

THIRD CIRCUIT PREDICTS DRAMATIC CHANGE IN PENNSYLVANIA PRODUCTS LIABILITY LAW

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In what could signal the most dramatic shift in Pennsylvania products liability law in decades, the U.S. Court of Appeals for the Third Circuit predicted that the Pennsylvania Supreme Court will change the Pennsylvania law that has stood for more than 40 years. The Third Circuit predicted that the Pennsylvania Supreme Court will adopt the Restatement (Third) of Torts: Products Liability, thereby allowing a child bystander to recover for injuries sustained by a riding lawnmower even though she was not the intended user of the product.

On June 16, 2009, however, the Pennsylvania Supreme Court dismissed an appeal as improvidently granted in a case in which it was specifically asked to consider whether to adopt the Restatement (Third) of Torts.

***Berrier v. Simplicity Manufacturing, Inc.*, 563 F.3d 38 (3d Cir. 2009)**

Four-year-old Ashley Berrier was seriously injured when her grandfather, Melvin Shoff, who was operating a Simplicity riding lawnmower, inadvertently backed up over Ashley's left foot, which was subsequently amputated. Ashley had gone into her grandfather's yard to give him a flower while he was mowing. Shoff disengaged the mower blades and told her to go inside. Believing that Ashley had done as he instructed, Shoff then re-engaged the blades and placed the mower in reverse to turn around. As he was backing up with the blades engaged, he backed over Ashley's left leg.

Ashley's parents filed suit against Simplicity, asserting claims in both strict liability and negligence. Plaintiffs argued that the lawnmower was defective because it did not have any backover protection, such as roller barriers or a "no mow in reverse" feature, which would have prevented the blades from operating when the mower was moving in reverse. The District Court granted summary judgment in favor of Simplicity on both claims, holding that Pennsylvania strict products liability law does not permit recovery for injuries to anyone other than the intended user of a product. Because Ashley was a bystander, and not the intended user of the riding mower, she could not recover against Simplicity.

Federal courts in Pennsylvania are obligated to apply the substantive law of the Commonwealth. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). However, the Pennsylvania Supreme Court has never expressly determined whether one who is merely a bystander, and not a user of a product, can bring a products liability claim against the manufacturer. In the absence of a controlling decision by the Pennsylvania Supreme Court, a federal court applying Pennsylvania law must predict how the state's highest court would decide the issue. *Nationwide Mutual Ins. Co. v. Buffetta*, 230 F.3d 634, 637 (3d Cir. 2000). In *Berrier*, the Third Circuit "predicted" that the Pennsylvania Supreme Court would adopt the Restatement (Third) of Torts: Products Liability §§ 1 and 2, thereby supplanting the Restatement (Second) of Torts § 402A.

Section 402A and the Intended Use/Intended User Doctrine

The Restatement (Second) of Torts, § 402A was adopted by the Pennsylvania Supreme Court more than 40 years ago in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966). Under Section 402A, a manufacturer or seller of a product "in a defective condition unreasonably dangerous to the user or consumer" is liable for physical injuries caused by the product even if it "has exercised all possible care in the preparation and sale of the product." The Supreme Court subsequently held that a jury in a products liability case must 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." *Azzarello v. Black Bros. Co., Inc.*, 480 Pa. 547, 559, 391 A.2d 1020, 1027 (1978).

Although *Azzarello* stands for the proposition that a product must be safe for its "intended use," it did not answer the question of whether it should be safe only for its "intended user." The Court addressed that issue in *Mackowick v. Westinghouse Electric Corp.*, 525 Pa. 52, 575 A.2d 100 (1990), where it held that in a failure-to-warn case, a product need only be safe for its intended user. In *Mackowick*, the plaintiff was injured when electricity arced from an electrical capacitor which was

allegedly defective because of the lack of a warning regarding the dangers of live, exposed electrical wires. The Court rejected that argument, holding that a capacitor was intended to be used only by a qualified electrician, who would be aware of such dangers, and not by a member of the general public.

The Court subsequently applied the intended use doctrine to a design defect case in *Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000 (2003), a tragic case in which a two-year-old boy used a disposable butane cigarette lighter to start a fire that killed himself, his mother, and his brother. Because a two-year-old child is not an intended user of a cigarette lighter, the Supreme Court affirmed summary judgment on the strict liability claim against the lighter's manufacturer, holding that a plaintiff must establish that a product was unsafe for its intended user. Though it may be foreseeable that young children may be inclined to play with cigarette lighters, the Supreme Court expressly stated that a manufacturer will not be held liable for failing to design a product that was safe for use by "any reasonably foreseeable user" because "such a standard would improperly import negligence concepts into strict liability law."

The Restatement (Third) of Torts, §§ 1 and 2

Under § 1 of the Third Restatement, a manufacturer, seller, or distributor of a defective product "is subject to liability to harm to persons or property caused by the defect." Section 2 defines the three categories of product defects. For manufacturing defects, § 2 retains strict liability, stating that a product is defective when it departs from its intended design despite the exercise of all possible care. For design and warning defects, however, § 2 adopts a reasonableness standard. A product 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." Similarly, a product 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."

The Third Restatement does not limit a strict liability cause of action to the "user or consumer" of a product, and broadly permits any person harmed by a defective product to recover in strict liability.

Potential Ramifications of the Third Restatement

For manufacturers, distributors, and sellers, the Third Restatement presents several significant changes to current products liability law in Pennsylvania. It sets

forth a common-sense, rational approach to products liability that takes into account a manufacturer's conduct. Under current Pennsylvania law, "strict liability examines the product itself, and sternly eschews considerations of the reasonableness of the conduct of the manufacturer." *Phillips*, 576 Pa. at 658, 841 A.2d at 1008.

The Third Restatement does away with an artificial distinction between strict liability and negligence, a distinction that Pennsylvania courts have struggled to maintain. "The Third Restatement therefore eliminates much of the confusion that has resulted from attempting to quarantine negligence concepts and insulate them from strict liability claims." *Berrier*, 563 F.3d at 55.

The Third Restatement will also allow for the introduction of evidence that is currently excluded, including a manufacturer's compliance with industry standards, other evidence regarding a manufacturer's conduct, and evidence of a plaintiff's comparative negligence. Due to the strict liability/negligence distinction, evidence of a product user's negligence is currently inadmissible to excuse a defective product, and negligence may not be used to reduce recovery by comparing fault. *Madonna v. Harley Davidson, Inc.*, 708 A.2d 507, 508 (Pa. Super. 1998). The only exception to this rule is where such evidence is introduced by the defense to establish that the accident was caused *solely* by the user's conduct, and not in any way by a product defect.

While the Third Restatement may confer obvious benefits to manufacturers, there may be some disadvantages as well. The Third Restatement will effectively eliminate the intended use/intended user doctrine, meaning that manufacturers cannot escape liability merely because their product was being put to an unintended use or was being used by an unintended user. Instead, the issue will be whether the unintended use or user was foreseeable. Manufacturers of products that may be misused by children, such as butane lighters, will need to be more vigilant in designing their products.

In *Pa. Dept. of General Services v. U.S. Mineral Products*, 587 Pa. 236, 898 A.2d 590 (2006), a Commonwealth office building caught fire, during which PCBs were released into the building. As a result, the Commonwealth felt compelled to demolish the building, and thereafter sought damages against Monsanto, the manufacturer of the PCBs. After a \$90 million verdict against Monsanto, the Pennsylvania Supreme Court reversed, holding that trial court's charge to jury did not distinguish between PCB's that were "off gased" from HVAC ductboard and PCB's that were released when the PCB-laden ductboard was consumed

by fire, and that being consumed by a fire was not an “intended use” of a product. 587 Pa. at 259, 898 A.2d at 604. The Court conceded that while it may have been foreseeable that a product may be consumed by a fire, foreseeability could not be considered in a strict liability case. 587 Pa. at 255, 898 A.2d at 602. After a retrial, Monsanto, which was represented by White and Williams LLP, obtained a defense verdict.

The Monsanto case illustrates the potential danger of adopting the Third Restatement’s approach, where judges and juries may too easily conflate uses that are truly “foreseeable” with those that are merely “conceivable.” For example, while it is conceivable that a motor vehicle might leave the road and go into a lake, it surely cannot be a “foreseeable use” that would require car manufacturers to make floating cars. Thus, while the incineration and destruction of any product, such as HVAC ductboard, is conceivable, under no sensible policy construct can it be said to be a “foreseeable use” justifying the imposition of civil liability.

***Bugosh v. I.U. North America, Inc.*, 2009 WL 1668509 (Pa. Jun. 16, 2009)**

The accuracy of the Third Circuit’s prediction that the Pennsylvania Supreme Court would adopt the Third Restatement has already been tested. The *Berrier* decision was issued while the Supreme Court was considering *Bugosh v. I.U. North America, Inc.*, 7 WAP 2008, a case in which it was asked to consider whether to apply § 2 of the Restatement (Third) of Torts: Products Liability in place of § 402A of the Restatement (Second) of Torts. Rather than deciding the issue on the merits, however, the Supreme Court dismissed the appeal “as improvidently granted.” *Bugosh v. I.U. North America, Inc.*, 2009 WL 1668509 (Pa. Jun. 16, 2009). The Court’s one-sentence *per curiam* opinion gave no reason for the decision.

Justice Thomas G. Saylor issued a lengthy and passionate dissenting statement, in which he was joined by Chief Justice Ronald D. Castille. In his dissent, Justice Saylor reiterated his belief that Pennsylvania products liability law, based as it is on *Azzarello*, is “severely deficient” and that “necessary adjustments are long overdue.” Justice Saylor did not want to let another opportunity to make those adjustments “go by the wayside.” Justice Saylor further stated that he would overrule *Azzarello* prospectively and adopt Sections 1 and 2 of the Restatement (Third) of Torts: Products Liability.

Conclusion

On balance, the Third Restatement provides a unitary, common-sense standard that will more readily allow manufacturers to conform their conduct and their products to it, thereby promoting safer products. It will also allow courts and juries to more easily and uniformly interpret and apply the law, thereby promoting greater fairness in our judicial system.

While the Third Circuit’s decision in *Berrier* suggests that a sweeping change in Pennsylvania products liability law may occur in the not-too-distant future, the Pennsylvania Supreme Court apparently felt that *Bugosh* was not the appropriate case to adopt such a change at this time. Or, it may simply be that there are currently not enough votes on the Court to support the adoption of the Third Restatement. At present, only Chief Justice Castille and Justices Saylor and Eakin are on record as supporting the Third Restatement, leaving them one vote short on the seven-justice Supreme Court.

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