Which Restatement of Torts Will PA Adopt?

After Berrier and Bugosh, Focus Will Remain on the Product

By Stephen J. Finley Jr.
June 22, 2009

(Editor's Note: This article went to press before the Pennsylvania Supreme Court issued its decision on Wednesday, June 17, to decline deciding Bugosh v. I.U. North America Inc. The article's author will be writing a follow-up piece to appear in an upcoming edition of The Legal Intelligencer and Pennsylvania Law Weekly.)

Practitioners of products liability law across the commonwealth of Pennsylvania await a ruling in Bugosh v. I.U. North America Inc. In this case, the Pennsylvania Supreme Court will determine whether to adopt the Restatement (Third) of Torts and abandon Section 402A of the Restatement (Second) of Torts adopted by Pennsylvania in 1966.

The anticipation surrounding the pending Bugosh decision was heightened by the 3rd U.S. Circuit Court of Appeals' decision in *Berrier v. Simplicity Manufacturing Inc.*, where that court predicted the Pennsylvania Supreme Court would adopt Restatement (Third) of Torts Sections 1 and 2.

In stealing the Pennsylvania court's thunder on the issue, the 3rd Circuit placed the Pennsylvania high court in the position of accepting its ruling or setting aside the prediction of the federal appeals court. However, regardless of whether the Pennsylvania Supreme Court follows the Berrier court's lead and adopts the Restatement (Third), the central issue in products liability law — whether or not the product in question is defective — will remain largely unchanged under Pennsylvania jurisprudence.

The *Berrier* Decision

In *Berrier*, the 3rd Circuit predicted that the Pennsylvania Supreme Court would adopt the Restatement (Third) of Torts in regard to design defect claims. Berrier involved claims brought on behalf of a young child who was injured when her grandfather backed over her foot while using a riding lawnmower manufactured by the defendant. The mower was not equipped with "back-over protection."

The district court had ruled, consistent with the Pennsylvania Supreme Court's decision in *Phillips v. Cricket Lighters*, that the child was not an "intended user" of the mower and therefore could not sustain a claim based in strict product liability. On appeal, the 3rd Circuit
reveresed the district court’s grant of summary judgment for the manufacturer and predicted that Pennsylvania would abandon its adherence to the intender user doctrine and adopt Restatement (Third) of Torts Sections 1 and 2. As a result, the injured child’s claim could survive and the matter was remanded to the district court.

In *Bugosh*, the Pennsylvania Supreme Court is faced with resolving this issue.

**The Restatement (Second)**

Pennsylvania adopted Section 402A of the Restatement (Second) of Torts in 1966 with the case of Webb v. Zern. The Restatement (Second) dictates that a manufacturer or seller will be held strictly liable if a defect in its product causes injuries to its user. Liability may be imposed either where a defect exists in the design or manufacture of the product, or if a manufacturer fails to adequately warn the user of the dangers associated with the product. These concepts have governed Pennsylvania products liability litigation for more than four decades.

In developing this body of law, Pennsylvania appellate courts have sought to maintain a strict separation between negligence and strict liability concepts. Under Pennsylvania’s application of the Restatement (Second) in Phillips v. Cricket Lighters, the category of plaintiffs is limited to a product’s intended users. While on its face the Restatement (Third) appears to represent a significant departure from well-settled legal principles, the extent to which the Restatement (Third) departs from Pennsylvania precedent may be over-stated.

**Expanding the Category of Plaintiffs**

There is no doubt that the category of plaintiffs able to maintain a claim in strict liability is more expansive under the Restatement (Third) than current Pennsylvania law permits within the confines of the intended user doctrine. Therefore, should the Restatement (Third) be adopted, Pennsylvania products liability law will change to the extent that a larger group of individuals may maintain a strict liability claim.

Indeed, the Restatement (Third) allows for a seemingly limitless class of plaintiffs, as a seller or distributor is strictly liable for "harm to persons or property caused by the defect," without regard for whether the plaintiff was an intended user. This represents an abandonment of the "intended user" limitation and is, on its face, broader than the "foreseeable user" standard in negligence cases.

**Inquiry distinction**
Once the category of persons who can maintain a suit in strict liability is determined, the inquiry under the Restatement (Third) is consistent with well-established Pennsylvania law. In a negligence case, the focus is on the reasonableness of a defendant's conduct, while in a strict liability claim the inquiry is limited to the defect in the product itself.

Consistent with this distinction, Pennsylvania courts have sought to maintain a firm segregation between strict liability's "product-oriented" analysis and the "conduct-oriented" analysis of negligence. In so doing, Pennsylvania courts have repeatedly handed down the admonition that negligence concepts have no place in a claim based in strict products liability.

On its face, the Restatement (Third) abandons this distinction. It reads as follows:

"Section 1: Liability of Commercial Seller or Distributor For Harm Caused by Defective Products

One engaged in the business of selling or otherwise distributing products themselves or distributes a defective product is subject to liability for harm to persons or property caused by the defect.

Section 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:

1. 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;

2. 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;

3. 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."
The Restatement (Third) represents an effort by its authors to permit the inclusion of negligence principles such as foreseeability and reasonableness and depart from the Restatement (Second)'s emphasis on "unreasonably dangerous." However, the Restatement (Third) does not invite a departure from Pennsylvania's strict separation between "product based" strict liability and "conduct based" negligence.

For example, Section 2(a) of the Restatement (Third) specifically permits for imposition of liability "even though all possible care was exercised in the preparation and marketing of the product." Likewise, evidence of a plaintiff's own negligence should remain inadmissible for purposes of establishing liability or apportioning fault. This is because the central determination in a claim based in strict liability — product defect — remains unchanged.

Thus, as is currently the standard under Pennsylvania law, the Restatement (Third) leaves the "reasonable person" standard and considerations of "due care" out of the analysis and instead keeps the focus on the product itself.

**Negligence Concepts**

Moreover, despite Pennsylvania courts' desire for the separation of negligence and strict liability concepts, in practice, negligence principles do creep into the strict liability analysis.

This confusion is likely a result of the language of Restatement (Second) of Torts Section 402A, which imposes liability on "one who sells any product in a defective condition unreasonably dangerous to the user or consumer ... ." The use of the phrase "unreasonably dangerous" is suggestive of negligence, even while the focus is on the properties of the product and not the reasonableness of a manufacturer's conduct.

In the failure to warn context, the Pennsylvania Superior Court held in Remy v. Michael D's Carpet Outlets that "there can be no liability unless the seller or manufacturer failed to take precautions that a reasonable person would take in presenting the product to the public." The Remy court described this basis of liability not as strict liability, but as "a ground of negligence liability better described as the sale of a product in a defective condition."

Furthermore, the negligence concept of duty has been utilized by Pennsylvania's Supreme Court, notably in Berkebile v. Brantly Helicopter Corp., in discussing liability on the basis of failure to warn, reasoning that a manufacturer has a duty to provide appropriate warnings to inform the user of the risks and inherent limitations of the product.

Moreover, in his concurring opinion in Phillips, Justice Thomas G. Saylor argued that negligence principles already appear in Pennsylvania's strict liability analysis under the Restatement (Second), at least with regard to design defect claims:
Pennsylvania trial and appellate courts, as well as federal courts applying Pennsylvania law, have been employing other aspects of negligence theory as central principles controlling design defect litigation for more than 20 years.

In light of Saylor's writing in Phillips and the precedents discussed above, despite the desire of Pennsylvania's appellate courts, negligence and strict liability are not treated entirely as separate and distinct concepts for imposing liability. Thus, as a matter of practice, if not as a matter of law, the negligence principles the Restatement (Third) would inject into Pennsylvania's strict liability analysis are largely consistent with existing law.

**Conclusion**

The Supreme Court's decision in Bugosh will resolve the issue of whether the commonwealth will join the list of states which have adopted the Restatement (Third) of Torts. The 3rd Circuit's decision in Berrier predicted that Pennsylvania will abandon the Restatement (Second)'s intended user standard and adopt the broader category of plaintiff under the Restatement (Third). Our Supreme Court may accept the 3rd Circuit's prediction and adopt the Restatement (Third), or it may adopt a middle ground by revisiting its decision in Phillips and modifying its holding concerning the intended user doctrine to encompass a broader category of plaintiffs.

It is also entirely possible that the court will reject the 3rd Circuit's approach, affirm its decision in Phillips and adhere to the Restatement (Second), thus leaving a conflict between the Berrier decision and Pennsylvania law.

Regardless of whether or not the Pennsylvania Supreme Court adopts the Restatement (Third) of Torts when it rules in Bugosh, we can expect that strict liability claims will continue to focus on the product at issue, while steering away from a consideration of a defendant's conduct appropriate only in negligence cases.

*Stephen J. Finley Jr.* is an associate in the products liability department of Gibbons P.C. in Philadelphia. He concentrates his practice in products liability and business and commercial litigation, defending product manufacturers, architects, physicians, clinical laboratories, and drug manufacturers in state and federal courts.

Reprinted with permission from the June 22, 2009 edition of *The Legal Intelligencer* © 2009 Incisive Media Properties, Inc. All rights reserved. Further duplication without permission is prohibited.