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Expert Analysis

A Maze of Uncertainty: Pennsylvania Product Liability Law Remains in a Confusing State of Flux

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As of the writing of this article in January, confusion is reigning in the Commonwealth of Pennsylvania on the uncertain issue of whether the Restatement (Second) of Torts or the different analysis set forth in the Restatement (Third) of Torts should be used in Pennsylvania product liability cases.

This uncertainty is the result of an ever-growing split of authority, not only between the Pennsylvania state and federal courts, but also among and even within the different federal district courts across the commonwealth.

The situation has now spiraled downward to the point that litigants with cases pending in the Pennsylvania federal court system have to research whether the particular federal district court judge presiding over the case has previously issued a decision on the issue in order to determine which restatement standard will be applied in that case.

Whereas one Pennsylvania federal court judge has politely noted that this area of the law in Pennsylvania is in a "state of flux,"[1] another has more aptly described Pennsylvania product liability law as being "a maze of uncertainty."[2]

The standard that is applied could make or break a case.

Although the Restatement (Second) favors strict liability concepts over negligence principles in the product liability context, the Restatement (Third) decreases the impact of concepts such as "intended use" and "intended user" and places a greater emphasis on the negligence principle of "reasonable foreseeability."

All of these changes in the Restatement (Third) arguably shift the balance in favor of manufacturer defendants in personal injury cases that are based on allegations that a defective product was the cause of the injury.

As noted below, under the current status of Pennsylvania product liability law, whether the case will be governed by the Restatement (Second) of Torts or the Restatement (Third) of Torts depends on whether the case is in state or federal court.

If the case is in federal court, the answer may further depend on which particular federal district court judge is presiding over the case.

THE RESTATEMENT (SECOND) OF TORTS SECTION 402A STANDARD

It is safe to say that most Pennsylvania lawyers who are now practicing law were trained on product liability issues in law school through a detailed study of the parameters of Section 402A of the Restatement (Second) of Torts.

This section of the Restatement (Second) of Torts, which first came back into play in 1965, provides, in pertinent part, that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer" may be held strictly liable to the injured party, even if the "seller has exercised all possible care in the preparation and sale of this product."[3]

At the time it was published, Section 402A of the Restatement (Second) of Torts codified a new strict liability cause of action against manufacturers to be considered in addition to the other previously viable causes of action, such as negligence and breach of warranty.

Section 402A also expanded the scope of possible liable parties to include all sellers in the distribution process related to the dissemination of the product to the public at large.

The Pennsylvania Supreme Court has consistently applied Section 402A of the Restatement (Second) of Torts to Pennsyl-vania product liability cases since its 1966 decision in the case of *Webb v. Zern*.[4]

Under the Restatement (Second) of Torts analysis, manufacturer defendants are held to be strictly liable for any manufacturing defects in their products. With regard to claims of design defects, since about 1984, the Pennsylvania courts have used a risk-utility analysis to initially determine, as a matter of law, whether a product may be considered by the jury to be defective.[5]

If the case makes it beyond this threshold finding, the matter will be permitted to proceed to the jury for a determination as to whether a product's design was defective and was the cause of the injury alleged.[6]

THE RESTATEMENT (THIRD) OF TORTS SECTION 2 STANDARD

The Restatement (Third) of Torts was published in 1998.[7] Under Section 2 of the Restatement (Third) of Torts, recognized product defects that may subject a defendant to liability include manufacturing defects, design defects and failure-to-warn defects.[8]

In Section 2 of the Restatement (Third) of Torts, the definition of a manufacturing defect is essentially identical to that contained in the Restatement (Second) — that is, strict liability is owed to the injured party for any injuries caused by a manufacturing defect of the product.[9]

However, in contrast to the principles espoused under the Restatement (Second) of Torts, claims asserting a design defect or a failure to warn are to be analyzed with reference to negligence principles and concepts delineated under the Restatement (Third) of Torts.[10]

For example, under design-defect cases governed by the Restatement (Third) of Torts, the strict liability analysis is altered by the inclusion of negligence-based principles, including consideration of the viability of a "reasonable alternative design."[11]

More specifically, the Restatement (Third) of Torts: Products Liability, Section 2(b) states, in pertinent part, that 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 by the seller or other distributor, or a predecessor in the commercial chain of distribution. It also states that the omission of the alternative design renders the product not reasonably safe.

Stated otherwise, whereas the analysis of design-defect cases under the Restatement (Second) of Torts focuses on the actual design of the product, the basis for liability under the Restatement (Third) of Torts in this context includes a consideration of the reasonableness of the defendant's conduct.[12]

Essentially, whereas the Restatement (Second) standard focuses on an intended user making an intended use of the product, the Restatement (Third) places the emphasis of the analysis on the foreseeable risks of harm and whether an alternative design could have minimized or eliminated that risk.[13]

Another difference with the Restatement (Third) of Torts in the product liability context is that, under the Restatement (Third) analysis, the plaintiff's own acts or omissions (*i.e.*, contributory negligence) are made an important part of the analysis of whether a product should be determined to be defectively designed.[14]

Changes in the Restatement (Third) arguably shift the balance in favor of manufacturer defendants in personal injury cases that are based on allegations that a defective product was the cause of the injury.

With the movement away from strict liability toward a more negligence-based analysis in the Restatement (Third) of Torts, it would appear that most defendants in product cases would advocate for the adoption and application of the Restatement (Third) standard. In contrast, most plaintiffs would probably favor the strict liability analysis under the Restatement (Second).

It should be noted, however, that the emphasis in the Restatement (Second) that the plaintiff be an intended user of the product serves to bar any recovery to bystanders injured by a product, thereby making the Restatement (Third) a more favorable standard for that particular class of plaintiffs.

Overall, there can be no dispute that, with the substantive differences between the two standards, the decision on which standard should be applied could have a significant impact on the admissibility of evidence and, consequently, the outcome of particular product liability cases.

HOW THE SPLIT OF AUTHORITY DEVELOPED

Pennsylvania courts, until recently, have consistently followed the doctrine of *stare decisis* and have applied the Restatement (Second) of Torts analysis in product liability cases since as far back as 1966. However, a recent slew of federal court decisions made in an attempt to predict which Restatement of Torts the Pennsylvania Supreme Court would adopt if presented with the issue again have left this area of the law filled with unfortunate uncertainty and confusion.

These efforts by the federal courts to predict how the Pennsylvania Supreme Court would address the Restatement (Second) versus the Restatement (Third) issue may have been borne out of signals from the Pennsylvania Supreme Court itself that

perhaps the time has come to consider the Restatement (Third) of Torts product liability standard as the law of the land.

For example, as far back as 2003, in his concurring opinion in the case of *Phillips v. Cricket Lighters*,[15] Pennsylvania Supreme Court Justice Thomas G. Saylor criticized the "ambiguities and inconsistencies" that had arisen in recent times with the Restatement (Second) analysis and stated that Pennsylvania's product liability law "demonstrate[d] a compelling need for consideration of reasoned alternatives, such as are reflected in the position of the Third Restatement."[16]

Yet, through at least 2008, the Pennsylvania Superior Court and the Pennsylvania Supreme Court had repeatedly rejected requests for the adoption of the Restatement (Third) analysis in several product liability cases.[17]

Then, in 2008, the Pennsylvania Supreme Court agreed to hear the appeal in the case of *Bugosh v. I.U. North America Inc.* to specifically address the issue of whether the Restatement (Third) of Torts should be adopted in the product liability context.[18]

The Superior Court in *Bugosh* had refused to overrule "established authority" supporting the application of the Restatement (Second) and rejected the defendant's assertion that the Restatement (Third) should be adopted.

While this issue was pending before the Pennsylvania Supreme Court in *Bugosh*, but not yet decided, the same issue came before the 3rd U.S. Circuit Court of Appeals in *Berrier v. Simplicity Manufacturing Inc.*[19]

The 3rd Circuit boldly predicted in *Berrier* that the time had come when the Pennsylvania Supreme Court would indeed adopt the Restatement (Third) of Torts as the new standard to apply in products cases.[20]

However, in June 2009 the Pennsylvania Supreme Court dismissed the appeal in *Bugosh* as improvidently granted and never reached the issue of whether to adopt the Restatement (Third) of Torts.[21] In that decision to dismiss the appeal, in a lengthy and strongly worded dissent, Justice Saylor again voiced his desire to adopt the Restatement (Third).[22]

The prediction by the 3rd Circuit in *Berrier,* followed by the dismissal of the appeal in *Bugosh,* created confusion among the Pennsylvania federal district court judges who faced the same issue thereafter.[23]

After *Bugosh*, federal district court judges across the Commonwealth of Pennsylvania, some of them even from the same district court bench, began to diverge on the question of which Restatement to follow. Then, in its more recent decision in 2011 on the issue in *Covell v. Bell Sports Inc.*,[24] the 3rd Circuit again predicted that the Pennsylvania Supreme Court would adopt the Restatement (Third) if squarely faced with the issue. The 3rd Circuit seemed to stand fast to this position again in a footnote contained in its denial of an appeal in the case of *Sikkelee v. Precision Automotive*.[25]

Since the issuance of the *Covell* decision by the 3rd Circuit reiterating this prediction, the lower federal courts have continued to issue conflicting decisions on which Restatement analysis to apply in products cases.

In 2011 the Pennsylvania Supreme Court issued its decision in *Schmidt v. Boardman Co.*[26] in which the court acknowledged that "foundational problems" existed in Pennsylvania product liability law based on the Restatement (Second) of Torts.[27] However, the court noted that the case before it was not selected to address those "foundational concerns."[28]

As such, the debate was not concluded in that case.

Yet, a study of the jurisprudence on this issue reveals that, in 2012, the Pennsylvania Supreme Court did have another opportunity to address the issue in *Beard v. Johnson & Johnson Inc.*[29] In *Beard*, the Pennsylvania Supreme Court again chose not to adopt the Restatement (Third) as had been repeatedly predicted by the Pennsylvania federal appellate court.

In the *Beard* decision, Pennsylvania Supreme Court Justice Max Baer clearly stated that "the current law of Pennsylvania ... is Section 402A of the Restatement (Second) of Torts."[30]

But *Beard* was not a definitive decision on the issue since it sent out some mixed signals from justices on Pennsylvania's highest court.

In his majority opinion in *Beard*, Justice Saylor, joined by Chief Justice Ronald D. Castille, along with Justices J. Michael Eakin and Joan Orie Melvin, wrote in a footnote, "It may be cogently argued that risk-utility balancing is more legitimately assigned to a jury." He was referring to the approach endorsed by the Restatement (Third) of Torts.[31]

Also, Justice Baer filed a concurring opinion in *Beard*, which Justices Debra Todd and Seamus P. McCaffery joined, in which he attempted to "distance" himself from what he viewed as Justice Saylor's rejection of the standard in Section 402A of the Restatement (Second) calling for a risk-utility analysis to be performed by judges.[32]

As noted in greater detail below, there has developed a split of authority in each of the branches of the federal district courts in Pennsylvania.

Although some of the federal district court judges have opted to follow the most recent pronouncement on the issue by the Pennsylvania Supreme Court in the *Beard* case favoring the Restatement (Second) analysis, still other federal court judges believe they are duty-bound to follow the contrary 3rd Circuit's predictions in the *Berrier* and *Covell* decisions as binding precedent in favor of the application of the Restatement (Third) standards until a subsequent, contrary decision is handed down by a Pennsylvania appellate court.

THE EASTERN DISTRICT OF PENNSYLVANIA

In a March 2010 decision in *Hoffman v. Paper Converting Machine Co.*, 694 F. Supp. 2d 359, 364-65 (E.D. Pa. 2010), U.S. District Judge Petrese B. Tucker of the Eastern District of Pennsylvania, noting that, as of that time, the Pennsylvania Supreme Court had dismissed the appeal in *Bugosh* without deciding the issue, opted to follow the 3rd Circuit's reference to the Restatement (Third) in *Berrier* as "binding precedent."

In so ruling, Judge Tucker cited *Richetta v. Stanley Fastening Systems,* 661 F. Supp. 2d 500 (E.D. Pa. 2009), and *Martinez v. Skirmish USA,* 2009 WL 1437624 (E.D. Pa. 2009), with approval.

The 3rd Circuit's prediction on the adoption of the Restatement (Third) was also followed by U.S. District Judge William H. Yohn Jr. in *Zhao v. Skinner Engine Co.*, No. 2:11-CV-07514-WY, 2012 WL 5451817 (E.D. Pa. 2012).

Other judges in the Eastern District of Pennsylvania have come to the contrary decision that Section 402A of the Second Restatement remains the law of Pennsylvania in light of the fact that the 3rd Circuit's prediction that the Pennsylvania Supreme Court would adopt the Restatement (Third) as the law of the land has not come to pass. *Thompson v. Med-Mizer Inc.*, No. 10-CV-2058, 2011 WL 1085621 (E.D. Pa. 2011) ("This court is not required to follow the 3rd Circuit's prediction where 'the state's highest court issues a decision contradicting that prediction or state intermediate appellate court's decisions subsequently indicate that prediction has not come to pass.'"), *citing Sweitzer v. Oxmaster Inc.,* 2010 WL 5257226, at *3-4 (E.D. Pa. 2010), and *Durkot v. Tesco Equip.,* 654 F. Supp. 2d 295, 298-299 (E.D. Pa. 2009).

In a more recent decision, U.S. Magistrate Judge Henry S. Perkin of the Eastern District of Pennsylvania also referred to the Restatement (Second) analysis in *Carpenter v. Shu-Bee's Inc*., No. CIV.A. 10-0734, 2012 WL 2740896 (E.D. Pa. 2012).

THE WESTERN DISTRICT OF PENNSYLVANIA

This split of authority is also evidenced in the U.S. District Court for the Western District of Pennsylvania, where judges who have presently chosen to follow the Restatement (Second) in product liability cases contrary to the 3rd Circuit's analysis include U.S. District Judge Nora Barry Fischer in *Gross v. Stryker*, 858 F. Supp. 2d 466 (W.D. Pa. 2012), and U.S. District Judge Arthur J. Schwab in *Konold v. Superior International Industries Inc.,* 2012 WL 5381700 (W.D. Pa. 2012), and *Schif v. Hurwitz*, 2012 WL 1828035 (W.D. Pa. 2012).

The Western District judges who have chosen to instead apply the Restatement (Third) under the 3rd Circuit's predictions in the *Berrier* and/or *Covell* decisions include U.S. District Judge Mark R. Hornak in *Sansom et al. v. Crown Equipment Corp. et al.,* 2012 WL 3027989 (W.D. Pa. 2012), and *Lynn v. Yamaha Golf-Car Co.,* 2012 WL 3544774 (W.D. Pa. 2012), along with U.S. District Judge Donetta W. Ambrose in *Zollars et al. v. Troy-Built LLC*, 2012 WL 4922689 (W.D. Pa. 2012), and U.S. District Judge Maurice Cohill Jr. in *Spowal v. ITW Food Equipment Group*, No. C.A. 10-187, ECF No. 52 (W.D. Pa. 2012).

THE MIDDLE DISTRICT OF PENNSYLVANIA

Federal judges in the Middle District of Pennsylvania have also split on the issue of which Restatement should be adopted in product cases.

U.S. District Judge A. Richard Caputo has repeatedly ruled that based on the *Covell* court's pronouncement that *Berrier* remains the controlling formulation of the law for district courts in this circuit and given that the Pennsylvania Supreme Court has not issued a decision to the contrary, the Restatement (Third) of Torts should be applied in Pennsylvania Middle District product liability cases as repeatedly

predicted by the 3rd Circuit. *See Vaskas v. Kenworth*, No. 3:10 CV-1024, 2013 WL 101612 (M.D. Pa. 2013); *Giehl v. Terex Utilities*, No. CIV.A. 3:12-0083, 2012 WL 1183719 (M.D. Pa. 2012).

Meanwhile, U.S. District Judge John E. Jones III of the Middle District of Pennsylvania issued a contrary decision in *Sikkelee v. Precision Automotive*, 876 F. Supp. 2d 479 (M.D. Pa. 2012), in which he chose to follow the Restatement (Second) in product liability cases contrary to the 3rd Circuit's predictions.

In *Sikkelee*, Judge Jones respectfully noted that federal district courts are not required to follow predictions by the 3rd Circuit if that prediction does not appear to have been realized in state court precedent.

In the appeal of Judge Jones' decision in *Sikkelee*, the 3rd Circuit again noted, in its own *en banc* decision denying a petition for clarification on the appeal, that federal district courts in Pennsylvania should continue to apply the Third Restatement.[33]

PENNSYLVANIA STATE COURTS

With the law being in a state of flux and the federal court decisions creating a maze of uncertainty, litigants are required to monitor the status of this issue with the Pennsylvania Supreme Court in order to determine how this issue may ultimately play out.

As noted above, the most recent, on-point pronouncement by the Pennsylvania Supreme Court on the Restatement (Second) versus (Third) debate is the court's decision in *Beard v. Johnson & Johnson*,[34] in which the court reiterated, as it has since 1966, that the standards set forth in Section 402A of the Restatement (Second) of Torts are to be applied in Pennsylvania product liability cases.

In its more recent decision in *Reott v. Asia Trend Inc.*,[35] a shorthanded Pennsylvania Supreme Court[36] issued a 5-1 decision recognizing that "highly reckless" conduct is an affirmative defense in product liability cases under which defendants could attempt to avoid liability by showing that a plaintiff's highly reckless conduct was the sole or superseding cause of the plaintiff's injuries. In so ruling, the majority, in an opinion written by Justice Max Baer, relied on Section 402A of the Restatement (Second) of Torts.

Accordingly, the *Reott* decision can be read as lending further support to the proposition that the Restatement (Second) remains the law of the land in Pennsylvania product cases.

However, it should also be noted that *Reott* was analyzed as a manufacturing defect case, and both the Second Restatement and Third Restatement are in agreement that strict liability applies in such cases. The conflict between the two Restatements arguably requires a square decision by the Pennsylvania Supreme Court in a design-defect case to finally conclude the matter once and for all.

It is also noted that, as of the writing of this article, the Pennsylvania Supreme Court has granted *allocatur* to hear the appeal in the case of *Lance v. Wyeth*,[37] in which it may have yet another opportunity to squarely address the Restatement (Second) versus (Third) issue. The hope remains that the court will tackle and finally resolve the issue when it announces its decision in *Lance v. Wyeth*.[38]

NOTES

[1] *See Sikkelee v. Precision Auto. Inc.,* 876 F. Supp. 2d 479, 489 (M.D. Pa. 2012).

[2] *See Samson v. Crown Equip.,* No. 2:10-CV-0958, 2012 WL 3027989 (W.D. Pa. 2012).

[3] Restatement (Second) of Torts § 402A (1965).

[4] *See* Arthur L. Bugay & Craig L. Bazarsky, *The Future of Pennsylvania Products Liability as Applied by Federal and State Courts: Covell v. Bell Sports Inc.*, Vol. LXXXIII, No. 4, PA. BAR ASS'N QUARTERLY, 139, 140 (October 2012), citing *Webb v. Zern*, 220 A.2d 853 (Pa.).

[5] *Id.* at 143, citing with "*See*" signal *Dambacher v. Mallis,* 485 A.2d 423, n. 6 (Pa. Super. Ct. 1984), and *Surace v. Caterpillar Inc.* 111 F.2d 1039 (3d Cir. 1997).

[6] *Id.*

[7] *Id.*

[8] *Id.* [citations omitted].

[9] *Id.*

[10] *Id.*

[11] *Id.* citing Restatement (Third) of Torts § 2 (1998).

[12] *Id.* at 144.

[13] *Hoffman v. Paper Converting Mach. Co.,* 694 F. Supp. 2d 359, 365 (E.D. Pa. 2010).

[14] *Id.*

[15] *Phillips v. Cricket Lighters,* 841 A.2d 1000 (Pa. 2003).

[16] *Id.* at 1000 [bracket inserted here].

[17] Bugay, *supra* note 4, at 146-147, citing with "*See*" signal *DeSantis v. Frick Co.,* 745 A.2d 624 (Pa. Super. Ct. 1999); *Phillips,* 841 A 2d 1000, and with "*See also*" signal *Bugosh v. I.U. N Am. Inc.,* 942 A.2d 897 (Pa. 2008).

[18] *Bugosh*, 942 A.2d 897.

[19] Bugay, *supra* note 4, at 140, citing *Berrier v. Simplicity Mfg.*, 563 F.3d 38 (3d Cir. 2009).

[20] *Berrier*, 563 F.3d at 53-54.

[21] 971 A.2d 1228, 1229 (Pa. 2009).

[22] *Id.* at 1241 (Saylor, J., dissenting).

[23] Bugay, *supra* note 4, at 148.

[24] *Covell v. Bell Sports Inc.,* 651 F.3d 357, 365 (3d Cir. 2011).

[25] *See* 2012 WL 5077571 (3d Cir. 2012).

[26] 11 A.3d 924 (Pa. 2011).

[27] *Id.* at 940–41.

[28] *Id.*

[29] 41 A.3d 823 (Pa. 2012); *see also Schmidt v. Boardman Co.,* 608 Pa. 327, 11 A.3d 924, 941 (Pa. 2011) ("Notwithstanding the 3rd Circuit's prediction, however, the present status quo in Pennsylvania entails the continued application of Section 402A of the Restatement Second, subject to the admonition that there should be no further judicial expansions of its scope under current strict liability doctrine.").

[30] *Id.* at 839; *see also* Bugay, *supra* note 4, at 148-149, citing *Barnish v. KWI Bldg. Co.,* 980 A.2d 535 (Pa. 2009), as another example of a case in which the Pennsylvania Supreme Court did not criticize the application of the Restatement (Second) analysis to the case presented.

[31] 41 A.3d 838, n. 18.

[32] *Id.* at 839.

[33] 2012 WL 5077571 (3d Cir. Oct. 17, 2012) (*en banc*), citing *Covell,* 651 F.3d 357, and *Berrier*, 563 F.3d 38.

[34] 41 A.3d 823 (Pa. 2012).

[35] 55 A.3d 1088 (Pa. Nov. 26, 2012).

[36] Justice Joan Orie Melvin was suspended from the court in 2012 to address criminal allegations filed against her pertaining to charges that she used legislative and judicial staff to perform work on her campaign for her seat on the Pennsylvania Supreme Court.

[37] 15 A.3d 429, 430 (Pa. 2011).

[38] A concern in this regard is that the Pennsylvania Supreme Court remains short one justice on account of Justice Orie Melvin's current suspension from the bench; this could lead to an equally split decision by the Pennsylvania Supreme Court on this all-important issue. A plurality decision in this regard will do little to end the dispute and would unfortunately represent a missed opportunity to resolve this debate once and for all.

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