Chapter 1

History of Product Liability Law

1-1 INTRODUCTION

For approximately a century, courts in this country have attempted to find ways to make it easier for plaintiffs to recover damages against the manufacturers and distributors of products that cause them injury. By the middle of the 20th century, courts were formulating new theories of liability to help the plaintiffs' (and their attorneys') endeavors. Now obviously, I say that somewhat tongue in cheek—but not entirely.

Who can forget wonderful toys like Aqua Dots, inflatable baby boats, the Austin Magic Pistol, Gilbert U-238 Atomic Energy Lab (which, included, Uranium bearing ore), CSI: Fingerprint Examination Kit (the "special" powder contained up to five percent asbestos—so at least the evidence wouldn't burn) and my personal favorite, Lawn Darts.

Ok, so maybe changes in the law were needed. The reality is that by and large, these emerging theories were applied to products that did, indeed, contain defects of one sort or another (assuming you consider lead, asbestos, and Uranium in kids' toys to be defects). If this were a text message, I'd be using one of those ironic smiley face emoticons. While I am a long-time defense lawyer, and therefore somewhat jaded, imposing these types of legal theories likely did make products safer. The question that I struggle with (and many of my peers struggle with) is whether courts in this commonwealth

have unleveled the playing field too much. I know what I think, but as I am constantly reminded, what I think is meaningless.

1-1:1 The Doctrine of Strict Product Liability

And off we go . . . the doctrine of strict product liability was devised to alleviate the plaintiffs' evidentiary burden in cases involving manufacturing defects. A manufacturing defect is one where the product's material or fabrication is actually at issue. A part can deviate from specifications, fail in operation, or not fit properly, thereby causing the product to fail. It is not the design of the product nor the warnings, but how the product itself was put together, a flaw in the manufacturing process. As we will see later in this book, a manufacturing defect has been defined as, "When the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product."[1] These types of defects are notoriously hard to prove and the courts thought it would be "nice" (my terminology, not theirs) to give the plaintiff's a helping hand.

Strict products liability was first articulated by Justice Traynor of the Supreme Court of California in his concurring opinion in *Escola v. Coca Cola Bottling Co.*[2] Justice Traynor found that the lack of familiarity with the manufacturing process would be fatal to an injured consumer's claim for negligence (he obviously never sat in a court here in Philadelphia), as it is quite difficult to prove a manufacturer is negligent when you do not understand how it goes about manufacturing a product. Justice Traynor suggested a manufacturer should be held strictly liable when the product that it has placed on the market, knowing it will be used without inspection for defects, proves to have a defect that causes injury to a human being. The cause of action for strict products liability focuses not on the manufacturer's conduct (whether it acted reasonably or not), but rather, on the product itself. For example, whether a tire has a bad steel belt that will cause a vehicle to overturn at high speed is the type of issue that Justice Traynor's idea addressed.

Such a theory was considered "socially desirable" because it shifted the loss from the consumers, who were powerless to protect

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1. Restatement (Third) of Torts: Prod. Liab. § 2(a)(1998).
2. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944)

themselves, to manufacturers who were in a better position to discover the hazards inherent in their products and who were better able to ensure (not insure) against the losses caused by those products. Shifting the loss from consumers to manufacturers, would advance the goals of product liability law. Namely, it would provide the incentive for product manufacturers to market safer products and would allow the manufacturers to spread the costs among the members of the public at large. Following the acceptance of this theory by the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*,[3] the American Law Institute codified the theory under Section 402A of the Restatement (Second) of Torts which we all know and love (insert ironic smiley face emoticon here).

Under Section 402A, a product causing an injury to a consumer is actionable if it left the manufacturer's control in a state of "defective condition [that is] unreasonably dangerous."[4] This is one of those amorphous terms that legal scholars write law review articles about. When one tries to apply this term to the "real world," it is about as clear as mud.

What is clear, are the comments to Section 402's intention to designate the term "defective condition" to apply only to those products that, because of a mishap during the manufacturing process, had been marketed in an unsafe condition. The definition of "defective condition" however, has changed over time.

1-1:2 The Role of the American Law Institute and the Restatements

The American Law Institute (ALI), founded in 1923, was created in response to what legal scholars viewed as uncertainty and complexity in the administration of justice throughout the American legal system.[5] The Institute's mission is to "promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."[6]

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3. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963).
4. Restatement (Second) of Torts § 402A (1979).
5. The American Law Institute, *available at* http://www.ali.org (last visited Nov. 3, 2021).
6. The American Law Institute, *available at* http://www.ali.org (last visited Nov. 3, 2021).

To consolidate the divergent common law rules of torts throughout the United States, the ALI drafted the Restatement (First) of Torts, a compilation of the majority views across the country. The Restatement, compiled by well-respected legal scholars, attorneys, judges, and professors, became a compelling source of law, and even began to direct the course of the decisional law that followed its publication.

In 1954, the ALI revisited the Restatement of Torts, to collect and organize laws emerging from new areas of torts and to correct flaws that developed as courts interpreted the First Restatement. The Second Restatement also included strict liability in Section 402A. Through the common law implementation of the Second Restatement of Torts, a distinction evolved between the rules for design, warnings, and manufacturing defects.

Acknowledging this variance in laws surrounding product defects, the ALI revisited the Restatement once more in 1998, with the Third Restatement of Torts: Products Liability. Throughout its 21 sections, the Third Restatement spans a variety of issues, including evidentiary rules, rules specific to commercial sellers of medical devices, used products and component parts, manufacturing and design defects, and the failure to warn. Frankly, I expected to be writing something here that read, "in the *Tincher* case, the Supreme Court of Pennsylvania finally adopted the Restatement of Torts (Third)." But nope. Close, but no cigar. And as it is turning out, not that close.

1-2 PENNSYLVANIA JUMPS ON THE BANDWAGON

In 1966, the Supreme Court of Pennsylvania, in *Webb v. Zern*,[7] jumped on the strict liability bandwagon. The Supreme Court grounded the law of strict product liability in tort rather than in contract,[8] which was further illustrated in *Salvador v. Atlantic Steel Boiler Co.*,[9] where the Supreme Court reaffirmed its adoption of Section 402A holding:

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7. *Webb v. Zern*, 220 A.2d 853 (Pa. 1966).
8. *Webb v. Zern*, 220 A.2d 853 (Pa. 1966).
9. *Salvador v. Atl. Steel Broiler Co.*, 319 A.2d 903 (Pa. 1974).

> Today . . . a manufacturer by virtue of Section 402A is effectively the guarantor of his products' safety. Our courts have determined that a manufacturer by marketing and advertising his product impliedly represents that it is safe for its intended use. We have decided that no current societal interest is served by permitting the manufacturer to place a defective article in the stream of commerce and then to avoid responsibility for damages caused by the defect. He may not preclude an injured plaintiff's recovery by forcing him to prove negligence in the manufacturing process.[10]

The Pennsylvania Court, however, found that the justices from California did not foresee the consequences of injecting the term "unreasonably dangerous" into the strict liability case.[11] This is somewhat ironic considering what has happened here in the last several years.

In a plurality opinion, the Court in *Berkebile v. Brantly Helicopter Corp.*,[12] found that the term "unreasonably dangerous" was not included to inject negligence principles into strict liability considerations, but rather to "foreclose any argument that the seller of a product with inherent possibilities for harm would be automatically responsible for all the harm that such things do in the world."[13] However, in *Azzarello v. Black Bros. Co., Inc.*,[14] the Supreme Court of Pennsylvania (in a unanimous decision) found 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."[15] The Court further emphasized that the supplier's

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10. *Salvador v. Atl. Steel Broiler Co.*, 319 A.2d 903, 907 (Pa. 1974).

11. *See Salvador v. Atl. Steel Broiler Co.*, 319 A.2d 903, 906-07 (Pa. 1974).

12. *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 899 (Pa. 1975), *abrogated by Reott v. Asia Trend, Inc.*, 55 A.3d 1088 (Pa. 2012). *Reott* held as a matter of first impression, allegedly highly reckless conduct in installing tree stand was an affirmative defense to claim for strict products liability that had to be pleaded, and required defendants to prove that plaintiff's conduct was so reckless as to constitute sole or superseding cause of injuries.

13. *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 899 (Pa. 1975), *abrogated by Reott v. Asia Trend, Inc.*, 55 A.3d 1088 (Pa. 2012).

14. *Azzarello v. Black Bros. Co., Inc.*, 391 A.2d 1020 (Pa. 1978), *overruled by Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014).

15. *Azzarello v. Black Bros. Co., Inc.*, 391 A.2d 1020, 1025 (Pa. 1978).

liability is that of a guarantor, not an insurer.[16] Again, these amorphous terms tend to be meaningless to a jury.

Nonetheless, the Court formulated the foundation of Pennsylvania strict liability law in a jury instruction, stating that a jury may find a defect if "the product, at the time it left the defendant's control, lacked any element necessary to make it safe for its use/intended use, or contained any condition that made it unsafe for its use/intended use."[17] Those making the argument that this language is what opened the door to claims of strict liability for non-manufacturing defects, i.e., design defects, and failure to warn, are correct. Since this time last year, the substantive law has changed. However, no one knows what the changes mean, or the practical impact they will make.

1-2:1 Pennsylvania Law Gets Muddier, The Mud Gets Screened . . . Into More Mud

We all learned that a federal court sitting in diversity must apply the substantive law of the jurisdiction in which it sits.[18] This is the case everywhere but in Pennsylvania.

Like a bad law school exam question, the substantive law being applied by the state courts and the federal courts is different. Therefore, in Pennsylvania, the choice of forum is principally important in strict liability cases, and Pennsylvania litigants face confusing circumstances. Pennsylvania state courts currently apply the Restatement (Second) of Torts,[19] whereas federal courts operating under the dictates of the Third Circuit apply the Restatement (Third).[20] Many of the changes included in the Restatement (Third) benefit plaintiffs, however, many more benefit the defendants.

In *Phillips v. Cricket Lighters*,[21] Justice Saylor (concurring) noted the ambiguities and inconsistencies in the application of the strict liability doctrine in Pennsylvania trial courts and federal courts

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16. *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1023 (Pa. 1978).
17. Pa. S.S.J.I. (Civ.) 8.02.
18. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).
19. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014).
20. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014).
21. *Phillips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003), *overruled by Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014).

applying Pennsylvania law. Joined by Justices Castille and Eakin, Justice Saylor penned a concurring opinion in which he strongly urged the state Court to adopt the Third Restatement. His support for the Third Restatement follows an acknowledgment by the majority that the Court in one regard has been "adamant that negligence concepts have no place in a strict liability action."[22] Yet, the majority also stated that "while we have remained steadfast in our proclamations that negligence concepts should not be imported into strict liability law, we have muddied the waters at times with the careless use of negligence terms in the strict liability arena."[23] What a mess! Justice Saylor insisted the Court use this case as an opportunity to clean up those ambiguities and inconsistencies in Pennsylvania products liability law.[24]

This insertion of negligence concepts began as a result of the impact of implementing Section 402A. In an attempt to prove negligence, plaintiffs in products liability cases faced severe difficulty in obtaining proof that the manufacturer failed to exercise due care in the manufacturing process.[25] The purpose of Section 402A was to relieve that burden, without making the manufacturer an insurer of his own product despite the product's utility and safety.[26] To prevent this, the Court moved to a risk-utility/cost-benefit analysis, which considered "balancing the utility of the product against the seriousness and likelihood of the injury and the availability of precautions that . . . might prevent the injury."[27]

Justice Saylor described the Restatement (Third) as a "reasoned and balanced approach, which synthesizes the body of products liability law into a readily accessible formulation based on the accumulated wisdom from 30 years of experience, represents the clearest path to reconciling the difficulties persisting in Pennsylvania law, while enhancing fairness and efficacy in the

22. *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1006 (Pa. 2003).
23. *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1006-07 (Pa. 2003).
24. *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1006-07 (Pa. 2003).
25. *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1013 (Pa. 2003).
26. *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1013 (Pa. 2003).
27. *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1014 (Pa. 2003) (citing *Burch v. Sears, Roebuck, & Co.*, 467 A.2d 615, 618 (Pa. Super. 1983)).

liability scheme."[28] Of course, 11 years later, and after the decision in *Tincher v. Omega Flex, Inc.*,[29] no such clarification has occurred. However, we now know that the Restatement of Torts (Third) has been rejected and the keystone case Pennsylvania courts have been using to interpret the Restatement of Torts (Second) has been overruled. Swell.

1-2:2 Pennsylvania, Out of the Mud, Into the Quicksand

In light of Justice Saylor's concurrence and the majority's admission of muddying the strict liability waters, the Third Circuit in *Berrier v. Simplicity Manufacturing, Inc.*,[30] ruled that the Restatement (Third) of Torts would apply to the plaintiff's strict liability claims in diversity cases applying Pennsylvania law. In this decision, the Third Circuit Court predicted that this decision would accord with the state court's expected adoption of the Restatement (Third) in *Bugosh v. I.U. North America, Inc.*,[31] which was pending before the state Supreme Court at the time.

In *Bugosh*, the Pennsylvania Supreme Court had the prime opportunity to address whether the state would continue to use the Restatement (Second) as its applicable law for products liability or to adopt the Restatement (Third), as this was the exact issue in the case.[32] Despite the appellant's thorough briefing, describing the opportunity as one to "fine tune" and correct what has become the "unnecessary befuddlement of [ ] simple legal propositions," and the receipt of nearly 30 amici briefs on the matter, yet again, the Court declined this opportunity.[33] The Court dismissed the case on procedural grounds.[34]

While the Court refused to chart a new course for the state, Justice Saylor did not miss a chance to stomp his feet on the matter. Justice Saylor (dissenting), joined by Justice Castille,

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28. *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1021 (Pa. 2003).

29. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014).

30. *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38 (3d Cir. 2009), *not followed on state law grounds by Sweitzer v. Oxmaster, Inc.*, No. 09-5606, 2011 U.S. Dist. LEXIS 21665 (E.D. Pa. Mar. 2, 2011).

31. *Bugosh v. I.U. N. Am., Inc.*, 971 A.2d 1228 (Pa. 2009).

32. *Bugosh v. I.U. N. Am., Inc.*, 971 A.2d 1228, 1229 (Pa. 2009).

33. *Bugosh v. I.U. N. Am., Inc.*, 971 A.2d 1228, 1231-32, 1233 n.6 (Pa. 2009).

34. *Bugosh v. I.U. N. Am., Inc.*, 971 A.2d 1228, 1229 (Pa. 2009).

penned another opinion reiterating his support for the adoption of the Third Restatement and expressing his disappointment with the Court for evading a chance to get it right. Of course, when he finally had the chance, on the eve of Justice Castille's retirement, he seemed to forget his prior decisions and, as Yogi Berra said, "when he got to the fork in the road, he took it."

Through these decisions, legal minds remained steadfast in their belief that Pennsylvania would adopt the Third Restatement as Justices Saylor, Castille, and Eakin, who strongly supported the adoption, remained on the Court. It was anticipated that one change in the vote or one change to the Court would result in Pennsylvania's successful adoption of the Restatement (Third) shortly. Oops. Not so fast legal minds. As it turns out, you were all wrong.

1-3 *TINCHER*—WILL PENNSYLVANIA FINALLY GET IT RIGHT – NO!

In 2013, Pennsylvania's Supreme Court was granted yet another opportunity to fulfill the Third Circuit's 2009 prophecy of adopting the Third Restatement approach to claims alleging strict liability based on defective product design; although the path to change has been clear for more than a decade, beginning with three of the Court's justices' lengthy concurrence in *Phillips v. Cricket Lighter*. In *Tincher v. Omega Flex, Inc.*,[35] petitioner, Omega-Flex, Inc. contended that the Third Restatement was the best approach for the state to address defective product design cases. In its brief to the Court, Omega-Flex, Inc. argued that Pennsylvania was behind the times of American tort law in its insistence on retaining the Second Restatement. *Tincher v. Omega Flex, Inc.*, centered around a house fire that began when an electrical current from a local lightning strike traveled into a natural gas pipe in the Tincher home. The current energized a natural gas pipe, manufactured by Omega-Flex, Inc., and then ignited the natural gas contained therein, severely damaging the Tincher home. The United Services Automobile Association (USAA), on behalf of its insured Tincher, argued for negligent design and strict liability. *Omega-Flex, Inc*.

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

argued that the pipe was improperly installed and that exposure to lightning was not an intended use.

Tincher provided a telling example of the inconsistencies that resulted in the application of the Second Restatement. At trial, the jury found for Omega-Flex on the negligent-design claim, but in favor of USAA on the strict-liability claim. In denying Omega-Flex's post-trial motion, the court concluded that the evidence presented was enough such that the jury *could have concluded* that the CSST pipe was not adequately designed and grounded to withstand an indirect lightning strike.[36] Interestingly enough, while lacking exact proof, a jury may infer a defect and assign liability.

In November 2014, the Court rendered its long-awaited decision in *Tincher v. Omega Flex, Inc.* The Court voted 6-0 to overrule *Azzarello v. Black Bros., Co., Inc.*,[37] the key 1978 case that formalized Pennsylvania's much-criticized and rigid distinction between strict liability and negligence. However, in a surprising decision on the main issue in the case, the Court voted 4-2 to continue to follow the Second Restatement.[38] The majority, therefore, rejected the Third Restatement, although noting cryptically that "certain principles contained in that Restatement ha[ve] certainly informed our consideration of the proper approach to strict liability in Pennsylvania in the post-*Azzarello* paradigm."[39] Overall, the change in our law as a result of this decision is not as great as it would have been if the Court had adopted the Third Restatement. The 137-page opinion and its progeny will be analyzed in greater detail in Chapter 4. In the nearly eight years since *Tincher* became law, it is questionable whether the law has changed much at all. Plaintiffs argue, no. Defendants argue, yes. The Supreme Court remains silent and other courts are all over the place.

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36. *Tincher v. Omega Flex, Inc.*, 2011 WL 9527303 (Chester Co. Aug. 5, 2011).

37. *See Azzarello v. Black Bros. Co. , Inc.*, 480 Pa. 547, 550, 391 A.2d 1020 (1978), *overruled by Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014).

38. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 400-01 (Pa. 2014).

39. *Tincher v. Omega Flex, Inc*., 104 A.3d 328, 335 (Pa. 2014).

1-4 NOTABLE DIFFERENCES BETWEEN THE RESTATEMENTS (FOR WHAT IT'S WORTH IN THE POST *TINCHER* WORLD)

The products liability portion of the Restatement (Second) states:

> 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.[40]

In the ALI's update to products liability featured in Restatement (Third) Torts, the new approach to product defects reads as follows:

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

[40] Restatement (Second) of Torts § 402A (1979).

> been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.[41]

The Third Restatement does away with strict liability and introduces an assessment of liability based on familiar negligence concepts. Under the Third Restatement, a product is deemed defective when the resulting harm was reasonably foreseeable. This view provides manufacturers with a little more grace upon the discovery of a potential defect. The ALI describes the Restatement (Third) of Torts: Products Liability as "provid[ing] both reasonable protection for the interests of consumers and workers and practicable standards of conduct for those who produce goods."[42] The distinction between the two approaches makes a significant impact on the choice of whether to bring a case in a particular forum, which uses one Restatement over the other.

The history behind strict liability will remain: however, the million-dollar question is whether the *Tincher* theory will stick, and that remains to be seen. Despite the passage of several years, we still have been granted virtually no guidance from the Supreme Court. Attorneys, trial courts, and the Superior Court continue to wrestle with this new law. In the time since the *Tincher* decision, let's just say that courts have remained consistently . . . inconsistent with its application. I have been saying for the last eight years, that ultimately, the adoption of the Restatement of Torts (Third) may make the most sense. You heard it here first, second, third and fourth folks.

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41. Restatement (Third) of Torts: Prod. Liab. § 2 (1998).

42. The American Law Institute, *available at* http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=54 (last visited Nov. 3, 2021).