Tincher v. *Omega Flex, Inc.*: A Lightning Strike On Pennsylvania Products Liability Law

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INTRODUCTION: *TINCHER* v. *OMEGA FLEX*: SAME QUESTION, DIFFERENT TIME

On March 26, 2013, the Pennsylvania Supreme Court granted allocatur in *Tincher* v. *Omega Flex, Inc*.[2] to answer the following question—for the third time:[3]

> Whether this Court should replace the strict liability analysis of §402A of the Second Restatement with the analysis of the Third Restatement . . . [and] whether, if the Court were to adopt the Third Restatement, that holding should be applied prospectively or retroactively.[4]

Since 2008, when the Pennsylvania Supreme Court certified a nearly identical question,[5] much has changed in Pennsylvania. Today, there is a rift between Federal Courts, applying Pennsylvania law, and state courts, with some Federal Courts applying the Restatement (Third), and others the Restatement (Second); meanwhile, the Pennsylvania Supreme Court and lower courts within the Commonwealth, apply the Restatement (Second) of Torts, §402A.[6] This time, many federal courts are applying the Restatement (Third) of Torts pursuant to a prediction made by the Third Circuit that the Pennsylvania Supreme Court will adopt the Restatement (Third) of Torts.[7] However, these federal courts have done this even while

1. Partner, Galfand Berger, LLP.
2. 64 A.3d 626 (Pa. 2013).
3. *See, Berrier* v. *Simplicity Manufacturing, Inc.,* 959 A.2d 900 (Pa. 2008) (declining to accept certification regarding whether Pennsylvania will adopt the Restatement (Third)); *Bugosh* v. *I.U. North America, Inc*., 942 A.2d 897 (Pa. 2008) (accepting allocatur to answer "Whether this Court should apply §2 of the Restatement (Third) of Torts . . ."); *Bugosh* v. *I.U. North America, Inc*., 971 A.2d 1228 (Pa. 2009) (dismissing appeal as being improvidently granted).
4. *Tincher* v. *Omega Flex, Inc*., 64 A.3d 626 (Pa. 2013).
5. *Bugosh* v. *I.U. North America, Inc*., 942 A.2d 897 (Pa. 2008).
6. This violates the Erie Doctrine. *See, Bugay and Bazarsky, The Future of Pennsylvania Products Liability as Applied by Federal and State Courts: Covell* v. *Bell Sports, Inc*., 83 Pa. B.Q. 139 (Oct. 2012) (hereinafter, *Bugay/Bazarsky*). One blog has even kept score for this debate. *See*, www.torttalk.com/2013/03/products-liability-restatement-scorecard (hereinafter, "*scorecard*").
7. *See, Berrier* v. *Simplicity Manufacturing, Inc*., 563F.3d 38 (3d Cir. 2009) (applying Restatement (Third) to reverse summary judgment entered with regard to child bystander injured by a lawn tractor); *Covell* v. *Bell Sports, Inc*., 651 F.3d 357 (3d Cir. 2011) (affirming trial court's application of the Restatement (Third) of Torts); *Sikkelee* v. *Precision Automotive,* 2012 U.S. App. LEXIS 22185 (3d Cir. 2012) (denying request for interlocutory appeal, stating that the predictions made in Berrier and Covell are the Third Circuit's pronouncement that Pennsylvania will adopt the Restatement (Third) of Torts. Pennsylvania's District Courts are evenly divided between the two Restatements. *See, Scorecard*.

the Pennsylvania Supreme Court continues to apply §402A of the Restatement (Second) of Torts.[8]

This time, after *Tincher* was granted allocatur, it was not dismissed as being improvidently granted.[9] This time argument occurred. This time, the Appellee Plaintiff's counsel, representing the interests of an insurance carrier in subrogation, argued that *Azzarello* v. *Black Bros. Co*.[10]—Pennsylvania's Supreme Court precedent that precludes a jury instruction on the definition of defect to refer to a product that is "unreasonably dangerous"—should be overruled.[11] More intriguing is the conflict between Appellee's counsel and the Pennsylvania Association of Justice, which filed an amicus brief in the matter. The Pennsylvania Association of Justice has requested reargument, stating that "The position urged at argument by counsel for the Tinchers [to suggest that *Azzarrello* should be overruled] represents a dramatic shift in the position of any plaintiff suing for damages in a products liability case."[12] *Tincher* also is different because now there is a full Supreme Court. In July, Superior Court Judge Correale Stevens was appointed to the Pennsylvania Supreme Court by Governor Corbett.[13]

In theoretical economic terms, consumer welfare is threatened with a major hit, while producers are poised to pour the champagne.

Today, in what appears to be a "perfect storm", the Pennsylvania Supreme Court is poised to change Pennsylvania Products Liability law for the first time in 48 years, since it adopted §402A.[14] Instead of simply limiting the application of strict liability, as it has done periodically since 1998—by creating new doctrines, like the intended user doctrine,[15] or by limiting the applicability of tort doctrines, like the law of foreseeability[16]—the Supreme Court may dramatically change Pennsylvania Products liability law. Whatever the change, it will limit product claims by injured Pennsylvania consumers and workers. In theoretical economic terms, consumer welfare is threatened with a major hit, while producers are poised to pour the champagne.

HISTORICAL CONTEXT—THE RESTATEMENT THIRD: THE EMPIRE STRIKES BACK

Since the 1990s,[17] Pennsylvania Products Liability law has been contracting in application. While Products law has been historically a product of political containment,[18]

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8. *See, e.g., Reott* v. *Asia Trend, Inc*., 55 A.3d 1088 (Pa. 2012); *Bugay and Bazarsky, supra*.

9. *See*, note 3.

10. 391 A.2d 1020 (Pa. 1978). *Azzarello*, in turn, applied the Supreme Court's plurality holding in *Berkebile* v. *Brantly Helicopter Corp*., 337 A.2d 893 (Pa. 1975).

11. Mitchell, *Restatement Arguments Focus Upon Alternative Product, Legal Intelligencer*, 10/17/13 at 1 ("In one point of agreement, both [parties] said that the Supreme Court's 1977 ruling in *Azzarello* v. *Black Brothers*, which upheld the *Second Restatement*, went too far in its attempt to protect plaintiffs, and should be reversed."); Evans, *Predicting the Application of the Restatement (Third) of Torts*, Pennsylvania Law Weekly, 11/12/13.

12. Ryan, "Plaintiffs' Attorneys Group Wants Rehearing in Pennsylvania Tort Law Case," Law360, 12/2/13. The PaAJ stated further that, "The impact of a court decision reversing Azzarello . . . should not be determined based upon a subrogation case essentially 'owned' by an insurance company and argued by one who is not committed to consumer protection policies."

13. *See*, Associated Press, July 13, 2013, "Correale Stevens Sworn in as Pa High Court Justice."

14. *Webb* v. *Zern*, 220 A.2d 853 (Pa. 1966).

15. *Mackowick* v. *Westinghouse Elec. Corp*., 575 A.2d 100 (Pa. 1990); *Griggs* v. *BIC Corp*., 981 F.2d 1429 (3d Cir. 1992); *Phillips* v. *Cricket Lighters*, ("Phillips I"), 841 A.2d 1000 (Pa. 2003) (citing Mackowick to formally establish the "intended user" doctrine).

16. *Pennsylvania Department of General Services* v. *United States Mineral Products Co*., 898 A.2d 590 (Pa. 2006).

17. In the early 1990s, products liability cases started to become more restricted through application of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), which, interestingly, was intended to broaden expert opinion admissibility from the requirements set forth by *Frye* v. *United States*, 293 F. 1013 (1923). After *Daubert*, through F.R.E. 702, federal trial courts became "gatekeepers" to expert opinion evidence and precluded such proffered testimony where it appeared, from expert report, deposition testimony, or from a *Daubert* hearing that the expert's opinion that was not sufficiently reliable to help the jury on an issue in dispute. In products liability matters, such restrictions were fatal to the case and rendered them susceptible to dismissal on summary judgment. *See, Kuhmo Tire Co., Ltd.* v. *Carmichael*, 526 U.S. 137 (1999). Alternatively, a plaintiff's verdict could be challenged after trial pursuant to a Daubert post-trial attack upon the plaintiff's expert. *See, Weisgram* v. *Marley Co*., 528 U.S. 440 (2000). Soon it became clear that products liability claims were more expensive and sub-

since 1966, through generations of lawyers and injured Pennsylvanians, it was believed that strict liability would remain an indelible part of Pennsylvania Products Liability law.[19] However, today, Pennsylvania strict liability may soon be replaced with product negligence law, a change which will harm Pennsylvania workers and consumers.

Until 1966, Pennsylvania's product liability law followed the privity rule, descended from Victorian England's *Winterbottom* v. *Wright*,[20] a containment doctrine used to preclude recovery to an injured mail coach driver, who did not have the required privity of contract with the coach's wheelwright, deemed to be a necessary prerequisite for a plaintiff's verdict.[21] The purpose of this liability containment policy was explained as follows:

> [I]f the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit would ensue.[22]

The mail coach driver,"lame for life", was deprived a remedy for his injuries caused by an established defect, a result which the English bench chalked up to damage without injustice.[23]

Pennsylvania followed this containment policy for 114 years, until 1966, when the Supreme Court applied it in *Miller* v. *Preitz*,[24] where it affirmed dismissal, on *demurrer*, of a wrongful death action brought on behalf of an infant burned to death when a vaporizer-humidifier shot boiling water onto him during the night.[25] Clearly, under these facts, the infant was an

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ject to greater risks in federal court than in Pennsylvania state court since, ultimately, the *Frye* standard was generally limited to more novel science or claims. *See, e.g., Booth* v. *Black and Decker, Inc*., 166 F.Supp.2d 215 (E.D. 2001); *Oddi* v. *Ford Motor Co*., 234 F.3d 136 (3d Cir. 2000); *Calhoon* v. *Yamaha Motor Corp*., 350 F.3d 316 (3d Cir. 2003). *See*, Bugay, *Products Liability Developments Since the Adoption of the"New"Pennsylvania Rules of Evidence*, 77 Pa. B.Q. (Jan. 2006).

18. The privity doctrine and the doctrine of *caveat emptor* are two vestiges of containment. The privity requirement limited standing to bring a products liability claim to those who were direct purchasers of the product involved in the accident. The doctrine of *caveat emptor* precluded products liability claims where the injured party had an opportunity to examine the product. From these doctrines, exceptions developed, such as for fraud, the sale of tainted food, or for inherently dangerous products, like pharmaceuticals which, unless carefully prepared, can have lethal consequences. *See, Thomas* v. *Winchester*, 6 NY 397 (NY 1852) (drug mislabeling), cited as a policy basis for limiting the privity doctrine by Judge Cardozo in *MacPherson* v. *Buick Motor Co*., 111 N.E. 1050 (1916); *Mazetti* v. *Armour & Co*., 135 P. 633 (1913) (food poisoning at a restaurant), *cited* by the Washington Supreme Court to bypass the privity requirement in *Baxter* v. *Ford*, 12 P.2d 409 (Wash. 1932) which held that false product representations may be actionable in strict liability pursuant to a breach of warranty claim. *Baxter* became the basis for §402B. *See also, Huset* v. *J.I. Case Threshing Machine Co*., 120 F. 865 (8th Cir. 1903) (identifying three exceptions to the privity doctrine).

19. Notwithstanding contraction in other areas, Pennsylvania strict liability is intact. In 1984, the Pennsylvania Superior Court held that a defendant's *Azzarello* risk/utility challenge to a claim that a product is"unreasonably dangerous"is waivable so that, if a trial commences without this defense being raised as a challenge, the product is presumed to be worthy of being evaluated for design defect. *Dambacher* v. *Mallis*, 485 A.2d 408 (Pa. Super. 1984). In 1985, the Pennsylvania Superior Court held that the state of the art defense was inapplicable to a strict products liability action. *See, Carrecter* v. *Colson Equip. Co*., 499 A.2d 326 (Pa. Super. 1985). In 1987, the Pennsylvania Supreme Court precluded industry standards in strict products liability cases. *See, Lewis* v. *Coffing-Hoist, Div. Duff-Norton*, 529 A.2d 590 (Pa. 1987). That year, the Pennsylvania Superior Court expanded *McCown* v. *Int'l Harvester Co*., 342 A.2d 381 (Pa. 1975), which adopted comment n to §402A, to preclude contributory negligence in a products liability case, to hold that user and consumer negligence evidence is precluded in a strict liability case. *See, Staymates* v. *ITT Holub Indus*., 527 A.2d 140 (Pa. Super. 1987). Thereafter, the Pennsylvania Superior Court precluded OSHA and ANSI standards in strict products liability cases. *See, Madjic* v. *Cincinnati Machine Co*., 537 A.2d 334 (Pa. Super. 1988); *Sheehan* v. *Cincinnati Shaper Co*., 555 A.2d 1352 (Pa. Super. 1989). In 1992, the Third Circuit limited user conduct evidence in a strict products liability case by summarizing the prior Pennsylvania case law. *See, Dillinger* v. *Caterpillar Tractor Co*., 959 F.2d 430 (3d Cir. 1992). In 1994, the Third Circuit held that a product defendant cannot present evidence of its claims of impracticalities associated with a proffered alternative design and stated that product manufacturers have a strict liability duty to make their products"as safe as possible, as soon as possible. *See, Habecker* v. *Clark Equip. Co*., *("Habecker III")*, 36 F.3d 278 (3d Cir. 1994). In 1997, the Third Circuit explained the methodology for performing the *Azzarello* risk/utility analysis. *See, Surace* v. *Caterpillar Tractor Co*., 111 F.3d 1039 (3d Cir. 1997).

20. 10 Meeson & Welsby 109, 15 Eng. Rep. 402 (Ex. 1842)(C.J. Abinger).

21. In Pennsylvania, this Rule was applied before *Winterbottom* in *McFarland* v. *Newman*, 9 Watts 55, 57, 34 Am. Dec. 497, 499 (Pa. 1839).

22. *Id*. at 115.

23. *Id*. at 115, ("*damnum absque injuria*", concurring opinion of Baron Rolff).

24. 221 A.2d 320 (Pa. 1966).

25. *See*, 221 A.2d 320 (Pa. 1966).

intended user of this product. Like other humidifiers of its day, the product was marketed for the purpose of helping children get through minor respiratory congestion.[26]

In *Miller*, the Pennsylvania Supreme Court reluctantly affirmed the trial court's dismissal;[27] however, its dissent was applied the same day in *Webb* v. *Zern*,[28] where the Pennsylvania Supreme Court adopted §402A of the Restatement (Second) of Torts.[29] Interestingly, *Webb* v. *Zern* is a bystander case. In *Webb*, the son of the purchaser of a one-quarter keg of beer was injured when the keg exploded as he walked into the room, where it was stored.

Somehow even though the case wherein the Pennsylvania Supreme Court adopted §402A involved a bystander injury, where there is a Pennsylvania Supreme Court approved jury instruction for products liability bystanders,[30] and numerous bystander products cases,[31] in 2005, when *Berrier* v. *Simplicity Manufacturing Co*.[32] was decided, the District Court concluded that §402A in Pennsylvania does not provide protection for injured bystanders. In 2009, the Third Circuit reversed summary judgment in *Berrier* by predicting that Pennsylvania's Supreme Court would adopt the Restatement (Third) of Torts: Products Liability, which recognizes bystander protection.[33] Through the Third Circuit's legal alchemy in *Berrier*, a recovery was made possible for a young girl whose foot was amputated after being run over by a lawn tractor which was operated by her grandfather in reverse[34] and the case was ultimately settled. However, a more direct approach would have been to simply recognize bystander liability pursuant to §402A.[35]

Since *Berrier*, the Third Circuit has repeatedly stated that Pennsylvania will adopt the Restatement (Third) of Torts: Products Liability. In *Covell* v. *Bell Sports, Inc*.,[36] it stated that this

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26. There is no product description in the case. However, the "electric vaporizer" is based on existing state of the art which used a gallon milk bottle or pickle jar, filled with water, being heated to put off steam, with an insecure capping system. This design is discussed in greater detail by the Minnesota Supreme Court in *McCormack* v. *Hankscraft Co*., 154 N.W.2d 488 (Minn. 1967) (4 year old suffered third degree scalding burns after she tipped over the humidifier in the night, causing the boiled water to spill over her body; $150,000 plaintiff verdict reinstated on appeal). Interestingly, notwithstanding a similar closure defect, in *Van Buskirk, ex rel.* v. *West Bend Co*., 100 F.Supp.2d 281 (E.D.Pa. 1999), summary judgment was granted in favor of the defendant manufacturer of a Four Cup Fryer, intended to make, inter alia, French fries, which, while in use, toppled atop a six and a half old child who had bumped into a cart it was on with his walker. The trial court's reasoning was premised upon the fact that the infant was not an "intended user" of the fryer. By 1999, the "intended user" defense was in vogue as a "hot" defense to products liability actions—particularly those involving tragic injuries to children. *See, Riley* v. *Warren Mfg*., 688 A.2d 221 (Pa. Super. 1997) (a child, who accompanied his grandfather to work, seriously injured when his fingers were amputated by unguarded impeller blades of an airlock component of a bulk feeder, used to distribute feed to animals destined for slaughter, is not an intended user).

27. "Our determinations in this appeal are in the first instance restricted by the election of the administrator to frame this action in assumpsit." 221 A.2d 320 (Pa. 1966).

28. 220 A.2d 853 (Pa. 1966).

29. §402A provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Sub§ (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

30. Pennsylvania Jury Instruction 8.10 defines Liability for harm to bystanders as follows: "The seller is liable for all harm for which his or her defective product is the factual cause, whether such harm be to a user, consumer, or bystander. The seller by placing his or her product into the stream of commerce, is responsible to all who come within the boundaries of its use."

31. *Flavin* v. *Alderich*, 250 A.2d 185 (Pa. Super. 1968); *Fedorchick* v. *Massey-Ferguson, Inc*., 438 F.Supp. 60 (E.D. Pa. 1977); *Kuisis* v. *Baldwin-Lima-Hamilton Corp*., 319 A.2d 914 (Pa. 1974); *Schmidt* v. *Boardman Co*., 11 A.3d 924 (Pa. 2011).

32. 413 F.Supp.2d 431 (E.D.Pa. 2005).

33. §1 of the Restatement (Third) does not limit recovery to users and consumers. Instead, "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."

34. 563 F.3d 38 (3d Cir. 2009).

35. *See, Bugay, Pennsylvania Products Liability at the Crossroads: Bugosh, Berrier and the Restatement (Third) of Torts*, 81 Pa B.Q. 1 (Jan 2010) (*hereinafter, Bugay/Bugosh*).

36. 651 F.3d 357 (3d Cir. 2011).

prediction is precedent, binding upon District Courts within the Third Circuit. However, Pennsylvania state courts have continued to apply §402A and this has created federal/state conflict.

Pennsylvania Products Liability law is threatened with change. That change will, at a minimum, limit application of the Restatement (Second) of Torts, §402A. With several Justices favoring the Restatement Third,[37] the transformation of Pennsylvania law may be complete.[38]

TINCHER: PLAINTIFFS PLAYING WITH FIRE

Tincher is a subrogation property damage case. It was argued by insurance company counsel; its suggestion to reverse *Azzarello* is not only contrary to the interests of Pennsylvania consumers, it is a basis for reversal and in contravention of the plaintiffs' own interest in that case.[39]

Tincher's products liability claims arise from a fire that allegedly spread from defendant Omega Flex's product, TracPipe, a corrugated stainless steel tubing ("CSST"), installed during the construction of their townhome in 2005. Defendant introduced their CSST product in 1992; this piping is used for gas connections and offers construction advantages over standard iron pipe. It has been popular in the building industry since 1988. However, CSST's piping design has thin side walls. For the Tinchers' home, it was used to connect their gas fireplace to the house's exterior gas main. The piping ran along their townhome's ground floor.

On June 20, 2007, lightning struck their townhome and their TracPipe CSST piping ignited. Their home was destroyed. The Tinchers filed suit in Chester County, alleging that the TracPipe was defective because its paper thin walls made it susceptible to eruption from lightning strikes. A Chester County jury awarded plaintiffs $958,895.85 in compensatory damages pursuant to their §402A claims.[40] During trial, the defendant's request for a Restatement (Third) of Products Liability jury instruction was denied; instead, the court gave a standard Pennsylvania strict liability jury instruction.[41] The Pennsylvania Superior Court affirmed the plaintiffs' verdict. The Pennsylvania Supreme Court granted allocatur and is about to decide this case—and potentially change Pennsylvania products liability law, which has governed such cases for 48 years.

CURRENT PENNSYLVANIA STRICT LIABILITY LAW: §402A, *AZZARELLO*, AND JURY INSTRUCTION 8.02

Section 402A expressly rejects the privity doctrine and shifts products liability law from a philosophy of seller protection—through a caveat emptor doctrine—to one where sellers must account for their product's safety, that of *caveat venditor*.[42] In *Azzarello* v. *Black Bros. Co.*,[43] the Pennsylvania Supreme Court intended to preserve strict liability claims as distinct from a negligence claim by separating the determination of whether a product is "unreasonably dangerous", a negligence determination, from the factual question of whether the product is defectively designed. At trial, the court quoted from §402A to provide the following charge, which used the consumer expectations test:

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37. *See, Evans, supra*. Justice Saylor is an advocate for adoption of the Restatement Third. Chief Justice Castille has joined in these opinions and is believed to be in favor of the Restatement Third. Justice Eakin joined Justice Saylor's concurrence in *Phillips I, supra*, also is predicted to favor adoption of the Restatement (Third). Other Justices—Justices Baer, Todd, and McCaffery—are predicted to prefer retaining the Restatement (Second). Justice Stevens participated in the Pennsylvania Superior Court's decision in *Reott v. Asia Trend, Ltd*., 7 A.3d 830 (Pa. Super. 2010). That decision made no reference to the Restatement (Third).

38. *See, Bugay/Bugosh, supra*.

39. *See, Evans, supra* (Given plaintiffs' counsel's assertion that *Azzarello* should be overruled, "[a] straight affirmance seems unlikely.").

40. Appellant Omega Flex's Brief at 6-12.

41. The trial court provided standard civil jury instruction 8.02, derived from the Pennsylvania Supreme Court's decision in *Salvador* v. *Atlantic Steel Boiler Co*., 319 A.2d 903 (Pa. 1974), *cited by Azzarello* v. *Black Bros. Co*., *supra* at 1027, n.12.

42. §402A(2) expressly eliminates the privity doctrine and asserts strict products liability as follows:

> (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

43. 391 A.2d 1020 (Pa. 1978).

> ". . . [T]he plaintiff must prove that the defendant sold the product involved in a defective condition, unreasonably dangerous to the user . . . ."
>
> "A properly made product is defective if its design is unreasonably dangerous. The prevailing interpretation of defective is that the product does not meet the reasonable expectations of the ordinary consumer as to its safety."[44]

During post-trial motions, the trial court reversed itself, stating that its above instruction had converted the plaintiff's strict liability claims into a negligence claim because the phrase "unreasonably dangerous" suggested an evaluation of reasonable care. In doing so, the trial court applied the Pennsylvania Supreme Court's decision in *Berkebile* v. *Brantly Helicopter Corp*.[45] where the Court stated that:

> The crucial difference between strict liability and negligence is that the existence of due care, whether on the part of seller or consumer, is irrelevant. The seller is responsible for injury caused by his defective product even if he "has exercised all possible care in the preparation and sale of his product."[46]

As such, contrary to those criticizing this ruling, *Azzarello* preserves the intended purpose of §402A by simplifying the burden of proof in a strict liability case, from that required by negligence, by establishing that the plaintiff need only prove defect and causation to sustain his or her burden of proof.[47] In *Azzarello*, as in *Berkebile*, the Pennsylvania Supreme Court held that proof of defect, in itself, was sufficient proof that the product involved in the plaintiff's accident was "unreasonably dangerous."[48] Since *Azzarello*, juries have been charged on strict liability as follows:

> 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.[49]

Jurors are also instructed that this strict liability duty is non-delegable and that product sellers are the guarantors of their product's safety.[50] These rulings have been held to preclude (1) consumer or user negligence; (2) state of the art evidence; (3) compliance with industry and governmental standards; and (4) defendant or other evidence and opinions that the proposed alternative design is not (a) practical; (b) desirable; (c) useful; or (d) desired by purchasers.[51]

Pursuant to *Azzarello*, a products liability defendant may challenge the plaintiff's strict liability design defect claims as a threshold matter. The Court then engages in a balancing of the *Wade* factors[52] to determine whether, on balance, viewing the evidence in the light most favorable to the plaintiff, the explicit and implicit costs of the proposed design are outweighed by the magnitude of the harm caused by the product's condition as sold.

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44. *Id*. at n2.
45. 337 A.2d 893 (Pa. 1975).
46. *Id*.
47. *See, e.g., Phipps* v. *GM Corp*., 363 A.2d 955 (Md. 1976) (strict liability permits plaintiff to prove claim without burden of negligence to show the defendant's knowledge of defect); *Greenman* v. *Yuba Power Prod., Inc*., 377 P.2d 397 (Cal. 1963) (notice is not necessary in strict liability because people are not knowledgeable about the complexities of modern products).
48. As the Pennsylvania Supreme Court stated in *Berkebile v. Brantly Helicopter Corp., supra*:

> The salutary purpose of the "unreasonably dangerous" qualification is to preclude the seller's liability where it cannot be said that the product is defective; this purpose can be met by requiring proof of a defect. 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. The plaintiff must still prove that there was a defect in the product and that the defect caused his injury; but if he sustains this burden, he will have proved that as to him the product was unreasonably dangerous. It is therefore unnecessary and improper to charge the jury on "reasonableness."

49. Pennsylvania Std. Civ. J.I. 8.02 (3d Ed. 2005).
50. Pennsylvania Std. Civ. J.I. 16.01 (renum.) states that: "A defendant in a strict liability case who puts a defective product into the market remains liable to the user or consumer, despite the foreseeable conduct, negligent or otherwise, of others, for the harm created by the product as a result of the defect."
51. *See*, cases cited in note 19, *supra*.
52. Rather than look to a consumer's expectations, an alternative test was proposed—by Professor John Wade—in a law review article. These factors, called the Wade Factors, are now predominantly used to determine whether a product is "unreasonably dangerous" as defined by §402A. They are:

Two concerns addressed by the Pennsylvania Supreme Court in *Tincher* are that, by overruling *Azzarrello* and preserving the issue of "unreasonably dangerous" for trial, thereby separating it from the plaintiff's proof of defect itself, strict liability claims will become unduly burdensome to present. The costs of trying a strict liability case will prevent meritorious claims which would otherwise have been brought. If *Azzarello* is overruled, a defendant will be able to present state of the art evidence—so that products like asbestos, which are proven to cause severe injury and death, can still be found to be not unreasonably dangerous because the manufacturer or seller did not know of the product's dangerous propensities when sold. Overruling *Azzarello* will permit the manufacturer to delegate its responsibility for safety by offering safety devices as extra cost options for the product, thereby placing the choice of safety in the hands of others, like employers who are immune from direct negligence claims brought by maimed employees who are injured by products sold without such safety devices.[53]

THE EFFECT OF OVERRULING *AZZARELLO*

During oral argument, the Court wanted to know whether the juror questions in a product liability case will change if *Azzarello* is overruled. Presently, jurors are asked to answer the following two questions: (1) Is the defendant's product defective? and (2) Did the defendant's product's defect cause the plaintiff's injury? However, if *Azzarello* is overruled, without adopting the Restatement (Third), this verdict slip would technically add a preliminary question of whether the defendant's product's design is "unreasonably dangerous" because it failed to incorporate the plaintiff's proffered feasible alternative design. If *Azzarello* is overruled, will jurors evaluate the defendant's product from the point of view of "social philosophers?"[54] Should the first question now be: Is the defendant's product "unreasonably dangerous"? Or will this question replace the factual question of whether the product is defective?

Within the next month or so, Pennsylvania's Products Liability law may change. At a minimum, proof of a feasible alternative design will be a required element instead of simply a burden of persuasion. The proof necessary to establish this feasible alternative design will become a more expensive process. More than likely, a typical products liability case will require more expert witness testimony, perhaps even including a new social policy expert. For example, in *Stollings* v. *Ryobi Technologies, Inc.*,[55] decided recently in the Seventh Circuit, applying Illinois law, a plaintiff presented a public policy expert to opine that the plaintiff's proffered alternative design would be "socially beneficial" and that the product, without the safety device, cost society, on average, $753 per accident. The expert opined that it would make economic sense to install the proffered safety device even if it cost $753 per product unit. The trial court's decision to preclude this testimony was reversed on appeal.[56]

After *Tincher*, the average cost of presenting a products liability case will increase. Chief Justice Castille noted this concern about higher processing costs during oral argument.[57] This

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1. The usefulness and desirability of the product—its utility to the user and to the public as a whole (Usefulness).
2. The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury (Safety and severity of injury).
3. The availability of a substitute product which would meet the same need and not be as unsafe. (Feasibility of Alternative Design).
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/or 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 the injury by] setting the price of the product or [by] carrying liability insurance.

53. *See, Bugay/Bugosh, supra*.

54. "Should an ill-conceived design which exposes the user to the risk of harm entitle one injured by the product to recover? Should adequate warnings of the dangerous propensities of an article insulate one who suffers injuries from those propensities? When does the utility of a product outweigh the unavoidable danger it may pose?" *Azzarello, supra* at 1024.

55. 725 F.3d 753 (7th Cir. August 2, 2013).

56. *Id*.

57. Mitchell, "Restatement Arguments Focus on Alternative Product", Legal Intelligencer (10/16/13).

will reduce the number of meritorious claims because they will become economically not viable to prosecute. If *Azzarello* is overruled, the determination of whether a product is "unreasonably dangerous" will be made by the jury and not, as a threshold matter, by the Court. This will increase the risks associated with case selection. Once again, meritorious claims will not be prosecuted. If the Restatment (Second) is retained, then the question will become whether Pennsylvania will continue to preclude state of the art evidence. During oral argument, several justices expressed concern about permitting manufacturers to defend a defect by claiming that, when they sold the product, they did not appreciate its hazards. However, today, more than ever, permitting such a defense creates a pandora's box of future problems. More than ever, the public is being sold products with new technology which, although they may pass "industry" or governmental minimum thresholds, are really being tested on the public—because they seem like good products at the time. These include "re-engineered food",[58] electronic cigarettes,[59] nanotechnology,[60] synthetic biology,[61] irradiated food, and cell phones, whose use has been linked to brain cancer. Is Pennsylvania prepared to permit defendants to escape liability on the claim that no one really understood the hazards associated with these and other products when they were introduced into the marketplace? For that matter, many product injuries occur to workers, who operate products sold to their employers. Many of these workers never see the products' sales literature or their manuals. Is Pennsylvania going to extend defenses by precluding recoveries for injured workers because product sellers provided obtuse information to third parties, like employers, rather than to the people who are actually exposed to their product's hazards?

If the Restatement (Third) is adopted, product sellers will be offered maximum protection, a change that will ultimately be borne on the backs of injured citizens and workers. All negligence defenses will be permitted—comparative negligence, industry standards, and state of the art claims. Defendants will also limit a plaintiff's claims through a multivariate factor attack on whether the product is "unreasonably dangerous". These factors are:

> (1) the magnitude and probability of the foreseeable risks of harm; (2) the instructions and warnings accompanying the product; (3) the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing; (4) the relative advantages and disadvantages of the product as designed and as it alternatively could have been designed; (5) the likely effects of the alternative design on production costs; (6) the effects of the alternative design on product longevity, maintenance, repair, and aesthetics; (7) the range of consumer choice among products.[62]

This is a significant change from the present *Azzarello* analysis.

Pennsylvania is presently a true strict liability jurisdiction where manufacturers are held to guarantee their product's safety. Safety has not been an option for nearly half a century. *Tincher* presents a significant break and may enable product defendants to increase profits through price discrimination—by selling products with safety features based on market preference rather than through a public policy based requirement to protect their product's users and consumers.

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58. Over the years, scientists have put growth hormones into beef and have developed biotech products. *See*, Owen, "Bending Nature, Bending Law, Florida Law Rev. (2010) at 974. In 2010, 80% of beef produced in the United States were infused with growth hormones. *Id*. In 2007, more than 97% of soybean and 87% of cotton planted was genetically engineered. Three quarters of all corn is bioengineered. *Id*.

59. *Id*. Who really knows whether these products which atomize vapor for inhalation are safe? They were commercially introduced in Asia in 2005. They are presently considered to be an "unapproved new drug."

60. Mandel, Nanotechnology Governance, 59 Ala. L. Rev. 1323 (2008).

61. The creation of new biological components not found naturally. Owen, *supra* at 578.

62. *See*, comment f to the Restatement (Third), § 2(b). The comment also states, "Moreover, these factors interact with one another. For example, evidence of the magnitude and probability of foreseeable harm may be offset by evidence that the proposed alternative design would reduce the efficiency and the utility of the product. On the other hand, evidence that a proposed alternative design would increase production costs may be offset by evidence that product portrayal and marketing created substantial expectations of performance or safety, thus increasing the probability of foreseeable harm."