The Legal Intelligencer

ALM Properties, Inc.
Page printed from: *The Legal Intelligencer*

Back to Article

Developing a Products Liability Case in Pennsylvania

To develop a Pennsylvania products liability case, practitioners must already prepare the case under two different analyses: that of the Restatement (Second) of Torts and the Restatement (Third) of Torts.

Peter M. Patton

2013-11-05 12:00:00 AM

To develop a Pennsylvania products liability case, practitioners must already prepare the case under two different analyses: that of the Restatement (Second) of Torts and the Restatement (Third) of Torts. No one knows how the Pennsylvania Supreme Court will rule in the pending *Tincher v. Omega Flex*, 64 A.3d 626 (2013), where the court will decide which restatement on strict liability will apply.

A recent decision in the U.S. District Court for the Middle District of Pennsylvania, *Vaskas v. Kenworth Truck*, 3:10-CV-1024 (M.D. Pa. March 18, 2013), highlights another danger in the application of the Restatement (Third) of Torts: elimination of the negligent design and warnings claim. The effect of the Third Restatement is to combine the negligence and products liability design/warnings claims into a single claim based on the risk-utility analysis of the Third Restatement's Sections 2(b) and 2(c). To prevail in a design claim, plaintiffs counsel must focus on each element of Section 2(b)'s risk-utility analysis.

Vaskas was a personal injury case in which the plaintiff, Robert Vaskas, was leaving the cab of a tractor when his right foot slipped off the top step, causing him to fall and sustain neck and back injuries. Vaskas introduced evidence that the tractor did not conform to design specifications, as the distance from the tractor's top step to the bottom step exceeded the manufacturer's specified distance by two inches. Vaskas' evidence also showed that the tractor steps' depth did not meet the manufacturer's internal requirements or those of the applicable Federal Motor Vehicle Safety Standards.

U.S. District Judge A. Richard Caputo of the Middle District of Pennsylvania applied the Restatement (Third) of Torts, reasoning that he was compelled to do so under the U.S. Court of Appeals for the Third Circuit's *Covell v. Bell Sports*, 651 F.3d 357 (3d Cir. 2011). The *Vaskas* court found that a jury could find the tractor's steps were manufactured defectively because they did not meet the manufacturer's own design specifications and requirements. The court also found that a jury could find evidence of reasonable alternative designs for the tractor's access system that were both technically and economically feasible, including placing hand rails on both sides of the tractor steps as

opposed to only one.

Caputo nonetheless found that a jury could not find that the omission of a reasonable alternative design of the cab access system rendered the tractor not reasonably safe. He reasoned that Vaskas had not adduced evidence that the tractor was not reasonably safe because it did not feature the proffered alternative designs. Caputo followed the same analysis in finding that a jury could not find the omission of warnings in the cab access area warning of stair slipperiness rendered the tractor not reasonably safe. In reaching its conclusions, the court stated that "the magnitude and possibility of the foreseeable harm, especially in light of numerous warnings contained in the tractor's operating manual, is not significant enough to convince the court that the Kenworth tractor is not reasonably safe in its current state." The manufacturer had argued that there was no proof of any similar incidents with the tractor's step system.

Caputo originally denied summary judgment as to the negligence claims against the manufacturer. He reasoned that there was evidence of a genuine issue of material fact as to a breach of duty because Vaskas' expert opined that the truck manufacturer failed to conform to fundamental engineering principles and practices by designing and manufacturing nonperforated metal steps with rounded edges, failing to place a warning sticker in the cab access area, and using only the one handhold. There was also evidence that the manufacturer failed to design according to the Code of Federal Regulations and the recommendations of the Pennsylvania Department of Transportation and the Society of Automotive Engineers.

Two months later, Caputo extended his grant of summary judgment to the plaintiff's negligent design and negligent failure-to-warn claims. He reasoned that allowing Vaskas to proceed to trial under negligent design and negligent failure-to-warn claims but not on strict liability design-defect and failure-to-warn claims was inconsistent with the Third Restatement. He quoted the Third Restatement's Section 2, Comment N, which states: "Regardless of the doctrinal label attached to a particular claim, design and warning claims rest on a risk-utility assessment." The same comment goes on to state: "To allow two or more factually identical risk-utility claims to go to a jury under different labels, whether 'strict liability,' 'negligence' or 'implied warranty of merchantability,' would generate confusion and may well result in inconsistent verdicts," although Caputo did not quote the above sentence.

In sum, Caputo ruled that since summary judgment had been granted in favor of the manufacturer on the strict liability design-defect and strict liability failure-to-warn claims, it was not consistent with the Third Restatementto allow Vaskas to proceed to trial on design-defect and failure-to-warn claims based on negligence.

Caputo's decision is consistent with the Third Restatement's Comment N, which permits only one claim of defect under Section 2(b) of the Third Restatementfor a design-defect claim. Nonetheless, the court's suggestion that warnings in the tractor's manual limited the magnitude and probability of the harm reveals inconsistencies in the Third Restatement. The Third Restatementitself states, "In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks. For example, instructions and warnings may be ineffective because users of the product may not be adequately reached, may likely be inattentive or may be insufficiently motivated to follow the instructions or heed the warnings. ... Warnings are not, however, a substitute for the provision of a reasonably safe design." If there was evidence of a foreseeable risk of harm and a practical, reasonable alternative design, as the *Vaskas* court found, the use of only warnings in a manual in lieu of that design by the manufacturer was a design failure under the Third Restatement's own terms, since the harm was reasonably preventable.

The reporters' note to Comment 1 itself cites *Uloth v. City Tank*, 384 N.E.2d 1188 (Mass. 1978), where the Massachusetts Supreme Court affirmed a judgment for a laborer on a claim of negligent design of the step of a garbage truck. Quoting *Uloth*, the reporters' note states: "If a slight change in a design would prevent serious, perhaps fatal, injury, the designer may not avoid liability by simply warning of the possible injury. We think that in such a case, the burden is best placed on the designer or manufacturer rather than the individual user of a product."

Vaskas highlights the need for practitioners to carefully consider whether a design-defect claim in negligence and products liability is based on the same factual predicates, or whether there may be variations in the factual predicates of a design-defect claim against one or more defendants. Plaintiffs counsel must also focus on evidence establishing that the omission of an alternative design renders a product not reasonably safe. The Third

Restatementitself notes that a plaintiff faces practical difficulties, stating, "Given the inherent limitations on access to relevant data, the plaintiff is not required to establish with particularity, the costs and benefits associated with adoption of a proposed alternative design."

As a practical matter, a plaintiff typically confronts the same problem in establishing the accident history of the product, since this evidence, if it exists at all, typically is in the hands of the manufacturer, as in *Spino v. John S. Tilley Ladder*, 548 Pa. 286, 696 A.2d 1169 (1997), in which a manufacturer kept a log of ladder mishaps. Nonetheless, counsel must seek information on prior similar incidents to show that the product was "not reasonably safe" as designed. Counsel must also seek admissions from the defendant's personnel that a warning is not a substitute for a safe design. *Vaskas* serves as a warning that under the Third Restatement, there is only one design/warnings claim, and counsel must prepare accordingly.

Peter M. Patton *is a senior partner at Galfand Berger. With decades of trial experience, he has won some of the firm's largest jury verdicts. His trial experience across Pennsylvania has helped achieve multimillion-dollar settlements in products liability and construction accident cases.*
