IN A LEAGUE OF ITS OWN: RESTORING PENNSYLVANIA PRODUCT LIABILITY LAW TO THE PREVAILING MODERN "ATTITUDE" OF TORT LAW

Nicholas P. Vari

Michael J. Ross*

I. INTRODUCTION

Recently, in *Tincher v. Omega Flex, Inc.*,[1] the Supreme Court of Pennsylvania took the long-awaited step of granting review of the question of whether Pennsylvania should adopt the legal standards set forth in the Restatement (Third) of Torts: Products Liability.[2] Although the court framed the issue as whether Pennsylvania courts "should replace the strict liability analysis of Section 402A of the Second Restatement with the analysis of the Third Restatement[,]"[3] in a very real sense, that is not the question that *Tincher* presents, since Pennsylvania courts do not adhere to the "strict liability analysis of Section 402A."[4]

At the time of its inception, Pennsylvania courts embraced section 402A and sought to align Pennsylvania with the "modern attitude" of tort law.[5] Nevertheless, it took only a few years for Pennsylvania courts to depart from the letter of section 402A–and from the decisions of the vast majority of courts interpreting

---

* Michael J. Ross and Nicholas P. Vari are partners in the Pittsburgh office of K&L Gates LLP focusing their practice primarily in product liability and toxic tort litigation.

[1] Tincher v. Omega Flex, Inc., 64 A.3d 626 (Pa. 2013).

[2] *Id.* at 626.

[3] *Id.* The *Tincher* appeal is currently pending with the Supreme Court of Pennsylvania. *Id.*, *appeal docketed*, No. 17-MAP-2013 (Pa. 2013).

[4] Phillips v. Cricket Lighters, 841 A.2d 1000, 1006 (Pa. 2003) (quoting Lewis v. Coffing Hoist Div., Duff-Norton Co., 528 A.2d 590, 593 (Pa. 1987)) (explaining that Pennsylvania courts do not require a showing of negligence concepts such as due care or unreasonable danger), *disapproved of by* McGonigal v. Sears Roebuck & Co., No. 07-CV-4115, 2009 WL 2137210, at *4 (E.D. Pa. 2009).

[5] Webb v. Zern, 220 A.2d 853, 854 (Pa. 1966).

section 402A–by effectively detaching the words "unreasonably dangerous" from section 402A's definition of whether a product is defective.[6] Thereafter, Pennsylvania product liability law proceeded upon its own path, in which the product liability defendant was placed in the position of virtually insuring against any injury occurring during the use of a product.[7]

While Pennsylvania law proceeded along its own unique path, the vast majority of courts have embraced section 402A's unreasonably dangerous standard, which appears in the text of section 402A itself.[8] These decisions led to the adoption of a further refined strict liability law, which is embodied in the Restatement (Third) of Torts: Products Liability.[9] Pennsylvania's current precedents align with neither body of law.[10]

If the issue on review in *Tincher* was whether the view of section 402A prevailing in other courts should be superseded by the Restatement (Third), there may be little to decide, since the outcome of the case likely would be the same either way.[11] But the issue now before the Supreme Court of Pennsylvania in *Tincher* is quite different: Whether Pennsylvania courts will align themselves with the prevailing view of strict liability law or whether they will continue along a path of imposing unique and undue burdens upon product defendants.[12]

---

[6] *See, e.g.*, Azzarello v. Black Bros. Co., 391 A.2d 1020, 1022-23 (Pa. 1978); Berkebile v. Brantly Helicopter Corp., 337 A.2d 893, 900 (Pa. 1975), *abrogated by* Reott v. Asia Trend, Inc., 55 A.3d 1088, 1099 (Pa. 2012).

[7] *See, e.g.*, Salvador v. Atl. Steel Boiler Co., 319 A.2d 903, 907-08 (Pa. 1974) (citing Hochgertel v. Can. Dry Corp., 187 A.2d 575, 578 (Pa. 1963)).

[8] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[9] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998). *See Cricket Lighters*, 841 A.2d at 1019 (Saylor, J., concurring) (showing the further refined strict liability law from the second to the third Restatement).

[10] *See, e.g.*, *Azzarello*, 391 A.2d at 1027 (rejecting the Restatement (Second) "unreasonably dangerous" standard); Bugosh v. I.U. N. Am., Inc., 971 A.2d 1228, 1247 (Pa. 2009) (Saylor, J., dissenting) (accepting *Azzarello* and rejecting the Restatement (Third) standard).

[11] *Compare* RESTATEMENT (SECOND) OF TORTS § 402A (stating that a seller is liable for harm caused to the user or his property), *with* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 ("[O]ne engaged in the business of selling or otherwise distributing products . . . is subject to liability for harm.").

[12] Tincher v. Omega Flex, Inc., 64 A.3d 626, 626 (Pa. 2013).

In a series of opinions, the United States Court of Appeals for the Third Circuit has predicted that the Supreme Court of Pennsylvania will take the former path and discontinue Pennsylvania's adherence to a view of product law that runs counter to that prevailing elsewhere, and which relies upon precedents that have no basis in legal theory other than themselves.[13] This article will explore the modern theories of product liability, analyze Pennsylvania's departure from those precedents, and set forth why the adoption of the Restatement (Third) stands as the only viable course to return Pennsylvania product law into the mainstream.

II. THE CURRENT PROBLEM

The present state of Pennsylvania's strict liability doctrine stems from the Supreme Court of Pennsylvania's decision to preclude any jury determination of the factual question of whether a product was unreasonably dangerous.[14] While the rationale of this rule was that the concept of "reasonableness" should be divorced from a no-fault theory of liability,[15] the real-world consequence of this approach has been to render product manufacturers the virtual insurers of their products,[16] even though Pennsylvania precedents acknowledged elsewhere that such an outcome is far beyond the intended reach of the strict liability cause of action.[17]

As written, the Restatement (Second) of Torts Section 402A imposes liability, without further evidence of "fault," on those who sell products in "a defective condition unreasonably dangerous to

---

[13] *See* Covell v. Bell Sports, Inc., 651 F.3d 357, 360 (3d Cir. 2011) (citing Berrier v. Simplicity Mfg., Inc., 563 F.3d 38, 40 (3d Cir. 2009)). Indeed, the Third Circuit recently has gone so far as to direct the district courts to apply the Restatement (Third) in actions arising under Pennsylvania law, consistent with its decisions in *Covell* and *Berrier*. Sikkelee v. Precision Airmotive Corp., No. 12-8081, 2012 WL 5077571, at *1 (3d Cir. 2012).

[14] *Azzarello*, 391 A.2d at 1022, 1026.

[15] *See id.* at 1024.

[16] *Id.* at 1026 (citing Salvador v. Atl. Steel Boiler Co., 319 A.2d 903, 907 (Pa. 1974)).

[17] *See id.* at 1024.

the user or consumer."[18] As detailed below, in a series of decisions beginning with *Berkebile v. Brantly Helicopter Corp.*,[19] abrogated by *Reott v. Asia Trend, Inc.*,[20] the Supreme Court of Pennsylvania held that, because considerations of reasonableness have no place in the jury's inquiry in a strict liability case, the question of whether a particular product was unreasonably dangerous is a question for the court to decide as a matter of law.[21] Following this reasoning, subsequent Pennsylvania decisions have excised any and all considerations of reasonableness, of whatever form, from the strict liability doctrine.[22] Because this approach is facially inconsistent with the Restatement (Second)'s use of unreasonable danger as a defining feature of the concept of "defect," the task of reconciling *Berkebile* and its progeny with the plain text of section 402A has proven difficult.[23] Thus, Pennsylvania case law in this area has evolved inconsistently at best.[24]

In the context of design defect claims, Pennsylvania stands at "the place in the inquiry where other courts stood in the late 1970s[,]" having never truly decided whether to adopt the "consumer expectations" test, the "risk-utility" test, or some

---

[18] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[19] Berkebile v. Brantly Helicopter Corp., 337 A.2d 893 (Pa. 1975).

[20] Reott v. Asia Trend, Inc., 55 A.3d 1088, 1098-99 (Pa. 2012).

[21] *Berkebile*, 337 A.2d at 900.

[22] *See, e.g.*, Lewis v. Coffing Hoist Div., Duff-Norton Co., 528 A.2d 590, 594 (Pa. 1987); DiFrancesco v. Excam, Inc., 642 A.2d 529, 531-32 (Pa. Super. Ct. 1994); Carrecter v. Colson Equip. Co., 499 A.2d 326, 331 (Pa. Super. Ct. 1985).

[23] *Compare* RESTATEMENT (SECOND) OF TORTS § 402A (1965), *with Berkebile*, 337 A.2d at 900 (showing the conflicting language of unreasonable danger in the Restatement (Second) and the absence of reasonableness considerations in *Berkebile*).

[24] *See, e.g.*, Ellis v. Chi. Bridge & Iron Co., 545 A.2d 906, 912-13 (Pa. Super. Ct. 1988) (citing Sweitzer v. Dempster Sys., 539 A.2d 880, 882 (Pa. Super. Ct. 1988)) (recognizing that strict liability claims of the 'failure-to-warn' variety "necessarily involve[] negligence principles such as reasonableness or foreseeability[,]" but noting that such considerations are inappropriate in a Pennsylvania action); *see also* Phillips v. Cricket Lighters, 841 A.2d 1000, 1012 (Pa. 2003) (Saylor, J., concurring) (noting that this area of Pennsylvania jurisprudence is ambiguous and inconsistent).

amalgam of the two.[25] Instead, Pennsylvania has decided only that none of these issues is for the jury.[26] Although a number of decisions, including the Superior Court's decision in *Tincher*, have held that the trial court must conduct a risk-utility analysis, the Supreme Court of Pennsylvania has provided little guidance on the factors relevant to such an analysis.[27] Likewise, few courts have considered the proper method of conducting a risk-utility analysis since the evidence pertinent to it, arguably, should not even be received by the jury pursuant to *Azzarello v. Black Brothers Co*.[28]

In the context of failure-to-warn claims, Pennsylvania is one of an exceedingly small number of jurisdictions willing to hold a product supplier liable for failing to warn of dangers that were completely unknown to science and industry at the time of a product's sale.[29] Indeed, there is no means by which the jury in a strict liability action can even consider whether a purported danger

---

[25] Bugosh v. I.U. N. Am., Inc., 971 A.2d 1228, 1247 (Pa. 2009) (Saylor, J., dissenting).

[26] *Id.*

[27] Tincher v. Omega Flex, Inc., No. 1472 EDA 2011 at 12 (Pa. Super. Ct. 2012) (unpublished opinion); *see* Surace v. Caterpillar, Inc., 111 F.3d 1039, 1044 (3d Cir. 1997) ("Absent further guidance from the Supreme Court, the Pennsylvania Superior Court has determined that in performing the social policy analysis, a court must play a dual role, acting as both a 'social philosopher' and a 'risk-utility economic analyst.' ").

[28] *See* Azzarello v. Black Bros. Co., 391 A.2d 1020, 1027 (Pa. 1978); Shetterly v. Crown Controls Corp., 719 F. Supp. 385, 388 (W.D. Pa. 1989) (holding a separate "fact hearing relating to the concepts of 'unreasonably dangerous' and 'risk-utility' " in which the trial judge determined the questions of "social policy" presented by the application of strict liability to the case); *see also* John M. Thomas, *Defining "Design Defect" in Pennsylvania: Reconciling Azzarello and the Restatement (Third) of Torts*, 71 TEMP. L. REV. 217, 218 (1998) (discussing the "unfortunate ambiguities in the *procedures*" by which the risk-utility test is to be applied by Pennsylvania's trial courts).

[29] *See* Carrecter v. Colson Equip. Co., 499 A.2d 326, 331 (Pa. Super. Ct. 1985) (citing Pegg v. Gen. Motors Corp., 391 A.2d 1074, 1083 n.10 (Pa. Super. Ct. 1978)). Ironically, although Pennsylvania decisions have for decades professed their adherence to the Restatement (Second), the court in *Anderson v. Owens-Corning Fiberglas Corp.* correctly pointed out that Pennsylvania is in the small minority of jurisdictions that have "rejected the proposal of the Restatement Second of Torts that knowledge or knowability is a condition of strict liability." Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 554-55 n.10 (Cal. 1991).

was either known to or knowable by a defendant who allegedly failed to warn of that defect.[30] Thus, a Pennsylvania defendant can conceivably be held liable for not warning of a danger that neither he nor anyone else appreciated at the time a product was sold.[31]

Courts in other jurisdictions have taken a very different approach in applying section 402A to both design defect and failure-to-warn claims.[32] In so doing, other jurisdictions have retained as a factual question the unreasonably dangerous element when applying section 402A, and instructed juries to consider the risks of, utility of, and expectations surrounding an allegedly defective product.[33] For instance, in the early 1980s, the Court of Appeals of New York interpreted the language unreasonably dangerous to summon an inquiry into "whether it is a product which, if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner."[34] Under this interpretation, the inquiry is one for the jury.[35] Numerous decisions from various jurisdictions follow this view of section 402A.[36]

Similarly, in a failure-to-warn context, outside of Pennsylvania, "[a]n overwhelming majority of jurisdictions support[] the proposition that a manufacturer has a duty to warn

---

[30] *Carrecter*, 499 A.2d at 328-29 (explaining that the jury may not "consider the reasonableness of the defendant's conduct").

[31] *See id.* at 331 (citing *Pegg*, 391 A.2d at 1083 n.10) ("This is so regardless of whether the seller knew or had reason to know of the risks and limitations.").

[32] *See, e.g.*, Voss v. Black & Decker Mfg. Co., 450 N.E.2d 204, 208 (N.Y. 1983); Anderson v. Hyster Co., 385 N.E.2d 690, 692 (Ill. 1979); Boatland of Hous., Inc. v. Bailey, 609 S.W.2d 743, 745-46 (Tex. 1980).

[33] *Voss*, 450 N.E.2d at 208-09; *Anderson*, 385 N.E.2d at 693; *Boatland of Hous., Inc.*, 609 S.W.2d at 749.

[34] *Voss*, 450 N.E.2d at 208.

[35] *Id.*

[36] *See, e.g.*, Gen. Motors Corp. v. Edwards, 482 So.2d 1176, 1183, 1198 (Ala. 1985) (stating that the jury is the one who decides whether a defect existed and whether it proximately caused the plaintiff's injuries); *Anderson*, 385 N.E.2d at 693; Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 186-87 (Mich. 1984); Holm v. Sponco Mfg., Inc., 324 N.W.2d 207, 215 (Minn. 1982); *Boatland of Hous., Inc.*, 609 S.W.2d at 749; Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666, 682 (W.Va. 1979).

only of risks that were known or should have been known to a reasonable person."[37] Pennsylvania, again, stands in an extreme minority of jurisdictions in this respect.[38]

III. WHERE STRICT LIABILITY IN PENNSYLVANIA DEVIATED FROM SECTION 402A

As the doctrine of strict liability in product defect cases took hold across the United States, Pennsylvania courts expressed an intention to align themselves with the modern attitude of tort law.[39] Nevertheless, interpreting a line of decisions from the highest courts of California and New Jersey, Pennsylvania courts redefined strict liability law to preclude factual inquiries into whether a product was unreasonably dangerous.[40] The highest courts of California and New Jersey ultimately rejected any reading of their precedents–the same precedents that gave rise to the "Pennsylvania view"–that would have precluded factual inquiries in this manner.[41] However, Pennsylvania courts did not follow the path of the California and New Jersey courts that had guided them previously.[42] Rather, Pennsylvania law continued to embody the notion that the concept of reasonableness could have no role in a strict liability analysis.[43] Since it followed neither the express language of section 402A, nor the decisions interpreting that

---

[37] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. m (1998); *see also Anderson*, 810 P.2d at 553 n.8; Mulhall v. Hannafin, 841 N.Y.S.2d 282, 285 (N.Y. App. Div. 2007); Woodill v. Parke Davis & Co., 402 N.E.2d 194, 198 (Ill. 1980).

[38] *Anderson*, 810 P.2d at 554-55 n.10.

[39] Webb v. Zern, 220 A.2d 853, 854 (Pa. 1966).

[40] Berkebile v. Brantly Helicopter Corp., 337 A.2d 893, 899-900 (Pa. 1975).

[41] *See* Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1159, 1163 (Cal. 1972); Glass v. Ford Motor Co., 304 A.2d 562, 564-65 (N.J. Super. Ct. Law Div. 1973).

[42] *See Berkebile*, 337 A.2d at 899-900.

[43] *Id.* at 900.

section across the nation, the Pennsylvania view quickly became an isolated idea in product liability jurisprudence.[44]

A. The Genesis of Strict Product Liability

The doctrine of strict liability in product cases may be traced back to Justice Roger Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co. of Fresno*.[45] In *Escola*, Justice Traynor set forth a compelling case as to why negligence principles were not sufficient to protect consumers from defective products in modern commerce.[46] Nearly twenty years later, in *Greenman v. Yuba Power Products, Inc.*,[47] strict liability in product cases became the law of California.[48] This time, writing for the majority, Justice Traynor declared that a defendant could be held strictly liable in tort for placing a product on the market that had an injurious defect, knowing that the product would be used without inspection for defect.[49]

Two years after *Greenman* was decided, the American Law Institute (ALI) released section 402A of the Restatement (Second) of Torts, which clarified the legal standard for imposing strict liability in cases involving injuries attributable to defective products.[50] Under section 402A, a plaintiff is excused from proving negligence or breach of contract in a product liability claim if he or she could prove that the defendant sold a "product in a defective condition unreasonably dangerous to the user or consumer."[51] Confirming that the unreasonably dangerous element was a necessary part of a plaintiff's burden of proof on the question of product defect, section 402A's drafters articulated the following

---

[44] *See id.* at 899. *See generally* Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 554-55 n.10 (Cal. 1991) (noting that Pennsylvania is one of the few jurisdictions that does not follow the Restatement (Second)).

[45] Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

[46] *Id.*

[47] Greenman v. Yuba Power Prod., Inc., 377 P.2d 897 (Cal. 1963).

[48] *Id.* at 900 (stating that the court adopted strict liability in product cases).

[49] *Id.*

[50] *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. h, i (1965).

[51] *Id.* § 402A.

definition of unreasonably dangerous:[52] "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[53] The drafters did not indicate that a judge, as opposed to a jury, should stand as the lone arbiter of what is "contemplated by the ordinary consumer," nor did they suggest that a court should unilaterally decide what constitutes "ordinary knowledge common to the community."[54]

B. Pennsylvania's Departure From the Mainstream View

One year after the Restatement (Second) was issued, the Supreme Court of Pennsylvania adopted section 402A verbatim in a 6-1 decision.[55] In so doing, the court did not express displeasure with the language of section 402A, the substance of the comments surrounding it, or the rule of law that it articulated.[56] Moreover, the court did not suggest that some departure from section 402A was necessary to avoid an undue overlap between negligence and strict liability claims.[57]

It was not until *Berkebile* that the Supreme Court of Pennsylvania made its first meaningful departure from section 402A (and, necessarily, from the modern attitude of tort law).[58] The *Berkebile* court's analysis began with the well-established

---

[52] *See* Berkebile v. Brantly Helicopter Corp., 337 A.2d 893, 899 (Pa. 1975); RESTATEMENT (SECOND) OF TORTS § 402A cmt. g, i (1965).

[53] RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

[54] *See id.* (noting that a product sold must be proven to be dangerous to the extent that it would be "contemplated by the ordinary consumer" with the "ordinary knowledge common to the community").

[55] Webb v. Zern, 220 A.2d 853, 854 (Pa. 1966) (quoting RESTATEMENT (SECOND) OF TORTS § 402A (1965)). Chief Justice Bell's dissent was based upon Constitutional concerns relating to the separation of powers. *Webb*, 220 A.2d at 855-56 (Bell, J., dissenting).

[56] *Id.* at 854 (holding that the court adopted the entirety of section 402A).

[57] *See generally id.* (noting that a new basis of liability pursuant to section 402A would be adopted).

[58] *See* Berkebile v. Brantly Helicopter Corp., 337 A.2d 893, 899-900 (Pa. 1975) (holding that "the 'reasonable man' standard in any form has no place in a strict liability case").

principle that a strict liability plaintiff need not prove negligence.[59] The court thereafter detached the unreasonably dangerous language from the definition of a defect.[60] In so doing, the court departed from the plain language of section 402A, which required that the plaintiff prove that the allegedly defective product in question was "in a defective condition unreasonably dangerous to the user or consumer."[61] The *Berkebile* court further looked past comment i to section 402A, which expressly limits the application of section 402A to instances "where the defective condition of the product makes it unreasonably dangerous to the user or consumer."[62]

Although the *Berkebile* court rejected the use of a test for defect, focusing on whether a product was unreasonably dangerous, it did not substitute any clear alternative test.[63] The *Berkebile* court provided no concrete guidance on the content of the defect inquiry, instead observing, without explanation, that sugar is not defective because some individuals will suffer diabetic shock from consuming it and whiskey is not defective because its consumption can cause intoxication.[64] Thus, without any stated intention of rewriting or correcting section 402A, the *Berkebile* court essentially created a standard by which the term defect became self-defining.[65] Now, a jury could find a product

---

[59] *Id.* at 899.

[60] *Id.* at 900 (noting that an unreasonably dangerous condition is proven by establishing there was a defect).

[61] *See id.* at 897 n.2, 900; RESTATEMENT (SECOND) OF TORTS § 402A (1965) (noting that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer" may be liable).

[62] *See Berkebile*, 337 A.2d at 899-900 (disregarding unreasonably dangerous language from comment i); RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

[63] *See Berkebile*, 337 A.2d at 900 (explaining that the better way to prove a defect is to require proof "that there was a defect in the manufacture or design of the product, and that such defect was a proximate cause of the injuries").

[64] *See id.* at 898 (explaining the requirements for strict liability—defect and proximate cause—but not explaining how you prove either of those requirements and instead using analogies).

[65] *Id.* at 900 (stating that one way "to preclude the seller's liability where it cannot be said that the product is defective" is to "requir[e] proof of a defect").

"defective" simply because it was somehow involved in causing an injury.[66]

Berkebile's departure from the express contours of section 402A was advanced further by the court's decision in *Azzarello*, in which the court applied *Berkebile* to a personal injury claim that was tried by a jury under section 402A.[67] At the outset of its analysis, the court impliedly rejected the express language of section 402A, as well as comment i,[68] and it effectively deleted the term unreasonably dangerous from the factual inquiry under section 402A.[69] From there, the court decided that the issue of whether a product is defective is a question of law, and that the terms "defective condition" and "unreasonably dangerous" are terms of art.[70] This conclusion reduced the inquiry of whether a product was defective to an issue of law, thereby precluding any

---

[66] *See id.* at 898 (explaining that while plaintiff still ostensibly had to prove the existence of a "defect," the unreasonably dangerous language that was previously used to define a defect was essentially merged into the question of causation). Accordingly, under the *Berkebile* analysis, if a product was involved in causing an injury, a jury could deem the product "defective" without ever having to consider its risks or utility or any other factors bearing on its "danger." *Id.* at 900 (explaining that if the plaintiff can prove that the product was defective and the defect caused their injury "he will have proved that as to him the product was unreasonably dangerous[,]" thereby negating the necessity of any inquiry into the unreasonable dangerousness of the product).

[67] Azzarello v. Black Bros. Co., 391 A.2d 1020, 1027 (Pa. 1978).

[68] *Id.* ("It is clear that the term 'unreasonably dangerous' has no place in the instructions to a jury as to the question of 'defect' in this type of case."). Like the *Berkebile* court, the *Azzarello* court ostensibly relied upon two precedents, one from California and one from New Jersey, to support its holding. *Id.* at 1025; *see* Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1159, 1163 (Cal. 1972); Glass v. Ford Motor Co., 304 A.2d 562, 564-65 (N.J. Super. Ct. Law Div. 1973). However, the highest courts in both of those jurisdictions subsequently rejected *Azzarello*'s jury-question-preclusion rule in strict liability design defect and failure-to-warn claims. *See* Bugosh v. I.U. N. Am., Inc., 971 A.2d 1228, 1236 (Pa. 2009) (citing Johnson v. Am. Standard, Inc., 179 P.3d 905, 915-16 (Cal. 2008)); Cepeda v. Cumberland Eng'g Co., 386 A.2d 816, 829 (N.J. 1978) (all demonstrating the proposition that California and New Jersey law recognize that there are triable issues of fact regarding the existence of a defect in product cases tried under strict liability theories).

[69] *Azzarello*, 391 A.2d at 1026.

[70] *Id.*

factual inquiry on this question.[71] Thereafter, Pennsylvania's trial judges were left "in the unenviable position of 'social philosopher' and 'risk-utility economic analyst.' "[72]

To date, no other state has followed Pennsylvania's lead in removing factual inquiries from the issue of whether a product was defective.[73] Nevertheless, as a consequence of the efforts of Pennsylvania courts to reach decisions conforming to *Berkebile* and *Azzarello*–as opposed to section 402A–Pennsylvania strict liability law became ever more isolated from the prevailing modern attitude, and Pennsylvania courts have "developed a unique and, at times, almost unfathomable approach to products litigation."[74]

IV. THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY

In 1998, the ALI published the Restatement (Third) of Torts: Products Liability.[75] The aim of the ALI was to "revise and update the Restatement (Second) of Torts" in light of the developments in American jurisprudence in this area during the time since the publication of the Restatement (Second) in 1965;[76] however, given the breadth of topic areas covered by the Restatement (Second), the ALI decided to accomplish this update in segments rather than as one all-encompassing project.[77] The segment on product liability "deals with the liability of commercial product sellers and distributors for harm caused by their products."[78]

The ALI noted that its adoption of section 402A of the Restatement (Second) represented "the first recognition by the Institute of privity-free strict liability for sellers of defective products."[79] At that time, however, the development of specific

---

[71] *Id.*

[72] Beard v. Johnson & Johnson, Inc., 41 A.3d 823, 836 (Pa. 2012).

[73] *See* James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 897 (1998).

[74] *Id.*

[75] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998).

[76] *Id.* at xv.

[77] *Id.*

[78] *Id.* at 3.

[79] *Id.*

legal theories that would govern the question of whether a product was defective was an area of litigation in its infancy.[80] The Restatement (Third) addresses this development at length.[81]

The Restatement (Third) features legal rules applicable to products generally, as well as products presenting somewhat unique legal issues, such as food products, drugs, and component parts of other finished products.[82] It also addresses the post-sale duties of product sellers (for instance, to issue post-sale warnings or conduct product recalls) and the liability of successor entities for the products sold by predecessors.[83] Further, the Restatement (Third) and its associated commentary expand on the Restatement (Second) by detailing at some length the methods by which a plaintiff can prove that a particular product was defective (by, for instance, requiring proof of a "reasonable alternative design" and discussing in the commentary the evidence that may be relevant on this question).[84]

The Restatement (Third) recognizes three theories of defect: manufacturing, design, and failure to warn.[85] The first involves a departure from a product's intended design, while the latter two focus on the question of whether "the foreseeable risks of harm posed by the product could have been . . . avoided by the adoption of a reasonable alternative design" or "the provision of reasonable instructions or warnings."[86] By continuing to focus on the concept of reasonableness in defining the strict liability cause of action as the Restatement (Second) did, the Restatement (Third) confirms that the trend in American jurisprudence has not been the approach

---

[80] *Id.*

[81] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. at 3 (1998) (explaining that there were many issues regarding the law of products liability that were not apparent to the drafters of the Restatement (Second), and the Restatement (Third) of Torts: Products Liability now addresses all of those issues).

[82] *Id.* at 4.

[83] *Id.* §§ 10, 12.

[84] *Id.* § 2 cmt. b (detailing, at some length, the methods by which a plaintiff can prove that a particular product was defective).

[85] *Id.* § 2.

[86] *Id.* The comments to section 2 further make it clear that a jury may consider "a broad range of factors" in conducting its risk-utility balancing and deciding whether a product maker should have adopted a reasonable alternative design. *See id.* § 2 cmt. f.

adopted in Pennsylvania–to divorce such considerations from the strict liability inquiry entirely.[87]

V. THE BACKGROUND OF TINCHER V. OMEGA FLEX

The *Tincher* action arose out of a structure fire that occurred on June 20, 2007 in the home of Terence D. and Judith R. Tincher, causing extensive property damage.[88] The evidence at trial suggested that an indirect lightning strike caused the fire by energizing corrugated stainless steel tubing that was used to connect a natural gas fireplace in the Tincher home to the main natural gas line.[89] This tubing was sold under the brand name "TracPipe" by Defendant and Appellant Omega Flex, Inc. (Omega Flex).[90] The Plaintiffs sued Omega Flex in the Court of Common Pleas of Chester County, Pennsylvania, asserting claims for negligence, strict liability, and breach of warranty and arguing that the tubing Omega Flex supplied was defective for having walls that were allegedly too thin to withstand perforation by an electrical arc produced by lightning.[91]

At trial, Plaintiffs dismissed their failure-to-warn claim voluntarily and the jury found against Plaintiffs on their negligence claim.[92] However, after conducting a risk-utility analysis, the trial court found that the risks of TracPipe outweighed its utility, and so it permitted the jury to consider Plaintiffs' strict liability design defect claim.[93] The jury returned a verdict in Plaintiffs' favor based solely on that claim.[94]

In conducting its risk-utility analysis, the trial court considered the availability of alternatives to TracPipe, including black iron pipe, as well as another form of steel tubing also marketed by

---

[87] *Compare* RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965), *and* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 (1998), *with* Azzarello v. Black Bros. Co., 391 A.2d 1020, 1027 (Pa. 1978).

[88] *See* Tincher v. Omegaflex, Inc., No. 2008-00974-CA, 2011 WL 9527303, at *1 (Pa. C.P. Chester Cnty. Aug. 5, 2011).

[89] *Id.* at *1-2.

[90] *Id.*

[91] *Id.* at *2-3.

[92] *Id.* at *6-7.

[93] *Id.* at *11, *20.

[94] *Tincher*, 2011 WL 9527303, at *7.

Omega Flex, known as "CounterStrike," which had been "designed to protect against transient electrical energy from lightning."[95] The trial court found that the availability of CounterStrike demonstrated "the mechanical feasibility of a safer design" that would have significantly lessened or eliminated the unsafe characteristics of TracPipe.[96] In light of this conclusion and its finding that TracPipe presented a significant potential danger, the trial court submitted the question of defect to the jury.[97]

Under a mainstream Restatement (Second) approach, the *Tincher* case would have been tried and potentially decided quite differently.[98] As discussed above, the Restatement (Second) does not suggest, as has become the rule in Pennsylvania, that the inquiry into whether a product was unreasonably dangerous is strictly one for the trial court.[99] Accordingly, applying the Restatement (Second) in the *Tincher* matter would have meant asking the jury, *inter alia*, (1) whether Omega Flex's TracPipe was defective; and (2) whether that defect rendered the product unreasonably dangerous.[100] The *Tincher* jury never received the second question or much of the evidence relevant to it; the trial

---

[95] *Id.* at *13-15.

[96] *Id.* at *16. The trial court ruled that Plaintiffs could not introduce evidence of CounterStrike on the question of defect, but the court did consider this material at length in conducting its risk-utility analysis. *Id.* This ruling highlights the practical difficulties that have resulted from Pennsylvania's treatment of the strict liability cause of action–in order to ensure that the jury receives no evidence going to the reasonableness of a defendant's conduct, a court must exclude otherwise admissible evidence that has a direct bearing on the question of whether a product was "unreasonably dangerous" and, thus, defective. *See generally* Dambacher v. Mallis, 485 A.2d 408, 436 (Pa. 1984) (Wieand, J., concurring & dissenting) (noting that reasonableness is not for the jury's consideration).

[97] *Tincher*, 2011 WL 9527303, at *20.

[98] *See generally* RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965) (requiring the plaintiff to prove the existence of a defect).

[99] *See id.* § 402A cmt. a (stating that under this approach, the question of unreasonably dangerous is not explicitly reserved for the court alone).

[100] *See generally id.* § 402A(1) (noting a seller of a product will be held strictly liable if the product is "in a defective condition unreasonably dangerous to the user or consumer or to his property").

court answered this question instead in conducting its risk-utility analysis.[101]

Applying a Restatement (Third) approach to the *Tincher* facts would likely lead to the same outcome dictated by the prevailing view under the Restatement (Second) if properly applied;[102] it would simply take the Restatement (Second) approach a step further and require the court to provide the jury with detailed guidelines in conducting the unreasonably dangerous inquiry.[103] Pursuant to the Restatement (Third), the *Tincher* plaintiffs seemingly would have had to submit evidence to the jury that a reasonable alternative design to that employed in TracPipe existed; that Omega Flex could have, and should have, adopted this design across the board; that TracPipe was not reasonably safe in the absence of this alternative design; and that the risk at issue in *Tincher*, perforation by indirect lightning strike and a resulting home fire, was one that was foreseeable to Omega Flex.[104] Omega Flex could have countered this evidence with evidence on factors such as "the magnitude and probability of the foreseeable risks of harm, ... [t]he relative advantages and disadvantages of the product as designed[,] and . . . . the likely effects of the alternative design on production costs[,]" among other factors bearing on the unreasonably dangerous inquiry.[105] It would have been within the

---

[101] *See generally Tincher*, 2011 WL 9527303, at *20 (noting that the jury addressed the question of whether the product was defective, and on appeal, the appellant argued that the trial court "erred in failing to instruct the jury" in regard "to the definition of . . . risk-utility analysis").

[102] *See generally* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(a)-(c) (1998) (noting the categories of product defect).

[103] *See generally id.* (providing a detailed guide to when a product is considered defective by conducting detailed inquiries into whether the product is reasonably safe).

[104] *See generally* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 & cmt. d (1998) ("Subsection (b) adopts a reasonableness ('risk utility' balancing) test as the standard for judging the defectiveness of product designs. More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design by the seller or a predecessor in the distributive chain rendered the product not reasonably safe.").

[105] *Id.* § 2 cmt. f (noting the factors a jury would consider).

province of the jury to assess all of this evidence in determining whether TracPipe presented an unreasonable danger.[106]

VI. THE OPPORTUNITY PRESENTED BY *TINCHER V. OMEGA FLEX*

In order to decide *Tincher*, the Supreme Court of Pennsylvania will have to confront its prior precedents in the strict liability arena.[107] *Tincher* presents a case in which the defendant product manufacturer's liability was based solely on a strict liability design defect theory; the jury specifically found the defendant not negligent and the plaintiffs voluntarily dismissed their failure-to-warn claim.[108] In *Tincher*, the trial court conducted, and the Superior Court of Pennsylvania upheld the use of, the sort of social philosopher and risk-utility economic analyst assessment that trial courts are to conduct in every strict liability claim in Pennsylvania.[109] The *Tincher* defendant raised the question of whether Pennsylvania should move to the Restatement (Third) approach both in the trial court and Superior Court of Pennsylvania,[110] thus, inarguably preserving it for the Supreme Court of Pennsylvania's review.[111] The Supreme Court of Pennsylvania granted that review on March 26, 2013, specifically noting in its order granting allocatur that it has taken the case to determine whether to adopt the Restatement (Third) approach and, if so, whether to apply that decision retroactively.[112]

The *Tincher* court now has three options before it: (1) continue to follow Pennsylvania's historical approach to strict

---

[106] *Id.* (explaining that evidence related to proving or disproving these factors would be relevant to the analysis).

[107] *See* Tincher v. Omega Flex, Inc., 64 A.3d 626, 626 (Pa. 2013) ("The issue . . . is: Whether this Court should replace the strict liability analysis of Section 402A of the Second Restatement with the analysis of the Third Restatement.").

[108] Tincher v. Omegaflex, Inc., No. 2008-00974-CA, 2011 WL 9527303, at *2, *6-7 (Pa. C.P. Chester Cnty. Aug. 5, 2011).

[109] *See id.* at 12; Tincher v. Omega Flex, Inc., No. 1472 EDA 2011 at *12-14 (Pa. Super. Ct. 2012) (unpublished opinion).

[110] *Tincher*, 2011 WL 9527303, at *10-11; *Tincher*, No. 1472 EDA 2011 at 13-14.

[111] *Tincher*, 64 A.3d at 626**.**

[112] *Id.* at 626-27.

liability; (2) abandon Pennsylvania's historical approach to strict liability in favor of some other state's approach; or (3) abandon Pennsylvania's historical approach to strict liability in favor of the approach taken in the Restatement (Third) of Torts: Products Liability.[113] The first path seems unlikely since the Supreme Court of Pennsylvania has, time and again, expressed frustration with the state of strict liability law in Pennsylvania.[114] Of the remaining two options, the adoption of the Restatement (Third) seems to be the more likely and the better approach. *Tincher* provides a perfect vehicle for such a shift in the law.

At this point, it would be a Herculean, and indeed, unnecessary task to unravel nearly four decades of case law predicated upon the questionable premise that the framers of section 402A placed no meaning on the terms defective condition and unreasonably dangerous.[115] Conversely, the modern attitude of tort law that the court endeavored to follow when it adopted section 402A verbatim in 1966 resides in section 2 of the Restatement (Third)[116] and the well-developed body of case law that initially framed, and now interprets, that section.[117] Unlike any one state's law, the Restatement (Third) attempts to capture and

---

[113] *See generally id.* (noting that the court does not specifically mention the second option on appeal, but one can logically forecast the court examining the laws of sister states).

[114] *See generally* Erin L. Ginsberg, *Revisiting Restatement Second or Third: The Uncertain Status of Product Liability Law in Pennsylvania*, 81 PA. B. ASS'N Q. 139, 139 (October 2010) (noting that the Supreme Court of Pennsylvania "concedes that is has blurred the line between negligence and strict liability").

[115] *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965) (showing that the Restatement contains no definition of defective condition or unreasonably dangerous).

[116] *Compare* Webb v. Zern, 220 A.2d 853, 854 (Pa. 1966) (adopting the exact language from Restatement (Second) § 402A), *with* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998) (noting the very similar language to section 402A of the Restatement (Second)).

[117] *See generally* J. Denny Shupe & Todd R. Steggerda, *Toward a More Uniform and "Reasonable" Approach to Products Liability Litigation: Current Trends in the Adoption of the Restatement (Third) and Its Potential Impact on Aviation Litigation*, 66 J. AIR L. & COM. 129, 144-45 (2000) (noting that state courts of all levels have analyzed the Restatement (Third) of Torts: Products Liability Section 2).

coalesce the larger national majority view in strict liability claims.[118] Thus, the Supreme Court of Pennsylvania can correct nearly four decades of troublesome precedents by simply adopting section 2 of the Restatement (Third) verbatim.[119] Such a decision would bring Pennsylvania's law in line with the strict liability doctrine that has evolved since the time of the Restatement (Second) and provide Pennsylvania's trial courts with defined standards for assessing product defects that do not exist under currently prevailing law.[120]

VII. WILL THE *TINCHER* HOLDING APPLY RETROACTIVELY?

As noted in its order granting allocatur in *Tincher*, the Supreme Court of Pennsylvania explicitly raised the question of whether, if it adopts the Restatement (Third) approach, it should apply that holding retroactively.[121]

The Supreme Court of Pennsylvania's general rule is to apply its decisions retroactively to all pending cases.[122] The court has issued prospective rulings only on rare occasions,[123] and those occasions have typically involved instances when the court considered its discretion to apply a decision retroactively "[w]here not limited by constitutional considerations."[124] In such instances, applying a ruling retroactively would have resulted in depriving claimants of a legal remedy on which they had justifiably relied or

---

[118] Phillips v. Cricket Lighters, 841 A.2d 1000, 1012, 1021 (Pa. 2003) (Saylor, J., concurring) (noting that the Restatement (Third) "synthesizes the body of products liability law into a readily accessible formulation based on the accumulated wisdom from thirty years of experience").

[119] See generally RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998), which provides more guidance than the Restatement (Second) of Torts Section 402A that is currently followed.

[120] *See generally Cricket Lighters*, 841 A.2d at 1021 (Saylor, J., concurring) (alluding that the law has evolved over the past thirty years). Justice Saylor also notes that adopting the Restatement "represents the clearest path to reconciling the difficulties persisting in Pennsylvania law." *Id.*

[121] Tincher v. Omega Flex, Inc., 64 A.3d 626, 626-27 (Pa. 2013).

[122] McHugh v. Litvin, Blumberg, Matusow & Young, 574 A.2d 1040, 1044 (Pa. 1990).

[123] Am. Trucking Ass'ns v. McNulty, 596 A.2d 784, 790 (Pa. 1991).

[124] Commonwealth v. Gray, 503 A.2d 921, 926 (Pa. 1985).

imposing some other extreme hardship on the parties.[125] No such considerations appear to apply in this instance (indeed, the court has signaled a move away from its historical approach to the strict liability cause of action numerous times now), and if the court were to adopt the Restatement (Third) in *Tincher*, it seems quite possible that the court will follow its "general rule" and apply that decision retroactively to cases pending on appeal.

---

[125] *See, e.g.*, Drain v. Covenant Life Ins. Co., 712 A.2d 273, 278-79 (Pa. 1998) (holding that the decision adopting the rule that aggrieved shareholders must make a written demand on a board of directors prior to bringing a shareholder derivative action would apply prospectively only, because by holding otherwise, the court would invalidate a potentially significant number of pending derivative actions that were validly asserted under the law existing at the time); *see also* Oz Gas, Ltd. v. Warren Area Sch. Dist., 938 A.2d 274, 283 (Pa. 2007) (holding that the decision making certain local taxes uncollectable would apply prospectively only since the relevant taxing authorities had "collected and made use of the taxes at issue with the good faith belief that they were legally entitled to them[,]" and "[r]equiring a refunding of the taxes would cause substantial financial hardship to the communities involved").