

# The Phillips, Berrier and Bugosh Decisions

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### The Phillips, Berrier and Bugosh Decisions: Their Holdings and Significance to Development of Pa. Products Liability Law

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Special to the Legal Intel

Thirty-one years ago, the Pennsylvania Supreme Court issued its decision in *Azzarelli v. Black Brothers Co. Inc.*, holding that negligence concepts were improperly included in a jury instruction on product defect given Pennsylvania's adoption of Section 402A of the Restatement (Second) of Torts.

Since *Azzarelli*, the Supreme Court repeatedly has declared that negligence concepts have no place in a strict liability case. Yet the court has not been entirely consistent on this point. *Azzarelli* itself incorporated risk-utility balancing into the analysis for determining defect. And the Supreme Court has recognized in *Davis v. Berwind and Stecher v. Ford Motor Company*, that negligence concepts affirmatively play a role in strict liability analysis in several instances.

Three recent decisions raise questions about the future of Pennsylvania products liability law.

The first is the Supreme Court's decision in *Phillips v. Cricket Lighters*, in which a two-justice plurality restated that negligence concepts have no place in strict liability, and also stated that a manufacturer could be strictly liable only for injuries caused to an intended user of a product.

The second is the 3rd U.S. Circuit Court of Appeals' decision in *Berrier v. Simplicity Manufacturing Inc.*, which predicted that Pennsylvania would adopt Sections 1 and 2 of the Restatement (Third) of Torts and thereby allowed a bystander to continue litigation against the manufacturer of an allegedly defective product.

The third is *Bugosh v. I.U. North America Inc.*, in which the Supreme Court allowed appeal to decide whether to adopt Section 2 and abandon Section 402A, but then dismissed the appeal as improvidently allowed. This article will address each decision in turn.

#### THE RESTATEMENT THIRD AND CURRENT LAW

Given the prominent role that Sections 1 and 2 of the Restatement Third play in recent products liability decisions, it is appropriate to consider how their adoption might alter Pennsylvania law. Section 1 provides that "one engaged in the business of selling or otherwise distributing products and who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect." This section outlines the general proposition that liability without fault is imposed for the harm caused by a defective product. It imposes liability without regard to whether the victim was an intended user, an unintended user, or a bystander. Section 1 begs the question of what is a "defect," that is where Section 2 would change Pennsylvania law.

By way of context, Pennsylvania law currently provides that product defect exists where a product "lack[ed] any element necessary to make it safe for its intended use or possess[es] any feature that renders it unsafe

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ity authored by Chief Justice Ralph Cappy. It clarified that "in this jurisdiction, negligence concepts have no place in strict liability law." But it narrowed the intended use doctrine, stating for the first time that its design defect cases the term "intended use" encompassed a requirement that a product need only be made safe for its "intended user."

Justice Thomas Saylor authored a concurring opinion, endorsing adoption of Section 2, which he characterized as representing a "synthesis of law derived from reasoned, mainstream, modern consensus" and "the most viable route to providing essential clarification and remediation, at least on a prospective basis." Justices J. Michael Eakin and Ronald Castille joined this concurrence. Justice Sandra Schultz Newman separately joined Cappy's analysis of the strict liability issue.

As Justice Stephen Zappala did not participate in the decision, and Justice Russell Nigro only concurred in the result, six justices had voted for dismissal of the strict liability claim. But as only two justices voted to maintain Section 402A, while three justices urged adoption of Section 2, *Phillips* revealed a rift around whether Pennsylvania should retain its commitment to traditional strict liability principles.

#### BERRIER

In May 2003, Ashley Berrier was visiting her grandparents at their home. While her grandfather was mowing his yard, Ashley

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*Phillips* foreshadows the Supreme Court's adoption of sections 1 and 2 of the Third Restatement. Applying Section 2, the 3rd Circuit used a "reasonably foreseeable use" standard and reversed the district court's summary judgment.

*Berrier* represents the first application of the Restatement Third to a Pennsylvania case. The result also benefited the plaintiff, demonstrating the Restatement Third is not defendant-friendly in all respects. Although *Berrier* is not controlling, its existence may influence the future of Pennsylvania's product liability law.

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In June 2009, the Supreme Court dismissed the appeal as improvidently granted, perhaps reflecting agreement with plaintiff's argument that the outcome would be the same under either a Section 2 or Section 402A analysis. Saylor, joined by Castille, filed a dissenting statement in which he reviewed the inconsistencies in Pennsylvania's product liability law and advocated for prospective adoption of Section 2 of the Restatement Third. For now, the law remains where the Superior Court found it when affirming judgment in Edward Bugosh's favor.

#### CONCLUSION

Eventually a case will emerge that invites the Supreme Court to consider the future of Pennsylvania product liability law. At that



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for the intended use," according to *Azzarelli*. This formulation focuses on the product and does not consider negligence principles.

Section 2 maintains this focus in relation to manufacturing defects, providing that a manufacturing defect is present "when the product departs from its intended design, even though all possible care was exercised in the preparation and marketing of the product." However, Section 2 would cause a dramatic shift in relation to design defect cases.

Abandoning strict liability, Section 2 focuses on the overall reasonableness of the manufacturer's design and the foreseeable risks of the design. Under Section 2, a product has a design defect "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 ... and the omission of the alternative design renders the product reasonably safe." The issue before the jury is the reasonableness of the manufacturer's conduct under a risk-utility test that weighs a product's potential harm against its practicability. The product no longer is judged on its characteristics alone.

Given the magnitude of this change, it is no wonder that the possibility of the Restatement Third's adoption has prompted so much controversy and consideration.

#### PHILLIPS

In November 1993, 2-year-old Jerome Campbell opened his mother's purse, retrieved a cigarette lighter, and used the lighter to ignite linens. The lighter had no child-resistant feature. The fire spread, and Jerome, his mother and another child died in the fire. The ensuing complaint alleged that the defendants should not have manufactured and distributed a lighter that lacked childproof features.

The trial court granted summary judgment. As to the design defect claim sounding in strict liability, it reasoned that Pennsylvania's requirement that a product be unsafe for its intended use implicated a requirement that the user be an intended user of the product. As Jerome was not an intended user, the lighter could not have been used for its intended use.

The Superior Court reversed, explaining that a product must only be safe for its intended use, and it was immaterial whether the user was intended or unintended.

The Supreme Court reinstated judgment on the strict liability claim. The court's opinion was a non-precedential, two-justice plural-

came into the yard. Her grandfather disengaged the mower blades and instructed her to go inside. Believing she had done so, the grandfather re-engaged the blades and placed the mower in reverse. As he was backing up with the blades engaged, he backed over Ashley's leg. Ashley's left foot had to be amputated.

In the ensuing lawsuit, Ashley's parents brought claims for design defect sounding in strict liability and negligence. A federal court granted summary judgment, reasoning that Pennsylvania did not permit recovery for injuries to anyone other than an intended user.

On appeal, the 3rd Circuit certified the following question to the Pennsylvania Supreme Court: "[w]hether, 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."

In October 2008, the Supreme Court denied the certification. Saylor explained that the court had accepted review in *Bugosh* to consider whether strict liability "applies in design-defect cases." He added, "With full appreciation and respect for the difficulties presented to federal courts in predicting Pennsylvania law at this juncture, I believe that this court's limited resources are best centered on the global issues."

In April 2009, the 3rd Circuit published a decision stating that Saylor's concurrence in *Products Liability* continues on P16.

#### BUGOSH

From 1957 to 1966, Edward Bugosh worked jobs in which he was exposed to asbestos-containing products. In 2003, Edward was diagnosed with mesothelioma. He brought suit against I.U. North America (IUNA), among others. The jury returned a verdict of \$1.4 million against all defendants.

On appeal, IUNA argued that it was entitled to a new trial because the trial court denied its motion to apply Section 2 against plaintiffs' strict liability claim. The Superior Court affirmed the judgment, and the Supreme Court allowed appeal to decide the ultimate question: "Should this Court apply § 2 of the Restatement (Third) of Torts in place of § 402A of the Restatement (Second) of Torts?"

moment, the Supreme Court will have several options before it: retain Pennsylvania's commitment to *Azzarelli* and Section 402(a) but clarify the "intended use" doctrine and bystander liability where uncertainty is said to exist; adopt sections of the Restatement Third on a case-by-case basis; or adopt the Restatement Third in full. These options require careful thought and consideration.

Given the uncertainty around Pennsylvania's products liability law, it is incumbent on counsel to be familiar with the Restatement Third and recognize that it may become the scheme against which future cases are measured. This may impact case selection, case development, and issue preservation. Products liability will remain a dynamic area of Pennsylvania law for years to come. \*