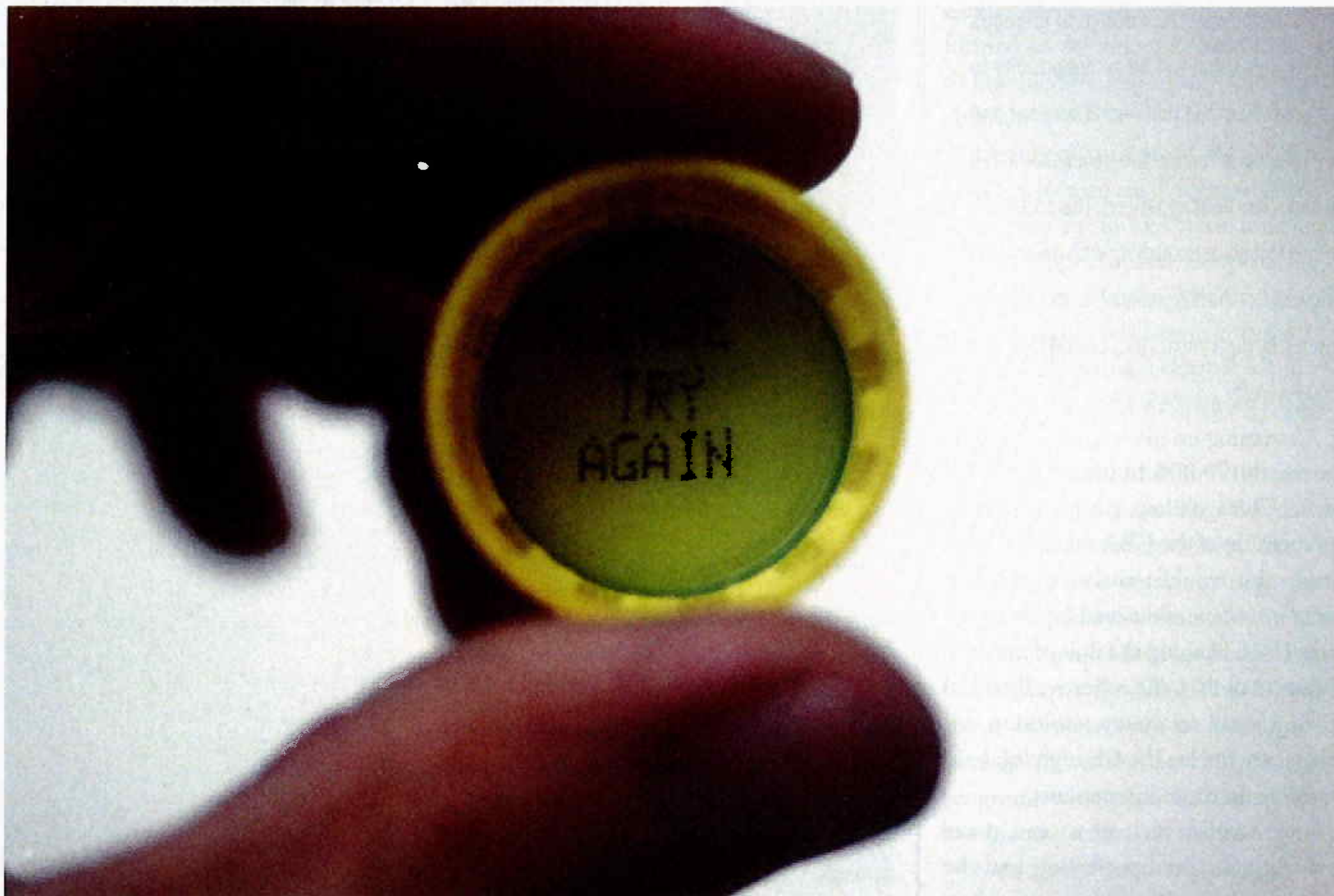
The *Jablonski* decision and the Continued Development of Products-Liability Law

Limiting Liabilities



By Donald Patrick Eckler and David J. Stein

When the Illinois Supreme Court in *Jablonski v. Ford Motor Company* reversed the decision of Appellate Court, Fifth District, that had affirmed a $43 million judgment from the trial court, it provided one more signal of the Court's interest in limiting liability for defendants in product-liability suits. First, it foreshadowed what may be the end of the consumer-expectation test as an independent basis of liability in Illinois product liability law. The consumer-expectation test now appears relegated to being but one factor under the risk-utility test. Second, the Supreme Court reiterated its resistance to adopting sections of the Restatement Third of Products Liability to impose novel bases of liability. Finally, and for a second time in a year, the Supreme Court limited the extent to which defendants can be said to have voluntarily undertaken a duty.

Procedural and Factual History

The claims in *Jablonski* arose from a high-speed rear-end collision that caused a pipe wrench in the trunk of the plaintiffs' Lincoln Town Car to pierce the trunk and rupture the automobile's fuel tank. The accident, and subsequent explosion from the fuel tank rupture, resulted in the death of the driver and the permanent disfigurement to the passenger of the automobile (the plaintiffs). Ford manufactured the Lincoln Town Car both for the general public, as well as law enforcement. The design of the gas tank on law enforcement vehicles was nearly identical to that of civilian vehicles. Before the accident there were multiple injuries and deaths to law enforcement officers caused by items in their trunks puncturing the fuel tank causing explosions of the same kind experienced by the plaintiffs. In response, Ford conducted a program to warn law enforcement agencies of the risks. It also created a "trunk pack" for vehicles sold to law enforcement in order to protect the gas tank from puncture by items in the trunk in the event of a rear-end collision. No such steps were taken to warn civilians or to minimize the risk for civilian users of these vehicles.

The plaintiffs' case presented three negligent-product-design theories, as well as a post-sale duty to warn theory. The plaintiffs successfully argued before the trial court that Ford was negligent because it: (i) failed to locate the fuel tank of the Lincoln Town Car over the rear axle or forward of the rear axle as opposed to the tank's location behind

the rear axle; (ii) failed to shield the fuel tank from punctures by objects contained in the car's trunk; (iii) failed to warn consumers of the risk of trunk contents puncturing the fuel tank; and (iv) failed to inform the Plaintiffs of remedial measures taken by Ford after the manufacture and sale of the vehicle but prior to the Plaintiffs' accident. The jury, sitting in Madison County, returned a verdict against Ford Motor Company for $28 million in compensatory damages and $15 million in punitive damages.

The Appellate Court affirmed the verdict and further found that Ford could alternatively be liable on a voluntary undertaking theory. The plaintiffs argued, and the Appellate Court agreed, that because Ford warned and took preventative measures with respect to law enforcement consumers, Ford assumed a duty under the voluntary undertaking doctrine to warn civilian consumers of the vehicles as well. The Appellate Court reasoned that this voluntary undertaking of a duty could give rise to liability.

The Supreme Court reversed the judgment of the trial court and Appellate Court and entered judgment for Ford, negating the $43 million verdict.

The Supreme Court began by addressing the applicable test for determining whether Ford owed any duty to the plaintiffs in this negligent-product-design case. The Court held that the proper test "encompasses a risk-utility balancing test, and compliance with industry standards is a relevant factor in the analysis but is not dispositive." Ford had argued on appeal that, as a matter of law, compliance with industry standards should entitle the company to judgment against the plaintiffs, and cited *Blue v. Environmental Engineering, Inc.*, 215 Ill.2d 78, 100 (2005), in support of that position. Applying the risk-utility test, the Court rejected Ford's argument that compliance with industry standards, standing alone, entitled Ford to judgment. Rather, the Court noted that industry standards are but one factor in the broader risk-utility analysis, which has been previously adopted as Illinois law. The Court then reiterated the other factors in a non-exhaustive list, including (i) the availability and feasibility of alternate designs, (ii) the utility of the product to the user and to the public as a whole, (iii) the safety aspects of the product, (iv) and the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

Using the risk-utility balancing test, the Court concluded that although Ford's compliance with industry standards alone did not entitle it to judgment, the plaintiffs failed to present sufficient evidence to allow a reasonable jury to conclude that Ford's conduct was unreasonable. In reversing the Appellate Court's analysis of the risk-utility factor test, the Court made a strong statement that plaintiffs must present significant evidence of a manufacturer's failure to meet its duty in a negligent-product-design case before the Court will allow a judgment to stand.

Consumer-Expectation Test Subsumed

Lurking beneath the surface of the Court's analysis of the risk-utility test in *Jablonski* is a foreshadowing of the end to the consumer-expectation test in Illinois product liability cases as a distinct method of proof. Previously, the consumer-expectation test amounted to a single factor. The jury was only asked to determine whether a product was unsafe when put to a use that is reasonably foreseeable considering the product's nature and function.

Only three years ago, in *Mikolajczyk v. Ford Motor Company*, 231 Ill.2d 516, 524-56 (2008), the Supreme Court exhaustively analyzed whether liability in Illinois could be proved under either the risk-utility test or the consumer-expectation test. *Mikolajczyk*, like *Jablonski*, was a design-defect case involving the death of the driver in an automobile collision. After a lengthy survey of significant products-liability cases decided by the Illinois Supreme Court, the *Mikolajczyk* opinion held:

> [B]oth the consumer-expectation test and the risk-utility test continue to have their place in our law of strict product liability based on design defect. Each party is entitled to choose its own method of proof, to present relevant evidence, and to request a corresponding jury instruction. If the evidence is sufficient to implicate the risk-utility test, the broader test, which incorporates the factor of consumer expectations, is to be applied by the finder of fact. *Id.* at 556.

While *Mikolajczyk* held that both the consumer-expectation test and the risk-utility test remained operative, the language hinted that the Supreme Court would revisit the consumer-expectation test. By directing that the narrower consumer-expectation test was to be incorporated as a factor in the risk-utility test, the Court all but assured that cases submitted to juries solely on a consumer expectation test theory would decrease significantly. Defendants would (and have) found ways to present evidence of the other factors relevant to a risk-utility analysis. Thus, when judges evaluate what method of proof is appropriate prior to instructing a jury, the risk-utility test naturally takes precedence as a broader, multi-factor test based on the evidence. This effect is evident in *Jablonski* through both the Court's recitation of the evidence offered at trial and through the Court's analysis.

Indeed, in *Jablonski*, the Court failed to even mention the consumer-expectation test. Rather, the Court stated that "[i]n *Calles* [*v. Scripto-Tokai Corp.*, 224 Ill.2d 247, 269 (2007)], we concluded that risk-utility balancing remains operative in determining whether a defendant's conduct is reasonable in a negligent-design case." Admittedly, the evidence submitted by the parties at the *Jablonski* trial invited the application of the risk-utility test. The plaintiffs presented a broad array of evidence to prove their claim of a defective design. Nonetheless, insofar as the Court's opinion began by stating that it "must first clarify the duty analysis in a negligent-product-design case," the omission of the consumer-expectation test is significant. In the context of the entire case, the omission appears as a tacit admission by the Court that the consumer-expectation test has lost its place as an independent method of proof.

The Restatement Third of Products Liability Rejected

The Court's analysis in *Jablonski* also signals a continuing resistance to adopting portions of the Restatement Third of Products Liability (beyond recitation of basic principles), regardless of whether the Restatement is invoked to the benefit of plaintiffs or defendants. In *Jablonski,* the plaintiffs invited the court to adopt the formulation in the Restatement Third of Products of a duty to warn, even where defects are discovered after the manufacturing of the product.

The Court stated that, in Illinois, a manufacturer is under no duty to issue post-sale warnings to remedy defects discovered after a product has left its control. In contrast, a continuing duty may be imposed if the manufacturer knew or should have known of the defect at the time of manufacture. The Court explicitly left open the possibility of adopting this duty under a different set of facts. The Court did not elaborate on what facts that made *Jablonski* an ill-suited backdrop for adopting a post-sale duty to warn. Nor did the Court identify facts that would make a future case appropriate for adoption of such a duty.

Similarly, in *Mikolajczyk*, when counsel for the defendants invited the court to adopt sections of the Restatement Third of Products Liability as controlling law in Illinois, the court concluded that the Restatement Third should not govern the proof structure in product liability cases. The Court reasoned that adoption would alter the "unreasonably dangerous" element of the product liability proof structure.

Voluntary Undertaking Doctrine Limited Again

Lastly, the Court reiterated the position it staked out in *Bell v. Hutsell*, 2011 Ill. LEXIS 777, *22-23 (2011), and limited liability under the voluntary undertaking doctrine. The Court again defined the precise duty actually undertaken by the defendant, as shown by the affirmative steps the defendants took, as the only duty that a defendant could be held to have breached. In *Bell*, the defendants informed their teenage son that underage drinking during a party at their home would not be tolerated. Subsequently, they did nothing to prevent such underage alcohol consumption. One of the teenagers at the party became intoxicated, left the party, and crashed his vehicle. The collision caused his death. The Court held that because the defendants did not attempt to prevent drinking by the underage party attendees beyond their verbal intent, the defendants did not voluntarily undertake any duty for which they could be liable.

Applying the same principle to *Jablonski,* the Court held that the only duty Ford could have undertaken was to warn and make repair to vehicles driven by law enforcement, not the civilian population. Because the holding came in spite of the fact that the design of the vehicles driven by law enforcement and those driven by the civilians was essentially the same, it further limited the voluntary undertaking doctrine to actions actually undertaken to the class of intended beneficiaries.

Practical Considerations of the Court Reversing a $43 Million Jury Verdict

Perhaps the most important consideration for practitioners in the wake of *Jablonski* stems from the Supreme Court reversing a $43 million plaintiffs' jury verdict. Significantly, on three of the four theories of liability argued by the plaintiffs, the Court did not reverse based on trial court error as to Illinois law. Rather, the Court stated that under the operative risk-utility factor analysis in Illinois, "plaintiffs presented insufficient evidence from which a jury could conclude that Ford breached its duty of reasonable care on the first three negligent-design theories." The Court performed an independent evaluation of the factual evidence presented in the case and concluded that the jury rendered an improper verdict under the risk-utility test.

The Court's willingness to reverse the jury's verdict from a cold record – a record based on what the Court acknowledged as an "11-day trial in this complex product design case [that] included testimony from numerous lay and expert witnesses, encompassing over 3,000 pages of transcript and hundreds of exhibits"–calls attention to the significance of the contents of the record on appeal. This should give plaintiffs' counsel pause in evaluating their cases before litigation, relying on non-IPI jury instructions, and advancing theories based on the Restatement. Unlike many cases, the plaintiffs in this case suffered a complete reversal with no chance to retry the case on remand. From the defense perspective, it becomes all the more important to establish the reasonableness of a design in order to provide a court of review with facts sufficient to rely upon in order to reverse an adverse judgment.

Conclusion

The *Jablonski* opinion itself may prove not to be a watershed, as the Court simply followed its previous trends as to (i) the risk-utility test in products liability cases, (ii) the absence of a post-sale duty to warn in Illinois, and (iii) a limited voluntary undertaking doctrine. Still, the case still proves significant because it signals a shift away from the consumer-expectation test as an independent method of proof and rejects the precedential value of the Restatement Third of Products Liability. ■

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