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Products Liability Law Slow to React to Growing Demand for Commercial Drone Use

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On Dec. 29, 2020, the Federal Aviation Administration (FAA) announced new rules regulating the use of drones. The new regulations coincide with the growing demand for the use of drones for commercial purposes. Companies, such as UPS and Amazon, were even approved last August for package delivery via drone. Commercial drones are being used in the nonshipping context as well. Surveyors, broadcasters and even farmers are beginning to use drones for various tasks vital to their business. You might have even seen Michael Jordan's new golf course—where your food and beverages will be delivered to you directly on the course. While we may be some years behind flying cars, it's a good bet we are going to become accustomed to seeing these small aircrafts fly above us while we walk to work or take the kids to school.



Courtesy photos

WESLEY PAYNE, LEFT, AND JAVIER PUGA, RIGHT, OF WHITE AND WILLIAMS.

The FAA has been regulating drone use for nearly a decade. Their authority rests with a variety of federal laws and administrative rulemaking. A review of the FAA Modernization and Reform Act of 2012 (Public Law 112-95), Extension, Safety, and Security Act of 2016 (Public Law 114-190) and the Reauthorization Act of 2018 (Public Law 115-254) provide a thorough frameworks for the type of laws and rules surrounding these products. Further, the many privacy concerns surrounding

these drones have resulted in some limited state and local ordinances regarding their use. For instance, Pennsylvania passed 18 Sec. 3505, making it illegal to operate a drone in private places or “operate in a manner that places another person in reasonable fear of bodily injury, or to deliver, provide, transmit or furnish contraband.”

While drone laws has often focused on the privacy or registration issues, concepts of negligence and products liability have yet to be shaped either by specific statute

or via common law. This is certainly the case in Pennsylvania, where there are no published decisions related to a personal injury arising from drone use.

The idea of drones flying above our heads, sometimes at excess of 100 mph, seems to just beg for litigation. Indeed, one does not need to be a law professor to craft a hypothetical scenario in which an unmanned drone crashes into a crowded area, injuring various persons. Of course, since there are no simple solutions, the drone will be operated out of a facility in a different state, by an independent contractor, for a company incorporated in an entirely different jurisdiction. Better yet, perhaps the drone was not even operated by a remote person, instead following a pre-determined route programmed into its software. Attorneys across Pennsylvania may quickly be looked by clients for guidance in how to design a framework for using drones in their business, without exposing themselves to hefty litigation.

Drones are, of course, not without similarity to other growing advancements in technology. As such, a logical starting point to this novel area is through analogy with other products. Since these aircrafts operate with varying degrees of autonomy, it seems prudent to look first to self-driving vehicles. One incident between a motorcyclist and General Motors,

involved a self-driving 2016 Chevrolet Bolt that allegedly crashed into the plaintiff. The incident resulted in a lawsuit, in which the plaintiff brought a negligence claim on the theory that the car was negligently designed. The parties ultimately settled the matter. In 2018, the first pedestrian fatality from a self-driving car allegedly occurred in Tempe, Arizona. The estate sued naming the city of Tempe and the state of Arizona, for negligently allowing this experimental and risky activity on public roads. These cases showcase some of the dangers present with drones, but also demonstrate that there has been little common-law progression in that area as well. And, as with drones, there are no published Pennsylvania decisions addressing negligence theories and fully autonomous vehicles.

The commercial aspect of the drone usage create unique challenges. States and local municipalities have little experience in the regulation of airspace commerce as compared to other areas such as roads and or even waterways. A local police officer cannot simply stop a drone in the same manner he can stop an eighteen-wheeler. As such, the state regulatory and criminal framework, so engrained in questions of automobile liability, is simply not present when dealing with commercial drones.

In terms of products liability and negligence suits, a key question is

whether the drone is remote controlled or operating without human monitoring. What “controls” the drone will certainly direct a personal injury plaintiff’s theory of the case. It might also create some contentious discovery battles if the plaintiff seeks to discover the highly coveted algorithm that makes the decisions for the drone. If the drone is operated, that is by an identifiable person, then we will certainly see all the negligence claims follow in any suit. Negligently operating the drone, negligent entrustment, negligence hiring or rehiring, and all variations of negligence theories are likely to follow when it appears that a person caused the drone to fly in a dangerous fashion. These will also follow the products claim, that the drone was negligently designed.

With the advent of artificial intelligence and unmanned vehicles as a whole, it’s possible that the majority of these commercial drones will be unmanned. Amazon has indicated such, noting that they expect drones, operating only on artificial intelligence, to be able to ship packages directly to the consumer from a nearby warehouse. If cases arise from the use of these drones, the case might rest more on the negligent design claims. That is, the exact software or hardware, of the drone created unreasonable risk of harm to a foreseeable person. This claim will certainly require experts in drone technol-

ogy and possibly artificial intelligence. Certainly, the issues for the jurors, and probably the lawyers, in understanding the archetype of the artificial intelligence to determine whether it was negligently designed could be a difficulty in bringing these suits. Those sort of technical nuances in the litigation is not a unique problem. What degree of information commercial drone companies will be forced to present will certainly end with fights over intellectual property, privacy concerns, and any number of objections for what is relevant or what amount of disclosure constitutes an overly burdensome endeavor.

One claim that will certainly arise in this context is that of strict liability. Pennsylvania has adopted the Restatement Second of Torts Section 402A, outlining the requirements in placing liability on a seller of a defective consumer product that causes injuries. Pennsylvania's exact approach to product liability law is evolving. In the landmark Pennsylvania Supreme Court case, *Tincher v. Omega Flex*, 628 Pa 296 (2014), the court affirmed that the state was to follow the Restatement Second, and not Third, of Torts. As it stands, Pennsylvania would likely exclude a commercial drone as a household product. Further, a commercial drone is not going to be sold to any consumer, and thus

the potential injuries it causes to below pedestrian arguably cannot be remedied with a 402A claim unless the law evolves as well. However, the operation of these drones could still be analyzed under a strict liability claim, not arising from section 402A of the Restatement. Whether drone usage could be considered an inherently dangerous activity is a question that a Pennsylvania court may be asked to address in the near future. Some states hold that airplanes and component-part manufacturers can be found strictly liable for accidents arising from their defective product. See *Crosby v. Cox Aircraft*, 109 Wn.2d 581 (1987). One Pennsylvania case, *Berkebile v. Brantly Helicopter Group*, 462 Pa. 83 (1975), affirmed that a helicopter crash was property litigation against the manufacturers under the theory of strict liability. That case may be dusted off soon in order to address claims against drones and we may see a more blanket rule for the adoption of strict liability against drone manufacturers.

The use of drones is certainly something that our society will face as we move to a world of self-automated vehicles and services like Amazon, where you are expecting your package with increasingly less patience. Pennsylvania, and many other states,

have not fully addressed these concerns. If cases are to occur in the future, lawyers and judges will be facing novel issues in products liability law as plaintiffs seek liability against those who own, operate, and, to some extent, control these unmanned aircrafts. As business-use multiplies the use of drones, the focus of the claims will move away from the individual drone owner and towards large companies engaged in manufacture and/or control of these drones.

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