A WORLD AFTER TINCHER V. OMEGA FLEX:

PENNSYLVANIA COURTS SHOULD PRECLUDE INDUSTRY STANDARDS AND PRACTICES EVIDENCE IN STRICT PRODUCTS LIABILITY LITIGATION

I. INTRODUCTION

When a product causes injury—whether that product is functioning, malfunctioning, useful, or non-useful—its manufacturer can be subject to liability under a number of causes of action. Because the manufacturer is responsible for a product’s quality, it is strictly liable for defects; this standard “may persuade manufacturers to exercise greater caution in producing their goods.” However, nestled behind a strict products liability analysis is a “struggle[] to balance individual fairness with social utility.” On one hand, strict liability and warranty law call for the imposition of liability on “[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer.” Liability in such a case is premised on the idea that manufacturers should bear responsibility for injuries caused by their products. This speaks to one of the main objectives of strict liability law: to protect consumers by providing a remedy for injuries. On the other hand, strict liability also allows for the possibility that “the danger may be overridden by the social utility of a product.” In some cases, liability will not attach if, on balance, the inherent

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1. See infra Part III.C for a discussion of the causes of action under which relief can be sought when a product causes injury.


5. See Ellen Wertheimer, Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back, 60 U. CIN. L. REV. 1183, 1186 (1992) (arguing that strict products liability is intended to protect innocent consumers and was created to hold manufacturers liable for defective products).

6. See id. at 1186–87.

social value of the product outweighs its potential danger.8

Understanding this need to balance individual fairness against social utility, modern courts settled on the concept of strict products liability, finding that regardless of the due care exercised by the actor, strict liability attaches when a product is “defective” or “unreasonably dangerous.”9 This standard ensures that products that are useful yet dangerous are not preemptively removed from the market and that injured victims retain a much-needed remedy.10 However, this judicial attempt to create a new class of liability distinct from negligence proved to be a distinction without a difference.11 Therein lies the essential problem of this Note.

Since the introduction of strict products liability law into American jurisprudence, scholars and judges have attempted to distinguish strict liability from negligence.12 This Note will refer to this distinction as the “negligence-strict liability dichotomy.”13 Despite these attempts to create a distinction, courts have used a reasonableness standard in products liability cases that is essentially “negligence, wrapped in a strict liability shroud.”14 Further, until recently, Pennsylvania courts had struggled to define when a product should be subject to strict liability, which has led to confusing results.15 For example, in Azzarello v.
The Pennsylvania Supreme Court drew a sharp line between strict liability and negligence. Later courts applied Azzarello’s hard line to prevent the admission of “negligence evidence and theories” in strict liability cases. One such form of negligence-based evidence, industry standards and practices evidence—the subject of this Note—has presented particular difficulties.

In light of these complications, the 2014 Pennsylvania Supreme Court decision, Tincher v. Omega Flex, Inc., restructured the analysis for products liability for defective design in Pennsylvania and laid the framework for understanding its future. Tincher overruled Azzarello and realigned Pennsylvania law with the law of many other jurisdictions. It primarily accomplished this by acknowledging that negligence-based principles are necessarily woven into the strict liability framework. The Tincher court expressly refused to adopt the Restatement (Third) of Torts, thereby retaining Pennsylvania as a Restatement (Second) of Torts jurisdiction, and held that plaintiffs should have the opportunity to argue defective design claims under alternative theories of liability. This Note will examine the impact of Tincher on evidentiary issues in Pennsylvania defective design products liability litigation, specifically the admission of industry standards and practices evidence to prove or defend against strict liability claims. This Note will argue that despite Tincher’s reintegration of negligence principles into the strict liability framework, industry standards and practices should remain excluded in strict liability analysis.

17. See Azzarello, 391 A.2d at 1026–27.
19. See Buckley, supra note 18, at 254–55.
21. See Tincher, 104 A.3d at 432–33; Buckley, supra note 18, at 256–60.
22. Tincher, 104 A.3d at 376.
23. See, e.g., Barker v. Lull Eng’g Co., 573 P.2d 443, 455–56 (Cal. 1978) (holding that plaintiff can prove a product is defective using either the consumer expectations test or the risk utility test); Koske v. Townsend Eng’g Co., 551 N.E.2d 437, 440–41 (Ind. 1990) (acknowledging that negligence-based principles like foreseeability and expected use are necessary considerations in a products liability analysis).
24. See Tincher, 104 A.3d at 376–78.
25. Id. at 395–99. See Part III.C for a discussion of why Tincher refused to adopt the Restatement (Third) of Torts.
26. Id. at 406 (holding that plaintiffs in Pennsylvania must prove that a product was defective using the consumer expectations test, the risk-utility test, or a combination of both tests); see also Buckley, supra note 18, at 259 (“Plaintiffs may now show that a product is in a defective condition by proving: (1) the danger is unknowable and unacceptable to the average or ordinary consumer (i.e., consumer expectations test), or (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden costs of taking precautions (i.e., risk-utility test).”) (footnotes omitted).
liability cases under *Lewis v. Coffing Hoist Division, Duff-Norton Co.* because their tendency to divert the jury’s attention to the reasonableness of a product’s design outweighs their evidentiary value. Moreover, allowing such evidence would eliminate any remaining distinction between negligence and strict liability and undermine the protective purpose of strict liability.

II. FACTS AND PROCEDURAL HISTORY

On June 20, 2007, a fire broke out at the home of Terrence and Judith Tincher. Although no one was injured, the Tinchers faced substantial damage to their home and property. Shortly after the incident, investigators concluded that the fire was caused by a lightning strike adjacent to the home; it punctured the corrugated stainless steel tubing (CSST) used to supply natural gas to their fireplace. Omega Flex manufactured and sold this CSST. Because the insurance company only compensated the Tinchers up to their policy limits, the Tinchers sued Omega Flex for additional losses. In a January 2008 lawsuit, they claimed strict liability, negligence, and breach of warranty.

After the court denied all dispositive motions, Omega Flex proposed a motion *in limine*, jury instructions, and findings of fact consistent with sections 1 and 2 of the Third Restatement. Under the Third Restatement, a product “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... and the omission of the alternative design renders the product not reasonably safe.”

Arguing instead under the Second Restatement, during trial, the Tinchers offered expert testimony that the CSST was defectively designed because it could not withstand a lightning strike; it was substantially thinner than the standard black iron piping used at the time. The Tinchers argued that unlike under the Third Restatement, under Pennsylvania’s interpretation of the Second Restatement, a product is subject to liability when that product “leaves the suppliers’ control lacking any element necessary to make it safe for its intended use.” In response, Omega Flex “expressly assumed that the trial court had denied its request to apply the Third Restatement” and offered expert testimony that the benefits of CSST arose from its greater flexibility (relative to

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27. 528 A.2d 590 (Pa. 1987).
29. *Id.* at 336.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
37. *Id.* at 340–41.
38. *Id.* at 338.
that of black iron piping). These benefits included “resistance to corrosion, structural shifts, and mechanical ruptures; ease of installation, relocation, and retrofitting; and fewer joints accompanied by decreased susceptibility to natural gas leaks at any required joints.”

After Omega Flex rested, the court denied the Tinchers’ motion for a directed verdict and, per Pennsylvania’s interpretation of the Second Restatement, instructed the jury, in part, as follows:

A product is defective when it is not safe for its intended purpose. That is, it leaves the suppliers’ control lacking any element necessary to make it safe for its intended use. The inquiry is whether or not there is a defect, not whether the defendant[s] conduct was negligent. In strict liability there is no consideration of negligence. It is simply, was the product defective or wasn’t it defective.

In October 2012, the jury awarded the Tinchers nearly $1,000,000.00.

Omega Flex immediately filed a motion for a new trial “premised upon trial court errors in denying its motion in limine and in failing to instruct the jury on the law as articulated in the Third Restatement.” Additionally, Omega Flex filed for a motion for “judgment notwithstanding the verdict on the theory that the evidence introduced at trial was insufficient to prove a claim of strict liability under Third Restatement principles.”

Omega Flex emphasized that the trial court’s Azzarello-based instructions on the Second Restatement confused the jury: first, by mentioning, without explaining, the relevance of evidence of a proposed alternative design, i.e., the black pipe system; second, by failing to guide the jury on the burden of proof relating to the alternative design; and, third, by failing to explain how the jury should consider the role of lightning in assessing liability.

The Superior Court of Pennsylvania upheld the verdict, finding that the trial court did not err by refusing to adopt the Third Restatement. The court further held “that the Tinchers’ claims implicated notions of strict liability, and the Tinchers had carried their burden of proof under the Second Restatement and Azzarello” because “lightning is a naturally occurring phenomenon outside the control of the Tinchers, who were using the product for its intended use.” The Supreme Court of Pennsylvania granted appeal on the limited question of “[w]hether this Court should replace the strict liability analysis of Section 402A of the Second Restatement with the analysis of the Third Restatement.”

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39. Id.
40. Id.
42. Id. at 340–41.
43. Id. at 341.
44. Id.
45. Id. at 341–42.
46. Id. at 343.
47. Id.
48. Id. (quoting Order Granting the Appeal, Tincher v. Omega Flex, Inc., No. 842 MAL 2012)
other words, it would assess whether a plaintiff must show that “the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design.”

III. PRIOR LAW

Part III.A of this Note provides a brief overview of the early history of products liability. Part III.B summarizes the development of strict products liability in the United States, specifically focusing on its development in Pennsylvania. Finally, Part III.C analyzes seminal cases that illustrate Pennsylvania courts’ attempts to strike a balance between strict liability and negligence for products liability. Specifically, this Part includes an overview of the risk-utility test, the consumer expectations test, and Pennsylvania courts’ preclusion of industry standards and practices evidence.

A. Early History of Products Liability Law

Scholars have suggested that products liability law has ancient roots in the Roman and Babylonian Empires. For instance, “guilds of the various crafts developed an elaborate system of localized criminal regulation of product quality by statutes that often developed into ordinances of the town.” Interestingly, the primary goal of the statutes was not to prevent injury to the public, but rather “to protect the public . . . from being cheated.” However, English law adopted the concept of caveat emptor, “let the buyer beware,” thereby abandoning “any notion of an implied warranty of quality[ ] lingering from the late Roman and ecclesiastical law.” In the nineteenth century, English courts developed the implied warranty of quality doctrine, which replaced the caveat emptor rule. The notion of implied warranty of quality is sometimes referred to as caveat venditor. But because claims brought under the implied warranty of quality were rooted in contract, recovery under that theory required privity between parties. Manufacturers responded to the looming possibility of

(Pa. Mar. 26, 2013)).

49. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(b) (AM. LAW INST. 1998).
51. Id. at 957–58.
52. Id.
53. Id. at 958–59 (internal quotation marks omitted) (“For the next two centuries, except for cases of fraud and breach of express warranty, the doctrine of caveat emptor ruled supreme.”).
54. Id. at 959 (defining implied warranty of quality as “the seller impliedly warrants that its products contain no hidden defects”).
55. Id. at 961–62.
56. William L. Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1126 (1960) (finding that although originally intended to lie in tort, the implied warranty of quality “came to lie mainly in contract” (quoting Note, Necessity for Privity of Contract in Warranties by Representation, 42 HARV. L. REV. 414, 415 (1929))).
57. See Owen, The Evolution, supra note 50, at 960–63 (“Unlike the development of the implied warranty of quality, which served to broaden contractual protection for buyers of defective goods, the
liability under the implied warranty of quality by creating a system of one-off sales that forced consumers to contract with a retailer, instead of a manufacturer, thereby eliminating privity and allowing the manufacturer to escape liability. 58 Thus, the plaintiffs faced substantial hurdles in bringing implied warranty of quality claims. 59 While caveat emptor perpetuated into the twentieth century, “enough American states had adopted a common law implied warranty of quality that the doctrine was promulgated as a uniform statute in the Uniform Sales Act of 1906.” 60

While some plaintiffs sought relief using negligence-based claims rather than implied warranty of quality claims, they faced similar hurdles, including the privity problem. 61 Many courts refused to extend both negligence-based and contract-based liability beyond parties in privity as they believed that exposing manufacturers to such liability—beyond the immediate purchaser and supplier—would be overly broad and would stunt the growth of the burgeoning American manufacturing market. 62 However, in the 1916 landmark case, MacPherson v. Buick Motor Co., 63 Justice Benjamin Cardozo “rejected the notion of privity in cases where negligently made products caused personal injury.” 64 In MacPherson, Justice Cardozo stated: “If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger,” and the manufacturer is subject to liability where such danger was foreseeable. 65

privity of contract rule went the other direction by restricting tort law’s protection of persons injured by defective products.”); see also Prosser, supra note 56, at 1100 (“What happened in the next century was enough to make the learned jurist turn in his grave. The courts began by the usual process of developing exceptions to the ‘general rule’ of nonliability to persons not in privity.”).

58. See Owen, The Evolution, supra note 50, at 962–63 (“As courts began imposing implied warranties of quality on manufacturers in the latter part of the nineteenth century, manufacturers increasingly were handing over the retail function to third-party dealers . . . . Thus, manufacturers sued in warranty by consumers of defective products in the late 1800s and early 1900s had available the ready-made defense of no privity of contract . . . .”). Contra MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051 (N.Y. 1916) (rejecting the privity requirement for products liability claims, and holding that “the defendant was not absolved from a duty of inspection because it bought the wheels from a reputable manufacturer”).


60. Owen, The Evolution, supra note 50, at 961–62, 962 n.28 (noting that the Uniform Sales Act of 1906 was the “predecessor to Article 2 of the Uniform Commercial Code”).

61. See id. at 962; see also Lebourdais v. Vitrified Wheel Co., 80 N.E. 482, 482–83 (Mass. 1907) (“If such an extended liability attached where no privity of contract exists it would include all persons however remote who had been damaged either in person or property by his carelessness, and manufacturers as a class would be exposed to such far-reaching consequences as to seriously embarrass the general prosecution of mercantile business.”); Curtain v. Somerset, 21 A. 244, 245 (Pa. 1891) (“It is safer and wiser to confine such liabilities to the parties immediately concerned.”).


63. 111 N.E. 1050 (N.Y. 1916).

64. OSWALD, supra note 62, at 366.

65. MacPherson, 111 N.E. at 1053.
B. The Development of Strict Products Liability

Although MacPherson’s application of negligence-based products liability in the absence of privity foreshadowed future developments in strict products liability law, the modern concept of strict products liability was not officially presented until Justice Traynor’s California Supreme Court concurrence in Escola v. Coca Cola Bottling Co. In Escola, a retail sales associate suffered an injury after a bottle of Coca-Cola exploded in her hand. Despite the defendant’s argument that there was an absence of privity between the sales associate and the manufacturer, Justice Traynor stated that “a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.”

Seemingly building on Justice Traynor’s concurrence in Escola, the Henningsen v. Bloomfield Motors, Inc. court shifted warranty actions from contract law to tort law. In Henningsen, the New Jersey Supreme Court allowed a third party to sue an automobile manufacturer for injuries sustained from a defective automobile despite the absence of privity between the manufacturer and the plaintiff and despite the disclaimer of warranties in the purchase order. The Henningsen court reasoned that the concept of the implied warranty of quality was created to protect the ordinary consumer. Picking up on Justice Traynor’s argument in Escola, the court allowed recovery because of “the consumer’s relative lack of knowledge and control of product safety factors, the pressure of modern advertising and marketing techniques, and the ‘gross inequality of bargaining position occupied by the consumer in the automobile industry.’” Therefore, in the absence of adequate inspection opportunity, even without privity, liability was warranted.

Then, in 1963, Justice Traynor’s Escola analysis was endorsed by a majority

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66. See infra Part III.C for a discussion of modern strict liability.
67. 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).
68. Escola, 150 P.2d at 438 (majority opinion).
69. Id. at 440 (Traynor, J., concurring).
70. 161 A.2d 69 (N.J. 1960).
71. See Henningsen, 161 A.2d at 80–81; see also Oswald, supra note 62, at 359–60 (“The 1960 decision of the New Jersey Supreme Court in Henningsen v. Bloomfield Motors, Inc., radically changed the law regarding privity in warranty actions.”).
72. See Henningsen, 161 A.2d at 74, 84 (holding that when a manufacturer produces and promotes an automobile, it is accompanied by “an implied warranty that it is reasonably suitable for use” and that “agency between the manufacturer and the dealer . . . is immaterial.”); Owen, The Evolution, supra note 50, at 969–71 (explaining that in Henningson, defendants alleged on appeal that claims “should have been dismissed” for lack of privity and because the sales contract contained a “disclaimer of implied warranties and limitation of remedies”).
73. Henningsen, 161 A.2d at 78.
74. Kysar, supra note 4, at 1710 (quoting Henningsen, 161 A.2d at 87).
75. See Henningsen, 161 A.2d at 78 (“Warranties developed in the law in the interest of and to protect the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose.”).
of the California Supreme Court in Greenman v. Yuba Power Products Inc., which signaled the shift of products liability entirely out of contract and into tort. In Greenman, the plaintiff was injured by a power tool that his wife had purchased as a gift. Writing for the majority, Justice Traynor discarded the breach of warranty requirement previously needed for a strict products liability claim and held that “[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.” Although Greenman officially ushered products liability law into the realm of torts, the Greenman court did not identify how to differentiate this strict liability analysis from a negligence analysis.

C. Strict Products Liability Law in Pennsylvania

In 1965, the American Law Institute published the Second Restatement, which reflected this shifting landscape of products liability law in the United States and attempted to distinguish strict products liability from negligence. Section 402A of the Second Restatement “officially promulgated the rule of strict products liability in tort,” providing that strict liability should apply if a product is “defective” or “unreasonably dangerous.”

In the late 1960s, building on the reasoning outlined in the Second Restatement and the recommendations of Justice Jones’s concurrence and dissent in Miller v. Preitz, Pennsylvania began to apply the Second Restatement to products liability cases. In 1966, the Pennsylvania Supreme

76. 377 P.2d 897 (Cal. 1963).
77. See Greenman, 377 P.2d at 900–01 (“A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”); Owen, The Evolution, supra note 50, at 967 (explaining that Greenman “declared that manufacturers of defective products are strictly liable in tort to persons injured by such products, irrespective of any contract limitations that might inhere in the law of warranty”).
79. Id. at 900.
81. Id. at 967; see also RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965) (“(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.”).
82. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. h; see also OSWALD, supra note 62, at 367–69.
83. 221 A.2d 320, 334–35 (Pa. 1966) (Jones, J., concurring and dissenting) (reasoning that if the court sought to retain the requirement of privity, the court should adopt the Second Restatement because the result would be the same).
84. See Owen, The Evolution, supra note 50, at 976–77; see also, e.g., Jarnot v. Ford Motor Co., 156 A.2d 568, 572 (Pa. Super. Ct. 1959) (“A person, who after the purchase of a thing, has been
Court formally adopted the Second Restatement as the law in Pennsylvania in Webb v. Zern. In Webb, the plaintiff purchased a full beer keg from the defendant beer distributor. The same day, after it was tapped, the keg exploded and injured the plaintiff. After adopting section 402A of the Second Restatement as the law in Pennsylvania, the Webb court permitted the plaintiff to amend his complaint.

1. The Consumer Expectations Test, the Risk-Utility Test, and the Second Restatement

Under the newly adopted Second Restatement, courts had to instruct juries how to determine whether a product was “in a defective condition unreasonably dangerous.” Whereas the Pennsylvania Supreme Court declared that the Second Restatement was intended only as an outline meant to guide courts and lawyers, other jurisdictions looked to comments i and g of section 402A for guidance in drafting jury instructions. Comment i to section 402A of the Second Restatement outlines what is now called the consumer expectations test. In relevant part, comment i states: “The article sold must be dangerous to damaged because of its unfitness for the intended purpose may bring an action in assumpsit against the manufacturer based on a breach of implied warranty of fitness; and proof of a contractual relationship or privity between the manufacturer and the purchaser is not necessary to impose liability for the damage.”

86. Webb, 220 A.2d at 854.
87. Id.
88. Id. at 854–55.
89. See RESTATEMENT (SECOND) OF TORTS § 402A(1) (AM. LAW INST. 1965); Thomas E. Riley et al., Recent Developments in Products Liability, 51 TORT TRIAL & INS. PRAC. L.J. 601, 602–03 (2016).
90. See, e.g., Azzarello v. Black Bros. Co., 391 A.2d 1020, 1026 (Pa. 1978) (“Thus the mere fact that we have approved Section 402A, and even if we agree that the phrase ‘unreasonably dangerous’ serves a useful purpose in predicting liability in this area, it does not follow that this language should be used in framing the issues for the jury’s consideration.”), overruled by Tincher v. Omega Flex, Inc., 104 A.3d 328 (Pa. 2014); Coyle ex rel. Coyle v. Richardson-Merrell, Inc., 584 A.2d 1383, 1385 (Pa. 1991) (“Even where this Court has ‘adopted’ a section of the Restatement as the law of Pennsylvania, the language is not to be considered controlling in the manner of a statute.”).
91. See, e.g., Koske v. Townsend Eng’g Co., 551 N.E.2d 437, 440–41 (Ind. 1990) (“The intended thrust of Bemis was to emphasize that § 402A liability should not be imposed for dangers so obvious that manufacturers could reasonably expect anticipated users to perceive and act to avoid injury. This is an entirely proper consideration, as reflected in comments g and i to § 402A.”); Lester ex rel. Lester v. Magic Chef, Inc., 641 P.2d 353, 361 (Kan. 1982) (“Having determined that the instruction using the term ‘unreasonably dangerous’ and defining it in the terms of the Restatement § 402A, Comment i, was proper, the judgment is affirmed.”); Phipps v. Gen. Motors Corp., 363 A.2d 955, 959 (Md. 1976) (“For a seller to be liable under § 402A, the product must be both in a ‘defective condition’ and ‘unreasonably dangerous’ at the time that it is placed on the market by the seller. Both of these conditions are explained in the official comments in terms of consumer expectations.”); Ellis v. Chicago Bridge & Iron Co., 545 A.2d 906, 912 (Pa. Super. Ct. 1988) (reciting comment g of the Second Restatement, and highlighting the consumer’s “reasonable expectation of buying a product that is reasonably safe”).
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.”93 Comment g adds that the product, “at the time it leaves the seller’s hands, [must be] in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.”94 Interestingly, comment i differentiates between “unreasonably dangerous” products and common products that involve a certain degree of risk.95 For example, “[g]ood whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous.”96

Some courts began to find that liability was inappropriate under the consumer expectations test where the products served some crucial function in society, despite that they were inherently unsafe or dangerous.97 Therefore, these courts adopted a second test to analyze the defectiveness of a product—the risk-utility test. The risk-utility test asks the fact finder to balance “the utility of the product against the seriousness and likelihood of injury and the availability of precautions that, although not foolproof, might prevent an injury.”98 In essence, the risk-utility test asks the fact finder to weigh the product’s social costs against its benefits.99 In a law review article, John Wade presented a number of risk-utility factors to consider, factors that the Pennsylvania Superior Court adopted:

1. The usefulness and desirability of the product—its utility to the user and to the public as a whole.
2. The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
3. The availability of a substitute product which would meet the same need and not be as unsafe.
4. The manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
5. The user’s ability to avoid danger by the exercise of care in the use of the product.
6. The user’s anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
7. The feasibility, on the part of the manufacturer, of spreading the...
loss of setting the price of the product or carrying liability insurance.\textsuperscript{100}

Over time, some jurisdictions adopted a “composite standard,” which allowed plaintiffs to alternatively rely on “either standard, or both.”\textsuperscript{101} Barker v. Lull Engineering Co.,\textsuperscript{102} a California case, is illustrative: the plaintiff, an operator of a high-lift loader, brought strict liability defective design claims against the manufacturer of the loader after it tipped over and caused falling lumber to strike the plaintiff.\textsuperscript{103} Finding that “the principal purposes behind the strict product liability doctrine is to relieve an injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action,”\textsuperscript{104} the Barker court concluded that a plaintiff could use either the consumer expectations test or the risk-utility test to prove that a product was defective.\textsuperscript{105} Moreover, Barker held that “once the plaintiff makes a prima facie showing that the injury was proximately caused by the product’s design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective.”\textsuperscript{106}

2. Development of the “Any Element Necessary Test” under Azzarello

After the Pennsylvania Supreme Court formally adopted the Second Restatement, it was still unclear how Pennsylvania courts were to apply the newly developing concept of strict products liability in jury instructions.\textsuperscript{107} This confusion led to a string of Pennsylvania tort cases that tried to decipher the seemingly enigmatic difference between negligence and strict products liability.\textsuperscript{108} In Bialek v. Pittsburgh Brewing Co.,\textsuperscript{109} the Pennsylvania Supreme Court held that a plaintiff “is not required to prove that the defendants were negligent, that the defendants can be held liable even if they exercised all possible care, and that no consideration should be given to negligence.”\textsuperscript{110} In

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\item \textsuperscript{101} Riley et al., supra note 89, at 604; see also Barker v. Lull Eng’g Co., 573 P.2d 443, 446–47 (Cal. 1978) (“As we explain in more detail below, we have concluded from this review that a product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors discussed below, the benefits of the challenged design do not outweigh the risk of danger inherent in such design. . . This dual standard for design defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety, or that, on balance, are not as safely designed as they should be.”).
\item \textsuperscript{102} 573 P.2d 443 (Cal. 1978).
\item \textsuperscript{103} Barker, 573 P.2d at 445–46.
\item \textsuperscript{104} Id. at 455.
\item \textsuperscript{105} Id. at 457–58.
\item \textsuperscript{106} Id. at 455.
\item \textsuperscript{107} See Buckley, supra note 18, at 261.
\item \textsuperscript{108} See id.
\item \textsuperscript{109} 242 A.2d 231 (Pa. 1968).
\item \textsuperscript{110} Bialek, 242 A.2d at 235.
\end{itemize}
The court reversed a motion for judgment on the record for the defendants, reasoning that although no defect was proven, the occurrence of five similar malfunctions and the evidence of the malfunction itself at the time of the accident sufficiently proved liability. Finally, in Berkebile v. Brantly Helicopter Corp., the court held that the negligence standard has no place in a strict products liability case. Berkebile not only clarified that a “defective condition” is not limited to defects in design or manufacture but also eliminated the “reasonable man standard” from the products liability analysis and held that “[t]he seller must provide with the product every element necessary to make it safe for use.”

In 1978, the Pennsylvanin Supreme Court granted review in Azzarello to “discuss the concept of ‘unreasonable danger’ and to define its role in products liability generally.” In Azzarello, the plaintiff was injured by an industrial coating machine and pursued strict liability claims against the manufacturer, Black Brothers Co. Black Brothers Co. added Azzarello’s employer as an additional defendant, arguing that the employer’s negligence caused the injuries. Because the case contained both a strict liability claim and a negligence claim, the trial court had faced the difficulty of delineating clear jury instructions for each claim. It had used the phrase “unreasonably dangerous” from the Second Restatement in its strict liability instruction. The jury had found in favor of Black Brothers Co., assigning all liability to Azzarello’s employer under a negligence theory. The court then granted Azzarello’s motion for a new trial, and Black Brothers Co. appealed. The Pennsylvania Supreme Court then reviewed whether the words “unreasonable dangerous” belonged in the jury instruction. To answer this question, the court discussed “the more fundamental question whether the determination as to the risk of loss is a decision to be made by the finder of fact or by the court.”

In an effort to consolidate and clarify the law in Pennsylvania, the Azzarello court found that “unreasonably dangerous” and “defective” were used interchangeably and have no independent significance within the context of the

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111. 319 A.2d 914 (Pa. 1974).
114. Berkebile, 337 A.2d at 900.
115. Id. at 901–02.
118. Id.
119. Id.
120. Id.
121. Id.
122. Id. at 1022–23.
123. Id. at 1025.
124. Id.
Second Restatement.125 However, the court held that the phrase “unreasonably
dangerous” was not appropriate in the strict liability jury instruction because it implied that the plaintiff must prove elements of negligence within a strict liability claim.126 Because of this potential for confusion, the Azzarello court determined that a judge should decide “as a matter of law, whether the product
should be subject to strict liability.”127 Thus, the court would “perform a risk-
utility analysis . . . to determine whether a product was ‘unreasonably dangerous’
under Section 402A of the Restatement (Second) of Torts.”128 If the court found
that the product was “unreasonably dangerous,” then it would remain a question
for the jury “whether the product was in a defective condition.”129 Furthermore,
the Azzarello court insisted that a manufacturer acts as a “guarantor” of a
“product’s safety.”130 In essence, even if a manufacturer exerts all possible due
care, the existence of a defect may warrant the application of strict liability.131
Borrowing verbiage from Berkebile, the Azzarello court held that “the jury may
find a defect where the product left the supplier’s control lacking any element
necessary to make it safe for its intended use or possessing any feature that
renders it unsafe for the intended use.”132

3. The Preclusion of Industry Practices, Foreseeability, and the Third
Restatement

Questions remained regarding the admissibility of evidence in Pennsylvania
products liability cases, even despite Azzarello’s delineation of “the rigorous
negligence-strict liability dichotomy.”133 In Lewis, the court excluded expert
testimony regarding industry standards and practices as a defense to defective
design allegations, concluding that the accompanying inference of a due care
standard was an inherently negligence-based analysis that could not be

125. See id. (“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.”); Wertheimer, Azzarello, supra note 116, at 421. (“In
other words, under Azzarello a product is defective when it is ‘unreasonably dangerous,’
and ‘unreasonably dangerous’ when it is defective.”).

126. Azzarello, 391 A.2d at 1026; see also Wertheimer, Azzarello, supra note 116, at 422 (“The
main problem is how to charge the jury in a strict liability case, given the need to protect the standard
from the pollution of negligence concepts. The underlying, tacit difficulty lies in developing acceptable
strict products liability jury instructions while at the same time ensuring that these instructions will
only be applied in cases in which strict liability is appropriate.”).

127. See Wertheimer, Azzarello, supra note 116, at 422 (“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.” (quoting Azzarello, 391 A.2d at 1026)).

128. See Riley et al., supra note 89, at 602.

129. Id.

130. Azzarello, 391 A.2d at 1026 (quoting Salvador v. Atlanta Steel Boiler Co., 319 A.2d 903,
907 (Pa. 1974)).

131. See Buckley, supra note 18, at 253–54.

132. Azzarello, 391 A.2d at 1023, 1027 (emphasis added).

133. See Buckley, supra note 18, at 255–56.
entertained in a strict liability defense. Relying on the Third Circuit’s interpretation of Pennsylvania law in Holloway v. J. B. Systems, Ltd., the Lewis court held that despite general consensus among jurisdictions that “due care” is not part of a strict liability analysis for defective design, “the courts part company when it comes to the relevance, and hence admissibility, of evidence showing industry standards, customs and practices concerning the design of products.”

Drawing on persuasive authority, the Lewis court built upon the Washington Supreme Court case Lenhardt v. Ford Motor Co.: In Lenhardt the Court concluded that the question of whether or not the defendant has complied with industry standards improperly focusses [sic.] on the quality of the defendant’s conduct in making its design choice, and not on the attributes of the product itself. Therefore, in the view of the Lenhardt Court, such evidence should be excluded because it tends to mislead the jury’s attention from their proper inquiry. The Lenhardt Court also observed that if a manufacturer’s product has design attributes which make it unsafe for its intended use, there is no relevance in the fact that such a design is widespread in the industry.

The preclusion of industry standards evidence in Lewis was later extended by the Pennsylvania Superior Court to include the preclusion of Occupational Safety and Health Administration (OSHA) safety standards, American Nation Standards Institute (ANSI) safety standards, and Federal Motor Vehicle Safety Standards (FMVSS). Notably, in Gaudio v. Ford Motor Co., the court excluded the use of industry standards at trial but identified exceptions: “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

135. 609 F.2d 1069, 1073 (3d Cir. 1979) (“It was inappropriate to admit testimony regarding trade custom, because the jury might have inferred that if virtually no other tank manufacturer in 1969 included a warning about pressurization it could hold EGW not liable. This use of trade custom as evidence of the reasonableness of EGW’s inaction would be permissible if the case were tried under negligence principles, but is inconsistent with the doctrine of strict liability.”).
136. Id. at 593–94.
137. 683 P.2d 1097 (Wash. 1984).
138. Lewis, 528 A.2d at 594 (emphasis added).
139. See, e.g., Sheehan v. Cincinnati Shaper Co., 555 A.2d 1352, 1355 (Pa. Super. Ct. 1989) (“We conclude that the OSHA regulations proffered would introduce into a strict liability action the reasonableness of Shaper’s failure to provide the new safety device for this machine, an issue irrelevant to whether liability attaches.”).
causation.”\textsuperscript{143} That is, industry standards can only be introduced to show causation, not breach. However, the \textit{Gaudio} court clarified that evidence of negligence by the plaintiff is not admissible “unless it is shown that the accident was \textit{solely} the result of the user’s conduct and not related in any [way] with the alleged defect in the product.”\textsuperscript{144} Relying on a Pennsylvania Superior Court case, \textit{Leaphart v. Whiting Corp.},\textsuperscript{145} and an Eastern District of Pennsylvania court case, \textit{Markovich v. Bell Helicopter Textron, Inc.},\textsuperscript{146} the \textit{Gaudio} court limited this exception in two ways: (1) opening arguments “should be reasonably related in scope to the substance of the offending testimony,” and (2) the evidence to be introduced must be “limited to testimony necessary to respond to the evidence presented.”\textsuperscript{147}

Likewise, in \textit{Kimco Development Corp. v. Michael D’s Carpet Outlets},\textsuperscript{148} the court rejected comparative negligence as a defense to a strict products liability claim.\textsuperscript{149} In 1998, shortly after \textit{Kimco}, the American Law Institute presented the Third Restatement, which included a categorical differentiation between strict liability and negligence.\textsuperscript{150} In relevant part, the Third Restatement states:

\begin{quote}
A product . . . 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 . . . .\textsuperscript{151}
\end{quote}

Although the Pennsylvania Supreme Court did not adopt the Third Restatement, a number of cases have referenced it.\textsuperscript{152}

\begin{flushright}
\textsuperscript{143} \textit{Gaudio}, 976 A.2d at 540–41.  \\
\textsuperscript{144} \textit{Id.} at 541 (quoting \textit{Charlton v. Toyota Indus. Equip.}, 714 A.2d 1043, 1047 (Pa. Super. Ct. 1998)).  \\
\textsuperscript{147} \textit{Gaudio}, 976 A.2d at 541.  \\
\textsuperscript{148} 637 A.2d 603 (Pa. 1993).  \\
\textsuperscript{149} \textit{Kimco}, 637 A.2d at 607.  \\
\textsuperscript{150} \textit{See Restatement (Third) of Torts: Prods. Liab. § 2 (Am. Law Inst. 1998)}; Owen, \textit{The Evolution, supra} note 50, at 986–87 (“In short, liability in section 2 of the \textit{Third Restatement} truly is strict for manufacturing defects but is based in negligence principles (but not explicitly in negligence doctrine) for design and warning defects.”).  \\
\textsuperscript{151} \textit{Restatement (Third) of Torts: Prods. Liab. § 2(b).}  \\
\textsuperscript{152} \textit{See, e.g., Phillips v. Cricket Lighters, 841 A.2d 1000, 1018–21 (Pa. 2003) (plurality opinion) (Saylor, J., concurring)} (“I believe, however, that the above summation of Pennsylvania law demonstrates a compelling need for consideration of reasoned alternatives, such as are reflected in the position of the Third Restatement.”); \textit{Pa. Dep’t of Gen. Servs. v. U.S. Mineral Prods. Co.}, 898 A.2d 590, 616 n.2 (Pa. 2006) [hereinafter \textit{Mineral Prods. Co.}] (Newman, J., concurring and dissenting) (“I recognize the apparent and possible appeal in the more progressive approach adopted by the Third Restatement, in particular, in cases such as this involving a known dangerous chemical where a risk-utility test would be a just measure of a manufacturer’s liability for the product. However, I will proceed to analyze the present matter pursuant to our existing caselaw and the Second Restatement of Torts.”).
In *Phillips v. Cricket Lighters*, the court struck down the use of foreseeability to prove strict liability. In *Phillips*, the plaintiff pursued a strict liability claim against a cigarette lighter manufacturer for its failure to include a safety mechanism to prevent the use of the lighter by a child. The plaintiff argued that liability should attach because it was “reasonably foreseeable that a small child may play with a butane lighter” and that harm would result. In a plurality opinion, the court rejected this argument and held that negligence principles, including foreseeability, have no place in a strict liability analysis.

Justice Saylor, joined by Justice Castille, concurred but wrote separately to discuss three points: (1) “Central conceptions borrowed from negligence theory are embedded in strict products liability doctrine in Pennsylvania,” (2) “[s]everal ambiguities and inconsistencies in the prevailing Pennsylvania strict products liability jurisprudence affect proper resolution of the question framed in this appeal,” and (3) “[t]he Restatement’s considered approach illuminates the most viable route to providing essential clarification and remediation.”

In *Pennsylvania Department of General Services v. United States Mineral Products Co.*, the Pennsylvania Supreme Court granted a new trial to a manufacturer of building materials containing dangerous chemicals because the trial court failed to instruct the jury that, consistent with Pennsylvania law, “a manufacturer can be deemed liable only for harm that occurs in connection with a product’s intended use by 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.” In *Mineral Products Co.*, the Pennsylvania Department of General Services, the Pennsylvania Department of Transportation, the Pennsylvania Public Utility Commission, the Pennsylvania Emergency Management Agency, and the Pennsylvania Department of State brought claims of strict liability and negligence against United States Mineral Products Co. for property damage and contamination of a government building.

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153. 841 A.2d 1000 (Pa. 2003) (plurality opinion).
154. *Phillips*, 841 A.2d at 1006 (“Strict liability affords no latitude for the utilization of foreseeability concepts such as those proposed by Appellee.”). But see id. at 1012 (Saylor, J., concurring) (“The lead opinion acknowledges that under prevailing authority of this Court, foreseeability, a conception firmly rooted in negligence theory, is assessed in strict liability cases involving certain types of product alterations.”).
155. Id. at 1005-07 (plurality opinion).
156. Id. at 1006.
157. See id. at 1011–12.
158. Id. at 1007 (“Recognition that strict liability is not a type of mongrel derivative of negligence is also consistent with the historical development of this cause of action. Strict liability was intended to be a cause of action separate and distinct from negligence, designed to fill a perceived gap in our tort law.”) (citing *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1023–24 (Pa. 1978)).
159. Id. at 1012 (Saylor, J., concurring).
160. Id. at 1016.
161. Id. at 1019.
162. 898 A.2d 590 (Pa. 2006).
by polychlorinated biphenyls (PCBs) contained in building materials.164 The plaintiffs discovered the PCBs after the building was partially destroyed in a fire.165 Despite noting the foreseeability that building materials may eventually encounter a fire,166 the court followed Phillips and rejected the negligence-based foreseeability doctrine “within the strict liability scheme as it presently exists in Pennsylvania.”167 In her concurrence and dissent, Justice Newman referenced the issues from Azzarello and Phillips raised in Justice Saylor’s concurrence in Phillips.168 Further, she acknowledged the “possible appeal” of the Third Restatement.169

In light of this support for adopting the Third Restatement in Phillips and Mineral Products, the Third Circuit applied the Third Restatement as the law in Pennsylvania, stating that if allowed the opportunity, the Pennsylvania Supreme Court would adopt the Third Restatement.170 In Berrier v. Simplicity Manufacturing, Inc.,171 the Third Circuit applied the duty of care outlined in the Third Restatement as Pennsylvania law, holding that plaintiff parents could recover for their child’s injuries from a defective lawnmower.172 Relying on Justice Saylor’s concurrence in Phillips and Justice Newman’s opinion in Mineral Products Co., the Berrier court agreed that the Third Restatement “eliminates much of the confusion that has resulted from attempting to quarantine negligence concepts and insulate them from strict liability claims.”173 Thus, the Third Circuit concluded that “there is substantial support on the Court to adopt the Third Restatement’s approach to product liability in an appropriate case.”174

Before Berrier, the Pennsylvania Supreme Court had granted appeal in

164. Id. at 593.
165. Id.
166. Id. at 601.
167. Id. at 600–04.
168. See id. at 615–16, 619 (Newman, J., concurring and dissenting) (“Thus, I find that, under current strict liability law, a colorable strict liability issue exists for the jury in a case such as this. Namely, when a product is used by its intended user (building owner) and for its intended use (in the construction and maintenance of a building), a question exists as to whether or not the product was lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use.” (quoting Azzarello v. Black Bros. Co., 391 A.2d 1020, 1027 (Pa. 1978))). See supra notes 159–61 and accompanying text for a discussion of Justice Saylor’s concurrence in Phillips.
169. See id. at 616 n.2 (“I recognize the apparent and possible appeal in the more progressive approach adopted by the Third Restatement, in particular, in cases such as this involving a known dangerous chemical where a risk-utility test would be a just measure of a manufacturer’s liability for the product. However, I will proceed to analyze the present matter pursuant to our existing caselaw and the Second Restatement of Torts.”).
170. See Berrier v. Simplicity Mfg., Inc., 563 F.3d 38, 68 (3d Cir. 2009) (“Because we have predicted that the Pennsylvania Supreme Court would adopt the Restatement (Third) of Torts, §§ 1 and 2, we hold that summary judgment should not have been granted to Simplicity on the Berriers’ claim of strict products liability.”).
171. 563 F.3d 38 (3d Cir. 2009).
172. Berrier, 563 F.3d at 41, 68.
173. Id. at 55, 57.
174. Id. at 57.
Bugosh v. I.U. North America, Inc.\textsuperscript{175} to decide whether section 2 of the Third Restatement should replace section 402A of the Second Restatement.\textsuperscript{176} However, sixteen months after granting the appeal,\textsuperscript{177} the court dismissed it “as having been improvidently granted.”\textsuperscript{178} In his dissent, Justice Saylor again advocated overruling Azzarello and adopting the Third Restatement.\textsuperscript{179} Despite the Third Circuit’s speculation in Berrier, in light of Bugosh, Azzarello and the Second Restatement remained the law in Pennsylvania.\textsuperscript{180}

IV. COURT’S ANALYSIS

In Tincher, the Pennsylvania Supreme Court “embarked on a new approach to strict products liability, overruling its decades-old decision in Azzarello v. Black Brothers Co.”\textsuperscript{181} In this monumental 2014 opinion, the Pennsylvania Supreme Court provided an in-depth analysis of the history of products liability law,\textsuperscript{182} the social policies it aims to protect,\textsuperscript{183} the progression of the common law throughout the mid-twentieth century,\textsuperscript{184} and the consequences of adopting the Second Restatement.\textsuperscript{185} After discussing the evolution of Pennsylvania law, the Tincher court overruled Azzarello\textsuperscript{186} and refused to adopt the Third Restatement, thereby retaining Pennsylvania as a Second Restatement jurisdiction.\textsuperscript{187} Finally, the Tincher majority concluded by articulating the framework for products liability law in Pennsylvania, allowing plaintiffs to plead products liability claims using either the consumer expectations test, the risk utility test, or both.\textsuperscript{188} Yet still, the court left a number of questions unanswered, specifically, how Pennsylvania courts should handle negligence-based evidence in strict liability cases.\textsuperscript{189}

A. Overruling Azzarello

After acknowledging the numerous opinions on restructuring products

\begin{itemize}
\item \textsuperscript{175} 942 A.2d 897 (Pa. 2008) (per curiam).
\item \textsuperscript{176} Id. at 897.
\item \textsuperscript{177} See id. (granting the appeal on February 27, 2008); Bugosh v. I.U. N. Am., Inc., 971 A.2d 1228, 1229 (Pa. 2009) (per curiam).
\item \textsuperscript{178} Bugosh, 971 A.2d at 1229.
\item \textsuperscript{179} Id. at 1244.
\item \textsuperscript{180} Arthur L. Bugay, Pennsylvania Products Liability at the Crossroads: Bugosh, Berrier and the Restatement (Third) of Torts, 81 Pa. B. Ass’n Q. 1, 33 (2010).
\item \textsuperscript{181} Riley et al., supra note 89, at 602.
\item \textsuperscript{182} See Tincher v. Omega Flex, Inc., 104 A.3d 328, 355–70 (Pa. 2014).
\item \textsuperscript{183} See id. at 394–99.
\item \textsuperscript{184} See id. at 355–70.
\item \textsuperscript{185} See id. at 358–70.
\item \textsuperscript{186} Id. at 410.
\item \textsuperscript{187} Id. at 399. See infra Part IV.C for a discussion of why the Tincher court retained Pennsylvania as a Second Restatement jurisdiction.
\item \textsuperscript{188} Tincher, 104 A.3d at 406–10.
\item \textsuperscript{189} See Buckley, supra note 18, at 261–64.
\end{itemize}
liability law after Azzarello. Tincher overruled Azzarello, stating that it failed “to reflect the realities of strict liability practice and to serve the interests of justice.” The court believed that applying Azzarello led to practical problems because its progeny went too far in stripping strict liability of its negligence origins, leading to “puzzling trial directives that the bench and bar understandably have had difficulty following in practice.” Moreover, the court stated that Azzarello was “dogmatic” in its interpretation of the Second Restatement. Therefore, the court commented that “[t]he rule derived by Azzarello premised upon this type of analysis is that negligence concepts and rhetoric—although addressed in the negative by the Restatement—somehow affected a plaintiff’s burden of proof in all strict liability cases, regardless of the pertinent facts.” The court stated that the Azzarello court’s incorrect “negligence-strict liability dichotomy may be explained by the Second Restatement’s explicit reference to negligence in the negative, i.e., that compensation under Section 402A does not require proof of due care.”

Additionally, the Tincher court criticized the Azzarello court’s treatment of the Second Restatement as a statute. The Tincher court explained that the American Law Institute is not a governing body with legal authority, and the Restatement does not constitute a statute to be interpreted. While the Azzarello court held that plaintiffs have the burden of proof in strict liability cases, the Tincher court asserted that “[t]he facts of Azzarello, when viewed with the appropriate judicial modesty, did not require such a broad pronouncement.” Moreover, the Tincher court criticized the Azzarello decision for not explaining “the leap in logic necessary to extrapolate that every lay jury would relate reasonableness and other negligence terminology, when offered in a strict liability charge, to a ‘heavier,’ negligence-based burden of proof.” As such, the holding in Azzarello “speaks volumes to the necessity of reading legal rules—especially broad rules—against their facts and the corollary that judicial pronouncements should employ due modesty.”

In addition, Tincher emphasized that the holding in Azzarello was

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191. Id. at 376.
192. See id.
193. Id.
194. Id. at 376–77.
195. Id.; see also RESTATEMENT (SECOND) OF TORTS § 402A cmts. i, g (AM. LAW INST. 1965) (explaining when a product is in a “defective condition” and “unreasonably dangerous,” respectively).
196. Tincher, 104 A.3d at 377.
197. See id.
198. Id.
199. Id.
200. Id. at 378.
supported by nonbinding cases from California (Cronin v. J.B.E. Olsen Corp., 201) and New Jersey (Glass v. Ford Motor Co., 202), rather than Pennsylvania authority. 203 Tincher rejected the reliance on Cronin because the facts were distinguishable and “the rationale of the decision was explained as significantly narrower by later California Supreme Court decision law.” 204 And Tincher rejected the reliance on Glass because the New Jersey Supreme Court subsequently clarified the law. 205 To make matters worse, the primary holding in Azzarello—the “any element necessary” test—was drawn from an out-of-context quote from Berkebile. 206

The Tincher court declared that Azzarello’s standard was “impracticable” for two reasons. 207 First, Azzarello improperly separated the issue of defectiveness from the issue of unreasonable danger. 208 Because of this, Tincher “returns to the finder of fact the question of whether a product is ‘unreasonably dangerous,’ a determination part and parcel of whether the product is, in fact, defective.” 209 Similarly, under Tincher, a defectiveness determination depends on “whether that product is ‘unreasonably dangerous,’” which requires an analysis of social policy. 210 Second, the Tincher court criticized Azzarello for overlooking “the practical reality . . . that trial courts simply do not necessarily have the expertise to conduct the social policy inquiry into the risks and utilities of a plethora of products and to decide, as a matter of law, whether a product is unreasonably dangerous.” The court rejected the Azzarello court’s discussion of “jury confusion,” because “[d]istinctions in theories of products liability are no more or less confusing than in other difficult areas of law.” 211

Although the Tincher court acknowledged Azzarello’s social policy considerations, its holding’s tremendous impact on later strict liability cases was

203. Id. at 377–78.
204. Id.
206. Tincher, 104 A.3d at 379. In Tincher, the court drew a comparison between Berkebile and Azzarello. Id. The Tincher court noted that Berkebile provided that the “seller must provide with the product every element necessary to make it safe for use,” while in Azzarello, the court provided that a “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.” Id. (first quoting Berkebile v. Brantley Helicopter Corp, 337 A.2d 893, 902 (Pa. 1975) (Jones, C.J., dissenting) (emphasis omitted); then quoting Azzarello v. Black Bros. Co., 391 A.2d 1020, 1027 n.12 (Pa. 1978)).
207. See id.
208. Id. at 380.
210. Tincher, 104 A.3d at 380.
211. Id. at 380.
overwhelming, specifically on those cases “whose merits were not examined to
determine whether such a bright-line rule was consistent with reason in light of
the considerations pertaining to the case.” 212 In light of these considerations,
Tincher overruled Azzarello, finding that it went against “the realities of strict
liability practice” and did not “serve the interests of justice.” 213

B. The Social Policy of Strict Liability in Pennsylvania and a Combined Test

The Tincher majority began its analysis of the current state of strict
products liability by affirmatively stating that strict liability for defective design
rests in tort principles. 214 Strict liability is presumptively available because “[n]o
product is expressly exempt.” 215 The court discussed the competing standards:
the consumer expectations standard, the risk-utility standard, and the composite
standard. 216 The first two reflect the opposing interests of sellers and
consumers. 217 To recover under a theory of strict products liability, the plaintiff
must “prove that the product is in a ‘defective condition’” by a preponderance of
the evidence. 218 The plaintiff can demonstrate this “by showing either that (1)
the danger is unknowable and unacceptable to the average or ordinary
consumer, or that (2) a reasonable person would conclude that the probability
and seriousness of harm caused by the product outweigh the burden or costs of
taking precautions.” 219

Aligning its analysis with the duty outlined in the Second Restatement, the
court specified that “a person or entity engaged in the business of selling a
product has a duty to make and/or market the product . . . free from ‘a defective
condition unreasonably dangerous to the consumer or [the consumer’s]
property.’” 220 After briefly touching on the requirement of duty, 221 the court
continued with an in-depth analysis of what constitutes a “defect,” 222 how a
product is determined to be “unreasonably dangerous,” 223 and ultimately, what
constitutes a breach of the duty. 224

A successful claim of strict liability may relate to “any product, provided
that the evidence is sufficient to prove a defect.” 225 However, the term “defect”
in this context is simply “an expression for the legal conclusion rather than a test

212. Id. at 380–81.
213. Id. at 376.
214. Id. at 355.
215. Id. at 381–82.
216. Id. at 387–91.
217. Id. at 387.
218. Id. at 335.
219. Id.
220. Id. at 383 (second alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 402A(1) (AM. LAW INST. 1965)).
221. See id. at 382–84.
222. See id. at 384–94.
223. See id. at 387–94.
224. See id. at 383–84.
225. Id. at 382.
Recognizing the availability of various tests to show that a product is defective, the court analyzed the “theoretical and practical limitations” of the consumer expectations test and the risk-utility test. First, the Tincher court pointed out that under the consumer expectations test, injuries sustained by a plaintiff from a danger that is “obvious or within the ordinary consumer’s contemplation would be exempt from strict liability.” Second, “a product whose danger is vague or outside the ordinary consumer’s contemplation runs the risk of being subjected to arbitrary application of the strict liability doctrine.” Similarly, the court identified the shortcomings of the risk-utility test—for example, though this test can produce efficiency, “in some respects, it conflicts with bedrock moral intuitions regarding justice in determining proper compensation for injury to persons or property in individual cases.”

Understanding that unfixable logical fallacies are inherent in each test, the court was presented with the following options: (1) “state the two standards in the alternative [where] a plaintiff’s injury is compensable whether either test is met;” (2) “incorporate the risk calculus into a test of consumer expectations or, vice versa, to incorporate consumer expectations into the risk-utility determination;” or (3) choose one test over the other. The Tincher court adopted the California “composite” test that allows the plaintiff to use either test because it “retains the best functioning features of each test, when applied in the appropriate factual context.”

C. Refusal to Adopt the Third Restatement

Understanding the limitations of both the risk-utility test and the consumer expectations test, the court retained the application of the Second Restatement in Pennsylvania for a number of reasons. First, the court rejected the Third Restatement’s requirement that plaintiffs present a feasible alternative design, because such a restriction “proscriptively limits the applicability of the cause of

226. Id. at 384 (quoting Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 182 (Mich. 1984)).
227. Id. at 388.
228. Id.
229. Id.
230. Id. at 390.
231. Id. (citing Soule v. Gen. Motors Corp., 882 P.2d 298, 308 (Cal. 1994); Vautour v. Body Masters Sports Indus., Inc., 784 A.2d 1178, 1182 (N.H. 2001)) (providing examples of cases that included a consumer expectations analysis as one element to consider within the risk-utility analysis).
232. See id. (“[T]wo standards have emerged, that purport to reflect the competing interests of consumers and sellers, upon which all American jurisdictions judge the adequacy of a product’s design: one measures ‘consumer expectations,’ and articulates the standard more from the perspective of the reasonable consumer; the second balances ‘risk’ and ‘utility,’ and articulates the standard more from the perspective of the reasonable seller. Other jurisdictions and the Third Restatement have combined the two standards.”).
233. Id. at 401-02 (citing Barker, 573 P.2d at 443).
234. Id. at 401.
235. Id. at 399.
action to certain products as to which that sort of evidence is available.” 236 This restriction would essentially create “categorical exemptions for some products,” such as those for which no alternative design is available. 237 Second, the court rejected Azzarello’s “broad pronouncement” and leap in logic 238 and was hesitant to articulate a broad, overarching rule “beyond the necessities of an individual case.” 239 Third, the court rejected the Third Restatement because “articulating common law principles in terms of extrapolations from evidence relevant in the typical case is problematic.” 240 Specifically, the court was hesitant to adopt bright-line rules because “they also risk elevating the lull of simplicity to doctrine.” 241 Lastly, the court refused to adopt the Third Restatement, given the “longterm deleterious effects” of Azzarello on strict products liability jurisprudence in Pennsylvania. 242

D. The Future of Products Liability Law for Defective Design

The Tincher court identified the difference between strict liability and negligence, noting that strict liability does not encompass “the more colloquial notion of ‘fault.’” 243 The court conceded that strict liability has evolved into a cause of action that has “retained . . . aspects of negligence and breach of warranty liability theories.” 244 Choosing a combined calculus to analyze products liability in Pennsylvania, the Tincher majority held that “the cause of action in strict products liability requires proof, in the alternative, either of the ordinary consumer’s expectations or of the risk-utility of a product.” 245 Tincher explained that strict liability “effectuates a further shift of the risk of harm onto the supplier than either negligence or breach of warranty theory by combining the balancing of interests inherent in those two causes of action.” 246 Whether a plaintiff would use one or both of the tests depends on numerous factors, including “the nature of the product,” the standard of proof, the likelihood of confusing the jury, and the availability of evidence. 247

In short, Tincher overruled Azzarello, declined to adopt the Third Restatement, and acknowledged that negligence-based principles are woven into the strict liability framework. 248 The Tincher court’s overhaul of products liability law in Pennsylvania provided much needed clarity to judges and juries.

236. Id. at 395.
237. Id.
238. Id. at 377.
239. Id. at 396.
240. Id. at 397.
241. Id. at 399.
242. Id.
243. Id. at 400.
244. Id. at 401.
245. Id. at 400–01.
246. Id. at 402.
247. Id. at 406.
248. See id. at 410.
for defective design products liability, particularly in light of the Third Circuit’s inaccurate prediction that if given the opportunity, the Pennsylvania Supreme Court would adopt the Third Restatement.\footnote{Zimmerman et al., supra note 209, at 382; see also Berrier v. Simplicity Mfg. Inc., 563 F.3d 38, 53 (3d Cir. 2009) (“We believe that Justice Saylor’s concurring opinion in Phillips foreshadows the Pennsylvania Supreme Court’s adoption of §§ 1 and 2 of the Third Restatement’s definition of a cause of action for strict products liability.”).} However, it remains unclear how \textit{Tincher} will shape future decisions, especially since unanswered questions remain within its framework.\footnote{See Buckley, supra note 18, at 263–64 (“Major cavities exist in Pennsylvania’s products liability law following \textit{Tincher}.”); Riley et al., supra note 89, at 604 (“[I]t will be for future cases to address these many complications.”).} As relevant to this Note, \textit{Tincher} left open whether negligence-based evidence like industry standards and practice should remain precluded from a strict liability analysis.

\section*{V. Analysis}

This analysis will evaluate the impact of \textit{Tincher} on the introduction of industry standards and practices evidence as a means of proving or defending against a claim of strict products liability. This Note argues that although \textit{Tincher} reintegrated negligence principles into the strict liability analysis\footnote{See Buckley, supra note 18, at 261 (“One of the principal effects of \textit{Tincher} is its perceived abolishment of the separation between negligence concepts and strict liability.”).} and overturned \textit{Azzarello}, evidence of industry standards and practices should remain excluded under \textit{Lewis} because its tendency to divert the jury’s attention to the reasonableness of a product’s design outweighs its evidentiary value, and allowing such evidence would eliminate any remaining distinction between negligence and strict liability and undermine the protective purpose of strict liability.

Under \textit{Azzarello}, which \textit{Tincher} overruled, the Pennsylvania Supreme Court had removed the last vestiges of a negligence analysis from the purview of strict liability.\footnote{See \textit{Azzarello} v. Black Bros. Co., 391 A.2d 1020, 1027 (Pa. 1978) (“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.”), overruled by \textit{Tincher} v. Omega Flex, Inc., 104 A.3d 328 (Pa. 2014).} Drawing on this decision, the \textit{Lewis} court precluded the introduction of industry standards and practices evidence in strict liability.\footnote{See \textit{Lewis} v. Coffing Hoist Div., Duff-Norton Co., 528 A.2d 590, 591 (Pa. 1987) (“[T]he court concluded that proof of the defendant's compliance with industry-wide standards, practices and customs would inject into the case concepts of negligence law, and that under our decision in \textit{Azzarello} v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978), negligence concepts have no role in a case based entirely on strict liability under Section 402A of the Restatement (Second) of Torts.”); see also Majdic v. Cincinnati Mach. Co., 537 A.2d 334, 338–39 (Pa. Super. Ct. 1988) (“We are aware that there exists in Pennsylvania cases which have discussed, and even suggested, that custom or usage and state of the art, as well as similar matters, should be admissible in design/defect cases. It is abundantly clear that the rationale employed in this body of cases has been expressly rejected by \textit{Lewis}.”).} \textit{Lewis} articulated that this evidence unnecessarily introduces negligence principles\footnote{See \textit{Lewis}, 528 A.2d at 594.} and could confuse the jury or interject misleading information into
their analysis. First, the court adopted the Third Circuit’s interpretation of Pennsylvania law holding that industry standards and customs too closely resemble a negligence analysis—thereby warranting their exclusion in a strict liability case. Second, in the same vein, Lewis excluded this evidence because of its propensity to divert the jury’s attention to the “reasonableness” of the choice of design. Third, Lewis applied Lenhardt’s reasoning to exclude this evidence because it “improperly focuses on the quality of the defendant’s conduct in making its design choice, and not on the attributes of the product itself.” Importantly, Lewis relied on Lenhardt as persuasive authority, noting that “[t]he Lenhardt Court also observed that if a manufacturer’s product has design attributes which make it unsafe for its intended use, there is no relevance in the fact that such a design is widespread in the industry.” Finally, having decided that evidence of industry standards and practices should be excluded, the Lewis court affirmed the trial court’s denial of a new trial.

Despite Lewis’s logic, the widespread acceptance of industry standards and practices under a negligence regime may incentivize overturning its holding. In other words, because Tincher reintegrated negligence principles into the strict products liability analysis, there is a reasonable possibility that future strict liability cases will reconsider the admissibility of currently prohibited negligence-based evidence. Moreover, it makes intuitive sense that Tincher may overrule Lewis because Lewis rested upon Azzarello, which Tincher overruled.  

255. See id.
256. Lewis, 528 A.2d at 594.
257. Id.
258. Id.
259. Id.
260. Id.
261. See, e.g., Covell v. Bell Sports, Inc., 651 F.3d 357, 365–66 (3d Cir. 2011) (“Lewis based its reasoning entirely upon the premise that there shall be no negligence in products liability. No longer can a court assume that premise is true . . . which means, by extension, that no longer can a court assume Lewis accurately reflects the law of Pennsylvania.” (citations omitted)); Surace v. Caterpillar, Inc., 111 F.3d 1039, 1046 (3d Cir. 1997) (“At all events, Lewis does not purport to cut back on Azzarello, and the discussion in Lewis that seems to have caused some confusion is background and arguably dicta . . . .”).
262. See Buckley, supra note 18, at 261.
263. See James M. Beck, ‘Tincher’ Opens Door to Previously Excluded Negligence Evidence, REED SMITH (Feb. 3, 2015), http://www.reedsmith.com/Tincher-Opens-Door-to-Previously-Excluded-Negligence-Evidence-02-03-2015/ [http://perma.cc/37GA-GX35] (“Tincher thus made explicit the court’s understanding that, with Azzarello and its negligence/strict liability dichotomy overruled, all of the prior restrictions on what were previously considered ‘negligence-derived’ or ‘use-related’ defenses and evidence are now fair game for reconsideration. By no means are any or all of them defunct, as yet, but these restrictions on how defendants may try their cases must now be evaluated on their substantive merit, and can no longer be justified simply because they involve negligence principles or evidence.”).
264. Zimmerman et al., supra note 209, at 378 (“Tincher necessarily pulls the rug from beneath Lewis.”).
265. Lewis, 528 A.2d at 591.
However, although intuitive, this argument fails to consider the underlying rationale for precluding industry standards and practices—namely, its tendency to divert the jury’s attention to the reasonableness of a product’s design.267

Along the same lines, some scholars argue that Lewis should remain good law.268 Moreover, the fact that Tincher does not address this topic suggests that its overruling of Azzarello may not automatically overturn Lewis:

This Opinion [Tincher] does not purport to either approve or disapprove prior decisional law, or available alternatives suggested by commentators or the Restatements, relating to foundational or subsidiary considerations and consequences of our explicit holdings. In light of our prior discussion, the difficulties that justify our restraint should be readily apparent. The common law regarding these related considerations should develop within the proper factual contexts against the background of targeted advocacy.269

In light of Tincher, litigants have sought to overturn Lewis in recent cases,270 and this has reinvigorated the industry standards and practices debate.271

One example is Cancelleri v. Ford Motor Co.,272 a nonprecedential Pennsylvania Superior Court opinion.273 In Cancelleri, the plaintiff brought strict products liability claims against defendant Ford Motor Company following a car accident that resulted in significant injuries when the plaintiff’s airbag did not deploy.274 At trial, Ford was precluded from introducing evidence of industry standards, including tests performed by the National Highway Traffic Safety Administration and the Insurance Institute for Highway Safety.275 Following a plaintiff’s verdict, Ford sought a new trial and lost; on appeal, Ford argued that Tincher’s reintegration of negligence principles into a strict liability analysis required that a jury determine the “unreasonably dangerous” component of the claim and that Ford should have been allowed to introduce evidence of industry

267. Lewis, 528 A.2d at 594.
269. Tincher, 104 A.3d at 410.
270. See, e.g., Webb v. Volvo Cars of N. Am., LLC, 148 A.3d 473, 483 (Pa. Super. Ct. 2016) (“The Lewis and Gaudio Courts both relied primarily on Azzarello to support the preclusion of government or industry standards evidence, because it introduces negligence concepts into a strict liability claim. According to Appellees, it follows that the trial court did not err in permitting the jury to consider the FMVSS evidence in connection with Appellant’s strict liability claims. . . .”).
273. Id.
275. Id. at *2.
standards. Citing Lewis and Gaudio, the trial court denied the post-trial motion “because such an exception to the general exclusion of evidence of compliance with industry and government standards had yet to be decreed.” The Superior Court of Pennsylvania affirmed.

Webb v. Volvo Cars of North America, LLC is also illustrative of the Lewis-focused litigation after Tincher. Following the death of his son in a vehicle collision, Webb (the administrator of his son’s estate) raised theories of both strict liability and negligence. The trial court permitted the introduction of FMVSS (Federal Motor Vehicle Safety Standards) evidence over Webb’s objection that the evidence was only relevant as a defense to his negligence claim, not his strict liability claim. The trial court admitted the evidence, despite entering a “nonsuit on the negligence claims.” The jury returned a verdict in favor of defendants on the strict products liability claim. Webb appealed, arguing that the court “erred in permitting the jury to consider the FMVSS evidence in connection with Appellant’s strict product liability claims.”

Following a detailed analysis of Lewis, Gaudio, and Tincher, the superior court granted the plaintiff a new trial, finding that Tincher’s overruling of Azzarello did not sufficiently support a decision to cast aside “the evidentiary rule expressed in Lewis and Gaudio.” Webb noted that “Tincher cited Lewis and Gaudio but did not overrule either case.” Moreover, rather than focus on the Lewis court’s concern that industry standards and practices may confuse the jury, Webb highlighted the Lewis court’s assertion that a “defective design could be widespread in an industry.” Based on the facts presented—particularly the nonsuit of the negligence claims—the superior court found that the trial court should have instructed the jury to disregard the FMVSS evidence. With that, it granted Webb a new trial on the strict liability

276. Id. at *1–2.
281. Id. at 478–80.
282. Id. at 483.
283. Id. at 477.
284. Id. at 480.
285. Id. at 480–83.
286. Id. at 483.
287. See Lewis v. Coffing Hoist Div., Duff-Norton Co., 528 A.2d 590, 594 (Pa. 1987) (“It is well established that a trial court should exclude evidence which has a tendency to distract the jury from its main inquiry or confuse the issue.”)
288. See Webb, 148 A.3d at 483 (“Lewis, in particular, noted that a defective design could be widespread in an industry. The Tincher opinion does not undermine that rationale for excluding governmental or industry standards evidence.” (citation omitted)).
289. Id. at 480–81.
Although ruling on a narrow issue based on particular facts, Webb warned that *Tincher* would impact future cases:

These contingencies illustrate that *Tincher* will affect every stage of future products liability cases. Post-*Tincher*, parties must tailor their pleadings, discovery, and trial strategy to one or both of the new theories of liability. We believe the continued vitality of the prohibition on government and industry standards evidence is a question best addressed in a post-*Tincher* case.

For future strict products liability cases, therefore, the rationale proposed in *Webb*—that “defective design could be widespread in an industry”—seems insufficient to maintain the preclusion of industry standards and practice evidence. That is, *Webb*’s focus on potential widespread defectiveness undervalues the importance of the negligence-strict liability dichotomy and the protective purpose of strict liability. In turn, it distracts from the more important reason for precluding such evidence proposed by *Lewis*: that evidence of industry standards and practices “divert the jury’s attention from the [defendant’s product] to the reasonableness of the appellant’s conduct in choosing its design.” Because the reasonableness of a defendant’s design, as evidenced by industry standards and practices, is an inherently negligence-based analysis, such evidence suggests a negligence-like approach to what should be a pure strict liability analysis. In light of the inherently convoluted nature of the negligence-strict liability dichotomy, allowing a jury to consider inherently negligence-based concepts like industry standards and practices compounds jury confusion and distraction to a degree that outweighs such evidence’s probative value.

The understanding that strict liability attaches, regardless of the action or the actor is paramount to strict liability—even if the defendant exercised all possible due care. The protective purpose of strict liability depends upon this foundation. As such, to successfully prove a claim of strict products liability, a plaintiff must only show “that a seller (manufacturer or distributor) placed on the market a product in a ‘defective condition.’” Therefore, any post-*Tincher* analysis must preclude industry standards and practices evidence because it should focus on the product itself rather than the reasonableness of manufacturing, designing, or distributing of the product. Most importantly,

290. *Id.* at 486.
291. *Id.* at 483.
292. *See id.* at 483 (“Lewis, in particular, noted that a defective design could be widespread in an industry. The *Tincher* opinion does not undermine that rationale for excluding governmental or industry standards evidence.” (citation omitted)).
293. *See Lewis*, 528 A.2d at 594.
294. *See id.*
295. *See id.*
296. *See RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965).*
297. *See Bugay, A New Era, supra* note 268, at 17.
introducing this type of evidence would allow a defendant to escape liability by merely demonstrating that the defective product satisfied industry standards, which would undermine the protective purpose of strict liability.

In short, because such evidence “divert[s] the jury’s attention from the [defendant’s product] to the reasonableness of the appellant’s conduct in choosing its design,” it undermines the protective purpose of strict liability. Pennsylvania courts should, therefore, continue to preclude such evidence.

VI. CONCLUSION

In conclusion, although Tincher’s overruling of Azzarello clarified a number of points within Pennsylvania products liability law by acknowledging the negligence-based origin of the strict liability framework, Pennsylvania courts should not interpret it as also overruling Lewis and, in effect, permitting industry standards and practices evidence in strict products liability claims. Despite that “Lewis explicitly depends upon Azzarello’s dictum, now discarded,” this Note argues that Lewis remains good law and should be followed to preclude the introduction of industry standards and practices evidence. Its likelihood to cause confusion outweighs its evidentiary value, and allowing industry standards evidence in a strict liability analysis would eliminate any remaining distinction between negligence and strict liability and undermine the protective purpose of strict liability.

theory that negligence concepts are to be kept out of cases based on strict liability under Section 402A, various courts have excluded attempts by manufacturer-defendants to prove that the quality or design of the product in question comports with industry standards or is in widespread industry use.”; see also RESTATEMENT (SECOND) OF TORTS § 402A (stating that liability attaches even when “the seller has exercised all possible care in the preparation and sale of his product”).

300. See Lewis, 528 A.2d at 595 (Larsen, J., concurring); Buckley, supra note 18, at 261–62.

301. See Bugay, A New Era, supra note 268, at 13–15 (“Tincher, like Barker, preserves Section 402A’s policy of protecting the public from unsafe products.”).


303. Buckley, supra note 18, at 261–62.

304. Zimmerman et al., supra note 209, at 376.

305. See Buckley, supra note 18, at 261–62.