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Pa. Products Liability Law: Uncertainty and Silence of the Majority

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Special to the Legal

Pennsylvania jurisprudence has long gone its own way in the creation and interpretation of the law of strict liability for defective products. As described in the commentary to the *Third Restatement of Torts*, Pennsylvania law is “difficult to decipher.” While I am no fan of the *Third Restatement*, the development of Pennsylvania products liability law since *Azzarello v. Black Brothers Co.* has followed a strict “no negligence concepts” mantra to the point where the innocent bystander has no remedy, and patently foreseeable uses will not trigger a strict liability claim if they were not intended by the manufacturer.

There was hope that the court would resolve these issues once and for all when it accepted allocatur in *Bugosh v. I.U. N Am. Inc.* to decide “[w]hether this court should apply § 2 of the *Restatement (Third) of Torts* in place of § 402A of the *Restatement (Second) of Torts*.” Those hopes were dashed June 16, when the court dismissed the *Bugosh* appeal as “improvidently granted.” The decision was apparently so frustrating to some members of the court that Justice Thomas G. Saylor felt compelled to write a 66-page dissenting statement that was joined by Chief Justice Ronald Castille. To understand the current state of Pennsylvania products liability law, a brief historical review of cases is warranted.

The divisions in the court first became prominent with its decision in *Phillips v. Cricket Lighters*, a case where a young child playing with a lighter caused a fire. The decision was a plurality, joined in its entirety by only two justices, and the opinion strictly interpreted *Azzarello* as forbidding any negligence concepts as part of a §402A case. “Negligence concepts have no place in a case based on strict liability,” the *Phillips* case noted. Consideration of what might be foreseeable in the design, manufacture or sale of a product was simply not part of the

strict liability case. A further strict reading of §402A limited its application to “intended users” only. Thus, the young child, who could in no way have been the intended user of a lighter, could not bring a claim in strict liability. Three justices concurred, contending that Pennsylvania law needed to be completely revamped, and proposed adoption of §2 of the *Third Restatement of Torts*: Products Liability in place of §402A.

The natural progression of *Phillips* was to eviscerate the rights of innocent bystanders, best exemplified in *Berrier v. Simplicity Corp.* in which a child was injured by an allegedly defective lawn mower manufactured by Simplicity. At the time of the accident, the mower was being operated by the child’s grandfather and while operating in reverse, he ran over the child’s foot, causing serious injuries. The mower was not equipped with a control system preventing the operator from engaging the mower blades while operating in reverse. Summary judgment was granted by the trial court, which, while expressing doubt about the logic of the *Phillips* decision, nevertheless ruled that Pennsylvania products liability law had evolved so that a product need only be made safe for its “intended user.” The case was appealed to the 3rd U.S. Circuit Court of Appeals, which then certified the following question to the Pennsylvania Supreme Court: “Whether, under Pennsylvania law a plaintiff minor child may pursue a strict liability claim for injuries caused by a riding lawnmower, where that child is neither an intended user nor consumer of the mower.”

No answer was forthcoming. The Supreme Court denied the petition for certification without opinion Oct. 17, 2008. Apparently believing an explanation was warranted, Saylor wrote a concurring opinion to a per curiam order: “The petition for certification seeks this court’s review in an arena in which there has been great difficulty achieving consensus. We recently accepted review

of the foundational matter of whether the strict liability doctrine appropriately applies in design-defect cases. (See *Bugosh v. I.U. North Am. Inc.*) With full appreciation and respect for the difficulties presented to the federal courts in predicting Pennsylvania law in this arena, at this juncture I believe that this court’s limited resources are best centered on the global issues. Notably, the federal courts are not without guidance as to current law, since, as the district court recognized, this court has sent a clear signal that the intended use doctrine is to be construed narrowly pending a decision on the foundational matters.” (See *DGS v. United States Mineral Products Co.*)

From the practitioner’s point of view, the signal was not so clear. How narrowly *Phillips* and *DGS* were to be interpreted was impossible to predict. Once *Berrier* was sent back, the 3rd Circuit, on April 21, looked into its crystal ball and predicted that the Pennsylvania Supreme Court would adopt Sections 1 and 2 of the *Third Restatement*, which allowed recovery by innocent bystanders and remanded the case to the district court for further proceedings under those sections.

A second significant issue, the intended use doctrine, arose out of the aforementioned *DGS* case. In 1994, the Pennsylvania Transportation and Safety Building had a fire. Safety reviews afterwards showed the presence of PCBs (polychlorinated biphenyls). As a result, the commonwealth decided to demolish and replace the building. The commonwealth’s Department of General Services, or DGS, then sued the building material suppliers who provided the materials containing the PCBs, and a jury awarded the commonwealth \$90 million. The case made it to the Pennsylvania Supreme Court, which reversed, stating, “This court has held that a manufacturer can be deemed liable only for harm that occurs in connection with a product’s intended use by an intended user; the general rule is that there is no strict liability

in Pennsylvania relative to non-intended uses even where foreseeable by a manufacturer,” citing *Phillips*.

“We acknowledge that it is reasonably foreseeable that building materials may be subject to consumption in a fire, and therefore, an argument can be made that safety for an intended use as building materials should be deemed to encompass their safety in the event of accidental combustion. As directed to the strict liability arena, however, such an argument contravenes the strong admonition of the lead opinion in *Phillips* (echoing prior decisions of the court) to the effect that foreseeability considerations have no place in the setting.”

While the court acknowledged limited targeted exceptions to this rule, such as crashworthiness, it stated quite definitively that there would be no further expansions. Justice Sandra Schultz Newman wrote an exasperated dissent joined by Justice Max Baer and in fact, most of the majority opinion was spent trying to refute the dissent. What may have been unclear in *Phillips* was clarified in *DGS*, namely that strict liability was limited to situations where a defective product causes an injury while being used as intended by the intended user, and with only a few limited exceptions, foreseeability of use, user or harm was irrelevant.

Bugosh was the case that would answer all the questions. In *Bugosh*, the defense affirmatively sought the application of the *Third Restatement*. Would the court finally adopt it? Or, would there be some reconfiguring of §402A? If a fire were accelerated by polyurethane foam in a sofa, would the devastated family have a strict liability claim, or was the fire an unintended, if foreseeable, use? If a defective wheel flew off a truck and struck and killed a bicyclist, would his grieving family have a claim, or would the victim not qualify as an intended user? Did it matter if the risk from a particular design was foreseeable? And, when would the new rules apply? Immediately? Prospectively?

The questions remain, as no consensus was achieved. Once again, Saylor spoke, both logically and passionately, of the need for the court to decide, saying: “I reiterate my belief that *Azzarello* is severely deficient, particularly when measured against developed understanding and experience, and necessary adjustments are long overdue. Thus, I cannot support the decision to dismiss this appeal

and permit another opportunity to go by the wayside.”

Saylor reviewed, in precise detail, the line of cases that led to this point and reiterated “the serious misalignment between the descriptions of our strict liability doctrine and its actual operation.” He looked deeply at the seminal cases and attempted to discern where our court had strayed from the doctrines it so mightily tried to enforce, arguing that language adopted from cases in other states had later been clarified and developed, but that development never reached the commonwealth.

He found that the law “is in a state of substantial disrepair occasioned by longstanding adherence to *Azzarello* and its progeny; and this path has taken our jurisprudence too far from the legitimate home of tort law in the concept of corrective justice.” Saylor would have the court recognize that it is impossible to take all concepts of negligence out of a products liability scheme. “To the degree a distinct category of ‘strict’ product liability doctrine is necessary, at most, it always has been, and rationally should be, one of quasi-strict liability, tempered, in design and warning cases, with the legitimate involvement of notions of foreseeability and reasonableness within the purview of the fact finder.”

Saylor offers two alternatives to fill the “void” in our jurisprudence — first, the outright adoption of the *Third Restatement* as a replacement for §402A in the *Bugosh* case, and second, the disapproval of the “no negligence in strict liability” doctrine.

Saylor favored the first approach as he believed it would form a better foundation “from which to make modest future adjustments, if necessary,” from *Azzarello*. Importantly, Saylor favors prospective application of the new law. While acknowledging in the normal course that the court applies the law at the time of the decision, it could deviate from that approach in the interests of justice.

“Here, a predominant consideration is the settled expectations of those with accrued causes of action and a present entitlement to resort to the civil justice system. *Azzarello* has been with us for too long, and too much settled jurisprudence has evolved around it, for it to be retroactively displaced without profound impact on vested entitlements.”

Employing the second alternative would allow the lower courts to fashion answers

to open questions while the Supreme Court sought a case better suited to handle the breadth of unsettled issues.

“Since the difficulties described above are with *Azzarello* and not §402A itself, Pennsylvania would remain a §402A jurisdiction. The disapproval of *Azzarello*’s no-negligence-in-strict-liability approach, however, should yield at least the non-exclusive set of consequences and considerations,” Saylor wrote. Saylor attached an appendix of issues including the intended use doctrine, how to treat manufacturing defects as distinguished from design and warning defects, distinguishing product from conduct of the manufacturer and returning the “unreasonably dangerous” standard to the jury for decision after they consider and weigh risk utility and consumer expectations. In this way, Saylor thought the court could allow the modernization of Pennsylvania jurisprudence.

The fact is that, despite his efforts, practitioners and trial judges are no better off now than they were in 2004, when *DGS* was decided. Pennsylvania Common Pleas courts will continue to struggle with the current standards and try to find ways to allow recovery in the right circumstances. Federal trial courts will apply the *Third Restatement* not knowing if it will actually be adopted. Our Supreme Court is clearly divided and no majority exists for any one solution.

In January 2010, a new justice will be sworn in, and hopefully, a majority willing to consider these issues will be forged, and Pennsylvania products liability law will be redesigned to best protect the interests of all litigants. •