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The term “product liability” generally refers to the “liability of a manufacturer, processor, or nonmanufacturing seller for injury to the person or property of a buyer or third party caused by a product which has been sold.”

I. Theories of Recovery

In Pennsylvania, a plaintiff can bring a cause of action against the manufacturer, seller, or distributor of an allegedly defective product under one or more of three separate theories: strict liability, negligence, and breach of warranty.

A. Strict Liability

1. Restatement (Second) of Torts, Section 402A

Under Pennsylvania product liability law, a plaintiff can proceed against a manufacturer, seller, or distributor of an allegedly defective product on a theory of strict liability under Section 402A of the Restatement (Second) of Torts, which provides that

(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.

Under section 402A, the seller of a product that is in a defective condition unreasonably dangerous to the ultimate user or consumer will be liable to that user or consumer if the product causes personal injury or property damage to the user or consumer, so long as the seller is engaged in the business of selling that product and the product reaches the consumer in substantially the same condition in which it is sold. The Restatement (Second) imposes a standard of strict liability on the seller, meaning that liability may be imposed regardless of whether the seller has exercised all possible care in the preparation and sale of his product, and regardless of whether the user or consumer has bought the product from or entered into any contractual relation with the seller. In other words, neither fault on the part of the seller nor privity of contract between the user or consumer and the seller are required in order for a plaintiff to proceed against the seller of an allegedly defective product on a theory of strict liability under section 402A of the Restatement (Second) of Torts.

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1 See 63 Am. Jur. 2d Products Liability § 1 (2011).
2. **Azzarello v. Black Brothers**

The seminal Pennsylvania product liability case discussing strict liability under section 402A remains the 1978 Pennsylvania Supreme Court case of *Azzarello v. Black Bros. Co.* In *Azzarello*, the Court explained that “the development of a sophisticated and complex industrial society” required a change in legal philosophy from the general doctrine of caveat emptor, or “buyer beware,” to the view that “the supplier of products should be deemed to be the ‘guarantor of his products’ safety.” The Court explained that the drafters of the Restatement (Second) included the phrase “unreasonably dangerous” as a means of qualifying and explaining the term “defective” to ensure that the supplier of a product, although a guarantor of his products’ safety, would not also become an insurer of that product.

The *Azzarello* Court also acknowledged that the inclusion of the term “unreasonably dangerous” in the Restatement (Second) on its face suggests that principles of negligence should be considered in determining liability under section 402A. The Court explained, however, that considerations of negligence are inappropriate in an action alleging strict liability under section 402A, and that the phrase “unreasonably dangerous” . . . merely represent[s] a label to be used where it is determined that the risk of loss should be placed upon the supplier.” The Court recognized that a lay member of a jury could be confused by the inclusion of the phrase unreasonably dangerous in a law defining strict liability, which ultimately led the Court to hold that it is a question of law for the Court to determine whether, as the Restatement (Second) of Torts requires, the product in question is in a “defective condition” that renders it “unreasonably dangerous” to the ultimate user or consumer. As the Court concluded,

[j]t 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. . . . A standard suggesting the existence of a “defect” if the article is unreasonably dangerous or not duly safe is inadequate to guide a lay jury in resolving these questions.

Thus, under *Azzarello*, the trial judge acts as a gatekeeper in strict product liability cases, and is responsible for determining whether the evidence of product defect is sufficient to allow the question to go to the jury. In making this determination, the trial judge must carry out a cost/benefit analysis, which generally involves a multitude of factors. For example, in a case involving an alleged design defect, the trial judge must look at “the gravity of the danger posed

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5 Id. at 1025.
6 Id. at 1024–26.
7 Id. at 1026.
by the challenged design; the likelihood that such danger would occur; the mechanical feasibility of a safer design; and the adverse consequences to the product and to the consumer that would result from the safer design." As the Superior Court noted in Schindler v. Sofarmor, Inc., the gatekeeping role of the trial court is a critical judicial function, one which gives the trial court an inherent "power to reject design defect claims as a matter of law, even where the plaintiff presents evidence tending to show that the product is defective." As such, it is not uncommon for sellers and manufacturers to avoid liability for claims of allegedly defective products by raising successful motions for summary judgment, directed verdict, or even judgment notwithstanding the verdict.

Since the Azzarello decision, Pennsylvania courts have attempted to distinguish between products liability cases sounding in negligence and those based on a theory of strict liability under section 402A. For example, the Pennsylvania Supreme Court stated in Lewis v. C. that Azzarello stands for the proposition that "negligence concepts have no place in a case based on strict liability." The Court restated this proposition more recently in its 2003 decision in Phillips v. Cricket Lighters (Phillips I).

In Phillips I, the Supreme Court stated that Lewis made clear that under section 402A, it is the product itself that is on trial, as opposed to the conduct of the manufacturer. In Lewis, the plaintiff was operating an overhead, electric chain hoist to lift a metal carriage assembly, a component of a machine being produced by his employer, into position. The hoist was operated by using a control pendant, which was essentially a control box that was attached to a cable running to the hoist. When the carriage assembly that he was hoisting became jammed, Mr. Lewis attempted to move the control pendant into a different position in order to correct the problem. While Mr. Lewis was attempting to correct the problem, he tripped and fell and accidentally hit an incorrect button on the control pendant. As a result, half of the carriage assembly became "unstuck" and swung forward into Mr. Lewis’ legs, seriously injuring him. Mr. Lewis filed suit against the manufacturer of the hoist, the Coffing Hoist Division of the Duff-Norton Company, alleging that the control pendant was defective in that it did not

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9 Schindler v. Sofarmor, Inc., 774 A.2d 765, 772 (Pa. Super. Ct. 2001). Trial courts will generally consider a multitude of factors in addition to the four cited. For a more comprehensive discussion of these factors, see Part I.A.4.b, infra.
10 Id. at 773.
14 528 A.2d 590, 593 (Pa. 1987).
15 841 A.2d at 1006.
16 Id.
17 Lewis, 528 A.2d at 591.
18 Id.
19 Id.
20 Id.
21 Id.
contain a guard or protective feature over the buttons in the box to prevent an accidental activation of the hoist.\textsuperscript{22}

Although the Coffing Hoist Division of the Duff-Norton Company wished to introduce expert testimony relating to industry standards regarding a lack of similar protective features on control boxes, the trial court excluded the evidence, ruling that evidence of compliance with “industry-wide standards, customs, and practices” would improperly inject concepts of negligence into an action alleging strict liability under section 402A.\textsuperscript{23} The case was ultimately appealed to the Supreme Court, which upheld the trial court’s ruling, and held that evidence of industry standards goes to “the reasonableness of the [defendant’s] conduct in making its design choice,” and that such evidence would not only have brought into the case improper concepts of negligence, but also would have diverted the jury’s attention away from “the [defendant’s] control box to the reasonableness of the [defendant’s] conduct in choosing its design.”\textsuperscript{24} To further this point, the Pennsylvania Supreme Court has explained that “[e]vidence of due care by a defendant is both irrelevant and inadmissible in a products liability case since a manufacturer may be strictly liable even if it used the utmost care.”\textsuperscript{25}

Although lower Pennsylvania courts have attempted to adhere to the principle that product liability cases sounding in negligence and strict liability are to be construed as wholly distinct causes of action, that has not always been the case, even by admission of the Court itself. For example, the court in \textit{Phillips I} stated that “[w]hile 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.”\textsuperscript{26} The \textit{Phillips I} Court cited the example of \textit{Davis v. Berwind Corp.},\textsuperscript{27} where the Supreme Court held that the manufacturer of a safe product could be held strictly liable for an injury caused by a subsequent change made to the product, even if the manufacturer was not responsible for the change, where the manufacturer “could have reasonably expected or foreseen such an alteration of its product.”\textsuperscript{28} Interestingly, however, the \textit{Phillips I} Court also stated that it felt it would be “imprudent” to reverse previous strict liability decisions that had incorporated negligence terms, and instead simply chose to “reaffirm” that negligence concepts have no place in strict liability law.\textsuperscript{29}

\section*{3. A Move to the Restatement (Third)}

Despite the Pennsylvania Supreme Court’s continued pronouncement that negligence concepts have no place in strict product liability actions, the United States Court of Appeals for

\begin{footnotesize}
\begin{enumerate}
\item Lewis, 528 A.2d at 591.
\item Id.
\item Id. at 594.
\item Spino v. John Tilley Ladder Co., 696 A.2d 1169, 1172 (Pa. 1997).
\item 841 A.2d at 1006–07.
\item 690 A.2d 186 (Pa. 1997).
\item Phillips I, 841 A.2d at 1007 (quoting Davis, 690 A.2d at 190).
\item Phillips I, 841 A.2d at 1007.
\end{enumerate}
\end{footnotesize}
the Third Circuit somewhat recently predicted in Berrier v. Simplicity Manufacturing that the Pennsylvania Supreme Court would abandon section 402A of the Restatement (Second) of Torts in favor of adopting the Restatement (Third) of Torts: Products Liability, sections 1 and 2. Citing a concurring opinion written by Pennsylvania Supreme Court Justice Thomas G. Saylor in Phillips I in which he voiced his support for the adoption of the Restatement (Third), the Third Circuit proclaimed that adopting “the Third Restatement [would eliminate] much of the confusion that has resulted from attempting to quarantine negligence concepts and insulate them from strict liability claims.”

Justice Saylor had explained in his concurring opinion in Phillips I that the difficulty faced by Pennsylvania courts in attempting to distinguish between negligence and strict liability in product liability cases “demonstrate[d] a compelling need for consideration of reasoned alternatives, such as are reflected in the position of the Third Restatement.” Finding support for its prediction in Justice Saylor’s concurrence, the Third Circuit stated its belief that his opinion “foreshadow[ed]” the Pennsylvania Supreme Court’s eventual adoption of sections 1 and 2 of the Restatement (Third). Rather than separating causes of action sounding in strict liability and negligence, the Restatement (Third) approach reflects the evolution of product liability case law by defining a defect in terms of whether it is a manufacturing defect, a design defect, or a warning defect. The Restatement (Third) applies strict liability in cases where the plaintiff alleges a manufacturing defect and principles of negligence where the plaintiff alleges a defect in design or inadequate warnings.

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31 Id. at 40.
32 Id. at 55 (citing Phillips I, 841 A.2d at 1019 (Saylor, J., concurring)).
33 841 A.2d at 1018 (Saylor, J., concurring).
34 Berrier, 563 F.3d at 54.
35 The Restatement (Third) of Torts: Products Liability, § 1 (1998) provides that “[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: (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product; (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe; (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.
In *Bugosh v. I.U. North America*, the Pennsylvania Supreme Court allowed an appeal to consider the issue of whether to adopt sections 1 and 2 of the Restatement (Third) of Torts: Products Liability in favor of section 402A of the Restatement (Second) of Torts. Instead of reaching the ultimate issue, the Court dismissed the case as being improvidently granted after hearing three days of oral argument. Despite the odd procedural nature of the Court’s decision, Justice Saylor filed a strongly worded dissent in *Bugosh* wherein he reaffirmed his support for adoption of the Restatement (Third). Justice Saylor was joined in his dissent by Chief Justice Ronald D. Castille, who also joined his concurring opinion in *Phillips I*.

Justice Saylor restated his belief that “the Third Restatement’s provisions are far more reasoned and balanced than *Azzarello*, and adoption would represent a substantial advancement in Pennsylvania law.” According to Justice Saylor, Pennsylvania’s continued adherence to *Azzarello* meant that the courts were “essentially thirty years behind” with respect to advancements in products liability law. Justice Saylor went on to cite the Third Circuit’s opinion in *Berrier*, tipping his cap to the judges who had based their prediction on Saylor’s own concurring opinion in *Phillips I*. He cited the Third Circuit’s belief that the Restatement (Third) eliminates the confusion that has arisen from attempting to keep separate actions sounding in negligence and products liability, and stated quite frankly that the Restatement (Third) “provides a suitable template for making up for lost time and moving forward.”

However strong Justice Saylor and Chief Justice Castille may be in their belief that the Pennsylvania Supreme Court would be wise to adopt sections 1 and 2 of the Restatement (Third) of Torts: Products Liability, it appears, at least for now, that the rest of the members of the Pennsylvania Supreme Court are content with section 402A of the Restatement (Second) as the controlling law in Pennsylvania.

4. **Proving the Plaintiff’s Case**

In order to prevail on a claim of strict liability against the seller of a defective product for injuries caused by that product, a plaintiff’s prima facie case under section 402A requires a showing that (1) the product was defective; (2) that the defect existed at the time the product left the manufacturer’s hands; and (3) that the defect was the proximate cause of the plaintiff’s injuries. Under the first prong of the plaintiff’s prima facie case, the plaintiff can show that the product was defective by proving that it was defectively manufactured, that it was defectively designed, or that it contained inadequate or improper warnings and/or instructions.

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36 971 A.2d 1228 (Pa. 2009). Interestingly, in *Berrier*, the Third Circuit cited the appeal allowed in *Bugosh* as support for its prediction that the Pennsylvania Supreme Court would ultimately adopt the Restatement (Third) of Torts: Products Liability.

37 *Bugosh*, 971 A.2d at 1241 (Saylor, J., dissenting).

38 *Id.*

39 *Id.*


41 *Id.* at 458–59.
a. Manufacturing Defect

In a case alleging a manufacturing defect, the plaintiff is generally responsible for proving that there is some discrepancy between the nature and quality of the product intended to be produced and the product that is actually produced.\(^{42}\) In a manufacturing defect case, the burden is on the plaintiff to show that the product has failed to “comport with its intended design and is unsafe for normal handling or use.”\(^{43}\)

In cases where a plaintiff is unable to prove the existence of a manufacturing defect by direct evidence, for example, where a product has been destroyed, a plaintiff may be able to proceed against a manufacturer of an allegedly defective product on a “malfunction theory,” a theory adopted by the Pennsylvania Supreme Court in *Rogers v. Johnson & Johnson Products Inc.*\(^{44}\) In a malfunction theory case, the plaintiff has the responsibility of showing the occurrence of a malfunction, which amounts to “circumstantial evidence that the product had a defect,” and some evidence to eliminate “abnormal use or reasonable, secondary causes.”\(^{45}\) By proving the first element, the plaintiff is essentially proving that the product had a defect, without actually being able to show what the defect was. Further, by eliminating abnormal use or other reasonable causes, the plaintiff is showing that the particular defect existed when it left the manufacturer’s hands and that the defect was the cause of the plaintiff’s injuries.\(^{46}\) Although stated differently, the plaintiff is still essentially responsible for proving the traditional elements of a prima facie case alleging strict liability, i.e., that the product was defective at the time it left the seller’s hands and that the defect was the proximate cause of the plaintiff’s injuries.

b. Design Defect

The plaintiff also has the option of proving that the seller’s product was defectively designed. As the Court noted in *Azzarello*, in his role as the guarantor of his product, a manufacturer is effectively representing that the product is “safe for its intended use” when he places it into the stream of commerce.\(^{47}\) In order to allow a trial court to determine that a product was defective because of its design, the plaintiff must show that the product either does not possess an “element necessary to make it safe for its intended use,” or that it possesses a “condition that makes it unsafe for its intended use.”\(^{48}\) In making this determination, trial courts will look to a number of factors. As discussed previously, a trial court will look to “the gravity of the danger posed by the challenged design; the likelihood that such danger would occur; the mechanical feasibility of a safer design; and the adverse

\(^{44}\) 565 A.2d 751 (Pa. 1989).
\(^{46}\) See id.
\(^{47}\) 391 A.2d at 1026 (quoting *Salvador*, 319 A.2d 903).
\(^{48}\) *Azzarello*, 391 A.2d at 1027; see also *Phillips I*, 841 A.2d at 1007.
consequences to the product and to the consumer that would result from the safer design.”

A court will also look to additional factors, including:

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 a 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.

In addition, the plaintiff is also responsible for showing that the defective design of the product was the proximate cause of his injuries.

c. Inadequate or Insufficient Warning

In addition to showing that a product is defective because of a manufacturing defect or a design defect, a plaintiff may also show that a product is defective because it was distributed with inadequate or insufficient warnings. Pennsylvania law places the burden on the plaintiff to show that the product was “distributed without sufficient warnings to notify the ultimate user of the dangers inherent in the product.” However, the Court noted in Mackowick v. Westinghouse Electric Corporation that a manufacturer is not required by section 402A or Pennsylvania law to “educate a neophyte in the principles of the product” and that a warning will be considered sufficient if it “adequately notifies the intended user of the unobvious dangers inherent in the product.” In order to prove causation in a defective warning case, a plaintiff must demonstrate that “the user of the product would have avoided the risk had he or she been warned of it by the seller.”

5. Unavoidably Unsafe Products

Comment k to section 402A of the Restatement (Second) of Torts states that some products, such as prescription drugs, are “quite incapable of being made safe for their intended

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49 Schindler, 774 A.2d at 772.
50 Id. (citing Riley v. Warren Mfg., 688 A.2d 221, 224–25 (Pa. Super. Ct. 1997)).
51 See Dambacher, 485 A.2d at 413; see also Sherk v. Daisy-Heddon, Etc., 450 A.2d 615, 617 (Pa. 1982).
53 Id.
As such, comment k states that such products, because of their usefulness, cannot be said to be defective or unreasonably dangerous, so long as accompanied by proper warnings and directions. Pennsylvania courts have recognized this exception to the rule of strict liability.

6. **Who Can Bring Suit**

While section 402A provides as a caveat that the American Law Institute expresses no opinion as to whether the section 402A applies to “harm to persons other than users or consumers,” Pennsylvania courts have consistently held that a manufacturer, seller, or distributor may be held liable for harm that occurs in “in connection with a product’s intended use by an intended user,” and conversely that “there is no strict liability in Pennsylvania relative to non-intended uses even where foreseeable by a manufacturer.” As the Court noted in *Mineral Products*, even “the foreseeable misuse of a product” is insufficient to support a claim of strict products liability. This does not leave non-intended users without an avenue to recovery, however. Pennsylvania courts have long found in favor of bystanders injured by a defective product so long as the product itself was being used in its intended manner by an intended user.

B. **Negligence**

In Pennsylvania, product liability suits may be grounded in negligence. Unlike suits grounded in strict liability, negligence suits require proof of the defendant’s fault. In order to prove fault, in some products liability cases Pennsylvania courts have only required plaintiffs to establish the traditional elements of negligence: (1) the defendant owed the plaintiff a duty; (2) the defendant breached that duty; (3) the breach proximately caused the plaintiff’s injuries; and (4) the plaintiff suffered actual damages. In other cases, however, the courts have suggested that the plaintiff must prove, in addition, that the defendant’s product is defective and that this defect caused the plaintiff’s injury.

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55 Restatement (Second) of Torts § 402A cmt. k (1965).
56 Id.
59 Id.
64 Dambacher, 485 A.2d at 424. But see Griggs, 981 F.2d at 1439 (predicting that the Pennsylvania Supreme Court would not require proof of defect in negligence cases).
Regardless of which elements are required, a defendant manufacturer owes a duty only to foreseeable users of the defendant’s products or those who could foreseeably be injured by the defendant’s products. The defendant also only owes a duty to avoid exposing others to risks that are foreseeable.

C. Breach of Warranty

In Pennsylvania, a plaintiff may also bring a claim against the seller of a defective product under a theory of breach of warranty. Generally, these claims will be for a breach of the implied warranty of merchantability or a breach of the implied warranty of fitness for a particular purpose, as those terms are defined under the Pennsylvania Uniform Commercial Code. In *Goodman v. PPG Industries, Inc.*, the Superior Court stated that “[o]ur Supreme Court harmonized the rules governing implied warranty claims with the rules governing products liability claims, because the two types of actions are now substantially similar.” Although product liability claims and breach of warranty claims are not “coterminous,” product liability cases “often include breach of warranty claims,” specifically where a plaintiff is alleging that a product was not safe for its intended use, i.e., the product was defectively designed.

In a case alleging a breach of an implied warranty, the Pennsylvania Supreme Court has held that anyone injured by the allegedly defective product may bring suit, and anyone “in the distributive chain” may be sued. The Court in *Goodman* explained that this rule is “true” because the adoption of strict liability in the realm of product liability requires that the seller of a product be the “guarantor” of that product’s safety. In order for a product to be considered merchantable, it must be “fit for its ordinary purpose.” On the other hand, for a plaintiff to bring suit against a seller on a theory of breach of the implied warranty of fitness for a particular purpose, the plaintiff must show that the product was not fit for the particular purpose that the plaintiff required, and that the seller, at the time of entering into the contract with the plaintiff, had a reason to know of that particular purpose and that the buyer was “relying on the skill or judgment of the seller to select or furnish such goods.” For breach of warranty claims arising in the context of product liability cases, liability “turns on a lack of fitness in the defendant’s product . . . rather than on the breach of a particular duty of care by the defendant.”

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65 *Griggs*, 981 F.2d at 1438.
69 849 A.2d at 1245.
70 *See id.*
71 *Id.*
72 *Id.*
74 13 PA. CONS. STAT. § 2315 (2011).
D. The Consumer Protection Act

Plaintiffs also have the option of bringing a cause of action against the seller of an allegedly defective product under the Unfair Trade Practices and Consumer Protection Law (UTPCPL). The UTPCPL creates a private cause of action for any person who “purchases or leases goods . . . primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act, or practice declared unlawful by section 3 of the [UTPCPL].” The UTPCPL lists 23 separate acts or practices that are declared to be unlawful, including “[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have,” “[r]epresenting that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand,” and “[r]epresenting that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another.”

II. Causation

Causation is of two types: (1) causation in fact and (2) proximate or legal causation. Under Pennsylvania law, the test for causation in fact is the “but-for test”: “if the harmful result would not have come about but for the negligent conduct then there is a direct causal connection between the negligence and the injury.” The test for proximate causation is usually said to be a “substantial factor test”: “the defendant’s acts or omissions . . . a substantial factor in bringing about the plaintiff’s harm[?]” On at least one occasion, the Pennsylvania Supreme Court seemed to suggest an alternative “natural sequence test” for proximate cause: “the actor is responsible for all the . . . consequences [of the actor’s conduct] no matter how remote, which follow in a natural sequence of events.”

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76 73 PA. STAT. ANN. § 201-1 et. seq. (2011).
77 Id. § 201-9.2.
78 Id. § 201-2(4)(v).
79 Id. § 201-2(4)(vi).
80 Id. § 201-2(4)(vii).
84 Berkebile v. Brantly Helicopter Corp., 337 A.2d 893, 900 (Pa. 1975) (plurality). In Berkebile, the Pennsylvania Supreme Court also specified that “[f]oreseeability is not a test of proximate cause.” Id.
Some Pennsylvania precedents suggest that, in order to recover in negligence or strict liability, a plaintiff must prove both types of causation. Other opinions suggest that a plaintiff, in bringing a strict liability claim, must only prove one type of causation—proximate causation. Similarly, for breach of warranty claims, the Pennsylvania courts require that the plaintiff prove proximate causation, but do not specifically require that the plaintiff prove cause in fact.

The Pennsylvania courts do agree that a plaintiff must prove both types of causation if the theory of recovery is strict liability for failure to warn. That is, the plaintiff must show that a product’s hazardous condition was the cause in fact of the plaintiff’s injury and that the failure to adequately warn about that condition was the proximate cause of the injury. Still, the Pennsylvania Superior Court somewhat altered the burden of proof for proximate cause when the court adopted the “heeding presumption” for claims alleging failure to adequately warn. Under this presumption, the court will presume that, had the plaintiff received an adequate warning, the plaintiff would have heeded such a warning. That is, the court will presume that the failure to adequately warn the plaintiff proximately caused the plaintiff’s injuries. Thus, the plaintiff will be required to prove proximate cause only if the defendant rebuts the presumption in favor of finding proximate cause.

When a plaintiff must prove causation, the plaintiff must do so by a preponderance of the evidence. A plaintiff may prove causation using circumstantial evidence.

85 See First, 686 A.2d at 21 n.2 (stating that both negligence and strict liability claims require proof of causation, which is defined as cause in fact and proximate causation); E.J. Stewart, Inc., 607 F. Supp. at 888–89.
86 Berkebile, 337 A.3d at 898 (“Strict liability requires, in substance, only two elements of requisite proof: the need to prove that the product was defective, and the need to prove that the defect was a proximate cause of the plaintiff’s injuries.”); Spino, 696 A.2d at 1172.
87 AM/PM Franchise Ass’n v. Atlantic Richfield Co., 584 A.2d 915, 923 n.12 (Pa. 1990) (In “all cases involving breach of warranty, the plaintiff is charged with the burden of proving that the defendant’s breach is the proximate cause of the harm suffered.”); Price v. Chevrolet Motor Div. of GMC, 765 A.2d 800, 809 (Pa. Super. Ct. 2000) (“To prevail on a claim for breach of warranty under the Pennsylvania Uniform Commercial Code, a plaintiff must establish that a breach of warranty occurred and that the breach was the proximate cause of the specific damages sustained.”).
89 See Coward, 729 A.2d at 621.
90 Id.
91 See id.
92 Id. at 621–22.
94 Blum ex. rel. Blum, 705 A.2d at 1316.
III. Industry Wide Liability

As the Pennsylvania Superior Court stated in *Burnside v. Abbot Laboratories*, “an essential element of any cause of action in tort is that there must be some reasonable connection between the act or omission of the defendant and the injury suffered by the plaintiff.” That is, the plaintiff must show that some conduct on the part of the particular defendant being sued was responsible for the plaintiff’s injuries. In some cases, however, it may be difficult for a plaintiff to identify which of a large group of manufacturers or sellers of a product was responsible for selling the particular product that the plaintiff alleges caused his/her injuries. For example, where a number of manufacturers produced a drug that was sold under a generic brand name, it may be difficult for plaintiffs to prove which defendant manufactured the particular drug taken by the plaintiff.

In such cases, a plaintiff or plaintiffs may attempt to proceed on a theory of “industry-wide” liability. By alleging “industry-wide” liability, the plaintiff or plaintiffs are attempting to shift the burden to the defendants by requiring each defendant to prove that their particular product did not cause the plaintiff’s injuries. Generally, plaintiffs can use one of five distinct theories to support their allegation of industry-wide liability: alternative liability, concert of action, enterprise liability, market share liability, and/or civil conspiracy.

A. *Burnside v. Abbot Laboratories*

In *Burnside*, five women brought an action against seventy-two pharmaceutical companies alleging that various physical disabilities that they suffered from were due to the ingestion by their mothers of the drug diethylstilbestrol (DES) during pregnancies. DES is a “synthetic estrogen [that was] first synthesized in 1937” and has been prescribed by physicians for various reasons, including deterrence of miscarriages. In *Burnside*, the five women did not specifically aver which company had been responsible for manufacturing the particular product that they ingested, and instead their complaints averred that all of the pharmaceutical companies were jointly and/or severally liable because DES was generically branded at the time of ingestion.

After initial discovery, thirty-two of the original defendants were dismissed without objection; seventeen defendants were dismissed because appellants failed to serve them, and fifteen others were able to show that it was impossible for their products to have been ingested by any of the plaintiffs. Of the forty remaining defendants, twenty-six then filed a motion for summary judgment, alleging that the five plaintiffs could not have been “exposed to and

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96 *Id.* at 978.
97 *Id.* at 976. One woman’s claims actually stemmed from her own ingestion of DES. *Id.*
98 *Id.*
99 *Id.*
100 *Burnside*, 505 A.2d at 976.
injured by its product.”\textsuperscript{101} The trial court granted each of the motions for summary judgment on the basis that undisputed affidavits and discovery documents showed that the defendants could not have been the manufacturer of the drugs ingested by the plaintiffs. Although the plaintiffs agreed with the court’s factual finding, they appealed the trial court’s ruling, alleging that summary judgment was improper because they had averred industry-wide liability under the theories of civil conspiracy, concerted action, and enterprise liability.\textsuperscript{102} Indeed, the plaintiffs’ theory on appeal was that although the defendants were not directly responsible for their injuries, they were liable on a theory of industry-wide liability.\textsuperscript{103}

B. Civil Conspiracy

In order to state a cause of action for civil conspiracy, Pennsylvania law requires that a plaintiff show that “two or more persons combine or enter an agreement to commit an unlawful act or to do an otherwise lawful act by unlawful means.”\textsuperscript{104} As the Superior Court noted, it is not actionable conspiracy simply because two or more persons happen to do a thing at the same time; rather, proof of malice is “an essential part” of a cause of action for civil conspiracy.\textsuperscript{105} Because the plaintiffs in \textit{Burnside} had failed to “allege the manner in which a conspiratorial scheme was devised and carried out,”\textsuperscript{106} the Superior Court upheld the trial court’s ruling.\textsuperscript{107} As the Superior Court explained, the plaintiffs’ complaint contained only bare allegations of “wrongful, reckless, careless, negligent, and grossly negligent” conduct, and no specific averments regarding any “meetings, telephone calls, joint filing, cooperation, consolidation, or joint licensing.”\textsuperscript{108} As such, the plaintiffs’ allegations of a “contemporaneous and negligent failure to act” were not sufficient to state a cause of action for civil conspiracy.

C. Concerted Action

Under the concerted action theory as found in section 876 of the Restatement (Second) of Torts, the seller of a product will be subject to liability for harm resulting to a third party from the conduct of another if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{101} \textit{Id.}
\item\textsuperscript{102} \textit{Id.} at 978.
\item\textsuperscript{103} \textit{Id.}
\item\textsuperscript{104} \textit{Id.} at 980 (citing \textit{Slaybaugh v. Newman}, 479 A.2d 517, 519 (Pa. Super. Ct. 1984)).
\item\textsuperscript{105} \textit{Burnside}, 505 A.2d 973, 980 (citing \textit{Thompson Coal Co. v. Pike Coal Co.}, 412 A.2d 466, 472 (Pa. 1979)).
\item\textsuperscript{106} \textit{Burnside}, 505 A.2d at 983.
\item\textsuperscript{107} \textit{Id.}
\item\textsuperscript{108} \textit{Id.}
\end{enumerate}
\end{footnotesize}
A plaintiff alleging liability based on the concert of action theory must show some wrongful conduct on the part of the defendant.\textsuperscript{109} The Superior Court in \textit{Burnside} explained that to proceed on a theory of concert of action, a plaintiff must “identify the person who acted in concert with the wrongdoer or who gave him assistance or encouragement.”\textsuperscript{110} The \textit{Burnside} court again upheld the trial court’s grant of summary judgment with respect to the concert of action theory, holding that the plaintiffs had not alleged “either a tacit understanding or common design to market a defective product,” but rather had charged the defendants with “‘parallel and imitative’ conduct,” conduct that is insufficient to support a cause of action under the theory of concert of action.\textsuperscript{111}

D. \textbf{Enterprise Liability}

A plaintiff can prevail on a theory of enterprise liability by proving that the allegedly defective product was (1) manufactured by “one of a small number of defendants in an industry,” (2) the defendants had “joint knowledge of the risks inherent in the product and possessed a joint capacity to reduce those risks;” and (3) rather than taking the steps to reduce the risk of harm inherent in the product, the manufacturers delegated that responsibility to a trade association.\textsuperscript{112} Generally, however, the enterprise liability theory is only applicable in cases involving a small number of defendants who comprise the entire industry or nearly the entire industry.\textsuperscript{113} In \textit{Burnside}, the plaintiffs failed to aver any of the elements of a cause of action for enterprise liability, and as such, the Superior Court rejected their claim.

E. \textbf{Market Share Liability}

In \textit{Burnside}, the Superior Court also acknowledged that plaintiffs may be able to recover on an industry-wide theory by proving market share liability, although the Superior Court refused to adopt the market share theory because the facts of the case did not support doing so.\textsuperscript{114} To prevail on a theory of market share liability, a plaintiff is responsible for showing that

(1) all defendants are tortfeasors; (2) the allegedly harmful products are identical and share the same defective qualities; (3) plaintiff is unable to identify which defendant caused her injury through no fault of her own; and (4) the manufacturers of substantially all of the defective products in the relevant area and during the relevant time are named as defendants.\textsuperscript{115}

\textsuperscript{109} See id. at 982 (citing Summit Hotel Co. v. Nat’l Broad. Co., 8 A.2d 302, 305 (Pa. 1939)).

\textsuperscript{110} \textit{Burnside}, 505 A.2d at 982.

\textsuperscript{111} Id. at 984.

\textsuperscript{112} Id.

\textsuperscript{113} Id. at 984–85.

\textsuperscript{114} Id. at 986.

In *Mellon v. Barre-National Drug Co.*, the Superior Court again refused to adopt market share liability, noting that the theory had only been adopted in the Commonwealth by a lone trial court opinion, there was no “clear authoritative signal” that the Pennsylvania Supreme Court would adopt market share liability, and no “nationwide consensus” existed with regard to whether market share liability theory is a valid exception to the general requirement that a plaintiff prove proximate causation on the part of the defendant.

**F. Alternative Liability**

Although the appellants in *Burnside* had also argued that the trial court’s grant of summary judgment was improper because questions of fact remained as to the appellees’ liability under the alternative liability theory propounded by section 433B(3) of the Restatement (Second) of Torts, appellants did not advance that issue at the Superior Court level. As such, the Superior Court did not discuss the alternative liability theory.

Section 433B(3) of the Restatement (Second) of Torts provides that “[w]here the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.” Although the *Burnside* court only acknowledged that alternative liability was another possible route of recovery for plaintiffs, the Superior Court has on other occasions discussed, and at a very minimum, implicitly adopted the theory.

**IV. Post-Sale Duties**

In Pennsylvania, the general rule is that a manufacturer has a post-sale duty to warn consumers if: (1) the product in question was defective at the time of sale; and (2) the manufacturer becomes aware of the defect. Such warnings must be made directly to the consumer or user.

The Pennsylvania courts generally do not impose a “post-sale duty to warn about technological advances [or new safer designs] where no defect existed in [a] product at the time of sale,” unless the product at issue is a prescription drug. The Pennsylvania courts also impose no common-law duty to recall, withdraw, or retrofit products.

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116 636 A.2d at 187.
117 *Burnside*, 505 A.2d at 978 n.1.
119 *RESTATEMENT (SECOND) OF TORTS* § 433B(3) (1965).
122 *Walton*, 610 A.2d at 459.
V. Successor Liability

Under Pennsylvania law, the general rule is that a successor-in-interest does not acquire the liabilities of its predecessor. Still, Pennsylvania courts have often recognized six exceptions to this rule:

1) The purchaser expressly or impliedly agrees to assume such obligation; 2) The transaction amounts to a consolidation or merger; 3) The purchasing corporation is merely a continuation of the selling corporation; 4) The transaction is fraudulently entered into to escape liability; 5) The transfer was not made for adequate consideration and provisions were not made for the creditors of the transfer; and, 6) The successor undertakes to conduct the same manufacturing operation of the transferor’s product lines in essentially an unchanged manner. The successor is then strictly liable for injuries caused by defects in the product line, even if previously manufactured and distributed by the transferor.

The sixth exception, known as the product-line exception, has been the subject of particularly frequent litigation. Although the Pennsylvania Superior Court has long recognized this exception, the Pennsylvania Supreme Court recently refused to decide whether the exception is valid.

VI. Defenses

A. Superseding Causes

A superseding cause “is an act of a third person or other force which, by its intervention, prevents the actor from being liable for harm to another which his antecedent

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124 Lance v. Wyeth, 4 A.3d 160, 167 & n.4 (Pa. Super. Ct. 2010) (holding that manufacturers of prescription drugs have “a continuing post-sale duty to warn” even where the drug in question was not defective at the time of sale), appeal granted, 15 A.3d 429 (Pa. 2011).
125 Id.; Lynch, 548 A.2d at 1280–81.
128 Schmidt, 11 A.3d at 936–46 (discussing product-line exception); Childers, 681 A.2d at 212–13 (affirming lower court’s decision to apply product-line exception); Burnside, 505 A.2d at 987 (rejecting application of product-line exception to a pharmaceutical company in a case involving DES); Dawejko, 434 A.2d at 110–12 (discussing, adopting, and applying the product-line exception).
129 Schmidt, 11 A.3d at 946.
negligence” proximately caused.\textsuperscript{130} That is, a superseding cause cuts off proximate causation. To be superseding, a cause must be so extraordinary that it could not reasonably have been foreseen.\textsuperscript{131} Whether a cause is superseding is normally a question for the jury to decide.\textsuperscript{132}

In product liability cases, the issue of superseding cause often arises where a product has been altered after the manufacturer sold it. Such alterations may constitute a superseding cause.\textsuperscript{133}

The tortious or criminal acts of third parties are often superseding causes. Such acts may not cut off liability, however, if they were foreseeable.\textsuperscript{134}

B. \textbf{Contributory Negligence / Comparative Fault}

In Pennsylvania, contributory negligence and comparative fault are governed by a statute, which states:

In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.\textsuperscript{135}

This statute establishes a modified system of comparative negligence. That is, the statute disposes of the traditional contributory negligence rule under which a plaintiff is completely barred from recovery if his own negligence contributed at all to his injury.\textsuperscript{136} Instead, a plaintiff is barred from recovering only if his negligence exceeds that of the defendant or defendants.\textsuperscript{137} Thus, a plaintiff would be barred from recovering if the jury determined that the plaintiff’s negligence was 51% or greater and the negligence of the defendant (or defendants) was 49% or

\textsuperscript{130} Von Der Heide v. Commonwealth Dep’t of Transp., 718 A.2d 286, 288 (Pa. 1998) (quoting RESTATEMENT (SECOND) OF TORTS § 440 (1965)).
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} Powell v. Drumheller, 653 A.2d 619, 624 (Pa. 1995).
\textsuperscript{133} See Davis, 690 A.2d at 190 (employer’s removal of safety device from machine constituted a superseding cause of plaintiff employee’s injuries); Kuisis, 319 A.2d at 922 n.15 (alterations may cut off liability unless the alterations were foreseeable); Putt, 722 A.2d at 221 (same).
\textsuperscript{134} Klages v. Gen. Ordnance Equip. Corp., 367 A.2d 304, 313 (Pa. Super. Ct. 1976) (holding that criminal conduct was not a superseding cause where defendant manufactured a can of mace which was intended for use against criminal attackers, but which was not as effective as the manufacturer promised).
\textsuperscript{135} 42 PA. CONS. STAT. § 7102(a) (2011).
less. As long as the plaintiff’s negligence is 50% or less, the plaintiff will recover something.\textsuperscript{138} The plaintiff’s recovery simply will “be diminished in proportion to the amount of negligence attributed to the plaintiff.”\textsuperscript{139}

By its terms, this statute applies to “actions . . . for negligence.” The Pennsylvania courts have held that, with strict liability claims, contributory negligence and comparative negligence may not be used as defenses.\textsuperscript{140}

C. **Assumption of the Risk**

The defense of assumption of the risk may be used to defend both negligence and strict liability claims.\textsuperscript{141} To prove assumption of the risk, a defendant must show that the plaintiff “knew of a defect [in a product] and yet voluntarily and unreasonably proceeded to use the product in conscious disregard for the attendant risks.”\textsuperscript{142} A plaintiff’s awareness of risk may be proven with circumstantial evidence.\textsuperscript{143} The court, and not the jury, decides whether the plaintiff assumed the risk.\textsuperscript{144} If a plaintiff assumed the risk, then the plaintiff will be completely barred from recovery.\textsuperscript{145} In Pennsylvania, an employee is not deemed to have assumed a risk if the employee uses a product as directed by his or her employer because the employee is considered to have no choice in encountering the risk posed by the product.\textsuperscript{146}

D. **Unintended Use, Intended Users, and Misuse**

In recent decisions, the Pennsylvania Supreme Court has stated that a defendant may only be strictly liable for injuries caused by a product defect if the consumer was an intended user who was using the product for its intended use.\textsuperscript{147} If a plaintiff was misusing a product, even if that misuse was foreseeable, the plaintiff cannot recover under strict liability.\textsuperscript{148} The court, however, has recognized a narrow exception where a manufacturer could have foreseen

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\textsuperscript{138} See *O’Brien v. Martin*, 638 A.2d 247, 248 (Pa. Super. Ct. 1994) (noting that the plaintiff recovered at trial, where the jury determined the plaintiff was 50% negligent and the defendants were 50% negligent).

\textsuperscript{139} § 7102(a).


\textsuperscript{142} See *Reott*, 7 A.3d at 836.


\textsuperscript{144} *Id.* at 8–9. But see *Robinson v. B.F. Goodrich Tire Co.*, 664 A.2d 616, 618 (Pa. Super. Ct. 1995) (“[T]he theory may be submitted to a jury[].”).


\textsuperscript{148} *Pa. Dep’t of Gen. Servs.*, 898 A.2d at 601 (“[F]oreseeable misuse of a product will not support a strict liability claim.”).
that consumers would alter a product (not merely misuse it) by, for instance, removing a safety device.\textsuperscript{149}

The Supreme Court’s recent statements seem to have created some confusion in this area of the law.\textsuperscript{150} The U.S. Third Circuit Court of Appeals recently attempted to interpret the Pennsylvania Supreme Court’s statements relating to intended and unintended users. The Third Circuit found that these statements should not be interpreted as disallowing bystander recovery.\textsuperscript{151} That is, even though a bystander who is injured by a product is not an intended user, such a person may still recover.

The Pennsylvania Superior Court also recently explained the Pennsylvania Supreme Court’s statements by distinguishing between the doctrine of unintended use and the defense of misuse.\textsuperscript{152} The Supreme Court’s statements relate to the former, and not the latter.\textsuperscript{153} The doctrine of unintended use arises where a defendant can show that its product is not defective because the product was designed so that it \textit{is} safe for its intended uses; the user was simply using the product for an unintended use.\textsuperscript{154} In contrast, the defense of misuse relates to causation. To employ this defense, a defendant must show that the plaintiff’s misuse of a product “was so outrageous and unforeseeable as to constitute the sole and superseding cause of the plaintiff’s injury.”\textsuperscript{155} Thus, while foreseeability is not an issue with regard to the doctrine of unintended use, it is an issue with regard to the defense of misuse.

\textbf{E. Statutes of Limitations}

A two-year statute of limitations applies to claims for personal injury and wrongful death,\textsuperscript{156} as well as claims for property damage.\textsuperscript{157} Breach of warranty claims, however, are governed by a longer four-year statute of limitations.\textsuperscript{158}

\begin{footnotes}
\item[149] \textit{Id.} at 601 n.10 (citing \textit{Davis}, 690 A.2d at 190).
\item[150] The U.S. Third Circuit Court of Appeals recently certified the following question to the Pennsylvania Supreme Court: “Whether, under Pennsylvania law a plaintiff minor child may pursue a strict liability claim for injuries caused by a riding lawnmower, where the child is neither an intended user nor consumer of the mower.” \textit{Berrier}, 563 F.3d at 60 n.33. The Pennsylvania Supreme Court declined to respond. \textit{See Berrier v. Simplicity Mfg.}, 959 A.2d 900 (Pa. 2008).
\item[151] \textit{Berrier}, 563 F.3d at 40. For more on bystander recovery, see infra Part VIII.B.
\item[153] \textit{See Reott}, 7 A.3d at 840–41.
\item[154] \textit{Id.} at 841.
\item[155] \textit{Id.} at 840. Stated otherwise, the defendant must show “that the misuse solely caused the accident while the design defect did not contribute to it.” \textit{Smith}, 5 A.3d at 321.
\end{footnotes}
Under Pennsylvania law, the statute of limitations will normally begin to run on a tort claim when the injury occurs.\textsuperscript{159} Still, Pennsylvania also employs the discovery rule, which arises where a potential plaintiff does not immediately realize that he or she is injured.\textsuperscript{160} Under such circumstances, the statute of limitations does not begin to run until the plaintiff realizes or should realize that he or she is injured and that the defendant’s conduct caused the injury.\textsuperscript{161} Notably, the discovery rule does not apply to wrongful death claims.\textsuperscript{162}

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\textbf{F. Statute of Repose}

Pennsylvania has a statute of repose,\textsuperscript{163} which states, in relevant part: “a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property must be commenced within 12 years after completion of construction of such improvement.”\textsuperscript{164} Defendants have sometimes asserted this statute as a defense in products liability cases.\textsuperscript{165} Still, this statute ostensibly has limited application in products liability law, because the Pennsylvania Supreme Court has held that the statute does not apply to manufacturers who do nothing more than design and/or supply a product that is incorporated, by others, into an improvement to real property.\textsuperscript{166} Instead, in order to find protection under the statute, a manufacturer must perform a function similar to that of a builder.\textsuperscript{167} In addition, the Supreme Court has suggested, without unequivocally stating, that the statute might only apply to products individually manufactured, and not to mass-produced products.\textsuperscript{168}

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\textbf{G. Federal Preemption of State Law Claims}

Preemption occurs where federal law precludes the application of state law. Preemption can be any one of three types: (1) express preemption, where the language of a federal statute expressly states that the statute displaces inconsistent state law; (2) occupation of the field preemption, where Congress has so comprehensively legislated within a particular field that no room is left for the states to legislate; and (3) conflict preemption, where federal

\begin{itemize}
  \item \textsuperscript{159} \textit{Moyer v. United Dominion Indus.}, 473 F.3d 532, 547 (3d Cir. 2007).
  \item \textsuperscript{160} Id.
  \item \textsuperscript{161} Id.
  \item \textsuperscript{162} \textit{Pastierik}, 526 A.2d at 325, 327.
  \item \textsuperscript{163} \textit{42 PA. CONS. STAT. § 5536 (2011)}.
  \item \textsuperscript{164} Id.
  \item \textsuperscript{166} \textit{McConnaughey}, 637 A.2d at 1334.
  \item \textsuperscript{167} Id.
  \item \textsuperscript{168} \textit{See id. at 1334–35 (quoting Freezer Storage, Inc. v. Armstrong Cork Co.), 382 A.2d 715, 719 (Pa. 1978)). In \textit{Catanzaro v. Wasco Products, Inc.}, the Pennsylvania Superior Court read the statute more broadly so that the statute applies to a manufacturer regardless of whether the manufacturer customized the product and regardless of whether the manufacturer had any role in installing the product. 489 A.2d at 265–66. This reading, however, is probably no longer valid after the Pennsylvania Supreme Court’s more recent decision in \textit{McConnaughey}}.
\end{itemize}
law and state law are in such conflict that state law must yield.\textsuperscript{169} Manufacturers have argued that state tort law claims are preempted by federal law in a variety of different types of product liability cases. These cases involve, for instance, the following products: medical implants and devices,\textsuperscript{170} vaccines,\textsuperscript{171} drugs,\textsuperscript{172} chemicals,\textsuperscript{173} pesticides,\textsuperscript{174} asbestos,\textsuperscript{175} cell phones,\textsuperscript{176} motor vehicles,\textsuperscript{177} trailers,\textsuperscript{178} forklifts,\textsuperscript{179} airplanes,\textsuperscript{180} lawnmowers,\textsuperscript{181} and trousers.\textsuperscript{182}


\textsuperscript{175} Atwell, 986 A.2d 888 (holding that various federal statutes did not preempt claims based on exposure to asbestos that occurred while decedent repaired locomotives). Contra Kurns v. A.W. Chesterton Inc., 620 F.3d 392 (3d Cir. 2010) (holding that the Locomotive Inspection Act preempted claims based on exposure to asbestos that occurred while decedent serviced locomotives), cert. granted, No. 10-879, 2011 U.S. LEXIS 4271 (U.S. June 6, 2011).

\textsuperscript{176} Farina v. Nokia, Inc., 625 F.3d 97 (3d Cir. 2010) (holding that Federal Communications Commission regulations preempted claims against cell phone manufacturers).

\textsuperscript{177} Cellucci v. GMC, 706 A.2d 806 (Pa. 1998) (holding that the National Traffic and Motor Vehicle Safety Act preempted state tort claims against the manufacturer of a motor vehicle that did not include airbags); Pokorny v. Ford Motor Co., 902 F.2d 1116 (3d Cir. 1990) (holding that the National Traffic and Motor Vehicle Safety Act preempted some claims against the manufacturer of a van); Carrasquilla v. Mazda Motor Corp., 166 F. Supp. 2d 169 (M.D. Pa. 2001) (holding that the National Traffic and Motor Vehicle Safety Act preempted some claims against a vehicle manufacturer); Lorincie v. SEPTA, 34 F. Supp. 2d 929 (E.D. Pa. 1998) (holding that the Locomotive Boiler Inspection Act preempted a claim against the manufacturer of an engineer’s cab seat in a train).
H. **Open and Obvious Dangers, Inherent Dangers, and the Common Knowledge Doctrine**

Under Pennsylvania law, a manufacturer has no duty to warn about open and obvious dangers.\(^{183}\) This same rule is sometimes stated otherwise: Manufacturers have no duty to warn of dangers which are common knowledge.\(^{184}\) Thus, for instance, the Pennsylvania Superior Court has found that a liquor manufacturer has no duty to warn of the dangers of drinking and driving.\(^{185}\)

The Pennsylvania courts have also adopted Comment i to the Restatement (Second) of Torts § 402A.\(^{186}\) According to this comment, a defendant can only be liable in strict liability if a product is:

dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good 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 fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.\(^{187}\)

Thus, if the dangers of a product are common knowledge, the product is not unreasonably dangerous and not defective.\(^{188}\) Under such circumstances, a strict liability claim cannot be maintained.

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\(^{178}\) *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777 (3d Cir. 1992) (holding that the National Traffic and Motor Vehicle Safety Act did not preempt state claims against the manufacturer of a flatbed trailer).


\(^{180}\) *Sikkelee v. Precision Airmotive Corp.*, 731 F. Supp. 2d 429 (M.D. Pa. 2010) (holding that federal law preempted claims against companies that manufactured, supplied, or repaired a carburetor that allegedly caused a plane crash).


\(^{186}\) See id. at 848; see also *Berkebile*, 337 A.2d at 899 (citing Comment i).

\(^{187}\) *Restatement (Second) of Torts § 402A cmt. i* (1965).

\(^{188}\) *Dauphin*, 596 A.2d at 848 (“If the dangers are known, then the product is not defective . . . .”).
Comment i is especially protective of inherently dangerous products, as evidenced by the comment’s discussion of whiskey and tobacco. Thus, in following this comment, “Pennsylvania courts have refused to recognize causes of action for products which are legal and not defectively manufactured, but inherently dangerous.”

I. **The Sophisticated User / Bulk Supplier Doctrine**

In *Phillips v. A.P. Green Refractories Co.*, the Superior Court of Pennsylvania adopted the sophisticated user / bulk supplier doctrine as a defense to both strict liability and negligence claims. According to this doctrine, a supplier is not liable to an end-user for failure to warn if: (1) the supplier could not feasibly warn the end-user; and (2) the supplier reasonably relied upon a knowledgeable intermediary, such as the end-user’s employer, to warn the end-user. Applying this doctrine, the Superior Court found that bulk suppliers of sand were not liable for failure to warn workers who used that sand, because the suppliers had reasonably relied upon the workers’ employer, a knowledgeable and sophisticated user, to warn its own employees.

J. **The Government Contractor Defense**

In *Boyle v. United Technologies Corp.*, the U.S. Supreme Court recognized the “government contractor defense.” This defense arises where a manufacturer has contracted to sell military equipment to the federal government. The manufacturer cannot be liable for design defects in the equipment if: (1) the federal government endorsed reasonably precise specifications; (2) the equipment adhered to the specifications; and (3) the contractor warned the federal government of any dangers in the use of the equipment that were not known to the government, but were known to the contractor.

This defense preempts state law. Thus, where the three elements are satisfied, a defendant cannot be liable regardless of what Pennsylvania tort law may otherwise require. Still, the defense is only available where a manufacturer contracted with the federal government.

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191 *Id.* at 882 (adopting the Restatement (Second) of Torts § 388). The Pennsylvania Supreme Court subsequently declined to review the Superior Court’s recognition of the sophisticated user doctrine. *Phillips*, 665 A.2d 1167.
192 See *Phillips*, 630 A.2d at 882–83.
193 See *id.* at 883–84; see also *Kalinowski v. E.I. Du Pont De Nemours & Co.*, 851 F. Supp. 149 (E.D. Pa. 1994) (applying the sophisticated user doctrine to a bulk supplier of a chemical used in a prosthesis that failed).
196 *Id.* at 832.
government. The Pennsylvania Supreme Court has refused to recognize an analogous defense where a manufacturer contracts with the Commonwealth of Pennsylvania.

VII. Defenses Not Recognized in Pennsylvania

A. Service of Process on Foreign Corporations

In some jurisdictions outside Pennsylvania, courts have found that service of process by mail on a foreign corporation violates the Hague Convention. Pennsylvania federal and state courts, however, have generally rejected this contention. Thus, this defense is unavailable in Pennsylvania.

B. The Seat Belt Defense

The courts of some states recognize the “seat belt defense,” where a defendant may be absolved of liability if the plaintiff failed to use an available seat belt and this failure contributed to the plaintiff’s injuries. Pennsylvania has eliminated this defense by statute. Under 42 Pennsylvania Consolidated Statute § 4581, courts may not even admit, in any civil action, evidence that someone did not use a seat belt.

C. The State of the Art Defense

Some jurisdictions recognize a “state of the art” defense in strict liability cases involving design or warnings defects. Using this defense, a defendant may argue that a product is not defective because the product’s design was state of the art at the time of manufacture. Pennsylvania courts, however, have rejected this defense in strict liability cases, because it injects negligence principles (i.e. fault) into a strict liability context.

D. Privity of Contract

In some states, a plaintiff must prove vertical and/or horizontal privity in order to recover from a defendant for breach of warranty. For vertical privity, the purchaser of a
product must have directly acquired the product from the defendant.\textsuperscript{205} For horizontal privity, the plaintiff must either be the purchaser or someone with a particular relationship, defined by state law, to the purchaser.\textsuperscript{206} In Pennsylvania, a plaintiff may assert a breach of warranty claim against a defendant even if the plaintiff is not in vertical or horizontal privity with the defendant.\textsuperscript{207} Thus, lack of privity is no defense to a claim for breach of warranty.\textsuperscript{208}

VIII. Damages

A. Economic Loss

The Pennsylvania Supreme Court has recognized the economic loss rule,\textsuperscript{209} and lower Pennsylvania courts have followed this rule in products liability cases.\textsuperscript{210} Thus, where a product malfunctions, a plaintiff is barred from suing in tort, whether the theory is negligence or strict liability, if the malfunction only damages the product itself.\textsuperscript{211} In such cases, a plaintiff’s remedy properly lies in contracts, rather than in torts.\textsuperscript{212}

A plaintiff may still recover damages in tort if a malfunctioning product damages other property or causes physical injuries. In Tennis v. Ford Motor Co.,\textsuperscript{213} the plaintiffs alleged that a product defect in a vehicle manufactured by the defendant caused a fire. This fire spread to, and damaged, other property besides the vehicle. Thus, the U.S. District Court for the Western District of Pennsylvania denied the defendant’s motion to dismiss based on the economic loss rule.\textsuperscript{214}

The economic loss rule has grown increasingly broad in Pennsylvania. At one time Pennsylvania courts did not apply the economic loss rule if a product was dangerously defective or if the defective product destroyed itself in a calamitous event.\textsuperscript{215} The courts have since eliminated such restrictions, regardless of whether the parties are both commercial

\textsuperscript{205} Salvador, 319 A.2d at 904 n.1.
\textsuperscript{206} Id.
\textsuperscript{207} Id. at 904.
\textsuperscript{208} See Goodman, 849 A.2d at 1246 n.6 (“[I]ssues of privity are irrelevant[.]”).
\textsuperscript{209} Excavation Techs., Inc. v. Columbia Gas Co., 985 A.2d 840, 841 n.3 (Pa. 2009).
\textsuperscript{212} REM Coal Co., 563 A.2d at 133.
\textsuperscript{213} 730 F. Supp. 2d 437 (W.D. Pa. 2010).
\textsuperscript{214} Id. at 449.
\textsuperscript{215} REM Coal Co., 563 A.2d at 129–31.
enterprises, or even if one party is an individual consumer. This has led one court to declare that “there is not even a nuclear accident exception to this economic loss rule.”

**B. Emotional Distress**

Traditionally, Pennsylvania courts adhered to the impact rule for negligent infliction of emotional distress. Under this rule, a plaintiff could only recover for negligent infliction of emotional distress if the plaintiff’s distress was the result of a physical impact caused by the defendant.

The Pennsylvania Supreme Court, however, has deviated from this requirement in at least two circumstances. First, the court adopted the “zone of danger” rule in *Niederman v. Brodsky*. In *Niederman*, the plaintiff experienced a heart attack after the defendant, who was driving a car, almost hit the plaintiff. The court held that the plaintiff could recover for his physical injuries resulting from his fear of physical impact, even where the physical impact never occurred, because a negligent force was directed against the plaintiff and the plaintiff was in a zone where he was personally exposed to physical danger. Second, the court recognized the bystander rule for negligent infliction of emotional distress in *Sinn v. Burd*. Under the bystander rule, a bystander may recover for emotional distress if: (1) the plaintiff was near the accident scene; (2) the emotional distress was caused by the direct impact of the plaintiff’s contemporaneous observation of the accident; and (3) the plaintiff was closely related to the victim.

The Pennsylvania Supreme Court may no longer require proof of physical impact for the recovery of emotional distress damages in some negligence cases, but the Court still requires such proof in cases of strict products liability. In *Schmidt v. Boardman Co.*, a fire engine hose accidentally deployed, killing a child. Family members, who witnessed the death, sued based on strict products liability. The court held that the family members could not recover for emotional distress damages in the absence of evidence that the family members had suffered a contemporaneous physical impact.

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216 Id. at 132.
217 *Jones*, 631 A.2d at 666.
219 *Schmidt*, 11 A.3d at 948.
220 Id.
222 Id. at 90.
223 404 A.2d 672 (Pa. 1979); see also *Mazzagatti v. Everingham*, 516 A.2d 672 (1986).
224 *Sinn*, 404 A.2d at 685 (quoting *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968)).
225 11 A.3d 924.
226 Id. at 953.
C. **Punitive Damages**

Unlike some other states, Pennsylvania does not have a statute that caps, or otherwise regulates, awards of punitive damages, either in product liability cases specifically, or in all cases generally. Punitive damage awards are thus primarily regulated by the common law. In regulating such damages, the Pennsylvania Supreme Court has followed the Restatement (Second) of Torts § 908.\(^{227}\) Under the Restatement (Second) of Torts § 908(2),

Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant’s act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.\(^{228}\)

Thus, an award of punitive damages is appropriate in Pennsylvania only if the defendant acted with an evil motive or with reckless indifference.\(^{229}\) In this context, reckless indifference means that the defendant’s conduct poses an unreasonable risk of physically harming another, and such risk must be substantially greater than that necessary to establish negligence.\(^{230}\) Therefore, to recover punitive damages, the plaintiff must show more than negligence or even gross negligence on the part of the defendant.\(^{231}\) In this regard, the Pennsylvania Supreme Court has found that a defendant’s compliance with safety standards weighs against a finding of evil motive or reckless indifference.\(^{232}\)

For punitive damages, the burden of proof is a preponderance of the evidence. That is, in order to get the issue of punitive damages to a jury, the plaintiff must present evidence sufficient to allow the jury to find, by a preponderance, that the defendant acted with evil motive or reckless indifference.\(^{233}\) The Pennsylvania Supreme Court considered and expressly rejected a higher clear-and-convincing-evidence standard in products liability cases.\(^{234}\)

If punitive damages are deemed appropriate, a jury should weigh three factors in order to arrive at the amount of damages. These factors, taken from the Restatement (Second) of Torts § 908(2), are: (1) the character of the defendant’s act; (2) the extent and nature of the


\(^{228}\) *RESTATEMENT (SECOND) OF TORTS* § 908(2) (1965).

\(^{229}\) *Phillips II*, 883 A.2d at 445 (quoting *Martin*, 494 A.2d at 1096).

\(^{230}\) *Id.* (quoting *Hutchison v. Liddy*, 870 A.2d 766, 771 (Pa. 2005)).

\(^{231}\) *Id.*

\(^{232}\) *Id.* at 447.

\(^{233}\) *Martin*, 494 A.2d at 1098.

\(^{234}\) *Id.* at 1098 & n.14; see also *Sprague v. Walter*, 656 A.2d 890, 923 (Pa. Super. Ct. 1995) (“The standard of proof for punitive damages in Pennsylvania traditionally has been proof by a preponderance of the evidence.”).
harm that the defendant caused or intended to cause to the plaintiff; and (3) the defendant’s wealth.\textsuperscript{235} At one time, the Pennsylvania Supreme Court also imposed a common law requirement that the amount of punitive damages must be proportional to the amount of compensatory damages.\textsuperscript{236} In *Kirkbride v. Lisbon Contractors, Inc.*,\textsuperscript{237} the court removed this requirement.

The Pennsylvania courts have not recognized state constitutional limitations on punitive damages. The U.S. Supreme Court, however, has recognized in multiple decisions that the Fourteenth Amendment to the U.S. Constitution places a limit on such damages.\textsuperscript{238} Among other things, these Supreme Court opinions recognize that the amount of a punitive damages award must be proportional to the amount of harm the plaintiff suffered. In the products liability context, the Pennsylvania courts have only infrequently interpreted and applied these Supreme Court decisions. In one recent case, the Superior Court held that the U.S. Supreme Court decisions only impose limitations on punitive damages where some of the defendant’s punishable conduct occurred outside the court’s jurisdiction.\textsuperscript{239} In an older decision, the Philadelphia Court of Common Pleas held that a punitive damages award withstood constitutional scrutiny, because the amount of the award was less than four times the amount of compensatory damages.\textsuperscript{240}

\section*{IX. Special Evidentiary Concerns}

\subsection*{A. Subsequent Remedial Measures}

Rule 407 of the Pennsylvania Rules of Evidence provides, in relevant part, that

> when, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove that the party who took the measures was negligent or engaged in culpable conduct, or produced, sold, designed, or manufactured a product with a defect or a need for a warning or instruction.\textsuperscript{241}

As an exception to its general rule, Rule 407 allows the introduction of such evidence when it is offered for “impeachment, or to prove other matters, if controverted, such as

\begin{footnotes}
\footnotetext[236]{See \textit{Martin}, 494 A.2d at 1098.}
\footnotetext[237]{555 A.2d 800.}
\footnotetext[241]{Pa. R. EVID. 407.}
\end{footnotes}
ownership, control, or feasibility of precautionary measures.”

Although the original version of the Rule was not clear as to whether it applied to product liability actions sounding in strict liability, the Pennsylvania Supreme Court ruled in Duchess v. Langston Corp. that Rule 407 was applicable to strict product liability cases, and as such, the original Rule was amended to reflect the Court’s decision. Pennsylvania law is now clear that, in addition to subsequent remedial changes being inadmissible in product liability cases sounding in negligence, evidence of subsequent changes in a product’s design or the inclusion of additional warnings or instructions is not admissible to prove that a product was defective in a strict product liability case.

B. Expert Testimony

The Pennsylvania Supreme Court has stated that “[t]he purpose of expert testimony is to assist the [finder of fact] in grasping complex issues not within the knowledge, intelligence, and experience of the ordinary layman.” As such, the Pennsylvania Superior Court has recognized that expert testimony is “often necessary in products liability and breach of warranty cases,” and courts in the Commonwealth have even held that expert testimony is “required” in certain products liability cases.

The Pennsylvania Rules of Evidence provide that

[i]f scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise

With regard to expert testimony, the Pennsylvania Supreme Court applies the Frye test, which was first announced by the United States Court of Appeals for the District of Columbia in Frye v. United States. Under Frye’s “general acceptance” test, the introduction of novel scientific evidence is permitted provided that “the methodology that underlies the evidence has general acceptance in the relevant scientific community.” Although the United States Supreme Court has since rejected the Frye standard in favor of the more recently adopted

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242 Id.
244 See also Official Comment, Pa. R. Evid. 407.
246 French, 980 A.2d at 634.
248 Pa. R. Evid. 702.
249 293 F. 1013 (D.C. Cir. 1923).
Daubert standard, a decision followed by a number of state courts, the Pennsylvania Supreme Court continues to adhere to Frye. 251

Under the Daubert test, the trial judge is required to evaluate whether the proffered expert testimony will “assist the trier of fact, and whether the evidence is reliable and scientifically valid.” 252 Although the trial judge will still look to Frye’s general acceptance test, it is only one of variety of factors that the court will consider in making its determination. 253 Although the Court had the opportunity in Grady v. Frito-Lay, Inc. to reject Frye in favor of adopting Daubert, the Pennsylvania Supreme Court chose to stick with Frye based on its belief that it provides a standard that is “more likely to yield uniform, objective, and predictable results” than Daubert. 254 As the Grady Court noted, the Frye test is “a proven and workable rule, which when faithfully followed, fairly serves its purpose of assisting the courts in determining when scientific evidence is reliable and should be admitted.” 255

It should be noted that the Frye “general acceptance” rule only applies to an expert’s methodology, and not his conclusions. In fact, the Pennsylvania Supreme Court does not require a showing that an expert’s conclusions are also generally accepted. 256 In addition to proving that an expert’s methods are generally accepted in the scientific community, the proponent of expert testimony is also responsible for showing that his witness is qualified to testify based on “knowledge, skill, experience, training, or education.” 257 As a final note, a trial court’s decision regarding an expert’s qualification and the general acceptance of his methodology will only be disturbed by an appellate court for an abuse of discretion. 258

C. Prior Accidents/Claims

Courts in the Commonwealth have consistently held that a plaintiff, while proving his case in chief in a products liability action, may introduce evidence of prior accidents involving the same instrumentality alleged to have caused the harm in the plaintiff’s case. 259 Such evidence has been deemed relevant and admissible to show that “the product was unsafe, to prove causation, and/or to show that a defendant had actual or constructive knowledge of a condition that could cause harm.” 260 However, evidence of a prior accident or claim will only be admissible if the previous incident is “sufficiently similar to the incident involving the plaintiff which occurred under sufficiently similar circumstances.” 261 In addition to permitting

251 See Grady, 839 A.2d at 1044.
252 Id. at 1044.
253 Id.
254 Id. at 1045.
255 Id.
256 Grady, 839 A.2d at 1045.
257 Id. (citing PA. R. Evid. 702).
258 Grady, 839 A.2d at 1047.
259 Spino, 696 A.2d at 1172.
260 Id.
261 Lynch, 548 A.2d at 1279.
plaintiffs to introduce such evidence, the Supreme Court of Pennsylvania has also held that
evidence of the “non-existence of prior claims [by a defendant] is admissible subject to the trial
court’s determination that the offering party has provided a sufficient foundation—that they
would have known about the prior, substantially similar accidents involving the product at
issue.”

D. The Collateral Source Rule

Pennsylvania Courts still follow the common law collateral source rule. The collateral
source rule generally provides that “[e]vidence that the plaintiff was compensated by a
collateral source for all or a portion of the damages caused by defendant's wrongful act is
generally inadmissible . . . .” In Johnson v. Beane, the Pennsylvania Supreme Court
reaffirmed Pennsylvania’s adherence to the rule, stating that “payments from a collateral
source shall not diminish the damages otherwise recoverable from the wrongdoer.”

According to the Johnson Court, the general premise behind the collateral source rule is that “it
is better for the wronged plaintiff to receive a potential windfall than for a tortfeasor to be
relieved of responsibility for the wrong.” In Beechwoods Flying Service, Inc. v. Al Hamilton
Contracting Corp., the Court noted that the collateral source rule is designed to avoid
precluding a plaintiff from “obtaining redress for his or her injury merely because coverage for
the injury was provided by some collateral source, e.g. insurance.” Although the Motor
Vehicle Financial Responsibility Law (MVFRL) and the Medical Care Availability and Reduction of
Error Act (MCARE Act) have abrogated the common law, neither of those acts would have
applicability in the realm of products liability.

E. Spoliation

In Schroeder v. Commonwealth, the Pennsylvania Supreme Court adopted the Third
Circuit’s approach to cases involving the alleged spoliation of evidence. Under Pennsylvania
law, the doctrine of spoliation provides that a party “should not benefit from its own
destruction or withholding of evidence;” in addition, the doctrine of spoliation “attempts to
compensate those whose legal rights are impaired by the destruction or withholding of
evidence by creating an adverse inference against the party responsible for the destruction or
withholding.” The Third Circuit’s approach looks to “(1) the degree of fault of the party who
altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party,

262 Spino, 696 A.2d at 1173.
(2004)).
265 Id. at 100.
266 Id.
268 Id. at 352.
269 710 A.2d 23 (Pa. 1998).
and (3) the availability of a lesser sanction that will protect the opposing party’s rights and deter future similar conduct.” A common sanction that follows a finding of spoliation is a jury instruction allowing an inference that “the missing evidence would have been unfavorable to the party that destroyed it.” Pennsylvania courts do not recognize a separate cause of action for spoliation of evidence, in light of the fact that “traditional remedies,” such as the creation of an adverse inference against the party charged with spoliation, “more than adequately protect the ‘non-spoiling’ party when the ‘spoiling party’ is a party to the underlying action.”

X. Jury Instructions

In Pennsylvania, trial courts enjoy “wide latitude” in determining the exact language that is used in jury instructions as long as such instructions fully, clearly, and adequately state the law for the jury. Thus, a trial court may freely reject a party’s proposed wording, and may choose its own wording instead. In addition, the Pennsylvania Supreme Court has not officially adopted the Pennsylvania Suggested Standard Jury Instructions. These instructions are merely a guide, and a trial court may “ignore them entirely,” even where a party specifically requests that the court use such instructions.

In strict liability cases, where the term “defect” arises, the trial court must instruct the jury on this term. In Azzarello v. Black Bros. Co., the Pennsylvania Supreme Court provided guidance on how to instruct the jury on “defect” in strict liability cases involving design defects. The court held that the words “unreasonably dangerous” should not be employed in such instructions, and the court quoted with favor the Pennsylvania Suggested Standard Jury Instruction for design defects. Subsequently, the Pennsylvania Superior Court relied upon Azzarello in holding that, where there is evidence that a plaintiff used a product in an unanticipated way, the instructions on “defect” must be cast in terms of “safe for intended use,” not merely “safe for use.” In another decision, the Superior Court relied upon Azzarello in developing suggested jury instructions for strict liability cases based on failure to adequately warn. Pennsylvania courts have also read Azzarello as an indication that negligence concepts

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271 Id. (citing Schmid v. Milwaukee-Electric Tool Corp., 13 F.3d 76 (3d. Cir. 1994)).
272 See generally Schroeder, 710 A.2d at 26, 27.
276 Butler, 604 A.2d at 273.
279 391 A.2d 1020.
280 Id. at 1027 & n. 12.
282 Dambacher, 485 A.2d at 428–30; see also Correcter, 499 A.2d at 330 (discussing Dambacher).
should be removed from jury instructions regarding strict liability claims.  

As the Pennsylvania Supreme Court recently lamented, this attempt to separate negligence and strict liability “has yielded minimalistic jury instructions (to insulate the jury from negligence terminology) which lack essential guidance concerning the key conception of product defect.”

XI. Contribution, Indemnity, and Apportionment of Liability

In Pennsylvania, apportionment of liability is governed by a statute which was amended in 2011. This statute provides that

Where recovery is allowed against more than one person and where liability is attributed to more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant’s liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned.

As the last few words suggest, for the purpose of apportioning liability, the jury may apportion liability to persons who are not a party to the present case or to persons whom the plaintiff released from liability.

This statute also specifies when several liability should be imposed and when, instead, joint and several liability should be imposed. Under several liability, if a defendant is apportioned, for instance, forty percent of the liability, the defendant may be required to pay no more than forty percent of the judgment. Under joint and several liability, any one defendant may be required to pay the entire judgment. Until recently, where multiple defendants were found liable, the statute determined that each defendant was jointly and severally liable. The Fair Share Act of 2011 amended the statute, thus making several liability the norm.

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283 Holloway v. J.B. Sys., Ltd., 609 F.2d 1069, 1073 (3rd Cir.1979) (“We read Azzarello as a signal that evidence and jury instructions regarding negligence concepts should be kept out of cases brought under § 402A.”); see also Carrecter, 499 A.2d at 330 (quoting Berkebile, 337 A.2d at 900) (declaring that, in a strict liability case, the jury should not be charged regarding negligence concepts). But see Foley v. Clark Equip. Co., 523 A.2d 379, 385 (Pa. Super. Ct. 1987) (holding that the trial court committed error by instructing the jury not to consider any evidence relating to negligence, when such evidence was relevant to the issue of causation).

284 Schmidt, 11 A.3d at 940.

285 See 42 PA. CONS. STAT. § 7102(a.1)–(a.2) (2011).

286 Id. § 7102(a.1)(1).

287 Id. § 7102(a.2).

288 Maloney v. Valley Med. Facilities, Inc., 984 A.2d 478, 489 (Pa. 2009) (“Joint tortfeasors generally are jointly-and-severally liable for the entire amount of a verdict, albeit that a jury may assign only a portion of fault to each.”).

289 See, e.g., Allen v. Mellinger, 784 A.2d 762, 766 (Pa. 2001) (quoting the version of § 7102 that was in effect prior to 2011 and declaring that this statute embodies “[t]he rule of joint and several liability”).

290 § 7102(a.1)(2).
types of actions: (1) intentional misrepresentation; (2) an intentional tort; (3) “[w]here the defendant has been held liable for not less than 60% of the total liability apportioned to all parties”; (4) a “release or threatened release of a hazardous substance”; and (5) a “civil action in which a defendant has violated section 497” of the Liquor Code.  

Contribution becomes a potential issue if joint and several liability is imposed and one defendant “discharges by payment more than that defendant’s proportionate share of the total liability.” Contribution allows this defendant to recover money from “defendants who have paid less than their proportionate share.”

Pennsylvania also continues to recognize the common law doctrine of indemnity. Indemnity takes “the entire loss from one who has been compelled, by reason of some legal obligation, to pay a judgment” and shifts this loss to “a defendant who was actually responsible for the accident which occasioned the loss.” For instance, in Burbage v. Boiler Engineering & Supply Co., a boiler valve malfunctioned, causing the boiler to explode, and this explosion killed a man. The man’s personal representative sued the boiler manufacturer. When a $70,000 verdict was returned against the boiler maker, the boiler maker successfully secured a $70,000 indemnification against the valve maker.

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291 Id. § 7102(a.1)(3).
292 Id. § 7102(a.1)(4).
293 Id.
298 Id. at 565. This result may be contrasted with the result in Walton, 610 A.2d 454 (holding, in a case involving a helicopter crash, that the helicopter manufacturer could not recover indemnity from the engine manufacturer).
These materials have been prepared by Dinsmore & Shohl LLP for informational purposes only. Although Dinsmore and Shohl LLP used reasonable efforts to include accurate and up-to-date information in this Monograph, no one should rely upon the information contained in this Monograph without first seeking professional advice.

Care must be taken in the citation of unpublished opinions. Rule 444 B of the Internal Operating Procedures of the Superior Court of Pennsylvania provides that:

An unpublished memorandum decision shall not be relied upon or cited by a Court or a party in any other action or proceeding, except that such a memorandum decision may be relied upon or cited (1) when it is relevant under the doctrine of law of the case, res judicata, or collateral estoppel, and (2) when the memorandum is relevant to a criminal action or proceeding because it recites issues raised and reasons for a decision affecting the same defendant in a prior action or proceeding. When an unpublished memorandum is relied upon pursuant to this rule, a copy of the memorandum must be furnished to the other party and to the Court.

Citation of unpublished opinions in the Pennsylvania federal courts is controlled by Third Circuit Internal Operating Procedure 5.7 and Federal Rule of Appellate Procedure 32.1(b).

Postings and opinions of the Pennsylvania Supreme Court (since November 1996), the Pennsylvania Superior Court (since December 1997) and the Pennsylvania Commonwealth Court (since January 1997) can be accessed through the website of the Unified Judicial System of Pennsylvania: http://www.pacourts.us/Search/OpinionSearch.htm.
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