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Pennsylvania Product Liability Law at a Crossroads?

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Almost thirty years after the Pennsylvania Supreme Court adopted strict products liability law, two recent appellate decisions, one from the Pennsylvania Supreme Court and one from the United States Court of Appeals for the Third Circuit suggested that perhaps change was in the air. However, when given the chance to change the law, in a case argued and decided earlier this summer, the Pennsylvania Supreme Court declined to do so.

In 2003, in *Phillips v. Crickett Lighters*, the Pennsylvania Supreme Court reiterated the premise that concepts of negligence and foreseeability have no place in a products liability case. However, in a concurring opinion, three Justices, Saylor, Castille, and Eakin, noted that in certain types of products cases, particularly design defect cases, the distinction between the character of a product and the conduct of the company that manufactured it is "tenuous." Indeed, part of the analysis in *Phillips* was the negligence based "risk utility" doctrine, with a plurality of Justices concluding that the utility of a disposable lighter, without a mechanism to make the lighter child proof, outweighed the risks of such a product (particularly the risk that a small child might find and use the lighter, causing a fire - the occurrence in *Phillips*). In their concurring opinion the Justices also noted that, despite language in the Pennsylvania decisions that negligence concepts have no place in a strict liability case, Pennsylvania's strict liability cases were littered with negligence language. Significantly, the three concurring justices found that the Third Restatement of Torts provided a viable route to clarification of the language associated with products liability law extant in Pennsylvania.

Subsequently, in April 2009, the Court of Appeals for the Third Circuit, in *Berrier v. Simplicity Manufacturing, Inc.*, a case involving a child who was severely injured when a person operating a riding lawn mower backed up over the child's leg, predicted that the Pennsylvania Supreme Court would adopt sections 1 and 2 of the Restatement (Third) of Torts. *Berrier*, like *Phillips* was a design defect and failure to warn case. Indeed, the Third Circuit Panel in *Berrier*, relied upon the concurrence of Justice Saylor in the *Phillips* case to predict that the Pennsylvania Supreme Court would adopt sections 1 and 2 of the Restatement (Third) of Torts. Indeed, the *Berrier* Court noted that the Pennsylvania Supreme Court had accepted the case of *Bugosh v. I. U. North America* and framed the issue before it in that case as whether the Pennsylvania Supreme Court should apply Section 2 of the Restatement (Third) of Torts.

Section 1 of the Restatement (Third) of Torts makes commercial sellers or distributors subject to liability for injury caused by a defect in the product. Section 2 goes on to define "defect" to include manufacturing, design and warnings defects. Significantly, however, Section 2, parts (b) and (c), dealing with design defect and inadequate instructions/warnings respectively, both use the terms "foreseeable" and "reasonable", the classic language of negligence in describing when a product will be defective.

After briefing and argument, the Pennsylvania Supreme Court dismissed the appeal in *Bugosh* as having been "improvidently granted." Significantly, however, Justice Saylor dissented from the dismissal of the appeal and filed a lengthy statement, in which Chief Justice Castille joined. In his statement, Justice Saylor articulated the reasons why Pennsylvania should adopt Sections 1 and 2 of the Restatement (Third) of Torts. Justice Saylor posited that the language used in strict liability cases continued to be interwoven with the

concepts of negligence. Justice Saylor then went on to analyze the cases from other leading products liability venues and concluded that they had either overtly adopted Sections 1 and 2 of the Third Restatement or had embraced the principles contained in those two sections. Additionally, Justice Saylor noted that the leading Pennsylvania strict liability cases had either been criticized or rejected in other jurisdictions.

What is not clear from *Bugosh* is why, after accepting the case, with a view towards answering the specific question whether Pennsylvania should adopt Sections 1 and 2 of the Restatement (Third) of Torts, the Court dismissed the appeal as having been improvidently granted. It may be that the Court as a whole thought that as the saying goes, "Bad facts make bad law" and thus was unwilling, after having had the benefit of a review of the record, briefing, and argument, to use the *Bugosh* case as the one to adopt the new position. Alternatively, it could be that the Court was reluctant to adopt the portion of the Restatement (Third) of Torts, which included a design defect definition in a warnings case. *Bugosh* was a claim for damages based upon alleged exposure to asbestos. The only defendants to go to verdict in *Bugosh* were the "supplier defendants", that is, middlemen in the distribution chain between the manufacturer and the user. Because the theory against the suppliers was of inadequate warnings, the Court might, as was suggested in a footnote, have been reluctant to use a "warnings case" to adopt a provision of the Restatement (Third) of Torts that included design and manufacturing defect language. Or, it may be that having accepted the case with a view towards making new law, a majority of the Justices, for whatever reason, just could not agree to the change.

Whatever the reasoning, litigants in Pennsylvania remain burdened with an antiquated products liability law, particularly in the areas of design defect and failure to warn. Additionally, for those courts that will use Pennsylvania law to reach their decision, particularly the Federal District Courts, sitting in diversity in Pennsylvania, they will, despite *Berrier's* prediction, be obliged to continue to follow the law as it existed before *Berrier*.