

PRODUCT LIABILITY &
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THE NEW PRODUCT LIABILITY PARADIGM IN PENNSYLVANIA: THE PA SUPREME COURT DECLINES TO ADOPT THE THIRD RESTATEMENT, BUT OVERRULES PRECEDENT PROHIBITING CONSIDERATION OF NEGLIGENCE PRINCIPLES IN STRICT LIABILITY CASES

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The Pennsylvania Supreme Court this past week dramatically altered the landscape of product liability litigation in Pennsylvania. In *Tincher v. Omega Flex, Inc.*, No. 17 MAP 2013 (Pa. November 19, 2014), the Court overruled long-standing precedent that stringently segregated negligence concepts from strict liability claims, and finally settled the question of whether Pennsylvania would move to the Third Restatement.

Background

Section 402A of the Restatement (Second) of Torts (which was adopted in Pennsylvania in 1966) imposes liability on one who sells a product in a “defective condition unreasonably dangerous to the user or consumer ...” In *Azzarello v. Black Brothers Company*, 391 A.2d 1020 (Pa. 1978), the Pennsylvania Supreme Court concluded that the phrase “unreasonably dangerous” has no “independent significance” and merely explains the term “defective.” The Court thus held that a plaintiff need not prove negligence in strict liability claims. The Court further concluded that whether a product was in a “defective condition unreasonably dangerous” was a decision for the trial judge alone, and not the jury. Subsequent decisions reinforced *Azzarello’s* prohibition on considering negligence principles in strict liability

claims and excluded evidence relating to negligence concepts.

In 1998, the American Law Institute introduced the Restatement (Third) of Torts: Product Liability, which sought to improve upon the concepts articulated in the Second Restatement. In addition, whereas the Second Restatement was designed to address manufacturing defects only, the Third Restatement provided guidance for design defect and failure to warn claims as well. Until this week, the Pennsylvania Supreme Court had not addressed the potential adoption of the Third Restatement in Pennsylvania, although several Justices individually indicated support for such a move. Over the past ten years, federal and state courts in Pennsylvania have tried to predict whether the Pennsylvania Supreme Court would adopt the analysis set forth in the Third Restatement, and have reached inconsistent results. As a result of these different conclusions, parties were left to guess which Restatement applied in any given case.

The *Tincher* case

When lightning struck near the Tinchers’ home, steel tubing carrying natural gas to a fireplace was punctured, igniting the gas and causing a fire that

resulted in significant damage to the Tinchers' home. The Tinchers sued Omega Flex, the manufacturer of the tubing, on a "design defect" theory and experts rendered differing opinions on the cause of the fire and whether the tubing was defective. Omega Flex argued for application of the Third Restatement. However, the trial court instructed the jury based on the Second Restatement and principles enunciated in *Azzarello*. The jury returned a verdict in the Tinchers' favor, and Omega Flex appealed.

After the Superior Court of Pennsylvania affirmed the judgment in Plaintiffs' favor, the Supreme Court of Pennsylvania granted Omega Flex's petition for allowance of appeal. After exhaustively outlining the development of current law, and some of the problems that have developed under the current paradigm, the Court rendered three notable rulings: (1) it overruled *Azzarello*; (2) it declined to adopt the Third Restatement; and (3) it provided new guidance for strict liability claims in Pennsylvania going forward.

***Azzarello* is Overruled**

The Court's opinion bluntly explained the result of the *Azzarello* framework: "decisional law has lapsed into an arguably unprincipled formulaic application of rhetoric, threatening to render the strict liability cause of action hopelessly unmoored in modern circumstances." In particular, the Court noted a number of practical problems. First, the determination of whether a product is defective is made by the trial court under a motion to dismiss standard (light most favorable to the plaintiff). Second, the jury is given no real guidance on what constitutes a defective product, and therefore, cannot make its own determination based on a risk utility or consumer expectations analysis. Third, the exclusion of any evidence relating to "negligence principles" precluded the jury from considering evidence bearing on the risk utility analysis.

Recognizing this unworkable and inconsistent landscape for product liability cases, the Court overruled *Azzarello*, acknowledging that strict liability claims are based in part on principles of negligence. Further, the Court clarified that the determination of whether a product is defective, including consideration of any factors that implicate principles founded in negligence, is for

the fact-finder (i.e., the jury in a case tried to a jury).

The Court Declines to Adopt the Third Restatement

To replace the *Azzarello* framework, Omega Flex argued for adoption of the Third Restatement, indicating it was the next logical step in the progression of product liability law in Pennsylvania and would bring Pennsylvania in line with the "mainstream" nationally. Omega Flex also argued that the Second Restatement is ill-suited for design defect cases.

The Court declined, however, to adopt the Third Restatement. First, the Court was concerned that adoption of the Third Restatement would require the application of a general principle of liability with respect to all products, while there may be particular products or circumstances that warrant special considerations. In this regard, the Court held, courts are not in a position to make policy judgments as to which products should be exempt from these general rules. Second, the Restatements "reflect the consensus among American jurisdictions as to the applicable liability construct in 'classic design cases.'" But the Court said its role is different; it involves application of general rules to specific factual scenarios based on a developing common law that is not necessarily in line with a consensus of jurisdictions. Further, given the fact-intensive nature of product liability cases, the Court believed the judiciary should be cautious about making broad pronouncements. For these reasons, the Court preferred to take an "incremental" approach, and not simply adopt an entirely new construct.

Justice Saylor, with whom Justice Eakin joined, dissented from this part of the Court's opinion, and argued for adoption of the Third Restatement.

Guidance on Strict Liability Claims

Given the overruling of *Azzarello*, and resulting lack of guidance in this area, the Court provided some discussion on the parameters of strict liability claims going forward.

According to the Court's opinion, the theory of strict liability remains the same as articulated in *Webb v. Zurn*, 220 A.2d 853 (Pa. 1966): "those who sell a product (i.e., profit from making and putting a product in the stream of commerce) are held responsible for damage caused to a consumer by

the reasonable use of the product.” The strict liability claim is based on a duty imposed by law which is distinct from the duty of due care applicable to negligence claims. In particular, “a person or entity engaged in the business of selling a product has a duty to make and/or market the product – which ‘is expected to and does reach the user or consumer without substantial change in the condition in which it is sold’ – free from ‘a defective condition unreasonably dangerous to the consumer or [the consumer’s] property’” (citing §402A). To demonstrate a breach of that duty, the plaintiff must prove that the defendant sold the product in a “defective condition.”

Whether a product is in a “defective condition” depends on a balancing of competing interests, and with respect to design defect claims, the Court adopted a composite of two general standards for balancing those interests. Under the “Consumer Expectations Standard,” a product is defective if, upon normal use, the product is “dangerous beyond the reasonable consumer’s contemplations.” Stated another way, the danger must be “unknowable and unacceptable to the average or ordinary consumer.” Among the factors relevant to considering a reasonable consumer’s expectations are the nature of the product, the identity of the user, the product’s intended use and intended user and any express or implied representations by the manufacturer or seller.

Under the “Risk-Utility Standard,” a product is defective if “a ‘reasonable person’ would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions” (this standard necessarily incorporates negligence principles). In other words, “a seller’s precautions to advert the danger should anticipate and reflect the type and magnitude of the risk posed by the sale and use of the product.” The Court identified, but fell short of endorsing, a number of factors that may be relevant to the risk-utility analysis, including the usefulness and desirability of the product, safety aspects of the product, the availability of a substitute product, the manufacturer’s ability to eliminate the unsafe condition, the user’s ability to avoid the danger, the user’s anticipated awareness of the danger, and the feasibility of the manufacturer spreading the loss.

Seeing shortcomings in both standards, the Court elected to adopt a composite approach: a breach

of duty can be established under either test. “[W]e hold that, in Pennsylvania, 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.” The Court also made clear that the cause of action in tort for strict liability retains “those aspects of negligence and breach of warranty liability theories from which it evolved,” and “combin[es] the balancing of interests inherent in those two causes of action.” Thus, the fiction created by *Azzarello* and its progeny of segregating negligence concepts entirely from strict liability claims no longer exists in Pennsylvania.

The Court also clarified the role of trial judge and jury in light of *Azzarello*’s demise. Regardless of which theory (consumer expectations or risk utility) a plaintiff chooses to pursue, the trial court acts in its ordinary gate-keeper role. If plaintiff chooses the risk-utility standard, “proof of risks and utilities are part of the burden to prove that the harm suffered was due to the defective condition of the product.” Whether a party has met the burden to prove the elements is a decision for the fact finder unless “reasonable minds cannot differ on the issue.”

Throughout the opinion, the Court articulated its hesitancy to make broad-based pronouncements, and expressed a preference for modest, incremental decisions that apply to specific factual scenarios. The opinion also emphasized that a larger shift in policy should be addressed, if at all, by the legislature. Given the legislature’s decision not to act on this issue, however, the Court elected to provide some guidance based on the common law. The Court recognized that many questions are left unanswered, but preferred to address those questions as they arise.

Azzarello and its progeny created tremendous difficulties and inconsistencies in product liability litigation for the past thirty years. Further, the uncertainty of whether Pennsylvania would move to the Third Restatement created even more confusion and practical problems. While many questions remain, the *Tincher* decision is a significant step toward clarifying the standards by which manufacturers and suppliers will be judged.



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