

CRICKET, S.A.; POPPELL, B.V.; :
WILKINSON SWORD/CRICKET, INC.; :
WILKINSON SWORD, INC.; UNIVERSAL :
MATCH COMPANY A/K/A UNIVERSAL :
MATCH CORPORATION; SWEDISH :
MATCH, A.B.; CRICKET, B.V.; INTER- :
MATCH, S.A.; AND FEUDOR, S.A. :

ARGUED: September 9, 2002

CONCURRING OPINION

MR. JUSTICE SAYLOR

DECIDED: DECEMBER 3, 2003

As a pillar of their reasoning concerning the character of strict products liability doctrine in Pennsylvania, the lead Justices retrench the Court's periodic admonishment to the effect that negligence concepts have no place in a strict liability action. A decided majority of courts and commentators, however, have come to recognize that this proposition cannot be justly sustained in theory in relation to strict products liability cases predicated on defective design; moreover, it is demonstrably incongruent with design-defect strict liability doctrine as it is currently implemented in Pennsylvania trial courts and in federal district courts applying Pennsylvania law. Furthermore, while the parties to the litigation underlying this appeal may not have expressly developed the approach of the products liability segment of the Third Restatement as such in their submissions, the Restatement position represents a synthesis of law derived from reasoned, mainstream, modern consensus. Particularly in light of pervasive ambiguities and inconsistencies in prevailing Pennsylvania jurisprudence in this area, I view this appeal as an opportunity to examine the range of readily accessible, corrective measures. In my judgment, the Restatement's considered approach illuminates the most viable route to providing essential clarification and remediation, at least on a

prospective basis. Ultimately, I join the majority disposition on the strict liability and negligence claims under present law. My reasoning follows.

I. Central conceptions borrowed from negligence theory are embedded in strict products liability doctrine in Pennsylvania.

First off, the lead opinion acknowledges that under prevailing authority of this Court, foreseeability, a conception firmly rooted in negligence theory, is assessed in strict liability cases involving certain types of product alterations. See Opinion, slip op. at 9-10 (citing Davis v. Berwind Corp., 547 Pa. 260, 690 A.2d 186 (1997)). Since they decline to disavow this precept, the lead Justices' broad proclamation that "negligence concepts have no place in strict liability law," id. at 10, is disproved on the face of their own analysis. Of course, the product alteration scenario is but one discrete aspect of strict liability doctrine. But even more fundamentally, Pennsylvania trial and appellate courts, and federal courts applying Pennsylvania law, have been employing other aspects of negligence theory as central principles controlling design defect litigation for more than twenty years.

Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966), accepted that a manufacturer or supplier should be liable for sale or distribution of a product "in a defective condition unreasonably dangerous" to the user or consumer or his property, thus bringing the basic framework of Section 402A of the Second Restatement of Torts into the jurisprudence. See id. at 427, 220 A.2d at 854. Significantly, scholars have pointed out that Section 402A developed in a landscape in which most of the relevant litigation centered on manufacturing, as opposed to design, defects.¹ See, e.g., John W. Wade,

¹ The analytical division of product defects into the three categories of manufacturing, warning, and design defects is now generally accepted. See James A. Henderson, Jr., (continued...)

On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 825 (1973) ("The prototype case was that in which something went wrong in the manufacturing process, so that the product had a loose screw or a defective or missing part or a deleterious element, and was not the safe product it was intended to be.").² A primary difficulty facing injured plaintiffs in the manufacturing defect line of cases was that, although an undisputed defect may have affected the safety of a final product, there remained inherent and often insurmountable obstacles to proof that the manufacturer failed to exercise due care in the production process, as would be necessary to sustenance of a cause of action grounded in negligence. One of the core objectives of Section 402A was to relieve plaintiffs of such burden. See Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. at 825-26 ("No longer was it necessary [under Section 402A] to prove negligence on the part of some employee in the assembly line or in the system under which the line functioned or in failing to inspect the finished product adequately."). See generally Griggs v. BIC Corp., 981 F.2d 1429, 1432 (3d Cir. 1992).³

(...continued)

and Aaron D. Twerski, Achieving Consensus on Defective Product Design, 83 CORNELL L. REV. 867, 869 (1998).

² See also Richard L. Cupp, Jr. and Danielle Polage, The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis, 77 N.Y.U.L. REV. 874, 890 (2002) ("Most of the early cases did not entail claims of defectiveness that could, even in retrospect, be classified as design claims."); Henderson and Twerski, Achieving Consensus on Defective Product Design, 83 CORNELL L. REV. at 880 (observing that "[t]he simple truth is that liability for defective design was in its nascent stages in the early 1960s and section 402A did not address it meaningfully, if at all.").

³ The other primary rationale underlying the development of strict products liability was loss-spreading. See Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. at 826 ("The idea is that the loss should not be allowed to remain with the injured party on whom it fortuitously fell, but should be transferred to the manufacturer, who, by pricing his product, can spread it among all the consumers."). Dean John W. Wade also (continued...)

Nevertheless, the intent of the Second Restatement was not to render the manufacturer an insurer of his product, responsible for any and all harm caused from the use of its product, regardless of the product's utility and relative safety. See, e.g., Azzarello v. Black Bros. Co., 480 Pa. 547, 555, 391 A.2d 1020, 1025 (1978). In order to impose appropriate limitations on the doctrine, therefore, as design defect litigation evolved, courts generally, and Pennsylvania courts in particular, recognized an integral role for risk-utility (or cost-benefit) balancing, derived from negligence theory.⁴ This was alluded to in Azzarello, 480 Pa. at 558, 391 A.2d at 1026 (suggesting that a court inquire as to whether "the utility of a product outweigh[s] the unavoidable danger it may pose"), and essentially engrafted on Pennsylvania law in Burch v. Sears, Roebuck & Co., 320 Pa. Super. 444, 450, 467 A.2d 615, 618 (1983) ("The finding of a defect requires a balancing of the utility of the product against the seriousness and likelihood

(...continued)

noted that "[t]he extent to which a manufacturer may be free to 'spread the risk' created by his product can be the subject of some debate[.]" id.; furthermore, courts have recognized inherent limitations on the just implementation of loss spreading via judicially crafted doctrine. See, e.g., Duchess v. Langston Corp., 564 Pa. 529, 552, 769 A.2d 1131, 1145 (2001).

⁴ As explained by one commentator:

Section 402A contained an internal tension: Its declaration that a manufacturer would be liable even if it "exercised all possible care in the preparation and sale of [its] product" was bounded by its application only to products that were "in a defective condition unreasonably dangerous to the user or consumer or to his property." Thus, the section's strict-liability rule was tempered by a negligence-based concept of defect.

George W. Conk, Is There a Design Defect in the Restatement (Third) of Torts: Products Liability?, 109 YALE L.J. 1087, 1092 (2000) (footnote omitted).

of the injury and the availability of precautions that, though not foolproof, might prevent the injury."), and Dambacher ex rel. Dambacher v. Mallis, 336 Pa. Super. 22, 50, 485 A.2d 408, 422 (1984).⁵ Both Azzarello and Dambacher evaluated, and considered favorably, portions of a seminal article by Dean John W. Wade in elaborating on such construct, in which Dean Wade also highlighted the marked similarities between negligence and strict liability in defective design cases, see Wade, On the Nature of Strict Liability for Products, 44 Miss. L.J. at 837-38, as well as the direct derivation of strict liability risk-utility balancing from negligence doctrine. See id.⁶

⁵ See, e.g., Surace v. Caterpillar, Inc., 111 F.3d 1039, 1044-45 (3d Cir. 1997) (recognizing the "long hegemony" of cost-benefit analysis under Pennsylvania law); Hittle v. Scripto-Tokai Corp., 166 F. Supp. 2d 159, 164 (M.D. Pa. 2001); Bowersfield v. Suzuki Motor Corp., 111 F. Supp. 2d 612, 617 (E.D. Pa. 2000); Van Buskirk ex rel. Van Buskirk v. West Bend Co., 100 F. Supp. 2d 281, 283 (E.D. Pa. 1999); Schindler v. Sofamor, Inc., 774 A.2d 765, 772-73 (Pa. Super. 2001); Phillips ex rel. Estate of Williams v. Cricket Lighters, 773 A.2d 802, 813-14 (Pa. Super. 2001). See generally John M. Thomas, Defining "Design Defect" in Pennsylvania: Reconciling Azzarello and the Restatement (Third) of Torts, 71 TEMP. L. REV. 217, 223 (1998) ("Pennsylvania appellate courts following Azzarello have concluded, almost uniformly, that a cost-benefit analysis must be used in determining whether a product is 'defective' or 'unreasonably dangerous.'").

⁶ See also Cupp and Polage, The Rhetoric of Strict Products Liability Versus Negligence, 77 N.Y.U.L. REV. at 882-83 ("An increasing number of courts and writers have agreed with the Reporters that risk/utility balancing requiring a reasonable alternative design is usually the appropriate test in design defect cases, and that in these cases strict liability risk/utility balancing is substantively no different from negligence risk/utility balancing[;] [r]egardless of the label, the underlying approach is increasingly one of simple negligence." (footnotes omitted)); Conk, Is There a Design Defect in the Restatement (Third) of Torts: Products Liability?, 109 YALE L. J. at 1094 ("To summarize, the Restatement (Second)'s section 402A embodied a strict-liability rule, tempered with negligence elements . . ."); id. at 1087-88 (describing "risk-utility analysis" as "a negligence-based approach championed by John Wade"); Henderson and Twerski, Achieving Consensus on Defective Product Design, 83 CORNELL L. REV. at 879 ("Dean Prosser, the Reporter responsible for drafting section 402A, writing some seven years after its promulgation, made it clear that the standard for both design and (continued...)

As justification for its adherence to the position that negligence concepts have no place in strict liability, the lead opinion indicates that "[s]trict liability focuses solely on the product, and is divorced from the conduct of the manufacturer." Opinion, slip op. at 10. But, while this was a common aphorism in the developmental stages of strict liability doctrine, and the lead Justices are not alone in perpetuating it, most courts and commentators have come to realize that in design cases the character of the product and the conduct of the manufacturer are largely inseparable. For example, one pair of commentators has explained:

One of the most frequently repeated distinctions is that even though both [negligence and strict liability] risk/utility tests focus on reasonableness, strict liability focuses on the reasonableness of the product, whereas negligence focuses on the reasonableness of the seller. In theory a product manufacturer could act reasonably in designing a product, but its product could nevertheless be unreasonably dangerous. Perhaps, however, the key words in this formulation are "in theory." In practice, manufacturers consciously choose how to design their products. Asking whether the product is reasonable tends to circle back to

(...continued)

failure-to-warn defects sounds in classic negligence."); Thomas, Defining "Design Defect" in Pennsylvania, 71 TEMP. L. REV. at 233-34 ("[C]ost-benefit analysis lies at the core of the negligence analysis, just as it lies at the core of the defect analysis."); William A. Worthington, The "Citadel" Revisited: Strict Tort Liability and the Policy of Law, 36 S. TEX. L. REV. 227, 270 (1995) ("The risk-utility test, which requires a balancing of design considerations, is inevitably a fault-based test, and although it fails to provide explicitly any objective standard of conduct, the reasonable and prudent manufacturer is implicit."); John W. Wade, Strict Tort Liability of Manufacturers, 19 SW. L.J. 5, 15 (1965) ("It may be argued that [the 'unreasonably dangerous' dynamic of Section 402A] is simply a test of negligence. Exactly."). See generally Griggs, 981 F.2d at 1429 (describing the classic role of risk-utility balancing in negligence law). Compare Dambacher, 336 Pa. Super. at 50-51 n.5, 485 A.2d at 423 n.5 (referencing various strict liability risk-utility factors), with RESTATEMENT (SECOND) OF TORTS §§291-93 (1965) (negligence risk-utility factors).

asking whether the manufacturer used due care in designing it. The effort at distinguishing between reasonable products and reasonable manufacturers may be more of a weak excuse for articulating two tests than a true justification.

Cupp and Polage, The Rhetoric of Strict Products Liability Versus Negligence, 77 N.Y.U.L. REV. at 893) (footnotes omitted). This point is made more forcefully by the Reporters for the new Restatement:

[T]o condemn a design for being unreasonably dangerous is inescapably to condemn the designer for having been negligent. To insist otherwise would be akin to a professor telling a law student that, while the brief the student wrote is awful, the professor is not passing judgment on the student's skill in writing it. Similarly, . . . insistence that strict liability is somehow being imposed if the court assesses the reasonableness of the design and not the reasonableness of the designer's conduct is purest sophistry.

Henderson and Twerski, Achieving Consensus on Defective Product Design, 83 CORNELL L. REV. at 919; see also Wade, Strict Tort Liability of Manufacturers, 19 SW. L.J. at 15. See generally Duchess, 564 Pa. at 546-47, 769 A.2d at 1141-42 (citing cases).

The concern, expressed by the lead Justices here, with the purity of strict liability theory has been previously addressed, for example, by Dean Wade. See, e.g., Wade, On the Nature of Strict Tort Liability for Products, 44 MISS. L.J. at 835 ("A possible initial impression is that [express recognition of the role of negligence concepts in strict products liability theory] is rank apostasy, amounting to an abandonment of the strict-liability concept and a return to the negligence concept will be seen as erroneous on analysis"). Dean Wade's answer, however, was not to perpetuate a fiction, but rather, to acknowledge that the strict liability dynamic pertains to the plaintiff's burden of establishing due care in the manufacture/supply process; whereas, concepts derived from negligence theory serve a critical role at other stages (or in other aspects) of the

liability assessment. See, e.g., id. at 834-35; see also Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. at 15; accord RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §1 cmt. a (1998) ("'[S]trict products liability' is a term of art that reflects the judgment that products liability is a discrete area of tort law which borrows from both negligence and warranty.").

I believe that the time has come for this Court, in the manner of so many other jurisdictions, to expressly recognize the essential role of risk-utility balancing, a concept derived from negligence doctrine, in design defect litigation. In doing so, the Court should candidly address the ramifications, in particular, the overt, necessary, and proper incorporation of aspects of negligence theory into the equation. This Commonwealth's products liability jurisprudence is far too confusing for another opinion to be laid down that rhetorically eschews negligence concepts in the strict liability arena, while the Court nevertheless continues to abide and/or endorse their actual use in the liability assessment. Cf. Surace, 111 F.3d at 1046 ("We regret that the [Pennsylvania] Supreme Court has not yet spoken definitively on the matter of risk-utility analysis or its component factors.").

II. Several ambiguities and inconsistencies in the prevailing Pennsylvania strict products liability jurisprudence affect proper resolution of the question framed in this appeal.

A primary legal question framed by this appeal is whether strict products liability doctrine requires that a plaintiff's injuries or loss be sustained during a product's use by an "intended user," or merely in the course of a use that was reasonably foreseeable to the manufacturer or supplier. Since I do not agree with the lead Justices that this question can be resolved by the rhetorical exclusion of negligence concepts from strict

liability doctrine, I believe that a more searching examination of the doctrine is necessary.

Substantively, Pennsylvania's acceptance of risk-utility (or cost-benefit) balancing places it "very much in the mainstream of modern products liability law." Thomas, Defining "Design Defect" in Pennsylvania, 71 TEMP. L. REV. at 218; see also id. at 222 ("There is widespread agreement among courts and scholars today that the cost-benefit balancing test is the appropriate test for design defect.").⁷ There are several ambiguities and inconsistencies in Pennsylvania's procedure, however, which render our law idiosyncratic. See Henderson and Twerski, Achieving Consensus on Defective Product Design, 83 CORNELL L. REV. at 897 ("Pennsylvania has, by common agreement, developed a unique and, at times, almost unfathomable approach to products litigation."). First, in the attempt to insulate the jury from consideration of any terminology derived from or related to negligence theory, the Court has effectively relegated the core decisional aspect of strict liability cases (risk-utility balancing) to the trial judge in a role described by the Superior Court as "a social philosopher and a risk-utility economic analyst." See, e.g., Fitzpatrick v. Madonna, 424 Pa. Super. 473, 476, 623 A.2d 322, 324 (1993).⁸ See generally Henderson and Twerski, Achieving Consensus on Defective Product Design, 83 CORNELL L. REV. at 897 ("Pennsylvania

⁷ A competing framework, known as the consumer expectations test, has come to be widely regarded as inadequate in and of itself, fairly sustainable only as one component of cost-benefit balancing. See generally Cupp and Polage, The Rhetoric of Strict Products Liability Versus Negligence, 77 N.Y.U. L. REV. at 889-92.

⁸ Negligence doctrine also places the trial court in the role of determining duty; however, this entails the broader assessment of whether a duty of care is owed in general, see generally Althaus ex rel. Althaus v. Cohen, 562 Pa. 547, 553, 756 A.2d 1166, 1169 (2000), not the specifics of how the duty must be implemented in individualized circumstances and, correspondingly, when the duty is breached. Such fact-based determinations are inherently the function of the jury.

stands alone in its view that risk-utility balancing is never properly a jury function."'). At the same time, the Court has maintained that it is the jury's function to resolve questions concerning the condition of the product and the truth of the plaintiffs' factual averments. See Azzarello, 480 Pa. at 556-58, 391 A.2d at 1025-26. The efforts of trial and intermediate appellate courts to reconcile these directives has led to risk-utility balancing by trial courts on the facts most favorable to the plaintiff (to avoid entangling the trial judge in determining the factual questions assigned by Azzarello to the jury), see, e.g., Fitzpatrick, 424 Pa. Super. at 475, 623 A.2d at 324, and minimalistic jury instructions (to insulate the jury from negligence terminology), which lack essential guidance concerning the nature of the central conception of product defect.⁹

With regard to the role of the trial court, the concern is summarized in commentary as follows:

[I]f the court is required to view the evidence on the cost-benefit factors in the light most favorable to the plaintiff, and if (as most scholars and some courts have concluded) the Azzarello instruction does not permit the jury to consider cost-benefit factors at all, then neither the court nor the jury has the authority to actually decide whether the true benefits

⁹ Azzarello endorsed the following suggested jury instruction:

The (supplier) of a product is the guarantor of its safety. The product must, therefore, be provided with every element necessary to make it safe for (its intended) use, and without any condition that makes it unsafe for (its intended) use. If you find that the product, at the time it left the defendant's control, lacked any element necessary to make it safe for (its intended) use or contained any condition that made it unsafe for (its intended) use, then the product was defective, and the defendant is liable for all harm caused by such defect.

Azzarello, 480 Pa. at 560 n.12, 391 A.2d at 1027 n.12; see also PA. SUGGESTED STANDARD JURY INSTRUCTIONS 8.02 (PBI Press 1997).

of the proposed alternative design outweigh the true costs. In other words, under this view of the division of decisional power, neither the court nor the jury determines whether the product is in fact unreasonably dangerous or defective.

. . . [T]he fundamental issue of whether the incremental societal benefits of the proposed alternative design outweigh the incremental societal costs remains forever in a sort of legal limbo; trial courts are permitted to decide only whether the evidence is sufficient to submit that issue to the jury, but they are prohibited from actually submitting it.

Thomas, Defining "Design Defect" in Pennsylvania, 71 TEMP. L. REV. at 232.

With regard to the sufficiency of the jury charge, Dean Wade afforded the following perspective to the central conception of product defect:

[T]he term "defective" raises many difficulties. Its natural application would be limited to the situation in which something went wrong in the manufacturing process, so that the article was defective in the sense that the manufacturer had not intended it to be in that condition. To apply it also to the case in which a warning is not attached to the chattel or the design turns out to be a bad one or the product is likely to be injurious in its normal condition, is to use the term in a Pickwickian sense, with a special, esoteric meaning of its own. It is not without reason that some people, in writing about it, speak of the requirement of being "legally defective," including the quotation marks. To have to define the term to the jury, with a meaning completely different from the one they would normally give to it, is to create the chance that they will be misled. To use it without defining it to the jury is almost to ensure that they will be misled. . . . Finally, the term "defective" gives an illusion of certainty by suggesting a word with a purported specific meaning rather than a term connoting a standard involving the weighing of factors.

Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. at 831-32 (footnote omitted).¹⁰

It is by way of reference to the state of our law as reflected above that I would answer the question concerning whether design-defect, strict products liability doctrine should be limited according to an intended user concept. While recognizing that integration of the "reasonably foreseeable use" alternative into strict products liability

¹⁰ Professor John M. Thomas states the concern specific to Pennsylvania law as follows:

To be sure, the Azzarello instruction successfully avoids negligence terminology. It does not, however, "clearly and concisely" express the concept of "defect," because it fails to instruct the jury how to determine whether a product is "safe" or "unsafe" for its intended use. Obviously, the court could not have meant "safe" to mean incapable of causing injury, both because every product is capable of causing injury under some circumstances, and because such a meaning would create exactly the type of automatic liability that the court said the law must preclude. Yet, the instruction contains no language that effectively serves the same "critical" function as the unreasonably dangerous requirement under section 402A or the cost-benefit instructions approved in Barker [v. Lull Eng'g Co.], 573 P.2d 443 (Cal. 1978)]. That is, nothing in the instruction explicitly ensures that the manufacturer will not be held liable as an insurer and therefore will not automatically be liable for all injuries resulting from the product's use. To the contrary, the Azzarello instruction affirmatively states that the manufacturer is the "guarantor" of the product's safety, a term that to a lay jury will surely seem indistinguishable from "insurer."

Thomas, Defining "Design Defect" in Pennsylvania, 71 TEMP. L. REV. at 225.

doctrine may reflect the greater consensus and better reasoned view,¹¹ in the landscape of our law as it presently exists, I must agree with the majority's holding that the narrowest category of cases should be subjected to such a liability scheme.¹² I believe,

¹¹ See, e.g., 1 PROD. LIAB.: DESIGN AND MFG. DEFECTS §3.5 (2d ed. 2002) ("Misuse of the product must be anticipated by the manufacturer[;] [f]orseeable misuses of a product will not absolve the manufacturer."). On this point, Dean Wade explained:

Some courts have spoken of the intended use of the product. And the intent is sometimes restricted to that of the manufacturer, thus affording him the opportunity to limit the scope of his liability. Once again, this sounds more like an action for breach of contract than a tort action. In substitution for the term "intended use," other adjectives may be used -- expected, anticipated, normal, foreseeable; note how they became broader in their scope. For an action based upon negligence it would seem that a manufacturer should be held to the duty of seeking to make his product duly safe for uses which might be reasonably foreseen. Of course, it may be argued that for strict liability, which is imposed on an objective basis without having to find negligent conduct, a narrower scope as to the nature of the use may be appropriate. The other view seems better, and reference may be made again to the suggested standard of what a reasonable prudent man would do, assuming that he had knowledge of the dangerous condition of the chattel.

Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. at 847 (footnotes omitted).

¹²Again, Dean Wade's commentary remains highly relevant in adding perspective:

It is appropriate to remark here that a court which seeks to impose liability for any product which is unsafe, without consideration of whether that lack of safety is due or reasonable, will find other means of controlling the extent of the liability. One of the ways of doing this is to speak of proximate cause or to limit the scope of the risk on the basis of a more restricted type of use to which the liability will extend. It seems much better to bring the policy elements

(continued...)

however, that the above summation of Pennsylvania law demonstrates a compelling need for consideration of reasoned alternatives, such as are reflected in the position of the Third Restatement.

III. The Restatement's considered approach illuminates the most viable route to providing essential clarification and remediation.

Section 2 of the newest Restatement catalogues the traditional three categories of product defect: manufacturing defects, design defects, and defects arising from inadequate warnings or instructions. Compare RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2(a)-(c), with supra note 1. Manufacturing defects are discerned according to a fairly straightforward test: they are deemed present when a product fails to conform to its intended design, and liability is imposed regardless of whether or not the manufacturer's quality control efforts satisfy reasonableness standards. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2(a) & cmt. a. The Restatement thus retains classic strict products liability for the category of defects that the doctrine was concerned with when it initially evolved. See supra notes 1-3 and accompanying text.

By contrast, however, the Restatement's conception of defective design is more nuanced, to accommodate the wider range of scenarios that may face injured consumers and manufacturers/suppliers. As a general rule, a product is deemed defective in design when the foreseeable risks could have been reduced or avoided by the use of a reasonable alternative design, and when the failure to utilize such a design

(...continued)

out into the open by giving consideration to the factors to be weighed in determining whether the product is duly safe.

Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. at 847.

has caused the product to be "not reasonably safe." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2(b).¹³ The Reporters explain the need for such a negligence-based standard in such "classic design cases" as follows:

In contrast to manufacturing defects, design defects . . . are predicated on a different concept of responsibility. In the first place, such defects cannot be determined by reference to the manufacturer's own design or marketing standards because those standards are the very ones that plaintiffs attack as unreasonable. Some sort of independent assessment of advantages and disadvantages, to which some attach the label "risk-utility balancing" is necessary. Products are not generically defective merely because they are dangerous. Many product-related accident costs can be eliminated only by excessively sacrificing product features that make products useful and desirable. Thus, the various trade-offs need to be considered in determining whether accident costs are more fairly and efficiently borne by accident victims, on the one hand, or, on the other hand, by consumers generally through the mechanism of higher product prices attributable to liability costs imposed by courts on product sellers.

¹³ In other scenarios contemplated by the newest Restatement, an inference of defective design may attach where a product fails to perform safely its manifestly intended function. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2 cmt. b, §3. The Restatement's Section 4, concerning violations of statutory and regulatory safety standards, also facilitates determinations of defective design in another discrete category of cases. See id. §4. Further, the Restatement addresses special products and product markets to which the general standard in subsection 2(b) may not apply. See id. §§5-8. See generally Henderson and Twerski, Achieving Consensus on Defective Product Design, 83 CORNELL L. REV. at 905-07 (detailing the Third Restatement's approach). Finally, the Restatement acknowledges the possibility of manifest unreasonableness of a product, despite lack of an alternative, safer design. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2 cmt. e. The special categories of design defect theory function, inter alia, to alleviate the plaintiff's burden of proof in appropriate circumstances.

Id. §2 cmt. a.¹⁴ The Restatement also roundly endorses a reasonableness-based, risk-utility balancing test as the standard for adjudging the defectiveness of product designs. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2 cmt. d. See generally Conk, Is There a Design Defect in the Restatement (Third) of Torts, 109 YALE L.J. at 1132-33 ("The Restatement (Third) correctly restates the law of products liability in the alternative-safer-design test of section 2(b). In design-defect cases, it is generally a negligence standard, not a strict-liability rule, that determines whether a product is defective. That fault-based standard [represents] the distilled expression of thirty years of design-defect litigation. . ."). The Restatement also indicates that the cost-benefit test will be applied by the jury, guided by appropriate instructions, where sufficient

¹⁴ The Reporters also describe the essential role of evidence of an alternative safer design in classic design cases as follows:

Common and widely distributed products such as alcoholic beverages, firearms, and above-ground swimming pools may be found to be defective [in design] only upon proof of [a reasonable alternative design] Absent [such proof], however, courts have not imposed liability for categories of products that are generally available and widely used and consumed, even if they pose substantial risks of harm. Instead, courts generally have concluded that legislatures and administrative agencies can, more appropriately than courts, consider the desirability of commercial distribution of some categories of widely used and consumed, but nevertheless dangerous, products.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2 cmt. d; see also Conk, Is There a Design Defect in the Restatement (Third) of Torts, 109 YALE L.J. at 1088 ("The 'alternative-safer-design' rule enshrined in section 2 of the Restatement (Third) is the vindication of [Dean] Wade's view that design-defect litigation should turn on whether the product could have and should have been made safer before it was sold."); cf. Thomas, Defining "Design Defect" in Pennsylvania, 71 TEMP. L. REV. at 230 ("Azzarello and its progeny also support, almost uniformly, the Restatement's requirement that plaintiffs prove a reasonable alternative design as part of their prima facie case.").

evidence has been presented to preclude summary judgment or a directed verdict. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2 cmt. f.

Additionally, and of particular interest in this case, the Reporters propose that liability standards reject the "open and obvious" or "patent danger" rule as a total bar to a design defect claim, relegating "obviousness" to the role of "one factor among many to consider as to whether a product design meets risk-utility norms." See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2 cmt. d. One commentator forecast the effect of the Restatement as follows:

[T]he Restatement (Third) of Torts: Products Liability may be anticipated to provide theories of recovery and systems of proof and defense that neutralize most of the harsh effects of the consumer expectations test and the open and obvious defense. In their stead the Reporters promote exclusive resort to a risk-utility evaluation, fortified by concepts of reasonable foreseeability, which increases the likelihood of liability for manufacturers who put into household use products nominally intended for adults, but which foreseeably invite misadventure with children.

M. Stuart Madden, Products Liability, Products for Use by Adults, and Injured Children: Back to the Future, 61 TENN. L. REV. 1205, 1240 (1994). The new Restatement also recognizes that there are scenarios in which a design duty may persist, despite the affordance by the manufacturer of an express warning. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2 cmt. I; accord Price v. BIC Corp., 702 A.2d 330, 333 (N.H. 1997) (“[W]hen an unreasonable danger could have been eliminated without excessive cost or loss of product efficiency, liability may attach even though the danger was obvious or there was adequate warning.” (quoting LeBlanc v. American Honda Motor Co., 688 A.2d 556, 562 (N.H. 1997))). See generally James A. Henderson, Jr.

and Aaron D. Twerski, The Products Liability Restatement in the Courts: An Initial Assessment, 27 WM. MITCHELL L. REV. 7 (2000).

In my view, adoption of the Restatement's closely reasoned and balanced approach, which synthesizes the body of products liability law into a readily accessible formulation based on the accumulated wisdom from thirty years of experience, represents the clearest path to reconciling the difficulties persisting in Pennsylvania law, while enhancing fairness and efficacy in the liability scheme.¹⁵

IV. Either under the Restatement Third or traditional negligence theory, the Phillips' claims should survive the present summary judgment effort.

Appellants' arguments in support of the trial court's grant of summary judgment are constructed primarily on the intended user, simple tools, and open and obvious doctrines. As the lead correctly notes, a reasonably foreseeable use, as opposed to intended user framework, applies in the negligence setting. Nevertheless, in child-play fire cases, some courts have accepted arguments akin to Appellants' as controlling, although the various theories advanced by plaintiffs and reasons adopted by the courts make it difficult to generalize.¹⁶ Other courts have concluded that the matter should be

¹⁵ It should be noted that the Restatement does not take a position concerning the appropriate jury instruction in design defect cases. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2 cmt. d. It would not be difficult, however, to synthesize an appropriate approach to the jury charge from those used by other jurisdictions and advocated in the commentary. See, e.g., Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. at 839-41; Thomas, Defining "Design Defect" in Pennsylvania, 71 TEMP. L. REV. at 240-41.

¹⁶ See, e.g., Jennings v. BIC Corp., 181 F.3d 1250, 1258 (11th Cir. 1999) ("Under Florida law, . . . BIC was not required to child-proof its lighters to satisfy its duty of (continued...)

determined by risk-utility balancing, and thus, may be properly submitted to a jury.¹⁷

See generally Annotation, Products Liability: Lighters and Lighter Fluid, 14 A.L.R.4th 47 (Lawyers Cooperative Publishing 1993 & West Group Supp. 2002).

(...continued)

reasonable care.”); Todd v. Societe BIC, S.A., 21 F.3d 1402, 1407 (7th Cir. 1994); Kirk v. Hanes Corp. of N.C., 16 F.3d 705, 711 (6th Cir. 1994) (“The public policy of Michigan . . . provides that the primary responsibility for safeguarding children from the obvious and inherent dangers associated with the hundreds of simple tools with which we surround ourselves rests with the parents of these children and not the manufacturer of the simple tool.” (emphasis in original)); Sedlock ex rel. Sedlock v. BIC Corp., 741 F. Supp. 175, 177 (W.D. Mo. 1990) (“Missouri law explicitly holds that manufacturers are not liable for failure to make adult products child proof.”); Boumelhem v. BIC Corp., 535 N.W.2d 574, 576-77 (Mich. App. 1995) (following Michigan precedent to conclude that a manufacturer owed no duty to design a child-resistant lighter, utilizing a “simple tool” analysis); Curtis ex rel. Curtis v. Universal Match Corp., 778 F. Supp. 1421, 1425 (E.D. Tenn. 1991) (holding, under Tennessee law, that a disposable lighter is not unreasonably dangerous because the “ordinary adult consumer” understood and appreciated the danger posed by children’s use of lighters).

¹⁷ See, e.g., Griggs, 981 F.2d at 1439 (applying, under Pennsylvania negligence law, a risk-utility analysis and holding that a viable design liability claim could result from a manufacturer’s failure to make a lighter child resistant); Hittle, 166 F. Supp. 2d at 159 (following Griggs in relation to an “Aim ‘N Flame” lighter); Price, 702 A.2d at 333 (opining, in a disposable lighter case, that “barring a determination that the utility of the product completely outweighs the risk associated with its use or that the risk of harm is so remote as to be negligible, the legal representative of a minor child injured as a result of the misuse of a product by another minor child can maintain a defective design product liability claim against the product’s manufacturer, even though the product was intended to be used only by adults, when the risk that children might misuse the product was open and obvious to the product’s manufacturer and its intended users.”); Bean v. BIC Corp., 597 So. 2d 1350, 1352 (Ala. 1992) (concluding, under a consumer expectations test, that manufacturers owe consumers a duty to make lighters child resistant, because the court was unwilling to make “the sweeping and decisive pronouncement that a manufacturer of a product that it intends to be used by adults never has a duty to make the product safer by making it child-resistant when the dangers are foreseeable and prevention of the danger is feasible”); Campbell v. BIC Corp., 586 N.Y.S.2d 871, 873 (N.Y. Sup. Ct. 1992) (“Because the lighters manufactured by defendant are commonly used and kept about the home, it is reasonably foreseeable (continued...)”).

The tension in these cases is obvious. On the one hand, concepts of parental responsibility and known and open childhood risks disfavor reallocation of loss.¹⁸ Nevertheless, some of the policies underlying tort law loss reallocation are implicated in the disposable lighter cases, which involve a specific type of household, simple tool that

(...continued)

that children will have access to them and will try to use them[;] [t]hus, the court finds that defendant did owe plaintiff a duty of care."); *id.* ("Nor does defendant's invocation of the 'open and obvious' doctrine [control,] because in New York that is simply another factor that is considered in determining the reasonable care exercised by the partie[s.]").

¹⁸ Professor M. Stuart Madden summarized this point as follows:

Concededly, some childhood injuries require the conclusion that the cost and other burdens of the injury should remain with the injured child and not shift to the manufacturer, seller, or other third party. For example, childhood misuse may break the causal connection between a manufacturer's design or warning and the injury when the appearance or promotion of the product does not by itself attract the risky behavior. A few commonplace products are unlikely to trigger liability in the absence of some bizarre or malevolent concatenation of events. As one court stated:

Toothpicks like pencils, pins, needles, knives, razor blades, nails, tools of most kinds, bottles and other objects made of glass, present obvious dangers to users, but they are not unreasonably dangerous, in part because the very obviousness of the danger puts the user on notice. It is part of normal upbringing that one learns in childhood to cope with the dangers posed by such useful everyday items. It is foreseeable that some will be careless in using such items and will be injured, but the policy of our law in such cases is not to shift the loss from the careless user to a blameless manufacturer or supplier.

M. Stuart Madden, Products Liability, Products for Use by Adults, and Injured Children, 61 TENN. L. REV. at 1210-11 (footnotes omitted).

may be particularly destructive and may be reasonably capable of safer design. See generally Jerry J. Phillips, Products Liability for Personal Injury to Minors, 56 VA. L. REV. 1223, 1240-41 (1970) ("[E]ven the best of educational efforts cannot be expected to change the essential nature of children, and, unless we are prepared to ignore this fact, in many instances better product design presents the only realistic means available for protecting children against injury.").

On balance, I agree that the above considerations are best assessed by a factfinder in a risk-utility equation. Thus, on the arguments presented in Appellants' summary judgment motion and properly before this Court,¹⁹ I join the majority in its decision to refrain from precluding child resistance as a design obligation in terms of this particular type of household product known to be diverted to child play. I also believe that this view squares with the approach advanced in the Restatement Third.

Messrs. Justices Castille and Eakin join this concurring opinion.

¹⁹ Various amici suggest that state tort law may be preempted based on regulatory involvement of the national Consumer Product Safety Commission, and, in particular, regulations permitting the sale of certain, stockpiled disposable lighters not meeting specified child resistance criteria. See Safety Standards for Cigarette Lighters, 16 C.F.R. §§1210.1, 1210.4 (2001). Such an argument, however, was not advanced in Appellants' summary judgment motion, and therefore, is not presently before the Court.