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

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TABLE OF CONTENTS

I. THE PAST IS PROLOGUE – PENNSYLVANIA STRICT LIABILITY PRINCIPLES FROM *WEBB* UNTIL *TINCHER* 93
 A. *The 1960s and Early 1970s – Pennsylvania Strict Liability Before Erection of the Wall Between Negligence and* Azzarello *Super-Strict Liability* 93
 B. *The Mid-1970s − Creation of* Azzarello *Super-Strict Liability and the Walling Off of Negligence Concepts*...... 102
 C. *The Late 1970s to Early 1990s −* Azzarello *Super-Strict Liability at Full Flood*.................................. 107
 D. *The Mid 1990s to Mid 2000s − The Accelerating Decay of* Azzarello *Super-Strict Liability* 121
 E. *2003-2013 − Strict Liability in Limbo* 132
II. STRICT LIABILITY REFORMULATED – *TINCHER V. OMEGA FLEX* 141
 A. *Returning the "Unreasonably Dangerous" Element of Defect to the Jury* 144
 B. *Eliminating the Strict Separation of Negligence from Strict Liability* 146
 C. *Rejecting the Strict Liability Jury Instruction Required by* Azzarello... 147
 D. *Replacing* Azzarello *with a Two-Part Standard for*

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Proof of Unreasonably Dangerous Defect 149
E. *Declining To Replace the "Broad"* Azzarello *Regime with Equally Broad Third Restatement Principles* 151
F. *Leaving Open "Related" and "Subsidiary" Issues* 153
G. *Avoiding Any Special Retroactivity Rule* 155
III. EVOLUTION OF STRICT LIABILITY IN PENNSYLVANIA FOLLOWING *TINCHER* 155
A. *Post-*Tincher *Jury Instruction on "Unreasonably Dangerous" Defect* 156
B. Tincher*'s Impact on Warning and Manufacturing Defect Claims* 161
C. *Post-*Tincher*, State-of-the-Art Evidence Should Be Admissible in Strict Liability Cases.* 164
D. *Post-*Tincher*, Plaintiff Conduct Should Be Admissible Where Relevant to Causation or Defect, But Not as Comparative Fault* 172
E. *Post-*Tincher*, Negligence Concepts Will Likely Ameliorate the Rigidity of the Intended Use and User Doctrines* 175
F. *Post-*Tincher *Application of Consumer Expectation Approach to Defect* 177
G. *Post-*Tincher *Application of the Burden of Proof* 179
IV. CONCLUSION 182

ABSTRACT

The Supreme Court of Pennsylvania's *Tincher v. Omega Flex, Inc.*[1] 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.*[2] 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."[3]

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[1] Tincher v. Omega Flex, Inc., 628 Pa. 296, 104 A.3d 328 (2014).

[2] Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978).

[3] DAVID G. OWEN, PRODUCTS LIABILITY LAW § 9.2, at 592 (2d ed. Hornbook Series 2008) [hereinafter OWEN Hornbook]; Victor E. Schwartz, *The*

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*,[4] advocating that the *Azzarello* strict liability standard should be scrapped and replaced by the Restatement (Third) of Torts.[5] 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[6] 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*,[7] 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.[8] 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.[9]

Death of 'Super Strict Liability': Common Sense Returns to Tort Law, 27 GONZ. L. REV. 179, 189 (1992).

[4] Phillips v. Cricket Lighters (*Phillips II*), 576 Pa. 644, 841 A.2d 1000 (2003).

[5] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. (AM. LAW. INST. 1998).

[6] RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW. INST. 1965).

[7] Webb v. Zern (*Webb I*), 422 Pa. 424, 220 A.2d 853 (1966).

[8] *Id.* at 426, 220 A.2d at 854 (adopting RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW. INST. 1965)).

[9] *E.g.*, James A. Henderson, Jr. & Aaron D. Twerski, *Will a New Restatement Help Settle Troubled Waters: Reflections*, 42 AM. U. L. REV. 1257, 1259 (1993) ("strict liability" under § 402A became "the anthem for the [product liability] revolution"); Douglas A. Kysar, *The Expectations of Consumers*, 103

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.[10] 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.[11] 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.[12]

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

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COLUM. L. REV. 1700, 1705 (2003) (describing "the revolutionary but problematic language of section 402A"); David W. Lannetti, *Toward A Revised Definition of "Product" Under the Restatement (Third) of Torts: Products Liability*, 35 TORT & INS. L.J. 845, 853 (2000) ("Section 402A . . . officially introduced the revolutionary concept of strict products liability"); George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2301 (1989) ("adoption of Section 402A . . . in 1965 is commonly viewed as initiating a revolution in the law of torts . . . . The dimensions of this conceptual revolution in tort law should not be underestimated.").

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

[11] *Id.* at 426-27, 220 A.2d at 854 (referencing Miller v. Preitz, 422 Pa. 383, 398-424, 221 A.2d 320, 328-41 (1966)). *Webb I* "simply referred to the concurring and dissenting opinions in *Miller v. Preitz*." Berrier v. Simplicity Mfg, Inc., 563 F.3d 38, 46 (3d Cir. 2009) (applying Pennsylvania law).

[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.*,[13] Pennsylvania recognized assumption of the risk as an affirmative defense to strict liability.[14] 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,[15] 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].[16]

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.[17] In accordance with *Forry*, Pennsylvania juries were routinely charged with deciding whether the characteristics of claimed product defects rendered those products "unreasonably dangerous."[18]

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[13] Ferraro v. Ford Motor Co., 423 Pa. 324, 223 A.2d 746 (1966).

[14] *Id.* at 327-28, 223 A.2d at 748. Assumption of the risk remains a Pennsylvania strict liability defense to this day. *E.g.*, Surace v. Caterpillar, Inc., 111 F.3d 1039, 1044 (3d Cir. 1997) (applying Pennsylvania law); Colosimo v. May Dep't Store Co., 466 F.2d 1234, 1235-36 (3d Cir. 1972) (applying Pennsylvania law); Reott v. Asia Trend, Inc., 618 Pa. 228, 241, 55 A.3d 1088, 1095-96 (2012).

[15] Forry v. Gulf Oil Corp., 428 Pa. 334, 340, 237 A.2d 593, 597 (1968) (citing with approval RESTATEMENT (SECOND) OF TORTS § 402A, cmt. d, f-g, i (AM. LAW. INST. 1965)). *Forry* was a plurality opinion as to concurrent causation, but the dissenters agreed that the opinion of the court "correctly" applied strict liability. *Id.* at 348-49 n.2, 237 A.2d at 601 n.2 (Roberts, Musmanno & O'Brien, JJ., dissenting).

[16] *Forry*, 428 Pa. at 340, 237 A.2d at 597; *see also id.* at 345, 237 A.2d at 599 (plaintiff "must proceed upon the theory that, if the defect in the [product] caused an unreasonable risk of harm to the users thereof . . . [the manufacturer] would still remain liable even if [plaintiff] was negligent in [using the product").

[17] *Id.* at 342, 342 n.10, 237 A.2d at 598, 598 n.10.

[18] *See* Greiner v. Volkswagenwerk Aktiengeselleschaft, 540 F.2d 85, 94-95 (3d Cir. 1976) (applying Pennsylvania law); Bair v. American Motors Corp., 535 F.2d 249, 250 (3d Cir. 1976) (per curiam) (applying Pennsylvania law); Taylor v. Paul O. Abbe, Inc., 516 F.2d 145, 147 (3d Cir. 1975) (applying Pennsylvania law); Friedman v. General Motors Corp., 411 F.2d 533, 537 (3d Cir. 1969) (applying Pennsylvania law); Bowman v. General Motors Corp., 427 F. Supp. 234, 245-46 (E.D. Pa. 1977); Serpiello v. Yoder Co., 418 F. Supp. 70,

Months later, *Bialek v. Pittsburgh Brewing Co.*[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."[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."[21]

A third 1968 decision, *Bartkewich v. Billinger*,[22] recognized the defenses of product misuse and obvious danger.[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".[24]

In *Burbage v. Boiler Engineering & Supply Co.*,[25] the Supreme Court of Pennsylvania approved Restatement Section 402, comment n[26] and rejected

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71-72 (E.D. Pa. 1976), *aff'd mem.*, 556 F.2d 568, 570 (3d Cir. 1977); Bunn v. Caterpillar Tractor Co., 415 F. Supp. 286, 290 (W.D. Pa. 1976), *aff'd mem.*, 556 F.2d 564 (3d Cir. 1977); Beron v. Kramer-Trenton Co., 402 F. Supp. 1268, 1273-74 (E.D. Pa. 1975), *aff'd mem.*, 538 F.2d 318, 319 (3d Cir. 1976); Zurzolo v. General Motors Corp., 69 F.R.D. 469, 471-72 (E.D. Pa. 1975); Hayes v. Pennsylvania Lawn Products, Inc., 358 F. Supp. 644, 648-49 (E.D. Pa. 1973); LaGorga v. Kroger Co., 275 F. Supp. 373, 381 (W.D. Pa. 1967), *aff'd*, 407 F.2d 671 (3d Cir. 1969); Bialek v. Pittsburgh Brewing Co., 430 Pa. 176, 186-87, 242 A.2d 231, 235-36 (1968); Romanishan v. International Harvester Co., 60 Pa. D. & C.2d 147, 155 (C.P. Northampton Cty. 1973).

[19] *Bialek*, 430 Pa. at 176, 242 A.2d at 231.

[20] *Id.* at 185, 242 A.2d at 235.

[21] *Id.*

[22] Bartkewich v. Billinger, 432 Pa. 351, 247 A.2d 603 (1968).

[23] *Id.* at 355, 247 A.2d at 605-06. Both product misuse (in design cases) and obvious danger (in warning cases) remain strict liability defenses. *E.g.*, Day v. Volkswagenwerk Aktiengesellschaft, 451 F. Supp. 4, 5-6 (E.D. Pa. 1977), *aff'd mem.*, 578 F.2d 1373, 1376 (3d Cir. 1978); Nelson v. Airco Welders Supply, 107 A.3d 146, 161 (Pa. Super. Ct. 2014) (en banc); Reott v. Asia Trend, Inc., 7 A.3d 830, 837 (Pa. Super. Ct. 2010), *aff'd on other grounds*, 618 Pa. 228, 55 A.3d 1088 (2012); Gaudio v. Ford Motor Co., 976 A.2d 524, 540-41 (Pa. Super. Ct. 2009); Stephens v. Paris Cleaners, Inc., 885 A.2d 59, 69 (Pa. Super. Ct. 2005).

[24] *Bartkewich*, 432 Pa. at 356, 247 A.2d at 606.

[25] Burbage v. Boiler Eng'g & Supply Co., 433 Pa. 319, 249 A.2d 563 (1969).

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

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[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.

[29] *See* Wenrick v. Schloemann-Siemag Aktiengesellschaft, 523 Pa. 1, 9, 564 A.2d 1244, 1248 (1989) (refusing to impose a warning duty on the manufacturer of a non-defective component part). Component part cases involve other manufacturers' components and also a completed product, and thus often turn on issues of foreseeability. *See also* Jacobini v. V. & O. Press Co., 527 Pa. 32, 40, 588 A.2d 476, 480 (1991) (component part manufacturer "cannot be expected to foresee every possible risk that might be associated with use of the completed product"); Stephens v. Paris Cleaners, Inc., 885 A.2d 59, 69 (Pa. Super. Ct. 2005) ("[W]here a component part manufacturer can foresee a use of its product that will create a certain danger, the manufacturer has a duty to warn of that danger.") (quoting Colegrove v. Cameron Machine Co., 172 F. Supp. 2d 611, 625 (W.D. Pa. 2001)).

[30] Kassab v. Cent. Soya, 432 Pa. 217, 246 A.2d 848 (1968), *overruled on other grounds,* AM/PM Franch. Ass'n v. Atl. Richfield Co., 526 Pa. 110, 584 A.2d 915 (1990).

[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").

[32] *See* Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 28-30, 68 A.2d 517, 530-32 (1949) (adopting RESTATEMENT OF TORTS § 388 (AM. LAW. INST. 1939).

[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* precedent[38] holding that

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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.

[35] Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206 (1971), *overruled on other grounds,* Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A.2d 1027 (1980) (calculating amount of award).

[36] *Id.* at 288, 282 A.2d at 220. The learned intermediary doctrine has been the law of Pennsylvania ever since. *E.g.*, Mazur v. Merck & Co., 964 F.2d 1348, 1355 (3d Cir. 1992) (applying Pennsylvania law); Lance v. Wyeth, 624 Pa. 231, 238 n.6, 85 A.3d 434, 438 n.6 (2014); Coyle v. Richardson-Merrell, Inc., 526 Pa. 208, 213, 584 A.2d 1383, 1385 (1991); Baldino v. Castagna, 505 Pa. 239, 247, 478 A.2d 807, 812 (1984); Cochran v. Wyeth, Inc., 3 A.3d 673, 676 (Pa. Super. Ct. 2010); Creazzo v. Medtronic, Inc., 903 A.2d 24, 31-32 (Pa. Super. Ct. 2006); Lineberger v. Wyeth, 894 A.2d 141, 144-45 (Pa. Super. Ct. 2006); Demmler v. SmithKline Beecham Corp., 448 Pa. Super. 425, 431, 671 A.2d 1151, 1154 (1996); Taurino v. Ellen, 397 Pa. Super. 50, 52, 579 A.2d 925, 927 (1990); Brecher v. Cutler, 396 Pa. Super. 211, 218-19, 578 A.2d 481, 484-85 (1990); Makripodis v. Merrell-Dow Pharm., Inc., 361 Pa. Super. 589, 596, 523 A.2d 374, 378 (1987).

[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

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[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.

[41] *Id.* at 288-89, 282 A.2d at 220. *See* Day v. Volkswagenwerk Aktiengesellschaft, 318 Pa. Super. 225, 239, 464 A.2d 1313, 1320 (1983) (clarifying that overpromotion "did not create a separate cause of action," but rather was a theory for overcoming the adequacy of warnings).

[42] D'Antona v. Hampton Grinding Wheel Co., 225 Pa. Super. 120, 310 A.2d 307 (1972).

[43] *Id.* at 125, 310 A.2d at 310 (citations omitted).

[44] Suchomajcz v. Hummel Chem. Co., 524 F.2d 19, 25 (3d Cir. 1975) (applying Pennsylvania law).

[45] Salvador v. Atl. Steel Boiler Co., 457 Pa. 24, 319 A.2d 903 (1974), *overruling* Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963).

privity[46] 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.[47]

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.[48]

A plurality of the Supreme Court of Pennsylvania in *Kuisis v. Baldwin-Lima-Hamilton Corp.*[49] 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.[50] The product must be reasonably new when the accident happened, or else "normal-wear-and-tear" will necessarily be an alternative cause.[51] Post-*Kuisis*, the malfunction theory in Pennsylvania has

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[46] "Vertical privity" involved who in the chain of product distribution could be sued. "Horizontal privity" involved which product users, beyond the actual product purchaser, could bring suit. *See Salvador*, 457 Pa. at 25 n.1, 319 A.2d at 904 n.1.

[47] *Id.* at 32, 319 A.2d at 907 (citations omitted).

[48] *Id.* at 26, 319 A.2d at 904.

[49] Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 319 A.2d 914 (1974) (plurality opinion).

[50] *Id.* at 329, 319 A.2d at 920 ("[I]n the absence of other identifiable causes, the malfunction itself is evidence of a 'defective condition.'"). Greco v. Bucciconi Eng'g Co., 407 F.2d 87, 89-90 (3d Cir. 1969) (applying Pennsylvania law) (affirming liability in the case of a new product, holding that "a plaintiff in a strict liability case can establish a 'defective condition' within the meaning of Section 402A by proving that the product functioned improperly in the absence of abnormal use and reasonable secondary causes (footnote omitted)). *Accord* MacDougall v. Ford Motor Co., 214 Pa. Super. 384, 390-91, 257 A.2d 676, 680 (1969), *disapproved on other grounds*, REM Coal Co. v. Clark Equip. Co., 386 Pa. Super. 401, 563 A.2d 128 (1989) (en banc).

[51] *Kuisis*, 457 Pa. at 334-35, 319 A.2d at 922-23. *Accord* Schwartz v. Subaru of America, Inc., 851 F. Supp. 191, 193-94 (E.D. Pa. May 5, 1994) (malfunction theory impossible where vehicle had 80,000 miles of prior use); Barnish v. KWI Bldg. Co., 602 Pa. 402, 422, 980 A.2d 535, 547 (2009) ("prior

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]hether 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

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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).

[52] Rogers v. Johnson & Johnson Products, Inc., 523 Pa. 176, 182, 565 A.2d 751, 754 (1989). *Accord* Barnish v. KWI Bldg. Co., 602 Pa. 402, 412-13, 980 A.2d 535, 541-42 (2009) (the "second element in the proof of [the] malfunction theory" "is evidence eliminating abnormal use or reasonable, secondary causes"). *See* Raskin v. Ford Motor Co., 837 A.2d 518, 522 (Pa. Super. Ct. 2003) ("a plaintiff does not sustain its burden of proof in a malfunction theory case when the defendant furnishes an alternative explanation for the accident, which the jury accepts"); Thompson v. Anthony Crane Rental, Inc., 325 Pa. Super. 386, 395, 473 A.2d 120, 125 (1984) (jury finding of negligence by product operator established "secondary cause" precluding use of malfunction theory to establish product defect).

[53] *Kuisis*, 457 Pa. at 331 n.13, 319 A.2d at 921 n.13 (citations omitted). *See* Schreffler v. Birdsboro Corp., 490 F.2d 1148, 1153 (3d Cir. 1974) (applying Pennsylvania law).

[54] McCown v. Int'l Harvester Co., 463 Pa. 13, 342 A.2d 381 (1975).

[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).

[56] *McCown*, 463 Pa. at 16, 342 A.2d at 382 (quoting Salvador v. Atl. Steel Boiler Co., 457 Pa. 24, 32, 319 A.2d 903, 907 (1974), *overruling* Hochgertel v.

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

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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.

[58] Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975), *abrogated* Reott v. Asia Trend, Inc., 618 Pa. 228, 55 A.3d 1088 (2012) (as to abnormal use).

[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"

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[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

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[69] *Berkebile*, 462 Pa. at 101, 337 A.2d at 902 (citation omitted).

[70] Francioni v. Gibsonia Truck Corp., 472 Pa. 362, 372 A.2d 736 (1977).

[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)).

[73] Musser v. Vilsmeir Auction Co., 522 Pa. 367, 372-73, 562 A.2d 279, 281-82 (1989) (auctioneer); Nath v. Nat'l Equip. Leasing Corp., 497 Pa. 126, 132, 439 A.2d 633, 636 (1981) (financier).

[74] As a plurality opinion, *Berkebile* "[wa]s not binding." Reott v. Asia Trend, Inc., 618 Pa. 228, 246, 55 A.3d 1088, 1099 (2012) (disapproving *Berkebile* on abnormal use grounds).

> 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.[75]

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.*[76] 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."[77] 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.[78]

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

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[75] Greiner v. Volkswagenwerk Aktiengeselleschaft, 540 F.2d 85, 94-95 (3d Cir. 1976) (citations omitted) (applying Pennsylvania law). *Accord* Schell v. 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, 754-55 (3d Cir. 1976) (applying Pennsylvania law).

[76] Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978).

[77] *Id.* at 553, 391 A.2d at 1023.

[78] *Id*. at 553, 391 A.2d at 1023-24 (quoting "guarantor" language from Salvador v. Atl. Steel Boiler Co., 457 Pa. 24, 32, 319 A.2d 903, 907 (1974)).

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]

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[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]

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[86] *Azzarello*, 480 Pa. at 558, 391 A.2d at 1026.

[87] Oehler v. Davis, 223 Pa. Super. 333, 336-37, 298 A.2d 895, 897 (1972) (no liability for person bitten by dog allowed to escape confinement by failure of restraining ring). *See* Romanishan v. Int'l Harvester Co., 60 D. & C.2d 147, 156 (Pa. C.P. Northampton Cty. 1973) ("casual bystanders" cannot recover under § 402A). The first Pennsylvania decision to confront bystander liability directly, phrased bystander liability as "[f]oreseeable or reasonable anticipation of injury". Stone v. Kuhn, 46 Pa. D. & C.2d 638, 646 (C.P. Perry Cty. 1969).

[88] Pegg v. Gen. Motors Corp., 258 Pa. Super. 59, 391 A.2d 1074 (1978).

[89] *Id.* at 69, 391 A.2d at 1078 (opinion in support of affirmance). In many contexts, public policy precludes persons from recovering for injuries suffered by reason of their criminal conduct. *See* Minnesota Fire & Cas. Co. v. Greenfield, 579 Pa. 333, 356, 855 A.2d 854, 868-69 (2004); Holt v. Navarro, 932 A.2d 915, 923 (Pa. Super. Ct. 2007); Mineo v. Eureka Sec. Fire & Marine Ins. Co., 182 Pa. Super. 75, 81, 125 A.2d 612, 615 (1956).

Strict liability overturned the ordinary non-liability of successor corporations in *Dawejko v. Jorgensen Steel Co.*,[90] where the Superior Court adopted another California concept – the "product line" exception.[91] Even by contract, successor corporations could not avoid strict liability where a sale of corporate assets "virtual[ly]" eliminated a plaintiff's "remedies against the original manufacturer," the successor was viable, and "fairness" supported successor liability.[92] 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.[93] The Pennsylvania Supreme Court has never approved this "product line" liability innovation,[94] which is a distinct minority position.[95]

Sherk v. Daisy-Heddon[96] addressed causation in strict liability actions. On facts establishing user awareness of the product's "lethal" potential and disobedience of instructions,[97] the court refused to relax causation standards that supported the defense of abnormal use/misuse in negligence cases:

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[90] Dawejko v. Jorgensen Steel Co., 290 Pa. Super. 15, 434 A.2d 106 (1981).

[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.*

[94] The product line exception has been applied on several occasions by the Third Circuit and intermediate Pennsylvania appellate courts. *See* Kradel v. Fox River Tractor Co., 308 F.3d 328, 331-33 (3d Cir. 2002) (applying Pennsylvania law); LaFountain v. Webb Indus. Corp., 951 F.2d 544, 546-47 (3d Cir. 1991) (applying Pennsylvania law); Conway v. White Trucks, Div. of White Motor Corp., 885 F.2d 90, 95 (3d Cir. 1989) (applying Pennsylvania law); Mendralla v. Weaver Corp., 703 A.2d 480, 484 (Pa. Super. Ct. 1997) (en banc); Keselyak v. Reach All, Inc., 443 Pa. Super. 71, 76-80, 660 A.2d 1350, 1353-54 (1995). In Schmidt v. Boardman Co., 608 Pa. 327, 11 A.3d 924 (2011), the Supreme Court intended to consider the viability of the product liability exception, but found the issue waived. *Id.* at 355-56, 11 A.3d at 941-42. "Assuming the product-line exception applies," the court rejected "charging jurors with a somewhat loose interests-of-justice assessment of 'philosophical origin.'" *Id.* at 357, 362, 11 A.3d at 357, 362.

[95] In addition to California and Pennsylvania, appellate authority accepting the product line exception exists in New Jersey, New Mexico, and Washington, along with trial court authority in Connecticut. *See* Richard L. Cupp, Jr. & Christopher L. Frost, "*Successor Liability for Defective Products: A Redesign Ongoing*," 72 BROOK. L. REV. 1173, 1178 n.20 (2007).

[96] Sherk v. Daisy-Heddon 498 Pa. 594, 450 A.2d 615 (1982).

[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:

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[98] *Sherk*, 498 Pa. at 600, 450 A.2d at 618 (citation and quotation marks omitted).

[99] *Id.*

[100] Summers v. Certainteed Corp., 606 Pa. 294, 316, 997 A.2d 1152, 1165 (2010) (citations omitted).

[101] Dambacher v. Mallis*,* 336 Pa. Super. 22, 485 A.2d 408 (1984) (en banc), *appeal dismissed*, 508 Pa. 643, 500 A.2d 428 (1985), *overruled sub silentio on other grounds*, *Phillips II*, 576 Pa. 644, 658, 841 A.2d 1000, 1008 (2003) (as to negligence claim).

[102] *Dambacher*, 336 Pa. Super. at 45, 485 A.2d at 420.

[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 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)).

> [T]he 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]

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[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)).

[107] *Id.* at 50-51 n.5, 485 A.2d at 423 n.5 (quoting D. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973)). The Third Circuit followed *Dambacher*'s gloss on *Azzarello* in Surace v. Caterpillar, Inc., 111 F.3d 1039, 1046 (3d Cir. 1997) (applying Pennsylvania law). For a discussion of the differences and similarities between the California factors and the "Wade Factors," see Arthur L. Bugay, "A New Era in Pennsylvania Products

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]

Liability Law – *Tincher v. Omega-Flex, Inc.*: *The Death of Azzarello*," PA. BAR ASS'N QUARTERLY, at 13-14 (Jan. 2015).

[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.

[113] Burch v. Sears, Roebuck & Co., 320 Pa. Super. 444, 450-51, 467 A.2d 615, 618-19 (1983). "[T]he judge makes the determination under a weighted view of the evidence, considering the facts in the light most favorable to the plaintiff." Moyer v. United Dominion Indus., Inc., 473 F.3d 532, 538 (3d Cir. 2007) (applying Pennsylvania law).

[114] Between the 1984 *Dambacher* decision, and the overruling of *Azzarello* in 2014, less than one decision every two years rejected a product defect claim as not "unreasonably dangerous" as a matter of law. *See* Riley v. Warren Mfg., Inc., 455 Pa. Super. 384, 392-94, 688 A.2d 221, 225-26 (1997); Fitzpatrick v. Madonna, 424 Pa. Super. 473, 477-80, 623 A.2d 322, 325-26 (1993), *overruled on other grounds sub silentio*, *Phillips II*, 576 Pa. 644, 841 A.2d 1000 (2003);

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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Jordon v. K-Mart Corp., 417 Pa. Super. 186, 190, 611 A.2d 1328, 1330-31 (1992); Ellis v. Chicago Bridge & Iron Co., 376 Pa. Super. 220, 235-36, 545 A.2d 906, 914 (1988); Martinez v. Triad Controls, Inc., 593 F. Supp. 2d 741, 757-59 (E.D. Pa. 2009); Robinson v. Midwest Folding Prod. Corp., 2009 WL 928503, at *3 (E.D. Pa. Apr. 7, 2009); Warnick v. NMC-Wollard, Inc., 512 F. Supp. 2d 318, 325-29 (W.D. Pa. 2007); Epler v. Jansport, Inc., 2001 WL 179862, at *3-5 (E.D. Pa. Feb. 22, 2001); Short v. WCI Outdoor Prod., Inc., 2000 WL 1659938, at *5-8 (E.D. Pa. Nov. 2, 2000); Van Buskirk v. W. Bend Co., 100 F. Supp. 2d 281, 285-89 (E.D. Pa. 1999), *aff'd mem.*, 216 F.3d 1078 (3d Cir. 2000); Fireman's Fund Ins. Co. v. Xerox Corp., 30 F. Supp. 2d 823, 826-27 (M.D. Pa. 1998); Riley v. Becton Dickinson Vascular Access, Inc., 913 F. Supp. 879, 883-92 (E.D. Pa. 1995); Monahan v. Toro Co., 856 F. Supp. 955, 958-64 (E.D. Pa. 1994); Shetterly v. Crown Controls Corp., 719 F. Supp. 385, 388-94 (W.D. Pa. 1989), *aff'd mem.*, 898 F.2d 139-42 (3d Cir. 1990).

[115] Carrecter v. Colson Equip. Co., 346 Pa. Super. 95, 499 A.2d 326 (1985).

[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 Incollingo 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."[119]

The doctrinal separation between negligence and strict liability reached its zenith in *Lewis v. Coffing Hoist Div*.[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,[121] and held that "negligence concepts" such as reasonableness and foreseeability "have no role in . . . strict liability."[122] "[I]ndustry standards" go to the negligence concept of reasonable care, and . . . under our decision in *Azzarello* such a concept has no place in an action based on strict liability in tort."[123] The court emphasized that, in *Azzarello*, it had taken "another approach," different from either the "consumer expectations" or risk/utility theories in other states.[124]

Although recognizing that industry standards could also bear upon defectiveness or feasibility of alternative designs,[125] the court departed from *Bialek*, which had held dual-relevance evidence admissible subject to cautionary instruction.[126] *Lewis* prohibited juries from learning that a product conformed to

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[119] Habecker v. Clark Equip. Co., 942 F.2d 210, 216 (3d Cir. 1991) (applying Pennsylvania law). Even *Habecker* would not go as far as *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." *Id.* at 215.

[120] Lewis v. Coffing Hoist Div., 515 Pa. 334, 528 A.2d 590 (1987).

[121] Previously, in negligence, and in pre-*Azzarello* strict liability, industry standards had been admissible evidence, but not conclusive as to the duty of care. *See* Forry v. Gulf Oil Corp., 428 Pa. 334, 341-42, 237 A.2d 593, 598 (1968); Maize v. Atlantic Ref. Co., 352 Pa. 51, 56-57, 41 A.2d 850, 853 (1945); MacDougall v. Pa. Power & Light Co., 311 Pa. 387, 397, 166 A. 589, 592 (1933); Dallas v. F.M. Oxford Inc., 381 Pa. Super. 89, 95-97, 552 A.2d 1109, 1112 (1989); Berkebile v. Brantly Helicopter Corp., 219 Pa. Super. 479, 485, 281 A.2d 707, 710 (1971); George v. Morgan Constr. Co., 389 F. Supp. 253, 262-64 (E.D. Pa. 1975). *Contra* Holloway v. J. B. Sys., Ltd., 609 F.2d 1069, 1073 (3d Cir. 1979) (per curiam) (applying Pennsylvania law).

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

[123] *Id.* at 343, 528 A.2d at 594.

[124] *Id.* at 340, 528 A.2d at 593.

[125] *Id.* at 342, 528 A.2d at 593-94.

[126] Bialek v. Pittsburgh Brewing Co., 430 Pa. 176, 185, 242 A.2d 231, 235 (1968); *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."[127]

> 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.[128]

In dissent, Justices Hutchinson and Flaherty lamented that "madness" that had overtaken strict liability in Pennsylvania.[129]

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.*,[130] 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.[131] "[T]he rationale in *Lewis* for excluding evidence of compliance with industry standards has been extended to exclude evidence of compliance with government standards."[132]

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[127] *Lewis*, 515 Pa. at 343, 528 A.2d at 594 (citations omitted).

[128] *Id.* at 343, 528 A.2d at 594. *See* Majdic v. Cincinnati Mach. Co., 370 Pa. Super. 611, 620, 537 A.2d 334, 339 (1988) (error, under *Lewis*, to admit evidence of industry custom for customizing safety devices); Santiago v. Johnson Mach. & Press Corp., 834 F.2d 84, 85 (3d Cir. 1987) (error, under *Lewis*, to charge jury on "state of the art") (applying Pennsylvania law).

[129] "I am compelled, in the words of a popular song, to 'speak out against the madness.' The instant madness is a creeping consensus among us judges and lawyers that we are more capable of designing products than engineers. A courtroom is a poor substitute for a design office." *Lewis*, 515 at 346, 528 A.2d at 596 (Hutchinson & Flaherty, JJ., dissenting).

[130] Estate of Hicks v. Dana Cos., 984 A.2d 943, 965 (Pa. Super. Ct. 2009) (en banc). *See* Cave v. Wampler Foods, Inc., 961 A.2d 864, 869 (Pa. Super. Ct. 2008) (regulatory compliance "evidence is directly relevant to and probative of [plaintiff's] allegation that the product at issue was defective") (overruled in *Hicks*); Jackson v. Spagnola, 349 Pa. Super. 471, 479, 503 A.2d 944, 948 (1986) (regulatory compliance is "of probative value in determining whether there is a defect") (overruled in *Hicks*); Brogley v. Chambersburg Eng'g Co., 306 Pa. Super. 316, 320-21, 452 A.2d 743, 745-46 (1982) (courts have "uniformly held admissible . . . safety codes and regulations intended to enhance safety").

[131] *See* Blacker v. Oldsmobile Div., 869 F. Supp. 313, 314 (E.D. Pa. 1994) ("[b]ecause compliance is mandatory, [regulations] do not reflect a manufacturer's voluntary choice to exercise a particular level of care").

[132] Gaudio v. Ford Motor Co., 976 A.2d 524, 543-44 (Pa. Super. Ct. 2009).

> 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."[133]

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

Exclusion of regulatory compliance evidence, however, was a one-way street under *Azzarello*. Plaintiffs remained free to assert *non*-compliance not only as evidence, but as prima facie proof of defect.[136] Violations of "statutory provisions" are "a basis for civil liability in actions for torts . . . such as . . . strict liability."[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.[138]

Disparate treatment of compliance and non-compliance evidence was not the only instance of one-way, pro-plaintiff treatment of negligence terminology under *Azzarello*. The same courts that so readily applied *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 *Azzarello* era, the Superior Court declared, "[a]n allegedly abnormal use will negate liability, however, only if it

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[133] *Hicks*, 984 A.2d at 962 (quoting Azzarello v. Black Bros. Co., 480 Pa. 547, 559, 391 A.2d 1020, 1027 (1978)).

[134] *Id.* at 968-69; Sheehan v. Cincinnati Shaper Co., 382 Pa. Super. 579, 584, 555 A.2d 1352, 1355 (1989); Nesbitt v. Sears, Roebuck & Co., 415 F. Supp. 2d 530, 534 (E.D. Pa. 2005).

[135] *Gaudio*, 976 A.2d at 544; Harsh v. Petroll, 840 A.2d 404, 424-25 (Pa. Commw. 2003), *aff'd on other grounds*, 584 Pa. 606, 887 A.2d 209 (Pa. 2005).

[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).

[137] RESTATEMENT (SECOND) OF TORTS § 288, cmt. d (AM. LAW. INST. 1965).

[138] *Gaudio*, 976 A.2d at 544; Leaphart v. Whiting Corp., 387 Pa. Super. 253, 265-66, 564 A.2d 165, 171 (1989); Elick v. Ford Motor Co., 2010 WL 2612631, at *1 (W.D. Pa. June 29, 2010); Clevenger v. CNH America, LLC, 2008 WL 2383076, at *8 (M.D. Pa. June 9, 2008), *aff'd*, 340 F. Appx. 821 (3d Cir. 2009); Markovich v. Bell Helicopter Textron, Inc., 805 F. Supp. 1231, 1240 (E.D. Pa. 1992).

was not reasonably foreseeable by the seller."[139] Likewise, the *Azzarello* concept of "intended use" was, for many years, defined to "include all those which are reasonably foreseeable to the seller."[140] Throughout the *Azzarello* period, Pennsylvania appellate decisions continued to apply the pre-*Azzarello* *D'Antona*[141] "reasonably foreseeable" standard for substantial change.[142] Similarly, foreseeability was invoked to narrow the defense of product misuse.[143]

Mackowick v. Westinghouse Electric Corp.[144] 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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[139] Burch v. Sears, Roebuck & Co., 320 Pa. Super. 444, 452, 467 A.2d 615, 619 (1983) (citing pre-*Azzarello* precedent). *See* D'Angelo v. ADS Mach. Corp., 128 F. Appx. 253, 255 (3d Cir. 2005) (applying Pennsylvania law).

[140] Parks v. AlliedSignal, Inc., 113 F.3d 1327, 1331, 1336 (3d Cir. 1997) (applying Pennsylvania law); Metzgar v. Playskool Inc., 30 F.3d 459, 464-65 (3d Cir. 1994) (applying Pennsylvania law); Pacheco v. Coats Co., 26 F.3d 418, 422 (3d Cir. 1994) (applying Pennsylvania law); Sheldon v. W. Bend Equip. Corp., 718 F.2d 603, 608 (3d Cir. 1983) (applying Pennsylvania law). The Pennsylvania Supreme Court rejected this definition prior to *Tincher*. *See infra* text accompanying notes 274-77.

[141] *See supra* text accompanying notes 42-43.

[142] *E.g.*, Myers v. Triad Controls, Inc., 720 A.2d 134, 135 (Pa. Super. Ct. 1998); Steinhouse v. Herman Miller, Inc., 443 Pa. Super. 395, 402, 661 A.2d 1379, 1383 (1995); Sweitzer v. Dempster Sys., 372 Pa. Super. 449, 453, 539 A.2d 880, 882 (1988); Eck v. Powermatic Houdaille, Div. of Houdaille Indus., Inc., 364 Pa. Super. 178, 190-91, 527 A.2d 1012, 1018-19 (1987); Thompson v. Motch & Merryweather Mach. Co., 358 Pa. Super. 149, 155, 516 A.2d 1226, 1229 (1986); *Burch*, 320 Pa. Super. at 453-54, 467 A.2d at 620; Rooney v. Fed. Press Co., 751 F.2d 140, 144 (3d Cir. 1984) (applying Pennsylvania law); Merriweather v. E. W. Bliss Co., 636 F.2d 42, 45 (3d Cir. 1980) (applying Pennsylvania law).

[143] Childers v. Power Line Equip. Rentals, Inc., 452 Pa. Super. 94, 108, 681 A.2d 201, 208 (1996); Dougherty v. Edward J. Meloney, Inc., 443 Pa. Super. 201, 223-24, 661 A.2d 375, 386-87 (1995); Surace v. Caterpillar, Inc., 111 F.3d 1039, 1054 (3d Cir. 1997) (applying Pennsylvania law); Griggs v. BIC Corp., 981 F.2d 1429, 1438 (3d Cir. 1992), *abrogated on other grounds*, Surace v. Caterpillar, Inc., 111 F.3d 1039 (3d Cir. 1997) (applying Pennsylvania law); Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 119 (3d Cir. 1992) (applying Pennsylvania law); Petree v. Victor Fluid Power, Inc., 831 F.2d 1191, 1195 (3d Cir. 1987) (applying Pennsylvania law).

[144] Mackowick v. Westinghouse Elec. Corp., 525 Pa. 52, 56-57, 575 A.2d 100, 102-03 (1990).

knowledge for whom the product was not intended.[145] 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.[146]

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,"[147] 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.[148]

In *Walton v. Avco Corp.*,[149] 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.[150] *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).

[147] Phillips v. A-Best Prods. Co. (*Phillips I*), 542 Pa. 124 n.5, 131, 665 A.2d 1167, 1171 n.5 (1995) (quoting Azzarello v. Black Bros. Co., 480 Pa. 547, 558, 391 A.2d 1020, 1026 (1978); *see supra* text accompanying notes 77-87. Other aspects of *Phillips I* are discussed, *infra* text accompanying notes 216-220.

[148] *Phillips I*, 542 Pa. at 133, 665 A.2d at 1172 (declining to reach question). To date, "the sophisticated user defense has never been adopted in Pennsylvania." Amato v. Bell & Gossett, 116 A.3d 607, 624 (Pa. Super. Ct. 2015), *appeal dismissed*, 150 A.3d 956 (Pa. 2016). Citing *Azzarello*'s "risk-spreading" policy, the Third Circuit rejected this defense in Brown v. Caterpillar Tractor Co., 741 F.2d 656, 660 (3d Cir. 1984) (applying Pennsylvania law).

[149] Walton v. Avco Corp., 530 Pa. 568, 610 A.2d 454 (1992).

[150] *See* RESTATEMENT (SECOND) OF TORTS § 402A, cmt. g (AM. LAW. INST. 1965) ("condition" of product determined "at the time it leaves the seller's hands"). Thus "no post-sale duty to warn exists where no defect existed in the product at the time of sale." DeSantis v. Frick, 745 A.2d 624, 630 (Pa. Super. Ct. 1999); *accord* Inman v. Gen. Elec. Co., 2016 WL 5106939, at *7 (W.D. Pa. 2016).

fault' liability."[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."[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.[153]

Walton rejected a universal duty to provide post-sale warnings. The duty turned on what was reasonable, given the "peculiarities of the industry."[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.[155] Even in *Walton*, the "theoretical dam" was not leak-proof.[156]

The "dam" looked solid in *Kimco Development Corp. v. Michael D's Carpet Outlets*,[157] when *McCown*'s[158] preclusion of contributory negligence

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[151] *Walton*, 530 Pa. at 584, 610 A.2d at 462.

[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.

[153] *Walton*, 530 Pa. at 578, 610 A.2d at 459 (citations omitted).

[154] *Id.*

[155] *Id. See* Habecker v. Clark Equip. Co., 797 F. Supp. 381, 388 (M.D. Pa. 1992) ("common business appliances" outside scope of duty), *aff'd*, 36 F.3d 278 (3d. Cir. 1994); Ierardi v. Lorillard, Inc., 777 F. Supp. 420, 423 (E.D. Pa. 1991) (impossible to give post-sale warnings to cigarette smokers). Nor does the duty extend to recalling or retrofitting products. Habecker v. Copperloy Corp., 893 F.2d 49, 54 (3d Cir. 1990) (applying Pennsylvania law); Talarico v. Skyjack, Inc., 191 F. Supp. 3d 394, 399 (M.D. Pa. 2016); McLaud v. Indus. Res., Inc., 2016 WL 7048987, at *8 (M.D. Pa. 2016); Inman v. Gen. Elec. Co., 2016 WL 5106939, at *7 (W.D. Pa. 2016); Padilla v. Black & Decker Corp., 2005 WL 697479, *7 (E.D. Pa. 2005); Boyer v. Case Corp., 1998 WL 205695, at *2 (E.D. Pa. 1998).

[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.

[157] Kimco Dev. Corp. v. Michael D's Carpet Outlets, 536 Pa. 1, 637 A.2d 603 (1993).

was extended to the legislature's poorly phrased 1978 comparative fault statute that replaced contributory negligence.[159] 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."[160] 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.[161]

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*[162] − and in the process disregarded the causation holdings in *Sherk*.[163] "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."[164] Causation, according to *Parks*, "is not the primary focus of section 402A cases."[165] 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."[166] 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).

[162] Parks v. AlliedSignal, Inc., 113 F.3d 1327, 1335 (3d Cir. 1997) (citation and quotation marks omitted) (applying Pennsylvania law).

[163] Sherk v. Daisy-Heddon, 498 Pa. 594, 450 A.2d 615 (1982); *see supra* notes 96-99 and accompanying text.

[164] *Parks*, 113 F.3d at 1334 (quoting Kern v. Nissan Indus. Equip. Co., 801 F. Supp. 1438, 1440 (M.D. Pa. 1992)).

[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 j[169] – "[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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[167] Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 119 (3d Cir. 1992) (applying Pennsylvania law) (emphasis added).

[168] Coward v. Owens-Corning Fiberglass Corp., 729 A.2d 614 (Pa. Super. Ct. 1999), *appeal granted*, 560 Pa. 705, 743 A.2d 920 (1999). *Coward* was an asbestos case, and due to the defendant's bankruptcy, the Pennsylvania Supreme Court never heard the appeal it accepted.

[169] RESTATEMENT (SECOND) OF TORTS § 402A, cmt. j (AM. LAW. INST. 1965).

[170] *Coward*, 729 A.2d at 619 (quoting RESTATEMENT (SECOND) OF TORTS § 402A, cmt. j (AM. LAW. INST. 1965)). The Third Circuit had previously made a similar prediction in a consumer product case. Pavlik v. Lane Ltd./Tobacco Exps. Int'l, 135 F.3d 876, 883 (3d Cir. 1998) (applying Pennsylvania law).

[171] *Coward*, 729 A.2d at 621.

[172] *Id.* at 619-20 (citing primarily *Azzarello* and *Berkebile*).

D. The Mid 1990s to Mid 2000s − The Accelerating Decay of Azzarello *Super-Strict Liability*

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* rule[176] 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

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[173] Hart v. W.H. Stewart, Inc., 523 Pa. 13, 17, 564 A.2d 1250, 1259 (1989) (footnote omitted); *see* Mazzagatti v. Everingham, 512 Pa. 266, 281, 516 A.2d 672, 680 (1986) (Flaherty, J. concurring).

[174] Cafazzo v. Cent. Med. Health Serv., Inc., 542 Pa. 526, 535, 668 A.2d 521, 526 (1995) (citation omitted).

[175] Coyle v. Richardson-Merrell, Inc., 526 Pa. 208, 217, 584 A.2d 1383, 1387 (1991).

[176] Incollingo v. Ewing, 444 Pa. 263, 584 A.2d 1383, 1387 (1991); *see supra* notes 35-41 and accompanying text.

[177] Baldino v. Castagna, 505 Pa. 239, 245, 478 A.2d 807, 810 (1984).

[178] Hahn v. Richter, 427 Pa. Super. 130, 628 A.2d 860 (1993) (en banc), *aff'd* 543 Pa. 558, 673 A.2d 888 (1996).

[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.[180]

The Supreme Court expanded this strict liability-free zone to include intermediate sellers of prescription medical products in *Coyle v. Richardson-Merrell, Inc.*,[181] and *Cafazzo v. Central Medical Health Services, Inc.*[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."[183] Shortly before *Tincher*, *Lance v.*

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company bound for unforeseeable reactions to their products." *Id.* at 871 (Cavanaugh, J., Rowley, P.J, & Beck. J., concurring).

[180] *Hahn*, 543 Pa. at 563, 673 A.2d at 891 (citation omitted). *Hahn* involved a prescription drug, but the same rule has been applied to prescription medical devices for all but (occasionally) manufacturing defect claims. *See* McPhee v. DePuy Orthopedics, Inc., 989 F. Supp. 2d 451, 460-61 (W.D. Pa. 2012); Gross v. Stryker Corp., 858 F. Supp. 2d 466, 482 (W.D. Pa. 2012); Kee v. Zimmer, Inc., 871 F. Supp. 2d 405, 409 (E.D. Pa. 2012); Soufflas v. Zimmer, Inc., 474 F. Supp. 2d 737, 749-50 (E.D. Pa. 2007); Davenport v. Medtronic, Inc., 302 F. Supp. 2d 419, 442 (E.D. Pa. 2004); Parkinson v. Guidant Corp., 315 F. Supp. 2d 741, 747 (W.D. Pa. 2004); Creazzo v. Medtronic, Inc., 903 A.2d 24, 31 (Pa. Super. Ct. 2006).

[181] Coyle v. Richardson-Merrell, Inc., 526 Pa. 208, 213-14, 584 A.2d 1383, 1385-86 (1991) (invoking RESTATEMENT (SECOND) OF TORTS § 402A, cmt. k (AM. LAW. INST. 1965) to preclude strict liability for pharmacists dispensing prescription drugs).

[182] Cafazzo v. Cent. Med. Health Serv., Inc., 542 Pa. 526, 537, 668 A.2d 521, 527 (1995) (applying *Coyle* to hospitals providing medical devices; "research and innovation in medical equipment and treatment would be inhibited" by imposing). *Cafazzo* thus impliedly overruled Grubb v. Albert Einstein Medical Center, which had "extrapolate[ed] strict liability to hospitals as "sellers in the distributive chain." Grubb v. Albert Einstein Med. Cent., 255 Pa. Super. 381, 401, 387 A.2d 480, 490 (1978) (citation omitted). *See* Podrat v. Codman-Shurtleff, Inc., 384 Pa. Super. 404, 406-10, 558 A.2d 895, 895-98 (1989) (rejecting *Grubb*).

[183] *Cafazzo*, 542 Pa. at 537-38, 668 A.2d at 527.

Wyeth reaffirmed that "for policy reasons this Court has declined to extend strict liability into the prescription drug arena."[184]

A second strict liability-free zone came into being in *Redland Soccer Club, Inc. v. Dep't of the Army*,[185] 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.[186]

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,[187] crashworthiness was recognized as a strict liability cause of action in *Kupetz v. Deere & Co.*[188] In crashworthiness cases, the claimed product defect "d[oes] 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

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[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.

[185] Redland Soccer Club v. Dep’t of the Army, 548 Pa. 178, 696 A.2d 137 (1997).

[186] *Id.* at 195, 696 A.2d at 145. *See* Sheridan v. NGK N. Am., Inc., 2007 WL 3429205, at *2 (E.D. Pa. Nov. 15, 2007); Wagner v. Anzon, Inc., 453 Pa. Super. 619, 631, 684 A.2d 570, 576 (1996); Cull v. Cabot Corp., 61 Pa. D. & C.4th 343, 347-49 (C.P. Phila. Cty. 2001); Brown v. Becton Dickinson, 2000 WL 33342381, at *1 (Pa. C.P. Phila. Cty. 2000).

[187] Habecker v. Clark Equip. Co., 942 F.2d 210, 214 (3d Cir. 1991) (applying Pennsylvania law). Prior to *Azzarello*, federal courts had permitted crashworthiness under the theory that a "manufacturer is required to design a product reasonably fit for its intended use," Roe v. Deere & Co., 855 F.2d 151, 153 & n.2 (3d Cir. 1988) (applying Pennsylvania law), and that such accidents were "readily foreseeable misuse" that required manufacturers to guard against "foreseeable, though accidental, traumatic consequences." Dyson v. Gen. Motors Corp., 298 F. Supp. 1064, 1072-73 (E.D. Pa. 1969). *See* Jeng v. Witters, 452 F. Supp. 1349, 1355 (M.D. Pa. 1978) ("[s]trict liability in tort requires that the product be used in a foreseeable manner"), *aff'd mem.*, 591 F.2d 1334 (3d Cir. 1979).

[188] Kupetz v. Deer & Co., 435 Pa. Super. 16, 26, 644 A.2d 1213, 1218 (1994).

the accident.[189] 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.[190]

"The effect of the crashworthiness doctrine is that a manufacturer has a legal duty to design and manufacture its product to be reasonably crashworthy."[191]

The elements of crashworthiness and the plaintiff's burden of proof, as stated in *Kupetz*, were ratified by the Pennsylvania Supreme Court,[192] and remained Pennsylvania law throughout the *Azzarello* period and beyond.[193] Despite *Azzarello*, crashworthiness cases routinely employed negligence terminology similar to *Kupetz*. "The basis of th[is] doctrine is that the manufacturer must design his product so that it is safe for any reasonably foreseeable use."[194] Nonetheless, crashworthiness continued to be considered a

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[189] *Kupetz*, 435 Pa. Super. at 26-27, 644 A.2d at 1218.

[190] *Id.* at 27-28, 644 A.2d at 1218 (citing Dorsett v. American Isuzu Motors Inc., 805 F. Supp. 1212, 1218 (E.D. Pa. 1992) (observing that "proof of a defect resembles, on its face, proof of negligence"); Craigie v. Gen. Motors Corp., 740 F. Supp. 353, 357-58 (E.D. Pa. 1990) (crashworthiness "requires that a designer eliminate any unreasonable risk of foreseeable injury").

[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)).

[192] *See* Stecher v. Ford Motor Co., 571 Pa. 312, 320, 812 A.2d 553, 558 (2002) (reversing Superior Court decision that would have shifted the burden of proof); Schroeder v. Com., DOT, 551 Pa. 243, 252 n.8, 710 A.2d 23, 27 n.8 (1998) (reciting *Kupetz* elements of crashworthiness).

[193] Parr v. Ford Motor Co., 109 A.3d 682, 689 (Pa. Super. Ct. 2014) (post-*Tincher*); Gaudio v. Ford Motor Co., 976 A.2d 524, 532, 551-52 (Pa. Super. Ct. 2009); Raskin v. Ford Motor Co., 837 A.2d 518, 523 (Pa. Super. Ct. 2003); Colville v. Crown Equip. Corp., 809 A.2d 916, 922-23 (Pa. Super. Ct. 2002); *see* Oddi v. Ford Motor Co., 234 F.3d 136, 143 (3d Cir. 2000) (expressing same requirements as four elements) (applying Pennsylvania law); Habecker v. Clark Equip. Co., 36 F.3d 278, 284 (3d Cir. 1994) (same) (applying Pennsylvania law).

[194] Harsh v. Petroll, 840 A.2d 404, 417 (Pa. Commw. Ct. 2003), *aff'd on other grounds*, 584 Pa. 606, 887 A.2d 209 (2005). *See* Daddona v. Thind, 891 A.2d 786, 811 (Pa. Commw. Ct. 2006) ("industry standards" were "not improper

"subset of," and "a targeted exception to the prohibition against utilizing an analysis of the foreseeability . . . in, strict liability."[195]

Perhaps no aspect of strict liability became more confused under *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."[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.[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.[198]
- That plaintiff used the product without a safety shield in violation of explicit warnings.[199]

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given that the practicability of an alternative, feasible design is an essential element in a crashworthiness case").

[195] *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 *Tincher*, the issue might be moot.

[196] Reott v. Asia Trend, Inc., 618 Pa. 228, 249, 55 A.3d 1088, 1098 (2012). The conduct in *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, *id*. at 233, 55 A.3d at 1091, was deemed not sufficiently "unforeseeable and outrageous" to be admissible. *Id.* at 250, 55 A.3d at 1096.

[197] *Id.* at 245, 55 A.3d at 1098.

[198] *Daddona*, 891 A.2d at 810-11.

[199] Gigus v. Giles & Ransome, Inc., 868 A.2d 459, 462 (Pa. Super. Ct. 2005).

- 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]

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[200] Coffey v. Minwax Co., 764 A.2d 616, 621 (Pa. Super. Ct. 2000).

[201] Frey v. Harley Davidson Motor Co., 734 A.2d 1, 6-8 (Pa. Super. Ct. 1999) (finding reversible error).

[202] Madonna v. Harley Davidson, Inc., 708 A.2d 507, 508-09 (Pa. Super. Ct. 1998) (motorcycle); Gallagher v. Ing, 367 Pa. Super. 346, 352, 532 A.2d 1179, 1182 (1987) (automobile).

[203] Foley v. Clark Equip. Co., 361 Pa. Super. 599, 628-29, 523 A.2d 379, 394 (1988) (finding reversible error).

[204] Keirs v. Weber Nat'l Stores, Inc., 352 Pa. Super. 111, 117, 507 A.2d 406, 409 (1986).

[205] Gottfried v. Am. Can Co., 339 Pa. Super. 403, 412, 489 A.2d 222, 227 (1985).

[206] Bascelli v. Randy, Inc., 339 Pa. Super. 254, 260-61, 488 A.2d 1110, 1114 (1985) (finding reversible error).

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

[208] Wilson v. Vermont Castings, Inc., 170 F.3d 391, 395-96 (3d Cir. 1999) (applying Pennsylvania law).

[209] Smith v. Yamaha Motor Corp., 5 A.3d 314, 321 (Pa. Super. Ct. 2010).

- That plaintiff was distracted and unable to control his vehicle.[210]
- That plaintiff was inattentive while handling metal near a high tension power line.[211]
- That plaintiff or a third party turned on the product while plaintiff stood on it.[212]
- That both participants in a collision, including plaintiff, were inattentive to where they were going.[213]
- That plaintiff, without setting an emergency brake, tried to exit a vehicle while it was in gear.[214]
- That plaintiff failed to read an operator's manual and failed to use the emergency brake.[215]

In a case involving plaintiff conduct, *Phillips v. A-Best Products Co.*,[216] followed *Sherk*.[217] The defense in *Phillips I* established a *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."[218] "Based on this actual knowledge of the danger on the part of the user," *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.[219] Application of assumption of the risk principles in *Phillips I* in the employment setting is thus incompatible with lower court decisions holding that employment activities cannot be "voluntary."[220]

The erstwhile "dam" between negligence and strict liability began giving way when *Davis v. Berwind Corp.*[221] adopted the Superior Court's pre-*Azzarello*

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[210] Gaudio v. Ford Motor Co., 976 A.2d 524, 539-42 (Pa. Super. Ct. 2009).

[211] Clark v. Bil-Jax, Inc., 763 A.2d 920, 924 (Pa. Super. Ct. 2000).

[212] Jara v. Rexworks Inc., 718 A.2d 788, 793-94 (Pa. Super. Ct. 1998).

[213] Charlton v. Toyota Indus. Equip., 714 A.2d 1043, 1047-48 (Pa. Super. Ct. 1998).

[214] Childers v. Power Line Equip. Rentals, 452 Pa. Super. 94, 107-08, 681 A.2d 201, 208 (1996).

[215] Dillinger v. Caterpillar, Inc., 959 F.2d 430, 440-44 (3d Cir. 1992) (applying Pennsylvania law).

[216] *Phillips I*, 542 Pa. 124, 665 A.2d 1167 (1995).

[217] Sherk v. Daisy-Heddon, 498 Pa. 594, 450 A.2d 615 (1982); *see supra* notes 96-99 and accompanying text.

[218] *Phillips I*, 542 Pa. at 132, 665 A.2d at 1171.

[219] *Id.* at 133, 665 A.2d at 1171.

[220] *See* Sansom v. Crown Equip. Corp., 880 F. Supp. 2d 648, 666 (W.D. Pa. 2012); Jara v. Rexworks Inc., 718 A.2d 788, 795 (Pa. Super. Ct. 1998).

[221] Davis v. Berwind Corp., 547 Pa. 260, 690 A.2d 186 (1997).

test[222] for establishing that a product was "substantially changed" prior to an accident. *Davis* employed "reasonable foreseeability" language ostensibly done away with in *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.[223]

Davis affirmed judgment n.o.v. where the plaintiff's employer removed a safety device notwithstanding the defendant manufacturer's specific contrary warning.[224] Injury from a substantial change to a product could not be "foreseeable" where the defendant manufacturer had expressly warned *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 *not* to operate a product without a safety device indicates to a user that the product *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.[225]

Thus, the doctrine of substantial change precluded liability where the product alteration was made in disregard of warnings against so doing.[226]

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

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[222] *See supra* notes 43, 142 and accompanying text.

[223] *Davis*, 547 Pa. at 267, 690 A.2d at 190 (citations omitted).

[224] *Id.* at 264, 690 A.2d at 188.

[225] *Id.* at 268-69, 690 A.2d at 190-91 (footnote omitted) (emphasis in original).

[226] *Id.*

[227] *See supra* notes 169-73 and accompanying text (discussing Coward v. Owens-Corning Fiberglass Corp., 729 A.2d 614 (Pa. Super. Ct. 1999), *appeal granted*, 560 Pa. 705, 743 A.2d 920 (1999)).

[228] *See supra* text accompanying notes 178-80.

[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."[230] 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."[231]

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."[232] Plaintiffs, however, objected to the absence of similar accidents as "negligence" evidence in *Spino v. John S. Tilley Ladder Co.*[233] Rejecting that contention, the court retreated from the *Lewis* position that relevance to "negligence" required exclusion.[234] Instead, the court returned to the usual rule that "while evidence can be found

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SmithKline Beecham Corp., 448 Pa. Super. 425, 434, 671 A.2d 1151, 1155 (1996). *See also* Lineberger v. Wyeth, 894 A.2d 141, 149-50 (Pa. Super. Ct. 2006); Rowland v. Novartis Pharm. Corp., 34 F. Supp. 3d 556, 572 n.10 (W.D. Pa. 2014).

[230] Viguers v. Philip Morris USA, Inc., 837 A.2d 534, 538 (Pa. Super. Ct. 2003), *aff'd*, 881 A.2d 1262 (Pa. 2005) (per curiam). *See also* Goldstein v. Phillip Morris, 854 A.2d 585, 587 (Pa. Super. Ct. 2004); Moroney v. Gen. Motors Corp., 850 A.2d 629, 634 n.3 (Pa. Super. Ct. 2004). Thus, the expansive, heeding presumption applicable to all products predicted in *Pavlic* failed to materialize. *See supra* note 170 and accompanying text (discussing *Pavlic*).

[231] Overpeck v. Chic. Pneumatic Tool Co., 823 F.2d 751, 756 (3d Cir. 1987) (quoting Commonwealth v. Vogel, 440 Pa. 1, 34, 268 A.2d 89, 102 (1970)) (applying Pennsylvania law).

[232] "Substantial similarity" has been described as "similar accidents occurring at substantially the same place and under the same or similar circumstances." Majdic v. Cincinnati Mach. Co., 370 Pa. Super. 611, 625, 537 A.2d 334, 341 (1988). For *Azzarello*-era appellate authority addressing similar occurrence evidence, see DiFrancesco v. Excam, Inc., 434 Pa. Super. 173, 185, 642 A.2d 529, 535 (1994); Harkins v. Calumet Realty Co., 418 Pa. Super. 405, 415-16, 614 A.2d 699, 704-05 (1992); Rogers v. Johnson & Johnson Prods., Inc., 401 Pa. Super. 430, 435-37, 585 A.2d 1004, 1006-07 (1990); Lynch v. McStome & Lincoln Plaza Assocs., 378 Pa. Super. 430, 436, 548 A.2d 1276, 1279 (1988); Whitman v. Riddell, 324 Pa. Super. 177, 180-81, 471 A.2d 521, 522-23 (1984); Barker v. Deere & Co., 60 F.3d 158, 162-63 (3d Cir. 1995) (applying Pennsylvania law). *See also* Hutchinson v. Penske Truck Leasing Co., 876 A.2d 978, 985-87 (Pa. Super. Ct. 2005) (applying substantial similarity requirement to accident statistics), *aff'd per curiam*, 592 Pa. 38, 922 A.2d 890 (2007).

[233] Spino v. John S. Tilley Ladder Co., 548 Pa. 286, 696 A.2d 1169 (1997).

[234] *See supra* text accompanying notes 127-28.

inadmissible for one purpose, it may be admissible for another."[235] The absolutist position taken in *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.[236]

The Superior Court opened the door wide to "negligence" risk/utility evidence in *Phatak v. United Chair Co.*[237] Although *Brandimarti v. Catterpillar Tractor Co.*[238] had prohibited jury charges from mentioning risk/utility factors, the same court in *Phatak* held that juries should receive extensive *evidence* concerning the same factors[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.[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."[241]

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

[236] *Id.* at 298, 696 A.2d at 1174.

[237] Phatak v. United Chair Co., 756 A.2d 690 (Pa. Super. Ct. 2000).

[238] Brandimarti v. Catterpillar Tractor Co., 364 Pa. Super. 26, 33, 527 A.2d 134, 138 (1987). *See supra* note 108 and accompanying text.

[239] *Phatak*, 756 A.2d at 694 (quoting "Wade factors" from Dambacher v. Mallis, 336 Pa. Super. 22, 50-51 n.5, 485 A.2d 408, 423 n.5 (1984) (en banc), *appeal dismissed*, 508 Pa. 643, 500 A.2d 428 (1985), *overruled sub silentio on other grounds*, *Phillips II*, 576 Pa. 644, 658, 841 A.2d 1000, 1008 (2003) (as to negligence claim)); *see supra* note 107 and accompanying text.

[240] *Phatak*, 756 A.2d at 694.

[241] 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.*[242] Slicing through a Gordian Knot of conflicting intermediate appellate decisions,[243] *Duchess* unanimously held that subsequent remedial measures are inadmissible in both negligence and strict liability.[244] 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].[245]

Instead of relying on California law, as in *Azzarello* and *Berkebile*,[246] the Court rejected the California rule holding subsequent remedial measures admissible in strict liability while excluding them in negligence.[247] 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.[248] *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.[249] The court also gave little weight

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[242] Duchess v. Langston Corp*.*, 564 Pa. 529, 769 A.2d 1131 (2001).

[243] *Id.* at 535-38, 769 A.2d at 1134-36 (discussing Duchess v. Langston Corp., 709 A.2d 410 (Pa. Super. Ct. 1998), *aff'd*, 564 Pa. 529, 769 A.2d 1131 (2001); Connelly v. Roper Corp., 404 Pa. Super. 67, 590 A.2d 11 (1991); Gottfried v. Am. Can Co., 339 Pa. Super. 403, 489 A.2d 222 (1985); Matsko v. Harley Davidson Motor Co., 325 Pa. Super. 452, 473 A.2d 155 (1984)).

[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*).

[247] *Duchess*, 564 Pa. at 544-48, 769 A.2d at 1140-42 (disagreeing with Ault v. Int'l Harvester Co., 13 Cal.3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (1974)).

[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

Duchess 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.

[251] *Phillips II*, 576 Pa. 644, 841 A.2d 1000 (2003).

[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.[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 *Davis*[258] for specific criticism.[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."[260] Whether to "abandon[] our current interpretation of strict liability law" or to "adopt the Restatement (Third) of Torts[] . . . ha[d] been waived."[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 *Azzarello* negligence/strict liability divide was beset by "pervasive ambiguities and inconsistencies."[262] These Justices believed that the "rhetorical exclusion of negligence concepts from strict liability doctrine" imposed by *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."[263] They contended that negligence and strict liability were not logically separable,[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

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[257] *Phillips II,* 576 Pa. at 654-55, 841 A.2d at 1006 (footnote omitted). *See supra* text accompanying notes 223-27.

[258] Davis v. Berwind Corp., 547 Pa. 260, 690 A.2d 186 (1997).

[259] *Phillips II*, 576 Pa. at 655-66, 841 A.2d at 1006-07.

[260] *Id.* at 1007.

[261] *Id.* at 657 n.6, 841 A.2d at 1008 n.6. These issues had, however, been extensively briefed in an *amicus curiae* brief filed in *Phillips II* by this author. *See* Brief of Amicus Curiae Product Liability Advisory Council, Inc. in Support of Appellants, Phillips v. Cricket Lighters, No. 90 WAP 2001, 2002 WL 32178114, at *14-31 (Pa. filed Mar. 7, 2002).

[262] *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. *Id.* at 682-85, 841 A.2d at 1023-25 (concurring in result, concurring and dissenting opinion).

[263] *Id.* at 671, 841 A.2d at 1016 (concurring opinion).

[264] *Id.* at 670, 841 A.2d at 1015-16 (concurring opinion).

> guidance concerning the nature of the central conception of product defect.[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.[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.[267]

> [T[he 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.[268]

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

Harsh v. Petroll, avoided the Restatement issue[270] while demolishing another piece of the wall between negligence and strict liability. The Court

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[265] *Phillips II*, 576 Pa. at 672, 841 A.2d at 1017 (concurring opinion) (citations and footnote omitted).

[266] *Id.* at 1019-21, 841 A.2d at 1019-21 (concurring opinion) (discussing RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (AM. LAW. INST. 1998)).

[267] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2, cmt. e-g (AM. LAW. INST. 1998).

[268] *Phillips II*, 576 Pa. at 670, 841 A.2d at 1015-16 (concurring opinion).

[269] After remand, the same litigation returned to the Supreme Court of Pennsylvania. Phillips v. Cricket Lighters (*Phillips III*), 584 Pa. 179, 883 A.2d 439 (2005). Addressing implied warranty, *Phillips III* imported the "intended user" concept into the "ordinary purposes" language of 13 PA. CONS. STAT. § 2314(3) (2017). *Phillips III*, 584 Pa. at 187-88, 883 A.2d at 444-45 (the product's "ordinary purpose certainly was not to be a two year old child's plaything"). The procedural posture of *Phillips III* left no opportunity to revisit strict liability issues. *Id.* at 185 n.2, 883 A.2d at 43 n.2.

[270] Harsh v. Petroll, 584 Pa. 606, 618 n.16, 887 A.2d 209, 216-17 n.16 (2005).

answered the apportionment question left open in *Walton*[271] and rejected the plaintiff's argument − accepted by a number of *Azzarello*-era decisions[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:

> [A]lthough 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 decedents], the trial court did not err in assessing liability jointly and severally.[273]

Foundational strict liability issues again arose in *Pennsylvania Dep't of General Services v. United States Mineral Products Co.*,[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.[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.[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

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[271] *See supra* note 156 and accompanying text.

[272] Carrasquilla v. Mazda Motor Corp., 963 F. Supp. 455, 459 (M.D. Pa. 1997); Harries v. Gen. Motors Corp., 786 F. Supp. 446, 448 (M.D. Pa. 1992); Frazier v. Harley Davidson Motor Co., 109 F.R.D. 293, 295-96 (W.D. Pa. 1985); Struss v. Renault U.S.A., Inc., 108 F.R.D. 691, 694-95 (W.D. Pa. 1985); Bike v. Am. Motors Corp., 101 F.R.D. 77, 82 (E.D. Pa. 1984); Conti v. Ford Motor Co., 578 F. Supp. 1429, 1434-35 (E.D. Pa. 1983), *rev'd on other grounds*, 743 F.2d 195 (3d Cir. 1984). *Contra* Craigie v. Gen. Motors Corp., 740 F. Supp. 353, 361-62 (E.D. Pa. 1990).

[273] *Harsh*, 584 Pa. at 623, 887 A.2d at 219. The Third Circuit had reached a similar result in a non-crashworthiness case involving allegedly strictly liable and negligent defendants. *See* Rabatin v. Columbus Lines, Inc., 790 F.2d 22, 25-26 (3d Cir. 1986) (applying Pennsylvania law).

[274] Pa. Dep't of Gen. Serv. v. United States Mineral Prods. Co. (*DGS*), 587 Pa. 236, 898 A.2d 590 (2006).

[275] *Id.* at 245, 898 A.2d at 595.

[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.[277]

While not overruling *Azzarello* or doing away with the negligence/strict liability dichotomy, *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 *Phillips [II]* . . . that there are substantial deficiencies in present strict liability doctrine, [and] it should be closely limited pending an overhaul by the Court.[278]

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

Bugosh v. I.U. North America, Inc.,[280] attempted the overhaul envisioned in *DGS*. Unfortunately, upon closer examination, none of the defendants in *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.[281] Thus, after oral argument, the *Bugosh* appeal was dismissed as improvidently granted, despite a dissent by two of the concurring justices in *Phillips II*.

> The reality is that *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 *Azzarello* has substantially impeded the progress of our product liability jurisprudence.[282]

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[277] *DGS*, 587 Pa. at 258, 898 A.2d at 603.

[278] *Id.* at 254, 898 A.2d at 601 (citation & footnote omitted).

[279] *Id.* at 254 n.10, 898 A.2d at 601 n.10.

[280] *See* 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.").

[281] *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2, cmt. o (AM. LAW. INST. 1998).

[282] Bugosh v. I.U. N. Am., Inc., 601 Pa. 277, 295-96, 971 A.2d 1228, 1239 (2009) (Saylor & Castille, JJ., dissenting) (citation omitted).

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.*[283] 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."[284] So did the Third Restatement.[285] 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.[286]

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,[287] while others did not,[288] leading to widespread disputes.

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[283] Berrier v. Simplicity Mfg., Inc., 563 F.3d 38 (3d Cir. 2009) (applying Pennsylvania law).

[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).

[287] Konold v. Superior Int'l Indus., 911 F. Supp. 2d 303, 311-12 (W.D. Pa. 2012); Sikkelee v. Precision Auto., 876 F. Supp. 2d 479, 489-90 (M.D. Pa. 2012), *disapproved*, 2012 WL 5077571 (3d Cir. Oct. 17, 2012) (en banc); Carpenter v. Shu-Bee's, Inc., 2012 WL 2740896, at *1-3 (Mag. E.D. Pa. July 9, 2012); Thompson v. Med-Mizer, Inc., 2011 WL 1085621, at *6-7 (E.D. Pa. Mar. 21, 2011); Sweitzer v. Oxmaster, Inc., 2010 WL 5257226, at *4-5 (E.D. Pa. Dec. 23, 2010); Milesco v. Norfolk S. Corp., 2010 WL 55331, at *3 (M.D. Pa. Jan. 5, 2010); Durkot v. Tesco Equip., LLC, 654 F. Supp. 2d 295, 298-300 (Mag. E.D. Pa. 2009); McGonigal v. Sears Roebuck & Co., 2009 WL 2137210, at *4-5 (Mag. E.D. Pa. July 16, 2009).

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

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[288] Thomas v. Staples, Inc., 2 F. Supp. 3d 647, 65 (E.D. Pa. 2014); Varner v. MHS, Ltd., 2 F. Supp. 3d 584, 591 & n.2 (M.D. Pa. 2014); Trask v. Olin Corp., 298 F.R.D. 244, 264 n.23 (W.D. Pa. 2014); Spowal v. ITW Food Equip. Grp. LLC, 943 F. Supp. 2d 550, 555-56 (W.D. Pa. 2013); Jackson v. Louisville Ladder, Inc., 2013 WL 3510989, at *5-6 (M.D. Pa. July 11, 2013); Punch v. Dollar Tree Stores, Inc., 2013 WL 1421514, at *4 (Mag. W.D. Pa. Jan. 24, 2013), *adopted*, 2013 WL 1788063 (W.D. Pa. Apr. 8, 2013); Lynn v. Yamaha Golf-Car Co., 894 F. Supp. 2d 606, 624-27 (W.D. Pa. 2012); Sansom v. Crown Equip. Corp., 880 F. Supp. 2d 648, 653-56 (W.D. Pa. 2012); Zollars v. Troy-Built, LLC, 2012 WL 4922689, *3 n.4 (W.D. Pa. Oct. 16, 2012); Giehl v. Terex Util., 2012 WL 1183719, at *7-9 (M.D. Pa. Apr. 9, 2012); Shuman v. Remtron, Inc., 2012 WL 315445, at *9 n.10 (M.D. Pa. Feb. 1, 2012); Hoffman v. Paper Converting Mach. Co., 694 F. Supp. 2d 359, 364-65 (E.D. Pa. 2010); Covell v. Bell Sports, Inc., 2010 WL 4783043, at *4-5 (E.D. Pa. Sept. 8, 2010), *aff'd*, 651 F.3d 357 (3d Cir. 2011); Richetta v. Stanley Fastening Sys., 661 F. Supp. 2d 500, 506-07 (E.D. Pa. 2009); Martinez v. Skirmish, U.S.A., Inc., 2009 WL 1437624, at *3 (E.D. Pa. May 21, 2009).

[289] Jackson v. Louisville Ladder Inc., 586 F. Appx. 882, 884 (3d Cir. 2014) (applying Pennsylvania law); Sikkelee v. Precision Airmotive Corp., 2012 WL 5077571, at *1 (3d Cir. Oct. 17, 2012) (en banc) (applying Pennsylvania law); Covell v. Bell Sports, Inc., 651 F.3d 357, 363-64 (3d Cir. 2011) (applying Pennsylvania law).

[290] Schmidt v. Boardman Co., 608 Pa. 327, 11 A.3d 924 (2011).

[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."[293] 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.[294]

Almost thirty years after *Dambacher* added its extensive gloss to *Azzarello*'s "threshold risk-utility analysis" holding,[295] the Supreme Court of Pennylvania first reviewed that process in *Beard v. Johnson & Johnson, Inc.*[296] 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.[297]

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.'"[298] 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

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[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.[299] A "wider-ranging assessment . . . was obviously intended from the outset," given "the open-ended factors" that are "the basis for risk-utility review."[300] *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.[301]

Finally, in *Reott v. Asia Trend, Inc.*,[302] the Supreme Court at last addressed the vexing question of the relevance of plaintiff conduct to causation in strict liability.[303] *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."[304] Thus, a plaintiff's "highly reckless" conduct was admissible to establish that such conduct "was the sole or superseding cause of the injuries sustained."[305] Analogizing to established defenses of assumption of the risk and abnormal use,[306] *Reott* considered "highly reckless" conduct to be an affirmative defense as to which defendants had the burden of proof.[307] 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.[308]

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[299] *Beard*, 615 Pa. at 124, 41 A.3d at 838.

[300] *Id.* at 122, 41 A.3d at 837. Previously, *Beard* had discussed the "Wade factors" from *Dambacher*. Dambacher v. Mallis, 336 Pa. Super. 22, 50 n.5, 485 A.2d 408, 423 n.5 (1984) (en banc), *appeal dismissed*, 508 Pa. 643, 500 A.2d 428 (1985), *overruled sub silentio on other grounds*, *Phillips II*, 576 Pa. 644, 658, 841 A.2d 1000, 1008 (2003) (as to negligence claim); *see Beard*, 615 Pa. at 115, 41 A.3d at 833.

[301] *Beard*, 615 Pa. at 123 n.18, 41 A.3d at 838 n.18.

[302] Reott v. Asia Trend, Inc., 618 Pa. 228, 55 A.3d 1088 (2012).

[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.

[306] *See* Parks v. AlliedSignal, Inc., 113 F.3d 1327, 1331, 1336 (3d Cir. 1997) (applying Pennsylvania law); Metzgar v. Playskool Inc., 30 F.3d 459, 464-65 (3d Cir. 1994) (applying Pennsylvania law); Pacheco v. Coats Co., 26 F.3d 418, 422 (3d Cir. 1994) (applying Pennsylvania law); Sheldon v. W. Bend Equip. Corp., 718 F.2d 603, 608 (3d Cir. 1983) (applying Pennsylvania law).

[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.*[309] Except for involving property damage rather than personal injury,[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.[311] Plaintiffs sued Omega Flex, manufacturer of the tubing, claiming a strict liability design defect.[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.[313] Pretrial, the defense sought to apply the Third Restatement rather than *Azzarello* and proposed jury instructions to that effect, which were denied.[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.[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.[316] The jury returned a verdict for plaintiffs.[317] Defense post-trial motions, raising, inter alia, *Azzarello* jury instruction and Third Restatement issues, were denied.[318]

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[309] Tincher v. Omega Flex, Inc., 628 Pa. 296, 104 A.3d 328 (2014).

[310] *Id.* at 310, 104 A.3d at 336. *Tincher* involved a subrogated fire insurance claim. *Id.*

[311] *Id.* at 310, 104 A.3d at 336 (2014).

[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.

[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.

[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).

[315] *Id.* at 315-16, 104 A.3d at 339.

[316] *Id.* at 317, 104 A.3d at 340.

[317] *Tincher*, 628 Pa. 296 at 318, 104 A.3d at 340.

[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.[319] The Superior Court did so, affirming in an unpublished memorandum opinion,[320] 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,[323] 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).

[320] Tincher v. Omega Flex, Inc., 60 A.3d 860 (Pa. Super. Ct. 2012) (table), *rev'd in part and remanded*, 628 Pa. 296, 104 A.3d 328 (2014).

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

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

[323] *Tincher* was argued before the Pennsylvania Supreme Court on October 15, 2013. Tincher v. Omega Flex, Inc., No. 17 MAP 2013, Docket Sheet, at 11 (Pa.) https://ujsportal.pacourts.us (follow Docket Sheets, Appellate Courts, search in Docket Number search bar “17 MAP 2013”) (last accessed Jan. 10, 2017).

[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,"[327] *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."[328] 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."[329]

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."[330] 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.[331]

"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."[332] "[P]ublic policy also adjusts expectations of efficiency and intuitions of justice considerations in the context of products liability."[333] The reduced emphasis on policy in *Tincher* may be a function of the court's repeated invocation of "judicial modesty."[334]

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[327] *See* Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020, 1025-27 (1978).

[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.

[330] Tincher v. Omega Flex, Inc., 628 Pa. 296, 397, 421, 104 A.3d 328, 389, 403 (2014) (in both instances citing Miller v. Preitz, 422 Pa. 383, 411-12, 221 A.2d 320, 334-35 (1966)).

[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. Conaway 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,"[335] *Tincher* made four fundamental changes to Pennsylvania product liability law, and portends others.

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,"[336] the court held that, "in the context of a strict liability claim, whether a product is defective depends upon whether that product is 'unreasonably dangerous.'"[337] "[P]ractical reality" dictates that this inquiry be a jury question:

> [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.[338]

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

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

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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).

[335] *Tincher*, 628 Pa. at 382, 104 A.3d at 380.

[336] *Id.* at 375-76, 104 A.3d at 376.

[337] *Id.* at 382-83, 104 A.3d 328, 380.

[338] *Id.* at 383, 104 A.3d at 380.

[339] *Id.* at 384, 104 A.3d at 381.

[340] Azzarello v. Black Bros. Co., 480 Pa. 555, 391 A.2d 1020, 1025 (1978) (quoting Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972)). *See supra* text accompanying notes 70-72.

[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.

California.[342] Thereafter, "Pennsylvania, unfortunately, did not adjust its jurisprudence in light of these developments that eroded *Azzarello*'s underpinnings.[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."[344] Later, *Tincher* reiterated that "the notion of 'defective condition unreasonably dangerous' is the normative principle of the strict liability cause of action."[345]

> [I]n 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."[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."[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."[348] Whether a defect renders a product "unreasonably dangerous" is once again – as it was prior to *Azzarello*/*Berkebile*[349] – an element of strict liability that plaintiffs must prove.

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[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.").

[343] *Id.*

[344] *Id.* at 361, 104 A.3d at 367.

[345] *Id.* at 416, 104 A.3d at 400.

[346] *Id.* at 382-83, 104 A.3d at 380.

[347] Beard v. Johnson & Johnson, Inc., 615 Pa. 99, 119, 41 A.3d 823, 835-36 (2012). *See supra* notes 112-14 and accompanying text.

[348] *Tincher*, 628 Pa. at 431, 104 A.3d at 409.

[349] *See* Forry v. Gulf Oil Corp., 428 Pa. 334, 340, 237 A.2d 593, 597 (1968); *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"[350] – 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]

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[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 "'approv[e]' jury instructions in strict liability cases generally" only "[c]ompound[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

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[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").

[361] *Id.* at 342, 104 A.3d at 355 (quoting Maloney v. Valley Med. Facilities, Inc., 603 Pa. 399, 418, 984 A.2d 478, 490 (2009) (internal quotations omitted)); *id.* at 380, 104 A.3d at 378 (repeating same quotation).

it "conflated a determination of the facts and its related yet distinct conceptual underpinnings."[362] *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,"[365] however, did not mean leaving juries with 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.[366] "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."[367] Because the jury is now to decide whether defects render product designs "unreasonably

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[362] *Tincher*, 628 Pa. at 378, 104 A.3d at 377. *Tincher* thus used language similar to critiques by earlier commentators of the same language in *Azzarello*. The Owen Hornbook cited repeatedly by *Tincher* described *Azzarello's* supplier as "guarantor" standard as "ha[ving] frightening implications, and it has elsewhere been properly rejected as too extreme." *See infra* notes 377, 379, 382, 508 and accompanying text; OWEN Hornbook, § 5.8 at 322-23 (2d ed. 2008). "This instruction calls forth fantastic cartoon images of products, both simple and complex, laden with fail-safe mechanism atop fail-safe mechanism." McKay v. Sandmold Systems, Inc., 333 Pa. Super. 235, 240, 482 A.2d 260, 263 (1984) (quoting Shelia L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 637-639 (1980)). "Viewed most charitably, such an approach to the design defect issue is confused and unworkable." *Id.* at 240, 482 A.2d at 263 (quoting James A. Henderson Jr., *Renewed Judicial Controversy over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773, 801 (1979)). "How, one may ask, could any automobile today turn out not to be actionable under [*Azzarello*'s] tests?" *Id.* at 241, 482 A.2d at 264 (quoting John W. Wade, *On Product 'Design Defects' & Their Actionability*, 33 VAND. L. REV. 551, 567 (1980)).

[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,"[368] 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."[369]

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,[370] 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."[371] Under the consumer expectation approach, the plaintiff must prove that "the danger is unknowable and unacceptable to the average or ordinary consumer."[372] 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."[373]

This "composite" standard incorporated aspects of both the risk/utility rule contained in the Third Restatement and the consumer expectation approach found in Restatement Second Section 402A.[374]

> 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.[375]

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

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[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).

[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."[383] In the event of "overreaching by the plaintiff," "[a] defendant may also seek to have dismissed" either approach by "appropriate motion."[384] 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."[385] 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.[386]

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.[387] Cognizant of the errors of *Azzarello* – and, indeed, of the entire "first decade" of strict liability,[388] – *Tincher* displayed "modesty" in its approach to revamping *Azzarello*'s legacy.[389] The justices in *Tincher* initially appealed to Pennsylvania lawmakers for "comprehensive legislative reform" that "address[ed] this arena of substantive law."[390] Until that happened, the court was not keen to jump directly from the failed "broad holding[s]" of *Azzarello*[391] to the second set of product liability "principles of broad application" represented by the Third Restatement.[392]

> [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

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[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.[393]

It was preferable "to permit the common law to develop incrementally."[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."[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.[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."[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."[398]

> [T]he 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."[399]

Thus, the majority in *Tincher*[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."[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"

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393 *Tincher*, 628 Pa. at 414, A.3d at 399.

394 *Id.* at 426, 104 A.3d at 406.

395 *Id.* at 411, 104 A.3d at 399.

396 *Id.*

397 *Id.* at 409, 104 A.3d at 396.

398 *Id.* at 413, 104 A.3d at 398.

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).

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).

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 *Tincher*[405] 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.

[406] *Id.* at 432, 104 A.3d at 409 (citing Bugosh v. I.U. N. Am., Inc., 601 Pa. 277, 305-06, 311-12, 971 A.2d 1228, 1244-45, 1248-49 (2009) (Saylor, J., dissenting)).

> 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]

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[407] *Tincher*, 628 Pa. at 431-32, 104 A.3d at 409.

[408] *Id.* at 432, 104 A.3d at 409-10. While not briefed by the parties, these issues had been extensively briefed by multiple *amici curiae*. *E.g.*, Brief of Pennsylvania Ass'n for Justice as *Amicus Curiae* in Support of Appellees, 2013 WL 8022901 (Pa. filed Aug. 6, 2013); *Amici Curiae* Brief of Pennsylvania Business Council, *et al.*, in Support of Appellant, 2013 WL 8022897 (Pa. filed June 5, 2013); Brief of *Amici Curiae* Pennsylvania Defense Institute & International Ass'n of Defense Counsel in Support of Appellant, 2013 WL 8022898 (Pa. filed June 5, 2013); Brief of *Amicus Curiae* Product Liability Advisory Council, Inc. in Support of Appellant, 2013 WL 12173678 (Pa. filed June 5, 2013) (all filed in Tincher v. Omega Flex, Inc., 628 Pa. 296, 104 A.3d 328 (2013), No. 17 MAP 2013).

[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.[413] In Pennsylvania, "the general rule is that all decisions are to be applied retroactively."[414] Prospective application is appropriate only where a decision involves "an issue of first impression not clearly foreshadowed by precedent,"[415] 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.[416]

Because the defendant had preserved the *Azzarello* issue, it was "entitled to the benefit" of *Tincher*'s holdings.[417] The high court remanded the case without prejudging what, if any, relief the defendant should receive.[418] In other then-pending cases, *Tincher* has applied retroactively where a defendant properly preserved a challenge to the viability of *Azzarello*.[419]

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)

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[413] *Tincher*, 628 Pa. at 432, 104 A.3d at 410.

[414] 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).

[415] Fiore v. White, 562 Pa. 634, 643, 757 A.2d 842, 847 (2000).

[416] *See supra* Part I(E).

[417] *Tincher*, 628 Pa. at 432, 104 A.3d at 410.

[418] *Id.* On remand, the trial court denied any relief, deciding *sua sponte*, that "reasonable minds could not differ" on risk/utility, and in effect granting a directed verdict that plaintiffs never sought – thus avoiding a new trial for not charging the jury on that issue under *Tincher. See* Tincher v. OmegaFlex, Inc., No. 2008-00974-CA, slip op. at 5-6 (Pa. C.P. Chester Cty. Mar. 22, 2016) (copy on file with author). This ruling is currently on appeal. *See* 1285 EDA 2016 (Pa. Super. Ct. argued Feb. 14, 2017).

[419] DeJesus v. Knight Indus. & Assocs., Inc., 599 F. Appx. 454, 455 (3d Cir. 2015) (applying Pennsylvania law); Nathan v. Techtronic Indus. N. Am., Inc., 92 F. Supp. 3d 264, 270-72 (M.D. Pa. 2015); Amato v. Bell & Gossett, 116 A.3d 607, 619 (Pa. Super. Ct. 2015), *appeal dismissed*, 150 A.3d 956 (Pa. 2016); *cf.* Webb v. Volvo Cars of N. Am., L.L.C. (*Webb II*), 148 A.3d 473, 483 (Pa. Super. Ct. 2016) (defendant failed to preserve).

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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[420] High v. Pa. Supply, Inc., 154 A.3d 341, 347,(Pa. Super. Ct. 2017).

[421] *Webb II*, 148 A.3d at 483.

[422] Renninger v. A & R Mach. Shop, __ A.3d __, 2017 WL 1326515, at *10 (Pa. Super. Ct. Apr. 11, 2017). *See id.* at *7 ("Nowhere does [*Tincher*] state that negligence principles will not be relevant.").

[423] *See supra* notes 345-46 and accompanying text.

[424] *Amato*, 116 A.3d at 620.

[425] Tincher v. Omega Flex, Inc., 628 Pa. 296, 428-29, 104 A.3d 328, 408 (2013).

[426] Nelson v. Airco Welders Supply, 107 A.3d 146, 160 (Pa. Super. Ct. 2014) (en banc).

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

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[427] Forry v. Gulf Oil Corp., 428 Pa. 334, 340, 237 A.2d 593, 597 (1968); *see supra* notes 15-18 and accompanying text.

[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: CJI Civ. 14:3; Florida: FSJI (Civ.) 403.7(b); Illinois: IPJI-Civ. 400.06; Indiana: IN-JICIV 2117; Kansas: KS-PIKCIV 128.17; Louisiana: La. CJI § 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). *Cf.* Georgia: GSPJI 62.640 ("reasonable care"); New Mexico: NMRA, Civ. UJI 13-1407 ("unreasonable risk"); New Jersey: NJ-JICIV 5.40D-2 ("reasonably safe"); New York: NYPJI 2:120 ("not reasonably safe ").

[431] Bifolck v. Philip Morris, Inc., 324 Conn. 402, 416-17, 438, 152 A.3d 1183, 1192-93, 1204 (2016).

[432] Conn. Civ. JI § 3.10-1 Product Liability ("Existence of a Defect") (cited in *Bifolck*, 324 Conn. at 438, 152 A.3d 1183, 1204).

[433] Pennsylvania Suggested Standard Civil Jury Instructions, 4th ed. (PBI 2016) [hereinafter SSJI or SSJI (Civ.)].

"depends."[434] Equally inexplicably, SSJI Section 16.10 retains the *Azzarello* "element"-based approach to defect,[435] despite *Tincher*'s rejection of that language as "impracticable," "out of context," and "perpetuat[ing] jury confusion."[436]

Indeed, the SSJI commentary proceeds as if *Tincher* did not overrule *Azzarello*:

> In this regard, *Tincher* and *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.'"[437]

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

It also has no place in post-*Tincher* precedent. Every precedential post-*Tincher* Superior Court decision addressing the issue has held that "a plaintiff must prove that the [claimed defect] rendered the product unreasonably dangerous."[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."[441] Likewise, "the question of whether a product is

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[434] Tincher v. Omega Flex, Inc., 628 Pa. 296, 416, 104 A.3d 328, 400 (2013).

[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").

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

[437] Pa. SSJI (Civ.) § 16.10, Subcommittee Note (2016).

[438] Pa. SSJI (Civ.) § 16.10, Subcommittee Note (2016) (quoting Azzarello v. Black Bros. Co., Inc., 480 Pa. 547, 559, 391 A.2d 1020, 1027 (1978)).

[439] *See* Renninger v. A&R Mach. Shop, 2015 WL 13238603, at *3-4 (Pa. C.P. Clarion Cty. Nov. 3, 2015) (rejecting use of *Azzarello* jury instruction post-*Tincher*) *aff'd* __ A.3d __, 2017 WL 1326515 (Pa. Super. Ct. Apr. 11, 2017).

[440] Barton v. Lowe's Home Ctrs, Inc., 124 A.3d 349, 355 (Pa. Super. Ct. 2015).

[441] High v. Pa. Supply, Inc., 154 A.3d 341, 347 (Pa. Super. Ct. 2017). *See id.* (quoting RESTATEMENT (SECOND) OF TORTS § 402A, cmt. i (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."[442] 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.[443]

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[442] Amato v. Bell & Gossett, Clark-Reliance Corp., 116 A.3d 607, 619 (Pa. Super. Ct. 2015), *appeal dismissed*, 150 A.3d 956 (Pa. 2016).

[443] English v. Crown Equip. Corp., 183 F. Supp. 3d 618, 620 (M.D. Pa. 2016) (a product seller "has a duty to make and/or market the product . . . free from 'a defective condition unreasonably dangerous to the consumer'") (quoting Tincher v. Omega Flex, Inc., 628 Pa. 296, 388, 104 A.3d 328, 383 (2013)); Wright v. Ryobi Techs., Inc., 175 F. Supp. 3d 439, 450 (E.D. Pa. 2016) ("[§] 402A only applies when the defective condition of the product makes it unreasonably dangerous to the user or consumer."); Hatcher v. SCM Group, Inc., 167 F. Supp. 3d 719, 727 (E.D. Pa. 2016) ("a product is only defective . . . if it is 'unreasonably dangerous'"); Rapchak v. Haldex Brake Prods. Corp., 2016 WL 3752908, at *2 (W.D. Pa. July 14, 2016) ("the *Tincher* Court also made clear that it is now up to the jury not the judge to determine whether a product is in a 'defective condition unreasonably dangerous' to the consumer"); Ouelette v. Coty US, LLC, 2016 WL 1650775, at *4-5 (M.D. Pa. Apr. 25, 2016) (expert may opine that defect did not render product "unreasonably dangerous"); DeJesus v. Knight Indus., Inc., 2016 WL 1555793, at *5 (E.D. Pa. Apr. 18, 2016) ("*Tincher* overruled *Azzarello*, holding that separating the inquiry of whether the product was "unreasonably dangerous" from whether it was "defective" was "impracticable"); McKenzie v. Dematic Corp., 2016 WL 707485, at *8 (W.D. Pa. Feb. 16, 2016) (expert may opine that defect rendered product "unreasonably dangerous"); Dorshimer v. Zonar Sys., Inc., 145 F. Supp. 3d 339, 351 (M.D. Pa. 2015) (same quotation from *Tincher* as in *English*); Morello v. Kenco Toyota Lift, 142 F. Supp. 3d 378, 385 (E.D. Pa. 2015) ("[§] 402A imposes liability on a seller 'of any product in a defective condition unreasonably dangerous to the user or consumer'"); Stellar v. Allied Signal, Inc., 98 F. Supp. 3d 790, 806 (E.D. Pa. 2015) (same "affirmative" duty quotation from *Tincher* as in *English*); Nathan v. Techtronic Indus. N. Am., Inc., 92 F. Supp. 3d 264, 272 (M.D. Pa. 2015) ("applying *Tincher* frees the Court from having . . . to determine, as a matter of law and policy, whether a product is 'unreasonably dangerous'"); Punch v. Dollar Tree Stores, Inc., 2015 WL 7769223, at *3 (Mag. W.D. Pa. Dec. 5, 2015) (*Tincher* "repudiated the standards enunciated" by *Azzarello*; "unreasonably dangerous" aspect of "duty" was a "critical inquiry" under *Tincher*), *adopted*, 2015 WL 7776601 (W.D. Pa. Dec. 2, 2015); Horner v. Cummings, 2015 WL 4590959, at *8 (M.D. Pa. July 29, 2015) (a product seller "implicitly represents by placing a product on the market that the product is not in a defective condition unreasonably dangerous") (quoting *Tincher*, 628 Pa. at 420, 104 A.3d at 403); Horst v. Union Carbide Co., 2016 WL 1670272, at *15 (Pa. C.P. Lackawanna Cty. Apr. 17, 2016) (strict liability requires products to be "free from a defective condition unreasonably dangerous

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."[444] Again, such a statement cannot be squared with *Tincher* itself. Strict liability "overlaps" both "negligence and breach of warranty."[445] As already discussed at length, *Tincher* viewed the previous negligence/strict liability dichotomy as "puzzling" and "undesirable."[446] In particular, the risk/utility approach to proving is "indicative of negligence," analyzed manufacturer "conduct," and "obviously reflects the negligence roots of strict liability."[447] Thus, "[t]hroughout its *Tincher* opinion, the Supreme Court noted that the risk-utility test is derived from negligence principles."[448]

The 2016 SSJI were not approved by any court and received no judicial oversight.[449] With good reason, these "suggested" instructions are just that. "[A]s their title suggests, the instructions are guides only."[450] They are "not binding" and courts may "ignore them entirely."[451] Use of an erroneous SSJI can be reversible error.[452] 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.[453] In this instance, the conclusion is unavoidable that the SSJI erroneously discounted the "significant" changes *Tincher* made to Pennsylvania product liability doctrine.

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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).

[448] *Renninger*, 2017 WL 1326515, at *7.

[449] Commonwealth v. Smith, 548 Pa. 65, 80 n.11, 694 A.2d 1086, 1094-95 n.11 (1997) ("we emphasize that this court has never adopted the [SSJI]"); Butler v. Kiwi, S.A., 412 Pa. Super. 591, 597, 604 A.2d 270, 273 (1992) ("[T]he suggested standard jury instructions have not been adopted by our supreme court and therefore are not binding . . . .").

[450] Commonwealth v. Eichinger, 631 Pa. 138, 178, 108 A.3d 821, 845 (2014). The SSJI "exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." *Smith*, 548 Pa. at 80 n.11, 694 A.2d at 1094 n.11 (same).

[451] *Butler*, 412 Pa. Super. at 597, 604 A.2d at 273.

[452] Carpinet v. Mitchell, 853 A.2d 366, 374 (Pa. Super. Ct. 2004).

[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. INST , 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]

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[454] Tincher v. Omega Flex, Inc., 628 Pa. 296, 431-32, 104 A.3d 328, 409 (2013).

[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.

[460] Hicks v. Dana Companies, LLC, 984 A.2d 943, 962 (Pa. Super. Ct. 2009); Hadar v. AVCO Corp., 886 A.2d 225, 228 (Pa. Super. Ct. 2005); Ellis v. Chicago Bridge & Iron Co., 376 Pa. Super. 220, 226, 545 A.2d 906, 909 (1988). *See* Weiner v. Am. Honda Motor Co., 718 A.2d 305, 309 (Pa. Super. Ct. 1998)

Thus, in *Amato v. Bell & Gossett*, the Superior Court held that *Tincher* "provid[ed] something of a road map" for navigating the broader world of post-*Azzarello* strict liability law in an asbestos warning case.[462] The Supreme Court of Pennsylvania granted an appeal in *Amato* on this issue, but then dismissed that appeal as improvidently granted,[463] leaving the Superior Court's decision intact. Other courts have likewise applied *Tincher* to warning claims.[464] Thus, for strict liability to lie after *Tincher*, a product must be "unreasonably dangerous" without an improved warning.[465]

("[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).

[461] *See* Davis v. Berwind Corp., 547 Pa. 260, 267, 690 A.2d 186, 190 (1997) (manufacturer as "guarantor"); *Phillips I*, 542 Pa. 124, 131 n.5, 133 n.7, 665 A.2d 1167, 1171 nn.5, 7 (1995) (threshold determination of "unreasonably dangerous" defect; non-delegable duty to produce non-defective product); Walton v. Avco Corp., 530 Pa. 568, 583-84, 610 A.2d 454, 462 (1992) (manufacturer as "guarantor"; negligence/strict liability dichotomy generally); Mackowick v. Westinghouse Elec. Corp., 525 Pa. 52, 56-58, 575 A.2d 100, 102-03 (1990) (threshold determination of "unreasonably dangerous" defect; "intended user" doctrine); *Hicks*, 984 A.2d at 967-68 (exclusion of industry standards and regulatory compliance).

[462] Amato v. Bell & Gossett, 116 A.3d 607, 620 (Pa. Super. Ct. 2015), *appeal dismissed*, 150 A.3d 956 (Pa. 2016).

[463] Vinciguerra v. Bayer CropScience Inc., 150 A.3d 956 (Pa. 2016). *See* Yazdani v. BMW, LLC, 2016 WL 2755589, at *6 n.5 (E.D. Pa. May 12, 2016) (refusing to apply *Tincher* to warning claims while *Amato* appeal was pending).

[464] Bailey v. B.S. Quarries, Inc., 2016 WL 1271381, at *14-15 (M.D. Pa. Mar. 31, 2016) ("*Azzarello* . . . and its progeny are no longer good law" with respect to plaintiff's warning claim); Trask v. Olin Corp., 2016 WL 1255302, at *9 n.20 (W.D. Pa. Mar. 31, 2016) (refusing to apply Third Restatement as to post-sale duty to warn after *Tincher*); Williams v. U-Haul Int'l, Inc., 2015 WL 171846, at *3 n.6 (E.D. Pa. Jan. 14, 2015) ("this Court applies the standard set forth in *Tincher* to Plaintiffs' products liability claim, which alleges . . . failure-to-warn defects"), *vacated in part on other grounds*, 2015 WL 790142 (E.D. Pa. Feb. 25, 2015); Horst v. Union Carbide Co., 2016 WL 1670272, at *15-16 (Pa. C.P. Lackawanna Cty. Apr. 17, 2016) (applying *Tincher* to asbestos warning case).

[465] High v. Pa. Supply, Inc., 154 A.3d 341, 351 (Pa. Super. Ct. 2017) (plaintiff can show that a "deficiency in warning made the product unreasonably dangerous") (quoting *Phillips I*, 542 Pa. at 131, 665 A.2d at 1171); Inman v. Gen. Electric Co., 2016 WL 5106939, at *7 (W.D. Pa. Sept. 20, 2016) ("a plaintiff raising a failure to warn claim must establish . . . that the product was sold in a defective condition 'unreasonably dangerous' to the user"); Hatcher v.

Almost certainly, *Tincher*'s new, negligence-influenced standards will apply to warning cases. The "Owen Hornbook," from which *Tincher* drew heavily,[466] 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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SCM Grp., Inc., 167 F. Supp. 3d 719, 726 (E.D. Pa. 2016); *see* Trask v. Olin Corp., 2016 WL 1255302, at *8 n.15 (W.D. Pa. Mar. 31, 2016) (quoting RESTATEMENT (SECOND) OF TORTS § 402A, cmt. g (AM. LAW. INST. 1965)).

[466] Tincher v. Omega Flex, Inc., 628 Pa. 296, 394-420, 104 A.3d 328, 387-402 (2014) (citations omitted).

[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.

[470] *Tincher*, 628 Pa. at 379, 398, 401-03, 419, 421, 426, 429-31, 104 A.3d at 378, 389, 391-92, 402-03, 406, 408-09 (citing Barker v. Lull Eng'g Co., 20 Cal.3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978)); *id.* at 397, 401-04, 427-29 & n.29, 104 A.3d at 388, 391-93, 407-08 & n.29 (citing Soule v. Gen. Motors Corp., 8 Cal.4th 548, 34 Cal. Rptr.2d 607, 882 P.2d 298 (1994)).

[471] Anderson v. Owens-Corning Fiberglass Corp., 53 Cal. 3d 987, 281 Cal. Rptr. 528, 810 P.2d 549 (1991).

[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.[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."[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.[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.[476]

C. *Post-*Tincher*, State-of-the-Art Evidence Should Be Admissible in Strict Liability Cases.*

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

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[473] *Anderson*, 53 Cal.3d at 1002, 281 Cal. Rptr. at 537, 810 P.2d at 558 (citation omitted).

[474] Johnson v. American Standard, Inc., 43 Cal.4th 56, 73, 74 Cal. Rptr.3d 108, 121, 179 P.3d 905, 916 (2008) (citing, *inter alia*, *Anderson*).

[475] *Phillips I*, 542 Pa. 124, 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.").

[476] 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*).

[477] Amato v. Bell & Gossett, Clark-Reliance Corp., 116 A.3d 607, 620 (Pa. Super. Ct. 2015), *appeal dismissed*, 150 A.3d 956 (Pa. 2016) (quoting Tincher v. Omega Flex, Inc., 628 Pa. 296, 384, 104 A.3d 328, 381 (2014)).

[478] *Webb II*, 148 A.3d 473, 482 (Pa. Super. Ct. 2016).

negligence rhetoric and concepts were to be eliminated from strict liability law."[479]

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*,[480] and the Superior Court extended that prohibition to other state-of-the-art evidence, regulatory compliance and unknowable risks.[481] *Tincher* did not reach this issue,[482] 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."[483] 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."[484]

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[479] DeJesus v. Knight Indus. & Assocs., Inc., 2016 WL 4702113, at *6 (E.D. Pa. Sept. 8, 2016) (quoting *Tincher*, 628 Pa. at 384, 104 A.3d at 381). *See* Rapchak v. Haldex Brake Products Corp., 2016 WL 3752908, at *3 (W.D. Pa. July 14, 2016) ("[T]he dichotomy between strict liability and negligence that existed under *Azzarello* . . . conflicts with *Tincher*'s pronouncement that a manufacturer's conduct and reasonableness is relevant to the determination of product defect.") (citation and quotation marks omitted); Punch v. Dollar Tree Stores, Inc., 2015 WL 7769223, at *3 (Mag. W.D. Pa. Nov. 5, 2015) (same as *DeJesus*), *adopted*, 2015 WL 7776601 (W.D. Pa. Dec. 2, 2015); Sliker v. Nat'l Feeding Sys., Inc., 2015 WL 6735548, at *4 (Pa. C.P. Clarion Cty. Oct. 19, 2015) ("Knee-jerk rejection of legal concepts remotely related to negligence in products liability actions, even where such concepts clearly and explicitly relate to [the] risk-utility standard for assessing whether a product is defective, was clearly discouraged by *Tincher*'s extensive explication of the overlapping concepts of strict liability and negligence.").

[480] Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc., 515 Pa. 334, 528 A.2d 590, 594 (1987); *see supra* notes 120-29 and accompanying text.

[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.

[486] Renninger v. A&R Mach. Shop, __ A.3d __, 2017 WL 1326515 (Pa. Super. Ct. Apr. 11, 2017).

[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.

[491] *Webb II*, 148 A.3d 473, 479 (Pa. Super. Ct. 2016).

> 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.

[494] Tincher v. Omega Flex, Inc., 628 Pa. 296, 432, 104 A.3d 328, 410 (2014).

[495] *Webb II,* 148 A.3d at 483.

[496] *Id.* at 480, 483.

[497] *Id.* at 483.

[498] *Id.*

[499] Amato v. Bell & Gossett, 116 A.3d 607 (Pa. Super. Ct. 2015), *appeal dismissed*, 150 A.3d 956 (Pa. 2016).

[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.[502] Reflecting this movement in the Superior Court, more recent post-*Tincher* trial court decisions have also supported admissibility state-of-the-art evidence.[503]

It is likely that *Tincher*'s negligence-influenced approach to strict liability will eventually result in overturning the *Lewis* line of cases concerning state-of-the-art evidence. Given that *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,"[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)."[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 *Berrier* period (2009-14), which almost unanimously ruled that state-of-the-art evidence was relevant and

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[502] High v. Pa. Supply, Inc., 154 A.3d 341, 350-51 n.5 (Pa. Super. Ct. 2017) (expert compliance testimony relevant to product's "nature" in consumer expectation approach). *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).

[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"); Renninger v. A&R Mach. Shop, __ A.3d __, 2015 WL 13238603, at *2 (Pa. C.P. Clarion Cty. Nov. 3, 2015) ("admission of industry standards as relevant to the risk-utility standard analysis" was "proper") *aff'd*, 2017 WL 1326515 (Pa. Super. Ct. Apr. 11, 2017); Sliker v. Nat'l Feeding Sys., Inc., 2015 WL 6735548, at *7 (Pa. C.P. Clarion Cty. Oct. 19, 2015) (industry standards evidence admissible as "particularly relevant to factor (2)" of *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 *Tincher*, "the continued vitality of this prohibition is dubious"; admitting evidence of industry standards and regulatory compliance). Immediately after *Tincher*, some trial courts were reluctant to depart from prior law. Morello v. Kenco Toyota Lift, 2015 WL 12844274, at *1 (E.D. Pa. Dec. 23, 2015); Cancelleri v. Ford Motor Co., 2015 WL 263476, at *29 (Pa. C.P. Lackawanna Cty. Jan. 9, 2015), *aff'd mem.*, 136 A.3d 1027 (Pa. Super. Ct. 2016) (table).

[504] Tincher v. Omega Flex, Inc., 629 Pa. 296, 398, 104 A.3d 328, 389 (2014); *see supra* notes 354, 380 and accompanying text.

[505] Lance v. Wyeth, 624 Pa. 231, 269, 85 A.3d 434, 456 (2014); *accord* Birt v. Firstenergy Corp., 891 A.2d 1281, 1290 (Pa. Super. Ct. 2006).

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.

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[506] Covell v. Bell Sports, Inc., 651 F.3d 357, 364-67 (3d Cir. 2011) (applying Pennsylvania law); Berrier v. Simplicity Mfg., Inc., 563 F.3d 38, 65, 68 (3d Cir. 2009) (applying Pennsylvania law); Thomas v. Staples, Inc., 2 F. Supp. 3d 647, 655 (E.D. Pa. 2014); Spowal v. ITW Food Equip. Grp. LLC, 943 F. Supp. 2d 550, 556 (W.D. Pa. 2013); Lynn v. Yamaha Golf-Car Co., 894 F. Supp. 2d 606, 630 n.18 (W.D. Pa. 2012); Sansom v. Crown Equip. Corp., 880 F. Supp. 2d 648, 658 (W.D. Pa. 2012). The only federal decisions excluding state-of-the-art evidence during this time were those that refused to follow *Berrier* and did not apply the Third Restatement. *See supra* note 288 and accompanying text.

[507] *Tincher*, 628 Pa. at 431-32, 104 A.3d at 409; *see* High v. Pa. Supply, Inc., 154 A.3d 341, 348-49 (Pa. Super. Ct. 2017) (discussing formulation of consumer expectation approach).

[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.

> [M]ost 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.[514]

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

The Owen Hornbook also advocates admissibility of state-of-the-art evidence. The *Carrecter* holding excluding evidence that risks were "unknowable"[516] is a "dwindling idea."[517] Most cases doing so, like *Carrecter*, are "older" and "the continued viability of [them] may be in doubt."[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:

> [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.[519]

Thus, "the great majority of judicial opinions" take the position that "the practical availability of safety technology . . . is relevant and admissible."[520] As to industry standards, the *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."[521] The Owen Hornbook likewise views compliance with applicable governmental standards as admissible evidence:

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[514] Barker v. Lull Eng'g Co., 20 Cal.3d 413, 431, 143 Cal. Rptr. 225, 237, 573 P.2d 443, 455 (1978).

[515] Anderson v. Owens-Corning Fiberglass Corp., 53 Cal.3d 987, 991, 281 Cal. Rptr. 528, 550, 810 P.2d 549, 529 (1991).

[516] *See supra* notes 115-18 and accompanying text; Carrecter v. Colson Equip. Co., 346 Pa. Super. 95, 499 A.2d 326 (1985).

[517] OWEN Hornbook, *supra* note 3, § 9.2, at 587.

[518] *Id.* § 10.4, at 714 (footnote omitted).

[519] *Id.* at 715 (emphasis in original).

[520] *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." *Id.* at 729.

[521] *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." *Id.* at 394-95 (footnote omitted). *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.[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.[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.[524] This proposition is "essentially a form of the 'Wade-Keeton test,'" which has never been adopted in Pennsylvania,[525] and which was criticized in *Tincher*.[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.[527]

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stay abreast of (and perhaps advance) the developing science and technology in their fields").

[522] OWEN Hornbook, *supra* note 3, § 6.4, at 401 (footnote omitted). In light of the above discussion, the argument in Bugay, *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*.

[523] Pa. SSJI (Civ.) § 16.122 ("Knowledge of Defect" and "Industry Customs or Standards").

[524] *Id.* (suppliers are "presumed to have known at all relevant times" about product risks).

[525] *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, *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." *Id.* at 733.

[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."). *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, *Design Defects*, 73 MO. L. REV. 291, 3360 (2008)).

[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, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 UNIV. CIN. L. REV. 1183 (1992)).

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]

*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

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[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").

[531] *Id. See also* Renninger v. A&R Mach. Shop, __ A.3d __, 2017 WL 1326515, at *9-10 (Pa. Super. Ct. Apr. 11, 2017) (questioning precedential validity of pre-*Tincher* cases cited in Subcommittee Note to SSJI (Civ.) § 16.122). *See supra* notes 486-90 and accompanying text.

[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,[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.[538] California and a number of other states so hold.[539]

Unlike most aspects of strict liability, however, post-*Tincher* courts in this area do not write on a clean slate. Although extended to comparative fault during the *Azzarello* era,[540] Pennsylvania's prohibition against use of a plaintiff's fault to defeat or reduce recovery began with *McCown*,[541] and thus predates the creation of super-strict liability. *Tincher* did not view *McCown* as an example of excessive separation of strict liability from negligence.[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.[543] Rather than "fault," the statute addressed only "negligence";[544] and thus was construed as inapplicable to strict liability.

Pennsylvania law). Whether a plaintiff's conduct was typical of co-workers or other product users thus may have an effect on admissibility.

[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.

[538] *See* Spino v. John S. Tilley Ladder Co., 548 Pa. 286, 292, 696 A.2d 1169, 1172 (1997); Bialek v. Pittsburgh Brewing Co., 430 Pa. 176, 185, 242 A.2d, 231, 235 (1968); *see also supra* notes 233-36 and accompanying text; *supra* notes 19-21 and accompanying text.

[539] Daly v. Gen. Motors Corp., 20 Cal. 3d 725, 730, 575 P.2d 1162, 1164 (1978) (applying "principles of comparative negligence" to strict liability). *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 17 (AM. LAW INST. 1998) (Reporters' Note, cmt. a) (collecting cases).

[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.

[541] *McCown*, 463 Pa. 13, 342 A.2d 381; *see also supra* text accompanying notes 54-57.

[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" *McCown*).

[543] Act of April 28, 1978, P.L. 202, No. 53 § 10(89).

[544] 42 PA. CONS. STAT. § 7102(a) (2004).

> 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.[545]

The Legislature revised comparative negligence expressly to "include[e] actions for strict liability" in 2011,[546] but did so only in the context of contribution between "joint defendants."[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.[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.[549] Several other cases, however, have applied looser admissibility standards to plaintiff conduct after *Tincher*.[550] As with all other issues, the 2016 SSJI also take a position that preserves pre-*Tincher* law on this issue.[551]

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[545] Moran v. G. & W.H. Corson, Inc., 402 Pa. Super. 101, 107, 586 A.2d 416, 419 (1991); *see* McMeekin v. Harry M. Stevens, Inc., 365 Pa. Super. 580, 584-85, 530 A.2d 462, 464-65 (1987); Staymates v. ITT Holub Indus., 364 Pa. Super. 37, 47, 527 A.2d 140, 145 (1987).

[546] Act of June 28, 2011, P.L. 78, No. 17, § 1.

[547] 42 PA. CONS. STAT. § 7102(a.1) (2011).

[548] *E.g.*, Verizon Pa., Inc. v. Commonwealth, 127 A.3d 745, 757 (Pa. 2015); Fonner v. Shandon, Inc., 555 Pa. 370, 377, 724 A.2d 903, 906 (1999).

[549] Punch v. Dollar Tree Stores, 2017 WL 752396, at *11 (Mag. W.D. Pa. Feb. 17, 2017); Wright v. Ryobi Techs., Inc., 175 F. Supp. 3d 439, 450 (E.D. Pa. 2016); Rapchak v. Haldex Brake Prods. Corp., 2016 WL 3752908, at *6-7 (W.D. Pa. July 14, 2016). *See also* Bailey v. B.S. Quarries, Inc., 2016 WL 1271381, at *15 n.12 (M.D. Pa. Mar. 31, 2016) (unopposed motion); Nathan v. Techtronic Indus. N. Am., Inc., 92 F. Supp. 3d 264, 275 (M.D. Pa. 2015) (apparently not disputed by defendant); McKenzie v. Dematic Corp., 2015 WL 3866633, at *5 (W.D. Pa. June 23, 2015) (no argument made for inapplicability).

[550] *Punch*, 2017 WL 752396, at *11 (plaintiff conduct admissible as relevant to risk/utility factors); DeJesus v. Knight Indus. & Assocs., Inc., 2016 WL 4702113, at *10-11 & n.11 (E.D. Pa. Sept. 8, 2016) (no use of "highly reckless" standard); Sliker v. National Feeding Sys., Inc., 2015 WL 6735548, at *4 (Pa. Ct. Com. Pl. Oct. 19, 2015) (plaintiff conduct admissible as relevant to risk/utility factors).

[551] Pa. SSJI (Civ.) § 16.122 ("negligence of plaintiff").

Elimination of the negligence/strict liability dichotomy also removes prior doctrinal objections[552] 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.[553]

*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."[554] "[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."[555] "Intended," has been defined as "within the contemplation of the manufacturer"[556] and "in terms of the product's targeted purpose and audience."[557] 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

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[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").

[553] Pa. SSJI (Civ.) §§ 16.120, 16.121 (2016). *See* Wright v. Ryobi Techs., Inc., 175 F. Supp. 3d 439, 448 (E.D. Pa. 2016) (misuse).

[554] *DGS*, 587 Pa. at 253, 898 A.2d at 600; *see Phillips II*, 576 Pa. at 656, 841 A.2d at 1007; *see also supra* notes 275-80, 253-63 and accompanying text. The "'intended user' formulation is . . . derivative of the intended use doctrine." Nelson v. Airco Welders Supply, 107 A.3d 146, 161 (Pa. Super. Ct. 2014) (en banc).

[555] Harsh v. Petroll, 840 A.2d 404, 415 (Pa. Commw. Ct. 2003), *aff'd*, 584 Pa. 606, 887 A.2d 209 (2005). "[A] plaintiff must prove that the product is unreasonably dangerous to *intended* users for its *intended* use." Pacheco v. Coats Co., 26 F.3d 418, 422 (3d Cir. 1994) (emphasis in original) (citation omitted) (applying Pennsylvania law).

[556] Brantner v. Black & Decker Mfg. Co., 831 F. Supp. 454, 459 (W.D. Pa. 1993), *aff'd mem.*, 30 F.3d 1485 (3d Cir. 1994).

[557] Stratos v. Super Sagless Corp., 1994 WL 709375, at *3 (E.D. Pa. Dec. 21, 1994).

product need be made safe only for the intended user appears to be equally applicable."[558]

Rejection of bystander strict liability has been controversial because other jurisdictions "almost universally allowed recovery to foreseeable bystanders . . . for injuries caused by defective products."[559] Bystander liability issues ultimately led the Third Circuit to predict Pennsylvania's adoption of the Third Restatement in *Berrier*.[560]

Tincher held that intended use/intended user considerations remain part of the consumer expectation approach to design defect,[561] meaning that to some degree the intended use doctrine survives.[562] Otherwise, the court did not address "the proper application of the intended user doctrine."[563] Post-*Tincher*, bystanders have been precluded from relying on the consumer expectation

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[558] *Phillips II*, 575 Pa. at 653, 841 A.2d at 1005; *see supra* text accompanying notes 251-61. *See also* Griggs v. Bic Corp., 981 F.2d 1429, 1433-34 (3d Cir. 1992) (applying Pennsylvania law); Altman v. Bobcat Co., 2007 WL 626157, at *3-4 (W.D. Pa. Feb. 26, 2007); Makadji v. GPI Div. of Harmony Enters., Inc., 2006 WL 3498324, at *4 (E.D. Pa. Dec. 1, 2006); Berrier v. Simplicity Corp., 413 F. Supp. 2d 431, 442-43 (E.D. Pa. 2005), *reversed*, 563 F.3d 38 (3d Cir. 2009); Hittle v. Scripto-Tokai Corp., 166 F. Supp. 2d 159, 169 (M.D. Pa. 2001); Van Buskirk v. West Bend Co., 100 F. Supp. 2d 281, 284-85 (E.D. Pa. 1999), *aff'd mem.*, 216 F.3d 1078 (3d Cir. 2000); Shouey v. Duck Head Apparel Co., 49 F. Supp. 2d 413, 429 (M.D. Pa. 1999); Klemka v. Dillon Cos., 1996 WL 571753, at *2 (E.D. Pa. Oct. 4, 1996); Mackowick v. Westinghouse Elec. Corp., 525 Pa. 52, 56, 575 A.2d 100, 102 (1990) (as to warning defects); Riley v. Warren Mfg., Inc., 455 Pa. Super. 384, 400, 688 A.2d 221, 229 (1997); *see also supra* text accompanying notes 145-46.

[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).

[561] Tincher v. Omega Flex, Inc., 628 Pa. 296, 394-95, 104 A.3d 328, 387 (2014) ("intended use and intended user . . . are among considerations relevant to assessing the reasonable consumer's expectations"). *See* Wright v. Ryobi Tech., Inc., 175 F. Supp. 3d 439, 452 (E.D. Pa. 2016) (applying intended user rubric to consumer expectation claim).

[562] Renninger v. A&R Mach. Shop, 2015 WL 13238604, at *6 (Pa. C.P. Clarion Cty. Apr. 13, 2015).

[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,[564] but have been allowed to pursue strict liability claims under the risk/utility approach.[565] 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.[566]

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

As already discussed,[567] *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.[568] Very few tried cases during the *Azzarello* era turned on consumer expectations, since such expectations were an aspect of the threshold "unreasonably dangerous" analysis.[569]

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[564] Wright v. Ryobi Techs., Inc., 175 F. Supp. 3d 439, 452 (E.D. Pa. 2016) ("the intended user is the only relevant user"); Punch v. Dollar Tree Stores, Inc., 2015 WL 7769223, at *5 (Mag. W.D. Pa. Nov. 5, 2015), *adopted*, 2015 WL 7776601 (W.D. Pa. Dec. 2, 2015).

[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).

[568] RESTATEMENT (SECOND) OF TORTS § 402A, cmt. i (AM. LAW. INST. 1965). *See Tincher*, 628 Pa. at 394-95, 104 A.3d at 387; Bugosh v. I.U. N. Am., Inc., 601 Pa. 277, 309 n.7, 971 A.2d 1228, 1247 n.7, (2009) (Castille, J., dissenting); High v. Pa. Supply, Inc., 154 A.3d 341, 348 (Pa. Super. Ct. 2017); Hicks v. Dana Companies, LLC, 984 A.2d 943, 966 (Pa. Super. Ct. 2009) (en banc).

[569] Comment i was applied to bar claims that obvious or commonly known product risks result in unreasonably dangerous products. Goldstein v. Phillip Morris, Inc., 854 A.2d 585, 590 (Pa. Super. Ct. 2004) (harmful effects of smoking); Weiner v. Am. Honda Motor Co., 718 A.2d 305, 310 (Pa. Super. Ct. 1998) (rolling risk of heavy cylindrically shaped object); Jordon v. K-Mart Corp., 417 Pa. Super. 186, 190-91, 611 A.2d 1328, 1331 (1992) (unsteerability of plastic sled); Dauphin Deposit Bank & Trust Co. v. Toyota Motor Corp., 408 Pa. Super. 256, 261-65, 596 A.2d 845, 847-49 (1991) (risks of drinking and

A product is defective under the consumer expectation approach "if the danger is unknowable and unacceptable to the average or ordinary consumer."[570] A known risk cannot be a defect under this theory.[571] "Ordinary consumer" tests are "objective," rather than subjective.[572] An ordinary consumer is presumed to read and heed warnings.[573]

Another recurring issue with the consumer expectation approach is its scope. This approach has been applied to inherent product risks,[574] rather than to risks caused by the intricacies of mechanical designs.[575] 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

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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).

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

[571] Meyers v. LVD Acquisitions, LLC, 2016 WL 8652790, at *2 (Pa. C.P. Mifflin Cty. Sept. 23, 2016), *aff'd mem.*, 2017 WL 1163056 (Pa. Super. Ct. Mar. 28, 2017).

[572] Surace v. Caterpillar, Inc., 111 F.3d 1039, 1051 (3d Cir. 1997) (applying Pennsylvania law); Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 119 (3d Cir. 1992) (applying Pennsylvania law); Emerick v. U.S. Suzuki Motor Corp., 750 F.2d 19, 22 (3d Cir. 1984) (applying Pennsylvania law). *See* OWEN Hornbook, *supra* note 3, § 8.3, at 505 (the consumer expectations test is an *objective* test based on the average, normal, or "ordinary" expectations of a reasonable user or consumer") (emphasis original).

[573] RESTATEMENT (SECOND) OF TORTS § 402A, cmt. j (AM. LAW. INST. 1965) ("the seller may reasonably assume that it[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.

[574] High v. Pa. Supply, Inc., 154 A.3d 341, 349-50 (Pa. Super. Ct. 2017) (caustic nature of wet concrete).

[575] "[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."[576] Thus, in cases involving complicated machinery, several post-*Tincher* courts have dismissed consumer expectation-based design defect claims as untenable.[577]

Tincher agreed that the "typical" design defect case is one resolved under the risk/utility approach,[578] as have cases following *Tincher*.[579] 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.[580]

G. *Post-*Tincher *Application of the Burden of Proof*

The *Tincher* decision also touched on an issue that "parties obviously ha[d] not briefed" – the burden of proving defect.[581] 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

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[576] Tincher v. Omega Flex, Inc., 628 Pa. 296, 397, 104 A.3d 328, 388 (2014) (quoting Soule v. Gen. Motors Corp., 8 Cal. 4th 548, 567, 34 Cal. Rptr. 2d 607, 617, 882 P.2d 298, 308 (1994)).

[577] Yazdani v. BMW of N. Am., LLC, 188 F. Supp. 3d 486, 493 (E.D. Pa. 2016) (air-cooled motorcycle engine); *Wright*, 175 F. Supp. 3d at 452-53 ("rip fence" on table saw); *DeJesus*, 2016 WL 4702113, at *8-9 (industrial lift table); Capece v. Hess Maschinenfabrik GmbH & Co. KG, 2015 WL 1291798, at *3 (M.D. Pa. Mar. 20, 2015) (concrete block fabrication equipment) (uncontested). *But cf.* Rapchak v. Haldex Brake Prods. Corp., 2016 WL 1019534, at *13 (W.D. Pa. Mar. 15, 2016) (allowing consumer expectation approach as to height control valve on motor home).

[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).

[580] *See* Surace v. Caterpillar, Inc., 111 F.3d 1039, 1051 (3d Cir. 1997) (applying Pennsylvania law); Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 119 (3d Cir. 1992) (applying Pennsylvania law); Emerick v. U.S. Suzuki Motor Corp., 750 F.2d 19, 22 (3d Cir. 1984) (applying Pennsylvania law). *See also* Fassett v. Sears Holdings Corp., 2015 WL 5093397, at *6 (M.D. Pa. Aug. 28, 2015) (allegation that product exploded during "ordinary use" sufficient to plead consumer expectation claim).

[581] *Tincher*, 628 Pa. at 431, 104 A.3d at 408.

"policy judgment . . . to relieve an injured plaintiff of . . . onerous evidentiary burdens.[582]

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,[583] 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.[584] 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."[585]

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."[586] Nor

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[582] *Tincher*, 628 Pa. at 430-31, 104 A.3d at 409 (quoting Barker v. Lull Eng'g Co., 20 Cal.3d 413, 431, 573 P.2d 443, 455 (1978)).

[583] *Id.* at 431, 104 A.3d at 408 (citing Knitz v. Minster Mach. Co., 69 Ohio St. 2d 460, 464, 432 N.E.2d 814, 817 (1982)).

[584] *Id.* at 429, 104 A.3d at 408 (citing Lamkin v. Towner, 138 Ill. 2d 510, 531, 563 N.E.2d 449, 458 (1990)).

[585] *Id*. at 431, 104 A.3d at 409.

[586] Davis v. Berwind Corp., 547 Pa. 260, 267, 690 A.2d 186, 190 (1997); *see supra* text accompanying notes 221-26. *Accord Phillips II*, 576 Pa. 644, 650, 841 A.2d 1000, 1003 (2003) (plaintiff "was required to establish that the [product] was unsafe for its intended use"); Schroeder v. Pa. Dep't of Transp., 551 Pa. 243, 251, 710 A.2d 23, 27 (1998) ("plaintiff's burden of proof at trial [is] to establish that a defective product caused his injury will protect defendants"); Spino v. John S. Tilley Ladder Co., 548 Pa. 286, 293, 696 A.2d 1169, 1172 (1997) ("Pennsylvania law requires that a plaintiff prove . . . that the product was defective"); *Phillips I*, 542 Pa. 124, 131, 665 A.2d 1167, 1171 (1995) ("a plaintiff . . . must establish . . . that the product was sold in a defective condition 'unreasonably dangerous' to the user"); Walton v. Avco Corp., 530 Pa. 568, 576, 610 A.2d 454, 458 (1992) (§ 402A "requires . . . proof that a product was sold in a defective condition unreasonably dangerous to the user or consumer"); Rogers v. Johnson & Johnson Prod., Inc., 523 Pa. 176, 182, 565 A.2d 751, 754 (1989)

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

("[a] plaintiff presents a prima facie case of strict liability by establishing that the product was defective"); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 97, 337 A.2d 893, 900 (1975), *abrogated by* Reott v. Asia Trend, Inc., 618 Pa. 228, 55 A.3d 1088 (2012) ("plaintiff must still prove that there was a defect in the product"); Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 331, 319 A.2d 914, 921 (1974) (plaintiff had the burden of "[p]roving that a defect in the [product] existed"); Bialek v. Pittsburgh Brewing Co., 430 Pa. 176, 187, 242 A.2d 231, 236 (1968) (Section 402A "require[s] . . . that plaintiff prove that the product was in defective condition"); Forry v. Gulf Oil Corp., 428 Pa. 334, 340, 237 A.2d 593, 597 (1968) ("[i]t was [plaintiff's] burden to prove that there was a defect in this [product]").

[587] Skipworth by Williams v. Lead Indus. Ass'n Inc., 547 Pa. 224, 232, 690 A.2d 169, 172 (1997) ("[a]pplication of market share liability . . . would lead to a distortion of liability which would be so gross as to make determinations of culpability arbitrary and unfair"). *See* Gregg v. V-J Auto Parts, Co., 596 Pa. 274, 291-92, 943 A.2d 216, 226 (2007) (rejecting "*de minimis*" causation in asbestos litigation); Stecher v. Ford Motor Co., 571 Pa. 312, 319-20, 812 A.2d 553, 557 (2002) (vacating decision shifting burden of proving allocation of injury in crashworthiness cases); Stevenson v. Gen. Motors Corp., 513 Pa. 411, 427, 521 A.2d 413, 421 (1987) (malfunction theory case; plaintiffs' "only evidence as to the absence of secondary causes was their own incredible testimony. Thus, a new trial must be granted.").

[588] Tincher v. Omega Flex, Inc., 628 Pa. 296, 309, 104 A.3d 328, 335 (2014).

[589] 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.[591] Given *Tincher*'s oft-repeated assertions of "judicial modesty,"[592] 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.[593]

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."[594] Indeed, the jury instructions approved in *Forry*[595] 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*.[596] 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.

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[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.