



Product Liability in Pennsylvania

By Edward J. McGinn Jr.

Companies that manufacture, sell, or rent aerial work platforms and other products in the Commonwealth of Pennsylvania presently face partially conflicting rules of law in personal injury product liability cases filed in state and federal courts. The Pennsylvania state courts still apply the Restatement (Second) of Torts, Section 402A, which holds the seller strictly liable for the harm caused by its sale of a defective product. Pennsylvania has taken the position that in a purely strict product liability case, concepts of negligence (i.e., the due care exercised by the seller; the reasonableness of the seller in its design, manufacturing, or sale decisions; the foreseeability of certain risks of harm) have no place in the jury's determination of whether the product is defective.

On the other hand, the federal appellate court, which decides the law that the district (trial) courts in Pennsylvania must apply, has predicted that Pennsylvania will abandon the Restatement (Second) of Torts and will instead join the increasing number of states that are applying Sections 1 and 2 of the Restatement (Third) of Torts. The Restatement Third maintains the focus on the product and allows for the finding of product defect despite the exercise of all possible care by the seller/manufacturer. The Restatement Third, however, recognizes that concepts of "foreseeability" and "reasonableness" are in practice intertwined with an analysis of the product's design and its warning labels and instructions, and that Pennsylvania's current law, which precludes any evidence of such matters, is out of step with the more enlightened

approach set forth in the Restatement Third.

Federal courts that sit in Pennsylvania are required to apply Pennsylvania substantive law in cases based upon the diversity of citizenship jurisdiction of the court. However, in April the highest federal appellate court in Pennsylvania, the Third Circuit Court of Appeals, predicted in the case of *Berrier v. Simplicity Manufacturing Inc.*, 563 F.3d 38 (3d Cir. 2009), that Pennsylvania would finally join the growing number of states that have adopted certain sections of the Restatement (Third) of Torts. The significance of this ruling is that it predicted that Pennsylvania would finally abandon the rule of law that would not permit the introduction of negligence concepts into evidence at trial for a product liability claim. The Third Circuit made this prediction in the context of the strict product liability claim of a child who was injured when the operator of a riding lawn mower backed over her foot. The plaintiff's theory was that the lawn mower was defective in the absence of a device that would prevent the blade from spinning while the lawnmower was operating in reverse. The federal trial court had dismissed the case because under Pennsylvania law, the child was a bystander to whom no duty of care was owed. In addition, the child was not an intended user of the product, and therefore the strict product liability claim could not withstand the motion to dismiss. It was in the context of these facts that the Third Circuit refused to uphold the dismissal of the lawn mower manufacturer, remanded the case for trial, and in so doing predicted that Pennsylvania would adopt Sections 1 and 2 of the Restatement Third.

At the time the Third Circuit made its decision in *Berrier*, the Pennsylvania Supreme Court was considering an appeal that it had accepted in the matter of *Bugosh v. I.U. North America Inc.*, No 7 WAP 2008 (Pa. Supreme Court, June 17, 2009), to consider whether the state court should apply Section 2 of the Restatement (Third) of Torts in place of Section 402A of the Restatement (Second) of Torts. On June 17, 2009, the Pennsylvania Supreme Court dismissed the *Bugosh* appeal and did not decide the issue. As a result, personal injury product liability cases filed in Pennsylvania state court will continue to apply the strict liability law that has been in place since 1966 and precludes all concepts of negligence from the consideration of the jury. In federal court, however, the federal district (trial) courts must apply the law as predicted by the Third Circuit Court of Appeals. In federal court in Pennsylvania, the Restatement Third will apply. Therefore:

"[a] product: (b) 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." Restatement (Third) of Torts: Products Liability Section 2(b) (underlining added)

On the one hand, the Restatement Third tends to enlarge the pool of potential plaintiffs because it states that "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect." Restatement (Third): Products Liability, Section 1 (emphasis added). The law of Pennsylvania under section 402A currently restricts the universe of plaintiffs to "intended users." In addition, the

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Restatement Third's definition of a design defect adds the requirement that the plaintiff prove the existence of an alternative product design that would have reduced or avoided the foreseeable risk of harm. Notwithstanding the above changes, the Restatement Third continues to require that the seller be one that is engaged in the business of selling. Also, the Restatement Third continues to focus the inquiry upon the condition of the product at the time of sale, as does the current Pennsylvania state law.

The law's effect on AWP

If you are the renter or manufacturer of an aerial work platform, the law of Pennsylvania may have important implications that you should consider. The renter of an AWP may be strictly liable for defects in the work platform at the time of the rental. For example, if the product was originally sold by the manufacturer with a deployable rail system to reduce the risk of tipping over in the event that the wheel of a narrow aisle scissor lift is driven into a pothole or similar floor opening, then the failure to rent the equipment with that device—both present and functioning—may be the basis for a claim that the product was supplied in a defective condition. If the equipment was defectively designed and manufactured by the OEM, then the rental company may still be accused of having supplied a defectively designed product because it was in the chain of distribution. However, in such a situation, the rental company may have a claim of indemnification against the OEM because it was the entity that created the design or manufacturing defect and was therefore primarily responsible for the condition of the product.

Pennsylvania's strict product liability law can be a challenge to sellers, and particularly the renters and manufacturers of equipment. Injured plaintiffs may use the seller's failure to comply with industry standards as evidence of defect in the product, but sellers are prohibited from introducing their compliance with such standards as evidence in their defense. If there is a negligence defendant and a strict product liability defendant in the same case, the negligent defendant will have the defense of comparative negligence available to it (assuming the facts support the defense). The product defendant does not have the defense of comparative negligence available. As a consequence, any negligence that is found against the plaintiff at trial is deducted from the liability of the negligent defendant and is added to the liability of the product liability defendant. The rationale for this law is that if the plaintiff is injured by the defective product to any degree, then the seller

ANSI vs. the OEM

ANSI A92 is typically relied upon as an applicable industry standard for AWP. Many manufacturers' manuals refer to the applicable ANSI standard, and some units are supplied with a manual that contains a reprint of certain ANSI provisions that are to be read by the operator and others. The issues that the AWP rental company must consider include the fact that some manufacturers require certain actions in their operator's manuals that are not required by ANSI. For example, ANSI A92.6, which governs scissor lifts, does not require the use of a lanyard and harness system. Some manufacturers, however, have added lanyard anchorage points and include in their operator's manuals the requirement that a lanyard and harness be worn and attached to the designated point on the scissor lift while the machine is in use. There may be instances when the manufacturer may sell the scissor lift without supplying a lanyard and harness system. After all, ANSI does not require their use. The manufacturer that designs anchorage points on the scissor lift and calls for the use of a lanyard and harness system in its manual will nonetheless rely upon the users to use lanyard and harness systems. In addition, this may give the manufacturer the defense that the scissor lift was not being used as intended because the operator was not wearing a properly affixed lanyard and harness system.

Because Pennsylvania law requires that the AWP be sold by the manufacturer with all elements necessary to make it safe for its intended use, there is an argument that all information that is required for the safe and intended use of the AWP must be supplied by the manufacturer in its manuals and on its product labels and instructions. There is also an argument that it is inconsistent with the law of Pennsylvania to permit a manufacturer to pass that responsibility on to a third party like a rental company in hopes that the third party will supply information needed for the safe use of the AWP beyond what was supplied by the manufacturer in its manuals and product labels.

cannot indirectly benefit from the comparative negligence defense available only to the negligent co-defendant.

Consequently, the law of Pennsylvania can create a situation where the rental company and the manufacturer have two distinctly different interests when it comes to proving that it was the plaintiff's conduct that caused the accident. The rental company will reduce its liability by proving as much comparative negligence as possible. The manufacturer must either prove that the sole cause of the incident was the plaintiff's conduct, which can be a difficult position to prove, or that the product was not defective when it was originally sold. The prudent manufacturer and rental company in Pennsylvania know that any negligence found on the plaintiff will be added to the manufacturer's liability, unless the plaintiff's negligence was the sole cause of the incident. This nuance of the law may also create an incentive to the plaintiff to reach a pre-trial settlement with the negligence defendants so the jury will not hear evidence that the plaintiff was negligent and that his recovery should be reduced or eliminated due to his negligence.

The rental company also may find itself accused of negligence for allegedly failing to meet its duty of care in the service, maintenance, and supply of the AWP to the customer. For example, if the work platform has not been inspected and serviced in accordance with the applicable ANSI standard and the manufacturer's service and operations manuals, then the rental company may find itself defending the

lawsuit with no assistance from the product manufacturer. In fact, the standard of service and maintenance prescribed by the manufacturer may be used as the yard stick by which the rental company's conduct is measured. The manufacturer, against which a strict liability claim has likely been asserted, may take the position that the rental company substantially changed the AWP if it was not delivered to the customer in the same working condition and with the same written instructions and product warning labels that were supplied by the manufacturer. The "substantial change" to the product is a defense to the strict liability claim against the manufacturer, and you can expect that it will be used in the defense of the manufacturer at trial if it is available.

Future developments

It remains to be seen whether the Commonwealth of Pennsylvania will alter its current law of strict liability to adopt the approach set forth in the Third Restatement and adopted by the federal courts sitting in Pennsylvania. Perhaps Pennsylvania will stay the current course or develop a hybrid position. If your company is in the unenviable situation of defending a lawsuit in a personal injury strict liability claim in Pennsylvania, then you should be aware that this is an area of the law that could develop further in the near future. Consult with your attorney about these evolving issues and how they impact the development of your defense and your strategies at trial. ■