Pennsylvania Products Liability At The Crossroads: *Bugosh, Berrier* And The Restatement (Third) Of Torts

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INTRODUCTION: THE RESTATEMENT (THIRD), *BERRIER* AND *BUGOSH*

On May 20, 1997, the Restatement (Third) of Torts: Products Liability law was adopted by the American Law Institute ("ALI").[2] Professor James Henderson, from Cornell Law School, and Professor Aaron Twerski, from Brooklyn Law School, are the reporters.

In law school, you learned that you could rely on "the black letter law" from the Restatement, which Black's Law Dictionary describes as a retelling of the common law with commentary.[3] So naturally, one would think that the Restatement should be a mere summary of established law, compiled as an apolitical document. However, this is not true. The Restatement (Third) has been heavily criticized as a political document created at the behest of powerful lobby groups.[4] As discussed below, the principal outcome of the Restatement (Third) of Torts, with regard to product design

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2. *Lavelle, Crashing Into Proof of a Reasonable Alternative Design: The Fallacy of the Restatement (Third) of Torts: Products Liability,("Crashing into Proof"), 38 Duq. L. Rev. 1059 (Summer 2000).*

3. Black's Law Dictionary (5th Ed.) at 582.

4. Note, *Just What You Would Expect: Professor Henderson's Redesign of Products Liability*, 11 Harv. L. Rev. 2366, 2383, 9 (June 1998), (stating "The tort reformers have attempted to appropriate the prestige of the ALI through power politics, even though that prestige is built on the ALI's tradition as a non-

defect claims, is to perform legal alchemy, to transform what has heretofore been a "strict liability" claim, into a product negligence civil action. [5]

Until 2008, Restatement (Third) was rarely cited by Courts. However, things changed in 2008 when, in *Bugosh* v. *I.U. North America, Inc.*,[6] the Pennsylvania Supreme Court granted allocatur for the following certified question on appeal:

> *Whether this Court should apply §2 of the Restatement (Third) of Torts in place of §402A of the Restatement (Second) of Torts.*

Sixteen months later—and significantly after *Berrier* v. *Simplicity Manufacturing, Inc.*[7] was decided—the Pennsylvania Supreme Court dismissed this appeal as being improvidently granted.[8] In response, Justice Saylor filed a 39 page dissent, expressing displeasure at not having an opportunity to overrule *Azzarello* v. *Black Bros. Co.*[9] and criticizing the Supreme Court for rejecting the case for decision, stating:

However, the history of Pennsylvania strict products liability shows that the concept of foreseeability is an indelible part of its core analysis.

> In summary, the Court should no longer say negligence concepts have no place in "strict-liability" doctrine in Pennsylvania, when this simply is not accurate in our tort scheme, or in any scheme purporting to recognize that manufacturers and distributors are not outright insurers for all harm involving their products. To the degree a distinct category of "strict" product liability doctrine is necessary, at most, it always has been, and rationally should be, one of quasi-strict liability, tempered, in design and warning cases, with the legitimate involvement of notions of foreseeability and reasonableness within the purview of the fact finder.[10]

Justice Saylor's position regarding the concept of foreseeability in strict products liability actions was recently restated in *Pennsylvania Department of General Services* v. *United States Mineral Products Co.* (hereinafter "*DGS*")[11] as follows:

> In [strict liability actions], this Court has held that a manufacturer can be deemed liable only for harm that occurs in connection with a product's intended use by

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adversarial deliberative body.) Marshall S. Shapo, *A New Legislation: Remarks on the Draft Restatement of Products Liability*, 30 U. Mich. J.L. Reform 215, 218 (1997); *Vandall, Constructing a Roof Before the Foundation is Prepared: The Restatement (Third) of Torts: Products Liability Section 2(b) Design Defect*, 30 U. Mich. J. L. Reform, 261 (1997); *Vargo, The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402 A Products Liability Design Defects-A Survey of the States Reveals a Different Weave*, 26 U. Mem. L. Rev. 493 91996); *Arnold, Rethinking Design Defect Law: Should Arizona Adopt the Restatement (Third) of Torts: Products Liability*, 45 Ariz. L. Rev. 173 (2003) (concluding that the Restatement (Third) of Torts for Products Liability should be rejected by the Supreme Court of Arizona). *Conk, Is there a Design Defect in the Restatement (Third) of Torts: Products Liability?*, 109 Yale L. J. 1087(March 2000).

5. Strict products liability is established by the Restatement (Second) of Torts, Section 402A which states:

> (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:
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without a substantial change in the condition in which it is sold.
>
> (2) The rule stated in subsection (1) applies although
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> (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.

6. 942 A.2d 897 (Pa. 2008).
7. 563 F.3d 38 (3d Cir. 2009).
8. *971 A.2d 1228 (Pa. 2009)*.
9. 391 A.2d 1020 (Pa. 1978). discussed *infra*.
10. *Bugosh* v. *I.U. North America, Inc., supra at 1241.*
11. 898 A.2d 590 (Pa. 2006).

> an intended user; the general rule is that there is no strict liability in Pennsylvania relative to non-intended uses even where foreseeable by a manufacturer. See, *Phillips* v. *Cricket Lighters, 576 Pa. 644, 656-57, 841 A.2d 1000, 1007 (2003)["Phillips I"] (plurality opinion . . .)*. The Court has also construed the intended use criterion strictly, holding that foreseeable misuse of a product will not support a strict liability claim. See *id*.

However, the history of Pennsylvania strict products liability shows that the concept of foreseeability is an indelible part of its core analysis. This is not surprising since Pennsylvania strict products liability law is the product of negligence (tort) law and the statutory (UCC) implied breach of warranty claim for product defect (assumpsit). From the tort side, foreseeability plays a central role in evaluating duty, breach, and causation. From the breach of warranty side, foreseeability is statutorily engrafted in Pennsylvania by, *inter alia*, 13 Pa.C.S. §2318 which states, in pertinent part:

> [13 Pa.C.S. §2314, establishes that an implied breach of warranty] "extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable [for the product seller] to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.

As discussed below, the United States Court of Appeals for the Third Circuit in *Berrier* v. *Simplicity Manufacturing Inc*.[12] predicted that Pennsylvania will adopt the Restatement (Third) of Torts: Products Liability as a substitute for the Restatement (Second) Section 402A. This prediction is incorrect. This article suggests that the *Berrier* decision should have a short lifespan.

In the meantime, *Berrier* and *Bugosh* have created confusion and the potential for separate legal schemes for strict product liability analysis, depending upon whether a case is filed in federal or state court.[13] As discussed below, recent decisions suggest that most federal district courts are not following *Berrier* and do not cite it as

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12. *563 F.3d 38 (3d Cir. 2009)*.

13. At least one astute observer noted that "the *Berrier* Court [took] the bait!" *See, Ricci, Berrier + Bugosh = Azzarello, "Sr.", within "Penetrating the Fog: The Status of Product Liability Law in Pennsylvania, Post-Berrier (PAJ, September 2009) (hereinafter "Azzarello, Sr.")*. In 2008, the Third Circuit had asked the Pennsylvania Supreme Court for guidance by certifying the following question:

> Whether, under Pennsylvania law a minor child may pursue a strict liability claim for injuries caused by a riding lawnmower, where the child is neither an intended user nor consumer of the mower.

Berrier v. *Simplicity Manufacturing, Inc., 2008 WL 538912 (3d Cir. 2008)*. However, the Pennsylvania Supreme Court declined the Third Circuit's request. *See, Berrier* v. *Simplicity Manufacturing, Inc*., 959 A.2d 900 (Pa. 2008)("[T]he Petition for Certification . . . is respectfully DECLINED. The Motion for Leave to Advise of Supplemental Authority is DENIED"). Justice Saylor filed a concurring statement, directed at the United States District Court's concerns about the case as follows:

> I also note that the district court expressed "grave doubts" about the rationality of Pennsylvania's narrow application of the intended-user doctrine in strict liability theory, as the court believed that the doctrine serves to prevent recovery by innocent bystanders injured by defective products. Berrier v. Simplicity Corp., 413 F.Supp. 2d 431, 442 (E.D. Pa. 2005). However, fair compensation is not precluded by the intended-use doctrine. Rather, affected product-liability claims are channeled into negligence, where they may rise or fall on their merits. *Cf.* DGS, 898 A.2d at 604. . . .

Id. The additional authority on this issue (innocent bystander coverage under Section 402A) referenced by the aforementioned Motion for Leave to Advise of Supplemental Authority may have been *Schmidt* v. *Boardman Co*., 958 A.2d 498 (Pa. Super. 2008), where the Pennsylvania Superior Court affirmed a $4.5 million judgment in favor of the estate of a young girl, her injured mother, an emotionally traumatized child and a ten year old girl who suffered permanent head trauma. The ten year old was struck in the head by the same fire hose nozzle that struck and fatally injured the girl and her mother. The nozzle broke free from a fire truck that was responding to an alarm. The nozzle was launched like a missile and traveled with enough velocity to sheer a concrete bird feeder in half before striking and killing the girl, injuring her mother, and causing permanent head trauma to its third victim, an event directly witnessed by her sister. The case proceeded against the Boardman Company, its successor, Sinor Manufacturing, Inc. and the local fire department. A jury returned a verdict against each defendant. The Pennsylvania Superior Court affirmed the trial court's verdict on strict products liability in favor of the three victims and the estate of the young girl who were all obviously innocent bystanders injured in this tragic event.

precedent.[14] Rather, what *Berrier* and *Bugosh* show is that, while plaintiff's counsel should become familiar with the Restatement (Third) to see whether its provisions will affect cases currently pending or those being considered for litigation,[15] Section 402A and *Azzarello* will remain Pennsylvania law for the foreseeable future.

Berrier v. *Simplicity Manufacturing Co.*

Berrier involved horrendous injuries to a young child, Ashley Berrier, occurring while she was visiting her grandparents. Her grandfather was mowing the lawn with his Simplicity riding mower. Ashley was in the yard and she picked a flower. Meanwhile, her grandfather was making a turn with the mower in reverse. She didn't understand that the mower's blades were rotating or that she was in any danger when she went to hand her grandfather the flower. The mower did not have a No Mow in Reverse ("NMIR") system to deactivate the mower blade when the mower operated in reverse. Ashley's grandfather didn't see her as she approached. The blades continued to operate when the mower ran over Ashley, mutilating her left leg and foot. Ashley's left foot had to be amputated.

The plaintiffs argued that she should be protected as an innocent bystander under Section 402A. The trial court disagreed. The trial court also held that the plaintiff had not satisfied the basic risk/utility test to permit them to proceed with their case to the jury. The trial court dismissed the plaintiff's case. On appeal, the Third Circuit reversed. It held that the trial court erred because the Restatement (Third) of Torts: Products Liability, Sections 1 and 2[16] applied to provide the plaintiff with an opportunity for recovery.

Bugosh v. *I.U. North America, Inc.*[17]

Bugosh is an asbestos exposure strict products liability case. Judith Bugosh's husband, Edward, was a construction worker in Pittsburgh. As part of his job duties, he was required to cut pipe delivered to the worksite by Pittsburgh Gage, the predecessor to I.U. North America ("IUNA"). The pipe contained asbestos. Edward Bugosh contracted malignant mesothelioma, a cancer of the tissue surrounding the

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14. *See, Ricci, supra, citing Hittle* v. *Scripto-Tokai Corp., 166 F.Supp.2d 159 (M.D. Pa. 2001)*, to state: "There is authority for the general proposition that district courts are not necessarily bound by a state law prediction by the Court of Appeals."

15. There is a movement afoot that has gained at least one avid supporter in our State Supreme Court to replace existing Pennsylvania strict products liability law with the Restatement (Third) of Torts. Accordingly, products liability counsel, particularly in the plaintiff's bar, should be familiar with the Restatement (Third), even though it is not Pennsylvania law, because it may become an issue in the future.

16. The Restatement (Third) of Torts: Products Liability, Section 1 states:

> Liability of Commercial Seller or Distributor for Harm Caused by Defective Products
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> One 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.

Section 2 separates three kinds of defect cases, manufacturing, design and warnings defect cases, as follows:

> Categories of Product Defect
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> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
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> (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
>
> (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
>
> (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instruction or warnings renders the product not reasonably safe.

17. 942 A.2d 897 (Pa. 2008).

lung. Mesothelioma "is rare, except in those exposed to asbestos, and is specifically attributable to [asbestos] exposure."[18]

After trial, the jury awarded Mr. Bugosh's widow $1.4 million. The defendants filed post-trial motions, requesting a judgment notwithstanding the verdict ("JNOV") and, alternatively, a new trial.[19] On appeal, its defendant IUNA argued that the trial court had erred by failing to apply Section 2 of the Restatement (Third) of Torts.[20] The Pennsylvania Superior Court disagreed, stating:

> [T]he trial court can hardly be said to have erred in refusing to proceed against established authority [that is binding precedent]. Indeed, §402A of the Restatement (Second) of Torts makes it clear that "the imposition of strict liability for a product defect is not affected by the fact that the manufacturer . . . has 'exercised all possible care'" *Id.* at 1006 (citation omitted) . . . [A]s between the innocent consumer and a manufacturer of a defective product, the manufacturer should bear the loss."[21]

In the end, the Pennsylvania Supreme Court's certification of the issue regarding the choice between the Restatement (Second) and the Restatement (Third), set forth in the *allocatur* granted in *Bugosh*, is a nullity. The Supreme Court dismissed the *Bugosh* appeal as being improvidently granted. Instead, the Superior Court's decision represents the proper state of the law. Pennsylvania is a Section 402A state. *Azzarello* is current law. The Third Circuit's prediction in *Berrier* is incorrect. Trial Courts have properly declined to follow it in products liability cases.

This article argues against acceptance of the Restatement (Third) because it is a special interest policy document intended to convert the strict products liability system—which has heretofore focused on the characteristics of the product instead of upon the conduct of the parties—into a negligence system, by instituting a "fault-based" analysis. [22] Its impact on Pennsylvania products liability law is dramatic and is best examined through a review of current law with a comparison of the Restatement (Third) to examine the changes in the law that would follow should the Restatement (Third) be adopted in Pennsylvania.

PENNSYLVANIA'S SECTION 402A DESIGN DEFECT JURISPRUDENCE AND THE PROSPECTIVE CHANGES BY THE RESTATEMENT (THIRD) OF TORTS[23]

Pennsylvania's Adoption of §402A

Approximately forty-four (44) years ago, in *Webb* v. *Zern*,[24] the Pennsylvania Supreme Court adopted §402A of the Restatement (Second) of Torts. Before this, Pennsylvanians injured by defective products were forced to bring their claims through either a breach of warranty claim (assumpsit) that imposed formal restric-

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18. *Bugosh* v. *IU North America*, 932 A.2d 901, 906 (Pa. Super 2007), *citing Chenot* v. *A. P. Green Services, Inc.* 895 A.2d 55, 58 n.3 (Pa. Super 2006).

19. The asbestos suppliers argued that (1) the widow did not sustain her burden of proof at trial; (2) the verdict was against the weight of the evidence and, therefore, they should get a new trial; and (3) the verdict should be molded because they contended that the widow had already received some money from the Manville Trust. The Manville Personal Injury Settlement Trust was created in 1988, to settle asbestos claims related to products mined by Johns-Manville Corporation and its affiliated entities.

20. *See note 16, supra*.

21. 932 A.2d at 910-911, *citing* to *Andaloro* v. *Armstrong World Ind.* 799 A.2d 71 (Pa. Super. 2002) *quoting, Baker* v. *AC&S*, 729 A.2d 1140 (Pa. Super. 1999).

22. *Lavelle, supra at 1063-1068.*

23. This Section summarizes Pennsylvania strict products liability law. Due to space restrictions, the comparison to the Restatement (Third) is made by footnote where applicable. Most of the Pennsylvania cases discussed herein would be overruled by adoption of the Restatement (Third).

24. 220 A. 2d 853 (Pa. 1966).

tions for recovery, or a products negligence claim (trespass). In *Webb* v. *Zern*, the Pennsylvania Supreme Court expressly incorporated the dissent of Justice Jones in *Miller* v. *Preitz*,[25] decided the same day.

In *Miller*, Justice Jones stated that Pennsylvania should eliminate the formal prerequisites of privity,[26] previously needed to sustain a plaintiff recovery in products liability cases involving personal injuries and advocated to adopt §402A of the Restatement (Second) of Torts, as follows:

> In my opinion, the requirement of privity is illogical both when applied to the immediate purchaser or restricted to the immediate seller. A review of the case law in this and other jurisdictions reveals almost ludicrous attempts by the courts to fashion the concept of privity to individual cases. I would favor the abolition of the requirement of privity in assumpsit actions in this field. The remote manufacturer of a product shown to be defective should be held liable to any person or persons who might be reasonably foreseen to use, consume or be affected by the defective product.[27]
>
> Moreover, I believe that in this class of case the preferable approach would be to adopt §402A . . . [to] apply the rule of absolute liability [and] confine assumpsit actions to those cases where the damages claimed are solely commercial in nature [limited to economic loss]. Absolute liability is not novel in Pennsylvania. . . . Even the doctrines of *res ipsa loquitor* and exclusive control, which we restrictively recognize, are not a far cry from what would result from the adoption of §402A. Basically, the adoption of §402A would be sound and practical. Those who make and market products which are to be used and consumed by the public must be held to a special responsibility to any member of the using or consuming public who may be injured by the use and consumption of the product. The public, with justification, expects that, in the case of products over which it has a need and for which it must rely upon those who make and market the product, such as manufacturers and sellers, be they proximate or remote, will stand behind their products; the burden of injuries caused by defects in such products should fall upon those who make and market the product 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. . . . I believe that §402A . . . furnishes the appropriate vehicle for the recovery of damages for injuries to the person or property arising from defective products while actions for the recovery of damages for "economic loss" arising from defective products should be maintained under the uniform commercial code. . . . In my view, the arguments for extending the full protection of strict liability of consumers of non-food cases, widely accepted by other jurisdictions, as well as by legal commentators, are compelling, just as those same arguments were compelling in food cases. The public interest in affording the maximum protection possible under the law to human life, health and safety; [the] inability of the consumer to protect himself; the seller's implied assurance of the safety of a product on the open market; the superior ability of a manufacturer or seller to distribute the risk of loss; the needless circuitry of recovery and the expensive, time consuming, wasteful and often unjust process which insistence upon privity frequently occasions—all support the extension of the protection of strict liability beyond the food cases to those involving other consumer goods as well.[28]

Key Decisions: 1966–1982: Assumption of Risk, the Only Defense to Strict Products Liability

Between 1966 and 1982, Pennsylvania products liability law matured to limit conduct evidence in Pennsylvania's strict liability actions pursuant to §402A of the

25. 221 A.2d 320 (Pa. 1966).

26. Justice Jones defined vertical and horizontal privity as existing "where the actual purchaser proceeds against his remote vendor. His direction of suit is upward, through the series of sales which culminated in his purchase. Horizontal privity, on the other hand, begins with the user of the product and ends with the ultimate purchaser." 221 A.2d at 399, n.4.

27. Justice Jones dissented in *Miller* because the plaintiff was restricted to recovering from the retail seller. Clearly, even early on, Justice Jones saw foreseeability as part of a §402A analysis.

28. 221 A.2d at 334.

Restatement (Second) of Torts. In 1975, the Pennsylvania Supreme Court held that the only viable user conduct defense to strict products liability was the doctrine of assumption of risk. This period is also significant because the Pennsylvania Supreme Court discussed for the first time the concept of foreseeability and proximate cause in products liability cases. The Court also evaluated the sufficiency of evidence to establish a defect and the qualifications of a products liability expert. During this period, the Court also formally adopted several comments to Section 402A, including comment "q", holding the supplier of a defective component part strictly liable for injuries caused by a product's defective condition.[29]

In *Ferraro* v. *Ford Motor Co*.,[30] the Pennsylvania Supreme Court reversed the entry of JNOV in favor of the defendant, Ford, granted by the trial court pursuant to the doctrine of assumption of risk where the plaintiff had continued to operate a dump truck despite experiencing a malfunction on two prior occasions.[31] The Pennsylvania Supreme Court held that the entry of JNOV was improper because reasonable minds could differ as to whether one would continue to operate the truck under these circumstances. In *Ferraro*, the Pennsylvania Supreme Court held that, under the specific circumstances, the issue of assumption of risk was a question for the jury and could not be reviewed through post trial motions by the trial judge. The Supreme Court held that evidence regarding the plaintiff's conduct could be relevant with regard to the affirmative defense of assumption of risk at the trial of a strict products liability action.[32] However, as discussed below, the Supreme Court would later hold that, where there is insufficient evidence to present an assumption of risk charge, evidence regarding a product user's alleged improper conduct should be precluded at trial as irrelevant as a matter of law.[33]

In *Bartkewich* v. *Billinger*,[34] the Pennsylvania's Supreme Court was again presented with a question of what conduct is sufficient to defeat a strict products liability claim as a matter of law.[35] Unlike *Ferraro*, in *Bartkewich*, the Pennsylvania Supreme Court considered the plaintiff's conduct to be egregious because it viewed the actions to be wholly unnecessary. In *Bartkewich*, the plaintiff was injured when he reached his hand into a running glass breaking machine to un-jam glass that was jamming at a place where it normally jammed. Pursuant to his testimony, the plaintiff had reached into the machine to prevent the glass from damaging the machine, what the Court considered to be a silly purpose. [36] Moreover, the worker failed to use wooden sticks that his employer provided to un-jam the glass machine. Further, the worker

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29. In *Burbage* v. *Boiler Eng'g & Supply Co., Inc*., *249 A.2d 563 (Pa. 1969)*, the Pennsylvania Supreme Court adopted comment "q" to the Restatement (Second) of Torts, holding the manufacturer of a defective component part strictly liable under Section 402A. *See also, Woods* v. *Pleasant Hills Motor Co*., *309 A.2d 698 (Pa. 1973) (same)*. The Restatement (Third) of Torts: Products Liability describes component part liability in Section 5. Under the Restatement Third, the reasonableness concepts of Sections 1 and 2 are incorporated to make the case against a component part manufacturer a product negligence case.

30. 223 A.2d 746 (Pa. 1966)

31. The plaintiff has testified that the dump truck's wheel had locked during turns and that he had reported the matter to the product seller. He was assured in that it would not continue to happen into the future.

32. *See also, Greco* v. *Buccioni Eng'g Co., Inc*., *283 F.Supp. 978 (W.D. Pa. 1967)* (the question of assumption of risk belongs to the jury).

33. *See Berkbile* v. *Brantly Helicopter Crop*. 337 A.2d 893 (Pa. 1975) discussed *infra*.

34. 247 A.2d 603 (Pa. 1968).

35. Procedurally, in *Bartkewich*, plaintiff received a jury verdict and the defendant manufacturer's request for JNOV was denied by the trial court. The manufacturer appealed and the Pennsylvania Supreme Court held that the plaintiff's claim was defeated by his voluntary assumption of risk. *Id*.

36. Defense counsel will often cite to Justice Robert's quip about Mr. Bartkewich voluntarily taking such a known risk, wherein he stated:

> [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 zookeeper to keep his head out of a hippopotamus' mouth.

247 A.2d at 605.

had left the machine's operation station to un-jam the glass, while the machine was operating. The worker testified that he could have stopped the machine to un-jam the glass; but he chose not to do that. When presented with these facts, the Supreme Court affirmed the defense verdict finding that, under such circumstances, the worker had assumed the risk of his injuries.

Today, some defense counsel cite *Bartkewich* for the proposition that a manufacturer is not liable for an injury caused by an "open and obvious" danger. However, this defense was rejected by the Pennsylvania Supreme Court, which declined to follow New York's patent defect defense, set forth in *Campo* v. *Scofield*.[37] Consequently, *Bartkewich* is limited to its facts and applies only to the assumption of risk defense which has also been limited in Pennsylvania.

In *McCown* v. *International Harvester Company*,[38] the Pennsylvania Supreme Court adopted comment (n) to Section 402A to hold that contributory negligence is not a defense to a strict products liability action.[39] Significantly, at the time the case was decided, the Pennsylvania legislature had not yet adopted a comparative negligence statute.[40] The facts of *McCown* are interesting in that it involved a single vehicle accident, admittedly caused by the plaintiff's negligence.[41] In rejecting defendant's contributory negligence argument, the Pennsylvania Supreme Court stated:

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37. 301 N.Y. 368, 95 N.E.2d 802 (1950). In *Campo*, the plaintiff was operating an onion-topping machine whose components included opposing rollers that were used to grind and cut onions being fed into the machine. The plaintiff was injured when, while dumping a crate of onions into the machine, his hands became caught by the revolving rollers. His hands ultimately had to be amputated. The New York Court of Appeals held that the plaintiff could not sustain his product negligence action because the hazard created by the machine was open and not concealed or hidden. The holding became known as the "latent defect" or "patent danger" rule. Pursuant to this line of cases, "a [manufacturer of a] machine or any other article, dangerous because of the way in which it functions, and patently so, owes to those who use [its machinery] a duty merely to make [its machine] free from latent defects and concealed dangers. Accordingly, if a remote user sues a manufacturer of an article for injuries suffered, he must allege and prove the existence of a latent defect or a danger not known to [the] plaintiff or other users." *Id., 95 N.E.2d at 803. Campo* was later overruled by the New York Court of Appeals in *Micallef* v. *Miehle Co., Div. of Miehle-Goss Dexter, Inc*., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976). In *Micallef*, a printing press operator was injured "chasing hickies." A "hickie" is foreign material that gets onto the printing plate and causes a blemish or imperfection on the printed pages. The plaintiff told his boss about the problem and that he was going to "chase the hickies", a process which involves the worker placing a piece of plastic over the spinning plate cylinder where the ink is applied by pressing the plastic onto the roller with one's hand. The plaintiff's boss told the plaintiff to be careful. While so engaged, the plastic held in the plaintiff's hand and the plaintiff's hand were drawn into the press' in-running nip point, formed by the print roller, causing the plaintiff extensive injuries. In overruling *Campo*, the New York Court of Appeals stated that: "In today's world, it is often only the manufacturer who can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose. Once floated on the market, many articles in a very real practical sense defy detection of defect, except possibly in the hands of an expert after laborious and perhaps even destructive disassembly. . . . Apace with advanced technology, a relaxation of the *Campo* stringency is advisable." *Id*., 348 N.E.2d at 577. *See, Dorsey* v. *Yoder*, 331 F.Supp. 753 (E.D. Pa. 1971).

38. 342 A.2d 381 (Pa. 1975).

39. Comment (n) states: "Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases . . . applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand, the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."

40. *Id*., *342 A.2d at 382*. However, the Court noted that it would have reached the same decision even if the state legislature had adopted a comparative negligence statute. It stated, "To initially apply a theory of comparative negligence to an area of the law in which liability is not premised on negligence seems particularly inappropriate." *Id., at n.3*.

41. In *McCown*, the plaintiff lost control of the tractor he operated after hitting a guardrail while re-entering the Pennsylvania Turnpike. The collision caused the tractor's steering wheel to spin rapidly in the direction opposite to his turn and its spokes to strike the plaintiff's right arm, breaking his wrist and forearm.

> [In *Ferraro, supra*, this Court] permitted the assertion of assumption of the risk as a defense to a 402A action. . . . Today, we complete our acceptance of the principles delineated in comment n by rejecting contributory negligence as an available defense in 402A cases. . . . One does not inspect a product for defects or guard against the possibility of product defects when one assumes the item to be safe. The law should not require such inspection or caution when it has accepted as reasonable the consumer's anticipation of safety. We reject contributory negligence as a defense to actions grounded in Section 402A.[42]

Today, user conduct is still limited at the trial of strict products liability cases.[43] Often because of the circumstances of the accident, juries are not even instructed on the assumption of risk defense.[44]

Kuisis v. *Baldwin-Lima-Hamilton Corp.*: Proximate Cause in Strict Products Liability Cases

In *Kuisis* v. *Baldwin-Lima-Hamilton Corp.*,[45] the Pennsylvania Supreme Court discussed the role of foreseeability in a strict products liability action by distinguishing intervening negligence from superseding cause.[46] In *Kuisis*, the Pennsylvania Supreme

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42. *Id*. In *Staymates* v. *ITT Holub Industries, 527 A.2d 140 (Pa. Super. 1987)*, the Pennsylvania Superior Court extended the holding in McCown, supra to the doctrine of comparative negligence. In *Staymates*, a furniture manufacturer general foreman was injured while making a tour of the plant when his hand made contact with a rotating impeller on an industrial dust collector. While the dust collector was operating, its collection bag, about 19 square feet in size, blew off the collector's discharge chute, resulting in dust being blown freely throughout the shop and into the plaintiff's face. Instinctively, he grabbed the bag, yelled for someone to "Shut it down" and then picked up the bag and attempted to capture as much dust as possible, while pushing the bag back onto the machine. In the process, his hand inadvertently pushed into the machine's impeller blade and plaintiff was severely injured. The Court held that the question of assumption of risk was for the jury. To this end, the jury was given some history regarding the plaintiff's knowledge of the dust collector (it was minimal) and that he had not read the manual for the product. However, the Court reversed the trial court's decision to maintain the plaintiff's verdict because the plaintiff had proceeded to verdict with both design defect and warning claims and the Court held, as a matter or law, due to the plaintiff's "knee jerk" and instinctive response to the bag's separation from the collector, there was no basis for a warning defect claim; and since the record could not determine whether the jury had found defect on the basis of warnings or design, a new trial was necessary.

43. *See, Charlton* v. *Toyota Industrial Equipment*, 714 A.2d 1043 (Pa. Super. 1998) (forklift struck worker while operating in reverse); *Kramer* v. *Raymond Corp.* 840 F.Supp. 333 (E.D. Pa. 1993); *Fleck* v. *KDI Sylvan Pools, Inc. , supra* (rejecting reduction of jury award by a plaintiff's comparative negligence); *Dillinger* v. *Caterpillar, Inc*., 959 F.2d 430 (3d Cir. 1992); *Parks* v. *Allied Signal, Inc*., 113 F. 3d 1327 (3d Cir. 1997); *Forrest* v. *Beloit Corp*., 424 F.3d (3d Cir. 2005); *Moyer* v. *United Dominion Industries, Inc*., 473 F.3d 532 (3d Cir. 2006). These cases and the erosion of the preclusion of conduct evidence are discussed further in this article. *See also, Lavelle, Waters and Sweeny, "Recent Developments in Products Liability Litigation,"* 78 Pa. B.Q. 24 (Jan 2007). As discussed below, the *Moyer* case, which holds that certain conduct evidence is admissible, has been limited by a recent Pennsylvania Superior Court decision, *See, Gaudio* v. *Ford Motor Co*., 976 A.2d 524 (Pa. Super. 2009).

44. *Berkebile* v. *Brantly Helicopter Corp., supra*. The Restatement (Third) changes all of this. In fact, Sections 15 and 17 of the Restatement (Third) discuss causation and apportionment of fault. Section 17 reduces damages based on (1) the plaintiff's negligence; and (2) product alteration. Therefore, damages will be reduced even where the substantial change defense is unsuccessful. This goes beyond permitting comparative negligence in a "strict" products liability action. Today, the assumption of risk charge is given by Pennsylvania Standard (Civ.) Jury Instruction 8.09. this charge incorporates recent law that restricts the application of this defense in work related accident cases. *See, Staub* v. *Toy Factory, Inc., 749 A.2d 522 (Pa. Super. 2000)*; *Clark* v. *Bil-Jax, Inc., 763 A.2d 920 (Pa. Super. 2000)* (Where an employee, in doing a job, is required to use the equipment as furnished by the employer, the defense of assumption of the risk is unavailable. An employee who is required to use certain equipment in the course of his or her employment and who uses that equipment as directed by the employer has no choice in encountering a risk inherent in that equipment). *See, Jara* v. *Rexworks*, 718 A.2d 788 (Pa. Super. 1998); *Long* v. *Norriton Hydraulic, Inc*. 662 A.2d 1089 (Pa. Super. 1995); *Robinson* v. *B.F. Goodrich Tire Co*., 664 A.2d 616 (Pa. Super. 1995). Comment (a) to Section 17 of the Restatement (Third) states that user fault is not limited to voluntary assumption of risk. Under the Restatement (Third) fault is apportioned based on user negligence, misuse, or product alteration. This section incorporates damage reduction apportionment for product alterations by others as well.

45. 319 A.2d 914 (Pa. 1974).

46. The Restatement (Second) of Torts has one chapter devoted to causation, Chapter 16. Pennsylvania Courts have used the Restatement's statements regarding causation for strict products liability cases. Significantly, the Restatement (Second) of Torts states that:

Court reversed the trial court's judgment for a defendant crane manufacturer where the plaintiff was injured by falling pipes suspended from defendant crane operated by the plaintiff's co-worker.[47] The plaintiff attempted to prove defect through circumstantial evidence by proffering evidence of five (5) prior similar occurrences when the crane's locking mechanism failed to retain the load.[48] Moreover, he did not present any evidence of a feasible alternative design for the crane's braking system.[49]

In *Kuisis*, the Supreme Court recognized that strict products liability arises from negligence law. It affirmed the trial court's order that permitted the plaintiff to amend his complaint, after the expiration of the statute of limitations, to include a strict liability claim in addition to his original negligence claim, stating as follows:

> Appellant's claim under §402A was clearly implicit in his allegations of negligence in the design and manufacture of the crane. The principle of strict liability in tort adds nothing to Kuisis' theory of how the accident occurred; it operates merely to simplify his proof problem by eliminating the issue of negligence from

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> Section 434(1)(a) "It is a function of the court to determine whether the evidence as to the facts makes an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff; (b) whether the harm to the plaintiff is capable of apportionment among two or more causes; and (c) the questions of causation and apportionment, in any case in which the jury may not reasonably differ. (2) It is the function of the jury to determine, in any case in which it may reasonably differ on the issue, (a) whether the defendant's conduct has been a substantial factor in causing the harm to the plaintiff, and (b) the apportionment of the harm to two or more causes."

Accordingly, even though this section references conduct and apportionment, it nevertheless defines the roles of judge and jury when determining causation. For the court, this essentially references determining whether, as a matter of law, an event or conduct is a superseding cause. The Restatement (Second) defines "superseding cause" and "intervening force" as follows:

> A superseding cause is an act of a third person or force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.

Restatement (Second) of Torts, Section 440. An "Intervening Force" is defined by Section 441 as follows:

> An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed. (2) Whether the active operation of an intervening force prevents the actor's antecedent negligence from being a legal cause in bringing about harm to another is determined by the rules stated in Sections 442-453.

The Restatement Section 447 references "Negligence of Intervening Acts" as follows:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

47. In *Kuisis*, the plaintiff argued both a manufacturing defect and a design defect. However, it is known primarily as a manufacturing defect case. Most recently, the Pennsylvania Supreme Court has indicated that *Rogers* v. *Johnson & Johnson Products*, 565 A.2d 751 (Pa. 1989) represents the Supreme Court's rule on manufacturing defect cases. *Barnish* v. *KWI Building Co.*, 980 A.2d (Pa. 2009).

48. The crane's brake locking mechanism used a ratchet and pawl positive locking device, activated by the crane operator by a foot pedal. The pawl, also known as a "dog," locked the crane's drum through a ratchet gear system, it was not visible to the operator, because it was located beneath the floor of the crane cab. The theory was that the pawl could become incompletely engaged—where the pawl was lodged between the gear teeth—thereby creating the impression that the brake was engaged when, in fact, it was incompletely locked. The plaintiff presented his claims through a malfunction and design defect theory. Accordingly, unlike *Forry* v. *Gulf Oil Corp., 237 A.2d 593 (Pa. 1968)*, a tire defect case discussed below,, where the failed product became "real evidence" that could be closely examined by experts and physically brought to court as direct evidence of defect, in *Kuisis*, the plaintiff relied entirely on circumstantial evidence of defect. The Restatement (Third) permits a plaintiff to prove defect by circumstantial evidence. *See, Restatement (Third) Torts: Products Liability, Section 3*.

49. It is still permitted under Pennsylvania law to prove defect without proffering a feasible alternative design. *See, DiFrancesco* v. *Excam, Inc., 642 A.2d 529 (Pa. Super. 1994)*, where the Pennsylvania Superior Court stated:

> In essence, appellants suggest that case law requires a plaintiff to provide specifications and plans for safer designs as well as risk/effectiveness ratios. Pennsylvania courts have not imposed such rigorous restrictions in strict liability cases.

Id., 642 A.2d at 531. Nevertheless, as a practical matter, alternative designs are presented in most every case.

> the case. If in negligence actions "we have defined the 'cause of action' as 'the negligent act or acts which occasioned the injury'", [citation omitted][50] under Section 402A, it is *the defect itself* which constitutes the cause of action. Thus, it is of no moment that the theories of negligence and strict liability may be subject to different defenses and require different measures of proof. Assuming arguendo that two different causes of action are involved here, for purposes of the statute of limitations, *both* were stayed in the original complaint.[51]

The Court also expressly found that the negligence concept of foreseeability applied to strict liability when it found that the question of whether a co-worker's negligence was a proximate cause of the plaintiff's accident was properly a question for the jury.[52] At trial, it was established that the plaintiff's co-worker had committed negligence because he had left the crane unattended while it had a suspended load. The defense argued that the co-worker's negligence was a superceding cause of the plaintiff's accident. The Supreme Court disagreed and held that "[q]uestions of proximate causation should normally be left to the finder of fact and this case is no exception."[53] In *Kuisis*, the Supreme Court found a clear connection between strict products liability and negligence and acknowledged this when it discussed the concept of foreseeability when determining whether the plaintiff's co-worker's negligence was a proximate cause of the plaintiff's accident.

Abnormal Use: The Expansion of Assumption of Risk

In *Berkebile* v. *Brantly Helicopter Corp.*,[54] the Pennsylvania Supreme Court considered jury charges for "abnormal use," "defect" and proximate cause."[55] *Berkebile* is a wrongful death case involving a private helicopter crash. The helicopter was marketed to the general aviation market. Its advertising described the helicopter as being "safe, dependable," not "tricky to operate," and one that "beginners and professional pilots alike agree . . . is easy to fly."[56] The plaintiff's decedent's accident occurred

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50. 319 A.2d at 918, *quoting, Saracina* v. *Cotoia*, *417 Pa. 80, 85, 208 A.2d 764 (1965)*. The Court also quoted Justice Cardozo as follows:

> This Court has never adopted a comprehensive definition of what constitutes a cause of action, for the excellent reason that no such definition exists. In *United States* v. *Memphis Cotton Oil Co., 288 U.S. 62, 67-68, 77 L.Ed 619, 623 (1933)*, Justice Cardozo remarked: "A 'cause of action' may mean one thing for one purpose and something different for another. It may mean one thing when the question is whether it is good upon demurrer, and something different when there is a question of the amendment of a pleading or of the application of the principle of res judicata. . . . At times and in certain contexts, it is identified with the infringement of a right or the violation of a duty. . . ." For a more recent attempt to grapple with this slippery judicial concept, *see Ernest v. Larami Corp., 414 Pa. 396, 200 A.2d 901 (1964)*.

51. *Id. at 918.*

52. Pennsylvania Courts no longer charge the jury on superseding cause. Even in negligence cases superceding cause is now a legal question to be decided by the court. *See*, Pa. Std. Civ. J.I. 3.18 discussed *infra*.

53. *Kuisis, 319 A.2d at 920-921*.

54. 337 A.2d 893 (Pa. 1975).

55. The Pennsylvania Supreme Court ordered a new trial, the third in the case, because of the following abnormal use charge given to the jury:

> The defendant is not liable if the product is used in an abnormal manner, or in a way in which it was not designed to be used. . . If you take a helicopter and use it abnormally . . . and such improper use was the proximate cause of the accident, that does not make the helicopter defective. . . . It must be used normally and properly in order for it to be defective and dangerous. . . . If you push the collective lever down and go into autorotation within the necessary time, then you are using it normally, but if you do not do it then you are not using it normally.

The Pennsylvania Supreme Court found that the trial court had put the "rabbit" in the hat by telling the jury that the decedent put the helicopter to an abnormal use if he didn't activate the autorotation since obviously this didn't happen since the helicopter crashed. As the Court stated, the trial court's instruction "was tantamount to his directing a verdict against the plaintiff on [the plaintiff's] theory [of liability]." 337 A.2d at 901. The Supreme Court also ordered a new trial because of the trial court's instruction on proximate cause. The trial court charged the jury that, in order for it to be said that a defect caused a plaintiff's injury, "such a consequence under all the surrounding circumstances of the case, must have been foreseeable by the seller." *Id*.

56. *Id., 337 A.2d at 897*.

while he was flying alone. While making a "climbing flight,"[57] a seven-foot section of one of the three main rotor blades separated and the helicopter crashed into a hill. Complicating the case for the plaintiff was evidence that the helicopter's engine had failed because the helicopter was out of fuel.

Defendant sold the helicopter with an autorotation safety system, a "safety device existing for the sole purpose of preventing a crash in the event of engine failure *for any reason*."[58] However, the helicopter's autorotation safety system did not automatically activate. Instead, the pilot had to activate the autorotation system by pushing down "the collective pitch" stick manually. The pilot had varying amounts of time to do this, depending upon whether the helicopter was in "cruise" flight, "hover" flight or in "climbing" flight.

The parties did not dispute that the pilot would have had the least amount of time to activate the helicopter's autorotation system during a climbing flight. Moreover, before the product was sold, the defendant's test pilot had submitted a report stating his concerns about "rapid rotor decay" during climbing flight, suggesting that a rotor blade would most likely fail, if at all, in this mode. The trial court excluded this study over the plaintiff's objection.

At trial, the plaintiff made four (4) strict liability product claims. She claimed that the helicopter's rotor system was defectively designed because the average pilot had an insufficient amount of time to activate the helicopter's autorotation system during an emergency engine failure in a climbing flight; that the helicopter's rotor blade was defectively designed and manufactured; that the helicopter was defective because of inadequate instructions and warnings; and that the manufacturer had misrepresented the helicopter's safety in its advertising.[59] The plaintiff pointed to the broken rotor blade as physical evidence of defect.

The defendant countered that the helicopter's rotor blade was a "victim" of the decedent's "abnormal use," stating that it "fractured" because the helicopter had run out of fuel during a climbing flight and that the decedent had put the helicopter to an abnormal use by failing to make an emergency landing.

Berkebile is a landmark Pennsylvania strict products liability case for several reasons. First, the Court attempted for the first time to separate strict liability issues from negligence principles.[60] Second, it stated that Pennsylvania's strict products liability law was intended to relieve the injured plaintiff from the "nearly impossible burden of proving negligence where, for policy reasons, . . .a seller should be responsible for injuries caused by defects in his products."[61] For this reason, a prod-

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57. The Court described three (3) flight modes: (1) cruise flight, where there is the most time to activate autorotation; (2) hovering flight, where there is an intermediate amount of time to activate autorotation; and (3) climbing flight, where there is the least amount of time to activate autorotation. The time needed is measured by the amount of rotor decay in each of the flight scenarios. Autorotation was designed to allow the pilot to make a safe landing in case of engine failure.

58. *Id. at 901*. Emphasis in original.

59. The plaintiff included a §402B claim, stating that the defendant's advertising misrepresented its product's safety. The Supreme Court disagreed stating that the sales claims were sales "puffing."

60. As the Court stated, "[there's] a basic confusion concerning the principles of strict liability in torts [and] . . . it is apparent that the lack of clearly articulated standards has generated much misinterpretation." 337 A.2d at 894.

61. 337 A.2d at 894, *citing* to comment (c) to the Restatement (Second) of Torts. The Restatement (Third) seeks to reinstate these evidentiary burdens on plaintiffs. *See, Lavelle, "Crashing into Proof, supra* ("[A] reasonable alternative design requirement, by its nature, [is based upon] . . . negligence . . . [and] would effectively remove design defect cases from the realm of strict liability . . . thereby providing manufacturers with a distinct advantage, in the negligence realm, [where] the social policy of manufacturer-as-guarantor . . . is not recognized."). In *Berkebile,* the Supreme Court noted that Pennsylvania's products liability policies supported the simplification of the plaintiff's evidentiary burden at trial. Specifically, the Court stated that the plaintiff's strict products liability case is simplified to proving two things: (1) that the product was defective and that (2) the product's defective condition was a proximate cause of the plaintiff's injuries. The Supreme Court also reversed the trial court with regard to its evidence rulings. It held that the defendant's chief test pilot's report was admissible as a statement of a party opponent as

uct seller is "responsible for injury caused by his defective product even if he ha[s] exercised all possible care in its design, manufacture and distribution. . . . [T]he seller is 'effectively the guarantor of his product's safety.'"[62] The Court also stated that "[t]he duty to provide a non-defective product is non-delegable."[63] Third, the Court defined the proof needed in order to charge a jury on the defense of assumption of risk.

Further, the Supreme Court ruled that the trial court had committed errors in charging the jury on abnormal use, defect, and proximate causation. With regard to "abnormal use" the Supreme Court held that, because the case had centered on the effectiveness of the helicopter's autorotation system, it was irrelevant for the jury to consider whether the plaintiff's decedent was "flying without gas . . .[because] the [effectiveness of the autorotation safety system] assumes engine failure [and therefore] the circumstances leading to such engine failure are irrelevant."[64] Specifically, the Court stated:

> The trial court's charge on "abnormal use" permitted the jury to conclude that an alleged failure on decedent's part to determine the amount of gas available for flight precluded plaintiff's recovery on any theory. A plaintiff cannot be precluded from recovery in a strict liability case because of his own negligence. He is precluded from recovery only if he knows of the specific defect eventually causing his injury and voluntarily proceeds to use the product with knowledge of the danger caused by the defect. . . . Furthermore, a finding of assumption of risk must be based on the individual's own subjective knowledge, not upon the objective knowledge of a "reasonable man" [*citing Dorsey* v. *Yoder*, 331 F.Supp. 753 (E.D. Pa. 1971)]. . . . Such a defense can be charged upon by the court only if there is evidence introduced by [the] defendant that the decedent knew of the specific defect causing death and appreciated the danger it involved before using the aircraft.[65]

Here, the Court reached its decision by equating the abnormal use defense to assumption of the risk. It concluded that the abnormal use charge was improper because there was insufficient evidence to establish assumption of risk as a matter of law.

With regard to "defect," the Supreme Court held that it would be improper to charge the jury by using the actual language of Section 402A, using the phrase "unreasonably dangerous" because this is a negligence concept.[66] Specifically, the Court stated that:

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were the defendant's letters about its autorotation system to the FAA. This evidence would be relevant to show that the defendant knew about the defect at issue. It represents circumstantial proof of defect through the defendant's acknowledgement of its existence—that the autorotation safety system did not function pursuant to its designed expectations or intentions. *Id*. at 895.

62. *Id., citing Salvador* v. *Atlantic Boiler Co., supra*.

63. *Id. at 901*. Based on the concept of a product seller's non-delegable duty to make its products safe, the Pennsylvania Superior Court has precluded OSHA regulations from strict products cases, where a manufacturer has argued that it was an employer's responsibility to guard a machine. *See, Sheehan* v.*Cincinnati Machine Co*., 555 A.2d 1352 (Pa. Super. 1989. Pennsylvania courts have also held that a strict products defendant cannot escape liability by offering a safety device to an employer as a product option. *See, Hammond* v. *International Harvester Co*., 691 F.2d 646 (3d Cir. 1982); *Brown* v. *CaterpillarTractor Co*., 741 F.2d 656 (3d Cir. 1984); *Dougherty* v. *Hooker Chemical Corp*., 540 F.2d 174 (3d Cir. 1976). *See also, Arnoldy* v. *Forklift, L.P*., 927 A.2d 257 (Pa. Super. 2007), the Pennsylvania Superior Court held that OSHA regulations federally preempted a plaintiff's strict products liability claims against a fork truck manufacturer. *Arnoldy* has since been overruled by the Superior Court *en banc* in *Kiak* v. *Crown Equipment Corporation*, 2010 Pa. 13 (Pa. Super. 1/29/10).

64. *Id. at 895*. Therefore, by extension if there is no such evidence, there should not be any jury charge referencing conduct. As such, all conduct evidence would thereby become inadmissible through a Motion in Limine. There is also a corresponding jury instruction on factual cause that references an initial impact. Pa. Std. Civ. J. I. 8.04.

65. *Id*. Here, the Court states that abnormal use is the same as assumption of the risk.

66. *Id*. Interestingly, the Supreme Court also disapproved of the Wade Factors discussed below, because they constituted a negligence balancing test. Today, the court engages in a risk utility balancing test pursuant to *Azzarello* v. *Black Bros*., 391 A.2d 1020 (Pa. 1978) and *Dambacher* v. *Mallis*, 485 A.2d 408 (Pa. Super. 1984). These cases are discussed below.

> We hold today that the "reasonable man" standard in any form has no place in a strict liability case. 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 [to] 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 conditions that have led us to hold in *Salvador*[67] 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."[68]

Finally, the Court held that the jury's charge on proximate cause was error because it improperly used the tort concept of foreseeability as a measure of duty. Specifically, the Court stated:

> To require foreseeability is to require the manufacturer to use due care in preparing his product. In strict liability, the manufacturer is liable even if he has exercised all due care. . . .Foreseeability is not a test of proximate cause; it is a test of negligence. . . . Because the seller is liable in strict liability regardless of any negligence, whether he could have foreseen a particular injury is irrelevant in a strict liability case. In either negligence or strict liability, once the negligence or defective product is shown, the actor is responsible for all the unforeseen consequences thereof no matter how remote, which follow in a natural consequence of events.[69]

Here, *Berkebile's* discussion of foreseeability is entirely consistent with Section 435 of the Restatement (Second) of Torts, which applies to strict products liability and negligence actions. Section 435 states:

> Foreseeability of Harm or Manner of Its Occurrence
>
> (1) If the actor's conduct is a substantial factor in bringing about the harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.

Berkebile is consistent with this Restatement section because, once it is established that a product's defective condition is a substantial factor in bringing about the harm, the manufacturer's ability to foresee the manner of the accident's occurrence is irrelevant as a matter of law.

In 1982, in *Sherk* v. *Daisy-Heddon*,[70] the Pennsylvania Supreme Court again considered the questions of misuse and proximate cause in a strict products liability case and concluded, as a matter of law, that the product in question, a Daisy Power King Model 880 pump-up air rifle, was misused by the decedent's friend who, while "horsing around," stood five (5) feet from the decedent, pointed the rifle at decedent's head and, thinking the safety was on, squeezed the trigger, causing the rifle to fire a B-B pellet into decedent's head, killing him.

At trial, the plaintiff claimed that the product's warning and instructions were inadequate because they did not warn of the rifle's lethal propensity. A jury returned

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67. *Salvador* v. *Atlantic Boiler Co., 319 A.2d 903 (Pa. 1974)*.

68. *Id.* Three years later, the "unreasonably dangerous" defect threshold became the *Azzarello* risk/utility threshold analysis, conducted by the trial court. This is discussed below.

69. *Id. Berkebile, supra* is also and probably most famous for its holding that a product's defects can include the failure to provide proper and adequate warnings and instructions for the product and that these warnings and instructions must be "calculated to reach the end user." As the Court stated, "Where warnings or instructions are required to make a product non-defective, it is the duty of the manufacturer to provide such warnings in a form that will reach the ultimate consumer and inform of the risks and inherent limits of the product." *Id. at 903*.

70. 450 A.2d 615 (Pa. 1982).

a defense verdict. However, on appeal, the Superior Court reversed and ordered a new trial on evidence and jury instruction grounds. None of this mattered to the Supreme Court which concluded that, as a matter of law, the B-B rifle was misused. The Supreme Court stated:

> Liability in negligence or strict liability is not imposed upon a manufacturer simply for the manufacture of a defective product. Rather, the plaintiff must demonstrate that the injuries sustained were proximately caused by the product's defect. . . .
>
> * * *
>
> The evidence makes clear that the Power King air rifle was misused by [decedent's friend] in a manner that [he] knew could cause serious bodily injury.
>
> * * *
>
> As stated by Dean Prosser,
>
> "[t]here 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 abnormal use of it. Sometimes this has been on the ground that the manufacturer has assumed responsibility only for normal uses; sometimes it has gone off on 'proximate cause.'"[71]
>
> * * *
>
> Thus, because this record demonstrates that [decedent's friend] is legally chargeable with sufficient apprehension of the nature of the risk of his misuse of the Power King, he is exclusively responsible for the consequences of his misuse.[72]

Accordingly, in *Sherk* the Supreme Court modified *Berkebile* to adopt comment (h) to §402A wherein a court can conclude, as a matter of law, that a product was put to an abnormal use. The Supreme Court also refers to this as product misuse. Another term, equally applicable, is "highly reckless conduct." These concepts were applied by the Pennsylvania Superior Court in *Bascelli* v. *Randy, Inc*.[73] and *Gottfried* v. *American Can Co*.[74]

In *Bascelli* v. *Randy, Inc*. the Pennsylvania Superior Court held that, in some circumstances, a product user's conduct is admissible at trial to rebut the plaintiff's evidence regarding causation. In *Bascelli*, the plaintiff brought a strict products liability action against a motorcycle manufacturer, alleging that his chopper style motorcycle, which he had wrecked while speeding at 100 mph, had a defective front end assembly. In his accident, plaintiff and a passenger, lost control, jumped a median strip, crossed two lanes of on-coming traffic, and crashed into a guardrail.[75]

At trial, the court excluded evidence that the plaintiff was traveling at least 100 mph at the time of his crash. However, the Pennsylvania Superior Court reversed. It held that "the cause for [plaintiff] losing control of the motorcycle while going 100 [mph] was significantly relevant and extremely important evidence . . . to show the cause of the accident. . ."[76] The Superior Court ordered a new trial.

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71. 450 A.2d at 618, *quoting* Prosser, The Fall of the Citadel, 50 Minn. L. Rev. 791, 824 (1966). The Court also cited to comment (h) to §402A which states:

> A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use . . . or from abnormal consumption . . . the seller is not liable.

72. *Id*.

73. 488 A.2d 1110 (Pa. Super. 1985).

74. 489 A.2d 222 (Pa. Super. 1985), overruled on other grounds, *Duchess* v. *Langston Corp*, 709 A.2d 410 (Pa. Super. 1998).

75. *Id*.

76. *Id*. at 1113. *See also, Gallagher* v. *Ing*., 532 A.2d 1179 (Pa. Super. 1987) (in a crashworthiness case, the Superior Court affirmed the trial court's admission of blood alcohol evidence because it was relevant to establish, if believed, that "the decedent was so intoxicated that he was incapable of driving safely and that this was the legal cause for his loss of control of the vehicle he was driving.)" *Madonna* v. *Harley Davidson, Inc*., 708 A.2d 507 (Pa. Super. 1998).

Accordingly, as in *Sherk*, where the conduct at issue *actively causes* the injury through highly reckless conduct, such conduct may not only be admissible at trial, as in *Bascelli*, but, as in *Sherk*, it may be deemed to be a superseding cause of the accident to preclude a recovery in a strict liability case.

In *Gottfried*, the Pennsylvania Superior Court affirmed a defense verdict in a case where the plaintiff alleged that a can of sunflower nuts had a defective metal lid, which was sharp, stating: "the . . . issue of causation is raised when the plaintiff's action is so reckless that the plaintiff could have been injured despite the curing of any alleged defect, or is so extraordinary and unforeseeable as to constitute a superseding cause."[77] As such, *Bartkewich* established assumption of risk as a matter of law; product misuse or abuse was established in *Sherk*. Highly reckless conduct was shown in *Bascelli* and *Gottfried*. Each case demonstrates affirmative defenses based on active conduct that negates causation by constituting a superseding cause of an accident.

In *Dillinger* v. *Caterpillar, Inc.*,[78] *Parks* v. *Allied Signal, Inc.*,[79] and in *Moyer* v. *United Dominion Industries, Inc.*,[80] the United States Court of Appeals for the Third Circuit stated the guidelines for the admission of user or third party conduct evidence at a strict products liability trial. In *Dillinger*, the plaintiff was injured while operating a 50 ton capacity dumpster truck, which plunged over an embankment when its brakes failed. The plaintiff established that the brakes had failed because a hydraulic hose, necessary to control the rear brake, was cut by road debris during normal use. The plaintiff contended that the design was defective because this and other important hydraulic lines were unprotected from road debris, a problem that could have been easily remedied by incorporating a "belly pan" to cover these hoses.

At trial, the court admitted, over the plaintiff's objection, evidence that the plaintiff did not wear a seatbelt and that he did not use the truck's four supplementary braking systems to stop the truck before it rolled off the embankment. The Third Circuit disagreed, holding that each of these evidentiary matters should have been excluded at trial.

In reaching its decision, the Third Circuit discussed the narrow permissible uses of conduct evidence in a strict products liability case—to prove assumption of risk, product misuse or abuse, or to establish highly reckless conduct—and found that the plaintiff's actions, in failing to prevent the accident after the product's failure, did not fit within any of these defense categories and, as such, it was irrelevant at trial. Instead, active conduct is required as a prerequisite for the admission of conduct evidence to rebut causation.

In *Parks*, the plaintiff's decedent was killed when he was crushed between the counterweight of an excavating machine, when it pinned him against a wall.[81] At the time of the accident, the plaintiff's decedent was giving instructions to the machine operator and to another co-worker, who operated the machine's chipper attachment.

At trial, over objection, the defendant contended that the decedent's death was not caused by the alleged design defect—the failure to incorporate a rear-view mirror for the excavator. Instead, the defendant claimed that the accident was caused by the plaintiff's negligence in being too close to the machine, his co-workers' negligence in the machine's operation, or his employer's negligence in replacing the machine's shovel with a chipper attachment and its particular use of the product.

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77. *Id.*
78. 959 F. 3d 430 (3d Cir. 1992).
79. 113 F.3d 1327 (3d. Cir. 1997).
80. 473 F.3d 532 (3d. Cir. 2006).
81. The function of the counterweight is to keep the Gradall from tipping when the machine's excavator arm is off center.

The Third Circuit disagreed and held that the trial court had erred when it admitted this negligence evidence at trial. The Third Circuit analyzed the facts by using foreseeability and a superseding cause analysis[82] as follows:

> Section 402A liability cannot be found if, at the time of the accident, the product was being used in an unforeseeable manner. . . .The concept of foreseeability is relevant to strict products liability cases for the purposes of determining whether the use that was made of the product at the time of the accident was one that the manufacturer could have reasonably anticipated. . . .
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> * * *
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> [A] plaintiff's conduct may be introduced to undermine a plaintiff's claim [of] defect causing his accident only insofar as the plaintiff's conduct was unforeseeable to the defendant, even where the plaintiff played some part in setting the accident in motion.
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> * * *
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> In determining causation, therefore, the task of the jury is not simply to determine whether the plaintiff played a part in causing the accident. Rather, the threshold question is whether the plaintiff's actions were foreseeable. . . . [A] manufacturer is responsible for making the product safe for all foreseeable uses. . . . [Under Pennsylvania law], if both a manufacturer's defect and a plaintiff's conduct are found to be proximate causes, the plaintiff will recover unless the defendant meets the burden of proving that plaintiff's conduct was so unforeseeable as to constitute a superseding cause. . . . If foreseeable, the jury must find for the plaintiff, unless it finds that the defect did not play even a substantial, or more than negligible, role in causing the plaintiff's injury.
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> * * *
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> In short, even if an intervening but foreseeable action is responsible for the major share of a strict products liability injury, that action cannot ordinarily be held to be the legal cause of the injury. Instead, it is removed from the picture, and liability attaches to the remaining actor or actors.[83]

Based on this analysis, the Third Circuit held that, "[a]s a matter of law . . . strict products liability demands that a plaintiff's foreseeable actions can never displace manufacturer liability when a product defect was a substantial factor in causing the plaintiff's injury."[84] The Court ordered a new trial because the trial court had not engaged in a superseding causation analysis. It also stated that the jury instruction was error because, if the court had found that the plaintiff's conduct or other intervening acts were foreseeable to the defendant, it was obliged to further instruct the jury that the plaintiff's comparative negligence was not a defense. The Court stated that such conduct evidence should be admitted *only if*, as a matter of law, it would be proper to charge the jury on abnormal use/misuse, assumption of risk or highly reckless conduct.[85]

In *Moyer* v. *United Dominion Industries, Inc.*,[86] the Third Circuit revisited these issues in a matter involving a swaging machine.[87] Workers sued the manufacturer because, over time, they had developed hand-arm vibration syndrome from the machine. A jury found for plaintiffs and awarded damages. On appeal, the Third Circuit reversed, holding that conduct evidence could be admitted to show that *the sole cause* of the machine's inordinate vibration was because of product misuses. To

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82. The Court cited to the Restatement (Second) of Torts, §431 (substantial factor). The Court stated, "In determining how the elements of foreseeable and causation may properly be demonstrated, we are . . . guided by Pennsylvania law, when addressing causation, Pennsylvania has rejected the "but for" test and adopted the "substantial factor" test as embodied by the Restatement (Second) of Torts §431. . . ." The Court also discussed superseding cause and specifically referred to §440 of the Restatement (Second) of Torts.

83. *Id*. at 1331-1334.

84. *Id*. at 1336.

85. *Id*.

86. 473 F.3d 532 (3d Cir. 2007).

87. A swaging machine shapes the end of a metal coil to a point in cold forming processing.

this end, the Court held that the proffered evidence showing that poor maintenance and improper machine use, beyond the product's designed operating parameters, was the sole cause for the machine's excess vibration was admissible to rebut plaintiff's causation and defect claims.

Moyer presents a specific application of *Parks* and *Dillinger*, where the product's injury causing hazard—here vibration—was alleged to be *solely* caused by another. These cases show that foreseeability evidence is part of a strict products liability case insofar as it relates to proximate cause and the affirmative defenses of assumption of risk, misuse, abnormal use, and highly reckless conduct.[88]

By contrast, pursuant to the Restatement (Third), a plaintiff's conduct evidence would be admissible in every products liability case.[89] The adoption of the Restatement (Third) will overrule *McCown, supra*, *Berkebile, supra,* and other Pennsylvania strict products liability cases which preclude such evidence at a strict products liability trial.[90] Further, despite the Pennsylvania Supreme Court's recent concern over the use of foreseeability in strict liability cases, the Restatement (Third) will continue this practice by retaining traditional proximate cause analysis. Specifically, Section 15 of the Restatement (Third) states:

> General Rule Governing Causal Connection Between Product Defect and Harm
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> Whether a product defect caused harm to persons or property is determined by the prevailing rules and principles governing causation in tort.

Azzarello v. *Black Bros. Co.*[91]—Pennsylvania's Two Step Approach to Design Defect

In *Azzarello*, the Pennsylvania Supreme Court affirmed the trial court's order granting a new trial based upon an incorrect jury instruction that defined "defect."[92] The Supreme Court agreed that the trial court's use of the phrase "unreasonably dangerous," when charging the jury on the question of defect, improperly introduced the concept of negligence to the jury, resulting in fundamental error, and ordered a new trial. Instead, the *Azzarello* Court held that the phrase "unreasonably dangerous" is a "term of art" which relates to the court's threshold determination of whether, as a matter of law, the factual question of defect can be decided by the jury.[93]

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88. The Third Circuit's use of foreseeability is not new. In *Kuisis, supra*, the Pennsylvania Supreme Court expressly recognized that foreseeability is part of a strict liability case. *Quoting* Prosser, the *Kuisis* Court stated:

> Professor Prosser has noted that this principle [the tort concept of foreseeability] carries over from traditional negligence law to strict liability cases. Prosser, The Fall of the Citadel (strict liability to the consumer), 50 Minn. L. Rev. 791, 826-27 (1966). It makes no difference in this regard whether the operator's conduct is characterized as an intervening act of negligence or as an "abnormal use" of the crane; whether under §402A a particular use of a product is abnormal depends on whether the use was reasonably foreseeable by the seller. Restatement of Torts, 2d §402A, Comment h.

Kuisis, 319 A.2d at 920, n.13. *See also, Dyson* v. *General Motors Corp*., 298 F.Supp. 1064 (E.D. Pa. 1969); *Suchomajcz* v. *Hummel Chemical Co*., 524 F.2d 19 (3d Cir. 1975).

89. Pursuant to the Restatement (Third) user conduct is admitted as a consideration to determine whether the product is defective, a jury consideration. Section 2, comment (f). It is also admitted for apportionment of fault pursuant to Section 17 of the Restatement (Third).

90. *See, McCown* v. *International Harvester, supra*; *Staymates* v. *ITT Holub Industries, supra*; *Berkebile* v. *Brantly Helicopter Corp., supra*.

91. 391 A.2d 1020 (Pa. 1978).

92. In *Azzarello*, plaintiff was injured when his right hand became caught between an unguarded nip point formed by two hard rubber rollers, moving in opposing directions, on a coating machine manufactured by the defendant.

93. As the Court stated: "It must be understood that the words, 'unreasonably dangerous' have no independent significance and merely represent a label to be used where it is determined that the risk of loss should be placed upon the supplier." 391 A.2d at 1024. The Court described this threshold determination of defect as a matter of law as follows:

In reaching its decision, the *Azzarello* Court again reviewed the social policy underlying Pennsylvania products liability law.[94] Since *Azzarello*, the question of product defect has been separated into two parts, the first being a legal determination by the trial court, viz: whether the question of defect may be sent to the jury as a matter of law; and second, a factual determination of defect decided by the jury.[95] The next section discusses these two aspects of a *prima facie* product liability design defect case under existing law.

The Azzarello Threshold Analysis

Since 1978, when the Pennsylvania Supreme Court decided *Azzarello*, the Pennsylvania Superior Court and federal trial courts have applied its holdings to perform both the threshold analysis, to determine whether to charge a jury with regard to product defect, and to review jury instructions in strict products liability cases.[96] In

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> 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? 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 to determine whether the facts of the case support the averments of the complaint. They do not fall within the orbit of a factual dispute which is properly assigned to the jury for resolution. A standard suggesting the existence of a "defect" if the article is unreasonably dangerous or not duly safe is inadequate to guide a lay jury in resolving these questions.

391 A. 2d at 1026.

94. The Court stated that:

> The development of a sophisticated and complex industrial society with its proliferation of new products and the changes in the private enterprise system has inspired a change in legal philosophy from the principle of *caveat emptor* which prevailed in the early 19th century marketplace to the view that a supplier of products should be deemed to be "a guarantor of his products' safety". . . . The realities of our economic society as it exists today forces the conclusion that the risk of loss for injury resulting from defective products should be borne by suppliers, principally because they are in a position to absorb the loss by distributing it as a cost of doing business. 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's now the consumer who must be protected. The courts have recently 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.

391 A.2d at 1023-1024.

95. These terms are used synonymously for purposes of the *Azzarello* threshold analysis. Specifically, the Pennsylvania Supreme Court stated:

> It is a judicial function to decide whether, under the plaintiff's averment of facts, recovery would be justified; and only after this judicial determination is made is the case submitted to the jury to determine whether the facts . . . support the averments of the complaint.
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> In this case we are called to determine when liability should attach in cases where a "bad design" is charged. . . . [W]e must look to whether the product is safe for its intended use.
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> [Should the Court determine that the risk of loss may properly be borne by the product seller, we] believe that an adequate charge to the jury, one which expresses clearly and concisely the concept of "defect," while avoiding interjection of the "reasonable man" negligence terminology, is the jury instruction directed to the definition of a "defect," which was fashioned . . . by the Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions, Civil Instruction Sub-Committee . . . [by] Pennsylvania Standard Jury Instruction 8.02 (civil) Sub-Committee draft (June 6, 1976).

391 A.2d at 1024.

96. The *Azzarello* threshold risk-utility analysis has been used in the following cases, although these cases are not exclusive citations. *See, Schell* v. *AMF, Inc*., 567 F.2d 1259 (3rd Cir. 1977) (reversing trial court entry for assumption of risk); *Dambacher* v. *Mallis*, 485 A.2d 408 (Pa. Super. 1984) (reversing judgment for defendant and remanded for new trial with instructions); *Marshall* v. *Philadelphia Tramrail Co*., 626 A.2d 620 (Pa. Super. 1993) (reversing judgment for plaintiff and remanded for new trial with instructions with regard to Standard Instruction 8.02); *Jordan* v. *The K-mart Corp*., 611 A.2d 1328 (Pa. Super. 1992) (affirming summary judgment in favor of defendant seller pursuant to the *Azzarello* threshold analysis); *Fitzpatrick* v. *Madonna*, 623 A.2d 322 (Pa. Super. 1993) (opinion by Judge Wieand; dissent by Judge Hoffman); *Monahan* v. *The Toro Company*, 856 F.Supp. 955 (E.D. Pa. 1994); *Surace* v. *Caterpillar, Inc*. 111 F.3d 1039 (3rd Cir. 1997); *Weiner* v. *American Honda Motor Co., Inc.*, 718 A.2d 305 (Pa. Super. 1998); *Riley* v. *Warren Mfg*., 688 A.2d 221 (Pa. Super. 1997); *Bowersfield* v. *Suzuki Motor Corp*., 111 F.Supp. 2d 612 (E.D. Pa. 2000); *Moyer* v. *United Dominion Industries, Inc*. 473 F. 3d 532 (3rd Cir. 2006).

1984, Judge Spaeth was the first to incorporate the "Wade factors" to formulate the risk/utility balancing test when performing the *Azzarello* threshold analysis in *Dambacher* v. *Mallis*.[97] When comparing §402A to the Restatement (Third), it is significant to note that the Pennsylvania Superior Court stated in *Dambacher* that the *Azzarello* risk/utility threshold determination can be waived by a product defendant where the issue is not raised before a jury is charged on the question of defect.[98] As the Superior Court stated:

> In *Azzarello*, the Court did not do what [Sears, the appellant seller] argues the trial court should have done here—the [*Azzarello*] Court did not explicitly formulate or resolve the question [of] whether on the particular facts before it recovery for strict liability would be proper. However, the *Azzarello* Court did affirm the trial court's order granting a new trial, and in doing so, it decided what jury instruction should be used on retrial. It is evident, therefore, that the *Azzarello* Court regarded the case before it as one in which, on proper jury instruction, and on proof of the plaintiff's averments of the facts, recovery would be justified. The same may be said of this case.
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> * * *
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> Nothing in *Azzarello* precludes a supplier or manufacturer, by appropriate motion, from asking the trial court to make explicit its ruling on the threshold determination of social policy that *Azzarello* requires. In the absence of such a motion, it will be presumed that the court, by permitting the case to go to the jury, resolved the threshold determination against the defendant.[99]

The *Dambacher* Court identified seven (7) factors to be used when performing the threshold *Azzarello* analysis to determine whether a product is "unreasonably dangerous." John Wade identified these factors in a 1973 law review article, "On the Nature of Strict Tort Liability for Products."[100] They are commonly known as the "Wade Factors."These seven (7) factors are:

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

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97. 485 A.2d 408 (Pa. Super. 1984). In *Dambacher* v. *Mallis*, 485 A.2d 408 (Pa. Super. 1984), a 16 year old high school student replaced a flat tire with a Sears radial tire. The other tires on the car were non-radials. The next day he gave seven fellow students a ride home from school. Plaintiff was one of the students and a passenger in the vehicle. It was drizzling and there were leaves on the highway. While driving at about 20-25 mph, he failed to negotiate an S-curve and braked. The back of the car slid sideways and it went off an embankment. Plaintiff's theory of liability was that mixing radials and non-radials created instability and resulted in the driver's inability to negotiate the turn. The tire in question was not embossed with a warning that it should not be mixed with non-radial tires. However, a brochure that accompanied the tire contained a warning that IDEALLY, ALL FOUR TIRES SHOULD BE OF THE SAME CONSTRUCTION TYPE. Plaintiff contended that the warning and instructions in the brochure were inadequate because they needed to be on the tire itself in order to be properly understood or heeded.

98. By contrast, under the Restatement (Third) this is both a court and a jury analysis. Section 2, comment (f). In Pennsylvania, it is reversible error to present the Wade Factors to the jury for its determination. *See, Brandimarti* v. *Caterpillar Tractor Co*., 527 a.2d 134 (Pa. Super. 1987).

99. 485 A.2d at 421, 423, n.6. By contrast, pursuant to the Restatement (Third), not only will the Wade factors be sent to the jury, their determination is non-waivable. Adoption of the Restatement (Third) would overrule *Azzarello* and its progeny.

100. 44 Miss. L.J. 825, 837-38 (1973).

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.[101]

To date, the most in depth analysis of the Wade factors was made by Judge Becker in *Surace* v. *Caterpillar, Inc*.[102] There, the United States Court of Appeals for the Third Circuit applied existing federal and state case law to establish the proper standard and scope of review for the *Azzarello* threshold analysis.[103] The *Surace* Court concluded that, "[I]n performing the [*Azzarello* threshold] social policy analysis, a court must play a dual role, acting as both a 'social philosopher' and [as] a 'risk-utility' economic analyst."[104] Further, when evaluating the claim of defect, the ultimate issue to be decided is whether the risk of loss should be borne by the product seller.[105] The burden of proof as to the balancing of the seven (7) factors is on the defendant[106]; whereas the ultimate burden of proving defect at trial is with the plaintiff.[107] The Court must also view the evidence in the light most favorable to the plaintiff and render all inferences in the plaintiff's favor.[108] Further, a court must not consider the non-existence of a proffered alternative feasible safety design as evidence of its non-feasibility.[109]

In *Surace*, the United States Court of Appeals for the Third Circuit reversed the trial court's entry of summary judgment in favor of the manufacturer of a pavement profiler machine which ran over a ground crew member (Surace) while the machine was operating in reverse. At the time of the accident, the machine was being used to mill rumble strips at the base of a bridge. The machine had several safety features for reverse operation designed to alert ground crew personnel. The machine had (1) a warning sign, alerting ground personnel to stay at least 25 feet clear of this machine; (2) an automatic back-up alarm; (3) flashing back-up lights; and (4) a rotating overhead beacon light which signaled when the profiler was in operation.

In *Surace*, the plaintiff claimed the product was defectively designed because it did not have an incorporated "lock-out/tag-out" device to prevent the machine from reversing unless affirmatively unlocked by the ground crew. The plaintiff claimed that the other safety devices on the machine were insufficient because, over time, they had become habituated to the noise and the working environment created by the machine. The trial court granted summary judgment pursuant to the *Azzarello* threshold analysis.

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101. Today, the risk-utility test is the predominant test used to determine defect as a threshold matter in most jurisdictions. *See*, Frumer & Friedman Products Liability (Matthew Bender 2008), §11.03[4] at 11.79-11.80.

102. 111 F.3d 1039. *See also, Moyer* v. *United Dominion Industries, Inc*. ("UDI"), 473 F.3d 532 (3d Cir. 2007) (affirming trial court's threshold *Azzarello* risk/utility analysis finding product defect claims could be presented to the jury).

103. In *Surace*, plaintiff's right foot was crushed by a large pavement profiler, operated by his co-worker. The plaintiff showed that the profiler had a blind spot for the operator. The plaintiff contended that he was wearing ear protection as personal protective equipment and was and had become habituated to the noise of the profiler by working so closely to the machine and that this had negated the machine's existing annoying features. As an alternative feasible design, the plaintiff proposed that the machine should have a lock out/ tag out device that would prevent the machine from moving in reverse unless activated by the ground crew.

104. 111 F.3d at 1044, *citing Fitzpatrick* v. *Madonna, supra*; *Carrecter* v. *Colson Equipment Co, supra*.

105. *Fitzpatrick* v. *Madonna, supra* (considering "propeller guard for an open screw propeller for a boat motor sold in 1978).

106. Pursuant to the Restatement (Third), the threshold burden is on the plaintiff. This issue is also presented to the jury. Section 2, comments (d) and (f).

107. *See, Shetterly* v. *Crown Controls Corp*., 719 F.Supp. 385, 401 (W.D. Pa. 1989); *See also, Bowersfield* v. *Suzuki Motor Corp*., 111 F.Supp. 2d 612 (E.D. Pa. 2000).

108. *Barker* v. *Deere Co*., 60 F. 3d 158, 166 (3rd Cir. 1995).

109. *Surace* v. *Caterpillar, Inc., supra, citing Barker* v. *Deere, supra, Habecker* v. *Clark Equipment Co*., 36 F.3d 278, 286 (3rd Cir. 1994).

The Third Circuit reversed, stating that the trial court had exceeded its limited procedural role in determining the pending motion for summary judgment. The Third Circuit also held that the trial court had erred by engaging in fact-finding to conclude (in reference to the second Wade factor) that there was not a sufficiently grave risk of harm to warrant submitting the plaintiff's design defect claim to the jury. The Court held that there were genuinely disputed issues of material fact that required the trial court to weigh this factor, as a threshold matter, in favor of the non-movant, the plaintiff.

The Court also held that the trial judge had erred by accepting evidence of the non-existence of the proffered alternative design as evidence of that safety device's alleged infeasibility. The Court of Appeals held that the trial court's ruling was contrary to Third Circuit precedent in *Habecker III*,[110] where the Third Circuit held that the fact that a proposed alternative design does not exist in a like-kind product does not mean that it is not feasible. As such, the Court held that there were generally disputed issues of material fact regarding feasibility that were properly reserved for the jury and that the trial court's ruling against the plaintiff in this regard had violated the summary judgment standard. Based on this conclusion, the *Surace* Court reversed the trial court's determination with regard to the fourth Wade factor, "a manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility."

The *Surace* Court also reversed the trial court's holding that there was insufficient evidence from which to determine whether the profiler would be "safer" if equipped with the plaintiff's proposed alternative design, the lock-out/tag-out device. The trial court found that the proposed safety alternative was prone to human error, like the safety devices that were already equipped on the machine. However, the Third Circuit reversed, stating that the plaintiff's expert's testimony had created a genuinely disputed issue of material fact, that the proffered safety device would "cut the risk significantly" of an injury such as the one suffered by the plaintiff.[111]

The *Surace* Court also noted that the fifth Wade factor, "the user's ability to avoid the danger through reasonable care in the use of the product," might not be adopted by Pennsylvania because of its injection of negligence evidence.[112] However, since the *Azzarello* threshold determination is conducted by the Court and not by a finder of fact, the Third Circuit concluded that, if such evidence were to be considered, it would be done by using an objective test of reasonableness and not by using the subjective facts of the individual case. As the *Surace* Court stated:

> The proper focus in applying the fifth Wade factor . . . is an objective inquiry into whether the class of ordinary purchasers of the product [and] not whether [the] particular plaintiff could have avoided this particular injury. Put differently, the user's ability to avoid injury . . . appears to be a design factor that may justify a more or less exacting design depending on the facts, but it is, in any case, not a vehicle for injecting a plaintiff's (alleged) failure to exercise due care into the case.[113]

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110. *Habecker* v. *Clark Equipment Co.*,(*Habecker III*) 36 F. 3d 278 (3rd Cir. 1994) *Habecker, III* is discussed in greater detail later in this article.

111. 111 F.3d at 1048-1049.

112. The *Surace* Court stated that this factor is "not a vehicle for injecting a plaintiff's (alleged) failure to exercise due care into the case." 111 F.3d at 1051. *See also, Martinez* v. *Skirmish, USA, Inc*. 2009 U.S. Dist. LEXIS 51628 (E.D. Pa. 2009).

113. *Surace*, 111 F.3d at 1051. The Court also quoted in *Wade*, stating "it is missing the real point [of strict products liability, where the proper focus is on the products design and not on the conduct of the parties] to pose the issue in terms of whether the plaintiff was contributorily negligent [with regard to the product]." *Id. quoting Wade, supra* at 846. As the *Surace* Court has stated:

> The analysis does not center on the due care *vel non* of the consumer but rather highlights whether a product is duly safe for its intended use. This is true of all the Wade factors.

Based on the record facts—that the plaintiff was wearing OSHA required ear protection and the profiler operator was not supposed to move the vehicle without a signal from the ground crew—the *Surace* Court reversed the trial court and found that this fifth Wade factor balanced in the plaintiff's favor.[114]

The *Surace* Court then reviewed the remaining Wade factors and concluded that they were neutral or weighed favorably for the plaintiff. It reversed the trial court and held that the plaintiff could present the case to the jury on the question of defect. Both federal and state courts have since followed *Surace*.[115]

It is important to emphasize that the *Azzarello* risk/utility threshold analysis is presently performed as a pretrial matter by the trial judge. It is error to admit evidence regarding the Wade Factors to the jury and to charge the jury to make a determination regarding their weight.[116] The Restatement (Third) would change this so that these issues would be directly considered by the jury when evaluating whether a product is defective. In other words, if adopted the Restatement (Third) would overrule *Dambacher* and *Azzarello*.

Pennsylvania Jury Instruction 8.02—*Azzarello's* Defect Instruction and Proof of a Feasible Alternative Design

Pursuant to *Azzarello*, today Pennsylvania juries are given the definition of "defect" through Pennsylvania Standard (Civil) Jury Instruction 8.02 (3d Ed. 2005), which defines "defect" 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.

Significantly, if adopted, the Restatement (Third) would change the jury instruction on defect to include, among other things, the aforementioned Wade factors. This would invoke a dramatic change in Pennsylvania for the trial of a products liability case. It would transform such cases into negligence matters. In other words, this would overrule *Webb* v. *Zern, supra*.

Proof of defect is the focus of every products liability case. As the Pennsylvania Supreme Court stated in *Lewis* v. *Coffing-Hoist Div. Duff-Norton*[117] it is the product itself that is on trial, and not the manufacturer's conduct. In a strict product liability case, a plaintiff's expert will testify about the product's defect by identifying how it was sold without a feasible safety feature necessary to make the product safe for its intended use or, alternatively, state that the product possessed a feature that ren-

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114. As the *Surace* Court stated:

> Although an individual working on the ground behind the profiler could in theory, avoid the danger by exercising care to always remain out of the machine's blind spot, it seems likely that ordinary workers at a highway construction site will occasionally find it necessary to step behind the machine, and that such workers, may, like *Surace*, be habituated to these profiler's and thus unable to avoid danger since the profiler's operator backs up without signaling. 111 F.3d at 1052-1053.

115. *Surace, supra*, it has been followed by a number of court's however, some particular cases are of interest here, *Bowersfield* v. *Suzuki Motor Corp.*, 111 F.Supp. 2d 612 (E.D. Pa. 2000); *Schindler* v. *Sofamor, Inc.* 774 A.2d 765 (Pa. Super. 2001); *Weiner* v. *American Honda Motor Corp.*, 718 A.2d 305 (Pa. Super. 1998); *Forrest* v. *Beloit Corp.*, 424 F.3d 344 (3rd Cir. 2005); *Moyer* v. *UDI, supra*; *Carr* v. *Gillis Associate Ind. Inc.*, 227 Fed. Appx. 172 (3rd Cir. 2007) (non precedential); *Steffy* v. *The Home Depot, Inc.*, 2009 E.S. Dist. LEXIS 27682 (M.D. Pa. 2009); *Robinson* v. *Midwest Folding Prod. Corp.*, 2009 U.S.Dist. LEXIS 30395 (E.D. Pa. 2009).

116. *Brandimarti* v. *Caterpillar Tractor Co.*, 527 A.2d 134 (Pa. Super. 1987).

117. 528 A.2d 590, 593 (Pa. 1987).

dered it unsafe for its intended uses.[118] As noted above, proof of defect can be made through direct or circumstantial evidence.[119] In most cases, a design defect must be explained through expert testimony.[120]

In *Forry* v. *Gulf Oil Corp*.,[121] the Pennsylvania Supreme Court considered the sufficiency of evidence to prove defect and held that it could be established through expert testimony. In *Forry*, a service station worker sued Gulf Oil for a defective motor vehicle tire that exploded during an attempted repair. Although the tire had been retained, it was not examined until 6½ years post accident by a materials expert. The trial court held that there was insufficient evidence and entered a compulsory non-suit. The Pennsylvania Supreme Court reversed, holding that a reasonable jury could find that the tire was defective from the expert's opinion, substantiated by his visual examination and x-ray inspection of the tire.[122]

In *Forry*, the plaintiff's expert introduced evidence of industry standards to substantiate his opinions regarding the product's defect by stating that the defendant's design did not conform to the industry custom and practice. The Pennsylvania Supreme Court would later hold that such evidence, if sought to be introduced by the defendant manufacturer, would be inadmissible because it tended to show the reasonableness of the selected design.[123] Pursuant to the Restatement (Third), such evidence will be routinely admitted.[124]

Forry is also significant because the Pennsylvania Supreme Court expressly adopted §400 of the Restatement (Second) of Torts, which holds a party vicariously liable for another manufacturer's defect where the party puts its name on the product. In *Forry*, defendant Gulf Oil put its name on the product when, in fact, it was manufactured by Goodrich Tire. Section 400 states:

> One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.[125]

In *Forry, supra*, the plaintiff essentially proceeded with a product negligence case. He showed that the defendant's design did not conform to industry standards to show that the product was defective. By doing this, while the plaintiff introduced evidence of an alternative manufacturing design,[126] and proceeded ostensibly under Section 402A, his case was, in reality, a negligence matter. As the Supreme Court noted in *Lewis* v. *Coffing Hoist Div., Duff-Norton Co*., industry standards tend to set a lower floor for conduct.[127]

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118. *See*, Bugay, Products Liability Update: Developments Since the Adoption of the "New" Pennsylvania Rules of Evidence, 77 Pa. Bar Q. 1 (Jan. 2006).

119. In *Forry* v. *Gulf Oil, supra*, the plaintiff conducted a physical examination and x-ray analysis of real evidence, the tire that exploded and caused his injury. In *Kuisis, supra*, the plaintiff relied upon a malfunction theory and a design defect theory regarding a crane and proved malfunction defect indirectly through the admission of prior similar accident evidence.

120. *See, Dion* v. *Graduate Hosp., of the Univ. of Pa*., 520 A.2d 876 (Pa. Super. 1987).

121. 237 A.2d 593 (Pa. 1968).

122. *See also, Bileck* v. *Pittsburgh Brewing Co*., 242 A.2d 231 (Pa. 1968) (reversing a defense verdict in a case where a bottle of beer had exploded and caused injury to the plaintiff).

123. *Lewis* v. *Coffing Hoist Div., Duff-Norton Co., Inc., 528 A.2d 590 (Pa. 1987)*. Where introduced by a plaintiff, this may open the door for the admission of rebuttal evidence regarding such standards, including the introduction of other standards and custom and practice in the industry. *See, Daddona* v. *Thind*, 891 A.2d 786 (Pa. Cmwlth. 2006); *Clevenger* v. *CNH America, LLC, 2008 U.S. Dist. LEXIS 45225 (M.D. Pa. 2008), aff'd, 2009 U.S. App. LEXIS 18011 (3d Cir. 2009) (non-precedential opinion pursuant to Internal Operating Procedure Rule 5.7 and Fed. R.Civ. App. P. 32.1)*.

124. Restatement (Third), Section 4.

125. The Restatement (Third) addresses "ostensible sellers" in Section 14. This section's language closely tracks the Restatement (Second) Section 400.

126. By introducing such evidence, however, the plaintiff could effectively convert the strict products inability case into a product negligence case by opening the door to conduct evidence at trial. *See, Duchess* v. *Langston, supra*; *Lewis* v. *Coffing Hoist, Div. Of Duff-Norton, supra*.

127. In *Lewis*, the Supreme Court stated: "The injection of industry standards into a design defect case would be not only irrelevant and distracting, but also, because of the inherently self-serving nature of

Patents and competitor products (redacted and presented as design exemplars) also provide evidence of an alternative feasible design.[128] As noted below, pursuant to the Restatement (Third), it is not only necessary to present evidence of an alternative design, the Restatement (Third) requires the plaintiff to introduce evidence of a "reasonable alternative design."[129] Such a requirement would completely change the original intended focus of the trial of a strict products liability case. Instead of the product being on trial, a defendant's conduct regarding its design choices would become the relevant issue.[130] The Restatement (Third) will also admit ANSI, OSHA, industry standards and the defendant's design opinions regarding "state of the art" evidence. In other words, the Restatement (Third) would overrule *Lewis* v. *Coffing Hoist Div., Duff Norton, supra, Sheehan* v. *Cincinnati Shaper Co., supra* and *Madjic* v. *Cincinnati Machine Co., supra*.[131]

Currently, "state of the art" evidence is inadmissible at the trial of a strict products liability case.[132] In *Carrecter* v. *Colson Equipment* Co., the Pennsylvania Superior Court reversed a verdict entered by the trial court because the trial court had instructed the jury that "it can consider the engineering know-how available to [the defendant] at the time [the product] was manufactured in determining whether the [product] was defective." The Pennsylvania Superior Court reversed the trial court, holding that these instructions improperly injected the reasonable person standard into the trial of a strict products liability case and ordered a new trial. However, pursuant to the Restatement (Third), such "state of the art" evidence would be routinely admissible as a proper basis to defend a strict products liability action.[133]

"State of the art" evidence is sometimes disguised in terms of consumer demand ("our customers did not want this feature") or by claims that such evidence is not "desirable." Presently, such arguments and defenses are inadmissible in a strict products liability action. Instead, the proper focus is whether the plaintiff's proffered alternative design was feasible when the product was sold. The Pennsylvania Supreme Court discussed "feasibility" in *Duchess* v. *Langston Corp.*,[134] as follows:

'industry standards,' would be highly prejudicial to the consumer/plaintiff. By our determination today, we have made it clear that a manufacturer cannot avoid liability to its consumers . . . by showing that 'the other guys do it too.'" 528 A.2d at 594. *See also, Madjic* v. *Cincinnati Machine Co*., 537 A.2d 334 (Pa. Super. 1988); *Sheehan* v. *Cincinnati Shaper Co*., 555 A.2d 1352 (Pa. Super. 1989) (precluding OSHA regulations).

128. *See, DiFrancesco* v. *Excam, supra* and *Habecker* v. *Clark Equipment Co.(Habecker III)*, where patent evidence was admitted to show feasible alternative designs.

129. Section 2 (b) brought in under the Restatement (Third) of Products refers to a "reasonable alternative design" Comment (f).

130. *See, Habecker III, supra*; *Colson* v. *Carrector Equipment, supra*; *Madjic* v. *Cincinnati Sharper Co., supra*; *Lewis* v. *Coffing Hoist Div., Cuff-Norton, supra*; *Sheehan* v. *Cincinnati Machine Co., supra*. These issues are expressly defining design defect factors relevant to determining omission of a reasonable alternative design. *See, Lewis* v. *Coffing Hoist Div., Duff-Norton Co*., 528 A.2d 590 (Pa. 1987) (holding compliance with industry standards or conformance with custom in design are "reasonableness: concepts irrelevant as a matter of law to a strict products liability action under §402A). *See also, Majdic* v. *Cincinnati Machine Co*., 537 A.2d 344 (1988) (stating that ANSI standards are irrelevant to a strict products liability action under §402A). *See also, Lavelle, Crashing Into Proof, supra*.

131. *Lewis* v. *Coffing Hoist Div., Duff Norton, supra*; *Sheehan* v. *Cincinnati Shaper Co., supra*; *Madjic* v. *Cincinnati Shaper Co., supra*.

132. *Carrecter* v. *Colson Equipment Co*., 499 A.2d 326 (Pa. Super 1985). The term "state of the art" has been referred by some courts as referencing the standard of the industry. *See, Feldman* (Bisel Co. 2000 §12.18 at 388) *Pennsylvania Trial Guide: Products Liability*, §12.18. In *Colson, supra*, a Pennsylvania Superior Court stated that 'the term state of the art' has be given a variety of meanings including (1) industry custom, . . . (2) government regulatory and licensing standards, or (3) technological feasibility or capability. *Id*. n.6. State of the art evidence is admissible under the Restatement (Third) *See*, §2, Comment (d).

133. Restatement (Third), Section 2, comment (d).

134. 769 A.2d 1131 (Pa. 2001). In *Duchess*, the Pennsylvania Supreme Court held that Pennsylvania Rule of Evidence Rule 407 precluded evidence of a subsequent design change by the defendant favorable to the plaintiff's design defect claims. However, the court stated that the defendant had opened the door to admit such evidence when its expert testified at trial that the proposed interlocking safety device at issue was "technologically possible," but not "practical" when in fact, the device had been incorporated into the defendant's product's design after the plaintiff's accident.

> Feasibility denotes whether it would have been practicable to have employed [the proposed alternative design]. Whether something is feasible relates not only to [the] actual possibility of operation, and its cost and convenience, but also to its ultimate utility and success in its intended performance; that is to say "feasible" means not only possible, but also capable of being utilized or dealt with successfully.[135]

In *Habecker* v. *Clark Equipment Co*.,[136] the United States Court of Appeals for the Third Circuit stated that there are important differences between a design that is "feasible" and one that the manufacturer considers to be "desirable." The Third Circuit described these differences when it held that a manufacturer is precluded from presenting evidence that a proposed alternative design was "not known" or "desirable" when the product at issue was sold. The Court stated:

> *Feasibility* means: 1) capable of being done, executed, or effected, possible of realization; 2) capable of being managed, utilized, or dealt with successfully. Webster's Third New International Dictionary of the English Language Unabridged.
>
> *Desirability* means the quality, fact, or degree of being desirable or having worth, and *desirable* means worth seeking or doing as advantageous, beneficial or wise. *Id*. . . . The line between feasibility and desirability is certainly a fine one. To argue the lack of feasibility is to argue that [the proposed alternative feasible design] was incapable of being placed on the [subject product] on [the date the product was manufactured] for some reason other than its non-existence, possibly a mechanical incompatibility. The fact that the [proposed alternative design] did not exist [in the year of manufacture], although an intuitively attractive argument, does not mean that it was incapable of being placed on the [subject product]. . . .
>
> Therefore, we find that the user letters, concerns, and objections to [the proposed alternative design] are inadmissible; as is the engineers' lack of knowledge whether [the proposed alternative design] would indeed be safer. They are in response to desirability, that is, whether it was advantageous to put [the proposed alternative design] on [the subject product]. A viable argument would be that the [proposed alternative design] is not safer, or would not have helped in this situation. . . . As stated above, Pennsylvania's public policy is to encourage manufacturers to make their products as safe as possible, as soon as possible. It is the jury's prerogative to hold a manufacturer responsible for not more aggressively researching and implementing safety devices.[137]

The Restatement (Third) will change all of this. Pursuant to the Restatement (Third), evidence regarding the "desirability" of a proposed alternative design is admitted.[138]

Intended Users and Intended Use

Pursuant to *Azzarello, supra* and Jury Instruction 8.02, a product seller must "provide its product with every element necessary to make it safe for its intended use and without any condition that makes it unsafe for its intended use." However, what happens when a product is designed for one type of consumer, but is used by an individual outside this group? This is what occurred in the disposable cigarette lighter cases—small children obtained butane lighters from a parent or family member and, while playing with them, started a fatal fire. In these cases, Pennsylvania and Federal Courts have held that the child, who played with the lighter, is not an "intended user" and that all harm caused by the fire, including to other family members, is not recoverable in strict products liability or pursuant to a statutory breach of implied warranty claim.[139]

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135. 769 A.2d 1131, 1146 n.21, quoting 29 Am. Jur. 2d Evidence §475 (1994).
136. 36 F.3d 278 (3rd Cir. 1994).
137. 36 F. 3d at 286.
138. Restatement (Third) Section 2, comments (a), (d) and (f).
139. *See, Griggs* v. *BIC, 981 F.2d 1439 (3d Cir. 1992); Phillips* v. *Cricket Lighters, ("Phillips I"), 841 A.2d 1000 (Pa. 2003) and ("Phillips II"), 883 A.2d 439 (Pa. 2005). See also, Klemka v. BIC Corp., 1996 U.S. LEXIS 15395 (E.D.*

While the cigarette lighter cases present an obvious example of an "unintended user," other cases are not so clear. In *Metzger* v. *Playskool, Inc.*[140] the United States Court of Appeals for the Third Circuit reversed summary judgment in favor of a toy manufacturer whose toy blocks caused the asphyxiation of a fifteen (15) month old child. The defendant contended that its toy blocks were not defective because they were not choking hazards for their intended users, children ages 18 months to 5 years of age. The United States Court of Appeals for the Third Circuit disagreed, stating that:

> We . . . agree . . . that "a product is not defective unless it possesses 'any feature that renders it unsafe for its intended use,'" and that the concept of intended uses "encompasses the participation of an intended user." [Quoting the District Court Opinion, citing *Griggs* and *Azzarello*]. We are much less certain, however, that Matthew, at age fifteen (15) months, was not an intended user of this particular product. The eighteen month to five-year recommendation boldly marked on the Playskool box is not, to our minds, an unequivocal indication that these blocks are unsuitable for a child who is just three months shy of eighteen months, particularly given the potential disparities among young children in the relation of their chronological age to their physical and mental "developmental age." Moreover, the plaintiffs produced several experts who concluded that Playskool's age guideline pertained to the intended user's developmental age. We must emphasize that under Pennsylvania's interpretation of §402A strict liability, the "intended user" of a product is not so broad a class as to encompass every user reasonably foreseeable to the manufacturer. Foreseeability pertains to a duty analysis under negligence tort law, but strictly speaking does not form a part of the appropriate analysis under Pennsylvania strict products liability law. [Citing, *Griggs*; *Azzarello*; *Berkebile*; and *Lewis*]. Furthermore, it is the court, which decides the threshold determination of the product's intended use based upon the parties' averments, and as part of that determination, whether the injured party was an "intended user."
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> * * *
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> [T]he "intended user" must be determined in the context of the knowledge and assumptions of the ordinary consumer in the relevant community. . . . Thus, although foreseeability is not a term that should be associated with strict liability, the concept, to the extent it implies an objective test, is not entirely foreign to a strict liability analysis, although it is applied in a more narrow sense than in negligence law.[141]

Pa. 1996). According to Justice Saylor, who wrote concurring opinions in the *Phillips* cases, no different result would occur through application of the Restatement (Third) of Torts: Products Liability.

140. 30 F. 3d 459 (3d Cir. 1994).

141. *Id. 30 F.3d at 464-465. See also, Spruil* v. *Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962)* wherein the Fourth Circuit construed "intended use" in the context of foreseeability. This is most likely the context that the Pennsylvania Supreme Court considered the term "intended use" in *Azzarello* v. *Black Bros. Co., supra*. Accordingly, those who construe "intended use" narrowly, to assiduously exclude foreseeability, are probably not following the Pennsylvania Supreme Court precedent of established in 1978. *Spruil* concerned a product liability claim against a furniture polish manufacturer whose product killed a small child after it accidentally ingested the product. The Fourth Circuit rejected the "intended user" defense as follows:

> "Intended use" is but a convenient adaptation of the basic test of "reasonable foreseeability" framed more specifically to fit the factual situations out of which arise questions of a manufacturer's liability for negligence. "Intended use" is not an inflexible standard to be apomictically applied in every case. Normally a seller or manufacturer is entitled to anticipate that the product he deals in will be used only for the purposes for which it is manufactured and sold; thus he is expected to reasonably foresee only injuries arising in the course of such use.
>
> However, he must also be expected to anticipate the environment which is normal for the use of his product and where, as here, that environment is the home, he must anticipate the reasonably foreseeable risks of the use of his product in such an environment.

Id., 308 F.2d at 83. Although *Spruil* was decided in 1962, before the Restatement (Second) was published, it was cited favorably by the Pennsylvania Superior Court in *Pegg* v. *General Motors, 391 A.2d 1074 (Pa. Super. 1978)*, decided the same year as *Azzarello, supra*. If foreseeability was incorporated into the question of intended user, the trial court could rule as it did in the cigarette lighter cases to hold that, as a matter of law, the injured child was not an intended user of the product. In *Riley* v. *Warren Manufacturing Inc., 688 A.2d 221 (Pa. Super. 1997)*, the Pennsylvania Superior Court held that, as a matter of law, a child was not an intended user of a bulk feed trailer. The child was injured while working with his grandfather. The same end result was obtained using a foreseeability analysis. *See, Winnet* v. *Helix Corp., 310 N.E.2d 1 (Ill.*

DGS and Its Application

Accordingly, like the *Azzarello* risk/utility analysis, the Third Circuit has held that the question of whether the injured party is an "intended user" is, at least initially, a determination to be made by the trial court as a threshold matter. In 2006, the Pennsylvania Supreme Court discussed "intended use" in *Pennsylvania Department of General Services* v. *United States Mineral Products Co*. (hereinafter "*DGS*").[142] Viscerally an economic loss case, the *DGS* litigation involved a torched "maintenance starved, asbestos-infested," decrepit state office building, constructed in 1963 and consumed by fire in 1994.[143]

The *DGS* litigation centered around polychlorinated biphenyls ("PCB's"), a class of toxic synthetic chemicals. The plaintiff, *DGS*, alleged that, after the fire, PCBs from the building's components were distributed throughout the building. In 1998, the building was imploded because of PCB contamination.

Adding to the unique facts presented by the case is the fact that there was no specific evidence that linked USMP to the installation of the PCB components. Before the case reached the Pennsylvania Supreme Court, USMP, the original defendant, was dismissed.[144]

In *DGS*, the Pennsylvania Supreme court reversed the trial court with instructions to direct a verdict in favor of the manufacturer because the building components at issue had been put to an "abnormal use," holding that, as a matter of law, since "it is undisputed that the incineration of building products is not a use intended by the manufacturer, . . . damages in strict liability are unavailable for the fire related contamination."[145]

Essentially, *DGS* presents highly unique facts. Further, while the *DGS* opinion, states that the concept of foreseeability is generally not part of a strict liability case, its actual holding is quite simple: since it was undisputed that building components were not intended to be burned, any damages secondary to their incineration are not recoverable in strict liability. The remaining discussion regarding foreseeability is commentary or dictum regarding why it would be "unfair" to permit foreseeability to benefit plaintiffs, while precluding conduct evidence that would benefit defendants.

Justice Saylor stated:

1974) (accident involving a 4 year old girl, injured when she placed her fingers on a moving belt of farm equipment was not the proximate cause of a product defect because the accident was not reasonably foreseeable to the products seller).

142. 898 A.2d 590 (Pa. 2006).

143. The plaintiff, the Pennsylvania Department of General Services, apparently skirted around the economic loss issue by claiming that the PCB exposure posed an increased risk of physical harm. However, this does not explain how the statute of repose was never raised. The fire occurred in 1994, over thirty (30) years after the alleged building materials had been installed. 42 Pa.C.S.A. §5536; *McConnaughey* v. *Building Components, Inc*. 637 A.2d 1331 (Pa. 1994).

144. After trial, Monsanto complained about juror misconduct. At that time, the jury foreman revealed for the first time that his brother suffered from cancer which he believed was caused by Monsanto's PCB's. *Id*. at 594. The highly controversial aspects of the case were not ignored by the Pennsylvania Supreme Court. The case had attained considerable publicity and the Supreme Court received amici briefs filed by the Honorable Arlin Adams, a retired Third Circuit Judge, and by several Pennsylvania State Senators who claimed that the case was "lawsuit abuse" perpetrated by their employer, the Commonwealth of Pennsylvania. As the Supreme Court stated:

> Monsanto also criticizes the case . . . as lacking in foundation and as distorted by extensive and persistent over reaching. Indeed, Monsanto casts Appellees' efforts to assess it with liability for the destruction of the Building and various of its contents based upon the presence of trace amounts of PCBs as nothing more than a transparent attempt to shift the Commonwealth's own financial responsibility to a deep-pockets defendant. Several amici curiae, including a number of Pennsylvania legislators, also characterized the litigation as an example of lawsuit abuse perpetrated by arms of the Commonwealth.

Id. at 595.

145. *Id*. However, the Court affirmed the trial court's denial of JNOV insofar as it related to the plaintiff's pre-fire "off-gassing" theory. *Id*. at 605-606.

> [C]onsumers are protected by the availability of negligence theory to vindicate meritorious design defect claims that are grounded in negligence concepts, and in this setting, disputes may be resolved on a level field, as defendants may avail themselves of established negligence based defenses.[146]

Justice Saylor's statements follow the Restatement Third's goal of converting Pennsylvania's strict products liability into a negligence cause of action. However, it is respectfully submitted that these views are contrary to existing Pennsylvania law.[147] Consequently, most Pennsylvania Courts interpret *DGS* narrowly to its highly unique facts.[148]

Nevertheless, *DGS* has had some interim impact on products design cases at the federal level. In *Clevenger* v. *CNH America, LLC*,[149] the United States District Court for the Middle District of Pennsylvania applied *DGS* to admit the manufacturer's operator's manual and product warnings as evidence of the manufacturer's intended use of the product at trial. *Clevenger* concerned a Case 85XT skid loader, which the plaintiff used on his farm. On the day of the accident, he was using it to remove snow, an undisputed intended use of the product. However, the plaintiff's accident occurred when, while attempting to exit the loader, via the loader's door, he inadvertently hit the loader's controls that activated its lift arms, which raised and pinched the plaintiff's left arm against the door, causing permanent and severe injury. The trial court admitted the loader's manual and warnings as evidence of intended use relevant to the defendant's misuse claims.

However, *Clevenger* may be limited because, unless it is established that the plaintiff's conduct is the *sole* cause of this harm, it is respectfully submitted that the admission of such conduct evidence is generally inadmissible in a strict products liability action. This was noted by the Pennsylvania Superior Court in *Gaudio* v. *Ford Motor Co*.[150] *Gaudio* is a crashworthiness case where the plaintiff's decedent ran a stop sign, lost control of his vehicle, and hit a dirt embankment.

The defendants presented biomechanical evidence to state that the decedent was out of position at the time he ran the stop sign—that he was bending down or performing some other maneuver, such as adjusting the radio. The Superior Court held that it was also error to admit this evidence at trial, stating:

> [W]hile evidence of a plaintiff's contributory negligence is generally inadmissible, there are certain limited exceptions in which the plaintiff's conduct in a particular case may be relevant. . . . Evidence of a plaintiff's voluntary assumption of the risk, misuse of a product, or highly reckless conduct is admissible to the extent that it relates to the issue of causation. . . . To establish voluntary assumption of the risk, the defendant must show that the buyer knew of a defect and yet voluntarily and unreasonably proceeded to use the product. . . . To establish misuse of the product, the defendant must show that the use was "unforeseeable or outrageous." . . . Highly reckless conduct is akin to evidence of misuse and requires the defendant to prove that the use was "so extraordinary and unforeseeable as to constitute a superseding cause." . . . [However, unlike] these limited exceptions, "evidence of a plaintiff's ordinary negligence may not be admitted in a strict

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146. 898 A.2d at 603. Given the ultimate holding, on this particular issue, Justice Saylor's comments on foreseeability could be viewed as dictum.

147. The Court could have reached the same result by following established precedent. *See, Sherk* v. *Daisy-Heddon, supra*.

148. *See*, e.g. *Opshinsky* v. *Wing Enterprises, Inc*. 2007 U.S. Dist. LEXIS 2652 (M.D. Pa. 2007) (denying summary judgment and observing that Justice Saylor "believes there is a compelling need for . . . alterations [to §402A], such as are reflected in the . . . Third Restatement"), *Makadji* v. *GPI, Div. Of Harmony Enterprises, Inc*. 2007 U.S. Dist. LEXIS 1557640 (E.D. Pa. 2007) (denying motion for summary judgment); *Rice* v. *2701 Red Lion Assoc., L.P*., 2007 Phila. Ct. Com. Pl. LEXIS 206 (Phila. 2007) (denying JNOV and new trial motion).

149. 2008 U.S. Dist. LEXIS 45225 (M.D. Pa. 2008), *aff'd*, 2009 U.S. App. LEXIS 18011 (3d Cir. 2009) (*not precedential opinion under Third Circuit Internal Operating Procedure Rule 5.7, such opinions are not regarded as precedents which bind the court; see, Fed. R.App. Proc. 32.1*).

150. *976 A.2d 524 (Pa. Super. 2009)*, decided after *Clevenger, supra*.

> products liability action . . .unless it is shown that the accident was **solely** the result of the user's conduct and not related in any [way to] the alleged defect in the product. . . . As we explained in *Madonna [v. Harley Davidson, Inc., 708 A.2d 507 (Pa. Super. 1998) (evidence of plaintiff's intoxication is admissible regarding causation)]*, "a user's negligence is not relevant if the product defect contributed in any way to the harm."[151]

Since none of the decedent's pre-impact conduct was the "sole" cause of the decedent's accident or death, the Superior Court held that these opinions, evidence and arguments should have been excluded at trial.

Given *Gaudio*, the long-term impact of *Clevenger* is questionable. In *Clevenger*, the Middle District held that foreseeability has no role in a strict products liability case. However, such evidence is relevant as a threshold matter to determine whether a manufacturer may argue that a user's conduct was the sole cause of the accident at issue. In *Moyer*, this was permitted because the manufacturer stated that poor maintenance and improper use of the machine were the sole causes of its vibration and that this, in turn, had caused the plaintiff's injuries.

Family Members, Bystanders And Others Within The Scope Of Protection Of §402A: Jury Instruction 8.10

Berrier presents an anomalous fact scenario that can be corrected by formally adopting an innocent bystander instruction. This instruction will do no more than what the Restatement (Third) proposes and is consistent with existing Pennsylvania precedent. For example, *Miller* v. *Preitz*, *Webb* v. *Zern* and *Salvador* v. *Atlantic Boiler Co*.[152] and *Kuisis*, *supra*, each extended liability to persons who were not actual purchasers of the product at issue.[153] In *Miller*, a 7-month-old infant was killed by boiling water shot from a vaporizer-humidifier, purchased by the child's aunt who lived next door. The Pennsylvania Supreme Court reversed the trial court's dismissal of the child's estate's breach of warranty claim against the direct seller, a local drugstore, holding that there was a potential cause of action since the child was a family member, one who could *reasonably be expected* to use the vaporizer since he lived next door.[154]

In *Webb* v. *Zern*, the plaintiff's father bought a one-quarter keg of beer from defendant. Later that day, the plaintiff's brother tapped the keg and drew about a gallon of beer. That evening, the plaintiff entered the room where the keg was located and it exploded, causing the plaintiff severe injuries.

In *Salvador* and in *Burbage*, *supra* workers were injured by boiler explosions. In *Kuisis*, a worker was injured by pipes, suspended by a co-worker, who had left a

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151. *976 A.2d at 542-543 (emphasis in original), quoting and citing, Childers* v. *Power Line Equip. Rentals, 681 A.2d 201 (Pa. Super. 1996)*; *Clark* v. *Bil-Jax, Inc. 763 A.2d 920 (Pa. Super. 2000)*; *Charlton* v. *Toyota Industrial Equipment, 714 A.2d 1043 (Pa. Super. 1998)*; *Ferraro* v. *Ford Motor Co., Inc., 223 A.2d 746 (Pa. 1966)*; *Dillinger* v. *Caterpillar, Inc., 959 F.2d 430 (3d Cir. 1992)*; *Bascelli* v. *Randy, Inc., 488 A.2d 1110 (Pa. Super. 1985)*.

152. 319 A.2d 903 (Pa. 1974).

153. In *Kuisis*, the issue of whether the plaintiff was protected by §402A was squarely ruled in favor of the plaintiff.

154. 221 A.2d at 324, applying 13 Pa.C.S. Section 2-318, discussed above. In his concurring opinion, Chief Justice Bell stated that a different result would apply if the deceased child and the purchaser had lived in different cities. Justice Bell stated as follows:

> In the instant case plaintiffs-decedent, the 7 month old nephew who lived next door with his mother—who was the sister of the buyer of the allegedly defective article, viz, a vaporizer-humidifier—was not only a close relative of the buyer, but because he lived next door, it was reasonable to expect that he might use such article and hence was included in the protection of the warranty. On the other hand if the buyer lives and buys the goods in Philadelphia and, the son or nephew of the buyer lives in Chicago or Miami or San Francisco, he would not be covered by the code if the explosion and injury occurred in one of those remote cities or in any other remote place.

Id. at 327. Such random differences are controlled by the innocent bystander instruction.

crane unattended. From *Miller*, *Salvador* and *Webb*, Pennsylvania's adoption of §402A eliminated the formal of privity requirements previously required to establish a breach of express or implied warranty pursuant to Pennsylvania Uniform Commercial Code. Further, its protections in tort extended beyond the actual purchasers of the product to all users and consumers of the product itself. While *Miller* and *Webb* both involved injuries to the product's purchaser's family members, Comment (l) to §402A makes it clear that this protection also extends to injured guests, recipients of gifts, to a purchaser's employees, to those who actually use the product, and those who repair the product.

Although the Restatement (Second) of Torts did not take a position as to whether or not innocent bystanders are protected by §402A,[155] Pennsylvania law is replete with examples where innocent bystanders have been permitted to recover under §402A.[156] The outcome in *Berrier* would have been avoided if Pennsylvania had clearly stated that innocent bystanders are protected by Section 402A. Such a statement is provided by Pennsylvania Standard (Civil) Jury Instruction 8.10, which states as follows:

> 8.10 Liability for harm to bystanders
> 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.[157]

Berrier presents facts similar to *Miller* v. *Preitz*, where a child is injured by a defective product. In both instances, the child is a family member. In *Miller*, the Court held that the child may pursue an implied breach of warranty claim. In his dissent, Justice Jones stated that the child's claims would properly fall within §402A. Clearly, Jury Instruction 8.10 is supported by the same policy underlying the original adoption of §402A. The argument that the Restatement (Third) is the only means by which to provide such protection—under the guise of "legal symmetry" or logic—is

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155. Comment (o) to §402A states as follows: "Thus far, the Courts, in applying the rules stated in this section, have not gone beyond allowing recovery to users and consumers as those terms are defined in Comment (l). Casual bystanders, and others who may come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle or a pedestrian hit by an automobile had been denied recovery. There may be no essential reason why such persons should not be brought within the scope of the protection of 40 other than that they do not have the same reasons for expecting such protection who buys a marketed product; but the social pressure which has been largely responsible for the development of the rule stated, has been a consumers' pressure, and there is not the same demand for the protection of casual strangers. The Institute expresses neither approval nor disapproval of expansion of the rule [for] recovery by such persons."

156. *See, Salvador* v. *Atlantic Steel Boiler Co*., 319 A.2d 903 (Pa. 1974) (abolishing the vertical privity requirement). *See also, Kuisis* v. *Baldwin-Lima-Hamilton Corp*. 319 A.2d 914 (Pa. 1974); *Pegg* v. *General Motors*, 391 A.2d 1074 (Pa. Super. 1978) (plaintiffs were neither users or consumers, were permitted to recover when a chemical, in a car, ignited); *Statos* v. *SuperSaglesCorp*., 1994 W.L. 7093755 (E.D. Pa. 1994) (17 month old child strangled when she became entrapped in the moving frame of a hospital bed); *Herman* v. *Welland Chemical Ltd*., 580 F.Supp. 823 (E.D. Pa. 1984) (a fireman permitted to recover in strict liability from injuries following a chemical spill even though he was not a user or consumer of the product in question); *Schmidt* v. *Boardman Co*., 958 A.2d 498 (Pa. Super. 2009) (a bystander child permitted to recover in strict products liability for a physical injury caused by a defective fire hose from a fire truck); *Fedorchick* v. *Massey-Ferguson, Inc*., 438 F.Supp. 60 (E.D. Pa. 1977) (holding that §402A protects an innocent bystander who is injured by a defective loader located where he was standing). *Flavin* v. *Aldrich*, 250 A.2d 185 (Pa. Super. 1968) (plaintiff injured in an automobile accident after being rear ended by Aldrich, another defendant, sued the product seller pursuant to §402A because the car had defective brakes; the plaintiff was permitted to present this case to the jury); *Suchomajcz* v. *Hummel Chemical Co*., 524 F.2d 19 (3d Cir. 1975).

157. The jury instruction was formed by this committee in 2005. It states that "the committee believes that, because of these policy considerations [that sellers of products are in a better position to assume the risk of defects in those products], innocent bystanders, who have absolutely no chance to inspect the product or protect themselves from its defects, are entitled to even greater protection than the actual purchaser or consumer. Such protection for bystanders also would keep the focus of the jurors determination where Pennsylvania's law has consistently endeavored to keep it on the product. . . ."

incorrect and contrary to the actual purpose and history of Pennsylvania strict products liability law. Such a conclusion disregards the fact that Pennsylvania has made foreseeability an indelible part of strict products liability claims.

CONCLUSION—THE FUTURE OF PENNSYLVANIA STRICT PRODUCTS LIABILITY LAW

The Restatement (Third) of Torts: Products Liability will cause radical changes to Pennsylvania strict products liability law. The Courts should not make such changes. Rather, if something of this nature is to be done, it should be implemented by Pennsylvania's General Assembly. The suggested wholesale adoption of the Restatement Third is tantamount to legislating from the bench with regard to a body of law that has been in place for 44 years. Instead, other changes are possible that will reduce Court confusion. One immediate change would be to formally adopt Pennsylvania Jury Instruction 8.10. Another would be to fashion appropriate jury charges pertaining to factual issues concerning genuine disputes regarding "intended use" and a product's "intended users." In reality, some cases, like the cigarette lighter cases, *Sherk*, and *DGS*, will be resolved by the court as a matter of law. However, others present factual disputes that properly belong to the jury in our open system.

Pennsylvania should continue to focus on the product and exclude conduct and reasonable person evidence from the trial of a strict products liability case. The Restatement (Third) proposes to change this focus to a fault-based "reasonable manufacturer" standard and will convert strict products liability cases into negligence actions. This result increases the evidentiary burden for the injured plaintiff and will permit the manufacturer to present evidence that the Pennsylvania Supreme Court has previously held to be irrelevant as a matter of law.

Pennsylvania Courts should continue to follow *Azzarello*. It is *stare decisis* and current law. The present law properly preserves Pennsylvania's products liability social policies of shifting the risk of loss from the injured consumer to the product seller by simplifying the plaintiff's evidentiary burden at trial. As discussed above, a product defendant has the protection of the trial court's *Azzarello* risk/utility balancing test.

As stated, *Bugosh* is a legal nullity. The Supreme Court declined to decide the issue of whether the Restatement (Third) should replace Section 402A. This decision is clear—Section 402A is still Pennsylvania law. *Azzarello* still applies. Pennsylvania Jury Instruction 8.02 is the proper instruction in Pennsylvania strict products liability cases.[158]

Nevertheless, Pennsylvania products attorneys should become familiar with how the Restatement (Third) may affect their cases. In many cases, the Restatement (Third) will not be outcome determinative. For example, in *Barnish* v. *KWI Building Co.*,[159] a manufacturing defect case, Justice Saylor points out that the majority's decision could have just as easily have been determined by the Restatement (Third). This may be true even though the majority properly chose to follow its own precedent, which led to an outcome with which Justice Saylor substantially agreed.[160]

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158. This is also clear from the Pennsylvania Supreme Court's most recent decision in *Barnish* v. *KWI Building Co.*, 980 A.2d 535 (Pa. 2009). There, Justice Baer, writing for the majority, applied Section 402A without any discussion of the Restatement (Third) of Torts. Although under the particular facts, the Court affirmed summary judgment for the defendant, there is no question that the majority eschewed the Restatement (Third) debate.

159. 980 A.2d 535 (Pa. 2009).

160. *Id.*

In short, *Berrier* was a bet, based on the then-certified issue pending before the Pennsylvania Supreme Court in *Bugosh*, which directly raised the question for the first time as to whether the Restatement (Second) should be replaced by the Restatement (Third). The Third Circuit's prediction is incorrect. The Pennsylvania Supreme Court dismissed the *Bugosh* appeal as being improvidently granted. *Berrier* should not be followed.[161] Section 402A and *Azzarello* are controlling law and should remain so for the immediate future.

161. *See, Czarnecki* v. *Home Depot USA, Inc*., 2009 U.S. Dist. LEXIS 51637 (E.D.Pa. June 15, 2009) (distinguishing *Berrier* and declining to adopt it as a basis for introducing industry standards); *Martinez* v. *Skirmish USA, Inc*., 2009 U.S. Dist. LEXIS 51628 (E.D. Pa. June 16, 2009) (*citing* to Berrier, but then proceeding to an Azzarello risk/utility analysis, finding that safety goggles, used for paintball were unreasonably dangerous and that the factual question of defect was properly before the jury); *McGonigal* v. *Sears Roebuck & Co*., 2009 U.S. Dist. LEXIS 61325 (E.D. Pa. July 16, 2009), where in Judge Rice stated "*Bugosh* . . . recently afforded the Supreme Court the opportunity to clarify strict liability law, but the appeal was dismissed as having been improvidently granted. . . . [T]he Supreme Court has not yet resolved the issue . . . and the General Assembly has not addressed it. . . . [B]ecause the issue [involves debatable social judgment and] complicated social and economic issues, requiring investigations and social value judgments, the legislature is better able to address whether Pennsylvania should adopt the Third Restatement, or an alternate scheme, for strict liability cases." *But see, Richetta* v. *Stanley Fastening Systems, LP, 2009 U.S. Dist. LEXIS 75230 (E.D. Pa. August 25, 2009) (applying the Restatement (Third) to a nail-gun accident case to deny summary judgment)*; *Durkot* v. Tesco *Equipment LLC, 2009 U.S. Dist. LEXIS 82387 (E.D. Pa. September 9, 2009) (denying a manufacturer's motion to apply the Restatement (Third) and holding that the Restatement (Second) applied to a strict products liability case)*. In *Durkot*, Magistrate Judge Jacob Hart stated:

> Most significantly, we find that the Third Circuit's prediction as to the Pennsylvania Supreme Court's adopting [of] the Restatement Third simply did not hold true. When presented with the opportunity to adopt the Restatement (Third), even after granting the appeal on that precise issue and hearing extensive oral argument, the Court did not take the opportunity to do so.

In *Milesco* v. *Norfolk Southern Corp., 2010 U.S. Dist. LEXIS 780 (M.D. Pa. January 5, 2010)*, Judge Jones for the Middle District declined the plaintiff's invitation to follow the Restatement (Third) based on *Berrier*, *supra*. As the Court stated:

> I]t is instructive that when faced with the opportunity to supplant the Second RST [Restatement of Torts] with the Third RST the Pennsylvania Supreme Court declined the invitation to do so. . . . the dismissal of the appeal unmistakably indicates that such super session is anything but a certainty. Consequently, taken in context, we believe that the Pennsylvania Supreme Court's dismissal of *Bugosh* was a clear indication that it intends for the Second RST to apply in the Commonwealth for the time being.