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FEATURE ARTICLES

Playing with Fire: Assessing Lighter Manufacturers' Duties Regarding Child Play Lighter Fires

by Thomas M. Peters and Hal O. Carroll

I. INTRODUCTION

Disposable gas-fueled lighters offer consumers greater convenience and probably greater safety than matches. Lighters are more convenient than matches because they last longer than a book of matches and can be operated with one hand. Since a dropped lighter extinguishes itself, while a dropped match continues to burn, a lighter may be a safer product. However, like many other products, lighters can cause injury if they are defective, such as when the plastic back cracks or the gas does not shut off. With respect to defects, lighters are no different from other products, so the standard product liability laws apply.

What differentiates lighters from many other products, however, is their potentially dangerous use by children. Even a defect-free lighter, which functions as intended in the hands of an adult, can cause serious harm when activated by a child. For example, one source estimated that children under age 5 cause 5,800 residential fires, 170 deaths, and 1,190 injuries each year by playing with lighters.¹ Additionally, the estimated amount of damage caused by child lighter fires ranges from \$300-375 million annually, and "dollar for dollar, these lighters are involved in causing almost as much damage through childplay as they generate in sales at the retail level."²

Three fundamental principles of law and public policy emerge in these cases. First, a product that performs as designed is not defective, and therefore gives rise to no liability. Second, society, recognizing the limitations of small children, expects adults to ensure children's safety. Finally, a lighter is a simple tool, and a simple tool,

like a sharp knife, exhibits both an obvious hazard and a usefulness inseparable from that hazard. The interplay of these three principles in child lighter fire cases has created some difficulties for courts regarding each of the two main duties associated with product liability law — the duty to warn of possible hazards and the duty to design and manufacture products that are not "unreasonably dangerous."

This article analyzes how courts and legislatures have applied their states' product liability law in child lighter fire cases. The article focuses on the way courts alter traditional product liability concepts in resolving child lighter fire cases. First, the article introduces some basic product liability concepts. Second, the article addresses manufacturers' duty to warn adults and children about the dangers of child lighter fires. This section explains how courts apply the "open and obvious" and "adult product" doctrines in determining whether to impose a duty upon manufacturers to warn of the dangers created by using a lighter. Next, the article details the different approaches used by several states to outline manufacturers' duty to childproof lighters. This section analyzes the different theories underlying design liability in various states and the ways that courts interpret and apply statutory language defining this

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duty. Finally, the article describes the risk-utility analysis employed by some courts to balance the benefits offered by lighters against the risks they present. In this section, the author describes the factors courts examine in applying the analysis, and the author suggests other factors that should be included in courts' analyses.

II. BACKGROUND

Different states formulate product liability law in different ways. In some states, courts have taken the lead in developing the law³ while legislatures have assumed this role in other states.⁴ Regardless of whether a state's product liability law is created by a legislature or a court system, different states adopt different legal theories underlying products liability. Several states utilize a strict liability scheme to define manufacturers' duties and to assess liability.⁵ By contrast, other states rely on a traditional negligence theory to accomplish these goals.⁶ Furthermore, in other states, consumer expectations form the foundation of product liability law.⁷

Underlying all of these theories is a fundamentally basic concept: the concept of "risk-utility" analysis. This concept involves balancing the risks a product poses against its benefits (otherwise known as its "utility"). Courts usually perform the risk-utility analysis because they are responsible for deciding the threshold question of whether a manufacturer has a duty to warn and design reasonably safe products.⁸ In many cases, the outcome of a risk-utility analysis dictates whether a manufacturer has a particular duty. The standard risk-utility analysis is complicated in child lighter fire cases because these cases present more intricate and more subtle "duty to warn" issues than traditional product liability cases. In addition, in child lighter fire cases, the adult nature of the product and the varying abilities of children further complicate the analysis.

Similarly, child lighter fire cases involve design issues that differ from traditional

product liability cases because the lighters are not defective when they injure a child or cause property damage. Courts deciding these cases do not complain, for example, that the lighter failed to extinguish the flame when the user released the lever, or that the lighter ruptured and released butane. In child play lighter fire cases, the lighter performs as designed — it creates a flame — but causes injury because of the *person* operating the product.

Since the sole purpose of a lighter is to make a flame, the "open and obvious hazard" doctrine represents a common defense to product liability lawsuits.⁹ Obviously, lighters create flames. The real issue, however, is whether this fact impacts a manufacturer's duty to warn or to design a "safer," more child-resistant product. The sections below address both the duty to warn and the duty to design safer lighters in detail.

III. DO MANUFACTURERS OWE CONSUMERS A DUTY TO WARN?

The basic question regarding "failure to warn" liability is whether manufacturers have a duty to warn consumers about the hazard of fires caused by lighter use.¹⁰ In child lighter fire cases, there are two specific issues: (1) whether manufacturers have a duty to warn adult purchasers of the hazards of child lighter fires;¹¹ and (2) whether manufacturers have a duty to warn children of the danger of lighter fires.¹²

When addressing a manufacturer's duty to warn adults of the fire hazards associated with *adult* use of lighters, courts have applied the "open and obvious hazard" doctrine to negate any duty to warn.¹³ Under this doctrine, manufacturers have no duty to warn adults because the hazard is obvious to the *intended* user.¹⁴ Similarly, some courts have been unwilling to impose upon manufacturers a duty to warn children.¹⁵ Often these courts base their decisions on one or both of two facts: (1) the danger is open and obvious; and (2) the lighter is an adult product.¹⁶ For example, in

Adams v. Perry Furniture Co., the Court of Appeals of Michigan determined that these two facts negated any duty to warn the child user of the danger of fires.¹⁷ Rejecting the argument that this danger is not open and obvious to a child, the court stated that "the focus is the typical user's perception"¹⁸ and "the typical user of a lighter is an adult."¹⁹ The court added that warnings directed at children are of doubtful value: "To the extent that children cannot read any warning or understand the obvious danger, we believe that a reasonably careful purchaser would keep the lighter from these children."²⁰ Thus, the court held that manufacturers have no duty to warn adults or children of *general* fire hazards associated with lighter use.²¹

If manufacturers have no duty to warn adults of the fire hazard resulting from adult use and no duty to warn children of the fire hazard resulting from child use, the next question is whether manufacturers have a duty to warn adults about the fire hazard created when children use lighters.

warnings are sufficient to warn adults of the hazards of child lighter fires.²² For example, in *Curtis v. Universal Match Corp.*, the United States District Court for the Eastern District of Tennessee stated that the warning "'KEEP OUT OF REACH OF CHILDREN' is sufficiently calculated [as a matter of law] to notify a reasonably prudent, ordinary consumer about the nature and extent of the danger involved in leaving a lighter around unsupervised children."²³

Similarly, the Court of Appeals of Michigan held that a lighter manufacturer "fulfills its

duty to warn by warning the adult purchasers of its products to keep the lighters out of the reach of children."²⁴ Although these courts held that the warnings were adequate as a matter of law, the courts' scrutiny of the warnings seems to suggest that manufacturers may have a duty to warn adults about the dangers inherent in children's use of lighters.

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A. *The Traditional Approach*

Most courts have not relied on legal theory or public policy in resolving the issue of whether manufacturers have a duty to warn adults about the hazard of child lighter fires. Instead, these courts have resolved the issue by considering the adequacy of the general warnings provided by manufacturers and by concluding, as a matter of law, that these general

B. *Alabama Adopts a Different Approach: Bean v. BIC Corp.*

In addressing whether there is a duty to warn adults about the danger of child lighter fires, the Alabama Supreme Court reviewed the warnings Tennessee and Michigan courts held sufficient as a matter of law. The court found that the adequacy of the warnings was not a matter of law, but rather was a question of fact

for the jury.²⁵ In *Bean v. BIC Corp.*, Plaintiffs made three specific allegations about the warnings that were not raised in Michigan or Tennessee. First, Plaintiffs claimed that the manufacturer "failed to warn about the attractiveness of the lighters to small children."²⁶ Second, they argued that the manufacturer "failed to warn of the serious danger of fires started by small children."²⁷ Third, they claimed that the manufacturer "failed to warn that small children could easily operate the lighters."²⁸ The *Bean* court accepted Plaintiffs' argument that these were questions for the jury, but did so essentially without discussion.²⁹

Plaintiffs' first argument, the "attractiveness" argument, is weak because Plaintiffs have either assumed that: (1) lighters are unusually attractive to children and courts should therefore impose liability; or, alternatively, (2) that courts should impose liability even though lighters are only as attractive as, but no more attractive than, other household objects. The assumption that children are more attracted to lighters than to other objects is an unsupported assumption at best. More importantly, this assumption conflicts with the common knowledge that small children explore the world by reaching for *all* objects. This knowledge is evidenced by the broad range of products which parents must keep from small children, including such diverse items as medicine, cleaning fluids, plastic bags, knives, coins, and matches. Parents must keep these items from small children because children may injure themselves playing or experimenting with them. Because the assumption that lighters are unusually attractive to children defies common knowledge, it should not support the conclusion that manufacturers have a duty to warn about the hazards of child lighter fires.

With this argument, Plaintiffs in *Bean* would have courts impose liability on lighter manufacturers for failing to warn adults that lighters are attractive to children even though lighters are no more attractive or dangerous than any of the objects mentioned above. Imposing this

duty would raise serious public policy concerns because it would create an artificial distinction between different simple tools, which are generally benign in the hands of an adult yet potentially dangerous when handled by children. If the *Bean* argument was adopted, lighter manufacturers would owe consumers a duty to warn while knife manufacturers would not. Given the common risk of child injury with both of these simple tools, there is no principled basis for imposing liability for failing to warn of a lighter's attractiveness to children while declining to impose liability for failure to warn of a knife's similar attractive quality.

The second argument Plaintiffs raised in *Bean*, the "serious danger" argument, is also unpersuasive. This argument implies that whether a manufacturer has a duty to explicitly warn adults about the danger posed by child lighter fires depends upon whether the danger is actually associated with children playing with lighters. This contention ignores the universally recognized danger associated with playing with fire, whatever its source. Given the common knowledge of this danger, the dangers of a fire created by a lighter are apparent to the intended user. Therefore, the open and obvious hazard doctrine should preclude a court from imposing a duty to warn,³⁰ and courts should not make a lighter manufacturer's duty to warn of basic fire dangers a question of fact.³¹

The strength of the third argument advanced in *Bean*, that children can operate lighters, differs sharply from that of the first and second contentions. This argument supports the claim that parents should be warned that "small children could easily operate the lighters."³² The *Bean* court's decision to submit this issue to a jury is more defensible than its decision to submit Plaintiff's first two arguments to the jury because this issue, unlike the other two, raises questions of fact. Specifically, it raises questions regarding the strength and dexterity required to operate a lighter. Given these questions of fact, the court submitted the duty

issue to the jury rather than hold, as a matter of law, that manufacturers have a duty to warn consumers about the ease with which children can operate lighters.³³ Although no other state has specifically addressed this argument, the tenor of the Tennessee and Michigan decisions strongly suggests that they would reject it on policy grounds.³⁴

Courts adopting the *Bean* approach would force manufacturers to charge higher prices for lighters. As a result, consumers would have to pay more for lighters without a corresponding increase in efficiency or performance. On the other hand, consumers would benefit from increased warnings in states which embrace the *Bean* approach. In those states, manufacturers may provide more specific warnings to minimize liability for failure to warn. This response may lead to improved lighter safety for consumers. Of course, relative costs and benefits would have to be weighed to determine the ultimate outcome for consumers.

C. Current Status of the Law

In all jurisdictions, courts unanimously hold that there is no duty to warn children of the hazard of child lighter fires; therefore, manufacturers will usually escape liability on this theory.³⁵ In addition, except for Alabama, courts either hold that there is no duty to warn adult purchasers of the hazard of child fires,³⁶ or that a simple "[k]eep out of reach of children" warning is sufficient.³⁷ Alabama stands alone in permitting a failure to warn claim for child lighter fire cases.³⁸ To resolve the issue of whether manufacturers have a duty to warn adults, the overwhelming majority of state courts employ conventional analyses based on the obviousness of the hazard, the nature of the lighter, and its function.³⁹ However, with respect to the second duty of product liability, the duty to design a reasonably safe product, the law is not as consistent.

IV. DO MANUFACTURERS HAVE A DUTY TO DESIGN "CHILDPROOF" LIGHTERS?

The second unique legal problem created by child play lighter fires is the issue of whether manufacturers have a duty to design lighters that are inoperable by most children, otherwise known as the "design duty."⁴⁰ The feasibility of child-resistant lighters is supported by the Consumer Product Safety Commission's adoption of a child-resistance standard for lighters.⁴¹ The standard requires that 85% of the child test panel, comprised of children under five years old, be unable to operate the lighter.⁴² Arguably, reducing the percentage of young children capable of operating a lighter would result in a measurable societal safety benefit with no corresponding decrease in lighter utility. To date, however, this proposition has been neither confirmed nor disproved by empirical data.

States have analyzed the design duty issue differently because of the varied legal theories underlying each state's product liability law.⁴³ The three main types of product liability theories currently embraced by states are: (1) the consumer expectation theory; (2) the negligence combined with strict liability theory; and (3) the refusal to impose design duty, even for foreseeable users. Despite the differences between these legal theories, the cases are surprisingly uniform in their results.⁴⁴ Specifically, courts appear reluctant to hold manufacturers liable in child play lighter fire cases for failing to design childproof lighters because the lighters worked as intended by creating a flame.⁴⁵ The uniformity in the results suggests that the details of each state's product liability theories are much less important than the particular court's perception of the underlying real-world facts relating to the purpose of lighters and the concept of parental responsibility.

A. Consumer Expectation Theory

One theory employed by courts determining a manufacturer's design duty is the "consumer expectation" theory.⁴⁶ Under this theory, the expectation of the "ordinary consumer" dictates whether a manufacturer has a design duty, and thus, ultimately determines whether a manufacturer will be liable for designing a lighter that can be operated by children.⁴⁷

1. States Requiring Defective AND Unreasonably Dangerous Products

Because Indiana's legislature statutorily adopted the consumer expectation theory, an examination of the relevant statute is beneficial. Indiana's product liability law provides in pertinent part:

One who sells, leases, or otherwise puts into the stream of commerce any product in a *defective condition unreasonably dangerous* to any user or consumer or to his property is subject to liability for physical harm caused by that product to the consumer or to his property if that user or consumer is in the class of persons that the seller should *reasonably foresee* as being subject to the harm caused by the defective condition.⁴⁸

This section of the Indiana statute defines the class of potential plaintiffs as those whom a seller should reasonably foresee as subject to harm. Since children are a class of plaintiffs which a seller could reasonably foresee as subject to harm from lighters, the Indiana statute may extend the manufacturer's design duty to children. Furthermore, a product is "defective" under Indiana law if it performs in a way that is not contemplated by "expected users."⁴⁹ The phrase "expected users" also arguably encompasses the concept of foreseeable users — users who might plausibly include children. However, Indiana's statutory

definition of an unreasonably dangerous product⁵⁰ restricts the class of plaintiffs to "ordinary consumers." The relevant section of the Indiana statute provides: "a product is unreasonably dangerous if it: exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by *the ordinary consumer who purchases it.*"⁵¹

In *Welch v. Scripto-Tokai Corp.*, the Indiana Court of Appeals applied this statutory scheme in the context of child lighter fires. The *Welch* court found that lighters are not unreasonably dangerous because "[t]he ordinary consumer of a lighter is an adult and the ordinary adult consumer contemplates the risks posed by a lighter, including the dangers associated with children who play with lighters."⁵² The court explained that "regardless of foreseeability, liability does not attach under the statute unless the product in question is in a defective and unreasonably dangerous condition."⁵³ Accordingly, Indiana law imposes no duty on manufacturers to childproof lighters because these products are not unreasonably dangerous to ordinary consumers: adults.

2. States Requiring Defective OR Unreasonably Dangerous Products

Like Indiana, Tennessee defines product liability by statute,⁵⁴ and Tennessee also distinguishes between "defective products" and "unreasonably dangerous" products.⁵⁵ Unlike Indiana, which requires that a product be both defective *and* unreasonably dangerous for a design duty to be imposed, Tennessee's consumer expectation test requires that a plaintiff prove that a lighter is *either* defective *or* unreasonably dangerous in order for a design duty to be imposed.⁵⁶

Under Tennessee's consumer expectation test, a "defective" product is one "unsafe for normal or anticipatable handling and consumption."⁵⁷ Like Indiana's "expected users" concept, Tennessee's "anticipatable handling" standard suggests that a manufacturer may owe

a design duty to foreseeable users of its products. Furthermore, the Tennessee statute defines an "unreasonably dangerous" product as one that is:

dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, or a product [that] because of its dangerous condition would not be put on the market by a reasonably prudent manufacturer or seller assuming that [the manufacturer or seller] knew of its dangerous condition.⁵⁸

In determining whether a product is unreasonably dangerous, Tennessee courts have held that the "ordinary consumers" of lighters are adults, not minor children.⁵⁹

In *Curtis v. Universal Match Corp.*, the United States District Court for the Eastern District of Tennessee applied Tennessee's version of the consumer expectation test to a child play lighter fire case. First, the *Curtis* court held that the lighter was not defective "because it performed in the manner expected . . . [It] produced a flame when operated which conformed to its normal and anticipated use."⁶⁰ Next, the court held that the lighter was not unreasonably dangerous because the "ordinary adult consumer" understood and appreciated the danger posed by children's use of lighters.⁶¹ By interpreting the statute's "ordinary consumer" language as applying only to *adult* consumers, the *Curtis* court implicitly rejected the notion that lighter manufacturers owe all *foreseeable* users a duty to design childproof products. The court also emphasized that Tennessee law does not require manufacturers to design perfect or accident-proof products.⁶² Instead, manufacturers only have to design products which are not defective or unreasonably dangerous to the ordinary adult user, as described above.

In summary, as the *Welch* and *Curtis* decisions illustrate, courts applying the consumer

expectation theory have limited the lighter manufacturers' design duty to design lighters for the intended users of the product: adults. Although the relevant statutes suggest that the Indiana and Tennessee legislatures may have intended to protect foreseeable users of lighters, the courts have narrowed the potential scope of these state statutes by construing the protection of these laws to apply only to adult users.

B. Combining Negligence and Strict Liability Theories

Product liability law in Pennsylvania applies both a negligence standard — which traditionally extends manufacturers' design duty to all foreseeable users — *and* a strict liability standard. Courts applying this hybrid approach in child fire cases have reached nontraditional and unexpected results.

In *Griggs v. BIC Corp.*,⁶³ the United States Court of Appeals for the Third Circuit noted that the strict liability prong of the Pennsylvania analysis is based on Section 402A of the Restatement (Second) of Torts.⁶⁴ Section 402A provides: "One who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . [i]s subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property."⁶⁵ Based on this standard, Plaintiff in *Griggs* argued that a lighter was unreasonably dangerous to foreseeable users, and thus defective, because it was not childproof.⁶⁶ The Third Circuit rejected this contention, agreeing with the district court that "a product may not be deemed defective unless it is unreasonably dangerous to intended users."⁶⁷ Specifically, the court found that, under Pennsylvania law, "foreseeability . . . plays no part in the initial determination of defect in strict liability."⁶⁸ Next, the court explained that "because children are not intended users, [the lighter manufacturer] is not strictly liable."⁶⁹ Thus, the *Griggs* court's conclusion on the strict liability portion of the analysis mirrored that reached

by the *Welch* court.

However, the *Griggs* court reached the opposite result under the negligence prong. Since foreseeability forms the basis of negligence liability, manufacturers owe a duty to "a different subset of the population, and one that is conceivably broader: a duty to anyone who foreseeably may be subject to an unreasonable risk of harm."⁷⁰ On this basis, the court applied the risk-utility analysis and held that a viable design liability claim could result from a manufacturer's failure to make a lighter child-resistant.⁷¹ Thus, in Pennsylvania, the manufacturer's design duty is greater under ordinary negligence than under strict liability. This result highlights a long-recognized misnomer: although "strict liability" implies liability without fault, it actually requires fault because it requires a defect in a manufacturer's product. As discussed below, courts in other states have employed different theories to reach substantially similar results.

Unlike their counterparts in Indiana and Tennessee, Alabama courts have not limited manufacturers' design duty to adult purchasers. Alabama courts define a "defective" product as one failing to meet the "reasonable expectation of an ordinary consumer as to its safety."⁷² Although the "ordinary consumer" language appears to limit the manufacturers' design duty to adults, Alabama law defines "unreasonable danger" as foreseeable danger which overrides the restrictive "ordinary consumer" language.⁷³

The reasoning the court used to reach this result in *Bean* is unclear. In one sentence the court refers to "the reasonable expectations of an ordinary consumer."⁷⁴ The next sentence

describes the danger as "unreasonable when it is foreseeable."⁷⁵ The following sentence concludes that "therefore" foreseeability constitutes the appropriate test.⁷⁶ After identifying foreseeability as the operative concept, the Alabama court reasoned that "[d]uty in this State remains a function of foreseeability of the harm tempered by a consideration of the feasibility of an alternative."⁷⁷ The court concluded 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 reasonable."⁷⁸

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The New York Supreme Court reached a similar result in *Campbell v. BIC Corp.*⁷⁹ In *Campbell*, the court reasoned that "there is almost no difference between a negligence cause of action and one sounding in strict products liability."⁸⁰ The court held that New York law imposed a duty

upon manufacturers when consumers used products "for an unintended but foreseeable use."⁸¹ The *Campbell* court appeared to use a variation of the concept of a foreseeable misuse. No other New York court has applied this concept to expand the category of users owed a duty.

These cases suggest a neat dichotomy: a manufacturer's duty to design child-resistant lighters usually exists where liability turns on who is a *foreseeable* user (Pennsylvania in *Griggs*, Alabama in *Bean*, and New York in

Campbell), but does not ordinarily exist where liability is based on an *intended* user (Pennsylvania in *Griggs*, Indiana in *Welch*, Tennessee in *Curtis*). However, this framework is not universal. As discussed fully in the following section, courts in some states refuse to impose design duty on lighter manufacturers even when liability is based on foreseeability.

C. Courts That Refuse to Impose Design Duty, Even for Foreseeable Users

Conventional negligence theory holds manufacturers liable for injuries to foreseeable users of products. Thus, manufacturers owe all foreseeable users a duty to design reasonably safe products. This theory greatly expands the class of potential plaintiffs in product liability actions because plaintiffs must only be foreseeable, rather than intended, users of the product. As described above, in Pennsylvania, Alabama, and New York, manufacturers have been held liable when they owed a design duty to foreseeable users. However, courts in some states deviate from this common framework and hold that manufacturers do not owe a design duty to all foreseeable users.

For example, Michigan courts have deviated from the common framework. In Michigan, product liability law has two branches: implied warranty and negligence. Although in negligence actions, duty is based on foreseeability, one Michigan appellate court held that manufacturers owed no duty to design child-resistant lighters, even though child fires are foreseeable.⁸² In *Adams v. Perry Furniture Co.*, the parties agreed that children might foreseeably handle lighters and injure themselves. Nevertheless, the court declined to impose a design duty on the manufacturer, explaining: “[w]e are not persuaded that the risk of this danger imposes a duty upon the manufacturer of the lighter to make it child-resistant in light of the fact that the product is intended to be sold to adults.”⁸³ Thus, the Michigan court injected the “intended user” concept into the foreseeability equation and

limited the duty that manufacturers would otherwise shoulder under a pure foreseeability theory.

It is interesting to compare the approaches of the Michigan and Alabama courts. Michigan used the intended user concept to override the foreseeable user theory, thereby *limiting* the duty, while Alabama used foreseeability to *expand* the scope of the duty that would have applied under its consumer expectation (“intended user”) test.

A subsequent case decided by a different panel of the Michigan Court of Appeals disagreed with the *Adams* decision. In *Boumelhem v. BIC Corp.*, the court criticized the *Adams* decision and stressed that Michigan follows a pure negligence standard requiring a foreseeability analysis.⁸⁴ “In a case alleging defective design, Michigan has adopted a pure negligence, risk-utility test for determining whether a defendant has breached its duty of care in designing a product.”⁸⁵ The court also rejected the argument that lighters are simple tools exhibiting obvious danger, which eliminates the design duty.⁸⁶ The ultimate answer on Michigan law, however, remains unclear because its supreme court has declined to review either the *Adams* or *Boumelhem* decisions.

Similarly, a federal district court applying Missouri law refused to impose a duty to make a lighter child-resistant, even under a negligence theory. In *Sedlock v. BIC Corp.*, the United States District Court for the Western District of Missouri ruled that “Missouri law explicitly holds that manufacturers are not liable for failure to make adult products child proof.”⁸⁷

D. The Bottom Line: Most States Belong to One of Three Camps

The cases analyzed above demonstrate that courts generally fall into one of three camps. In some states, manufacturers’ duty to design childproof lighters hinges on whether children are intended users of the product. Courts in

these states are reluctant to saddle manufacturers with such a duty. In the opposing camp, design liability hinges on whether children are foreseeable users. Courts in these states have imposed a duty to design childproof lighters on manufacturers. In the third camp, courts are unwilling to impose any design duty upon lighter manufacturers, even under a traditional negligence theory based on foreseeability.

Consumers should be somewhat unsettled by this wide range of possible results. Since the opinions illustrate no clear trend, it is difficult to predict whether manufacturers will modify existing lighter design to increase their products' safety. Currently, lighters are relatively inexpensive, widely available products which generally perform as designed. However, the substantial damage caused by child play lighter fires has caused some courts to reexamine design liability for lighter manufacturers. If courts saddle manufacturers with a duty to design childproof products, manufacturers may respond by increasing the product's price or limiting lighters' availability only to states which refuse to impose such a duty. The next several years could prove crucial to the future of the disposable lighter industry. Consumers could experience higher lighter prices and/or limited availability, depending on the approach adopted by courts in a given state.

V. RISK-UTILITY ANALYSIS — A BALANCING APPROACH

The risk-utility analysis underlies the application of both the duty to warn and the design duty. Regardless of which legal theory a court applies, the court usually performs the risk-utility analysis as an aid in determining a manufacturer's duty to warn or design duty.⁸⁸ Generally, courts employ this analysis to weigh the risk posed by a product against the product's usefulness. For example, the *Griggs* court recognized that "a finding of duty in negligence [turns] on the last remaining piece of the traditional duty puzzle: whether the foreseeable risks were unreasonable."⁸⁹ In

Griggs, the Third Circuit utilized the risk-utility analysis to conclude that the risk of harm to children operating lighters was unreasonable. Accordingly, the court held that "the manufacturer would have a duty to guard against the unreasonable risk of harm by designing the lighter to be childproof."⁹⁰

In child lighter cases, the key risk factor is easily identified — the risk of injury from fires started by small children. In *Griggs*, for example, the Third Circuit examined statistical evidence of deaths and injuries caused by such fires.⁹¹

Unfortunately, most court decisions fail to identify the appropriate utility factors. For example, the *Griggs* court held that two factors were relevant to the utility prong of the analysis: "the social value of the interest which the actor is seeking to advance," and "any alternative course open to the actor."⁹² Applying these criteria, the court held that "the only interest [the lighter manufacturer] can be seeking to advance . . . is one of cost and its own economic health."⁹³ This facile reasoning illustrates the importance of careful consideration for the utility aspect of the balancing test. By defining the issue as one of "social utility," and ignoring everyone except the seller, the *Griggs* court rendered the risk-utility analysis meaningless. The court erred by limiting "utility" to profit. The better approach would look beyond mere profit and emphasizes a product's utility to society as a whole, including intended users. Furthermore, the *Griggs* analysis ignores the relative utility of alternate sources of fire. The proper analysis contemplates the relative value of alternative sources of fire in weighing the utility of lighters.

VI. COMMON SENSE AND COMMON LAW

This article has described how courts alter traditional product liability concepts in resolving child play lighter fire cases. Additionally, this article has identified the trends reflected in recent child fire cases. In the duty to warn area,

the cases reflect different analyses yet consistent results, with Alabama being the lone exception. Though they employ different analyses, Indiana, Michigan, and Tennessee courts, for example, agree that manufacturers owe consumers no duty to warn. The differences in analysis reflect each state's unique formulation of its own product liability law.

The uniformity of results reflects the consensus that lighters are adult products, which do not require warnings to children. This suggests that common sense, or at least a common understanding, rather than a consistent legal theory, drives the analysis.

Similarly, the design duty opinions display more consistency in result than in courts' analyses in reaching these results. Where the text of a state's liability statute might permit one result, state courts have often reached a different result without even addressing the statutory language. For example, an Alabama court seeking to impose liability used "foreseeability" to cancel the limitations of its statute's "ordinary consumer" language.⁹⁴ By contrast, a Tennessee court declined to impose liability although the statute's "anticipatable handling" language suggested it could do so.⁹⁵ Though the courts have used a broad range of reasoning to come to their conclusions, their holdings have been consistent.

A broad consistency in result emerges. The opinions extensively discuss both the policy underlying manufacturers' duty to make lighters child-resistant, and the factual reality underlying the policy. With the exception of Alabama,⁹⁶ and a non-controlling Michigan case,⁹⁷ courts have declined to impose a duty to make non-defective products safer by making

them child-resistant.

Though the cases do not explicitly compare lighter fires to fires caused by matches, that comparison may form an unarticulated basis of the decisions. A match starts a fire as well as a lighter. Matches are easy to light, and the heat of a burning match is virtually certain to cause a child to drop it. Unlike a lighter, a match will

not go out when dropped. However, cases of children starting fires by playing with matches do not generate litigation against matchbook companies. Perhaps the best explanation for this result is historical, not legal. Fires resulting from matches have occurred as long as matches have existed, long before

product liability law emerged. On the other hand, inventors developed lighters after product liability law matured. Therefore, courts are more willing to view lighters as "products," though lighters perform the same function as matches and consumers operate both by hand.

In several of the cases surveyed, courts seem to employ legal analysis not so much to determine the result as to justify it. Several of the courts easily could have reached different results if the courts had applied theory more rigidly. Instead, the typical analysis tends to spring from a strong sense of the underlying factual and social realities of childhood hazards. Although courts seldom articulate this rationale, it is a powerful force driving the outcome of a majority of cases and explains the courts' general reluctance to impose either a duty to warn or a duty to design childproof lighters on manufacturers. As child lighter fire litigation multiplies, courts may be forced to reevaluate their positions.

Though the cases do not explicitly compare lighter fires to fires caused by matches, that comparison may form an unarticulated basis of the decisions.

E N D N O T E S

¹ See *Mandatory Safety Standard for Lighters Approved for Proposal by Safety Commission*, Product Liability Daily (BNA) (Aug. 5, 1992).

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

³ See, e.g., *Adams v. Perry Furniture Co.*, 497 N.W.2d 514 (Mich. Ct. App. 1993).

⁴ See, e.g., IND. CODE §§ 33-1-1.5-1 to -5 (1997).

⁵ See, e.g., *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 814 (Ind. Ct. App. 1995) (discussing Indiana's strict product liability scheme).

⁶ See, e.g., *Adams*, 497 N.W.2d at 518.

⁷ See, e.g., *Curtis v. Universal Match Corp.*, 778 F. Supp. 1421, 1425 (E.D. Tenn. 1991) (applying Tennessee's version of the consumer expectation test).

⁸ See, e.g., *Adams*, 497 N.W.2d at 518.

⁹ See, e.g., *Welch*, 651 N.E.2d at 815.

¹⁰ See, e.g., *Adams*, 497 N.W.2d at 518.

¹¹ See, e.g., *id.* at 519-20.

¹² See, e.g., *id.*

¹³ See, e.g., *Welch*, 651 N.E.2d at 815 ("[T]he manufacturer has no duty to warn if the danger is open and obvious").

¹⁴ See *id.*

¹⁵ See, e.g., *Adams*, 497 N.W.2d at 519-20.

¹⁶ See *id.*

¹⁷ See *id.* 497 N.W.2d at 519-20.

¹⁸ *Id.* at 519.

¹⁹ *Id.*

²⁰ *Id.* at 520 n.3.

²¹ See *id.* at 520.

²² See, e.g., *Curtis*, 778 F. Supp. at 1426.

²³ *Id.*

²⁴ *Adams*, 497 N.W.2d at 520.

²⁵ See *Bean v. BIC Corp.*, 597 So. 2d 1350, 1353-54 (Ala. 1992).

²⁶ *Id.* at 1353.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *id.*

³⁰ See, e.g., *Adams*, 497 N.W.2d at 520.

³¹ Courts rarely impose liability upon lighter manufacturers for failure to warn adults of such well-known dangers because parents often admit that the hazard of children playing with lighters was open and obvious to the parents. See, e.g., *Curtis*, 778 F. Supp. at 1426-27 (discussing plaintiff's testimony that "[a]ny normal human knows" that lighters should not be left lying around).

³² *Bean*, 597 So. 2d at 1353.

³³ See *id.*

³⁴ See *Curtis*, 778 F. Supp. at 1426-27; *Adams*, 497 N.W.2d at 519-20.

³⁵ See *Adams*, 497 N.W.2d at 520.

³⁶ See *id.*

³⁷ *Curtis*, 778 F. Supp. at 1426.

³⁸ See *Bean*, 597 So. 2d at 1353-54.

³⁹ See, e.g., *Adams*, 497 N.W.2d at 519-20.

⁴⁰ Although courts sometimes use the term “childproof,” they recognize that “childproofing” a lighter is impossible and acknowledge that the correct phrase is “child resistant.” See *Griggs*, 981 F.2d at 1430 n.1.

⁴¹ See Safety Standards for Cigarette Lighters, 16 C.F.R. § 1210.1-3 (1997).

⁴² See 16 C.F.R. § 1210.3.

⁴³ Compare *Welch*, 651 N.E.2d at 815-16 (precluding manufacturer’s design duty based on the open and obvious hazard and adult tool principles) with *Curtis*, 778 F. Supp. at 1425 (using the consumer expectations test to preclude manufacturer design liability).

⁴⁴ See *Welch*, 651 N.E.2d at 814-15.

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ IND. CODE § 33-1-1.5-3 (1997) (emphasis added).

⁴⁹ See IND. CODE § 33-1-1.5-2 (1997).

⁵⁰ *Id.*

⁵¹ *Id.* (emphasis added).

⁵² See *Welch*, 651 N.E.2d at 814.

⁵³ *Id.* at 815.

⁵⁴ See TENN. CODE ANN. §§ 29-28-101 to -108 (1997).

⁵⁵ TENN. CODE ANN. § 29-28-102 (1997).

⁵⁶ See *Curtis*, 778 F. Supp. at 1425.

⁵⁷ TENN. CODE ANN. § 29-28-102(2) (1997).

⁵⁸ TENN. CODE ANN. § 29-28-102(8) (1997).

⁵⁹ See *Curtis*, 778 F. Supp. at 1425.

⁶⁰ *Id.* at 1429.

⁶¹ *Id.* at 1430.

⁶² See *id.*

⁶³ 981 F.2d at 1431.

⁶⁴ See *id.* at 1431 (citing *Webb v. Zern*, 220 A.2d 853, 854 (Pa. 1966)).

⁶⁵ RESTATEMENT (SECOND) OF TORTS § 402A (1965).

⁶⁶ See *Griggs*, 981 F.2d at 1432.

⁶⁷ *Id.* at 1433 (quoting *Griggs*, 786 F. Supp. at 1205).

⁶⁸ *Id.* at 1433 n.7 (citing *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 900 (Pa. 1975)).

⁶⁹ *Id.* at 1433.

⁷⁰ *Id.* at 1438.

⁷¹ See *id.* at 1436-39.

⁷² *Casrell v. Altec Indus., Inc.*, 335 So. 2d 128, 133 (Ala. 1976).

⁷³ *Id.* at 131.

⁷⁴ *Bean*, 597 So. 2d at 1352 (quoting *Casrell*, 335 So. 2d at 133).

⁷⁵ *Id.* (quoting *Casrell*, 335 So. 2d at 131).

⁷⁶ *See id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ 586 N.Y.S.2d 871, 873 (N.Y. Sup. Ct. 1992).

⁸⁰ *Id.* at 873.

⁸¹ *Id.*

⁸² *See Adams*, 497 N.W.2d at 520.

⁸³ *Id.*

⁸⁴ 535 N.W.2d 574, 577 (Mich. Ct. App. 1995).

⁸⁵ *Id.* at 577-78.

⁸⁶ *See id.* at 577.

⁸⁷ 741 F. Supp. 175, 177 (W.D. Mo. 1990).

⁸⁸ In some states, however, the jury performs the risk-utility analysis, based on instructions from the judge. *See, e.g.*, *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1330 (Conn. 1997).

⁸⁹ *Griggs*, 981 F.2d at 1435.

⁹⁰ *Id.* at 1439.

⁹¹ *See id.* at 1436.

⁹² *Id.* (quoting W. PAGE KEETON, *ET AL.*, PROSSER AND KEETON ON THE LAW OF TORTS § 31, at 171 (5th ed. 1984)).

⁹³ *Id.*

⁹⁴ *Bean*, 597 So. 2d at 1352.

⁹⁵ *Curtis*, 778 F. Supp. at 1429-30.

⁹⁶ *See Bean*, 597 So. 2d at 1353-54.

⁹⁷ *See Boumelhem*, 535 N.W.2d at 578.