# EFFECTIVENESS OF THE MISUSE DEFENSE IN TOOL CASES WHEN A CHILD IS THE USER

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***ABSTRACT***
*Tools are both designed for and intended to be used by adults since tools clearly can cause injury, death, or property damage if they are misused. As one court has stated, it would be difficult or impossible for a manufacturer to produce or design a knife that will not cut or a hammer that will not mash a thumb.*[1]

*There can be very tragic consequences when a child plays with a product intended for use by an adult. For instance, a child playing with a loaded revolver can easily shoot and kill someone.*[2] *Or a child using a meat grinder can suffer severe injuries to a hand.*[3] *Children playing with cigarette lighters recently have caused as many as 130 fire deaths and 5,500 residential fires annually,*[4] *resulting in an annual cost that has been estimated to be as much as $300-375 million.*[5]

*Not surprisingly, plaintiffs harmed by children using adult tools or representing those harmed have sought damages from manufacturers of the products. These actions primarily are based on the law of product liability. The contentions in these cases center on whether the manufacturers had a duty to design the products in such a way that children could not cause personal injury or property damage with them.*[6]

*In their defense, the manufacturers often contend that the products were properly designed for adult users and were sold with appropriate instructions and warnings to adults. This paper explores the effectiveness of this misuse defense and the effect of the Restatement Third, Torts.*

## INTRODUCTION

Section 402A of the Restatement Second of Torts states that one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property.[7] Plaintiffs typically contend that the products of manufacturers are defectively designed because of their lack of safety features that would keep children from causing harm with them and/or a failure to warn of dangers.[8]

In response, manufacturers contend that there is no liability for <u>all</u> of the injuries caused by the product they manufactured. Instead, they argue that there is liability only when the products are used as intended. For instance, in the cases involving cigarette lighters, since it is unlawful for children to smoke cigarettes[9] such that the ordinary consumers of

lighters are adults,[10] and since cigarette lighters are made to be used to ignite cigarettes, lighters are not intended to be used as children's toys.[11] The courts in the last decade applied the Restatement Second of Torts consumer expectations test that the product was defective if, considering its reasonably foreseeable use, it left the seller in an unreasonably dangerous condition not contemplated by the ultimate consumer. The defense that there is no strict liability because children who were not the intended users of the product in effect thereby misused the adult products has been very successful in getting summary judgments or directed verdicts.
However, in 1998, the Restatement Third, Torts: Product Liability rejected the general use of the consumer expectation test and provided it is only one factor to be considered in the determination of whether a new product (other than food) is defective. The Restatement adopted instead a risk-utility analysis, which balances the risks of the product as designed against the costs of making the product safer. This test has been considered by some commentators to favor industry.[12] The question this poses for manufacturers is whether in child's play cases this change really will favor industry.

**CASES FROM 1990 THROUGH 2000**

The facts of one case tragically show the extreme consequences that can result from children playing with lighters.[13] The plaintiff's expert testified that the fire started when a three-year-old ignited the den sofa with a Cricket cigarette lighter. The resulting fire killed the three-year-old, her two-year-old and six-year-old siblings as well as her mother and grandfather. Her five-year-old sister was permanently disabled and their rental house was destroyed.

The jury rejected the plaintiff's theory that the lack of a child safety feature on the lighter was a design defect resulting in strict liability. The Fourth Circuit affirmed noting that a product cannot be defective when its design and performance meet all of the requirements of the intended user, regardless of the foreseeable misuse by unintended users. The court stated that the plaintiff's burden is to show that the product, as designed, is unreasonably dangerous in its failure to conform to the ordinary user's expectations.[14]

Another case involved a minor grandson of an employee of an agricultural commodities company putting his fingers into the discharge tube of a bulk feed trailer. This unfortunately occurred just as his grandfather activated the airlock in order to discharge the residual feed from the trailer. The child's fingers came in contact with the blades of the airlock device which amputated the tip of his left pinky finger and all of the three other fingers on his left hand.[15]

The plaintiffs contended that the design of the trailer was defective because the opening to the airlock was unguarded and unsafe. The appellate court affirmed a directed verdict for the manufacturer stating that the trailer was a sophisticated piece of industrial machinery whose normal and intended use was to be by trained employees who were responsible for hauling bulk feed to farms. Relief under tort product liability was held to not be available to the child because he never was reasonably expected to be an intended consumer of the product and had no reason to come in contact with it.[16]

In a firearm case, a 12-year-old boy playing with his stepfather's Ruger pistol shot and killed his 10-year-old friend.[17]The plaintiff alleged that the pistol was defectively designed because it did not include a safety device that would have prevented it from being fired by an unauthorized user. In affirming summary judgment for the manufacturer, the court stated that the burden is on the plaintiff to show that the defect

caused the gun not to function in a manner reasonably expected by an ordinary consumer (the risk-utility test having been statutorily barred as to firearms). Since the stepfather admitted that the gun "handled perfectly", there was no fact issue to justify the reversal of the summary judgment.[18]

A Florida three-year-old was playing with a Bic cigarette lighter when he accidentally lit his brother's pajamas on fire. The complaint alleged strict liability because of the failure to design a child-proof lighter.

The court noted that using an objective standard, whether under the consumer expectation or risk-utility test, or both, the defectiveness is not to be judged from a child's perspective but from the perspective of an ordinary consumer. From such a standard, the court held there was no defect noting first that a manufacturer is not liable for all injuries but only for those when the product is used as intended. The second item that the court took notice of was that lighters are not intended to be used as children's playthings.[19]
Two weeks before his injury, four-year-old Travis Shouey's father had allowed him to play with an empty cigarette lighter. When two weeks later Travis noticed a Zippo lighter on the table next to his chair, he picked it up and began flipping the wheel while holding the lighter close to his body. The lighter apparently ignited and his shirt caught fire.

The court stated the principle that the determination of whether the person injured was an intended user of the product is a part of the strict liability analysis (since it noted only in passing the risk-utility test, the court thereby placed primary emphasis upon the consumer expectation test). In granting summary judgment to the lighter manufacturer, the court noted that since it is unlawful for children to smoke cigarettes, a cigarette lighter presumably has little or no utility to a child.[20]

Six-year-old Gabriel Johnson picked up a Bic lighter left on a table by adult Anthony Scarpetta to show three-year-old Jennifer Scarpetta and four-year-old Jessica Scarpetta how to light it. Gabriel dropped the lighter on Jennifer setting her shirt on fire.

The court granted BIC's motion for summary judgment. The court stated that a manufacturer has no duty to design a product that is totally incapable of injuring those who foreseeably can come in contact with the product because product liability does not make the manufacturer an insurer of its products. Since the ordinary consumer of a lighter is an adult who is capable of expecting the danger of the lighter, the lighter is not unreasonably dangerous since it is not dangerous to an extent beyond which the ordinary consumer is capable of contemplating.[21]

One morning, four-year-old Cori Smith found a green Bic lighter on a table in the living room. She took it back upstairs to the bedroom she shared with twenty-three-month-old Tiffany Todd. Cori ignited some papers on the floor of the bedroom. In the ensuing blaze, Tiffany died.

The court found the lighter was not unreasonably dangerous and granted the manufacturer's motion for summary judgment on the strict liability claims. The court stated that a lighter is a product ordinarily purchased and used by adults who are capable of contemplating the danger of it. The court noted that to hold a product unreasonably dangerous because a use caused unintended consequences would impose a duty on a manufacturer of any potentially flammable product to child proof it.[22]

When the district court's interpretation of this consumer expectation test was challenged on appeal, the circuit court of appeals affirmed. The plaintiffs argued that the expectations should be that of the foreseeable user, the child, rather than the ordinary adult consumer. The appellate court stated that this interpretation could lead to the absurd result that a Superman cape could be held to be unreasonably dangerous because the child expected it would allow him to fly. This could cause manufacturers to have liability even though the real failure would not be in the product but in the natural deficiency that children have in their knowledge of consumer products.[23] (The Seventh Circuit declined to also use the risk-utility test because of an Illinois appellate court decision that the test was not applicable to simple but obviously dangerous tools.)

In an arguably more egregious fact setting but with fortunately fewer victims, the court held in favor of the manufacturer. One morning after sharing a pipe of marijuana with her husband, the mother fell asleep on the couch after he had left for work. Her five-year-old son used the Bic lighter (which had been left on the table) to light a candle and then the t-shirt his three-year-old sister was wearing. The girl suffered second and third degree burns over twenty-six percent of her body.

Although the plaintiff conceded that the manufacturer had no duty to make its lighters child proof or child resistant, the court still had to resolve the allegation that the defendant breached a duty of care. The court held that the dangers of a hand-held fire-producing simple tool were open and obvious to a reasonable and expected adult user of the lighter.[24] Thus, the duty of care was obviated and summary judgment was granted to the manufacturer.

In the handgun case discussed above, the plaintiff also alleged that the gun was unreasonably dangerous because the manufacturer failed to warn of the danger of handguns.[25] However, the court applied state case law holding that products liability law does not require a manufacturer to warn of obvious risks. The court noted that most jurisdictions have taken the position that the dangers of handguns are obvious and consequently granted summary judgment to the gun manufacturer on the warning issue as it related to strict liability.[26]

In another case that involved a product liability warning issue, eight-year-old Jason Cramer severely injured his right hand when he attempted to push deer meat into an electric commercial meat grinder.[27] In affirming the dismissal of the cause of action based on failure to warn, the court stated that an eight-year-old boy is not a reasonably foreseeable user of a commercial meat grinder. The court affirmed that the manufacturer had no duty to warn a minor child of the dangers of using the product.[28]

In a New York case in which a six-year-old ignited his clothes with a Bic lighter, the plaintiff contended that the failure of the lighter to have "child-resistant" qualities was a design defect. BIC moved to dismiss the claim for failure to state a cause of action. The court denied the motion on the basis that New York law is broader than the Restatement of Torts. Under it, a manufacturer not only has the duty to design its product so that it avoids an unreasonable risk of harm to an intended user but also has the duty to design so as to avoid an unreasonable risk when it is being used for an unintended but foreseeable use. The court noted that since lighters are kept about the home, it is reasonably foreseeable that children will try to use them.[29]

In all but the last of the above product liability claims against the defendant manufacturers, the manufacturers' misuse defense prevailed. Thus, in the last decade the misuse defense was very effective against product liability claims where there was harm resulting from a child playing with an adult tool. This was true whether the liability was premised upon a defect or upon a failure to warn.

**CASES SINCE 2001**

In cases during the past ten years, courts seem to have taken a more critical approach to deciding product liability cases based upon whether the risk was apparent to the adult product owner. In a 2003 decision, Texas investigators concluded that a four-year-old started the fire with a utility lighter.

In vacating the trial court's summary judgment for the manufacturer on product liability, the court went beyond the consumer's reasonable expectations noting that it agreed with the manufacturer that the dangers of child play associated with the utility lighter might well be readily apparent to the reasonable user. However, the court stated that the apparent danger of allowing a child access to the lighter did not warrant resolution of the dispute in the manufacturer's favor as a matter of law but was only one factor to be considered in analyzing the balance of the risk versus the utility of the tool's design.[30]

In a 2007 case also involving a utility lighter, the investigation concluded that a three-year-old girl started a fire that killed her twin sister. In addressing the product liability claim, the court first looked at the consumer expectation test. It stated that since the ordinary consumer of a lighter is an adult, the expectations regarding the use and safety of the lighter must be viewed from the point of view of the adult consumer, who would expect that when the trigger is pulled a flame would be produced. The court noted that the ordinary consumer would expect not only that a child could obtain possession of the lighter and attempt to use it but also the consequences that would naturally flow when that happened. The court felt that the inescapable conclusion was that the ordinary consumer's expectations were tragically fulfilled. Consequently, as a matter of law the court held that no fact finder could conclude that the lighter was unreasonably dangerous under the consumer expectation test. But the court then stated that the lighter could be found to be unreasonably dangerous (and thus defective) under the risk-utility test.

The manufacturer contended that the lighter was a simple tool whose dangers were open and obvious which meant that the risk-utility test did not apply to it. However, the court held that the open and obvious danger of a product did not create an absolute bar to recovery but was only one of several factors to be considered in applying the risk-utility test. Since reasonable persons could differ on the weight to be given the relevant risk-utility factors, the reversal of the summary judgment in favor of the manufacturer was affirmed.[31]

A subsequent Illinois case applied the risk-utility test in a firearm case. There, a 13-year-old boy accidentally shot a friend with his deputy sheriff dad's automatic handgun. (He had ejected the magazine thinking that doing so unloaded the gun.)

The appellate court affirmed the summary judgment in favor of Beretta under the risk-utility test. The court rejected the plaintiff's contention that a safer alternative design existed in the form of a magazine disconnect safety noting that the particular needs of police officers and the military were such that those users refused a magazine disconnect safety because of the fear that they would be unable quickly to use the weapon when it

was most needed.[32] Thus, although the court applied the risk-utility test in spite of the obvious danger, the peculiar fact that military and police users would be at risk using a safer design saved the day for the defendant manufacturer.

**CONCLUSION**

In the 1990s, the misuse defense was very effective in obtaining summary judgments or directed verdicts on child's play product liability claims against manufacturers of adult tools because the expectations of the adult consumer were considered dispositive. However, if the recent Flock, Calles, and Adames cases indicate a trend towards courts applying the Restatement Third risk-utility test to decide child play product liability claims, manufacturers face the prospect of fewer summary judgments or directed verdicts in their favor and the increased attendant liability hazards of more trials. This especially will be the situation if along with the application of the risk-utility test, courts consider that the open and obvious danger aspect is merely one factor to be used in the analysis rather than being considered dispositive of simple tools cases. Consequently, indications are that the application of the Restatement Third may not favor industry in child play cases because it may make disposition of the case in favor of the manufacturer without trial less likely.

**REFERENCES**

Adames, Jr. v. Sheahan, 880 N.E.2d 559 (Ill.App. 2007).

Calles v. Scripto-Tokai Corp., 864 N.E.2d 249 (Ill. 2007).

Campbell v. BIC Corp., 586 N.Y.S.2d 871 (Sup. Ct. 1992).

Carlson v. BIC Corp., 89 F.3d 832 (6th Cir. 1996).

Cramer v. Toledo Scale Co., 551 N.Y.S.2d 718 (Sup. Ct. 1990).

Dan B. Dobbs, The Law of Torts Sections 356-357 (1st ed. 2000).

Flock v. Scripto-Tokai Corp., 319 F.3d 231, (5th Cir. 2003).

Griggs v. BIC Corp., 981 F.2d 1429, 1436 (3d Cir. 1992).

Jennings v. BIC Corp., 181 F.3d 1250 (11th Cir. 1999.)

Keene v. Sturm, Ruger & Co., 121 F. Supp.2d 1063 (E.D. Tex. 2000).
Kirk v. Hanes Corp. of N.C., 16 F.3d 705 (6th Cir. 1994).

Riley v. Warren Manufacturing, Inc., 688 A.2d 221 (Pa. Super. Ct. 1995).

Scarpetta v. Health-Tex, Inc., 1990 U.S. Dist. LEXIS 5119 (N.D. Ill. 1990).

Shouey v. Duck Head Apparel Co., 49 F. Supp.2d 413 (MD. Pa. 1999).

Talkington v. Atria Reclamelucifers Fabricken BV, 152 F.3d 254 1998).

Todd v. Societe BIC, 1992 U.S. Dist. LEXIS 88 (N.D. Ill. 1992).

U.S. Consumer Product Safety Commission, Release # 05-059 (Dec. 1, 2004).

[1] *Carlson v. BIC Corp.*, 840 F. Supp. 457, 460-461 (E.D. Mich. 1993), *aff'd* 89 F.3d 832 (6th Cir. 1996).
[2] *Keene v. Sturm, Ruger & Co.*, 121 F. Supp.2d 1063, 1064 (E.D. Tex. 2000).
[3] *Cramer v. Toledo Scale Co.*, 551 N.Y.S.2d 718, 719 (Sup. Ct. 1990).
[4] U.S. Consumer Product Safety Commission, *News from CPSC*, Release # 05-059 (Dec. 1, 2004), *available at* http://www.cpsc.gov/cpscpub/prerel/prhtm 105/0509.html.
[5] *Griggs v. BIC Corp.*, 981 F.2d 1429, 1436 (3d. Cir. 1992).
[6] Although as is noted in *News from CPSC* referred to in Note 4, above, the Consumer Product Safety Commission has had a mandatory standard for child-resistant cigarette lighters for children under age 5 for several years, these types of tort actions are likely to continue because there still can be the contention that the manufacturers have a duty to make the lighters child proof, rather than child resistant. In addition, since the standard does not apply to children over 5 years of age, there can continue to be an issue of what duty is owed when a child is older than 5.
[7] *Riley v. Warren Manufacturing, Inc.*, 688 A.2d 221, 223 (Pa. Super. Ct. 1995).
[8] *Keene v. Sturm, Ruger & Co.*, 121 F. Supp.2d 1063, 1065 (E.D. Tex. 2000).
[9] *Shouey v. Duck Head Apparel Co.*, 49 F. Supp.2d 413, 428 (M.D. Pa. 1999).
[10] *Scarpetta v. Health-Tex, Inc.*, No. 84-C20352, 1990 U.S. Dist. LEXIS 5119, at *3. *See also Todd v. Societe BIC*, No. 90-C5487, 1992 U.S. Dist. LEXIS 88, at *2 and *Kirk v. Hanes Corp. of N.C.*, No. 90-70514, 1991 U.S. Dist. LEXIS 12464, at *3 (E.D. Mich. Sept. 5, 1991), *aff'd* 16 F.3d 705 (6th Cir. 1994).
[11] *Jennings v. BIC Corp.*, 181 F.3d 1250, 1256 (11th Cir. 1999).
[12] Dan B. Dobbs, The Law of Torts §§ 356-357 (1st ed. 2000).
[13] *Talkington v. Atria Reclamelucifers Fabricken BV,* 152 F. 3d 254 (4th Cir. 1998).
[14] *Talkington*, 152 F.3d at 262,263.
[15] *Riley v. Warren Manufacturing, Inc.*, 688 A.2d 221, 223 (Pa. Super. Ct. 1995).
[16] *Riley*, 688 A.2d at 228, 229.
[17] *Keene v. Sturm, Ruger & Co.,* 121 F. Supp.2d 1063, 1064 (E.D. Tex 2000).
[18] *Keene*, 121 F. Supp.2d at 1067.
[19] *Jennings v. BIC Corp.*, 181 F.3d 1250, 1255 (11th Cir. 1999).
[20] *Shouey v. Duck Head Apparel Co.*, 49 F. Supp.2d 413, 429 (MD. Pa. 1999).
[21] *Scarpetta v. Health-Tex, Inc.*, No. 84-C20352, 1990 U.S. Dist. LEXIS 5119, at *3 (N.D. Ill. Apr. 26, 1990).
[22] *Todd v. Societe BIC*, No. 90-C5487, 1992 U.S. Dist. LEXIS 88 at *4 (N.D. Ill. Jan. 7, 1992).
[23] *Todd v. Societe BIC*, 21 F.3d 1402, 1407-1408 (7th Cir. 1994).
[24] *Kirk v. Hanes Corp. of N.C.*, No. 90-70514, 1991 U.S. Dist. LEXIS 12464, at *3 (E.D. Mich. Sept. 5, 1991) *aff'd* 16 F.3d 705 (6th Cir. 1994).
[25] *Keene v. Sturm, Ruger & Co.*, 121 F. Supp.2d 1063, 1068 (E.D. Tex. 2000).
[26] *Keene,* 121 F. Supp. at 1069.
[27] *Cramer v. Toledo Scale Co.*, 551 N.Y.S.2d 718, 719 (Sup. Ct. 1990).
[28] *Cramer*, 551 N.Y.S.2d at 720.
[29] *Campbell v. BIC Corp.*, 586 N.Y.S.2d 871, 873 (Sup. Ct. 1992).
[30] *Flock v. Scripto-Tokai Corp.*, 319 F.3d 231, 241 (5th Cir. 2003).
[31] *Calles v. Scripto-Tokai Corp.*, 864 N.E.2d 249 (Ill. 2007).
[32] *Adames, Jr. v. Sheahan,* 880 N.E.2d 559 (Ill. App. 2007).