# Conquering Pa.'s Product Liability Conundrum

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Law360, New York (January 18, 2013) -- For nigh on 40 years, the Pennsylvania Supreme Court has tilted with an imaginary legal windmill of its own making: that negligence principles have no legitimate place in a products liability case.[1] Given the original judicial rationale for the adoption of products liability, this predilection is not surprising. When viewed through the crucible of actual experience, there is no compelling reason to persist in this mythical joust.

The current conundrum of products liability jurisprudence in Pennsylvania's state and federal courts can readily be solved simply by recognizing reality — of the three types of products liability claims, actual product malfunctions are few and far between, and negligent design and failure-to-warn theories are the lance of choice.

Unfortunately, the court has not yet recognized this clear trend and has chosen to follow what may be described as a faulty vision, one which has morphed into a nightmare.

## The Original Rationale

A number of historic "legalisms" in civil and criminal law were pushed to the side in the '60s and '70s as lawyers and judges alike rushed to modernize and replace legal constructs that were seen as unduly restrictive or unfair in a modern and growing industrial society. One of these constructs was the ancient doctrine of privity, emphatically rejected by the highly respected Justice Roger J. Traynor of the California Supreme Court in Greenman v. Yuba Power Products Inc.[2]

This monumental change in approach was justified by the perceived unfairness of the injured individual plaintiff trying to establish legal fault on the part of a manufacturer where that plaintiff had little or no opportunity or resources to do so.[3] To level the judicial-playing field, courts required that products sold to the public be safe for their intended use no matter how much or how little care went into their design, a rationale that was trumpeted in the dissenting opinions of Justices Jones and Owen Roberts in Miller v. Preitz[4] and endorsed as the law of Pennsylvania by the state's Supreme Court in Webb v. Zern.[5]

## The Problem

With little fanfare or citation, the Webb court adopted the "modern attitude" of Section 402A of the Restatement (Second) of Torts as the law of Pennsylvania.[6] Presumably, the Pennsylvania Supreme Court did so while recognizing that Section 402(A)(1) includes the phrase "unreasonably dangerous" when describing an actionable defective condition, a term which would appear to carry with it some aspect of the reasonable man standard, which evolved from years of common law jurisprudence.

However, believing that it had incorporated an entirely new approach to liability into Pennsylvania law, the court spent the next 46 years trying to insulate the new cause of action from any and all negligence principles.[7]

Thus, in Phillips v. Cricket Lighters, the lead opinion of the Pennsylvania Supreme Court tried to write the word "unreasonably" out of Section 402A by asserting that negligence principles did not exist in Pennsylvania's product liability law.[8] Relying on Section 402A of the Restatement (Second), the court noted that "the imposition of strict liability for a product defect is not affected by the fact that the manufacturer or other supplier has exercised 'all possible care.'"[9]

Rather, according to the court, "[s]trict liability focuses solely on the product, and is divorced from the conduct of the manufacturer."[11] Because "[s]trict liability was intended to be a cause of action separate and distinct from negligence, designed to fill a perceived gap in [Pennsylvania tort law]," the court deemed it "the height of illogic to introduce a test which examines whether the manufacturer acted with due care."[11]

Stubborn adherence to this pronouncement in the face of contrary reality is the source of much of the current conundrum. The confusion is amplified by differences between the Restatement (Second) and the Restatement (Third) of Torts, which currently compete for acceptance within the commonwealth and create "material ambiguities and inconsistencies in Pennsylvania's procedure," as the court itself admits.[12]

These material inconsistencies now play out daily in Pennsylvania, depending on whether the suit is pending in state or federal court and, if in federal court, depending upon whether you are west or east of the Alleghenies or in the center of the state.

According to the Third Circuit Court of Appeals, the issue of whether the Second or the Third Restatement applies to products liability cases governed by Pennsylvania law and filed in a Pennsylvania federal court, is clear as the court has three times endorsed application of the Restatement (Third) since 2009.

For example, in its 2009 opinion in Berrier v. Simplicity Mfg. Inc., a case brought on behalf of a minor child who suffered injuries when her leg was caught under a riding lawn mower, the Third Circuit predicted that the Pennsylvania Supreme Court would adopt Sections 1 and 2 of the Third Restatement (which recognized recovery by unintended consumers injured by a product).[13] The Third Circuit thus directed district courts to apply the third restatement to product liability claims governed by Pennsylvania law.[14]

Two years later, the Third Circuit reaffirmed its decision in Berrier in Covell v. Bell Sports Inc., an action involving the alleged defective design of a bicycle helmet.[15] There, the Third Circuit again predicted that the Pennsylvania Supreme Court would adopt the third restatement and, again, instructed federal courts exercising diversity jurisdiction to apply the third restatement to product liability claims brought under Pennsylvania law.[16]

While the Third Circuit's view of the issue and direction to federal district courts within the Circuit is clear, federal district courts have reacted inconsistently, some following applying the third restatement,[17] and others, such as the U.S. District Court for the Middle District of Pennsylvania in Sikkelee v. Precision Airmotive Corp., continuing to apply the second restatement.[18]

In 2012, the Third Circuit used Sikkellee as a third opportunity to reaffirm its rulings in Berrier and Covell and its direction to federal district courts within the circuit to apply the third restatement. Sikkelee was a product liability case arising from the death of David Sikkellee, who died in 2005 when the plane he was piloting crashed, allegedly as a result of an engine malfunction.

The Middle District, ruling on the motions for summary judgment filed by defendant Avco Corporation, the engine manufacturer, declined to follow the Third Circuit's precedent in Berrier and Covell. According to the district court, the Third Circuit's prediction in Berrier and Covell was "binding upon federal district courts sitting in diversity absent an affirmative indication from the Pennsylvania Supreme Court that it intends to retain the Restatement Second as the law in Pennsylvania."[19]

In the district court's opinion, "this indication was provided in Beard v. Johnson & Johnson, ... where the Pennsylvania Supreme Court took notice of 'the continuing state of disrepair in the arena of Pennsylvania strict-liability' law and nonetheless declined to take the opportunity to replace the Restatement Second with the Restatement Third."[20]

Avco petitioned the Third Circuit to accept interlocutory appeal on the "issue of whether the Pennsylvania Supreme Court would adopt the Restatement[] (Third) of Torts or continue its application of the Restatement (Second) of Torts," which the Third Circuit denied.[21] Avco subsequently filed a petition for clarification or, alternatively, rehearing en banc, of the denial.

Although the Third Circuit denied Avco's request for rehearing, the full court (14 judges) nevertheless took the opportunity to affirm its prior rulings and its direction to federal district courts within the circuit to apply the third restatement in product liability lawsuits governed by Pennsylvania law.

Specifically, in a two-page order signed by Circuit Judge Joseph F. Weis Jr., the court explained:

[W]e held [in Berrier] that federal courts sitting in diversity and applying Pennsylvania law to products liability cases should look to sections 1 and 2 of the Restatement (Third) of Torts. The precedential holding in Berrier, as set forth above, represents the Court's view of Pennsylvania's product liability law.

The Pennsylvania Supreme Court has not issued a definitive opinion on whether the Restatement (Third) of Torts or the Restatement[] (Second) of Torts ... applies to strict liability and product defect cases.[22]

The Third Circuit concluded that it would "follow the precedent set out in Covell and Berrier."[23]

It remains to be seen how federal courts in Pennsylvania will react to Sikkellee and whether they will follow the Third Circuit's direction to apply the third restatement or continue to apply the Third Circuit's decisions on the issue inconsistently.

It also remains to be seen how — or if — the Pennsylvania Supreme Court will decide the issue. Since the Third Circuit's decisions in Berrier, Covell and even Sikkellee, the Pennsylvania Supreme Court has both noted the inconsistencies and uncertainties in the product liability arena and had opportunities to settle those inconsistencies and uncertainties by definitively addressing whether the second or third restatement governs products liability claims in Pennsylvania.[24]

The Pennsylvania Supreme Court, however, has not directly addressed or definitively decided the issue, drawing ire from certain Pennsylvania Supreme Court justices.[25] Indeed, in its most recent decision involving products liability claims under Pennsylvania

law, the Pennsylvania Supreme Court did not even mention the third restatement or acknowledge the "state of disrepair" of Pennsylvania law on the issue, which it previously recognized.[26]

Based on this divergence in approaches, the Erie doctrine, in effect, if not in reality, has been suspended in products liability cases in Pennsylvania.[27] Indeed, to a large degree, the applicable legal standards, rights and obligations of consumers and product manufacturers and sellers may well depend on whether the case is pending in state court or federal district court in Pennsylvania.

Again, the root of the original problem is the nature of products liability claims in current times. Beneficial manufacturing techniques, advanced engineering and modern quality controls utilized by responsible manufacturers have eliminated most instances of product malfunctions — the kinds of claims Section 402 of the second restatement was intended to assuage.

Instead, in keeping with today's culture of talking heads and second-guessing, when an accident occurs, plaintiff's counsel zeroes in on an "expert" who, with the benefit of hindsight, will gladly opine that the product should have been designed differently and/or should have contained warnings which specifically predicted the use (or misuse) of the product that resulted in injury and prevented the occurrence.

This typical litigation exercise is not one of identifying a product malfunction. Rather, it is saying to the manufacturer, "someone was injured using your product, so you must have acted unreasonably under the circumstances." This is pure negligence, and to say otherwise is to tilt a legal windmill.

## The Solution

To correct this "state of disrepair" and bring Pennsylvania back into conformity with Erie, it is not necessary for the Pennsylvania Supreme Court to adopt the third restatement, which it appears reluctant to do. Rather, it needs only to acknowledge that negligence principles have a proper role to play in two types of products liability claims: those premised on improper design or failure to warn.

Jury charges can be readily adopted to this change, and jurors can understand the distinction between actual product malfunctions on the one hand and possibly negligent design or missing or inadequate warnings on the other. Regardless of the theory used, causation is a necessary part of the jury's deliberation, and to that extent, at least the plaintiff's own behavior is relevant to the decision-making process.[28] Special verdict forms with logically arranged questions can be used to assist the jury if needed.

Recognizing the presence of negligence principles in design defect and warning defect claims not only reflects reality, but also, it is compatible with the unique but underutilized, risk-utility "division of labor" mandated by the Pennsylvania Supreme Court in Azzarello v. Black Bros. Co.[29]

Aided by appropriate expert testimony as necessary, the trial court makes an initial determination of whether a product is "unreasonably dangerous" as a matter of law — a decision-making process trial judges are accustomed to following in negligence cases of dubious vitality. Once that threshold decision is made, the case can proceed accordingly.[30]

The prohibitory negligence windmill in products cases was an understandable but artificial

creation of the Pennsylvania Supreme Court, apparently driven by a strong intellectual desire to keep product liability claims "pure." The false vision it created can be removed as easily as it was created.

The court should simply recognize that "unreasonably dangerous" products may be a part of Pennsylvania products liability jurisprudence, depending on the facts and theories asserted in a given case. And, if preferred, the pros and cons of the third versus second restatement can be left for another day or for the legislature.

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[1] The author prefers the term "products liability" to "strict liability" because liability in such cases is not automatic, as is likely the case with true forms of strict liability, such as when an ultra-hazardous activity is in play. Rather, products liability in Pennsylvania is sui generis and has several important legal hurdles which must be overcome before liability attaches, which defenses are set forth in Section 402A of the Restatement (Second) of Torts and in its modern counterpart, the Restatement (Third) of Torts. Therefore, products liability is a more accurate term to use even though courts commonly interchange the two.

[2] Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1963). In Greenman, the California Supreme Court held that "[t]he remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales." Id. at 901. Thus, to establish a manufacturer's liability for a defective product, it is sufficient that the plaintiff prove that "he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use." Id. In doing so, the California Supreme Court recognized what Justice Cardozo had recognized decades before. See MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051 (N.Y. 1916) ("If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.").

[3] Other historic rationales for judicial activism in products cases included: (1) promotes investment in product safety, (2) reduction in transaction costs – i.e., the costs of proof and litigation; (3) sharing of the cost to society of defective products through the cost-spreading mechanism of liability insurance.

[4] Miller v. Preitz, 221 A.2d 320 (Pa. 1966).

[5] Webb v. Zern, 220 A.2d 853 (Pa. 1966). Webb was the first of many decisions, as courts explored and developed the parameters of products liability law in Pennsylvania, providing a remarkable opportunity for newly-minted lawyers on both sides of the aisle in the 60's, 70's and 80's.

[6] Id. at 854.

[7] As noted in dissent by Chief Justice Bell, the plaintiff in Webb never even pled the legal

theory adopted by the majority. His dissent stands as the equivalent of modern day critics who would attack "activist" judges.

[8] Phillips v. Cricket Lighters, 841 A.2d 1000, 1006 (Pa. 2003).

[9] Id.

[10] Id. at 1007.

[11] Id.

[12] Schmidt v. Boardman, 11 A.3d 924, 940 (Pa. 2011); see, e.g., Pa. Dep't of Gen. Serv. v. U.S. Mineral Prod. Co., 898 A.2d 590, 602-04 (Pa. 2006).

[13] Berrier v. Simplicity Mfg., Inc., 563 F.3d 38 (3d Cir. 2009), cert. denied, 130 S.Ct. 553 (2009).

[14] Id. at 40.

[15] Covell v. Bell Sports, Inc., 651 F.3d 357 (3d Cir. 2011), cert. denied, 132 S.Ct. 1541 (2012).

[16] Id. at 360.

[17] See, e.g., Lynn ex. rel. Lynn v. Yamaha Golf-Car Co., No. 2:10-cv-01059, 2012 WL 3544774, at *11 (W.D. Pa. Aug. 16, 2012) (applying the Third Restatement); Hoffman v. Paper Converting Mach. Co., 694 F. Supp. 2d 359, 365 (E.D. Pa. 2010) (same); Richetta v. Stanley Fastening Sys., L.P., 661 F. Supp. 2d 500, 507 (E.D. Pa. 2009) (same).

[18] See, e.g., Sikkelee v. Precision Airmotive Corp., No. 4:07-cv-00886, 2012 WL 2552243, at *9 (M.D. Pa. July 3, 2012) (applying the Second Restatement); Carpenter v. Shu-Bee's, Inc., Case No. 10-0734, 2012 WL 2740896, at *3 (E.D. Pa. July 9, 2012) (same); Durkot v. Tesco Equipment, LLC, 654 F.Supp.2d 295, 300-301 (E.D. Pa. 2009) (same).

[19] Sikkelee.

[20] Id.

[21] Sikkelee v. Precision Airmotive Corp., No. 12-8081 (3d Cir. Oct. 17, 2012).

[22] Id.

[23] Id.

[24] See, e.g., Schmidt, 11 A.3d at 940-41 (noting that the "no-negligence-in-strict-liability rubric has resulted in material ambiguities and inconsistencies in Pennsylvania's procedure" but holding that, "[n]otwithstanding the Third Circuit's prediction,… the present status quo in Pennsylvania entails the continued application of Section 402A of the Restatement Second[.]"; Beard, 41 A.3d at 836 (recognizing the "continuing state of disrepair in the arena of Pennsylvania strict-liability design defect law").

[25] Bugosh v. I.U. North America, Inc., 971 A.2d 1228, 1229 (Pa. 2009) (Saylor, J.,

dissenting) ("I reiterate my belief that [Pennsylvania's products liability scheme] is severely deficient, particularly when measured against developed understanding and experience, and necessary adjustments [to the scheme] are long overdue. Thus, I cannot support the decision to dismiss this appeal and permit another opportunity to go by the wayside.").

[26] Reott v. Asia Trend, Inc., Nos. 27 WAP 2011, 28 WAP 2011, 29 WAP 2011, 30 WAP 2011 (Pa. Nov. 26, 2012) (applying the Restatement (Second) to a products liability claim alleging a manufacturing defect in a tree stand and, in particular, the pleading and proof requirement for an affirmative defense based on the plaintiff's alleged "highly reckless conduct").

[27] See Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); see also Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996) ("Under the Erie doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.").

[28] See Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); see also Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996) ("Under the Erie doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.").

[29] See Azzarello v. Black Bros. Co., 391 A.2d 1020 (Pa. 1978).

[30] See Surace v. Caterpillar, Inc. 111 F.3d 1039 (3d Cir. 1997); Monahan v. Toro Co., 856 F. Supp. 955 (E.D. Pa. 1994); Beard v. Johnson and Johnson, Inc., 41 A.3d 823 (Pa. 2012).

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