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Role of Misuse in Products Liability Litigation

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Misuse is frequently raised in products liability cases. Sometimes it bars recovery and sometimes it does not. This article discusses the appropriate method of analysis for determining the significance of alleged misuse in any given case.

MISUSE IS PUZZLING. Sometimes it cuts off liability and sometimes it does not, but courts have failed to clarify exactly what sort of conduct qualifies as the type of misuse that bars recovery. Generally speaking misuse takes two forms, abnormal use and mishandling. Abnormal use comes about when a product is used for an improper purpose;[1] mishandling comes about when a product is used for a proper purpose but in an improper manner.[2] Under this definition defendants can claim that virtually any unusual handling or use of a product constitutes misuse. Yet courts will not always accept this characterization. They frequently explain their results by stating that liability is cut off only if the misuse is unforeseeable. However, they use foreseeability in an artificial sense in such cases, more as a way of stating a conclusion than as an analytical device for determining what conclusion to reach. This has created an air of uncertainty with regard to the type of conduct that truly qualifies as misuse.

This article will describe how to identify the situations where misuse will bar liability and the situations where it will not. To do this it is necessary to examine the nature of the products liability system and evaluate the role that misuse plays in that system.

NEGATING DEFECT. Misuse is normally relevant in products liability litigation because it negates the existence of defect. Missouri has adopted the Restatement of Torts (Second) §402A[3] as the basis for imposing strict liability.[4] The Restatement imposes lia-

* In an earlier article this author discussed applicability of comparative negligence to misuse. *See,* Fischer, *Products Liability — Applicability of Comparative Negligence to Misuse and Assumption of the Risk,* 43 MO. L. REV. 643 (1978). Some of the ideas discussed in that article are parallel to the ideas discussed herein, although the context of the discussion is different.

bility only for defective products.[5] A comment to the Restatement states that a "product is not in a defective condition when it is safe for normal handling and consumption."[6] Consequently, "the seller is not liable if the injury results from abnormal handling . . . or from abnormal consumption. . . ."[7] These comments make clear that misuse can prevent a product from being defective. In order to understand how misuse negates defect it is necessary to examine the test of defect used by the Restatement.

The Restatement uses a two-part test for determining defectiveness. A product is defective if it is "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[8] In order to be defective a product must meet both of these tests, i.e., it must possess an unexpected danger and the danger must be unreasonable.

Courts often mistake misuse for an affirmative defense,[9] when actually plaintiff must prove proper use.[10] The mistake becomes obvious when you consider that the effect of misuse is to negate defect, which is an essential element of plaintiff's case.

Misuse can negate both aspects of the Restatement test of defect. This article will describe how this works by discussing the two tests separately.

CONSUMER EXPECTATIONS TEST. The first part of the two-part test is known as the consumer expectations test. It protects consumers from unexpected dangers arising from the use of products. Under this test a product is deemed nondefective if the danger it poses is either obvious,[11] generally known,[12] or has been adequately warned against.[13] In order to be defective under this test the product must be "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."[14]

Misuse can prevent a product from being defective on the basis that consumer expectations have not been violated. For example, suppose plaintiff uses an axe to cut his toenails and inadvertently amputates his toe because he misjudges his aim. Plaintiff would have no action against the manufacturer of the axe because it was not defective. Consumer expectations were not violated because any reasonable consumer would recognize that an axe cannot safely be used for such a purpose. On this basis it has been held that a shoe is not defective if it harms the plaintiff's foot because he buys the wrong size,[15] a baby food jar is not defective if it breaks because plaintiff tries to open it with a beer can opener,[16] and a paint container is not defective because its volatile contents explode when plaintiff tries to cut it in half with an acetylene torch.[17]

UNREASONABLY DANGEROUS TEST. The second part of the Restatement Test of Defect, is that the product be unreasonably dangerous. A product is defective under this test if its utility is outweighed by the gravity of harm threatened by its use.[18] Some courts distinguish this test from negligence by using hindsight at the time of trial rather than foresight at the time of manufacture to determine whether the danger is reasonable.[19] Missouri has apparently adopted this approach.[20] The question is

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Misuse will sometimes prevent a product from being defective on the basis that the product is not unreasonably dangerous

whether a reasonable person with full knowledge of the danger posed by the product and of feasible design alternatives would market the product in the same fashion as the defendant.[21]

Under this test a product containing a manufacturing defect that causes harm would normally be defective. A manufacturing defect results from a miscarriage in the manufacturing process that produces a product in an unintended condition, e.g., a physically flawed product such as a tire with a weak spot in the side wall that poses the danger of a blowout. Such a product would normally be defective because a reasonable person with knowledge of the flaw and the danger would normally choose to withhold it from the market.

However, products that contain no physical flaw but are allegedly defective because of the way they are designed will be non-defective under this test if they meet three requirements: The risk posed by the design must be one that cannot be eliminated "in the present state of human knowledge";[22] the apparent utility of the product must justify its sale notwithstanding the danger;[23] and the manufacturer must give an appropriate warning.[24] A product that meets these tests is not defective because it is not unreasonably dangerous. The Restatement labels such products "unavoidably unsafe."[25] For example, an automobile can seriously harm its occupants if it collides head-on with another car. Yet it is not unreasonably dangerous because automobiles have great utility and cannot be made safe for use in such accidents.[26]

Misuse will sometimes prevent a product from being defective on the basis that the product is not unreasonably dangerous. Suppose the plaintiff uses a set of automobile battery booster cables to tow a disabled car. The cables break because they are not strong enough to withstand the tension and an accident results. Because of the misuse the cables are not defective. Even if the consumer expectations test of defect is violated because consumers would not expect booster cables to break under such circumstances, the cables would still not be defective under the unreasonably dangerous test of defect. The cables contained no physical flaw and are not defective in design. They are made of copper wire, which has low tensile strength, because it is a superior conductor of electricity. The utility of the product as designed greatly outweighs the gravity of harm. Therefore, the design was not unreasonably dangerous because a reasonable man with knowledge of the risk would still sell the product.[27] It might technologically be possible to make a booster cable that can also be used as a tow cable. For example, a third cable made of steel might be included along with the two copper cables. Yet the product is not defective because it is reasonable to market booster cables without this added feature.[28]

Hays v. Western Auto Supply Co.[29] illustrates that misuse can prevent a harmful product from being deemed unreasonably dangerous. The operator of a riding mower backed over a young child. The child was injured because the machine was designed without a rear blade guard. The court found for the defendant on the basis that the mower was reasonably fit for the intended use of cutting grass with children kept away. A rear guard was not reasonably necessary because the tip of the blade was twelve to fourteen inches from the rear of the machine. Therefore, even if a person came into contact with the rear of the machine he could not be injured by the blade. The manufacturer could not

foresee that the mower would be backed against a young child, causing him to fall down and to be run over by the mower.

Hays was decided under an implied warranty theory before strict tort liability was adopted in Missouri, but the principle is the same. Strict liability in tort was derived from the law of warranty and imposes essentially the same liability in personal injury and property damage cases as implied warranty, except that contract defenses such as notice, disclaimer, and privity are not recognized.[30] The implied warranty is that goods be reasonably fit for ordinary use.[31] The Restatement requirement that goods not be unreasonably dangerous is merely the converse of the implied warranty requirement that a product be reasonably fit.[32] The Missouri courts recognize that there is no substantive difference between the two theories.[33] A Restatement jurisdiction would reach the same result in *Hays* by saying that the mower was not unreasonably dangerous when used properly rather than by saying it was reasonably fit for its intended use.

Up to now we have been concerned with products that are alleged to be unreasonably dangerous because of the way they are designed, but products can also be unreasonably dangerous because of a failure to warn. Even if the danger arising from the design of a product is unavoidable, the manufacturer will have to give a warning if two conditions are met. First, the danger must be one that he should reasonably know about.[34] Second, the warning must be necessary because it is not generally known.[35]

Products can also be unreasonably dangerous because of a failure to warn

Misuse can prevent a product from being unreasonably dangerous on a failure to warn theory if it is unforeseeable. In the case of the automobile battery booster cables that are used to tow a car, the cables are not unreasonably dangerous because of a failure to warn. No warning is necessary because this misuse is not reasonably foreseeable.

If the misuse is foreseeable, a product can be unreasonably dangerous because of a failure to warn

If the misuse is foreseeable, a product can be unreasonably dangerous because of a failure to warn. In *Higgins v. Paul Hardeman, Inc.*[36] a control rod which activated the hydraulic lift mechanism on a dump truck was exposed when the bed was raised. The driver raised the bed and crawled under it to oil some parts without shoring up the bed. The bed fell when he inadvertently kicked the control rod, and he was crushed to death. Crawling under the bed of the truck without shoring it up was not the sort of abnormal use that would cut off liability because it was foreseeable, and thus the truck was unreasonably dangerous. It should have been designed to be safe for this use, or the manufacturer should have warned that shoring must be used.

Only an adequate warning will prevent a product from being unreasonably dangerous. In *Rogers v. Toro Manufacturing Co.*,[37] a person cutting grass with defendant's self-propelled lawn mower put the drive mechanism in neutral and emptied the grass bag while the engine was still running. Vibrations from the engine caused the drive mechanism to engage, the mower moved forward, ran into a child in the vicinity, and injured him. Defendant argued that the accident resulted from misuse because the owner's manual cautioned against leaving the mower unattended while the engine was running. The court held that the manual was not admissible to show misuse be-

cause it failed to explain the reason that the mower should always be attended while the engine was running. This decision is correct because misuse did not negate either of the Restatement tests of defect. The mower violated consumer expectations because the danger was unknown, and it was unreasonably dangerous because a reasonable person would have warned about this danger.

No warning at all is required if the danger is obvious because it would serve no useful purpose

No warning at all is required if the danger is obvious because it would serve no useful purpose. An axe is not unreasonably dangerous because of a failure to warn against using it to cut toenails.

A product that is safe for use in accordance with adequate instructions is not defective because harm results from misuse in violation of those instructions.[38] A tire that blows out because it is used on the wrong size wheel or because it is inflated with the wrong amount of air pressure is not defective.[39] Consumer expectations have not been violated because the danger is either known or has been warned against, and the product is not unreasonably dangerous because its utility outweighs the gravity of harm threatened by the possibility that someone will ignore the directions and cause an accident.

CIRCUMSTANTIAL EVIDENCE OF DEFECT. Circumstantial evidence can sometimes be used to prove that a product was defective in some way even though the specific defect cannot be identified. In some cases evidence of malfunction alone can create an inference that the product must have been defective. Failure of a car's steering mechanism to turn the car in the direction in which it is steered creates the inference that the mechanism is defective.[40]

Misuse can negate the existence of defect in such cases by preventing the inference from arising. Sufficient evidence of defect at the time the product left defendant's control must be presented so that the jury does not have to speculate.[41] Misuse or alteration of a product after it leaves the hands of the manufacturer can prevent the inference of defect from arising if the jury has no basis for deciding whether the defect was caused at the time of manufacture or at the time of the misuse.[42] Suppose the suspension of a passenger car fails after long use as an off the road vehicle. The car is defective, but it is not clear that the defect existed prior to the abnormal use.

PROXIMATE CAUSE. Misuse may sometimes prevent a harm from being a proximate result of a defect. Normally in strict liability cases the defendant is not liable for injuries resulting from a different hazard than the one that warrants the imposition of liability.[43] For example, liability is not imposed for blasting which causes a mother mink to eat her young.[44] Blasting is an abnormally dangerous activity because of the hazard of damage caused by concussion rather than damage caused by fright. This situation could also arise in a products liability case. Suppose a soda bottle contains a flaw which creates the risk of explosion. The contents are consumed without mishap. Plaintiff then uses it to pry two heavy objects apart. Because of the flaw the bottle breaks and plaintiff is injured. The bottle is defective because it presents an unreasonable danger of exploding and consumer expectations are violated because the flaw is hidden. Yet since a different hazard than the one that made the bottle unreasonably dangerous produced the harm, a court might well hold that there is no proximate cause.

FORESEEABLE MISUSE. Courts frequently say that misuse cuts off lia-

bility if it is unforeseeable but not otherwise.[45] These statements cannot be taken literally. It is true that foreseeability is often a relevant consideration in determining the effect of misuse, but it is not always controlling. Cases will arise where the defendant is held liable notwithstanding foreseeable misuse.

Foreseeability of misuse is often relevant to determining whether a product is unreasonably dangerous and thus defective

Foreseeability of misuse is often relevant to determining whether a product is unreasonably dangerous and thus defective. This can be illustrated by comparing *Rogers v. Toro Manufacturing Co.*[46] with *Hays v. Western Auto Supply Co.*[47] Rogers involved the self-propelled lawn mower that slipped into gear when left unattended with the engine running. The mower presented an unreasonable danger precisely because it was foreseeable that it might be misused in this way. As long as it was properly attended no harm could result. The mower was unreasonably dangerous because the misuse was foreseeable. *Hays* involved the riding mower without a rear blade guard that caused harm by backing over a child laying on the ground. The mower's design was not unreasonably dangerous because it was unforeseeable that this kind of accident could happen. A rear blade guard was not reasonably required because the tip of the blade was at least a foot away from the rear of the machine. It was unforeseeable that someone would back the mower over a child. You may disagree with the factual determination in *Hays* that this kind of accident is unforeseeable, but the principle of the case is correct. The mower was not unreasonably dangerous if the misuse was unforeseeable.

Foreseeability alone is not always conclusive

Foreseeability alone is not always conclusive. Sometimes a manufacturer will be held liable even though unforeseeable misuse contributed to the accident. Suppose an eccentric person uses a brand new concrete truck for commuting to work every day. The brakes fail because of a hidden flaw in the master cylinder, and an accident results. Use of the truck for this purpose is abnormal because it was meant for hauling concrete. The misuse also caused the harm because the plaintiff would not have been injured had he been driving a passenger car instead. Furthermore, the abnormal use is clearly unforeseeable when you consider the expense, inconvenience, and discomfort involved in driving this truck rather than a passenger car. Yet the misuse should not bar plaintiff's recovery. The truck was defective because the danger was hidden and unreasonable. The defect was a proximate cause of the harm because the defect created the hazard of loss of control due to brake failure, and this is the hazard that caused harm to plaintiff. Therefore, the elements of plaintiff's case are fully established. He is not barred by the affirmative defense of contributory fault because he did not knowingly encounter an unreasonable risk of brake failure.[48] The unforeseeable misuse is irrelevant to any issue in this case and should not bar recovery.

Conversely, plaintiff may sometimes be unable to recover in cases where his foreseeable misuse contributed to the injury. Suppose plaintiff wears a pair of track shoes to a movie theater. He slips on a wet spot on the floor and injures himself. The manufacturer of the shoes is not liable even if this use is reasonably foreseeable. Shoes are not defective simply because they are capable of losing traction on a wet surface.[49] Con-

sumer expectations are not violated because this risk is generally known. The shoes are not unreasonably dangerous because they have great utility, and this outweighs the gravity of harm threatened by an occasional slip and fall. Since the product is not defective, the manufacturer cannot be held liable. The same result frequently occurs when a product is used in violation of the manufacturer's instructions. Surely, it is foreseeable that motorists will sometimes fail to maintain the recommended amount of air pressure in their tires. Yet if the tire fails because it has been over-inflated the manufacturer will not be held liable. Assuming that an adequate warning has been given and it is not feasible to make a safer tire, the tire is not defective. The risk of blowout due to over inflation is reasonable. Thus, plaintiff's misuse bars recovery even though it is foreseeable.

Courts tend to force misuse cases into a foreseeability framework by making rigid and unrealistic rules about what is foreseeable. For example, in *Polk v. Ford Motor Company*[50] the court stated that an auto manufacturer would not be liable for failing to make a car that can be safely crashed off of a cliff because this constitutes unforeseeable misuse. It is true the manufacturer would not be liable, but not because the misuse is unforeseeable. It is quite foreseeable that cars will crash off cliffs from time to time. That is the reason that roadbuilders locate guardrails at such places. The car manufacturer is not responsible because the car is not defective. Consumer expectations are not violated since the danger is known. The car is not unreasonably dangerous because it has great utility, and it is not technologically possible to make one that is crashworthy. Because foreseeability is used in an artificial way in misuse cases it is often used as a way of expressing the court's conclusion rather than as an analytical device for reaching the conclusion.

CONCLUSION. Suppose you represent the plaintiff in a products liability action. You can expect the defendant to characterize virtually any unusual handling or use of a product as misuse that cuts off liability. Foreseeability cannot be relied on to always determine the effect of misuse. How do you determine the effect of misuse in your case? The answer is to systematically analyze the conduct in light of the role that misuse plays in the law of products liability. Misuse is normally relevant because it negates defect or proximate cause. The proper approach is to determine first whether the product is defective under the Restatement two-part test of defect. If it is, you must determine whether the defect proximately caused the harm. If it did the alleged misuse has not negated any element of your case. The only possible relevance of the conduct is that it might constitute an affirmative defense such as contributory fault. Of course the defendant bears the burden of proof on this issue. Assuming the misuse does not constitute contributory fault it is legally irrelevant and should have no bearing on the outcome of your case.

Foreseeability cannot be relied on to always determine the effect of misuse

Clarity would be enhanced if courts would analyze these cases in terms of defect, causation, and contributory fault. The term misuse would never have to be used. However, courts have developed an affinity for this terminology, and lawyers must learn to work within the framework courts have established. □

FOOTNOTES

[1] Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of the Risk*, 25 VAND. L. REV. 93, 95-96 (1972); Note, *Plaintiff Misconduct as a Defense in Products Liability*, 25 DRAKE L. REV. 189, 195 (1975).

[2] W. Prosser, Handbook of the Law of Torts, 668-69 (4th ed. 1971); Note, *supra*

note 1, at 195.

[3] Restatement (Second) of Torts §402A (1965) [hereinafter cited as Restatement].

[4] Keener v. Dayton Electric Mfg. Co., 445 S.W.2d 362 (Mo. 1969); Cryts v. Ford Motor Co., 571 S.W.2d 683 (St.L. App. 1978); Higgins v. Paul Hardeman, Inc., 457 S.W.2d 943 (St.L. App. 1970).

[5] Restatement, *supra* note 3, §402A.

[6] Restatement, *supra* note 3, §402A, comment h.

[7] *Id.*

[8] Restatement, *supra* note 3, §402A, comment g.

[9] McDevitt v. Standard Oil Co. of Texas, 391 F.2d 364 (5th Cir. 1968).

[10] Rogers v. Toro Mfg. Co., 522 S.W.2d 632 (St.L. App. 1975).

[11] *E.g.*, Maas v. Dreher, 10 Ariz. App. 520, 460 P.2d 191 (1969); Denton v. Bachtold Brothers, Inc., 8 Ill. App. 3d 1038, 291 N.E.2d 229 (1972). Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 Sw. L. J. 256, 274 (1969).

[12] Restatement, *supra* note 3, §402A, comment i.

[13] *Id.*, comments h and j.

[14] *Id.*, comment i.

[15] Dubbs v. Zak Bros. Co., 175 N.E. 626 (Ohio App. 1931).

[16] Vincent v. Nicholas E. Tsiknas Co., Inc., 151 N.E.2d 623 (Mass. 1958).

[17] Pridgett v. Jackson Iron and Sign Metal Co., 253 So.2d 837 (Miss. 1971).

[18] Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L. J. 825, 837-38 (1973).

[19] Keeton, *Product Liability and the Automobile*, 9 Forum 1 (1973); Wade, *supra* note 18.

[20] Blevins v. Cushman Motors, 551 S.W.2d 602 (Mo. En Banc 1977); Cryts v. Ford Motor Co., 571 S.W.2d 683 (St.L. App. 1978).

[21] Phillips v. Kimwood Mach. Co., 269 Ore. 485, 525 P.2d 1033 (1974); Roach v. Kononen, 269 Ore. 457, 525 P.2d 125 (1974).

[22] Restatement, *supra* note 3, §402A, comment k.

[23] *Id.*

[24] *Id.*, comments j and K.

[25] *Id.*, comment k.

[26] Dreisonstok v. Volkswagenwert, A. G., 489 F.2d 1066 (4th Cir. 1974).

[27] Rideaux v. Lykes Bros. Steamship Co., 285 F.Supp. 153 (S.D. Texas 1968).

[28] Phillips v. Kimwood Mach. Co., 269 Ore. 485, 525 P.2d 1033 (1974).

[29] Hays v. Western Auto Supply Co., 405 S.W.2d 877 (Mo. 1966).

[30] Krauskopf, *Products Liability*, 32 Mo. L. Rev. 459, 469 (1967); Reitz and Seabolt, *Warranties and Product Liability: Who Can Sue and Where?*, 46 Temp. L. Q. 527 (1973); Rheingold, *What Are the Consumer's "Reasonable Expectations"?*, 22 Bus. Law. 589-91 (1967).

[31] Keeton, *Product Liability and the Automobile*, 9 Forum 1, 7 (1973); Rheingold, *supra* note 30, at 590 n. 4; Note, *The Automobile Manufacturer's Liability to Pedestrians for Exterior Design: New Dimensions in "Crashworthiness,"* 71 Mich. L. Rev. 1654, 1670-71 (1973).

[32] Note, *The Concept of Defective Condition: A Tale of Judicial Re-Tailoring*, 39 U.M.K.C. L. Rev. 260, 263-64 (1970-71).

[33] Blevins v. Cushman Motors, 551 S.W.2d 602 (Mo. En Banc 1977); Keener v. Dayton Electric Mfg. Co., 445 S.W.2d 362 (Mo. 1969).

[34] Restatement, *supra* note 3, §402A, comments h and j.

[35] *Id.* at comment j.

[36] *Higgins v. Paul Hardeman, Inc.*, 457 S.W.2d 943 (St.L. App. 1970).

[37] Rogers v. Toro Mfg. Co., 522 S.W.2d 632 (St.L. App. 1975).

[38] Restatement, *supra* note 3, §402A, comment j.

[39] McDevitt v. Standard Oil Company of Texas, 291 F.2d 364 (5th Cir. 1968).

[40] Williams v. Ford Motor Co., 411 S.W.2d 443 (St.L. App. 1966).

[41] Weatherford v. H. K. Porter, Inc., 560 S.W.2d 31 (St.L. App. 1977).

[42] General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977).

[43] Note, *Torts — Proximate Cause in Strict Liability Cases*, 50 N.C. L. Rev. 714, 715, 717, 722 (1972).

[44] Foster v. Preston Mill Co., 44 Wash. 2d 440, 268 P.2d 645 (1954).

[45] *E.g.*, Polk v. Ford Motor Co., 529 F.2d 259 (8th Cir.), Cert denied, 426 U.S. 907 (1976); Keener v. Dayton Electric Mfg. Co., 445 S.W.2d 362 (Mo. 1969); Rogers v. Toro Mfg. Co., 522 S.W.2d 632 (St.L. App. 1975); Higgins v. Hardeman, Inc., 457 S.W.2d 943 (St.L. App. 1970).

[46] 522 S.W.2d 632 (St.L. App. 1975).

[47] 405 S.W.2d 877 (Mo. 1966).

[48] Restatement, *supra* note 3, §402A, comment n.

[49] Fanning v. Lemay, 38 Ill. 2d 209, 230 N.E.2d 182 (1967).

[50] Polk v. Ford Motor Co., 529 F.2d 259 (8th Cir.), *Cert denied*, 426 U.S. 907 (1976).