.²⁰ This provision is a departure from the common law and is reflective of the view that a

¹² *Id.*

¹³ *Id.* § 2A:58C-3(a)(2).

¹⁴ See RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).

¹⁵ See SENATE JUDICIARY COMM. STATEMENT, SENATE NO. 2805—L.1987, c.197.

¹⁶ N.J. STAT. ANN. § 2A:58C-3(a)(3) (West 1987).

¹⁷ *Id.* § 2A:58C-4.

¹⁸ *Id.*

¹⁹ 21 U.S.C. §§ 301-392 (1982 & Supp. IV 1986).

²⁰ 42 U.S.C. §§ 201-300cc-15 (1982 & Supp. IV 1986).

jury should not be permitted to second guess the government's decision.

The Act sets forth the criteria for awarding punitive damages.²¹ First, it requires separate trials on the issues of compensatory and punitive damages.²² Under the Act, the trier of fact can award punitive damages only upon a showing of intentional wrongdoing: an evil-minded act or an act accompanied by complete disregard of the rights of another.²³ In addition, there must be a showing that the act was deliberate or was an omission with both the knowledge of a high probability of harm and a reckless indifference to the results.²⁴

The Act precludes the awarding of punitive damages if a drug, device, food or food additive which caused the harm was subject to premarket approval or licensing by the FDA.²⁵ The Act provides that in the event that the trier of fact determines that punitive damages should be awarded, then it may consider all relevant evidence²⁶ in addition to the profitability of the defendant, when the misconduct was terminated, and the financial condition of the tortfeasor.²⁷

This new products liability law limits the ability of the consumer to successfully obtain compensation for injuries sustained on defectively designed and manufactured consumer goods. Conversely, however, the Act provides manufacturers a greater ability to evaluate the economic effect of manufacturing their products. Consequently, this should result in the development of safer products, and new potentially life saving drugs and medicines which may not have been marketed due to unknown potential tort liabilities.

Gary Price

²¹ N.J. STAT. ANN. § 2A:58C-5 (West 1987).

²² *Id.* § 2A:58C-5(b).

²³ *Id.* § 2A:58C-5(a).

²⁴ *Id.*

²⁵ *Id.* § 2A:58C-5(c).

²⁶ *Id.* § 2A:58C-5(b).

²⁷ *Id.* § 2A:58C-5(d).