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Thus Sprach the Pennsylvania Supreme Court

The Pennsylvania Supreme Court, with a commanding majority, split the baby and Justice Castille may just be the new Solomon. Although Justices Saylor and Eaken concur and dissent, their protest is hardly a peep.

The question presented to the Pennsylvania Supreme Court was how an injured person proves that a product was defectively designed. Currently, the court determines the risks of the danger of the product versus the utility of the device and then the jury decides whether the manufacturer or supplier delivered a product in a defective condition. Advocates of the American Law Institute Restatement Third approach argued that the reasonableness of the manufacturer and the user of the product must be weighed and balanced to determine whether a product was defectively designed where it caused injury to a consumer or user.

The battle between these two forces has been dramatic. Ultimately, the question is whether the focus for defective design should be on the product or the manufacturer and the user. If a steering wheel falls off a new car being driven down the street, should the driver have to prove how or why the steering wheel was improperly affixed or is it enough that the defective design allowing the wheel to fall off caused injury to the driver? This has been the battle since *McPherson v. Buick* was decided in 1903.

Pennsylvania found itself in a most awkward situation. Federal courts applying Pennsylvania law essentially disregarded the Pennsylvania Supreme Court and held that the Restatement Third approach would apply; focus on the manufacturer or the user in terms of reasonableness. State courts, required to follow their own Supreme Court, stuck to what is usually called The American Law Institute Restatement 402A formulation; that the court weighs the risks versus the rewards of the product and the jury decides defectiveness.

The intervening years have seen extraordinary confusion. I have been involved in arguing these cases before the Pennsylvania Supreme Court, and together with Pam Shipman, Esquire, writing amicus briefs on the subject.

The formulation by the Pennsylvania Supreme Court in *Tincher v. Omega Flex* is elegant and while not intended to address every situation, will clearly improve an understanding of the role of judge and jury in Pennsylvania.

It can be persuasively argued that the new jury charge in Pennsylvania should be as follows:

Plaintiff(s) have brought a strict liability cause of action.

Plaintiff(s) must prove that the product is in a defective condition.

Plaintiff(s) may prove the defective condition by showing either that: (1) the danger is unknowable and unacceptable to the average or ordinary consumer, or that (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions.

A manufacturer may not preclude an injured plaintiff's recovery by forcing him to prove negligence in the manufacturing process.

The seller must provide with the product every element necessary to make it safe for use.

The seller is the guarantor of the product and you may find a defect where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use.

A seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that public has a right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed on those who market them, and be treated as a cost of production; and that a consumer of such product is entitled to the maximum of protection at the hands of someone, and proper persons to afford it are those who market the products.

Where the plaintiff is claiming a failure of consumer expectations, you should consider the following:

1. *The nature of the product;*
2. *The identity of the user;*
3. *The product's intended use;*
4. *The intended user of the product;*
5. *Any express or implied representations by a manufacturer or other seller.*

Powerful reasons support protections of a consumer's expectations of product safety that arise from the safety representations of a manufacturer or other seller, whether those representations be express or

implied. When making safety "promises" in an effort to sell its products, a manufacturer seeks to convince potential buyers that its affirmations are both valuable and true. Safety information is valuable to users because it provides a "frame of reference" that permits a user to shift his or her limited understanding and other resources away from self-protection toward the pursuit of other goals – which in turn shifts responsibility for protecting the user to the manufacturer. In this manner, true safety information adds value to the product by enhancing the user's autonomy, for which value the consumer fairly pays a price. So, if the information is not true but false, the purchaser loses significant autonomy, as well as the benefit of the bargain. Since an important purpose of the law is to promote independence, and the equality of the buyer to the seller as reflected in their deal, the law fairly may demand that the seller repair any underlying falsity and resulting inequality in the exchange transaction if harm results.

Where a plaintiff pursues a risk-utility theory, the following factors should be considered:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

[In a prescription drug case, for some products there is no alternative design.]

[It may be appropriate when proceeding upon a risk-utility theory to shift the burden to the defendant the burden of production or persuasion to demonstrate that an injury producing product is not defective in design.]

This analysis is based upon the well-written and evenly flowing verbiage of Mr. Chief Justice Castille. The court endorsed the policy underlying the Restatement 402A, that a manufacturer is effectively the guarantor of its product's safety. Footnote 12, p. 52, Slip Opinion. "The seller must provide with the product every element necessary to make it safe for use." Slip Opinion p. 55. The seller is the "guarantor" of the product and the jury could find a defect "where the product left its supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." At Slip Opinion p. 59, citing prior legal authority.

With strict liability the focus is on the nature of the product and the consumer's reasonable expectations with respect to the product, rather than upon the conduct of either the manufacturer or the person injured. At Slip Opinion p. 63. While these sentiments reflect *Berkebile v. Brantley Helicopter Corp.*, 337 A.2d 893 (Pa. 1975) (Opinion Announced Judgment of Court), *Webb v. Zern*, 220 A.2d 853 (Pa. 1966), and *Azzarello v. Black Brothers Company*, 391 A.2d 1020 (Pa. 1978), the *Tincher* court does not repudiate any of that logic while nevertheless overruling *Azzarello*.

The law will continue to require that a plaintiff prove the seller (manufacturer or distributor) placed on the market a product in a "defective condition." The strong majority adopted the view that a plaintiff may prove a violation either of the consumer expectation standard or a violation of a risk-utility analysis in demonstrating the defectiveness of the design of a product.

The nature of the product, the identity of the user, the product's intended use and intended user, and any express or implied representations by a manufacturer or other seller are among considerations relevant to assessing the reasonable consumer's expectations. Slip Opinion p. 95. The consumer expectations test derives from the Restatement Second of Torts § 402A, and is set forth in detail at Slip Opinion 96.

However, the court wrote that the consumer expectations test alone would not be sufficient to vindicate basic public policy undergirding strict liability. At 98. The risk-utility standard offers an appreciation of what a "reasonable person" would conclude with respect to the probability and seriousness of harm caused by a product as opposed to the burden or costs of taking precautions. At 98. "Stated otherwise, a seller's precautions to advert the danger should anticipate and reflect the type and magnitude of the risk posed by the sale and use of the product." At Slip Opinion 98-99.

The court clearly sets out, loosely based upon Dean Wade, the factors to be considered in the risk-utility balancing test. They are as follows:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
(3) The availability of a substitute product which would meet the same need and not be as unsafe.
(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
(5) The user's ability to avoid danger by the exercise of care in the use of the product.
(6) The user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

At Slip Opinion 99.

Even the application of a risk-utility balancing test in its purest form has theoretical and practical shortcomings. The court noted those shortcomings and therefore agrees that a plaintiff may pursue either a consumer expectations or a risk-utility approach in proving the defective design of a product. This may be different with respect to prescription drugs, for example, where there is no alternative design at all.

The sword of Solomon therefore overruled *Azzarello* because of the way it splits the function between judge and jury but clearly rejects the American Law Institute Restatement Third because of its inherent limitations.

"The Third Restatement approach presumes too much certainty about the range of circumstances, factual or otherwise, to which the 'general rule' articulated should apply." At Slip Opinion 115.

In comparing the Third Restatement to the Second, the court said:

> Unlike the Third Restatement, we believe that the Second Restatement already adopted, and properly calibrated, permits the plaintiffs to tailor their factual allegations and legal argumentation to the circumstances as they present themselves in the real-world crucible of litigation, rather than relying upon an evidence-bound standard of proof.

Slip Opinion p. 117.

In applying the consumer expectations contract, the court analogizes the law of warranty. "Derived from its negligence-warranty dichotomy, the strict liability cause of action theoretically permits compensation where harm results from risks that are known or foreseeable…and also where harm results from risks unknowable at the time of manufacture or sale – a circumstance similar to cases in which traditional implied warranty theory is Implicated." At 126.

The court falls somewhat short when it discusses jury instructions, preferring to leave that to the development of case law. It is noted that the plaintiff "is the master of the claim in the first instance." At 130. Therefore the plaintiff will have the option of premising their case either upon "consumer expectations" or "risk-utility" theory or both.

> The calculus for a plaintiff and a plaintiff's advocate in choosing to pursue either theory or both will likely account, among other things, for the nature of the product, for the theoretical limitations of either alternative standard of proof, for whether pursuing both theories simultaneously is likely to confuse the finder of fact and, most importantly, for the evidence available or likely to become available for trial.

At 130.

In connection with the burden of proof, the court cites with approval *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978), suggesting that in certain circumstances where the risk-utility theory is utilized, the burden may be shifted to the defendant to demonstrate that an injury producing product is not defective. "The similarity of the approach we have approved to the *Barker* standard of proof may raise a question of whether Pennsylvania should also require a shifting of the burden of proof to the defendant when the plaintiff proceeds upon a risk-utility theory." At 133.

At least, for the time being, trying a products liability case in Pennsylvania, whether in federal or state court, should prove less of a challenge. The jury will perform its usual function and the court will continue to be the "gatekeeper" in the same manner that it performs that function in any other type of case. This should render the job of the court a lot easier as well.

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