

Apparently recognizing the limitations of its first rationale, the court went on to assert that the approval for an exemption also constituted an initial determination that the design was safe enough to justify the risks of further experimentation. To allow the suit thus would require additional design characteristics, a result not permitted by the amendments' preemptive section.

Finally, the court rejected the argument that the result of preemption would deny Slater a remedy for his injury. The court noted that Slater had alternatives to the experimental treatment and assumed the risk of an experimental procedure. It further noted that the notice he received and signed provided an informed consent.

Maryland Court Modifies Punitive Damages Standard

Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 601 A.2d 633 (Md. Ct. App. 1992).

The Maryland Court of Appeals substantially revised its standards for assessing punitive damages in negligence and products liability. In this case, Zenobia sued several manufacturers and installers for asbestosis injuries. He received a judgment based on strict liability of \$1.2 million in compensatory damages and over \$200,000 in punitive damages. The jury awarded the punitive damages based on an instruction that permitted them if it found by a preponderance of evidence that a defendant acted with gross negligence. On appeal, Owens-Illinois argued for a higher standard of intent and a heavier burden of proof. Maryland's highest court agreed and remanded the case for further evidence.

Initially, the court abandoned a distinction between injuries that occurred before or after a contract between the plaintiff and the defendant. Under the prior rule in Maryland, the plaintiff had to show only gross negligence to claim punitive damages if the injury occurred before the parties entered a contract, but he had to show actual malice if the injury happened after contracting. The court found that the rule was unprincipled. Punitive damages were to relate to the defendant's conduct, not the timing of the injury. Therefore, the court eliminated the distinction.

The court then adopted an actual malice standard for punitive damages. Under the prior rule, punitive damages were available on a showing of implied malice. Under the court's definition of implied malice, a plaintiff could recover on a showing of gross negligence. The court felt this standard had led to inconsistent awards and confusion about the scope of actions covered by punitive damages. The court, therefore, adopted a requirement of actual malice. It defined actual malice as a showing of evil motive, intent to injure, or fraud. Recognizing the difficulty of extending the doctrine to products liability cases, the court went on to explain that actual malice in a products case could be shown if the seller had actual knowledge of a dangerous defect and deliberately disregarded the safety of others. The court characterized this standard as a bad faith decision to market the product.

Finally, the court increased the level of proof for punitive damages to a clear and convincing standard from a preponderance of the evidence standard. The court concluded that the stigma associated with a penal award required the higher standard.

Tennessee Adopts Comparative Fault Standards

McIntyre v. Balentine, Case No. 1 (Tenn. Sup. Ct., decided May 4, 1992) (Lexis, states lib.)

Joining the vast majority of states, the Tennessee Supreme Court adopted a modified comparative fault standard for negligence. In this case, the plaintiff, McIntyre was struck by the defendant, Balentine, as the former entered a highway. Both had been drinking prior to the accident, and McIntyre had a blood alcohol level of .17. The state law presumption of intoxication was .10. Balentine, on the other hand, was allegedly speeding. McIntyre sued, and Balentine alleged contributory negligence as a complete bar to McIntyre's claim. The jury found the parties to be equally at fault. Under the rule of contributory negligence, McIntyre lost. He appealed, and the Supreme Court agreed to remand the case for a new trial at which a new rule of comparative negligence would be applied.

Until this case, Tennessee followed the rule contributory negligence that barred the plaintiff's recovery if he were at fault in any way. Due to the harshness of the rule, the state had also adopted several exceptions that mitigated its effects. Contributory negligence did not prevent recovery if the defendant had the last clear chance to prevent the accident, the defendant was grossly negligent, or the plaintiff's negligence was a remote cause. Even with these exceptions, however, the court noted that forty-five states had moved to comparative fault as a result of judicial or legislative action. It then noted that it had the authority to change the judicially created doctrine of contributory negligence even if the legislature did not take any action.

Having decided to adopt comparative fault, the court next addressed the form it would apply. Comparative fault standards are either pure or modified. Under a pure system, the plaintiff's recovery is reduced by the full amount of his negligence, even if that negligence is greater than that of the defendant. Under a modified form of comparative fault, the plaintiff's recovery is reduced by the percentage of his fault unless his fault equals or is greater than the defendants. If the plaintiff's fault is equal to or greater than the defendant's, then he is denied any recovery. (The states are split as to whether the amount of the plaintiff's fault must be greater than the defendant's to prevent recovery.)

The court rejected a pure comparative fault rule and instead adopted a "greater than" approach. The court concluded that the plaintiff could recover unless his liability exceeded 49 percent. It adopted this approach because it provided the best balance between the harshness of the old contributory negligence rule and the need to maintain a fault-based system.

Copyright of Journal of Risk & Insurance is the property of Blackwell Publishing Limited and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.