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December 11, 2018

## \$10.7M verdict reversed in toddler's scalding death

By Andrew Maloney  
Law Bulletin staff writer

An appeals court has reversed a jury's award of \$10.7 million for a toddler killed by scalding bathwater.

The 1st District Appellate Court has ordered a new trial in the product-liability case against a water heater company, writing the judge was wrong to block certain evidence as well as a specific question about the heater's design.

In a 21-page decision, Justice Maureen E. Connors wrote jurors should have been allowed to see the heater's instruction manual as well as a warning label on both a mock-up and the actual heater at issue.

They also should have been given the chance to answer a special interrogatory, a question that aims to distill and frame the issues, asking whether the product was "unreasonably dangerous" when it left the manufacturer.

To determine whether a product design is defective, courts consider whether its benefits outweigh its risks. The state Supreme Court has held such a "risk-utility test" should consider "the instructions and warnings accompanying the product." Instruction manuals "certainly" qualify, Connors wrote.

And while the trial judge technically denied a plaintiff motion to exclude warning labels from evidence, jurors still weren't really able to scrutinize them.

"Additionally, the warning labels in the photographs of both the mock-up model and the water heater in question are not legible. Even if they were clear, the jurors would not have known to look for the labels since defendant was barred from referencing the labels or asking about them on direct cross-examination," the panel pointed out.

"As we have already noted, a factor to consider in the risk-utility test is the 'warnings accompanying the product.' Accordingly, we find that the trial court also erred in barring evidence of the warning labels during trial, despite its order to the contrary."

Mikayla King was scalded in a hot bath in February 2010, while she was at home with her mother Jennifer and her 4-year-old sister, Kiera. The mother testified she had told the older child,

Kiera, there was no time for a bath because the family had to pick up two older sons from school.

She was doing laundry when she heard the bath begin to run and after instructing Kiera to turn the water off, began walking toward the bathroom. She heard Mikayla, then 18 months old, scream, and ultimately called 911 to have her taken to the hospital for burns. Mikayla was taken to Provena Mercy Hospital in Aurora, then airlifted to Loyola University Medical Center's burn unit. She underwent 19 surgeries over the next two months, but died April 18, 2010.

The independent administrator of Mikayla's estate brought a claim for product liability against American Water Heater Co., a subsidiary of A.O. Smith Corp. The defendant was found liable under a strict product-liability theory in July 2016 with the jury awarding Mikayla's estate \$1.8 million for grief; \$1.8 million for loss of society; \$1.8 million for loss of a normal life; \$1.8 million for conscious pain and suffering; \$1.8 million for emotional distress; \$713,601 for medical expenses and \$1 million for the loss of benefit the child would likely have contributed to the future.

On appeal, the company argued the heater was not unreasonably dangerous, the judge excluded material evidence, improperly barred the defense from challenging the foreseeability of the injury and improperly denied a special interrogatory.

The appeals court on Friday noted that, in a strict liability claim, evidence of contributory negligence is irrelevant. As such, Associate Judge James E. Snyder granted some of plaintiff's motions to bar evidence relating to how much water was in the tub and how long Mikayla was in the tub.

He also barred evidence of the instruction manual, which the estate claimed would suggest the consumer was at fault and related to "failure to warn" rather than defective design claims.

The panel noted the manual warned that temperatures over 125 degrees posed risks, especially for children and the elderly. A police investigation had concluded water coming out of the Kings' tub faucet spout reached 134 and 138 degrees.

The manual also recommended installing a valve to reduce the water temperature at the point of use and noted that such valves are readily available at local plumbing stores.

Connors wrote that the panel agreed the manual was pertinent under the risk-utility test and the jury should have seen it.

"As noted above, our [S]upreme [C]ourt has specifically stated that one of the factors to be considered in the risk-utility test includes 'the instructions and warnings accompanying the product,'" she wrote. "The instruction manual would certainly fall under this category."

The majority also concluded Snyder committed reversible error by rejecting a special question proffered by the company. Specifically, it asked: "Was the water heater designed and manufactured by American Water Heater Company in 2005 unreasonably dangerous when it left its control?"

The company claimed a negative answer would be inconsistent with a verdict for the plaintiff. The judge denied it, stating it was "not a specific stated element of the current burden of proof instruction."

But Connors wrote that judges don't have discretion to reject special questions that are properly formatted and that there is "simply no requirement that a question reflect a specific stated element of the jury instructions, and certainly not that the subject of the special interrogatory must be a specific element of the burden of proof instruction."

Such questions need only relate to an ultimate issue of fact upon which the parties' rights depend.

"Here, the special interrogatory directly related to an ultimate issue of fact — whether the water heater was unreasonably dangerous when it left defendant's control," Connors, joined by Justice Mathias W. Delort, wrote.

Justice Sheldon A. Harris authored a one-page concurrence, writing that he agreed on the special question but disagreed on the decision about the instruction manual, saying its use in the trial would imply the plaintiff bore some blame for the injury and that such claims are irrelevant in strict product-liability cases.

"Use of the manual to show that plaintiff failed to discover or guard against scalding water would have allowed the jury to improperly blame plaintiff for negligently causing Mikayla's injuries and ultimate death," Harris wrote. "Therefore, I would find that the trial court did not abuse its discretion in excluding the manual."

Michael A. Scodro, of Mayer Brown LLP, represented the defendants in the case. He could not be reached for comment this morning.

Jay Paul Deratany, a partner at the Deratany Law Firm who represented Mikayla's estate, also could not be reached.

The case is *Tarick Loufti v. A.O. Smith Corp. and American Water Heater Co.*, 2018 IL App (1st) 170095-U.

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