REBOOTING PENNSYLVANIA PRODUCT LIABILITY LAW:  
TINCHER V. OMEGA FLEX  
AND THE END OF AZZARELLO SUPER- STRICT LIABILITY  

James M. Beck, Esquire*  

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* Reed Smith LLP, of counsel.
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ABSTRACT

The Supreme Court of Pennsylvania’s Tincher v. Omega Flex, Inc. decision in late 2014 overturned more than 35 years of Pennsylvania product liability precedent. Before Tincher, the unusually strict form of strict liability imposed by Azzarello v. Black Brothers Co. had produced a long string of restrictive rulings narrowing not only the arguments that product liability defendants could present on their behalf, but also the evidence admissible against plaintiffs seeking to recover in strict liability. Commentators have described the Azzarello strict liability regime as “super-strict liability.”

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Tincher was a capstone to rising judicial criticism of Azzarello that began some ten years earlier, when three justices concurred in Phillips v. Cricket Lighters, advocating that the Azzarello strict liability standard should be scrapped and replaced by the Restatement (Third) of Torts. The Court ultimately did not make the wholesale change in the nature of Pennsylvania product that the Phillips II concurrence advocated. Tincher did, however, end the attempt at absolute separation of strict liability from "negligence concepts" that had been the foundation for most, if not all, of the peculiarities of Pennsylvania strict liability doctrine under Azzarello.

This article traces the pre-Tincher development of Pennsylvania product liability law, reviews the Tincher decision, and seeks to extrapolate how a faithful application of post-Tincher product liability principles under the Second Restatement of Torts could bring about a fairer and more rational application of strict liability in the Commonwealth.

I. THE PAST IS PROLOGUE – PENNSYLVANIA STRICT LIABILITY PRINCIPLES FROM WEBB UNTIL TINCHER

A. The 1960s and Early 1970s – Pennsylvania Strict Liability Before Erection of the Wall Between Negligence and Azzarello Super-Strict Liability

The logical starting point for any history of Pennsylvania product liability jurisprudence is Webb v. Zern, which in a single page of the Atlantic Reporter, overturned almost a century of Pennsylvania product liability precedent. To supplement established negligence and warranty causes of action, Webb I "adopt[ed] a new basis of liability," the "modern attitude" of Second Restatement Torts. Although purportedly a "restatement" of existing common law, Section 402A strict liability has been widely recognized as a "revolutionary" expansion of the scope of product liability.


6 RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW. INST. 1965).
8 Id. at 426, 220 A.2d at 854 (adopting RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW. INST. 1965)).
Strict liability under Section 402A requires that: (1) the defendant be a product "seller," (2) the product, when sold, be (3) in a "defective condition unreasonably dangerous to the user," (4) which reached the user "without substantial change," and (5) caused "physical harm" to the user or the user's property. The opinion in Webb I was terse, giving no reason for making this dramatic shift beyond broadly incorporating the concurring and dissenting opinions of another opinion decided the same day. Those opinions, presaging many to come, justified strict liability in terms of cost-shifting.

The underlying purpose of §402A is to ensure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves . . . . [T]he burden of injuries caused by defects in such products should fall upon those who make and market the products and the consuming public is entitled to the maximum of protection. Only through the imposition of liability under the provisions of §402A can this be accomplished.

The minimal discussion of the practicalities of Section 402A strict liability in Webb I left much of the law unsettled. Subsequent appellate decisions began filling in the blanks, and for a decade Pennsylvania appeared to be evolving within the Section 402A strict liability


10 Webb I, 422 Pa. at 427, 220 A.2d at 854 (quoting RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW. INST. 1965)).


12 Miller, 422 Pa. at 410-12, 221 A.2d at 334-35 (Jones, J., dissenting in pertinent part) (footnote and citations omitted); accord id. at 419-20, 220 A.2d at 338 (citing "public interest in affording the maximum protection . . . to human life, health and safety"; "inability of the consumer to protect himself"; a "seller's implied assurance of the safety of [its] product"; and "the superior ability of the manufacturer or seller to distribute the risk of loss") (Roberts, J., dissenting in pertinent part) (footnotes omitted).
mainstream. Soon after Webb I, in Ferraro v. Ford Motor Co., Pennsylvania recognized assumption of the risk as an affirmative defense to strict liability. In 1968, in the most extensive Section 402A discussion to that time, Forry v. Gulf Oil Corp. relied on several of the Restatement's comments, and identified four elements – including that the product be "unreasonably dangerous" – that a plaintiff must prove to recover in strict liability:

It was [plaintiff's] burden to prove that there was a defect in this [product], that this defect existed when the [product] left [the defendant's] hands, that the defective condition was unreasonably dangerous to the user and that there was a causal connection between this defect and the [accident that caused injury].

A plaintiff's proof could draw "either from direct or circumstantial evidence or both." Evidence of industry standards – "the custom and practice in the [relevant] industry" was relevant to establishing product defect. In accordance with Forry, Pennsylvania juries were routinely charged with deciding whether the characteristics of claimed product defects rendered those products "unreasonably dangerous."
Months later, *Bialek v. Pittsburgh Brewing Co.*\(^\text{19}\) first addressed a plaintiff arguing that "negligence" evidence should be inadmissible in strict liability— evidence of the defendant's manufacturing practices. *Bialek* held that, while such evidence could be relevant to "due care," which was an element of negligence, it also "tend[ed] to show" that the product "was not defective or unreasonably dangerous."\(^\text{20}\) The manufacturing practices evidence was therefore admissible: "it is elementary that evidence admissible for one purpose is not rendered inadmissible because it would be inadmissible for another purpose and because the jury might improperly consider it for that other purpose."\(^\text{21}\)

A third 1968 decision, *Bartkewich v. Billinger,\(^\text{22}\)* recognized the defenses of product misuse and obvious danger.\(^\text{23}\) Neither a guard nor a warning was necessary where the plaintiff deliberately placed his hand in an operating trash crusher. 

"[W]e hardly believe it is any more necessary to tell an experienced factory worker that he should not put his hand into a machine that is at that moment breaking glass than it would be necessary to tell a zoo-keeper to keep his head out of a hippopotamus' mouth."\(^\text{24}\)

In *Burbage v. Boiler Engineering & Supply Co.*,\(^\text{25}\) the Supreme Court of Pennsylvania approved Restatement Section 402, comment n\(^\text{26}\) and rejected

\(^{19}\) *Bialek*, 430 Pa. at 176, 242 A.2d at 231.

\(^{20}\) *Id.* at 185, 242 A.2d at 235.

\(^{21}\) *Id.*


\(^{24}\) *Bartkewich*, 432 Pa. at 356, 247 A.2d at 606.

ordinary contributory negligence as a defense. Only plaintiff conduct amounting to "assumption of the risk," and not a plaintiff's mere failure to discover a defect, could preclude strict liability. 27 Burbage also recognized the issues peculiar to component part manufacturers, 28 marking the beginning of component part doctrine in Pennsylvania. 29

The policy rationale that loomed large in the adoption of Restatement Section 402A was not in evidence in Ferraro, Forry, Bialek, Bartkewich, or Burbage. Redistributionist rhetoric returned, however, in Kassab v. Central Soya Co. 30 to support dismantling what remained of the privity defense. 31

Previously, privity had been abolished in negligence-based product liability litigation; 32 however, it had persisted in product-related cases brought under warranty theories. 33 "[P]olicy" required ending vertical privity in warranty

26 Restatement (Second) of Torts § 402A, cmt. n (Am. Law. Inst. 1965).
27 Burbage, 433 Pa. at 325, 249 A.2d at 566-67.
28 Id. at 324-25, 248 A.2d at 566.
31 Decades of early Pennsylvania decisions had enforced privity in product-related negligence and warranty actions. See, e.g., Smith v. Pennsylvania R.R. Co., 201 Pa. 131, 133, 50 A. 829, 830 (1902) (defendants have no "liability to the public"); First Presbyterian Congregation v. Smith, 163 Pa. 561, 577, 30 A. 279, 282 (1894) (rejecting duties owed to "third parties"); Fitzmaurice v. Fabian, 147 Pa. 199, 202, 23 A. 444, 444 (1892) (same, as to "dut[ies] to a stranger"); Curtin v. Somerset, 140 Pa. 70, 80, 21 A. 244, 245 (1891) (same, as to duties owed "to the whole world").
33 Express and implied warranties relating to "goods" were regularized by Uniform Commercial Code (UCC), completed in 1952 in a joint effort by the American Law Institute and the National Conference of Commissioners on
actions "coextensive[ly]" with Restatement Section 402A so that "large, financially responsible manufacturers who place their wares in the stream of commerce" could not escape contractual liability.34

In Incollingo v. Ewing,35 the Supreme Court of Pennsylvania had its first encounter with prescription medical product liability under Restatement Section 402A. Incollingo addressed four important issues of first impression. First, the Court adopted the learned intermediary doctrine:

Since the drug was available only upon prescription of a duly licensed physician, the warning required is not to the general public or to the patient, but to the prescribing doctor. The question, therefore, in this case is whether the warning that was given to the prescribing doctors was proper and adequate.36

Second, invoking public policy as expressed in comment k to Section 402A,37 Incollingo continued to follow pre-Webb I precedent38 holding that

Uniform State Laws (now the Uniform Law Commission). Pennsylvania was the first state to adopt the UCC, on April 6, 1953. Act of April 6, 1953, P.L.3, No. 1; 13 PA. CONS. STAT. §§ 1102-1109 (1980).

34 Kassab, 432 Pa. at 228-31, 246 A.2d at 853-54.
37 RESTATEMENT (SECOND) OF TORTS § 402A, cmt. k (AM. LAW. INST. 1965).
38 DiBelardino v. Lemmon Pharm. Co., 416 Pa. 580, 585, 208 A.2d 283, 285-86 (1965) (rejecting claimed implied warranty similar to fitness for a particular purpose); Henderson v. National Drug Co., 343 Pa. 601, 611, 23 A.2d 743, 749 (1942) (rejecting application of what would later be called the implied warranty of merchantability; "[a]n action against a druggist to recover for personal injuries should be ex delicto and not ex contractu").
negligence, not warranty, was the only viable product liability cause of action against the manufacturer of a prescription medical product:

Since the strict liability rule of § 402A is not applicable, the standard of care required is that set forth in §388 of the Restatement dealing with the liability of a supplier of a chattel known to be dangerous for its intended use. Under this section, the supplier has a duty to exercise reasonable care to inform those for whose use the article is supplied of the facts, which make it likely to be dangerous.\(^{39}\)

Third, Incollingo recognized that under the learned intermediary doctrine, an allegedly inadequate warning to a physician is causal only if it makes a difference in the ultimate outcome, therefore, where nothing in the allegedly inadequate warning "had a material influence on [a doctor's] prescription of the drug" failure of causation defeated the claim.\(^{40}\) Finally, Incollingo recognized a new theory of negligence for "overpromotion" that could negate an otherwise adequate product warning: "whether or not the printed words of warning were in effect cancelled out and rendered meaningless in the light of the sales effort made by the detail men" was a "question[] properly for the jury."\(^{41}\)

The Superior Court endorsed a standard for evaluating if a product had been substantially changed contrary to Section 402A's defect-at-sale requirement in D'Antona v. Hampton Grinding Wheel Co.\(^{42}\) "The test in such a situation is whether the manufacturer could have reasonably expected or foreseen such an alteration."\(^{43}\) Foreseeability was similarly invoked to narrow the defense of product misuse: "Pennsylvania does impose liability upon a manufacturer for harm caused by misuse of its product, if that misuse was foreseeable."\(^{44}\)

The redistributive social policy notions of strict liability returned with vengeance in Salvador v. Atlantic Steel Boiler Co.,\(^{45}\) as the Supreme Court of Pennsylvania completed its elimination of privity by abolishing horizontal

\(^{39}\) Incollingo, 444 Pa. at 288 n.9, 282 A.2d at 220 n.8 (citing RESTATEMENT (SECOND) OF TORTS § 388 (AM. LAW. INST. 1965)).

\(^{40}\) Id. at 286, 282 A.2d at 219.


\(^{43}\) Id. at 125, 310 A.2d at 310 (citations omitted).


privity and extended the right to sue to all "intended" product users. Public policy precluded a "guarantor" of product safety from erecting privity-based obstacles to suit:

[A] manufacturer by virtue of section 402A is effectively the guarantor of his products' safety. Our courts have determined that a manufacturer by marketing and advertising his product impliedly represents that it is safe for its intended use. We have decided that no current societal interest is served by permitting the manufacturer to place a defective article in the stream of commerce and then to avoid responsibility for damages caused by the defect.

Thus, the terms "guarantor" and "intended use" arrived on the product liability scene via a policy discussion in a decision that affirmed the reversal of a privity-based demurrer.

A plurality of the Supreme Court of Pennsylvania in Kuisis v. Baldwin-Lima-Hamilton Corp. adopted what later came to be known as the "malfunction theory" – whereby an unexplained product malfunction, occurring in the absence of other causes, is sufficient circumstantial defect evidence to support a jury finding of liability. The product must be reasonably new when the accident happened, or else "normal-wear-and-tear" will necessarily be an alternative cause. Post-Kuisis, the malfunction theory in Pennsylvania has
been expressed in terms of whether the plaintiff's case is sufficient to permit the jury to eliminate all "reasonable secondary causes" suggested by the evidence.

This theory encompasses nothing more than circumstantial evidence of product malfunction. It permits a plaintiff to prove a defect in a product with evidence of the occurrence of a malfunction and with evidence eliminating abnormal use or reasonable, secondary causes for the malfunction. 52

*Kuisis* also addressed the role of "abnormal use" in strict liability deciding: "[W]ether under § 402A a particular use of a product is abnormal depends on whether the use was reasonably foreseeable by the seller." 53

The Supreme Court of Pennsylvania returned to the topic of contributory negligence in *McCown v. International Harvester Co.* 54 In a quick four paragraphs, the Court jettisoned decades of contributory negligence precedent. 55 In a product liability case, allowing contributory negligence "would defeat one theoretical basis for" strict liability, that the manufacturer "impliedly represents that [its product] is safe for its intended use." 56 A contributory negligence successful use" of a product "undermines the inference that the product was defective when it left the manufacturer's control"; Cuddy Foods, Ltd. v. Swab Wagon Co., 69 Pa. D. & C.2d 780, 789 (C.P. Dauphin Cty. 1975) (malfunction theory impossible where vehicle had 300,000 miles of prior use).


55 Previously, a plaintiff's contributory negligence, however small, was a complete defense, including in cases involving the use of products. *E.g.* Hummel v. Womeldorf, 426 Pa. 460, 463, 233 A.2d 215, 217 (1967); Notarianni v. Ross, 384 Pa. 63, 64-65, 119 A.2d 792, 793 (1956); Ralston v. Baldwin Locomotive Works, 240 Pa. 14, 17, 87 A. 299, 299 (1913).

defense "would contradict this normal [consumer] expectation of product safety." 57

B. The Mid-1970s — Creation of Azzarello Super-Strict Liability and the Walling Off of Negligence Concepts

Berkebile v. Brantly Helicopter Corp. 58 was critical to the evolution of Pennsylvania product liability law into super-strict liability. Although only a two-justice plurality opinion, 59 Berkebile presaged the anti-negligence sentiment later cemented into law in Azzarello. Berkebile concluded that "the 'reasonable man' standard in any form has no place in a strict liability case." 60 The plurality followed "the vanguard of products liability" – California – by declaring it "improper to charge the jury on 'reasonableness'" in a strict liability case because it "rings of negligence." 61 California precedent, however, did not follow Restatement Section 402A, so without addressing the issue, the Berkebile plurality veered from Section 402A strict liability into the realm of super-strict liability. 62 The drafters of Restatement Section 402A, conversely, had included

Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963); see also supra notes 45-48 and accompanying text.
57 McCown, 463 Pa. at 16-17, 342 A.2d at 381, 382.
59 Chief Justice Jones' lead opinion was joined only by Justice Nix. Three justices concurred in the result without opinion. Id. at 104, 337 A.2d at 903. Two others concurred specially with short opinions. Id. at 104-05, 337 A.2d at 903-04.
60 Id. at 96, 337 A.2d at 900. Previously, the Third Circuit had limited, but not prohibited, foreseeability-based in strict liability jury charges. "In actions brought pursuant to § 402A '[t]he duty of a manufacturer or supplier is limited to foreseeing the probable results of the normal use of the product or a use which can be reasonably anticipated." Eshbach v. W. T. Grant's & Co., 481 F.2d 940 (3d Cir. 1973) (applying Pennsylvania law) (quoting Kaczmarek v. Mesta Mach. Co., 463 F.2d 675, 679 (3d Cir. 1972)).
61 Berkebile, 462 Pa. at 96, 337 A.2d at 899-900 (1975) (following Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153 (1972)).
62 Rather than apply § 402A, Cronin rejected it. Cronin, 8 Cal. 3d at 131, 501 P.2d at 1160 ("We have not hesitated to reach conclusions contrary to those set forth in Restatement [§] 402A."). Fifteen years after Berkebile, the California Supreme Court itself disavowed Cronin's super-strict liability. "[T]he claim that a particular component 'rings of' or 'sounds in' negligence has not precluded its acceptance in the context of strict liability." Anderson v. Owens-Corning Fiberglas Corp., 53 Cal. 3d 987, 1001, 810 P.2d 549, 557 (1991).
the phrase as a means of limiting liability only to defects that rendered products "unreasonably dangerous."\(^{63}\)

As support for changing the basic approach to product defect, the Berkebile plurality pointed to the manufacturer as "guarantor" of product safety "policy consideration" it derived from Salvador.\(^{64}\)

To charge the jury or permit argument concerning the reasonableness of a consumer's or seller's actions and knowledge, even if merely to define "defective condition," undermines the policy considerations that have led us to hold in Salvador that the manufacturer is effectively the guarantor of his product's safety.\(^{65}\)

This rejection of "reasonable man" negligence concepts stemmed from the plurality's disapproval of strict liability based upon foreseeability. According to the Berkebile plurality, "[f]oreseeability is a test of negligence," and thus "irrelevant" to a strict liability action.\(^{66}\) Notwithstanding foreseeability or reasonableness, "[t]he seller must provide with the product every element necessary to make it safe for use," such as warnings or instructions.\(^{67}\) The defect element of strict liability "is not to be governed by the reasonable man standard."\(^{68}\)

In the strict liability context, Berkebile rejected standards based upon what the "reasonable" consumer could be expected to know or what the "reasonable"

\(^{63}\) See RESTATEMENT (SECOND) OF TORTS § 402A, cmt. g (AM. LAW. INST. 1965) (strict liability "only where the product is . . . in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."); id., cmt. i (strict liability "only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe . . . That is not what is meant by "unreasonably dangerous" in this Section"); id., cmt. j ("a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous"), id., cmt. k (a product "incapable of being made safe for their intended and ordinary use," if "properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous").

\(^{64}\) Salvador v. Atl. Steel Boiler Co., 457 Pa. 24, 319 A.2d 903; see supra notes 45-48 and accompanying text.

\(^{65}\) Berkebile, 462 Pa. at 97, 337 A.2d at 900.

\(^{66}\) Id. (citation omitted). Accord id. at 101, 337 A.2d at 902 (in strict liability "we reject standards based upon what the 'reasonable' consumer could be expected to know or what the 'reasonable' manufacturer could be expected to 'foresee' about the consumers who use his product").

\(^{67}\) Id. at 100, 337 A.2d at 902 (discussing warning claims).

\(^{68}\) Id. at 101, 337 A.2d at 902.
manufacturer could be expected to "foresee" about the consumers who use his product. 69

California "public policy" notions were again utilized in Francioni v. Gibsonia Truck Corp., 70 which expanded strict liability beyond products that are sold to those that are leased. Justice Nix, who had joined Berkebile, decreed, "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products." 71 The court viewed the lease in Francioni as the effective equivalent of a sale, so this "policy statement" warranted:

extending [Section 402A's] application to anyone "who enters into the business of supplying human beings with products . . . ." What is crucial to the rule of strict liability is not the means of marketing but rather the fact of marketing, whether by sale, lease or bailment, for use and consumption by the public. Where the fundamental principles are applicable, the imposition of artificial distinctions will only frustrate the intended purpose. 72

Subsequent cases following Francioni, did not apply strict liability to non-sellers with only "tangential participation" and "no control over [product] manufacture." 73

Berkebile's plurality holding "that the requirement of 'unreasonably dangerous' should be purged from the law of strict liability" was seen as such a radical departure from established law that federal courts predicting Pennsylvania law in diversity cases declined to follow it. 74

Comments i and j indicate that "unreasonably dangerous" is to be defined by asking the question whether the user or consumer ordinarily would know of the product's dangerous or unsafe propensities . . . . [T]he Pennsylvania Supreme Court in its adoption of section 402A and willingness to refer to its comments for guidance has never read the "unreasonably dangerous" language out of the

69 Berkebile, 462 Pa. at 101, 337 A.2d at 902 (citation omitted).
71 Id. at 366, 372 A.2d at 738 (quoting Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 462, 150 P.2d 436, 440 (1944)).
72 Id. at 366, 372 A.2d at 739 (quoting RESTATEMENT (SECOND) OF TORTS § 402A, cmt. f (AM. LAW. INST. 1965)).
section . . . . [Berkebile's] weak precedential value does not permit us

to find an "unequivocal rejection" of the unreasonably dangerous

concept . . . given the phrase's important place as a limitation on

liability in the American Law Institute's deliberations when it drafted

section 402A.  

These federal decisions were proven incorrect, however, as Berkebile

merely set the stage for Justice Nix to lead a unanimous embrace of super-strict

liability in Azzarello v. Black Brothers Co.  For over thirty-five years

Azzarello's interpretation of strict liability held sway in Pennsylvania.

Azzarello justified creating a doctrinal wall between "strict liability" and

"negligence," "principally because [manufacturers] are in a position to absorb

the loss by distributing it as a cost of doing business." The court drew on the

redistributive public policy statements concerning strict liability already uttered

in other contexts in Berkebile and Salvador:

The development of a sophisticated and complex industrial society

with its proliferation of new products and vast change in the private

enterprise system has inspired a change in legal philosophy from the

principle of caveat emptor which prevailed in the early nineteenth
century market place to view that a supplier of products should be

deemed to be "the guarantor of his products' safety." . . . In an era of
giant corporate structures, utilizing the national media to sell their
wares, the original concern for an emerging manufacturing industry
has given way to the view that it is now the consumer who must be
protected. Courts have increasingly adopted the position that the risk
of loss must be placed upon the supplier of the defective product
without regard to fault or privity of contract. 

Taking language that Salvador had originally developed in the pre-trial,
dispositive motion context, Azzarello applied it to a jury's verdict on a full trial
record. "[T]his expansion of the supplier's responsibility for injuries resulting
from defects in his product has placed the supplier in the role of a guarantor of

75 Greiner v. Volkswagenwerk Aktiengesellschaft, 540 F.2d 85, 94-95 (3d
AMF, Inc., 567 F.2d 1259, 1263 (3d Cir. 1977) ("the principle of foreseeability
carries over from traditional negligence to strict liability cases") (applying
Pennsylvania law); Posttape Assocs. v. Eastman Kodak Co., 537 F.2d 751, 754-
77 Id. at 553, 391 A.2d at 1023.
78 Id. at 553, 391 A.2d at 1023-24 (quoting "guarantor" language from
his product's safety," but was "not intended to make him an insurer of all injuries caused by the product."79

Following the same California precedent as the Berkebile plurality, Azzarello removed from jury consideration the "unreasonably dangerous" element of Restatement Section 402A that Forry and other post-Webb I decisions had previously approved for strict liability jury instructions.80 The Restatement's "unreasonably dangerous" formulation of defect "rings of negligence," and therefore was not truly "strict" liability.81 According to Azzarello, a definition of product "defect" couched in terms of unreasonable danger "tend[ed] to suggest considerations which are usually identified with the law of negligence."82 To replace Restatement Section 402A's "unreasonably dangerous" element, Azzarello adopted as "adequate" a "draft" strict liability jury instruction in which liability turned on "whether the product is safe for its intended use."83

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.84

This unique formula combined Salvador's "guarantor" and "intended" use language concerning the abolition of privity with the "any element" terminology Berkebile had used in describing warning claims, and turned it into the standard for jury determination of design defects.85

79 Azzarello, 480 Pa. at 553, 391 A.2d at 1024.
80 See Bialek v. Pittsburgh Brewing Co., 430 Pa. 176, 242 A.2d 231 (1968); see also supra note 18 and accompanying text.
81 Azzarello, 480 Pa. at 555, 391 A.2d at 1025.
82 Id.
83 Id. at 558-59, 391 A.2d at 1026-27 (footnote omitted).
84 Id. at 547, 559-60, 391 A.2d at 1027 n.12 (quoting Pa. Cmte. For Proposed Standard Jury Instructions, Civ. Instruction Subcommittee, Draft SSJI § 8.02 (Civ.) (June 6, 1976)).
85 Id. at 559-60 n.12, 391 A.2d at 1027 n.12. "[N]o other state has adopted the Azzarello approach to strict products liability." Phoebe A. Haddon, An Independent Judiciary: The Life and Writings of Robert N.C. Nix, Jr., 78 TEMP. L. REV. 331, 349 (2005). "[O]ur research fails to disclose any other jurisdiction that has adopted the [Azzarello] two-step approach or denies the jury a chance to apply the risk-utility test." Moyer v. United Dominion Indus., Inc., 473 F.3d 532, 540-41 (3d Cir. 2007) (applying Pennsylvania law).
Unlike Berkebile, however, Azzarello did not completely do away with "reasonableness" in the strict liability context – the court simply took the "unreasonably dangerous" issue away from the jury. Azzarello transformed Restatement Section 402A's "unreasonably dangerous" element into a preliminary "question of law" for courts to decide before strict liability claims are submitted to juries.

These are questions of law and their resolution depends upon social policy. Restated, the phrases 'defective condition' and 'unreasonably dangerous' as used in the Restatement formulation are terms of art invoked when Strict liability is appropriate. It is a judicial function to decide whether, under plaintiff's averment of the facts, recovery would be justified; and only after this judicial determination is made is the cause submitted to the jury.86

C. The Late 1970s to Early 1990s – Azzarello Super-Strict Liability at Full Flood

Almost simultaneously with Azzarello, the Superior Court grappled with whether strict liability extended to bystanders – persons other than intended product users who nonetheless suffer product-related injuries. Prior to recognition of the intended user doctrine, that court had rejected bystander liability on causation grounds.87 However, in Pegg v. General Motors Corp.,88 an evenly split Superior Court allowed a thief to recover for injuries caused by a product he had stolen from his employer. "[M]anufactured products [should] be free of defect as of the time of manufacture, regardless of whose hands they subsequently fall into."89

86 Azzarello, 480 Pa. at 558, 391 A.2d at 1026.
Strict liability overturned the ordinary non-liability of successor corporations in Dawejko v. Jorgensen Steel Co., where the Superior Court adopted another California concept – the "product line" exception. Even by contract, successor corporations could not avoid strict liability where a sale of corporate assets "virtually" eliminated a plaintiff's remedies against the original manufacturer, the successor was viable, and "fairness" supported successor liability. The "paramount policy" of strict liability – "the protection of otherwise defenseless victims of manufacturing defects" and spreading the "cost of compensating them" "throughout society" – justified this expansion of liability. The Pennsylvania Supreme Court has never approved this "product line" liability innovation, which is a distinct minority position.

**Sherk v. Daisy-Heddon** addressed causation in strict liability actions. On facts establishing user awareness of the product's "lethal" potential and disobedience of instructions, the court refused to relax causation standards that supported the defense of abnormal use/misuse in negligence cases:

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91 *Id.* at 21-22, 434 A.2d at 109 (citing Ray v. Alad Corp., 19 Cal.3d 22, 136 Cal. Rptr. 574, 560 P.2d 3 (1977)).
92 *Id.* at 22-23, 434 A.2d at 109 (quoting *Ray*, 19 Cal. 3d at 31, 136 Cal. Rptr. at 580, 560 P.2d at 9).
93 *Id.*
97 *Id.* at 598-99, 450 A.2d at 617-18.
There appears to be no reason to doubt that strict liability has made no change in the rule, well settled in the negligence cases, that the seller of the product is not to be held liable when the consumer makes an abnormal use of it. Sometimes this has been put on the ground that the manufacturer has assumed responsibility only for normal uses; sometimes it has gone off on "proximate cause."98

In strict liability as well as negligence, an actor "with sufficient appreciation of the nature of the risk of his misuse of the [product] is exclusively responsible for the consequences of his misuse."99 Thus, "the requirements of proving substantial-factor causation remain the same" for both negligence and strict liability.100

The Superior Court endeavored to fill in some of Azzarello's blanks in Dambacher v. Mallis.101 Dambacher first extended Azzarello to warning claims, and second expounded on the "preliminary" judicial analysis of the "unreasonably dangerous" aspect of strict liability that Azzarello required trial courts to undertake. The warning claim in Dambacher was extreme — that a warning should have been physically embossed on a tire.102

Dambacher had no problem applying Azzarello to warning claims,103 agreeing that "under Azzarello, the trial court will have to rule whether, as a matter of law, the jury could find the [product] defective."104 "Court control of jury action [wa]s more extensive" in strict liability.105 Dambacher also "identified various factors" that trial courts "should consider" in assessing whether, as a matter of law, alleged product "defects" were "unreasonably dangerous" under Azzarello. Some were derived from California law:

98 Sherk, 498 Pa. at 600, 450 A.2d at 618 (citation and quotation marks omitted).
99 Id.
103 Id. at 52, 485 A.2d at 423-24 ("we are not thus free to reject Azzarello" in warning defect cases); id. at 60, 485 A.2d at 428 (following Azzarello to hold" that in a strict liability case, principles of negligence have no place").
104 Id. at 46, 485 A.2d at 420 (emphasis original).
105 Id. at 48, 485 A.2d at 422, (quoting D. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 838 (1973)).
The gravity of the danger posed by the challenged design; the likelihood that such danger would occur; the mechanical feasibility of a safer design; the financial cost of a safer design; and the adverse consequences to the product and to the consumer that would result from a safer design.106

Dambacher also invoked Dean Wade's seven factors as a means of answering the "unreasonably dangerous" question:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product that would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss of setting the price of the product or carrying liability insurance.107

106 Dambacher, 336 Pa. Super. at 50 & n.5, 485 A.2d at 423 & n.5 (citing Barker v. Lull Eng’g Co., 20 Cal.3d 413, 431, 143 Cal. Rptr. 225, 237, 573 P.2d 443, 455 (1978)).

Although courts engage in multi-factorial analysis to evaluate "unreasonably dangerous" defect initially, juries were not allowed to consider these same factors under the Azzarello "any element" standard.\(^{108}\)

Acknowledging the "difficulties in thinking of an inadequate warnings case as a products liability case," the en banc Superior Court in Dambacher rejected "negligence terms" in favor of charging the jury "that it is to consider whether the product was safe in the absence of warnings or in light of the warnings that were given."\(^{109}\) Dambacher recognized that "risk/utility analysis" was inappropriate for warning claims since "the utility of a product will remain constant whether or not a warning is added, but the risk will not," thus potentially "lead[ing] to absolute liability."\(^{110}\) Consequently, the Azzarello "any element" jury instruction was proper in warning cases, although warning-specific language could also be added.\(^{111}\)

Dambacher did not address the burden of proof as to the preliminary "legal" issue of risk/utility under Azzarello, but since defendants had to bring "appropriate motions" to obtain Azzarello's "threshold determination of social policy,"\(^{112}\) this procedural posture effectively placed a heavy burden defendants. "[T]he court must first view the evidence in the light most favorable to the plaintiff to determine if a defect may be found."\(^{113}\) So-called Azzarello-Dambacher motions were frequently made, but infrequently granted.\(^{114}\)

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\(^{108}\) Brandimarti v. Caterpillar Tractor Co., 364 Pa. Super. 26, 33, 527 A.2d 134, 138 (1987) ("[I]t is for the court to balance these social policy factors. . . . [t]he jury is not to be presented with the factors.").

\(^{109}\) Dambacher, 336 Pa. Super. at 57, 485 A.2d at 426 (citation omitted).

\(^{110}\) Id. at 58 n.7, 485 A.2d at 427 n.7 (citations omitted).

\(^{111}\) Id. at 62-63, 485 A.2d at 429. Dambacher suggested that juries be charged that "[a] product otherwise properly made is defective if the supplier does not adequately warn of the dangers of the product" and if the product "lacked the warnings necessary to make it safe for its intended use, then the product was defective." Id. at 63, 495 A.2d at 429-30.

\(^{112}\) Id. at 51, 485 A.2d at 423.


The Superior Court continued to excise "negligence concepts" from strict liability trials in *Carrecter v. Colson Equipment Co.*,115 excluding evidence that, when the product was manufactured, the risk in question was scientifically unknown.116 Unlike pre-*Azzarello* precedent,117 the Superior Court rejected any defense based on "the technological feasibility aspect of state of the art," because the duty to design a safe product applies "regardless of whether the seller knew or had reason to know of the risks and limitations" of its product.118

"Thus, the manufacturer is liable even if it must choose blindly, with no information about the relative merits of safety features" because defect is "a

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116 Liability for unknowable risks had previously been rejected in *Leibowitz v. Ortho Pharm. Corp.*, 224 Pa. Super. 418, 434, 307 A.2d 449, 458 (1973) ("A warning should not be held improper because of subsequent revelations.") (opinion in support of affirmance). However, the split decision in *Hoffman* was non-binding, and also involved a prescription drug that was exempt from strict liability under *Incolling v. Ewing*, 444 Pa. 263, 288 n.9, A.2d 206, 220 (1971), overruled on other grounds, *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980) (calculating amount of award); see *Mazur v. Merck & Co.*, 964 F.2d 1348, 1366-67 (3d Cir. 1992) (invoking "the state of medical knowledge" at the time of manufacture in prescription vaccine case) (applying Pennsylvania law).

117 *Frankel v. Lull Eng’g Co.*, 334 F. Supp. 913, 924 (E.D. Pa. 1971) (§ 402A "requires only proof that the manufacturer reasonably should have known"). *aff’d*, 470 F.2d 995 (3d Cir. 1973) (*per curiam*).

118 *Carrecter*, 346 Pa. Super. at 101 n.6, 104, 499 A.2d at 330 n.6, 331. Cf. *Santiago v. Johnson Mach. & Press Corp.*, 834 F.2d 84, 84-85 (3d Cir. 1987) (reversible error to charge jury to consider "the 'state of the art' in existence when the product in question . . . was manufactured") (applying Pennsylvania law).
question that is to be answered on the basis of all the knowledge available at the time of trial.\textsuperscript{119}  
The doctrinal separation between negligence and strict liability reached its zenith in \textit{Lewis v. Coffing Hoist Div.}\textsuperscript{120}  Deciding whether evidence that the defendant's product had complied with industry standards was admissible in strict liability, a profoundly divided Pennsylvania Supreme Court departed from prior practice,\textsuperscript{121}  and held that "negligence concepts" such as reasonableness and foreseeability "have no role in . . . strict liability."\textsuperscript{122}  "[I]ndustry standards" go to the negligence concept of reasonable care, and . . . under our decision in \textit{Azzarello} such a concept has no place in an action based on strict liability in tort.\textsuperscript{123}  The court emphasized that, in \textit{Azzarello}, it had taken "another approach," different from either the "consumer expectations" or risk/utility theories in other states.\textsuperscript{124}  
Although recognizing that industry standards could also bear upon defectiveness or feasibility of alternative designs,\textsuperscript{125}  the court departed from \textit{Bialek}, which had held dual-relevance evidence admissible subject to cautionary instruction.\textsuperscript{126}  \textit{Lewis} prohibited juries from learning that a product conformed to

\textsuperscript{119}  Habecker v. Clark Equip. Co., 942 F.2d 210, 216 (3d Cir. 1991) (applying Pennsylvania law). Even \textit{Habecker} would not go as far as \textit{Carrecter}, however, holding that "evidence of what safety features were feasible at the time a product was designed . . . must be admissible in a crashworthiness case." \textit{Id.} at 215.

\textsuperscript{120}  \textit{Lewis v. Coffing Hoist Div.}, 515 Pa. 334, 528 A.2d 590 (1987).


\textsuperscript{122}  \textit{Lewis}, 515 Pa. at 337, 528 A.2d 590, 591 (1987) (citing \textit{Azzarello} v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978); \textit{see supra} notes 76-86 and accompanying text. Justice (later Chief Justice) Nix authored both \textit{Azzarello} and \textit{Lewis}.

\textsuperscript{123}  \textit{Id.} at 343, 528 A.2d at 594.

\textsuperscript{124}  \textit{Id.} at 340, 528 A.2d at 593.

\textsuperscript{125}  \textit{Id.} at 342, 528 A.2d at 593-94.

\textsuperscript{126}  \textit{Bialek} v. Pittsburgh Brewing Co., 430 Pa. 176, 185, 242 A.2d 231, 235 (1968); \textit{see supra} notes 19-21 and accompanying text.
industry standards, because such "negligence" evidence had a "tendency to
distract the jury from its main inquiry [and to] confuse the issue."

Having reached the conclusion that evidence of industry standards
relating to the design of the [product] involved in this case, and
evidence of its widespread use in the industry, go to the
reasonableness of the [defendant's] conduct in making its design
choice, we further conclude that such evidence would have
improperly brought into the case concepts of negligence law.

In dissent, Justices Hutchinson and Flaherty lamented that "madness" that
had overtaken strict liability in Pennsylvania.

Although Lewis involved only evidence of voluntary industry standards, in
its wake the Superior Court reversed prior precedent in Estate of Hicks v. Dana
Cos., and extended Lewis to prohibit evidence of a product's compliance with
mandatory government safety regulations – even though regulatory compliance
also relates to a product's condition, since sale of noncompliant products is
illegal. "[T]he rationale in Lewis for excluding evidence of compliance with
industry standards has been extended to exclude evidence of compliance with
government standards."
In either situation the use of such evidence interjects negligence concepts and tends to divert the jury from their proper focus, which must remain upon whether or not the product . . . was "lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use."\textsuperscript{133}

Thus, juries were prohibited from learning that industrial products complied with Occupational Safety and Health standards,\textsuperscript{134} or that automobiles had been manufactured to satisfy Federal Motor Vehicle safety Standards.\textsuperscript{135}

Exclusion of regulatory compliance evidence, however, was a one-way street under \textit{Azzarello}. Plaintiffs remained free to assert non-compliance not only as evidence, but as prima facie proof of defect.\textsuperscript{136} Violations of "statutory provisions" are "a basis for civil liability in actions for torts . . . such as . . . strict liability."\textsuperscript{137} Plaintiffs always have had the option to "open the door" to compliance/non-compliance evidence in strict liability actions whenever such evidence would assist their cases.\textsuperscript{138}

Disparate treatment of compliance and non-compliance evidence was not the only instance of one-way, pro-plaintiff treatment of negligence terminology under \textit{Azzarello}. The same courts that so readily applied \textit{Azzarello} to restrict "negligence" concepts and evidence when offered in defense of strict liability actions nonetheless allowed plaintiffs to embrace "reasonableness" and "foreseeability" in limiting defenses such as abnormal use, misuse, and substantial change. Thus, at the height of the \textit{Azzarello} era, the Superior Court declared, "[a]n allegedly abnormal use will negate liability, however, only if it

\textsuperscript{133} Hicks, 984 A.2d at 962 (quoting Azzarello v. Black Bros. Co., 480 Pa. 547, 559, 391 A.2d 1020, 1027 (1978)).


\textsuperscript{136} Stanton v. Astra Pharm. Prods., Inc., 718 F.2d 553, 571 (3d Cir. 1983) (jury may use regulatory violation to determine product defect) (applying Pennsylvania law).

\textsuperscript{137} 	extsc{Restatement (Second) of Torts § 288}, cmt. d (\textsc{Am. Law Inst. 1965}).

was not reasonably foreseeable by the seller." Likewise, the Azzarello concept of "intended use" was, for many years, defined to "include all those which are reasonably foreseeable to the seller." Throughout the Azzarello period, Pennsylvania appellate decisions continued to apply the pre-Azzarello D'Antona "reasonably foreseeable" standard for substantial change. Similarly, foreseeability was invoked to narrow the defense of product misuse.

Mackowick v. Westinghouse Electric Corp. confirmed Dambacher by extending to warning claims the Azzarello procedure of determining "defect" by the court rather than the jury. Product warnings "must be directed to the understanding of the intended user," not to others with minimal experience or

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141 See supra text accompanying notes 42-43.


knowledge for whom the product was not intended. When a product is marketed solely to sophisticated "intended users," it may carry warnings that reflect the anticipated level of user knowledge.

A warning of inherent dangers is sufficient if it adequately notifies the intended user of the unobvious dangers inherent in the product. A seller or manufacturer should be able to presume mastery of basic operations by experts or skilled professionals in an industry, and should not owe a duty to warn or instruct such persons on how to perform basic operations in their industry.

While the Supreme Court has reiterated that "[t]he determination of whether an alleged defect would render a product 'unreasonably dangerous' is a question of law," it has yet to determine whether, under Mackowick, strict liability allows warnings to reflect the sophistication of the "intended" purchaser, rather than the end user, where the product is sold to sophisticated purchasers.

In Walton v. Avco Corp., the high court expanded the scope of warnings in strict liability to include a relatively narrow post-sale duty to warn in strict liability, compatible with Restatement Section 402A in measuring defectiveness from the date of sale. Walton observed that the "Court has continually fortified the theoretical dam between the notions of negligence and strict 'no

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145 Mackowick, 525 Pa. at 56, 575 A.2d at 102 (strict liability "does not require the manufacturer to educate a neophyte in the principles of the product").
146 Id. at 56-57, 575 A.2d at 102-03 (citations and quotation marks omitted) (emphasis in original).
fault' liability.\textsuperscript{151} Following the Berkebile plurality, a majority of the court declared that the strict liability "duty to provide a non-defective product is non-delegable."\textsuperscript{152} For all Walton's super-strict liability rhetoric, however, it framed the post-sale duty to warn in negligence terminology. The extent of such a duty could not be set without considering what was "reasonable" to expect of product manufacturers:

Because of the likelihood that a purchaser will have a product serviced by its own technicians or by an unaffiliated service center, or possibly not serviced at all, sellers must make reasonable efforts to warn the user or consumer directly.\textsuperscript{153} Walton rejected a universal duty to provide post-sale warnings. The duty turned on what was reasonable, given the "peculiarities of the industry."\textsuperscript{154} Indeed, "mass-produced or mass-marketed products" that "becom[e] impossible to track or difficult to locate" were exempt from post-sale warning duties.\textsuperscript{155} Even in Walton, the "theoretical dam" was not leak-proof.\textsuperscript{156}

The "dam" looked solid in Kimco Development Corp. v. Michael D's Carpet Outlets,\textsuperscript{157} when McCown's\textsuperscript{158} preclusion of contributory negligence

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\textsuperscript{151} Walton, 530 Pa. at 584, 610 A.2d at 462.
\textsuperscript{152} Id. at 577, 610 A.2d at 459 (quoting Berkebile, 462 Pa. at 103, 337 A.2d at 903); see supra text accompanying notes 59-70.
\textsuperscript{153} Walton, 530 Pa. at 578, 610 A.2d at 459 (citations omitted).
\textsuperscript{154} Id.
\textsuperscript{156} Walton also held that, as between solely strictly liable defendants, comparative fault under 42 PA. CONS. STAT. § 7102 was unavailable. Walton, 530 Pa. at 583-84, 610 A.2d at 462 ("introduction of 'comparative fault' . . . between strictly liable defendants was erroneous" because strict liability is "liability without fault"). The court did not decide what rule should apply where a "defendant was found liable under the theory of negligence." Id. at 584, 610 A.2d at 461.
was extended to the legislature's poorly phrased 1978 comparative fault statute that replaced contributory negligence. Since the statute was phrased in terms of "negligence," and not "fault" or "liability" generally, Kimco reiterated that "we have been adamant that negligence concepts have no place in a strict liability action." Beyond "the conceptual confusion that would ensue should negligence and strict liability concepts be commingled," mixing negligence and strict liability in the context of comparative fault would undermine the "purpose" of strict liability:

[T]he underlying purpose of strict product liability is undermined by introducing negligence concepts into it. Strict product liability is premised on the concept of enterprise liability for casting a defective product into the stream of commerce . . . . The deterrent effect of imposing strict product liability standards would be weakened were we to allow actions based upon it to be defeated, or recoveries reduced by negligence concepts.

Construing Kimco and McCown to avoid "muddying the waters," the Third Circuit doubled down on "policy considerations endemic to § 402A" strict liability in Parks v. AlliedSignal, Inc. — and in the process disregarded the causation holdings in Sherk. The Pennsylvania Supreme Court, perhaps more than any other state appellate court in the nation, has been emphatic in divorcing negligence concepts from product-liability doctrine.  Causation, according to Parks, "is not the primary focus of section 402A cases." Once again, redistributionist "policy" -- that "Pennsylvania has determined that it is economically and socially desirable to hold manufacturers liable for accidents caused by their defective products, without introducing negligence concepts" -- meant, "de-emphasis of causation is a natural corollary of the distinction between negligence and strict products liability." Thus, at this point, strict

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158 McCown v. Int'l Harvester Co., 463 Pa. 13, 342 A.3d 381 (1975); see supra notes 54-57 and accompanying text.
159 See 42 PA. CONS. STAT. § 7102.
160 Kimco, 536 Pa. at 8, 637 A.2d at 606 (citations omitted).
161 Id. at 8-9, 637 A.2d at 606-07 (quotation from Azzarello omitted).
165 Id. at 1333.
166 Id.
liability could be imposed even though the plaintiff dove headfirst into three feet of water:

Unlike the law of negligence, product liability laws do not impose a duty upon the consumer; they instead encourage manufacturers to make safe products even for the careless and unreasonable consumer.167

Perhaps the final efflorescence of super-strict liability in Pennsylvania was the Superior Court's adoption of a "heeding presumption" that effectively reversed the burden of proof on causation in certain warning cases in Coward v. Owens-Corning Fiberglas Corp.168 Coward took a phrase from Restatement Section 402A, comment j169 — "[w]here a warning is given the seller may reasonably assume that it has been read and heeded"170 — and turned it on its head to create a "corollary" rule "that in cases where warnings or instructions are required to make a product non-defective and a warning has not been given, the plaintiff should be afforded the use of the presumption that he or she would have followed an adequate warning."171 The basis for this presumption, as always, was the strict liability "social policy" of expanding opportunities for recovery:

Our Supreme Court has molded Pennsylvania jurisprudence accordingly to assure injured plaintiffs a right of recovery, regardless of fault . . . . Were we to require that the toxic tort plaintiff demonstrate failure-to-warn defect causation by introduction of affirmative evidence, we would, in some cases, preclude recovery.172

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169 Restatement (Second) of Torts § 402A, cmt. j (Am. Law Inst. 1965).
171 Coward, 729 A.2d at 621.
172 Id. at 619-20 (citing primarily Azzarello and Berkebile).

Almost as fast as the edifice of super-strict liability was constructed, the forces of jurisprudential realism started eroding it. The Pennsylvania Supreme Court began backtracking on cost-spreading as a justification for liability in Hart v. W.H. Stewart, Inc.:

The magnitude of the injury sustained may never be permitted to overcome a plaintiff's failure to establish a defendant's liability. Sympathy for the plight of the injured party cannot relieve that party of the obligation to demonstrate the responsibility of the person from whom redress is sought.173

While Hart was a negligence case, the same caution soon emerged in strict liability. "To assign liability for no reason other than the ability to pay damages is inconsistent with our jurisprudence."174 "Reliance on cost-shifting as the only factor to be considered in whether a given party should be exposed to liability" would improperly "result in absolute liability rather than strict liability."175

Judicial unwillingness to eliminate state-of-the-art considerations kept strict liability at bay in cases involving prescription medical products. The Incollingo rule176 was invoked in Baldino v. Castagna, to support the adequacy of the defendant's warnings, which were "in compliance with the required standards of the [FDA]."177 In Hahn v. Richter,178 the Superior Court followed Incollingo and recognized Restatement Section 402A, comment k as broadly applicable to such products, since comment k "imposes liability only if the manufacturer knew or should have known of the defect at the time the product was sold or distributed."179 In affirming, the Supreme Court reiterated its

176 Incollingo v. Ewing, 444 Pa. 263, 584 A.2d 1383, 1387 (1991); see supra notes 35-41 and accompanying text.
179 Id. at 145, 628 A.2d at 876 (quoting Brown v. Superior Court, 751 P.2d 470, 476 n.4 (Cal. 1988)). The Superior Court of Pennsylvania also stated that innovation would be "stifle[d]" by a "rule of law which held a pharmaceutical
longstanding preference for negligence over strict liability in medical product cases:

[W]here the adequacy of warnings associated with prescription drugs is at issue, the failure of the manufacturer to exercise reasonable care to warn of dangers, that is, the manufacturer's negligence, is the only recognized basis of liability.\(^\text{180}\)

The Supreme Court expanded this strict liability-free zone to include intermediate sellers of prescription medical products in Coyle v. Richardson-Merrell, Inc.,\(^\text{181}\) and Cafazzo v. Central Medical Health Services, Inc.\(^\text{182}\) The Cafazzo court even acknowledged the court's first doubts about strict liability generally. "It is . . . not clear enough that strict liability has afforded the hoped for panacea in the conventional products area that it should be extended so cavalierly in cases such as the present one."\(^\text{183}\) Shortly before Tincher, Lance v.
Wyeth reaffirmed that "for policy reasons this Court has declined to extend strict liability into the prescription drug arena."

A second strict liability-free zone came into being in Redland Soccer Club, Inc. v. Dep't of the Army, where the Supreme Court recognized medical monitoring claims in the absence of present physical injury, but expressly limited them to negligence. The third of seven medical monitoring elements explicitly required the need for monitoring to be "caused by the defendant's negligence," thereby precluding medical monitoring claims asserting strict liability.

Also problematic under Azzarello's negligence/strict liability dichotomy were "crashworthiness" cases, where plaintiffs alleged that products were inadequately protective against dangers arising from foreseeable, albeit unintended, product uses – primarily, but not always, collisions involving motor vehicles. Although federal cases had previously allowed crashworthiness claims, crashworthiness was recognized as a strict liability cause of action in Kupetz v. Deere & Co. In crashworthiness cases, the claimed product defect "does not cause the accident or initial impact, but rather increase[s] the severity of the injury" due to a "second collision" by the plaintiff's body during

184 Lance v. Wyeth, 624 Pa. 231, 264, 85 A.3d 434, 453 (2014). Lance recognized negligence liability where a drug has been removed from the market as "too dangerous to be used by anyone" and "should not be used in light of its relative risks." Id. at 273-75, 85 A.3d at 459-60.


The commonly accepted elements of crashworthiness require that:

[A] plaintiff must demonstrate 1) that the design of the vehicle was defective and that when the design was made, an alternative, safer design practicable under the circumstances existed; 2) what injuries, if any, would have resulted to the plaintiff had the alternative, safer design, in fact, been used; and 3) some method of establishing the extent of plaintiff's enhanced injuries attributable to the defective design.

"The effect of the crashworthiness doctrine is that a manufacturer has a legal duty to design and manufacture its product to be reasonably crashworthy."  

The elements of crashworthiness and the plaintiff's burden of proof, as stated in Kupetz, were ratified by the Pennsylvania Supreme Court, and remained Pennsylvania law throughout the Azzarello period and beyond. Despite Azzarello, crashworthiness cases routinely employed negligence terminology similar to Kupetz. "The basis of this doctrine is that the manufacturer must design his product so that it is safe for any reasonably foreseeable use." Nonetheless, crashworthiness continued to be considered a

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191 Kupetz, 435 Pa. Super. at 27, 644 A.2d at 1218 (quoting Barris v. Bob's Drag Chutes & Equip., 685 F.2d 94, 98 (3d Cir. 1982)).
"subset of," and "a targeted exception to the prohibition against utilizing an analysis of the foreseeability . . . in, strict liability."\textsuperscript{195}

Perhaps no aspect of strict liability became more confused under \textit{Azzarello} than when a plaintiff's conduct – which would reflect contributory fault in a negligence action – was admissible on the issue of "causation" in strict liability. The general admissibility standard required "highly reckless conduct" – not mere "contributory negligence."\textsuperscript{196} The governing dichotomy between negligence and strict liability mandated this distinction:

[U]nder Pennsylvania's scheme of products liability, evidence of highly reckless conduct has the potential to erroneously and unnecessarily blend concepts of comparative/contributory negligence . . . . [W]ithout some further criteria, highly reckless conduct allegations by defendants could become vehicles through which to eviscerate a section 402A action by demonstrating a plaintiff's comparative or contributory negligence.\textsuperscript{197}

However, Pennsylvania courts struggled to identify "highly reckless" conduct in strict liability cases, reaching irreconcilable results. Numerous appellate decisions admitted "highly reckless" plaintiff conduct as relevant to causation in strict liability cases:

- That plaintiff used an improper product attachment, failed to use an available safety device, malpositioned the product, and without looking stuck his head out an open window.\textsuperscript{198}
- That plaintiff used the product without a safety shield in violation of explicit warnings.\textsuperscript{199}

\textsuperscript{195} \textit{Gaudio}, 976 A.2d at 534. The Supreme Court of Pennsylvania nonetheless noted the "continuing controversy" about "whether crashworthiness claims . . . are appropriately administered as a subset of strict liability and/or negligence theory." Harsh v. Petroll, 584 Pa. 606, 610 n.1, 887 A.2d 209, 211 n.1 (2005). Following \textit{Tincher}, the issue might be moot.

\textsuperscript{196} Reott v. Asia Trend, Inc., 618 Pa. 228, 249, 55 A.3d 1088, 1098 (2012). The conduct in \textit{Reott}, the plaintiff's "self-taught maneuver" of "rais[ing] himself on his toes and c[o]m[ing] down on" a hunter's tree stand in order to "set" it, \textit{id.} at 233, 55 A.3d at 1091, was deemed not sufficiently "unforeseeable and outrageous" to be admissible. \textit{Id.} at 250, 55 A.3d at 1096.

\textsuperscript{197} \textit{Id.} at 245, 55 A.3d at 1098.

\textsuperscript{198} \textit{Daddona}, 891 A.2d at 810-11.

That plaintiff either inserted or withdrew a plug from an electrical outlet while using a product known to give off inflammable fumes.\(^{200}\)

That plaintiff, in violation of law, drove a vehicle with a non-functional headlight.\(^{201}\)

That plaintiff operated the product while intoxicated.\(^{202}\)

That both participants in a collision, including plaintiff, were inattentive to where they were going.\(^{203}\)

That plaintiff did not change gasoline-soaked clothing and was burned.\(^{204}\)

That plaintiff, without looking, put his hand into a can with a jagged edge.\(^{205}\)

That plaintiff lost control of a vehicle while speeding at approximately 100 mph.\(^{206}\)

That plaintiff and others failed to maintain the product, so that it malfunctioned and caused injury.\(^{207}\)

That plaintiff failed to read an owner's manual and stood near an open flame wearing flammable clothing.\(^{208}\)

Other appellate decisions excluded almost any plaintiff conduct that might also be considered "negligent" under the Azzarello negligence/strict liability dichotomy. These courts barred admission of often-indistinguishable plaintiff conduct:

- That plaintiff operated the product under the influence of alcohol and drugs, and violated explicit warnings.\(^{209}\)


\(^{207}\) Moyer v. United Dominion Indus., Inc., 473 F.3d 532, 542-45 (3d Cir. 2007) (finding reversible error) (applying Pennsylvania law).


That plaintiff was distracted and unable to control his vehicle.\textsuperscript{210}

That plaintiff was inattentive while handling metal near a high tension power line.\textsuperscript{211}

That plaintiff or a third party turned on the product while plaintiff stood on it.\textsuperscript{212}

That both participants in a collision, including plaintiff, were inattentive to where they were going.\textsuperscript{213}

That plaintiff, without setting an emergency brake, tried to exit a vehicle while it was in gear.\textsuperscript{214}

That plaintiff failed to read an operator's manual and failed to use the emergency brake.\textsuperscript{215}

In a case involving plaintiff conduct, \textit{Phillips v. A-Best Products Co.},\textsuperscript{216} followed \textit{Sherk}.\textsuperscript{217} The defense in \textit{Phillips I} established a \textit{prima facie} case of assumption of the risk – that the plaintiff "knew" of the product's risk, based on employer-provided training, but nonetheless "voluntarily proceeded to expose himself to the product."\textsuperscript{218} "Based on this actual knowledge of the danger on the part of the user," \textit{Sherk}'s reasoning applied and defeated causation as a matter of law. "[T]he manufacturer could not be held strictly liable since the alleged deficiency in the warnings was not the cause of the accident.\textsuperscript{219} Application of assumption of the risk principles in \textit{Phillips I} in the employment setting is thus incompatible with lower court decisions holding that employment activities cannot be "voluntary."\textsuperscript{220}

The erstwhile "dam" between negligence and strict liability began giving way when \textit{Davis v. Berwind Corp.}\textsuperscript{221} adopted the Superior Court's pre-\textit{Azzarello}
test\textsuperscript{222} for establishing that a product was "substantially changed" prior to an accident. \textit{Davis} employed "reasonable foreseeability" language ostensibly done away with in \textit{Azzarello}.

The seller is not liable if a safe product is made unsafe by subsequent changes. Where the product reached the user or consumer with substantial change, the question becomes whether the manufacturer could reasonably have expected or foreseen such an alteration of its product.\textsuperscript{223}

\textit{Davis} affirmed judgment n.o.v. where the plaintiff's employer removed a safety device notwithstanding the defendant manufacturer's specific contrary warning.\textsuperscript{224} Injury from a substantial change to a product could not be "foreseeable" where the defendant manufacturer had expressly warned \textit{against} the change at issue. Rather than demonstrating foreseeability, adequate warnings eliminated it:

We find untenable the proposition that a manufacturer must anticipate that a specific warning \textit{not} to operate a product without a safety device indicates to a user that the product \textit{could}, in fact, be operated without the safety feature. Such conclusion defies common sense. It also renders warnings of any nature meaningless since the manufacturer must anticipate that the user will engage in the precise conduct which the warning cautions against.\textsuperscript{225}

Thus, the doctrine of substantial change precluded liability where the product alteration was made in disregard of warnings against so doing.\textsuperscript{226}

Causation also made a comeback in warning cases, as the scope of the \textit{Coward}\textsuperscript{227} heeding presumption was steadily trimmed. Prescription medical products, being exempt from strict liability generally,\textsuperscript{228} were never subject to any heeding presumption.\textsuperscript{229} Consumer products were also beyond the reach of

\textsuperscript{222} See \textit{supra} notes 43, 142 and accompanying text.

\textsuperscript{223} \textit{Davis}, 547 Pa. at 267, 690 A.2d at 190 (citations omitted).

\textsuperscript{224} \textit{Id.} at 264, 690 A.2d at 188.

\textsuperscript{225} \textit{Id.} at 268-69, 690 A.2d at 190-91 (footnote omitted) (emphasis in original).

\textsuperscript{226} \textit{Id.}


\textsuperscript{228} See \textit{supra} text accompanying notes 178-80.

\textsuperscript{229} The Superior Court of Pennsylvania held flatly that, in learned intermediary rule cases, "[P]roximate cause is not presumed." Demmler v.
the heeding presumption because "where the plaintiff is not forced by employment to be exposed to the product causing harm, then the public policy argument for an evidentiary advantage becomes less powerful." Decisions further established that once rebutted, "the office of the presumption has been performed; the presumption is of no further effect and drops from the case." Retrenchment also occurred with respect to evidence of similar accidents, which had repeatedly been held admissible in strict liability actions, provided that the plaintiff established "substantial similarity." Plaintiffs, however, objected to the absence of similar accidents as "negligence" evidence in Spino v. John S. Tilley Ladder Co. Rejecting that contention, the court retreated from the Lewis position that relevance to "negligence" required exclusion. Instead, the court returned to the usual rule that "while evidence can be found


234 See supra text accompanying notes 127-28.
inadmissible for one purpose, it may be admissible for another."\textsuperscript{235} The absolutist position taken in \textit{Lewis} that all "negligence" evidence necessarily misleads juries made "little" sense: 

This Court is fully cognizant of the danger of misleading a jury and the problems of prejudice in the inability of the opposing party to meet the evidence. However, there is little logic in allowing the admission of evidence of prior similar accidents but never admitting their absence.\textsuperscript{236}

The Superior Court opened the door wide to "negligence" risk/utility evidence in \textit{Phatak v. United Chair Co.}.\textsuperscript{237} Although \textit{Brandimarti v. Catterpillar Tractor Co.},\textsuperscript{238} had prohibited jury charges from mentioning risk/utility factors, the same court in \textit{Phatak} held that juries should receive extensive evidence concerning the same factors\textsuperscript{239} to evaluate claimed alternative designs:

Thus in determining whether the design of a product is "defective" or "unreasonably dangerous," or whether a product could have been designed "more safely," many factors could seemingly be weighed by the jury in reaching the ultimate conclusion whether a product was defective or not. The question before us, as we see it, is whether an assertion that a design change would make a product "unbelievably hazardous" to other persons enters into the equation of whether the product is "defective" for products liability purposes. We think the answer is yes.\textsuperscript{240}

Some years later, that court reaffirmed "that evidence of the risks and benefits of the allegedly defective product may be relevant in a design defect case."\textsuperscript{241}

\textsuperscript{235} \textit{Spino}, 548 Pa. at 292, 696 A.2d at 1172 (following Bialek, 430 Pa. 176, 185, 242 A.2d 231, 235 (1968); see \textit{supra} notes 19-21 and accompanying text).

\textsuperscript{236} \textit{Id.} at 298, 696 A.2d at 1174.


\textsuperscript{240} \textit{Phatak}, 756 A.2d at 694.

\textsuperscript{241} \textit{Gaudio v. Ford Motor Co.}, 976 A.2d 524, 548 (Pa. Super. Ct. 2009) (risk/benefit "critique" of plaintiff's proposed alternative design was admissible).
The *Azzarello* negligence/strict liability dichotomy suffered another serious loss in *Duchess v. Langston Corp.* Slicing through a Gordian Knot of conflicting intermediate appellate decisions, *Duchess* unanimously held that subsequent remedial measures are inadmissible in both negligence and strict liability. The same policies animated both causes of action:

More fundamentally, we are unable to meaningfully distinguish claims asserting negligent design from those asserting a design defect in terms of their effect on the implementation of remedial measures and/or design improvements . . . . [T]he prospect of our rules inhibiting such policy and, correspondingly, the continual process of improvement and innovation in the marketplace, favors the broader application of the evidentiary exclusion . . . . [T]here are analytical similarities between strict liability and negligence in relation to claims of defective design, and we agree with those courts that have concluded that no distinction between the two justifies differential treatment [of subsequent remedial measures].

Instead of relying on California law, as in *Azzarello* and *Berkebile*, the Court rejected the California rule holding subsequent remedial measures admissible in strict liability while excluding them in negligence. Doctrinal differences between the two theories were "marginal" because both used "similar" forms of risk/utility balancing, and because the potential for damages was a "deterrent" in both instances. *Duchess* recognized the "analytical similarities between strict liability and negligence in relation to claims of defective design" and "agree[d] with those courts that have concluded that no distinction between the two [theories of liability] justifies differential treatment" of subsequent remedial measures evidence. The court also gave little weight

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244 *Duchess*, 564 Pa. at 553, 769 A.2d at 1145.
245 *Id.* at 549-50, 769 A.2d at 1143-44 (citations and footnote omitted).
246 See *supra* notes 58-69 and accompanying text (discussing *Berkebile*); see also *supra* notes 76-86 and accompanying text (discussing *Azzarello*).
248 *Id.* at 546-47, 769 A.2d at 1141.
249 *Id.* at 550, 769 A.2d at 1144 (agreeing with *Krause v. Am. Aerolights, Inc.*, 307 Or. 52, 762 P.2d 1011 (1988); *Johnson v. John Deere Co.*, 935 F.2d
to redistributive "social policy" reasons for separating strict liability and negligence – that "recovery without proof of fault" was intended "in part, to alleviate the burden on injured plaintiffs and to provide a mechanism to achieve loss spreading."\(^{250}\)

**E. 2003-2013 – Strict Liability in Limbo**

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dress presaged *Phillips v. Cricket Lighters*,\(^{251}\) which directly called *Azzarello* super-strict liability into question and brought the Pennsylvania Supreme Court's internal disagreements over product liability "public policy" to light. The primary question in *Phillips II* was whether to recognize the lack of "childproof" safety features as a form of strict liability design defect.\(^{252}\) This claim was problematic under the *Azzarello* formulation of strict liability because a child was not an "intended user" of an adult-only product, but only an allegedly "foreseeable," albeit unintended, user.\(^{253}\) "Foreseeability," of course, was a negligence concept that *Azzarello* and its progeny had declared inapplicable to strict liability.\(^{254}\)

The majority opinion followed *Mackowick*\(^{255}\) and affirmed dismissal of plaintiff's strict liability claim because the product was being operated solely by an unintended user.\(^{256}\) *Phillips II* rejected that argument that the intended use doctrine was too "narrow" and that strict liability should be expanded to include all foreseeable, albeit unintended, users:

> There is some visceral appeal to [this] argument . . . . This visceral response has been memorialized in our tort law as a negligence cause of action.

Yet the cause of action presently being examined is not a negligence claim; rather, it sounds in strict liability. And strict liability affords no latitude for the utilization of foreseeability concepts such as those

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151 (8th Cir. 1991); Gauthier v. AMF, Inc., 788 F.2d 634, amended, 805 F.2d 337 (9th Cir. 1986); Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984); Birchfield v. Int'l Harvester Co., 726 F.2d 1131, 1139 (6th Cir. 1984)).

250 *Duchess*, 564 Pa. at 552, 769 A.2d at 1145.


252 *Id.* at 649, 841 A.2d at 1003.

253 *Id.* at 657, 841 A.2d at 1007-08.

254 *Id.* at 652-53, 841 A.2d at 1005.

255 See *supra* notes 144-46 and accompanying text.

256 *Phillips II*, 576 Pa. at 653, 841 A.2d at 1005 ("[T]he standard that the product need be made safe only for the intended user appears to be equally applicable.").
proposed by [plaintiff]. We have bluntly stated that negligence concepts have no place in a case based on strict liability.\textsuperscript{257}

The majority conceded that the court's prior opinions had "muddied the waters," with "careless use of negligence terms in the strict liability arena," singling out \textit{Davis}\textsuperscript{258} for specific criticism.\textsuperscript{259} Although it would be "imprudent of us to wholesale reverse all strict liability decisions which utilize negligence terms," the majority still "reaffirm[ed] that in this jurisdiction, negligence concepts have no place in strict liability law," this dichotomy being "the very underpinning[] of the strict liability cause of action."\textsuperscript{260} Whether to "abandon[] our current interpretation of strict liability law" or to "adopt the Restatement (Third) of Torts[] . . . ha[d] been waived."\textsuperscript{261}

Only two justices (Cappy, C.J. & Zappala, J.), were satisfied with this result. Three justices (Saylor, Castille, and Eakin, JJ.) filed a lengthy concurring opinion expressing their view that the \textit{Azzarello} negligence/strict liability divide was beset by "pervasive ambiguities and inconsistencies."\textsuperscript{262} These Justices believed that the "rhetorical exclusion of negligence concepts from strict liability doctrine" imposed by \textit{Azzarello} "cannot be justly sustained in theory in relation to strict products liability cases predicated on defective design," and was "demonstrably incongruent with design-defect strict liability doctrine as it is currently implemented in Pennsylvania."\textsuperscript{263} They contended that negligence and strict liability were not logically separable,\textsuperscript{264} and that the threshold judicial determination whether a defect was "unreasonably dangerous" defects:

\[H]as led to risk-utility balancing by trial courts on the facts most favorable to the plaintiff . . . and minimalistic jury instructions (to insulate the jury from negligence terminology), which lack essential

\textsuperscript{258} \textit{Davis} v. \textit{Berwind Corp.}, 547 Pa. 260, 690 A.2d 186 (1997).
\textsuperscript{259} \textit{Phillips II}, 576 Pa. at 655-66, 841 A.2d at 1006-07.
\textsuperscript{260} \textit{Id.} at 1007.
\textsuperscript{262} \textit{Phillips II}, 576 Pa. at 664-65, 841 A.2d at 1012 (concurring opinion). Justice Newman filed a separate opinion, mostly concerning negligence issues. Justice Nigro concurred in the result without opinion. \textit{Id.} at 682-85, 841 A.2d at 1023-25 (concurring in result, concurring and dissenting opinion).
\textsuperscript{263} \textit{Id.} at 671, 841 A.2d at 1016 (concurring opinion).
\textsuperscript{264} \textit{Id.} at 670, 841 A.2d at 1015-16 (concurring opinion).
guidance concerning the nature of the central conception of product defect.\textsuperscript{265}

The three concurring Justices urged the court to adopt the reasonableness-based product liability standard of the Restatement (Third) of Torts, Products Liability Section 2.\textsuperscript{266} Section 2 differed significantly from the Restatement Second, by eliminating "consumer expectation" as an independent product-defect standard (in favor of risk/utility balancing) and adding reasonable alternative design as an element for design defect claims.\textsuperscript{267}

\textit{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.}\textsuperscript{268}

For a decade after \textit{Phillips II}, the issues raised by the concurring justices, regarding the unworkability of \textit{Azzarello} super-strict liability and the Restatement Third as their proposed alternative, were central to the development of Pennsylvania product liability doctrine.\textsuperscript{269}

\textit{Harsh v. Petroll}, avoided the Restatement issue\textsuperscript{270} while demolishing another piece of the wall between negligence and strict liability. The Court

\begin{itemize}
\item \textsuperscript{265} \textit{Phillips II}, 576 Pa. at 672, 841 A.2d at 1017 (concurring opinion) (citations and footnote omitted).
\item \textsuperscript{266} \textit{Id.} at 1019-21, 841 A.2d at 1019-21 (concurring opinion) (discussing \textit{RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (AM. LAW. INST. 1998)}).
\item \textsuperscript{267} \textit{RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2, cmt. e-g (AM. LAW. INST. 1998)}.
\item \textsuperscript{268} \textit{Phillips II}, 576 Pa. at 670, 841 A.2d at 1015-16 (concurring opinion).
\item \textsuperscript{270} \textit{Harsh v. Petroll}, 584 Pa. 606, 618 n.16, 887 A.2d 209, 216-17 n.16 (2005).
\end{itemize}
answered the apportionment question left open in Walton\textsuperscript{271} and rejected the plaintiff's argument – accepted by a number of Azzarello-era decisions\textsuperscript{272} – that the negligence/strict liability dichotomy precluded the fault of negligent drivers in crashworthiness cases from being apportioned with the strict liability of vehicle manufacturers:

[Although] crashworthiness theory establishes a basis to support manufacturer liability for enhanced injury, it does not require that a manufacturer be the exclusive cause of such injury, nor does it diminish the causal link that exists between an initial collision and all resultant harm. Since [the driver's] negligence and the automobile design defect discerned by the jury were both determined to have been substantial factors in causing the deaths of the [plaintiff's decesso]nts, the trial court did not err in assessing liability jointly and severally.\textsuperscript{273}

Foundational strict liability issues again arised in Pennsylvania Dept of General Services v. United States Mineral Products Co.,\textsuperscript{274} where the plaintiff asserted a "fireworthiness" theory – "foreseeable" destruction by fire allegedly being an "intended use" – against a product claimed to have caused contamination when it burned\textsuperscript{275} Applying the Phillips II strict liability rationale, DGS held that "reasonably foreseeable events" such as accidental fires could not be "intended uses" of products.\textsuperscript{276} Negligence concepts could not be invoked by plaintiffs to expand the scope of strict liability:

It would be incongruous to constrain manufacturer resort to use-related defenses based on the logic that negligence concepts have no

\textsuperscript{271} See supra note 156 and accompanying text.


\textsuperscript{275} Id. at 245, 898 A.2d at 595.

\textsuperscript{276} Id. at 253-54, 898 A.2d at 600-01.
place in strict liability cases, while at the same time expanding the scope of manufacturer liability without fault in a generalized fashion using the negligence-based foreseeability concept.\textsuperscript{277}

While not overruling \textit{Azzarello} or doing away with the negligence/strict liability dichotomy, \textit{DGS} reiterated that this result was now an option. Admitting to "substantial deficiencies" in "current" law, the Court was openly skeptical of expansive strict liability, pending a thorough reexamination and overhaul of Pennsylvania product liability law:

As directed to the strict liability arena, however, such an argument contravenes the strong admonition . . . in \textit{Phillips [II]} . . . that there are substantial deficiencies in present strict liability doctrine, [and] it should be closely limited pending an overhaul by the Court.\textsuperscript{278}

Thus, "the prevailing consensus in \textit{Phillips [II]} was that there would be no further expansions under existing strict liability doctrine."\textsuperscript{279}

\textit{Bugosh v. I.U. North America, Inc.,}\textsuperscript{280} attempted the overhaul envisioned in \textit{DGS}. Unfortunately, upon closer examination, none of the defendants in \textit{Bugosh}, an asbestos case, were actual manufacturers – only intermediate sellers. Under the Third Restatement, the liability of "nonmanufacturing sellers" was assessed under different strict liability standards.\textsuperscript{281} Thus, after oral argument, the \textit{Bugosh} appeal was dismissed as improvidently granted, despite a dissent by two of the concurring justices in \textit{Phillips II}.

The reality is that \textit{Azzarello} simply was not well reasoned in its own time, and it certainly has not withstood the test of time. Its good intentions alone cannot justify its continuing longevity, particularly in light of the wealth of experience and scholarship establishing the unworkability, going forward, of its dictates as common-law tort principles . . . . [R]itualistic adherence to \textit{Azzarello} has substantially impeded the progress of our product liability jurisprudence.\textsuperscript{282}

\textsuperscript{277} \textit{DGS}, 587 Pa. at 258, 898 A.2d at 603.
\textsuperscript{278} Id. at 254, 898 A.2d at 601 (citation & footnote omitted).
\textsuperscript{279} Id. at 254 n.10, 898 A.2d at 601 n.10.
\textsuperscript{280} See \textit{Bugosh v. I.U. N. Am., Inc.,} 596 Pa. 265, 942 A.2d 897 (2008) (per curiam) (allowing appeal of rephrased question: "Whether this Court should apply § 2 of the Restatement (Third) of Torts in place of § 402A of the Restatement (Second) of Torts.").
\textsuperscript{281} See \textit{RESTATEMENT (THIRD) OF TORTS: PROD. LIAB.} § 2, cmt. o (AM. LAW. INST. 1998).
With Bugosh pending in the Pennsylvania Supreme Court, the Third Circuit took up the issue of bystander strict liability in Berrier v. Simplicity Manufacturing, Inc. Almost all states allowed bystanders (neither users nor purchasers of products) to bring strict liability claims, but no other state had Pennsylvania's super-strict liability doctrine. Although widely recognized, bystander strict liability was everywhere based on "foreseeability" concepts explicitly barred from strict liability by Azzarello and its progeny. "[M]any states . . . allow bystander liability using the very negligence concepts and foreseeability analysis that the majority opinion in Phillips [II] rejected." So did the Third Restatement. Taking note of the criticism of the Azzarello negligence/strict liability dichotomy in Phillips II and DGS, and of the pendency of the appeal in Bugosh, the Third Circuit predicted that the Pennsylvania Supreme Court would adopt the Third Restatement and restore "reasonableness" and "foreseeability" as permissible bases for strict liability.

After Berrier, strict liability in federal courts thus followed the negligence-influenced Third Restatement, while Pennsylvania state courts remained bound to apply Azzarello super-strict liability. Once the Bugosh appeal was dismissed, some federal district courts sought to ignore Berrier and return to Azzarello super-strict liability, while others did not, leading to widespread disputes.

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284 Id. at 54-55 (citations and footnote omitted).
285 Id. at 54 ("[T]he Third Restatement . . . broadly permits any person harmed by a defective product to recover in strict liability.") (citing RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (AM. LAW. INST. 1998)).
286 Id. at 60 (predicting that Pennsylvania "would adopt section 2 as well as section 1" of the Third Restatement and "would agree that the Third Restatement's considered approach illuminates the most viable route to providing essential clarification and remediation" of Pennsylvania's doctrinal problems with strict liability). Berrier made this prediction only after unsuccessfully seeking to certify the legal question to the Supreme Court of Pennsylvania. See Berrier v. Simplicity Mfg., Inc., 598 Pa. 594, 959 A.2d 900 (2008) (declining petition to certify).
The resultant chaos required the Third Circuit to remind the district courts three times that its prediction in Berrier remained binding precedent.\(^{289}\) Although Berrier’s Restatement Third prediction ultimately proved incorrect, federal cases from this period illustrate how strict liability can operate without the Azzarello negligence/strict liability dichotomy.

In Schmidt v. Boardman Co.,\(^{290}\) the Pennsylvania Supreme Court was unable to resolve either of the two questions before it due to the unsettled state of Pennsylvania product liability law.\(^{291}\) A majority of the court in Schmidt once again criticized the "no-negligence-in-strict-liability rubric" for having "resulted in material ambiguities and inconsistency in Pennsylvania's procedure."\(^{292}\) The Azzarello approach to strict liability was open to question because it applied "risk-utility balancing . . . on facts most favorable to the plaintiff," and for its "minimalistic jury instructions . . . which lack essential guidance concerning the


\(^{291}\) The court ruled that the defendant had waived whether Pennsylvania law recognized the product line exception to successor corporation non-liability. Id. at 355-57, 11 A.3d at 941-42. Although it did address some subsidiary points, "assuming the exception existed." Id. at 357, 11 A.3d at 357. See supra notes 92-94 and accompanying text. The court split evenly on the second question, whether strict liability permitted recovery of damages purely for emotional distress. Schmidt, 608 Pa. at 330, 11 A.3d at 926.

\(^{292}\) Schmidt, 608 Pa. at 353, 11 A.3d at 940.
key conception of product defect." In addition, it was unjust to treat negligence concepts as a one-way street that could only expand liability:

[We] commented on the fundamental imbalance, dissymmetry, and injustice of utilizing the no-negligence-in-strict-liability rubric to stifle manufacturer defenses, while at the same time relying on negligence concepts to expand the scope of manufacturer liability.

Almost thirty years after Dambacher added its extensive gloss to Azzarello's "threshold risk-utility analysis" holding, the Supreme Court of Pennsylvania first reviewed that process in Beard v. Johnson & Johnson, Inc. As in Schmidt, however, once again, the existential question of continuing to follow Azzarello versus applying the Third Restatement was not before the court. Instead the appeal in Beard, like Schmidt, was limited to "subsidiary issues":

[W]e again recognize the continuing state of disrepair in the arena of Pennsylvania strict-liability design defect law . . . . [S]everal Justices have favored review of the foundational questions[, but] a majority consensus has not yet been attained in any case . . . . [O]bviously, all Justices are not of a like mind on this subject, as this appeal involves subsidiary issues.

Putting off the "foundational question," Beard observed that, "[f]or better or worse, this Court's decisions have relegated our trial courts in the unenviable position of 'social philosopher' and 'risk-utility economic analyst.'" With this approach undisputed for purposes of the appeal, Beard held that the threshold analysis of whether a product's design was "unreasonably dangerous" (and thus presented a jury-triable strict liability claim), properly evaluated every use for which the product was "intended," and should not be confined to the use that

293 Schmidt, 608 Pa. at 353, 11 A.3d at 940.
294 Id. at 354, 11 A.3d at 940. Notwithstanding those issues, Schmidt was "not selected to address the foundational concerns." Id.
295 See supra text accompanying notes 104-07.
296 Beard v. Johnson & Johnson, Inc., 615 Pa. 99, 41 A.3d 823 (2012). Oddly, the product in Beard was a "medical instrument" used in surgery, and as such would not be subject to strict liability at all under the exception recognized in Hahn and Lance. See supra text accompanying notes 179-80, 184. The applicability of strict liability vel non was neither at issue, nor even mentioned, in Beard.
297 Beard, 615 Pa. at 120-12, 41 A.3d at 836 (citations and quotation marks omitted).
298 Id. at 121, 41 A.3d at 836.
allegedly injured the plaintiff. A "wider-ranging assessment . . . was obviously intended from the outset," given "the open-ended factors" that are "the basis for risk-utility review." Beard recognized that, ordinarily, juries rather than courts perform this function:

It may be cogently argued that risk-utility balancing is more legitimately assigned to a jury, acting in its role as a voice for the community and with the power to decide facts, rather than to a trial judge acting on a summary record. Indeed, such is the approach of the Restatement Third.

Finally, in Reott v. Asia Trend, Inc., the Supreme Court at last addressed the vexing question of the relevance of plaintiff conduct to causation in strict liability. Reott adopted the general test that Pennsylvania intermediate appellate courts had created to avoid "eviscerat[ing]" strict liability "by demonstrating a plaintiff's comparative or contributory negligence." Thus, a plaintiff's "highly reckless" conduct was admissible to establish that such conduct "was the sole or superseding cause of the injuries sustained." Analogizing to established defenses of assumption of the risk and abnormal use, Reott considered "highly reckless" conduct to be an affirmative defense as to which defendants had the burden of proof. Since Reott involved solely a manufacturing defect claim, subject to true strict liability even under the Third Restatement, once again no decision of the future of Azzarello super-strict liability was necessary to resolve the case.

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299 Beard, 615 Pa. at 124, 41 A.3d at 838.
301 Beard, 615 Pa. at 123 n.18, 41 A.3d at 838 n.18.
303 See supra notes 197-216 and accompanying text.
304 Reott, 618 Pa. at 245, 55 A.3d at 1098.
305 Id. at 250, 55 A.3d at 1101.
307 Reott, 618 Pa. at 247-49, 55 A.3d at 1100-01.
308 See id. at 251, 55 A.3d at 1101-02 (Saylor, J., concurring).
II. STRICT LIABILITY REFORMULATED – TINCHER V. OMEGA FLEX

After ten years of uncertainty, the Pennsylvania Supreme Court finally reached the foundational questions of the Azzarello negligence/strict liability dichotomy and the Second versus the Third Restatements in Tincher v. Omega Flex, Inc.\textsuperscript{309} Except for involving property damage rather than personal injury,\textsuperscript{310} Tincher was not an unusual case; it was simply the first case to reach the high court that preserved the issues that the court needed to address.

The plaintiffs in Tincher alleged that electrical arcing caused by a nearby lightning strike punctured "corrugated stainless steel tubing" that delivered natural gas to their house. The leaking gas ignited, and the house burned down.\textsuperscript{311} Plaintiffs sued Omega Flex, manufacturer of the tubing, claiming a strict liability design defect.\textsuperscript{312} They alleged that the tubing's "walls [were] too thin to withstand the effects of lightning," and asserted thicker "black iron pipe" as an alternative safer design.\textsuperscript{313} Pretrial, the defense sought to apply the Third Restatement rather than Azzarello and proposed jury instructions to that effect, which were denied.\textsuperscript{314} The jury was instructed in accordance with Azzarello and its progeny -- including both the manufacturer as "guarantor" language and the "any element necessary to make [the product] safe" test for defectiveness.\textsuperscript{315} During deliberations, the jury had questions about the meaning of "defect" and "defective design," which the trial court answered by repeating its Azzarello-based instructions.\textsuperscript{316} The jury returned a verdict for plaintiffs.\textsuperscript{317} Defense post-trial motions, raising, inter alia, Azzarello jury instruction and Third Restatement issues, were denied.\textsuperscript{318}

\textsuperscript{310} Id. at 310, 104 A.3d at 336. Tincher involved a subrogated fire insurance claim. Id.
\textsuperscript{311} Id. at 310, 104 A.3d at 336 (2014).
\textsuperscript{312} Id. at 310-11, 104 A.3d at 336. The plaintiffs also alleged, and tried, a negligence claim. Id. at 316, 104 A.3d at 340.
\textsuperscript{313} Id. at 311-12, 104 A.3d at 336-37. The defense argued that its design had "significant advantages, including resistance to corrosion, structural shifts, and mechanical ruptures; ease of installation, relocation, and retrofitting; and fewer joints accompanied by decreased susceptibility to natural gas leaks at any required joints." Id. at 314, 104 A.3d at 338.
\textsuperscript{314} Id. at 311, 313, 104 A.3d at 336, 338. See id. at 317, 104 A.3d at 340 ("the trial court . . . declined to instruct the jury in accordance with Third Restatement" because Pennsylvania appellate decisions had not adopted it).
\textsuperscript{315} Id. at 315-16, 104 A.3d at 339.
\textsuperscript{316} Id. at 317, 104 A.3d at 340.
\textsuperscript{317} Tincher, 628 Pa. 296 at 318, 104 A.3d at 340.
\textsuperscript{318} Id. at 318-20, 104 A.3d at 341-42.
On appeal, the defendant again preserved its *Azzarello* and Third Restatement issues, although the Superior Court, like the trial court, was bound by prior precedent to deny them. The Superior Court did so, affirming in an unpublished memorandum opinion, which "concluded that it was obligated to follow Supreme Court precedent, which remained premised upon the Second Restatement" and *Azzarello*.321

On further appeal the Supreme Court of Pennsylvania accepted two issues: first whether to "replace" *Azzarello* and Restatement Second Section 402A with the Third Restatement and second, whether a decision adopting the Third Restatement should apply "prospectively or retroactively."322

After deliberating more than a year following oral argument on November 19, 2014, the court unanimously overruled *Azzarello* in an opinion authored by Chief Justice Castille.324 Indeed, the court's lengthy opinion reiterated no less than nine times that *Azzarello* was overruled.325 Having overruled *Azzarello*, the court declined to adopt the Third Restatement, as discussed below.326

In overruling *Azzarello*, the court fundamentally overhauled strict product liability in Pennsylvania. Where *Azzarello* prevented juries from hearing of "unreasonably dangerous" defects because the phrase sounded in

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319 *Tincher*, 628 Pa. at 320-22, 104 A.3d at 342-43. Previously, in *Schmidt*, see supra text accompanying notes 290-94, the Supreme Court of Pennsylvania had enforced waiver, even though raising the issues below would have been "futile," given the existence of binding precedent that the appellant sought to challenge. *Schmidt v. Boardman Co.*, 608 Pa. 327, 355-57, 11 A.3d 924, 941-42 (2011).


321 *Tincher*, 628 Pa. at 322, 104 A.3d at 343.

322 *Id.* at 323, 104 A.3d at 343-44.


324 Pursuant to PA. CONST. art. V., § 16(b), the Chief Justice was obligated to retire at the end of 2014. Concurring Justices Saylor and Eakin joined in the overruling of *Azzarello*. *Tincher*, 628 Pa. at 433, 104 A.3d at 410 (Saylor, J., and Eakin, J., concurring and dissenting).

325 *Tincher*, 628 Pa. at 309, 376, 384, 415, 418, 431, 432 (twice), 433, 104 A.3d at 335, 376, 381, 399, 407, 409, 410 (three times).

326 *Id.* at 408-15, 104 A.3d at 394-99. See infra notes 387-404 and accompanying text.
"negligence," Tincher returned that determination to the jury. Tincher also rejected the prior strict separation between "negligence concepts" and strict liability, recognizing that strict liability "overlapped" and had "roots" in negligence, and that separating the two led to "puzzling" results and was ultimately "not viable." Tincher also did away with Azzarello's jury charge labeling product sellers as "guarantors" of "safety," and framing "defect" in terms of "elements" necessary to make products safe for "intended uses."

The redistributionist social policy pronouncements concerning strict liability, seen in many of the early cases, while muted in Tincher, were still present. The "salient policy" remained "that those who sell a product are held responsible for damage caused to a consumer despite the reasonable use of the product." In Tincher, however, "policy" cut both ways, serving both as grounds for limitation, as well as expansion, of liability:

[A]s a matter of policy, articulating categorical exemptions from strict liability is not a viable or desirable alternative. Courts, which address evidence and arguments in individual cases, are neither positioned, nor resourced, to make the kind of policy judgments required to arrive at an a priori decision as to which individual products, or categories and types of products, should be exempt.

"The principal point is that a jurisdiction is free to adopt a policy that reduces a supplier's exposure to strict liability for a product." [P]ublic policy also adjusts expectations of efficiency and intuitions of justice considerations in the context of products liability. The reduced emphasis on policy in Tincher may be a function of the court's repeated invocation of "judicial modesty."

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328 Tincher, 628 Pa. at 376, 384, 398, 418, 104 A.3d at 376, 381, 389, 401.
329 See id. at 558-60, 391 A.2d at 1026-27; see also supra notes 83-85 and accompanying text.
331 Id. at 409, 104 A.3d at 396 (emphasis in original).
332 Id. at 414, 104 A.3d at 398-99.
333 Id. at 419, 104 A.3d at 402.
334 Id. at 339 n.6, 378, 413, 426, 104 A.3d at 353 n.6, 377, 398, 406.

Tincher's modesty was presaged, a few months before, in Conway v. Cutler Group, Inc., which rejected a "public policy" basis for expanding tort liability. Conway v. Cutler Group, Inc., 626 Pa. 660, 99 A.3d 67 (2014). Such reasoning invited "nothing short of judicial legislation." Id. at 670, 99 A.3d at 73 (citation and quotation marks omitted). It is well established that the courts' authority to
Overall, because "the unsupported assumptions and conclusory statements upon which Azzarello's directives are built [we]re problematic on their face,"\textsuperscript{335} Tincher made four fundamental changes to Pennsylvania product liability law, and portends others.

\textbf{A. Returning the "Unreasonably Dangerous" Element of Defect to the Jury}

Because the Azzarello formulation of strict liability "articulate[d] governing legal concepts which fail to reflect the realities of strict liability practice and to serve the interests of justice,"\textsuperscript{336} the court held that, "in the context of a strict liability claim, whether a product is 'unreasonably dangerous.'"\textsuperscript{337} "[P]ractical reality" dictates that this inquiry be a jury question:

\begin{quote}
[T]rial courts simply do not necessarily have the expertise to conduct the social policy inquiry into the risks and utilities of a plethora of products and to decide, as a matter of law, whether a product is unreasonably dangerous except perhaps in the most obvious of cases.\textsuperscript{338}
\end{quote}

The peculiar Azzarello division of labor was "undesirable" because it "encourage[d] trial courts to make either uninformed or unfounded decisions of social policy."\textsuperscript{339}

As discussed, Azzarello removed the "unreasonably dangerous" aspect of Section 402A from the jury because it "rings of negligence."\textsuperscript{340} In overruling Azzarello on this point,\textsuperscript{341} Tincher repudiated that outdated California approach, viewing the decision both "distinguishable" and no longer the law even in

\begin{quote}
declare public policy is limited. In our judicial system, the power of courts to formulate pronouncements of public policy is sharply restricted; otherwise they would become judicial legislatures[.]" Id. at 670, 99 A.3d at 72 (citation and quotation marks omitted).
\end{quote}

\textsuperscript{335} Tincher, 628 Pa. at 382, 104 A.3d at 380.
\textsuperscript{336} Id. at 375-76, 104 A.3d at 376.
\textsuperscript{337} Id. at 382-83, 104 A.3d 328, 380.
\textsuperscript{338} Id. at 383, 104 A.3d at 380.
\textsuperscript{339} Id. at 384, 104 A.3d at 381.
\textsuperscript{341} Azzarello's "broad pronouncement" following Cronin was "not require[d]" and exceeded "appropriate judicial modesty." Tincher, 628 Pa. at 378, 104 A.3d at 377.
Thereafter, "Pennsylvania, unfortunately, did not adjust its jurisprudence in light of these developments that eroded Azzarello's underpinnings."\textsuperscript{343} Tincher, therefore, restored the "unreasonably dangerous" analysis to jury consideration, explaining that "[t]he words 'unreasonably dangerous' [in Section 402A] limit liability and signal that a seller is not an insurer but a guarantor of the product."\textsuperscript{344} Later, Tincher reiterated that "the notion of 'defective condition unreasonably dangerous' is the normative principle of the strict liability cause of action."\textsuperscript{345}

[In a jurisdiction following the Second Restatement formulation of strict liability in tort, the critical inquiry in affixing liability is whether a product is "defective"; in the context of a strict liability claim, whether a product is defective depends upon whether that product is "unreasonably dangerous."\textsuperscript{346}

Tincher also eliminated the unintended consequence of the Azzarello "threshold" determination – a procedural posture demanding that facts be viewed "in the light most favorable to [the plaintiff]" in deciding if claimed defects were "unreasonably dangerous."\textsuperscript{347} Instead, Tincher held that "Pennsylvania does not presume a product to be defective until proven otherwise" and "assign[s] the burden of proof in a strict liability case to the plaintiff."\textsuperscript{348} Whether a defect renders a product "unreasonably dangerous" is once again – as it was prior to Azzarello/Berkebile\textsuperscript{349} – an element of strict liability that plaintiffs must prove.

\textsuperscript{342} Tincher, 628 Pa. at 379, 104 A.3d at 378 ("Azzarello was distinguishable from Cronin on the facts."); id. ("[T]he rationale of the decision [Cronin] was explained as significantly narrower by latter California Supreme Court decisional law.").

\textsuperscript{343} Id.

\textsuperscript{344} Id. at 361, 104 A.3d at 367.

\textsuperscript{345} Id. at 416, 104 A.3d at 400.

\textsuperscript{346} Id. at 382-83, 104 A.3d at 380.


\textsuperscript{348} Tincher, 628 Pa. at 431, 104 A.3d at 409.

\textsuperscript{349} \textit{See} Forry v. Gulf Oil Corp., 428 Pa. 334, 340, 237 A.2d 593, 597 (1968); \textit{see also supra} note 16 and accompanying text.
B. Eliminating the Strict Separation of Negligence from Strict Liability

Tincher rejected not only Azzarello's result, but also its reasoning. Tincher thus abrogated the Azzarello-inspired strict dichotomy – Walton’s "theoretical dam"—between strict liability and negligence concepts.

Subsequent decisional law has applied Azzarello broadly, to the point of directing that negligence concepts have no place in Pennsylvania strict liability doctrine; and, as we explain, those decisions essentially led to puzzling trial directives that the bench and bar understandably have had difficulty following.351

Far from being separate, "strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty."352 Tincher totally rejected the proposition that "negligence concepts" could only "confuse" juries.

[A] strict reading of Azzarello is undesirable . . . . Subsequent application of Azzarello elevated the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative, whose merits were not examined to determine whether such a bright-line rule was consistent with reason . . . . [T]he effect of the per se rule that negligence rhetoric and concepts were to be eliminated from strict liability law was to validate the suggestion that the cause of action, so shaped, was not viable.353

Contrary to Azzarello, risk/utility analysis that provides juries the "opportunity to analyze post hoc whether a manufacturer's conduct in manufacturing or designing a product was reasonable . . . obviously reflect[ ] the negligence roots of strict liability."354 The relationship between negligence and strict liability envisioned in Tincher thus approximates that advocated by the dissenters in Bugosh – that strict liability should be "tempered, in design and warning cases, with the legitimate involvement of notions of foreseeability and reasonableness within the purview of the fact finder."355

350 See Walton v. Avco Corp. 530 Pa. 568, 584, 610 A.2d 454, 462 (1992) and supra text note 151 and accompanying text.
351 Tincher, 628 Pa. at 376, 104 A.3d at 376.
352 Id. at 418, 104 A.3d at 401.
353 Id. at 384, 104 A.3d at 380-81.
354 Id. at 398, 104 A.3d at 389 (citations omitted).
355 Id. at 373, 104 A.3d at 374 (quoting Bugosh v. I.U. N. Am., Inc., 601 Pa. 277, 297, 971 A.2d 1228, 1240 (2009) (Saylor, J., dissenting) (citation and quotation marks omitted)); see also supra note 282 and accompanying text.
C. Rejecting the Strict Liability Jury Instruction Required by Azzarello

The justices in Tincher condemned the jury instruction that Azzarello had mandated be given in all strict liability trials. Azzarello's decision to "approve[e] jury instructions in strict liability cases generally" only "compound[ed] the problem."356 Tincher quoted the Azzarello jury instruction,357 and criticized it harshly – on both its "guarantor" and "any element" aspects. As to the former, Tincher held that Azzarello erroneously "fill[ed] the legal void" caused by taking the "unreasonably dangerous" inquiry from the jury by pronouncing that a manufacturer "is a guarantor" of its product.358 The "guarantor" language was "impracticable" for leaving the jury with an unexplained legal "term[] of art":

The greater difficulty is that the Azzarello standard is impracticable. As an illustration of its new standard's application, the Azzarello Court offered that a supplier is not an insurer of a product, although it is a guarantor; these terms of art, with no further explanation of their practical import . . . .359

As to the latter, Tincher also rejected the "every element" standard for determining defect. That language had been taken "out of context," and "the endorsed jury charge significantly altered the import of the Berkebile passage."360 The court reiterated its "particular concern" with "the possibility that words or phrases or sentences may be taken out of context and treated as doctrines."361 Overall, the Azzarello-mandated jury instruction "perpetuated jury confusion in future strict liability cases, rather than dissipating it," because

356 Tincher, 628 Pa. at 380, 104 A.3d at 378-79.
357 Id. at 361, 104 A.3d at 367 ("the seller is the 'guarantor' of the product, and a jury could find a defect 'where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use'") (quoting Azzarello v. Black Bros. Co., Inc., 480 Pa. 557, 559, 391 A.2d 1020, 1027 (1978)).
358 Id. at 382, 104 A.3d at 379.
359 Id. at 358, 104 A.3d at 365 (quoting Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 100, 337 A.2d 893, 902 (1975)). Even if a manufacturer remains a product "guarantor" in some metaphysical sense, see Bugay, supra note 107, Tincher decisively removed the term from jury instructions.
360 Tincher, 628 Pa. at 381, 104 A.3d at 379. See id. at 358, 104 A.3d at 365 ("every element" language in Berkebile concerned "warnings," and had been quoted "out of context by the majority in Azzarello as the standard of proof in a strict liability action").
it "conflated a determination of the facts and its related yet distinct conceptual underpinnings." Azzarello's required jury instruction had a profoundly deleterious effect on Pennsylvania law for over three decades:

Predictably, the "approval" of such jury instructions operated to discourage the exercise of judicial discretion in charging the jury, including in [this] case, and likely stunted the development of the common law in this area from proceeding in a more logical, experience-based and reason-bound fashion.363

In accordance with its criticism of Azzarello, Tincher imposed no "rigid" jury charge to replace Azzarello's mistake.364 This exercise of "judicial modesty," however, did not mean leaving juries without guidance. While not imposing particular phraseology, Tincher leaves no doubt that juries must be charged on the unreasonably dangerous element of Section 402A – as an aspect of strict liability's "normative principle" in design defect cases.365

"The crucial role of the trial court is to prepare a jury charge that explicates the meaning of 'defective condition' within the boundaries of the law."366 Because the jury is now to decide whether defects render product designs "unreasonably


363 Tincher, 628 Pa. at 318-82, 104 A.3d at 379 (record citation omitted).
364 Id. at 429, 104 A.3d at 408.
365 Id. at 426, 104 A.3d at 406.
366 Id. at 415, 104 A.3d at 400.
367 Id. at 428, 104 A.3d at 408.
dangerous, some instruction on "unreasonable" product risks must now be given. "Where evidence supports a party-requested instruction on a theory or defense, a charge on the theory or defense is warranted."

\[368\] See Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978); see also supra notes 336-49 and accompanying text.

\[369\] See Tincher, 628 Pa. at 428, 104 A.3d at 408; see also Commonwealth v. Markman, 591 Pa. 249, 284, 916 A.2d 586, 607 (2007) ("a trial court may not refuse to charge the jury" on any theory or defense where it "is supported by evidence in the record") (citation and quotation marks omitted).

D. Replacing Azzarello with a Two-Part Standard for Proof of Unreasonably Dangerous Defect

*Tincher* replaced Azzarello's idiosyncratic approach to design defect with a two-part "composite" standard, for determining when such defects create unreasonably dangerous products. This standard "requires proof, in the alternative, either of the ordinary consumer's expectations or of the risk-utility of a product." Under the consumer expectation approach, the plaintiff must prove that "the danger is unknowable and unacceptable to the average or ordinary consumer." Under the risk-utility approach, the plaintiff must prove that "a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions."

This "composite" standard incorporated aspects of both the risk/utility rule contained in the Third Restatement and the consumer expectation approach found in Restatment Second Section 402A.

The combined standard, which states consumer expectations and risk-utility tests in the alternative, retains the features of each test, in practice, offering the parties a composite of the most workable features of both tests.

In describing the two approaches to design defect, *Tincher* discussed not only their strong points, but also their weaknesses.

\[370\] *Tincher*, 628 Pa. at 417-19, 104 A.3d at 401-02.

\[371\] Id. at 417, 104 A.3d at 401.

\[372\] Id. at 309, 104 A.3d at 335; see id. at 394, 104 A.3d at 387.

\[373\] Id. at 309, 104 A.3d at 335; see id. at 397-98, 104 A.3d at 389 (citation and quotation marks omitted).

\[374\] See *RESTATEMENT (SECOND) OF TORTS* § 402A, comment i (AM. LAW INST. 1965).

\[375\] *Tincher*, 628 Pa. at 401, 104 A.3d at 391 (citations omitted).
Under Tincher's consumer expectation approach, "[t]he nature of the product, the identity of the user, the product's intended use and intended user, and any express or implied representations by a manufacturer or other seller are among considerations relevant."\(^{376}\) This approach "reflects the warranty law roots of strict liability" and "shifts responsibility for protecting the user to the manufacturer."\(^{377}\) "Limitations" of the consumer expectation approach discussed in Tincher are: (1) "obvious" or "contemplate[d]" dangers would be "exempt from strict liability"; and (2) the analysis becomes "arbitrary" if applied to "complex" products "whose danger is vague or outside the ordinary consumer's contemplation."\(^{378}\)

"Risk/utility" is "a test balancing risks and utilities or, stated in economic terms, a cost-benefit analysis."\(^{379}\) Thus, "[t]he risk-utility test offers courts an opportunity to analyze post hoc whether a manufacturer's conduct in manufacturing or designing a product was reasonable, which obviously reflects the negligence roots of strict liability."\(^{380}\) In "other jurisdictions," the seven "factors" listed by Dean Wade as "relevant to the manufacturer's risk-utility calculus" have been "generally cited favorably."\(^{381}\) "[S]hortcomings" of the risk/utility approach are: (1) "not be[ing] immediately responsive in the (typical) case implicating allegations relating to a particular design feature," and (2) "in some respects, it conflicts with bedrock moral intuitions regarding justice in determining proper compensation."\(^{382}\)

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\(^{376}\) Tincher, 628 Pa. at 394-95, 104 A.3d at 387 (citing, inter alia, RESTATEMENT (SECOND) OF TORTS § 402A, cmt. i (AM. LAW. INST. 1965)).

\(^{377}\) Id. at 395, 104 A.3d at 388-89 (quoting OWEN Hornbook, supra note 3, § 5.6 at 303).

\(^{378}\) Id. at 396, 104 A.3d at 388. As to "complex" products, Tincher offered "guidance" that "the consumer expectations test is reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions," and therefore expert testimony "may not be used to demonstrate what an ordinary consumer would or should expect." Id. at 403, 104 A.3d at 392 (quoting Soule v. Gen. Motors Corp., 8 Cal.4th 548, 567, 34 Cal. Rptr. 2d 607, 617, 882 P.2d 298, 308 (1994)). Such expert testimony would "invade the jury's function." Id.

\(^{379}\) Id. at 397, 104 A.3d at 389 (citing OWEN Hornbook, supra note 3, § 5.7).

\(^{380}\) Id. at 398, 104 A.3d at 389 (citations omitted).

\(^{381}\) Id. Tincher went on to quote in full the seven Wade factors. Id. at 398-99, 104 A.3d at 389-90. See supra note 107 and accompanying text. The Supreme Court of Pennsylvania did not fully endorse these factors, however, as not all would necessarily apply, depending on the "allegations relating to a particular design feature." Tincher, 628 Pa. at 399, 104 A.3d at 390.

\(^{382}\) Tincher, 628 Pa. at 399, 104 A.3d at 389 (citing OWEN Hornbook, supra note 3, § 5.7 at 315-16).
In practice, under Tincher's composite, two-pronged defect standard, the plaintiff initially picks which approach, or both, s/he will pursue, as "master of the claim in the first instance." In the event of "overreaching by the plaintiff," "[a] defendant may also seek to have dismissed" either approach by "appropriate motion." In any given case, Tincher acknowledged that "the theory of strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty," so that the composite standard reflects this "duality of purpose." Manufacturers typically "engage[] in a risk-utility calculus" indicative of negligence, whereas intermediate sellers "implicitly represent[]" that their products are "not in a defective condition unreasonably dangerous" analogously to a warranty.

E. Declining To Replace the "Broad" Azzarello Regime with Equally Broad Third Restatement Principles

In crafting this "properly calibrated" form of strict liability under Restatement Second Section 402A, Tincher conversely refused to go as far as adopting the design defect approach of the Third Restatement of Torts. Cognizant of the errors of Azzarello – and, indeed, of the entire "first decade" of strict liability, Tincher displayed "modesty" in its approach to revamping Azzarello's legacy. The justices in Tincher initially appealed to Pennsylvania lawmakers for "comprehensive legislative reform" that "address[ed] this arena of substantive law." Until that happened, the court was not keen to jump directly from the failed "broad holding[s]" of Azzarello to the second set of product liability "principles of broad application" represented by the Third Restatement.

[O]ur reticence respecting broad approval of the Third Restatement is separately explainable by looking no further than to the aftermath of Azzarello, whose negligence rhetoric-related doctrinal proscription

383 Tincher, 628 Pa. at 426, 104 A.3d at 406.
384 Id. at 427, 104 A.3d at 407.
385 Id. at 418-19, 104 A.3d at 401-02 (emphasis in original).
386 Id. at 420, 104 A.3d at 402-03 (citation omitted).
387 Id. at 415, 104 A.3d at 399.
388 Id. at 359, 104 A.3d at 365. Tincher described Pennsylvania product liability jurisprudence beginning with Webb I, 422 Pa. 424, 220 A.2d 853 (1966); see supra notes 7-11 and accompanying text.
389 Tincher, 628 Pa. at 426, 104 A.3d at 406.
390 Id. at 384, 104 A.3d at 381.
391 Id. at 376, 104 A.3d at 376.
392 Id. at 409, 104 A.3d at 396.
arising from a peculiar set of circumstances had long-term deleterious effects on the development of strict liability law in Pennsylvania.\textsuperscript{393}

It was preferable "to permit the common law to develop incrementally."\textsuperscript{394} Tincher recognized that an "alternative design" was "relevant and even highly probative" in design defect litigation and acknowledged that in the "typical case . . . evidence of an alternative product design is the most persuasive and efficient means of convincing the trier of fact."\textsuperscript{395} But the Third Restatement's black letter that alternative design was an essential element of all design defect cases was "problematic" as an "extrapolation[] from evidence relevant in the typical case" to the whole of product liability.\textsuperscript{396} This element was also viewed as undesirably seeking to "anoint special 'winners' and 'losers' among those who engage in the same type of conduct."\textsuperscript{397} "The Third Restatement approach presumes too much certainty about the range of circumstances, factual or otherwise, to which the 'general rule' articulated should apply."\textsuperscript{398}

The area of strict liability law remains complex and our decision here does not purport to foresee and account for the myriad implications or potential pitfalls as yet unarticulated or unappreciated . . . . "[B]right lines and broad rules always offer a superficially enticing option. However, we cannot elevate the lull of simplicity over the balancing of interests embodied by the principles underpinning . . . the relevant area of law."\textsuperscript{399}

Thus, the majority in Tincher\textsuperscript{400} concluded "that the Third Restatement does not offer an articulation of the law sufficient to persuade us to simply abandon the Second Restatement formulation of the strict products liability cause of action."\textsuperscript{401}

However, this decision not to adopt the Third Restatement was not a blanket rejection of everything in it. Rather, Tincher recognized that a "typical"

\textsuperscript{393} Tincher, 628 Pa. at 414, A.3d at 399.
\textsuperscript{394} Id. at 426, 104 A.3d at 406.
\textsuperscript{395} Id. at 411, 104 A.3d at 399.
\textsuperscript{396} Id.
\textsuperscript{397} Id. at 409, 104 A.3d at 396.
\textsuperscript{398} Id. at 413, 104 A.3d at 398.
\textsuperscript{399} Tincher, 628 Pa. at 425, 104 A.3d at 406 (quoting Scampone v. Highland Park Care Center, LLC., 618 Pa. 363, 390-91, 57 A.3d 582, 598 (2012)). See id. at 414, 104 A.3d at 399 (repeating same quotation).
\textsuperscript{400} On the Third Restatement issue, Justices Saylor and Eaken dissented. See id. at 433-34, 104 A.3d at 410-11 (Saylor, J., concurring & dissenting).
\textsuperscript{401} Id. at 415, 104 A.3d at 399.
design defect case – including the claim before it on appeal – against a product manufacturer ordinarily alleges foreseeable risks, as do negligence actions, and thus is similar to the "alternative design" approach favored by the Third Restatement:

[This] claim was essentially premised upon the allegation that the risk of harm related to [the product's design] was both foreseeable and avoidable . . . . These allegations, at least, bear the indicia of negligence. Indeed, in some respects this is the "typical" case, which explains both the insight that in design cases, the character of the product and the conduct of the manufacturer are largely inseparable, and the Third Restatement's approach of requiring an alternative design as part of the standard of proof.402

The decision not to "move to" the Third Restatement was more a function of awareness that 'courts do not try the 'typical' products case exclusively," than of disagreement with the Third Restatement's positions in most product liability litigation.403 Resolution of this question has, however, closed the unseemly split between federal and state-court jurisprudence opened by the Third Circuit in Berrier.404

F. Leaving Open "Related" and "Subsidiary" Issues.

Due to the presence of a negligence claim in Tincher405 the evidentiary impact of the Azzarello negligence/strict liability dichotomy was not presented.406 Nor were a number of other issues implicated by the overruling of Azzarello and the replacement of its doctrinal dichotomy with Tincher's "composite" standard for defectiveness. These undecided issues included:

foundational issues regarding manufacturing or warning claims, and . . . subsidiary issues constructed from Azzarello, such as the

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402 Tincher, 628 Pa. at 424, 104 A.3d at 405 (case-specific facts omitted) (citing, inter alia, the concurring opinion in Phillips II, 576 Pa. 644, 664, 841 A.2d 1000, 1012 (2003) (Saylor, J., concurring)).
403 Id. at 425, 104 A.3d at 405.
404 See supra notes 287-89 and accompanying text; see also Bugay, supra note 107.
405 Tincher, 628 Pa. At 316, A.3d at 340.
availability of negligence-derived defenses, bystander compensation, or the proper application of the intended use doctrine.\(^{407}\)

"These considerations and effects are outside the scope of the facts of this dispute, and . . . have not been briefed by [the parties]."\(^{408}\) Early on, however, the Tincher decision "underscore[d] the importance of avoiding formulaic reading of common law principles and wooden application of abstract principles."\(^{409}\)

Tincher discussed at some length the court's prior decisions that had applied Azzarello's negligence-strict liability dichotomy to restrict the admission of certain evidence as introducing "negligence concepts" to strict liability.\(^{410}\) Tincher, however, expressly declined either to reaffirm or to overrule these decisions. Instead, the court explicitly left these questions open:

This Opinion does not purport to either approve or disapprove prior decisional law, or available alternatives suggested by commentators or the Restatements, relating to foundational or subsidiary considerations and consequences of our explicit holdings.\(^{411}\)

Instead, "[t]he common law regarding these related considerations should develop within the proper factual contexts against the background of targeted advocacy."\(^{412}\)

\(^{407}\) Tincher, 628 Pa. at 431-32, 104 A.3d at 409.


\(^{409}\) Tincher, 628 Pa. at 341, 104 A.3d at 355 (citation and quotation marks omitted).

\(^{410}\) Id. at 362-65, 104 A.3d at 367-70 (discussing Lewis, see supra notes 120-29 and accompanying text, and Kimco). Lewis, in particular, was based on "a proposition in harmony with the Azzarello decision" – the irrelevance of "negligence concept[s]." Id. at 363, 104 A.3d at 368.

\(^{411}\) Tincher, 628 Pa. at 432, 104 A.3d at 410.

\(^{412}\) Id.
G. Avoiding Any Special Retroactivity Rule

Having decided that Pennsylvania would continue to follow Restatement Section 402A, the justices in Tincher did "not reach the question of retroactive or prospective application" of the decision.\footnote{Tincher, 628 Pa. at 432, 104 A.3d at 410.} In Pennsylvania, "the general rule is that all decisions are to be applied retroactively."\footnote{Commonwealth v. Gray, 509 Pa. 476, 486, 503 A.2d 921, 926 (1985). Accord, e.g., Blackwell v. Commw., State Ethics Comm'n, 527 Pa. 172, 182, 589 A.2d 1094, 1099 (1991); McHugh v. Litvin, Blumberg, Matusow & Young, 525 Pa. 1, 10-11, 574 A.2d 1040, 1044-45 (1990).} Prospective application is appropriate only where a decision involves "an issue of first impression not clearly foreshadowed by precedent,"\footnote{Fiore v. White, 562 Pa. 634, 643, 757 A.2d 842, 847 (2000).} which was plainly not the case in Tincher, since reconsideration of Azzarello had been high on the Pennsylvania Supreme Court's agenda for over a decade since Phillips II was decided in 2003.\footnote{See supra Part I(E).}


III. EVOLUTION OF STRICT LIABILITY IN PENNSYLVANIA FOLLOWING TINCHER

As discussed, Tincher: (1) overruled Azzarello, (2) restored the "unreasonably dangerous" element of the defect inquiry to the jury; (3)
eliminated the doctrinal wall between negligence and strict liability; (4) rejected the previously mandatory "guarantor"/"every element" jury instruction as impractical and confusing, and (5) replaced the Azzarello defect standard with a "composite" standard incorporating risk/utility and consumer expectation alternatives. In addition, Tincher declined: (1) to replace Azzarello with the Third Restatement of Torts, or (2) to decide the validity of Azzarello-era precedent involving a variety of "related" and "subsidiary" issues.

Thus, Tincher "significantly altered the common law framework for strict products liability claims in Pennsylvania." 420 "Tincher will affect every stage of future products liability cases." 421 "Even a cursory reading of Tincher belies the argument" that is merely "overruled Azzarello but did little else." 422 Taking into consideration the legal principles applied in Tincher, Pennsylvania product liability precedent before and after the Azzarello negligence/strict liability dichotomy, and relevant authorities relied upon in Tincher, it is possible to make educated predictions about how some of these issues should be resolved.

A. Post-Tincher Jury Instruction on "Unreasonably Dangerous" Defect

The Section 402A element of "unreasonably dangerous" defect was characterized in Tincher as "the normative principle of the strict liability cause of action," so that "whether a product is defective depends upon whether that product is "unreasonably dangerous." 423 After Tincher, a determination that the product was in an "unreasonably dangerous" condition "is part and parcel of whether the product is, in fact, defective." 424 A trial court has "broad discretion" in "choos[ing] its own wording," but "[w]here evidence supports a party-requested instruction . . ., a charge on the theory or defense is warranted." 425 "[T]he jury must be afforded an opportunity to make a finding" on all material elements. 426

Prior to Azzarello, proof that "the defective condition was unreasonably dangerous" was one of four recognized elements of strict liability, along with

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421 Webb II, 148 A.3d at 483.
423 See supra notes 345-46 and accompanying text.
424 Amato, 116 A.3d at 620.
defect itself, defect at sale, and causation,\(^{427}\) and courts approved numerous jury instructions that so stated.\(^{428}\) With Azzarello overruled, these earlier jury instructions again become models for how post-Tincher courts may proceed.\(^{429}\)

In jurisdictions following Restatement Section 402A, standard jury instructions typically require a finding that a "defect" made the product "unreasonably dangerous" as a prerequisite to liability.\(^{430}\) In Connecticut, where the state's highest court recently followed Tincher adopting a nearly identical composite defect standard rather than the Third Restatement,\(^{431}\) the defect determination remains firmly linked to an "unreasonably dangerous" condition in the product. Connecticut judges instruct their juries that, "In order to prove that the product was defective, the plaintiff must prove that the condition that is claimed to be a defect made the product unreasonably dangerous."\(^{432}\) This language is as good as any.

In light of Tincher and significant post-Tincher Pennsylvania precedent, the Pennsylvania Bar Institute's 2016 suggested standard instructions\(^{433}\) on design defect are difficult to defend. First, unlike any other state following Restatement Section 402A, these instructions nowhere inform a jury of the "unreasonably dangerous" element of design defect that – after expressly returning this element to the jury – Tincher reiterated was both the "normative principle" of strict liability and the issue on which the defect analysis


\(^{428}\) Bialek v. Pittsburgh Brewing Co., 430 Pa. 176, 242 A.2d 231 (1968); see supra note 18 and accompanying text.

\(^{429}\) See Bugay, supra note 107 (Tincher brought about a "return [of] Pennsylvania products liability law to the year 1978").

\(^{430}\) Arizona: RAJI (Civil) PLI 3; Arkansas: AMJI Civ. 1017; Colorado: CJICiv. 14:3; Florida: FSJI (Civ.) 403.7(b); Illinois: IPJI-Civ. 400.06; Indiana: IN-JICIV 2117; Kansas: KS-PKCI 128.17; Louisiana: La. CJ 11:2; Maryland: MPJI-Cv 26:12; Massachusetts: CIVJI MA 11.3.1; Minnesota: 4A MPJI-Civ. 75.20; Mississippi: MMJI Civ. § 16.2.7; Missouri: MAJI (Civ.) 25.04; Nebraska: NJI2d Civ. 11.24; Oklahoma: OUJI-CIV 12.3; Oregon: UCJI No. 48.07; Tennessee: TPI-Civ. 10.01; Virginia: VPJI § 39:15 (implied warranty).


\(^{432}\) Bifolck v. Philip Morris, Inc., 324 Conn. 402, 416-17, 438, 152 A.3d 1183, 1192-93, 1204 (2016).

\(^{433}\) See Conn. Civ. JI § 3.10-1 Product Liability ("Existence of a Defect") (cited in Bifolck, 324 Conn. at 438, 152 A.3d 1183, 1204).

\(^{434}\) Pennsylvania Suggested Standard Civil Jury Instructions, 4th ed. (PBI 2016) [hereinafter SSJI or SSJI (Civ.)].
"depends."\textsuperscript{434} Equally inexplicably, SSJI Section 16.10 retains the \textit{Azzarello} "element"-based approach to defect,\textsuperscript{435} despite \textit{Tincher}'s rejection of that language as "impracticable," "out of context," and "perpetuat[ing] jury confusion."\textsuperscript{436}

Indeed, the SSJI commentary proceeds as if \textit{Tincher} did not overrule \textit{Azzarello}:

In this regard, \textit{Tincher} and \textit{Azzarello} are consistent in holding that while the phrase "unreasonably dangerous" is useful to the court to determine if the facts justify a strict liability claim, the phrase "has no place in the instructions to a jury as to the question of 'defect.'"\textsuperscript{437}

\textit{Tincher}, however, does not support the quoted "no place" proposition – that language is found nowhere in \textit{Tincher} and exists solely in the overruled \textit{Azzarello} opinion.\textsuperscript{438} Such a "no place" statement itself has no place in post-\textit{Tincher} jurisprudence.\textsuperscript{439}

It also has no place in post-\textit{Tincher} precedent. Every precedential post-\textit{Tincher} Superior Court decision addressing the issue has held that "a plaintiff must prove that the [claimed defect] rendered the product unreasonably dangerous."\textsuperscript{440} "[W]hether a product is in a defective condition unreasonably dangerous to the consumer is a question of fact that should generally be reserved for the factfinder."\textsuperscript{441} Likewise, "the question of whether a product is


\textsuperscript{435} "A product is defective . . . if you find that: 1. . . . [i]t lacked any element necessary to make it safe . . . , or contained any condition that made it unsafe . . . " Pa. SSJI (Civ.) § 16.10 ("General Rule of Strict Liability").

\textsuperscript{436} \textit{See supra} notes 360-61, 363 and accompanying text; \textit{accord} High v. Pa. Supply, Inc., 154 A.3d 341, 347 (Pa. Super. Ct. 2017) (\textit{Azzarello} standard was "confusing and impracticable, and incompatible with the basic principles of strict liability") (\textit{Tincher} citations omitted).

\textsuperscript{437} Pa. SSJI (Civ.) § 16.10, Subcommittee Note (2016).


\textsuperscript{441} High v. Pa. Supply, Inc., 154 A.3d 341, 347 (Pa. Super. Ct. 2017). \textit{See id.} (quoting \textsc{Restatement (Second) Of Torts} § 402A, cmt. i (\textsc{Am. Law. Inst.} 1965)) (consumer expectation test "applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer").
unreasonably dangerous is one for the fact finder." Since Tincher was decided, courts applying Pennsylvania law have repeatedly recognized that juries now decide the Section 402A element of a "defective condition unreasonably dangerous" to the product's user.


The SSJI commentary also states, "[i]t would be erroneous to view Tincher as a reinsertion of negligence principles into claims under section 402A of the Restatement (Second) of Torts." Again, such a statement cannot be squared with Tincher itself. Strict liability "overlaps" both "negligence and breach of warranty." As already discussed at length, Tincher viewed the previous negligence/strict liability dichotomy as "puzzling" and "undesirable." In particular, the risk/utility approach to proving is "indicative of negligence," analyzed manufacturer "conduct," and "obviously reflects the negligence roots of strict liability." Thus, "[t]hroughout its Tincher opinion, the Supreme Court noted that the risk-utility test is derived from negligence principles."

The 2016 SSJI were not approved by any court and received no judicial oversight. With good reason, these "suggested" instructions are just that. "[A]s their title suggests, the instructions are guides only." They are "not binding" and courts may "ignore them entirely." Use of an erroneous SSJI can be reversible error. These particular proposals were prepared by a tiny subcommittee that met secretly, sought no public input before releasing the SSJI, and ignored the adverse commentary it later received. In this instance, the conclusion is unavoidable that the SSJI erroneously discounted the "significant" changes Tincher made to Pennsylvania product liability doctrine.

to the consumer" (quoting Tincher)); see also Renninger, 2015 WL 13238603, at *5 (supplementing charge with seven Wade factors).

444 Pa SSJI (Civ.) § 16.10, Subcommittee Note (2016).
445 Tincher, 628 Pa. at 418-19, 104 A.3d at 401-02.
446 See supra notes 351-53 and accompanying text (particularly Part 2B).
447 Tincher, 628 Pa. at 398, 420, 104 A.3d at 389, 402-03 (citations omitted).
453 See William J. Ricci, Pennsylvania Supreme Court Overrules Azzarello in Landmark Tincher Decision, Only To Have Suggested Jury Instructions Seek Azzarello's Reinstatement, PA. DEF. INSTR., 1 COUNTERPOINT 1, 1-3 (Feb. 2017).
B. Tincher's Impact on Warning and Manufacturing Defect Claims

Tincher involved only design defect claims, but in closing the court reminded the "bench and bar" that the overruling of Azzarello "may have an impact upon . . . manufacturing or warning claims."454

Beyond its abolition of the Azzarello "guarantor"/"any element" jury instruction, Tincher's impact on manufacturing defect claims is likely to be minimal.455 Manufacturing defects involve products that fail to meet their manufacturer's own production standards.456 Because such defects were never supposed to exist, manufacturing defect claims do not implicate a manufacturer's design or warnings. Application of strict liability to manufacturing defects is not problematic, as has been the case with designs and warnings.457 There is no indication that Tincher will "materially alter[] the approach courts should take when confronting manufacturing defect claims."458

Warning defect cases, like design claims, involve intended attributes of the product and thus are more heavily impacted by Tincher's changes to product liability jurisprudence. While Azzarello (like Tincher) did not involve any warning-related claim,459 warnings were often viewed as a "subcategory" of design defect.460 Over time, all of Azzarello's major strict liability propositions were eventually applied to warning cases.461

455 To the extent that the Azzarello threshold "unreasonably dangerous" determination applied to manufacturing defect cases, Lancenese v. Vanderlans & Sons, Inc., 2007 WL 1521121, at *2-3 (E.D. Pa. May 21, 2007), it likewise would not survive Tincher.
456 E.g., Dalton v. McCourt Elec. LLC, 117 F. Supp. 3d 692, 697 (E.D. Pa. 2015) (a manufacturing defect is where "the product departs from its intended design even though all possible care was exercised").
457 Bugosh v. I.U. N. Am., Inc., 971 A.2d 1228, 1234, 601 Pa. 277, 289 (2009) ("application of strict liability in design and warning cases was far more problematic than in the manufacturing-defect paradigm") (Castille, J., dissenting).
458 Dalton, 117 F. Supp. 3d at 698.
459 Azzarello v. Black Bros. Co., Inc., 480 Pa. 547, 559 n.11, 391 A.2d 1020, 1027 n.11 (1978). However, one of Azzarello's examples of "social policy" questions that judges, rather than juries, should decide was "[s]hould adequate warnings of the dangerous propensities of an article insulate" a manufacturer from liability. Id. at 558, 391 A.2d at 1026.
Thus, in *Amato v. Bell & Gossett*, the Superior Court held that *Tincher* "provided something of a road map" for navigating the broader world of post-*Azzarello* strict liability law in an asbestos warning case. The Supreme Court of Pennsylvania granted an appeal in *Amato* on this issue, but then dismissed that appeal as improvidently granted, leaving the Superior Court's decision intact. Other courts have likewise applied *Tincher* to warning claims. Thus, for strict liability to lie after *Tincher*, a product must be "unreasonably dangerous" without an improved warning.

("[t]he claim of 'failure to warn' is a subset of defective design . . . [and] [t]o succeed on a claim of inadequate or lack of warning, a plaintiff must prove that the lack of warning rendered the product unreasonably dangerous") (citation omitted).


Almost certainly, Tincher's new, negligence-influenced standards will apply to warning cases. The "Owen Hornbook," from which Tincher drew heavily, states, with respect to warning claims:

Since the 1980s, there has been a significant resurgence in negligence reasoning in product liability law . . . . As has been pointed out for many years, claims for warning defects in negligence and strict liability in tort are nearly, or entirely, identical.\(^{467}\)

"[N]either [design defect] test is especially helpful in distinguishing between dangers that should be warned about, and those that should not."\(^{468}\) Rather, "to be adequate, a warning must provide a reasonable amount and type of information about a product's material risks and how to avoid them."\(^{469}\)

California law, on which Tincher also relied,\(^{470}\) is in accord. In Anderson v. Owens–Corning Fiberglas Corp.,\(^{471}\) the California Supreme Court found reasonableness standards appropriate in strict liability warning cases, while rejecting what had been Azzarello's rationale.\(^{472}\)

[S]trict liability doctrine has incorporated some well-settled rules from the law of negligence and has survived judicial challenges asserting that such incorporation violates the fundamental principles of the doctrine . . . . The "warning defect" relates to a failure extraneous to the product itself. Thus, while a manufacturing or

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\(^{467}\) OWEN Hornbook, supra note 3, § 9.2 at 589 (footnote omitted).

\(^{468}\) Id. § 9.2, at 591 ("both design defect tests point toward liability in every case in which a manufacturer fails to provide meaningful warning").

\(^{469}\) Id. § 9.3, at 595.


\(^{472}\) See supra note 61 and accompanying text (discussing Anderson's rejection of the same California precedent relied on by Azzarello).
design defect can be evaluated without reference to the conduct of the manufacturer, the giving of a warning cannot.\textsuperscript{473}

More recently, the same court reiterated that it "ha[s] repeatedly held that strict products liability law . . . may incorporate negligence concepts without undermining the principles fundamental to a strict liability claim."\textsuperscript{474}

Practical reasons also support extending Tincher to warning cases. First, the Supreme Court of Pennsylvania has treated Section 402A's "unreasonably dangerous" element identically in both warning and design cases and is likely to continue doing so.\textsuperscript{475} Second, warning and design defect claims are routinely tried together, so retaining the Azzarello standard for warning defects after Tincher overruled it in design cases, would require simultaneous application of two incompatible defect standards. It makes no sense for juries to decide the "unreasonably dangerous" issue for design claims (Tincher), while courts make the same determination for warning claims (Mackowick). Likewise, jury confusion would virtually guaranteed should the Azzarello "guarantor"/"any element" defect standard be retained for warning cases after having been abolished in design cases.\textsuperscript{476}


Subsequent decisions recognize that, in Tincher, the Pennsylvania Supreme Court "reject[ed] the blanket notion that 'negligence concepts create confusion in strict liability cases.'"\textsuperscript{477} Azzarello's "strict prohibition on introducing negligence concepts into strict products liability claims is no longer the law in Pennsylvania."\textsuperscript{478} In Tincher, "the Supreme Court rejected the 'per se rule that

\textsuperscript{473} Anderson, 53 Cal.3d at 1002, 281 Cal. Rptr. at 537, 810 P.2d at 558 (citation omitted).


\textsuperscript{475} Phillips I, 542 Pa. 124, 121, 131, 665 A.2d 1167, 1171 (1995) ("[A] plaintiff raising a failure-to-warn claim must establish . . . that the product was sold in a defective condition 'unreasonably dangerous' to the user.").

\textsuperscript{476} \textit{PA. SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS} § 16.30 (Subcomm. Note) (concerning warnings, suggests that Tincher "does not affect the law concerning this charge," and the language of the charge itself appears consistent with Tincher. However, to the extent that this commentary also relies on Azzarello-based "initial legal question" and "negligence concepts have no place" propositions, that commentary is obsolete after Tincher).


negligence rhetoric and concepts were to be eliminated from strict liability law."

As already discussed, the Pennsylvania Supreme Court extended Azzarello's negligence/strict liability dichotomy to bar evidence of industry standards – one form of state-of-the-art evidence – in Lewis, and the Superior Court extended that prohibition to other state-of-the-art evidence, regulatory compliance and unknowable risks. Tincher did not reach this issue, but it did harshly criticize "decisional law has lapsed into an arguably unprincipled formulaic application of rhetoric, threatening to render the strict liability cause of action hopelessly unmoored in modern circumstances." Indeed, the "subsequent application" of what Tincher characterized as "bright-line" or "per se" rules against "negligence rhetoric and concepts" was neither "consistent with reason" nor "viable."


481 See supra notes 115-19, 130-35 and accompanying text.

482 Tincher, 628 Pa. at 432, 104 A.3d at 409.

483 Id. at 380, 104 A.3d at 378.

484 Id. at 384, 104 A.3d at 380-81 (for full quotation, see supra note 331 and accompanying text). In another blow to Lewis, the primary out-of-state precedent that decision relied upon (Lewis, 515 Pa. at 341, 528 A.2d at 593); Lenhardt v. Ford Motor Co., 102 Wash.2d 208, 683 P.2d 1097 (1984), was overruled by statute as to admissibility of industry standards, WASH. REV. CODE § 7.72.050(1), and Soproni v. Polygon Apartment Partners, 137 Wash.2d 319, 328, 971 P.2d 500, 505-06 (1999), then held that "evidence of whether or not a product was in compliance with legislative or administrative regulatory standards is . . . relevant evidence that may be considered by the trier of fact" in strict liability cases.)
Tincher did not specifically identify the "decisional law" subject to this criticism, but Lewis was one of only two instances of "Post-Azzarello Design Defect Jurisprudence" that the opinion discussed.\(^{485}\) Since Tincher, continued exclusion of state-of-the-art evidence has come under sustained attack. In Renninger v. A&R Machine Shop,\(^{486}\) the court affirmed a defense verdict where evidence of both industry standards and regulatory compliance had been admitted at trial, without reaching the merits.\(^{487}\) Pointing out that Tincher had "throughout" recognized "the negligence underpinnings of the risk-utility test" and its being "derived from negligence theory," the Superior Court of Pennsylvania reaffirmed the "far reaching" effects of Tincher on product liability precedent.\(^{488}\) Pre-Tincher decisions "in harmony with Azzarello," such as the Lewis line of cases\(^{489}\) could no longer be treated as binding precedent:

Ordinarily, this Court is bound by Supreme Court precedent, as well as the published decisions of prior en banc and three-judge panels of this Court. In the wake of Tincher, however, the bench and bar must assess the Tincher opinion’s implications for a large body of post-Azzarello and pre-Tincher case law.\(^{490}\)

In Webb II,\(^{491}\) exclusion of regulatory compliance evidence under Lewis escaped primarily by virtue of waiver. The court recognized that Lewis was dependent on the now-overruled negligence/strict liability dichotomy:

Azzarello, with its strict prohibition on introducing negligence concepts into strict products liability claims, is no longer the law in

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\(^{485}\) Tincher, 628 Pa. at 362-65, 104 A.3d at 367-70. The other candidate decision was Kimco Dev. Corp. v. Michael D’s Carpet Outlet, 536 Pa. 1, 637 A.2d 603 (1993). Lewis certainly qualifies for Tincher's description as a post-Azzarello decision that "overstated" the "concern with across-the-board jury confusion" and "elevated the notion that negligence concepts create confusion ... to a doctrinal imperative" without examining whether "formulaic application" of its "bright-line rule" was "consistent with reason." Tincher, 628 Pa. at 378, 380, 384, 104 A.3d at 377-78, 381.


\(^{487}\) The plaintiff in Renninger failed to preserve objections to industry standards evidence, and regulatory compliance (with OSHA standards) involved only a non-party, and thus related only to causation, an issue the jury never reached. Id. at *8, 10.

\(^{488}\) Id. at *7.

\(^{489}\) Id. at *9-10 (discussing Lewis and other cases. See supra notes 128, 134 and accompanying text).

\(^{490}\) Id. at *10.

Pennsylvania. The rule presently at issue – the prohibition of
government or industry standards evidence in a strict products
liability case – clearly has its genesis in the now-defunct Azzarello
regime. The Lewis and Gaudio[492] Courts both relied primarily on
Azzarello to support the preclusion of government or industry
standards evidence, because it introduces negligence concepts into a
strict liability claim.493

Since Tincher did "not purport to either approve or disapprove prior
decisional law,"494 the Superior Court declined to do so in a case tried pre-
Tincher where the defendant had not preserved an Azzarello-based challenge.495
Without preservation, "the overruling of Azzarello" was not a "sufficient basis"
to overturn Lewis and its progeny, and those decisions had certainly been "the
prevailing precedent at the time of trial."496 It was also possible that state-of-the-art
evidence could be admissible under "both" Tincher's design defect
approaches, "one and not the other, or neither."497 Thus, the Superior Court
remanded for a new trial without reaching post-Tincher state-of-the-art
questions.498

Amato touched upon similar issues.499 The defendant claimed it was
"entitled to a 'state-of-the-art' jury instruction," but the Superior Court found the
argument unnecessary, without regard to Lewis, given how the defendant tried
the case.500 Amato also indicated, however, that the defendant would have been
entitled to defend itself on "state-of-the-art" grounds had it relied on that defense
at trial.501 Also since Tincher, the Superior Court has considered expert opinion
about industry standards to be admissible evidence precluding summary

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492 See supra notes 132, 135, 138 and accompanying text.
493 Webb II, 148 A.3d at 482-83.
495 Webb II, 148 A.3d at 483.
496 Id. at 480, 483.
497 Id. at 483.
498 Id.
500 The defendant in Amato took the position that its product "was not
dangerous" at all so that it "ha[d] no need for a 'state-of-the-art' instruction as to
the foreseeability of the risks or the reasonableness of its conduct" where it
claimed no risk existed. Id. at 622-23.
501 Id. at 622 ("[w]here evidence supports a party-requested instruction on a
theory or defense, a charge on the theory or defense is warranted").
judgment.\footnote{502} Reflecting this movement in the Superior Court, more recent post-
\textit{Tincher} trial court decisions have also supported admissibility state-of-the-art
evidence.\footnote{503}

It is likely that \textit{Tincher}'s negligence-influenced approach to strict liability
will eventually result in overturning the \textit{Lewis} line of cases concerning state-of-
the-art evidence. Given that \textit{Tincher} characterized the risk/utility approach as
"reflect[ing] the negligence roots of strict liability" and "analyz[ing] post hoc
whether a manufacturer's conduct . . . was reasonable,"\footnote{504} state of the art
is particularly likely to be admissible in risk/utility cases. In a recent case
discussing negligence, the Pennsylvania Supreme Court specifically held that
"Pennsylvania courts permit[] defendants to adduce evidence of compliance
with governmental regulation in their efforts to demonstrate due care (when
conduct is in issue)."\footnote{505} "Conduct" is now a shared aspect of negligence and
strict liability. Another indicator of admissibility in a strict liability regime
influenced by negligence is federal precedent from the \textit{Berrier} period (2009-14),
which almost unanimously ruled that state-of-the-art evidence was relevant and

2017) (expert compliance testimony relevant to product's "nature" in consumer
expectation approach). \textit{Accord} Morello v. Kenco Toyota Lift, 142 F. Supp. 3d
378, 386 (E.D. Pa. 2015) (expert compliance testimony relevant to alternative
design in risk/utility approach).

\footnote{503} Rapchak v. Haldex Brake Products Corp., 2016 WL 3752908, at *3
(W.D. Pa. July 14, 2016) (the "the principles of Tincher counsel in favor of [the]
admissibility" of compliance with "industry or government standards");
C.P. Clarion Cty. Nov. 3, 2015) ("admission of industry standards as relevant to
the risk-utility standard analysis" was "proper") \textit{aff'd}, 2017 WL 1326515 (Pa.
Super. Ct. Apr. 11, 2017); Sliker v. Nat'l Feeding Sys., Inc., 2015 WL 6735548,
admissible as "particularly relevant to factor (2)" of \textit{Tincher}'s risk/utility
approach); Renninger v. A&R Mach. Shop, 2015 WL 13238604, at *8 (Pa. C.P.
Clarion Cty. Apr. 17, 2015) (after \textit{Tincher}, "the continued vitality of this
prohibition is dubious"; admitting evidence of industry standards and regulatory
compliance). Immediately after \textit{Tincher}, some trial courts were reluctant to
depart from prior law. Morello v. Kenco Toyota Lift, 2015 WL 12844274, at *1

\footnote{504} \textit{Tincher} v. Omega Flex, Inc., 629 Pa. 296, 398, 104 A.3d 328, 389
(2014); \textit{see supra} notes 354, 380 and accompanying text.

\footnote{505} Lance v. Wyeth, 624 Pa. 231, 269, 85 A.3d 434, 456 (2014); \textit{accord}
admissible under the "reasonableness" liability standards of the Third Restatement. 506

State-of-the-art principles are also relevant to Tincher's consumer expectation approach to design defect. As formulated in Tincher, the state of the art – that the product risk in question is "unknowable" to the objective "average or ordinary consumer" – is an essential element of the consumer expectation approach. 507 Unknowability provides the "surprise element of danger" in consumer expectation analysis. 508

The consumer expectation element of unknowability is thus compatible with admission of state-of-the-art evidence. "Under [the consumer expectation test], the evidence of wide use in an industry may be relevant to prove a defect because the evidence is probative, while not conclusive, on the issue of what the consumer can reasonably expect." 509 Since evidence of the product's "nature," its "intended" uses and users, and any product-related "representations" are relevant to the consumer expectation approach, 510 a product's "compli[ance] with industrial ASTM standards" can be an appropriate subject of testimony. 511

As with warnings, 512 other authorities that Tincher found persuasive also support admissibility of state-of-the-art evidence. The California Supreme Court in Barker, a case heavily relied upon in Tincher, 513 found state-of-the-art evidence entirely compatible with strict liability.


508 Tincher, 628 Pa. 394, 104 A.3d at 387 (quoting OWEN Hornbook, supra note 3, § 5.6, at 303).

509 Hicks v. Dana Cos., 984 A.2d 943, 966 (Pa. Super. Ct. 2009) (en banc). Because this approach requires unknowability, state of the art would seem to be an element of the plaintiff's prima facie case.

510 High, 154 A.3d at 350 (quoting Tincher, 628 Pa. at 394-95, 104 A.3d at 387).

511 Id. 350-51 n.5 (expert compliance testimony relevant to product's "nature").

512 See supra Part III(B).

513 See supra note 470 and accompanying text.
Most of the evidentiary matters which may be relevant to the determination of the adequacy of a product's design under the 'risk-benefit' standard e.g., the feasibility and cost of alternative designs are similar to issues typically presented in a negligent design case.\textsuperscript{514}

Likewise, \textit{Anderson} held that "[e]xclusion of state-of-the-art evidence" in warning cases was "not consonant with established principles underlying strict liability."\textsuperscript{515}

The Owen Hornbook also advocates admissibility of state-of-the-art evidence. The \textit{Carrecter} holding excluding evidence that risks were "unknowable"\textsuperscript{516} is a "dwindling idea."\textsuperscript{517} Most cases doing so, like \textit{Carrecter}, are "older" and "the continued viability of [them] may be in doubt."\textsuperscript{518} Evidence of state-of-the-art is relevant to consumer expectation "to determine the expectation of the ordinary consumer," and as to risk/utility:

\textit{[T]he relevance of state-of-the-art evidence in design cases has become increasingly clear. In balancing the costs and benefits of a design feature . . . , the risk-utility test rests on the foreseeability of the risk and the availability of a feasible alternative design.}\textsuperscript{519}

Thus, "the great majority of judicial opinions" take the position that "the practical availability of safety technology . . . is relevant and admissible."\textsuperscript{520} As to industry standards, the \textit{Lewis} blanket inadmissibility rule is "an outmoded holdover from early, misguided efforts to distinguish strict liability from negligence," and a "great majority of courts allow applicable evidence of industry custom."\textsuperscript{521} The Owen Hornbook likewise views compliance with applicable governmental standards as admissible evidence:

\begin{itemize}
  \item \textsuperscript{514} Barker v. Lull Eng’g Co., 20 Cal.3d 413, 431, 143 Cal. Rptr. 225, 237, 573 P.2d 443, 455 (1978).
  \item \textsuperscript{517} OWEN Hornbook, \textit{supra} note 3, § 9.2, at 587.
  \item \textsuperscript{518} \textit{Id.} § 10.4, at 714 (footnote omitted).
  \item \textsuperscript{519} \textit{Id.} at 715 (emphasis in original).
  \item \textsuperscript{520} \textit{Id.} at 717. Only "[a] very small minority of states have refused to abandon the idea that strict liability should . . . impute to manufacturers constructive knowledge of all product dangers, even risks that are entirely unknowable." \textit{Id.} at 729.
  \item \textsuperscript{521} \textit{Id.} § 6.4, at 392-93 (footnote omitted). Industry standards are "some evidence" concerning defect and "does not alone conclusively establish whether a product is defective." \textit{Id.} at 394-95 (footnote omitted). \textit{See id.} § 10.4, at 712 ("[a]n appropriate state-of-the-art definition protects manufacturers who strive to
The rule as to a manufacturer's compliance with a governmental safety standard set forth in a statute or regulation largely mimics the rule on violation: compliance with a regulated safety standard . . . is widely considered proper evidence of a product's nondefectiveness but is not conclusive on that issue.\textsuperscript{522}

Even though admissibility of evidence is not a jury issue, the revisions to the 2016 Pa. SSJI nonetheless address state-of-the-art evidence.\textsuperscript{523} The first part of SSJI Section 16.122 purports to adopt a "presumed knowledge" standard for design defects, and thus to allow liability for unknowable product risks.\textsuperscript{524} This proposition is "essentially a form of the 'Wade-Keeton test," which has never been adopted in Pennsylvania,\textsuperscript{525} and which was criticized in Tincher.\textsuperscript{526} This presumed knowledge instruction is another example of the pro-plaintiff overreach that infects the 2016 amendments to the SSJI, and is simply not Pennsylvania law.\textsuperscript{527}

\footnotesize
\begin{itemize}
\item stay abreast of (and perhaps advance) the developing science and technology in their fields").
\item \textsuperscript{522} OWEN Hornbook, \textit{supra} note 3, § 6.4, at 401 (footnote omitted). In light of the above discussion, the argument in Bugay, \textit{supra} note 107, at 15-16, that state-of-the-art evidence remains inadmissible after Tincher is not persuasive, as it is based on rote application of Lewis.
\item \textsuperscript{523} Pa. SSJI (Civ.) § 16.122 ("Knowledge of Defect" and "Industry Customs or Standards").
\item \textsuperscript{524} \textit{Id.} (suppliers are "presumed to have known at all relevant times" about product risks).
\item \textsuperscript{525} \textit{Id.} at Subcommittee Note. As discussed at length in the Owen Hornbook, the Wade-Keeton test enjoyed fleeting popularity in the 1970s, proved unworkable in practice, and was superseded by the "triumph of the state-of-the-art defense." OWEN Hornbook, \textit{supra} note 3, § 10.4 at 720-33. "[M]odern product liability law is quite surely better off without a duty to warn or otherwise protect against unknowable risks." \textit{Id.} at 733.
\item \textsuperscript{526} Tincher v. Omega Flex, Inc., 628 Pa. 296, 424 104 A.3d 328, 405, (2014) ("Imputing knowledge, and assessing the avoidability of risk – was theoretically counter-intuitive and offered practical difficulties, as illustrated by the Wade-Keeton debate."). \textit{See also} Bugosh v. I.U. N. Am., Inc., 601 Pa. 277, 308 n.5, 971 A.2d 1228, 1246 n.5 (2009) (Castille, J., dissenting) ("The ghost of the Wade-Keeton test continues to haunt judicial halls, but its time has come and gone") (quoting David G. Owen, \textit{Design Defects}, 73 Mo. L. Rev. 291, 3360 (2008)).
\item \textsuperscript{527} The accompanying commentary cites no Pennsylvania law in support of "presumed knowledge," and relies solely on a law review article from 1992. Pa. SSJI (Civ.) § 16.122, Subcommittee Note (citing Ellen Wertheimer, \textit{Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back}, 60 UNIV. CIN. L. REV. 1183 (1992)).
\end{itemize}
The last part of SSJI Section 16.122 declares that defendants "cannot escape" liability "because the product met industry customs or standards on safety."\(^{528}\) The SSJI thus seek to perpetuate Lewis and its progeny,\(^{529}\) in direct contravention of Tincher, which specifically reserved these issues for resolution in future decisions.\(^{530}\) Tincher expressly refused "to either approve or disapprove prior decisional law."\(^{531}\) The 2016 SSJI amendments thus fly in the face of Tincher by treat this prior law as gospel, which is an invitation to error.\(^{532}\)

\section*{D. Post-Tincher, Plaintiff Conduct Should Be Admissible Where Relevant to Causation or Defect, But Not as Comparative Fault}

As discussed above,\(^{533}\) Azzarello era precedent concerning the circumstances under which plaintiff conduct was admissible in strict liability cases has been a confused and contradictory mess. In Reott, its last strict liability decision before Tincher, the Pennsylvania Supreme Court held that only "highly reckless" plaintiff conduct was admissible, and such evidence must tend to show "sole or superseding cause of the injuries."\(^{534}\) Whether this standard, adopted to avoid "erroneously and unnecessarily blend[ing] concepts of comparative/contributory negligence" with strict liability,\(^{535}\) survives Tincher is an open question.

One of the risk/utility factors for design defects mentioned in Tincher is the user's ability to avoid danger by the exercise of care in the use of the product.\(^{536}\) Logically, with the demise of the negligence/strict liability

\(^{528}\) Pa. SSJI (Civ.) § 16.122.

\(^{529}\) See id. at Subcommittee Note (relying upon the Lewis line of cases discussed supra notes 120-35 and accompanying text).

\(^{530}\) Tincher, 628 Pa. at 432, 104 A.3d at 410, (judicial "restraint" requires that "common law regarding these related considerations should develop within the proper factual contexts against the background of targeted advocacy").


\(^{532}\) See supra notes 449-52 and accompanying text (discussing non-precedential status of the SSJI).

\(^{533}\) See supra notes 196-215 and accompanying text.

\(^{534}\) See Reott v. Asia Trend, Inc., 618 Pa. 228, 250, 55 A.3d 1088, 1101 (2012); supra notes 302-08 and accompanying text.

\(^{535}\) Reott, 618 Pa. at 245, 55 A.3d at 1098.

\(^{536}\) Tincher, 628 Pa. at 398, 104 A.3d at 390. Azzarello-era precedent described this element as an "objective" user or "ordinary consumer" test. Surace v. Caterpillar, Inc., 111 F.3d 1039, 1051 (3d Cir. 1997) (applying
dichotomy and super-strict liability, plaintiff conduct, provided it amounts to more than failure to "inspect" for or to "guard against" product defects;\footnote{537} should be admissible, not only as causation, but as relevant to defect, subject to possible limiting instruction that strict liability does not involve a plaintiff's due care.\footnote{538}

California and a number of other states so hold.\footnote{539}

Unlike most aspects of strict liability, however, post-
\textit{Tincher} courts in this area do not write on a clean slate. Although extended to comparative fault during the \textit{Azzarello} era,\footnote{540} Pennsylvania's prohibition against use of a plaintiff's fault to defeat or reduce recovery began with \textit{McCown},\footnote{541} and thus predates the creation of super-strict liability. \textit{Tincher} did not view \textit{McCown} as an example of excessive separation of strict liability from negligence\footnote{542}

Quite apart from the former doctrinal separation of negligence and strict liability, causation – the allocation of fault – is one of the few product liability areas where Pennsylvania's General Assembly has intervened. In 1978, it enacted the Comparative Negligence Act.\footnote{543} Rather than "fault," the statute addressed only "negligence";\footnote{544} and thus was construed as inapplicable to strict liability.

\hspace{1in}

\begin{footnotes}
\footnote{537}{See McCown v. Int'l Harvester Co., 463 Pa. 13, 17, 342 A.2d 381, 382 (1975); see also OWEN Hornbook, supra note 3, § 13.3, at 858-59; supra text accompanying notes 54-57.}
\footnote{540}{See Kimco Dev. Corp. v. Michael D's Carpet Outlets, 536 Pa. 1, 637 A.2d 603 (1993); see also supra text accompanying notes 157-61.}
\footnote{541}{McCown, 463 Pa. 13, 342 A.2d 381; see also supra text accompanying notes 54-57.}
\footnote{542}{Tincher v. Omega Flex, Inc., 628 Pa. 296, 365 n.14, 104 A.3d 328, 369 n.14, (2014) ("doctrinal separation played a noticeably less prominent role in" \textit{McCown}).}
\footnote{543}{Act of April 28, 1978, P.L. 202, No. 53 § 10(89).}
\footnote{544}{42 PA. CONS. STAT. § 7102(a) (2004).}
\end{footnotes}
The Comparative Negligence Act is, by its express terms, applicable only to actions sounding in negligence. It has no applicability in cases involving strict liability.\textsuperscript{545}

The Legislature revised comparative negligence expressly to "include[e] actions for strict liability" in 2011,\textsuperscript{546} but did so only in the context of contribution between "joint defendants."\textsuperscript{547} Thus, it is arguable that the Legislature has acquiesced in the antecedent case law that precluded reduction for plaintiff comparative fault and restricted admissibility of plaintiff conduct to the causation question in strict liability cases.\textsuperscript{548}

With respect to causation, therefore, the effect of Tincher's reintroduction of negligence principles into strict liability is counterbalanced by its apparent preservation of McCown and by legislative activity. The majority of post-Tincher case law has so far continued to apply the Reott "highly reckless" standard limiting admissibility of plaintiff conduct for causation purposes to situations where a jury could find that conduct to be the "sole cause" of injury.\textsuperscript{549} Several other cases, however, have applied looser admissibility standards to plaintiff conduct after Tincher.\textsuperscript{550} As with all other issues, the 2016 SSJI also take a position that preserves pre-Tincher law on this issue.\textsuperscript{551}


\textsuperscript{547} 42 PA. CONS. STAT. § 7102(a.1) (2011).


\textsuperscript{551} Pa. SSJI (Civ.) § 16.122 ("negligence of plaintiff").
Elimination of the negligence/strict liability dichotomy also removes prior doctrinal objections to the use of foreseeability and reasonableness to define the scope of defenses relating to product use, such as misuse, substantial change, and abnormal use. Since these defenses were already defined in negligence terms, even during the Azzarello era, Tincher should not alter their prior scope.

E. Post-Tincher, Negligence Concepts Will Likely Ameliorate the Rigidity of the Intended Use and User Doctrines

During the Azzarello era, strict liability existed "only for harm that occurs in connection with a product's intended use by an intended user," and there was "no strict liability" for "non-intended uses even where foreseeable." "[D]efect is determined in relation to a particular subset of the general population: the intended user who puts the product to its intended use." "Intended," has been defined as "within the contemplation of the manufacturer" and "in terms of the product's targeted purpose and audience." Rejecting negligence concepts, in both design and warning defect cases, the Pennsylvania Supreme Court ultimately refused to extend strict liability beyond "intended users" to so-called "bystanders," whose use or contact with the product was "unintended" but nonetheless "foreseeable." "Whether the product is allegedly defective due to a lack of a warning, or because its design was ill-conceived, the standard that the

552 Phillips II, 576 Pa. 644, 656, 841 A.2d 1000, 1007 (2003) (criticizing use of "reasonably expected or foreseen" limit to substantial change); See DGS, 587 Pa. 236, 258, 898 A.2d 591, 603 (2006) ("incongruous" to use negligence principles only to "expand[]" strict liability by limiting "use-related defenses").


product need be made safe only for the intended user appears to be equally applicable.”

Rejection of bystander strict liability has been controversial because other jurisdictions “almost universally allowed recovery to foreseeable bystanders . . . for injuries caused by defective products.” Bystander liability issues ultimately led the Third Circuit to predict Pennsylvania’s adoption of the Third Restatement in Berrier.

Tincher held that intended use/intended user considerations remain part of the consumer expectation approach to design defect, meaning that to some degree the intended use doctrine survives. Otherwise, the court did not address "the proper application of the intended user doctrine." Post-Tincher, bystanders have been precluded from relying on the consumer expectation


559 OWEN Hornbook, supra note 3, § 5.3, at 273-74 (footnotes omitted). The Owen Hornbook characterized Pennsylvania as a "curious exception." Id. at n.55. See also Berrier, 563 F.3d at 55 (most "jurisdictions allow bystander liability using . . . negligence concepts and foreseeability analysis"); see also supra text accompanying notes 283-86.

560 Berrier, 563 F.3d at 54-60; see supra text accompanying notes 283-86. See also Thomas v. Staples, Inc., 2 F. Supp. 3d 647, 655 (E.D. Pa. 2014) (Third Restatement does not require intended user analysis).


563 Tincher, 628 Pa. at 432, 104 A.3d at 409-10 (we "do[] not purport to either approve or disapprove prior decisional law" with respect to "the proper application of the intended use doctrine").
approach," but have been allowed to pursue strict liability claims under the risk/utility approach. It is likely that Tincher's restoration of negligence concepts to strict liability will result in broader acceptance of bystander strict liability in Pennsylvania, at least as to claims asserting the risk/utility approach to design defect.

F. Post-Tincher Application of Consumer Expectation Approach to Defect.

As already discussed, Tincher adopted, as one of two alternatives in its "composite" standard for evaluating defectiveness, a "consumer expectation" approach that is new to Pennsylvania law. The consumer expectation approach originates in comment i to Restatement Section 402A. Very few tried cases during the Azzarello era turned on consumer expectations, since such expectations were an aspect of the threshold "unreasonably dangerous" analysis.

565 Wright, 175 F. Supp. 3d at 452; Punch, 2015 WL 7769223, at *5.
566 The 2016 SSJI allow bystander liability. Pa. SSJI (Civ.) § 16.140 (2016). Surprisingly, however, the commentary nowhere acknowledges the Supreme Court's strict application of the intended user doctrine in DGS, Phillips II, and Mackowick. Instead the commentary relies upon the Superior Court decision that was reversed in Phillips II without acknowledging the reversal. Pa. SSJI (Civ.) § 16.140, Subcommittee Note (2016).
567 See supra notes 376-78 and accompanying text (describing test and listing relevant factors); see also supra text accompanying note 407 (intended use/user issues).
A product is defective under the consumer expectation approach "if the danger is unknowable and unacceptable to the average or ordinary consumer." A known risk cannot be a defect under this theory. "Ordinary consumer" tests are "objective," rather than subjective. An ordinary consumer is presumed to read and heed warnings.

Another recurring issue with the consumer expectation approach is its scope. This approach has been applied to inherent product risks, rather than to risks caused by the intricacies of mechanical designs. For instance, "the ordinary consumer of an automobile simply has 'no idea' how it should perform in all foreseeable situations, or how safe it should be made against all driving); Hite v. R.J. Reynolds Tobacco Co., 396 Pa. Super. 82, 89-90, 578 A.2d 417, 420-21 (1990) (harmful effects of smoking); Ellis v. Chicago Bridge & Iron Co., 376 Pa. Super. 220, 230-32, 545 A.2d 906, 911-12 (1988) (unwieldiness of large, irregularly shaped objects); Schrim v. Campbell Soup Co., 2007 WL 2345288, at *6 (W.D. Pa. Aug. 16, 2007) (burn risk of hot soup).

Tincher, 628 Pa. at 394, 104 A.3d at 387 (citation omitted).


Restatement (Second) of Torts § 402A, cmt. j (AM. LAW. INST. 1965) ("the seller may reasonably assume that if[s warning] has been read and heeded"). See Davis v. Berwind Corp., 547 Pa. 260, 268, 690 A.2d 186, 190 (1997) (paraphrasing cmt. j); Wright v. Ryobi Tech., Inc., 175 F. Supp. 3d 439, 452 (E.D. Pa. 2016) (even though plaintiff "did not read" any warnings, an "ordinary consumer . . . would know and appreciate" the product's risks from the warnings); supra text accompanying notes 221-26.


"[T]he consumer expectations test is only appropriate in cases involving a product within the common experience of ordinary consumers." DeJesus v. Knight Indus. & Ass’n, Inc., 2016 WL 4702113, at *7 (E.D. Pa. Sept. 8, 2016) (citation and quotation marks omitted). See OWEN Hornbook, supra note 3, § 8.6, at 542 ("quite clear that the consumer expectations test was a poor gauge for ascertaining the adequacy of complex designs").
foreseeable hazards." Thus, in cases involving complicated machinery, several post-Tincher courts have dismissed consumer expectation-based design defect claims as untenable.

Tincher agreed that the "typical" design defect case is one resolved under the risk/utility approach, as have cases following Tincher. Thus, consumer expectation design defect cases should be relatively uncommon, and should involve inherent product characteristics of the sort previously resolved under the rubric of Restatement Section 402A, comment i.

G. Post-Tincher Application of the Burden of Proof

The Tincher decision also touched on an issue that "parties obviously had not briefed" – the burden of proving defect. The court noted that, when California adopted a similar dual approach to design defect in Barker, it shifted the burden of proof to the defendant: (1) because evidence of "most" risk/utility factors is "peculiarly within the knowledge of the manufacturer," and (2) due a


578 Tincher, 628 Pa at 411, 104 A.3d at 397 ("the more typical case implicates the type of products and circumstances in which evidence of an alternative product design is the most persuasive" means of proof); id. at 405, 104 A.3d at 424 (claim that an alternative design rendered a product risk "both foreseeable and avoidable" is "in some respects . . . the 'typical' case").

579 In Bifolck, Connecticut, formerly a consumer expectation state recognized as its "primary" defect test one involving "an alternative design" and "risk-utility balancing." Bifolck v. Philip Morris, Inc., 324 Conn. 402, 422, 152 A.3d 1183, 1196 (2016).


581 Tincher, 628 Pa. at 431, 104 A.3d at 408.
"policy judgment . . . to relieve an injured plaintiff of . . . onerous evidentiary burdens."  

Conversely, Tincher pointed out that other jurisdictions with similar approaches to design defect had not altered the traditional burden of proof. Tincher cited Knitz v. Minster Machine Co., which rejected a burden shift as "provok[ing] needless questions of defect classification," and Lamkin v. Towner, which held that plaintiffs who "fail[] to provide any evidence to support their allegations" of design defect have no basis to seek recovery. Such "countervailing considerations" would also be relevant:

- "[I]t is consistent with the treatment of tort causes of action generally, and the notion that Pennsylvania does not presume a product to be defective until proven otherwise, to assign the burden of proof in a strict liability case to the plaintiff."
- "[P]roving a negative is generally not desirable as a jurisprudential matter."
- "[E]vidence relevant to a risk-utility test . . . would seem to be within the knowledge of expert witnesses available to either plaintiff or defendant."
- "[L]iberal discovery may also aid the plaintiff."

Since strict liability was recognized in 1966, the Pennsylvania Supreme Court has consistently and repeatedly held that the burden of proving a product defect – however "defect" was defined – belongs to the plaintiff seeking recovery. "[A] plaintiff must establish that the product was defective." Nor
has the court shown any inclination to shift the burden of proving other essential strict liability elements, such as causation, away from the plaintiff, rejecting, for example, market share liability in *Skipworth v. Lead Industries Association, Inc.*587 *Tincher* thus altered the mode of proving design defect, while leaving the burden of proof where it had always been, providing two ways in which "the plaintiff may prove defective condition."588 In Pennsylvania, strict liability "policies" of the sort mentioned in *Barker*: "[H]ave not been, and cannot be, applied to remove all forms of restriction imposed upon plaintiffs' proofs in products liability actions. . . . [P]laintiffs will generally remain free to present expert testimony to support the theory that a design change was necessary to render the product safe. . . .589

Shifting from plaintiffs to defendants the burden of proving the risk/utility approach to design defect "would result in a significant departure from" from current law and a "depart[ure] from our time-tested general rule."590 California


*Duchess v. Langston Corp.*, 564 Pa. 529, 552, 769 A.2d 1131, 1145 (2001); *see supra* notes 242-50 and accompanying text.590

*Skipworth*, 547 Pa. at 232, 690 A.2d at 172.
is an outlier in this respect. Given Tincher's oft-repeated assertions of "judicial modesty," is it unlikely that the court would undertake such a change in the absence of either legislative direction or proof of a widespread inability of plaintiffs to prove risk/utility design defects, something that has not happened in any other state that has adopted this approach to proof of defect.

IV. CONCLUSION

Tincher represents a sea-change in the course of Pennsylvania jurisprudence in the product liability field. It has been called a "new era." Indeed, the jury instructions approved in Forry may well be the best place to start, now that the Azzarello edifice has collapsed of its own weight and been swept away in Tincher. Years, even decades, of litigation will be required to answer all of the questions that Tincher left open, intentionally or otherwise. The only alternative to such extended uncertainty would be legislative intervention of the sort requested in Tincher. The court's entreaty notwithstanding, that remains only a remote possibility.

The overruling of Azzarello was a long time coming. Now that this epochal event has finally happened, negligence concepts of reasonableness and foreseeability have returned to the strict liability battlefield. The task of the courts going forward is to see that these concepts are finally applied in an evenhanded manner, and not as has happened so often in the past, in a "heads I win, tails you lose" fashion solely to defendants' disadvantage. However, only time will tell if Pennsylvania has truly ceased to be an outlier jurisdiction in the product liability field.

591 OWEN Hornbook, supra note 3, § 6.4, at 399 ("The plaintiff has the burden of proof on each element . . . including of course the product defect.") (footnote omitted).

592 Tincher, 628 Pa. at 339 n.6, 378, 380, 411, 413, 426, 104 A.3d at 354 n.6, 377-78.

593 In another example of liability-enhancing tendencies, the PBI's SSJI includes an "alternative charge" on design defect purporting to shift the burden of proving risk/utility to the defendant, based solely on the dictum in Tincher. Pa. SSJI (Civ.) § 16.20.

594 Bugay, supra note 107, at 12.

595 See supra notes 16-18 and accompanying text.

596 Tincher, 628 Pa. at 384, 104 A.3d at 381.