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PENNSYLVANIA SUPREME COURT TO CONSIDER ADOPTING RESTATEMENT (THIRD) OF TORTS

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On February 27, 2008, the Pennsylvania Supreme Court may have taken the first step toward a possible revision to the Commonwealth's long-standing law on products liability. In *Bugosh v. I.U. North America, Inc.*, 942 A.2d 897 (Pa. 2008), in a two-sentence per curiam order, the court granted the defendant's petition for allowance of appeal to consider:

Whether this Court should apply § 2 of the Restatement (Third) of Torts in place of § 402A of the Restatement (Second) of Torts.

Does this mean the Supreme Court is poised to change Pennsylvania product liability law that has stood for more than four decades? The current state of Pennsylvania products liability law has been subjected to increasing criticism by scholars and practitioners.

I. The Underlying Case

On its face, *Bugosh* did not appear to be a likely candidate for allocatur on the issue of whether to adopt the Restatement (Third). *Bugosh v. Allen Refractories Co.*, 932 A.2d 901 (Pa. Super. 2007) involved three unconsolidated appeals brought by manufacturers and suppliers of asbestos products following a jury verdict of \$1,400,000 in favor of the estate of a worker who alleged that he contracted malignant mesothelioma from exposure to their products. From 1957 through 1962, Edward J. Bugosh was employed in a job that involved laying asbestos cement water and sewer lines for a Pittsburgh construction company. This job required him to cut pipe, which was printed with the word "asbestos." The pipe was delivered to the jobsite by trucks bearing the logo "Pittsburgh Gage," the predecessor of

I.U. North America, Inc. (IUNA). 932 A.2d at 906.

IUNA advanced two grounds for appeal: (1) the trial court erred in refusing to apply the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 instead of the RESTATEMENT (SECOND) OF TORTS § 402A; and (2) the trial court erred in refusing to allow IUNA to present the videotaped deposition testimony of a deceased witness.¹ *Id.* at 910.

The Superior Court quickly rejected IUNA's Restatement issue, devoting just two paragraphs to it. Noting that IUNA was arguing that a "miscarriage of justice occurred because the trial court applied the law currently accepted as authoritative in Pennsylvania" rather than precepts expressed by the concurrence in *Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000 (2003), the Superior Court held that "the trial court can hardly be said to have erred in refusing to proceed against established authority." *Id.* at 910-911. The Superior Court concluded that "[u]ntil and unless our Supreme Court alters its approach to strict liability, we will continue to adhere to established principles." *Id.* at 911.

Thus, the Superior Court summarily rejected IUNA's Restatement claim simply because the Restatement (Third) was not the law in Pennsylvania. In so doing, the Court never addressed the underlying substantive basis for IUNA's argument. Because IUNA was not a manufacturer, but only a supplier of asbestos products, plaintiff's only products liability claim against it was a failure to warn. IUNA claimed that the Restatement (Third) is better suited to dealing with failure to warn cases wherein it would be appropriate "to conduct a cost-benefit analysis in which

the conduct of the defendant is considered, not in a vacuum, but in the context of the real world." Brief of Appellant I.U. North America, Inc., p. 11. 2006 WL 4843781, *11.

Given that the Supreme Court has now agreed to consider the issue, it is appropriate to examine in some detail the differing approaches followed by the Restatement (Second) and the Restatement (Third).

II. The Restatement (Second) of Torts § 402A (1965)

The Restatement (Second) of Torts § 402A was adopted in Pennsylvania by *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966). Section 402A provides:

§ 402A. Special Liability of Sellers of Products for Physical Harm to User or Consumer

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not

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brought the product from or entered into any contractual relationship with seller.

Initially, products liability litigation centered on manufacturing rather than design defects or inadequate warnings. The primary difficulty for the plaintiff in such manufacturing defect cases was that despite an obvious defect that affected the safety of the final product, there were often insurmountable obstacles to proving that the manufacturer failed to exercise due care in the manufacturing process, which would be necessary in any cause of action grounded in negligence. One of the primary objectives of § 402A, therefore, was to relieve plaintiffs of that burden by focusing on the product itself, not the manufacturer's conduct, by not requiring proof of negligence. *See Phillips*, 576 Pa. at 665-666, 841 A.2d at 1012-1013 (Saylor, J., concurring).

A. The Strict Liability/Negligence Distinction

Since the adoption of § 402A, Pennsylvania courts have consistently sought to maintain a fundamental distinction between strict liability and negligence claims. "Negligence claims have no place in a case based on strict liability." *Phillips*, 576 Pa. at 655, 841 A.2d at 1006 (quoting *Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc.*, 515 Pa. 334, 341, 528 A.2d 590, 593 (1987)).

The difficulty in maintaining that distinction is evident by the very language of § 402A, which appears to incorporate negligence concepts by imposing liability on "one who sells any product in a defective condition *unreasonably dangerous* to the user or consumer. . . ." This language conjures images of the "reasonable man" standard that is inherent in hornbook negligence law.

Dean Wade has opined that the term, "unreasonably dangerous," may suggest "an idea like ultrahazardous or abnormally dangerous, and thus give rise to the impression that the plaintiff must prove that the product was unusually or extremely dangerous." Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 832 (1973). In an attempt to address the possible confusion arising from the term "unreasonably dangerous," the Pennsylvania Supreme Court felt compelled to caution

that those words "have no independent significance and merely represent a label to be used where it is determined that the risk of loss should be placed upon the supplier." *Azzarello v. Black Bros. Co., Inc.*, 480 Pa. 547, 556, 391 A.2d 1020, 1025 (1978)

B. The Negligently-Designed Non-Defective Product

The attempt to maintain the distinction between strict liability and negligence has the potential for yielding results that appear to defy logic. In *Phillips*, for example, the Supreme Court affirmed summary judgment on plaintiff's strict liability claim, holding that "in a strict liability design defect claim, the plaintiff must establish that the product was unsafe for its intended user." 576 Pa. at 657; 841 A.2d at 1007. Summary judgment was warranted in *Phillips* because a two-year child was not the intended user of a butane lighter. The Court refused to allow a manufacturer to be held strictly liable for "failing to design a product that was safe for use by any reasonably foreseeable user" because doing so "would improperly import negligence concepts into strict liability law." *Id.*

However, with regard to the negligence claims, the Court rejected appellants' argument that because the Superior Court had properly granted summary judgment on the strict liability claims, the negligence claims must naturally fail as well:

This reasoning is deeply flawed and we decline to adopt it. As we discussed supra, negligence and strict liability are distinct legal theories. Strict liability examines the product itself, and sternly eschews considerations of the reasonableness of the conduct of the manufacturer. In contrast, the negligence cause of action revolves around an examination of the conduct of the defendant. Were we to dispose of the negligence claim merely by an examination of the product, without inquiring into the reasonableness of the manufacturer's conduct in creating and distributing such a product, we would be divorcing our analysis from the elements of the tort. Thus, as the elements of the causes of actions are quite distinct, it would be illogical for us to dispose of Appellee's negligence claim based solely on our disposition of her strict liability claim.

Id. at 658, 841 A.2d at 1008.

Thus, the *Phillips* Court essentially held that the manufacturer of a butane lighter

could be held liable for negligently designing it, even though the product itself was not "defective," because it was safe for its intended user.

C. Azzarello and Risk-Utility Analysis

In *Azzarello*, the Pennsylvania Supreme Court rejected the use of "unreasonably dangerous" in instructions given to the jury. Instead, the Court concluded that whether a product was "unreasonably dangerous" is a question for the judge based on social policy considerations. 480 Pa. at 558; 391 A.2d at 1020. By contrast, the jury's focus is on whether the product is "defective," not on the user's conduct.

Accordingly, Pennsylvania law requires that a judge determine whether a product is "unreasonably dangerous" by engaging in a risk-utility analysis. The court weighs "a product's harms against its social utility." *Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1044 (3d Cir. 1997). Only after the judge has determined that a product is "unreasonably dangerous" is the case submitted to the jury, which then determines whether the product is defective. Specifically, the jury is required to consider whether the product "left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." *Phillips*, 576 Pa. at 652, 841 A.2d at 1005 (quoting *Azzarello*, 480 Pa. at 559, 391 A.2d at 1027).

Pennsylvania courts have identified a number of factors that may be considered by a judge in making the risk-utility analysis. They include:

- (1) The usefulness and desirability of the product – its utility to the user and to the public as a whole;
- (2) The safety aspects of the product – the likelihood that it will cause injury, and the probable seriousness of the injury;
- (3) The availability of a substitute product which would meet the same need and not be as unsafe;
- (4) 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;
- (5) The user's ability to avoid danger by the exercise of care in the use of the product;

- (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instruction; and
- (7) The feasibility, on the part of the manufacturer, of spreading the loss [by] setting the price of the product or carrying liability insurance.

Dambacher v. Mallis, 336 Pa. Super. 22, 51 n. 5, 485 A.2d 408, 423 n. 5 (1984) (citing John W. Wade, *supra* at 837-838). The risk-utility analysis is made under a weighted view of the evidence, considering the facts in the light most favorable to the plaintiff.

D. Criticism of Section 402A

Pennsylvania products liability law and its insistence on the strict liability/negligence distinction have been subjected to increasing criticism over the years, suggesting that properly applying Section 402A has proved to be confusing and cumbersome. Even the Pennsylvania Supreme Court has conceded that it has "muddied the waters at times with the careless use of negligence terms in the strict liability arena." *Phillips*, 576 Pa. at 655-656, 841 A.2d at 1006-1007.

According to Justice Saylor, the original rationale of relieving plaintiffs of the burden of proving that the manufacturer of a defective product was negligent is less applicable in design defect cases, where "most courts and commentators have come to realize that . . . the character of the product and the conduct of the manufacturer are largely inseparable." *Id.* at 669, 841 A.2d at 1015 (Saylor, J., concurring). As noted by two commentators:

[T]o condemn a design for being unreasonably dangerous is inescapably to condemn the designer for having been negligent. To insist otherwise would be akin to a professor telling a law student that, while the brief the student wrote is awful, the professor is not passing judgment on the student's skill in writing it.

James A. Henderson, Jr. and Aaron D. Twerski,² *Achieving Consensus on Defective Product Design*, 83 CORNELL L.REV. 867, 919 (1998).

Another commentator cited the tension between strict liability and negligence that is apparent from the framework of

§ 402A:

Section 402A contained an internal tension: Its declaration that a manufacturer would be liable even if it "exercised all possible care in the preparation and sale of [its] product" was bounded by its application only to products that were "in a defective condition unreasonably dangerous to the user or consumer or to his property." Thus the section's strict-liability rule was tempered by a negligence-based concept of defect.

George W. Conk, *Is There a Design Defect in the Restatement (Third) of Torts: Products Liability?*, 109 YALE L.J. 1087, 1092 (2000).

Even Dean Wade, whose seven risk-factors formed the basis of the *Azzarello* risk-utility test, has been critical of the *Azzarello* approach, claiming that the *Azzarello* test is "likely to confuse trial court and jury." John C. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 744 (1983). How, wondered Dean Wade "could any automobile today turn out not to be actionable under [the *Azzarello* test]?" John C. Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND L. REV. 551, 568 (1980).

III. THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998)

Section 402A was originally crafted to address manufacturing defects. As design defects and claims of inadequate warnings became more prevalent in the 1960's and 1970's, courts sought to impose strict liability for these types of claims under Section 402A. Restatement (Third) of Torts: Products Liability § 1, cmt. a. This approach has often been difficult since design and warning claims frequently require an inquiry into the manufacturer's conduct, rather than an examination of the product itself. This difficulty has been addressed in the Restatement (Third) of Torts: Products Liability § 2, which provides:

§ 2. Categories of Product Defect

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

- (a) contains a manufacturing defect when the product departs from

its intended design even though all possible care was exercised in the preparation and marketing of the product;

- (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
- (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Under the Restatement (Third), all three types of product defects are specifically addressed and dealt with separately. Manufacturing defects are treated in a fairly straightforward manner. A manufacturing defect exists when the product "departs from its intended design even though all possible care was exercised in the preparation and marketing of the product." Restatement (Third) of Torts: Products Liability § 2(a). As such, the Third Restatement retains strict liability for manufacturing defects. *Phillips*, 576 Pa. at 676, 841 A.2d at 1019 (Saylor, J., concurring).

In a design defect claim, however, a product is deemed defective:

when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor . . . , and the omission of the alternative design renders the product not reasonably safe.

Restatement (Third) of Torts: Products Liability § 2(b). Thus, the Third Restatement avoids the artificial distinction between strict liability and negligence by "endorsing a reasonableness-based, risk-utility balancing test as the standard for adjudging the defectiveness of product designs." *Phillips*, 576 Pa. at

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677, 841 A.2d at 1020 (Saylor, J., concurring) (citing Restatement (Third) of Torts: Products Liability § 2 cmt. d).

IV. A Distinction Without A Difference?

In their appellate brief to the Superior Court, IUNA argued that the changes sought by the Restatement (Third) with respect to design defect and failure to warn cases “do not mark a radical departure from Section 402A, rather, they fine-tune existing strict liability law so that it can be more easily applied to these distinct types of cases.” Brief of Appellant I.U. North America, Inc., p. 9. 2006 WL 4843781, *9.

The Reporters of the Restatement (Third) have taken a similar position:

Although Pennsylvania case law governing products liability is sometimes difficult to decipher, a careful analysis of Pennsylvania’s appellate decisions suggests that its law may be read to be consistent with § 2.

Restatement (Third) of Torts: Products Liability § 2 Reporters’ Note, p. 54. The Reporters specifically cite case law dealing with the *Azzarello* risk-utility analysis and the necessity of a reasonable alternative design to prevail on a design defect claim. After doing so, they argue that “when one views Pennsylvania law

in its broad sweep, both risk-utility analysis and the need to introduce evidence of a reasonable alternative are well-established and consistent with the views of this Restatement.” *Id.* at 58.

Supporters of the Restatement (Third) argue that the reasonableness standard set forth in §§ 2(b) and 2(c) for design defects and inadequate warnings is no different from the risk-utility analysis called for in *Azzarello*. The Pennsylvania Supreme Court has acknowledged that cases throughout the country addressing design defect cases have found that “the relevant differences between negligence and strict liability at both the theoretical and practical level are marginal.” *Duchess v. Langston Corp.*, 564 Pa. 529, 546, 769 A.2d 1131, 1141 (2001). This is due in part to the fact that design defect cases “employ risk-utility balancing similar to that utilized in evaluating negligence claims.” *Id.*

In his concurrence in *Phillips*, Justice Saylor acknowledged that certain negligence concepts are embedded in the strict products liability doctrine in Pennsylvania:

[E]ven more fundamentally, Pennsylvania trial and appellate courts, and federal courts applying Pennsylvania law, have been employing other aspects of negligence theory as central principles controlling design defect litigation for more than twenty years.

Phillips, 576 Pa. at 665, 841 A.2d at

1012 (Saylor, J., concurring).

The three most senior justices on what is currently a six-member Court (Chief Justice Castille, and Justices Saylor and Eakin) have endorsed the adoption of the Restatement (Third), having joined in Justice Saylor’s concurrence in *Phillips*. The remaining three members of the Court (Justices Baer, Todd, and McCaffrey) have all joined the Court since it first examined the issue in *Phillips*. Assuming that the opinions of the three senior justices on the merits of the Restatement (Third) have not changed in the intervening four years, it will be interesting to see if they can persuade one of the relative newcomers to join their efforts to reform and streamline Pennsylvania products liability law.

ENDNOTES

¹On the evidentiary issue, the Superior Court held that the videotaped deposition, which was taken in a previous action, was properly excluded as inadmissible hearsay because it did not satisfy Pa. R.E. 804(b)(1). The court held that the plaintiff was not “constructively represented” in the previous action because no party in the previous action “had the incentive to vigorously protect the same interests that the parties to the current action would want to protect.” 932 A.2d at 912 (quoting *Beaumont v. ETL Services, Inc.* 761 A.2d 166, 172 (Pa. Super. 2000)).

²Professors Henderson and Twerski were the Reporters for the Restatement (Third).

