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Torts - Strict Liability - Under Pennsylvania Law a Manufacturer May Be Held Strictly Liable for Injuries Caused by the Absence of a Safety Device Even When That Device Was Removed at the Request of a Knowledgeable Purchaser

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TORTS—STRICT LIABILITY—UNDER PENNSYLVANIA LAW A MANUFACTURER MAY BE HELD STRICTLY LIABLE FOR INJURIES CAUSED BY THE ABSENCE OF A SAFETY DEVICE EVEN WHEN THAT DEVICE WAS REMOVED AT THE REQUEST OF A KNOWLEDGEABLE PURCHASER


In April 1977, James Hammond, a farm employee, was operating a front-end loader tractor manufactured by International Harvester Company. While supervising work beneath him, Hammond apparently slipped and fell, inadvertently releasing the tractor's boom arms. Because the tractor was not equipped with a roll-over protective structure (ROPS) and attendant side screens, Hammond's body extended over the side of the tractor and he was crushed to death by the descending boom arm.

At the time of the accident, a ROPS was a standard safety device on the model loader Hammond was operating. However, when the farm manager purchased the loader in question, he had requested that the ROPS be removed to facilitate movement through a low barn door.

The decedent's wife instituted a tort action against International Harvester, in the United States District Court for the Eastern District of Pennsylvania, on a strict products liability theory. The plaintiff alleged that

2. Id. at 648 & n.2. The loader bucket on this model is operated by a foot pedal and is raised by boom arms which extend parallel to the driver's seat from the rear of the tractor to the bucket at the front. Id. Hammond had operated this tractor for approximately eight months without mishap. Id. at 648.
3. Id. Hammond and his son were attempting to put a metal leg stand under a manure conveyor. Id. He was using the tractor's loader bucket to lift the conveyor while his son attempted to place the stand under the conveyor. Id. Hammond evidently stood up on the knee guard to observe, slipped, and accidentally released the boom arms by hitting the foot pedal control. Id.
4. Id. The front-end loader operated by Hammond ordinarily comes equipped with a ROPS and side screens which prevent the driver from leaning or falling out of the operator's seat area. Id. For purposes of this note, the term ROPS will be used to designate both the rollover protective structure and the side screens.
5. Id. at 648-49.
6. Id. at 648.
7. Id. Hammond was employed by the owner of the dairy farm, Lois Peck. Id. Peck had also employed a farm manager, John Newlin, who was responsible for ordering the farm equipment. Id. Newlin, who purchased the tractor primarily for use in moving manure, had the ROPS removed prior to delivery. Id.
8. Id. Jurisdiction in the federal court was based on diversity of citizenship. Id. Judge Van Artsdalen presided over the trial in the district court.
loader that her husband was operating was defectively designed because it lacked a ROPS. The jury returned a verdict in favor of the plaintiff on the issue of liability, finding that the loader was in a defective condition, both at the time of sale and at the time of delivery, because it was not equipped with a ROPS.

On appeal, the United States Court of Appeals for the Third Circuit affirmed, holding that under Pennsylvania law, a product manufacturer is strictly liable for injuries caused by the absence of a safety device even when that device was a standard feature removed at the request of a knowledgeable purchaser. Hammond v. International Harvester Co., 691 F.2d 646 (3d Cir. 1982).

A plaintiff in a products liability action may bring suit under various

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8. Id. at 649.
9. Id. at 648. The parties had stipulated to an amount for damages prior to trial. Id.
11. The case was heard by Chief Judge Seitz and Judges Garth and Rosenn. Judge Rosenn delivered the opinion for a unanimous court.
12. Products liability law determines whether a manufacturer or supplier will be held legally responsible for harm caused by his products. See W. Keeton, D. Owen & J. Montgomery, PRODUCTS LIABILITY AND SAFETY 18 (1980) [hereinafter cited as W. Keeton, Products Liability]. The law of products liability began in 1842 with the case of Winterbottom v. Wright, 10 M & W. 109, 152 Eng. Rep. 402 (Ex. 1842). Misconstrued dicta from this decision became the basis of a rule that manufacturers or sellers of goods were not liable for harm caused by defects in their products to anyone except the immediate purchaser or one in privity with him. W. Prosser, HANDBOOK ON THE LAW OF TORTS, § 96, at 641 (4th ed. 1971) [hereinafter cited as W. Prosser, Law of Torts]. In the process of carving out exceptions to the Winterbottom rule, courts modified it to allow recovery, even in absence of privity, for negligence in manufacturing or selling a product “imminently dangerous to human life.” Thomas v. Winchester, 6 N.Y. 397 (1852). Eventually, the New York Court of Appeals “buried the general rule under the exception” and in MacPherson v. Buick Motor Co. 217 N.Y. 382, 111 N.E. 1050 (1916), held that a product is “a thing of danger” if it may reasonably be expected to place life or limb in peril when negligently made. See Prosser, The Assault Upon The Citadel, 69 YALE L.J. 1099, 1100 (1960) [hereinafter cited as Prosser, The Assault] (citing 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916). The MacPherson rule was rapidly accepted by the courts in all jurisdictions and was gradually interpreted to mean that “the seller is liable for negligence in the manufacture or sale of any product which may reasonably be expected to be capable of inflicting substantial harm if it is defective.” W. Prosser, LAW OF TORTS, supra, at § 96, at 643. While MacPherson marked a major change in tort law, the rule only established a duty upon the manufacturer to use reasonable care in making his products. The injured plaintiff was still required to prove negligent conduct on the part of the manufacturer. See J. McGillian, J. Fiorini, C. O’Connor & M. Brown, CONSUMER PRODUCT SAFETY LAW 31 (1977).

The development of the warranty theory of products liability provided additional protection for the consumer. See generally Prosser, The Implied Warranty of Merchantable Quality, 28 MINN. L. REV. 117 (1943). In the landmark case of Henningson v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), the New Jersey Supreme Court held that an ultimate user may recover from a manufacturer on a warranty theory even though there was no privity of contract between the two parties. Id. at 413, 161 A.2d at 100. Although warranty theory enabled an injured party to recover
legal theories including negligence, breach of warranty, and strict liability in tort. The warranty theory, governed by the Uniform Commercial Code (UCC), aims to protect the expectations of the parties to a contract. Recovery under tort theories, however, is based primarily on the social policy of protecting individuals from various kinds of harm. Strict liability differs from negligence in that it imposes liability on the manufacturer or supplier without proof of fault. For example, under the Restatement formulation without proving negligence, the plaintiff suing for a breach of warranty still must show reliance on the warranty and, prior to bringing suit, must give the manufacturer adequate notice of the injury. See Note, Restatement (Second) of Torts—Section 402A—Uncertain Standards of Responsibility in Design Defect Cases—After Azzarello, Will Manufacturers be Absolutely Liable in Pennsylvania?, 24 Vill. L. Rev. 1035, 1037 n.15 (1979). Additionally, manufacturers are able to disclaim liability under implied warranties by contractual provisions. See Prosser, The Assault, supra, at 1131-33. For a more detailed discussion of the evolution of products liability law, see, e.g., Noel, Manufacturers of Products—The Drift Toward Strict Liability, 24 Tenn. L. Rev. 963 (1957); Prosser, The Assault, supra; Prosser, The Fall of the Citadel, 50 Minn. L. Rev. 791 (1966).


When liability is based on common law negligence, the manufacturer or supplier is required to exercise the care of a reasonable man under the circumstances. W. Prosser, Law of Torts, supra note 12, at § 96. His negligence may be found anywhere in the process of preparation, manufacture or sale of the product. Id.

For a discussion of strict liability in tort, see notes 17-42 and accompanying text infra.


16. For a discussion of products liability actions based on negligence, see notes 12 & 13 supra.

17. The doctrine of strict liability in tort emerged in Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). Here, Justice Traynor, speaking for the California Supreme Court, stated:

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being...[T]he liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

Id. at 62-63, 337 P.2d at 900-01, 27 Cal. Rptr. at 700-01. Two years after Greenman, the American Law Institute promulgated section 402A of the Restatement (Second) of Torts. Section 402A provides in pertinent part:

(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.

Restatement (Second) of Torts § 402A(1) (1965).

Section 402A further provides that the rule applies regardless of whether the
of strict liability, liability will be imposed upon the seller of a product which is in a defective condition unreasonably dangerous to consumers if the product reaches the consumer without substantial change in the condition in which it is sold and the defect causes injury.

Courts and commentators have advanced various policy bases for imposing strict liability on manufacturers and sellers of products. One reason is that a manufacturer exercised reasonable care or whether there was privity of contract between the parties. Id. § 402A(2). The Restatement's theory of strict liability in tort was rapidly accepted by the courts in almost every jurisdiction. W. Prosser, Law of Torts, supra note 12, at § 98, at 657.

18. Restatement (Second) of Torts § 402A(1)(a) (1965). The Restatement provides that § 402A is applicable to a seller "engaged in the business of selling such a product." Id. Comment f indicates that the term "seller" applies to manufacturers, wholesalers, and retail dealers or distributors. Id. at comment f.

19. Id. § 402A(1). The comments to § 402A indicate that the term "product" was also intended to include the product's container and both processed and unprocessed articles. Id. at comments e and h.

20. Id. § 402A. Rather than defining "defective condition," the comments to the Restatement cite examples of the type of defects which would be considered a "defective condition." Id. at comments h and j. These examples include "harmful ingredients, not characteristic of the product, . . . foreign objects contained in the product, . . . [and] decay or deterioration." Id. at comment h. Also, failure to provide adequate warnings of potential dangers could constitute a defective condition. Id. at comment j. For a discussion of the judicially created tests used to determine "defect," see notes 29-42 and accompanying text infra.

21. Restatement (Second) of Torts § 402A(1) (1965). Comments i and j indicate that for a product to be "unreasonably dangerous," it must be dangerous to an extent beyond the contemplation of an ordinary consumer. For the text of comment i, see note 40 infra. The term "defective" was added to unreasonably dangerous during the American Law Institute proceedings to insure that there would be no liability for inherently dangerous products such as knives and whiskey. See Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 830 (1973).

22. Restatement (Second) of Torts § 402A(1)(b) (1965). Comment p indicates that the Institute was not extending application of the rule beyond products which are sold in substantially the same condition in which they are expected to reach the ultimate user or consumer. Id. at comment p. The draftsmen did state, however, that the mere fact that a product is to undergo processing will not in all instances relieve the seller of liability. Id. The question is whether the change is substantial enough to shift responsibility for discovery and prevention of the defect to the intermediate party who is to make the changes. Id.

23. The seller who sells a defective product is liable for "physical harm thereby caused to . . . the consumer or to his property." Id. § 402A(1). Normally, liability under § 402A is imposed in cases involving personal injuries, but it has been extended to wrongful death actions, property damage, and in a few cases, to economic loss. See, e.g., Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968) (wrongful death); Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968) (property damage); Monsanto Co. v. Thrasher, 563 S.W.2d 25 (Tex. Ct. App. 1970) (economic loss).

tionale is that it is often difficult, if not impossible, for a plaintiff to prove that a manufacturer was negligent in the design, manufacture or marketing of its product. Rather than allowing the victim to go uncompensated, the primary policy behind strict liability suggests that the loss be shifted to the manufacturer who may best allocate the losses caused by defective products among all consumers as a cost of doing business. This rationale is supported by the belief that the availability of products liability insurance makes losses easier for the manufacturer to bear. Additionally, it has been suggested that the threat of potential liability will give the manufacturer greater incentive to discover and prevent defects in its products.

Attempts to embody these policies into a workable standard of liability have resulted in little consensus as to what constitutes a defective product. Generally, any of three categories of "defects" may be alleged by a plaintiff in a strict products liability action. A defect may be due to an error in the

25. Wade, supra note 21, at 826. It has been suggested that although a majority of product accidents that are not caused by consumer abuse are probably attributable to the negligent acts or omissions of manufacturers at some stage of design, manufacture or marketing, the practical difficulties of discovering and proving negligence are often insurmountable. See W. KEETON, PRODUCTS LIABILITY, supra note 12, at 212 (1980). Moreover, it has been argued that potential liability for negligent actions is generally insufficient to induce manufacturers to market adequately safe products. Id.

26. See, e.g., Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 877 (Alaska 1979); Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145, 151 (1965). It has been argued that courts must resolve the conflict between the need for adequate recovery and the need for viable enterprises through a balancing process which involves a determination of the most just allocation of the risk of loss between members of the marketing chain. Helene Curtis Indus. v. Pruitt, 385 F.2d 841, 862 (5th Cir. 1967) (citing Wilson, Products Liability, 43 CALIF. L. REV. 809 (1955)). For a critical analysis of the political soundness of the risk spreading rationale, see Klemme, The Enterprise Liability Theory of Torts, 47 U. COLO. L. REV. 153, 191-94 n.107 (1976).

27. See Wade, supra note 21, at 826. It is generally assumed that the victim is less likely to have insured against such loss while the manufacturer is normally more likely to have done so. See Klemme, supra note 26, at 191-92 n.107.

28. See Prosser, The Assault, supra note 12, at 1122-23. See, e.g., Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor J., concurring) ("public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market").

29. See Henderson, Renewed Judicial Controversy over Defective Product Design: Toward the Preservation of an Emerging Consensus, 63 MINN. L. REV. 773, 773 (1979) [hereinafter cited as Henderson, Renewed Controversy]. The lack of consensus is particularly acute in the design defect area. According to Professor Henderson, the source of the disagreement over the appropriate standard for determining defective product design lies in the open-ended nature of the task. Id. at 774. This open-endedness may be contrasted with the more "mechanical inquiry" applied in "flawed product" cases, whereby the flawed product is merely measured against the manufacturer's design specifications for that product. Id. at 773-74. In "design defect" cases, the court must ask, "How much design safety is adequate?" and must develop or adopt some objective standard of adequacy. Id. at 774. See also Products Liability Act S.2361, Report of the Senate Committee on Commerce, Science and Transportation, S. REP. NO. 507, 97th Cong., 2d Sess. 26 (1982) ("[s]trict liability theories applied in the design area leave the trier of fact without meaningful guidelines as to when liability is to be fairly assessed").
manufacturing process, insufficient warnings or instructions, or an unsafe product design.

30. Wade, supra note 21, at 831. A manufacturing defect involves a deviation from the norm, that is a situation in which the final product is not in the condition that the manufacturer intended. Id. This may result from flaws in the raw materials, component parts, or from a mistake in their assembly into the final product. W. KEETON, PRODUCTS LIABILITY, supra note 12, at 269. Under a deviation from the norm standard, a product is defective if it is not of the same quality as other similar products. See Davison, supra note 24, at 647. See, e.g., Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) (automobile found to have defectively connected drive shaft); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (automobile defectively manufactured where brakes activated unexpectedly). While this standard is workable for manufacturing defects, it is unsuitable for design defects where presumably the manufacturer adopted a defective design for the entire product line. See Davison, supra note 24, at 647-48.


31. W. KEETON, PRODUCTS LIABILITY, supra note 12, at 295. Lack of adequate warnings or instructions may constitute a defect if the manufacturer fails to provide sufficient information to permit the consumer to use the product with reasonable safety or fails to warn of the hidden dangers which may result from the product’s use or misuse. Id. See, e.g., Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974) (manufacturer must disclose those dangers that the application of reasonable foresight would reveal). For a discussion of the recurring issues regarding the adequacy of warnings in strict liability in tort, see generally The Duty to Warn and Strict Liability, 48 INS. COUNS. J. 381-98 (July 1981); Twerski, Weinstein, Donaher & Piehler, The Use and Abuse of Warnings in Product Liability—Design Defect Litigation Comes of Age, 61 CORNELL L. REV. 495 (1976).

32. See Davison, supra note 24, at 643. In design defect cases, although the product is made in accordance with the manufacturer’s specifications, the design itself is inadequate because the manufacturer failed to use some alternative safer design. One commentator has drawn a distinction between “inadvertent design errors” and “conscious design errors.” See Henderson, Judicial Review of Manufacturers’ Conscious Design Choices: The Limits of Adjudication, 73 COLUM. L. REV. 1531, 1547-50 (1973). “Inadvertent design errors” resemble manufacturing errors in that the product does not function as intended. Id. at 1548-49. For a discussion of manufacturing flaws, see note 30 supra. Inadvertent design errors result from inadvertent failure of the design engineer to appreciate the implications of his design or to employ commonly understood and accepted design principles. Id. at 1548. “Conscious design errors,” on the other hand, are risks of harm which result from the conscious decision of the design engineer to accept the risks associated with the intended design because the designer believes the increased benefits or reduced costs justify conscious acceptance of the risks. Id. The error appears when the court finds that the end was not justifiable when these competing interests—the risks and benefits—are weighed. See id. at 1553.

An issue related to product defects is “crashworthiness” or “second collision” defects. See generally W. KEETON, PRODUCTS LIABILITY, supra note 12, at 412. Applied most often to motor vehicles, the concept focuses on defects which do not cause the initial accident, but may add to or enhance passengers’ injuries when they collide with the interior or exterior of the vehicle. Id. See, e.g., Larsen v. General Motors
Cases involving alleged design defects comprise the most uncertain area of strict products liability law. Much difficulty and disagreement have arisen in formulating a workable standard for determining when a design is "defective." Various standards have been suggested and depending on the jurisdiction, a product may be defectively designed if it fails to perform as safely as an ordinary consumer would expect; it is unreasonably dangerous considering the product's utility and the risk involved in its use; it involves risks which would cause a reasonable seller, having knowledge of its harmful character, not to market the product; it fails to perform as safely as an ordinary consumer would expect when used in a reasonably foreseeable manner or the defendant fails to prove that the product's utility outweighs its risks or it left the supplier's control lacking any element necessary to Corp., 391 F.2d 495, 502 (8th Cir. 1968) (car manufacturers are accountable for vehicular safety in the crash environment). "Crashworthiness" defects may be design defects or manufacturing defects. Davison, supra note 24, at 643 n.1. The doctrine has also been applied to aircraft, motorcycles, and tractors. W. KEETON, PRODUCTS LIABILITY, supra note 12, at 423 n.11. For a discussion of the recurring issues regarding "crashworthiness," see generally Galerstein, A Review of Crashworthiness, 45 J. AIR L. & COMM. 187 (1979); Note, Products Liability—Second Collision—Enhanced Injuries, Apportionment of Damages, 15 DUQ. L. REV. 733 (1977). For a detailed discussion of design defects, see notes 35-42 and accompanying text infra.

33. See note 29 supra. See also Henderson, Renewed Controversy, supra note 29, at 773; Note, supra note 12, at 1035-36.

34. See Davison, supra note 24, at 645.

35. See, e.g., Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 69 Wis. 2d 326, 230 N.W.2d 794 (1975) ("[i]f the average consumer would reasonably anticipate the dangerous condition of the product and fully appreciate the attendant risk of injury, it would not be unreasonably dangerous and defective"). For a discussion of the "consumer expectations approach," see note 40 infra.

36. See, e.g., Turner v. General Motors Corp., 514 S.W.2d 497 (Tex. Civ. App. 1974), rev'd on other grounds, 584 S.W.2d 844 (Tex. 1979) (risk created by vehicle without protective roll-bar outweighed its utility). For a discussion of the "risk-utility" approach, see note 41 infra.

37. See Phillips v. Kimwood Machine Co., 269 Or. 485, 525 P.2d 1033 (1974) (manufacturer liable if jury finds that a reasonably prudent manufacturer, knowing of the machine's propensity to regurgitate thin wood sheets when it was set for thicker sheets, would not have marketed the machine in the same fashion). This test imposes constructive knowledge of the condition of the product on the manufacturer. Id. at 492, 525 P.2d at 1036. If the seller would have been negligent for selling the product knowing of the risk involved, he is liable regardless of whether he in fact had such knowledge. Id. This test is supported by Professors Wade and Keeton. See Keeton, Product Liability and the Meaning of Defect, 5 ST. MARY'S L.J. 30 (1973); Wade, supra note 21, at 834. One difference between the Wade and Keeton formulations is that Wade would impute knowledge of the defect to the manufacturer at the time the product was sold while Keeton would impute knowledge at the time of trial. 269 Or. at 492 n.6, 525 P.2d at 1036 n.6. Compare Keeton, supra, at 38, with Wade, supra note 21, at 834.

38. See Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). This hybrid approach gives the plaintiff the alternative of proving that there was a defect under either the "consumer expectations" standard or under the "risk-utility" analysis. Id. The California Supreme Court, in Barker v. Lull Engineering Co., formulated this dual approach in recognition of the assertion that "the expecta-
make it safe for its intended use. The underlying difference between these various standards is the particular jurisdiction's emphasis on one of three considerations: consumer expectations, risk-utility, or allocation of risks of the ordinary consumer cannot be viewed as the exclusive yardstick for evaluating design defectiveness because 'in many situations . . . the consumer would not know what to expect, because he would have no idea how safe the product could be made.' 20 Cal. 3d at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236 (quoting Wade, supra note 21, at 829). Under the "consumer expectations" prong of Barker, the plaintiff has the burden of showing that the product failed to perform as safely as the ordinary consumer would expect. 20 Cal. 3d at 431-32, 573 P.2d at 457-58, 143 Cal. Rptr. at 239. Under the risk-utility analysis, the plaintiff has the burden of proving that the product's design was the proximate cause of his injuries. Id. The burden of proof then shifts to the defendant to show that benefits of the design outweigh its inherent risks. Id. See also Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979).

39. See Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978). Pennsylvania is the only state to adopt the "every element" standard promulgated in Azzarello. Deleting the "unreasonably dangerous" language from strict products liability analysis, the Pennsylvania court insisted that the risk of loss must be borne by the supplier "without regard to fault." Id. at 553, 391 A.2d at 1024. For a further discussion of Azzarello, see notes 52-58 and accompanying text infra.

40. A "consumer expectations" analysis is based on comments g and i to § 402A of the RESTATEMENT (SECOND) OF TORTS. Comment g defines "defective condition" in part as "a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." RESTATEMENT (SECOND) OF TORTS at comment g (1965) (emphasis added). Comment i defines "unreasonably dangerous" in part as follows:

Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by 'unreasonably dangerous' in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary customer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

Id. at comment i (1965) (emphasis added).

Although many courts have used a "consumer expectations" analysis in determining what constitutes a "defect," Professor Keeton contends that this standard is inadequate for judging an alleged design defect because, under this approach, "a manufacturer is not responsible for failing to add a relatively inexpensive safety device if the purchaser knows that it does not exist and that there is a resulting danger." Id. Moreover, consumers often have no definite expectations regarding a given product which leaves the jury to speculate as to a product's defectiveness. See Keeton, Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products, 20 SYRACUSE L. REV. 559, 591 (1969) [hereinafter cited as Keeton, Manufacturer's Liability].

It has been suggested that a "consumer-expectations" emphasis embraces the seller-oriented standard as well. See Phillips v. Kimwood Mach. Co., 269 Or. 485, 493, 525 P.2d 1033, 1037 (1974); Welch v. Outboard Marine Corp., 481 F.2d 252 (5th Cir. 1973); Davison, supra note 24, at 650. For a discussion of the seller-oriented standard, see note 37 and accompanying text supra. The assertion is that they are two sides of the same standard; if it would be unreasonable for a manufacturer to market a particular product knowing of its risks, then necessarily he would be marketing a product which would fall below the reasonable expectations of a purchaser. See Phillips v. Kimwood Mach. Co., 269 Or. at 493, 525 P.2d at 1037. For examples of design defect cases adhering to the consumer expectations approach, see, e.g,

41. Under the “risk-utility” approach, either the judge or the jury determines whether the magnitude of the risk created by the product’s design outweighs the product’s benefits or utility. See Henderson, Renewed Controversy, supra note 29, at 775; Davison, supra note 24, at 654. Professor Keeton has suggested that the utility of a given design should be determined by evaluating three important factors: the needs served by the product; the technological and economic feasibility of serving the same needs with an alternative product; and the feasibility of providing the desired utility with a safer product. Keeton, Manufacturer’s Liability, supra note 40, at 592-93. On the other hand, Dean Wade has suggested seven factors to be weighed when making a risk-benefit analysis. See Wade, supra note 21, at 837-38. These factors are:

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

Id. (footnote omitted). Dean Wade would impute knowledge of the dangerous condition to the defendant and ask whether the defendant was negligent in marketing the product in that condition. Id. In other words, scienter is applied as a matter of law. Wade then proceeds with a risk-utility analysis, applying the seven factors to weigh the magnitude of the risk created by the dangerous condition against the product’s social utility. Id. at 834-35.

For examples of design defect cases applying a risk-utility analysis, see, e.g., Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978); Allen v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830 (Iowa, 1978); Ross v. Up-Right, Inc., 402 F.2d 943 (5th Cir. 1968).

42. Courts which advocate the no-fault “allocation of loss” rationale maintain that the manufacturer should bear the cost of product-related injuries because they are in a position to allocate the loss among all consumers as a cost of doing business. See, e.g., Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 134, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); Azzarello v. Black Bros. Co., 480 Pa. 547, 553, 391 A.2d 1020, 1023 (1978). For a discussion of Azzarello, see notes 52-58 and accompanying text infra.

43. Webb v. Zern, 422 Pa. 424, 427, 220 A.2d 853, 854 (1966). Webb involved a suit against a brewer, beer distributor, and keg manufacturer for injuries resulting from a beer keg explosion. Id. at 426, 220 A.2d at 854. Describing the issue as “the nature and scope of the liability in trespass of one who produces or markets a defec-
Court in **Salvador v. Atlantic Steel Boiler Co.**[^44] abolished the horizontal privity requirement in strict liability actions,[^45] concluding that a manufacturer by virtue of section 402A, “is effectively the guarantor of his products’ safety.”[^46]

The following year, in **Berkebile v. Brantly Helicopter Corp.**,[^47] a two-member plurality of the Pennsylvania Supreme Court concluded that the words “unreasonably dangerous,” although found in the text of section 402A,[^48] have no place in strict products liability actions.[^49] Expanding the concept of defectiveness to include lack of appropriate warnings and/or instructions,[^50] the court concluded that a seller must provide a product with “every element necessary to make it safe for use.”[^51]

[^44]: 457 Pa. 24, 319 A.2d 903 (1974). In **Salvador**, the employee of the purchaser of a steam boiler brought an action against the manufacturer for damages the plaintiff sustained when the boiler exploded. *Id.* at 26, 419 A.2d at 904.


[^46]: *Id.* at 32, 319 A.2d at 907. The court reasoned that allowing recovery only to the actual purchaser would be inconsistent with the policy that the manufacturer is the guarantor of his product’s safety. *Id.* at 97, 337 A.2d at 902.

[^47]: 462 Pa. 83, 337 A.2d 893 (1975), noted in Note, *Products Liability—Restatement (Second) of Torts—Section 402A—Under Pennsylvania Law Must a Defective Product Be “Unreasonably Dangerous”?*, 21 *Vill. L. Rev.* 794 (1976). In **Berkebile**, the plaintiff brought suit against the manufacturer of a helicopter for the wrongful death of her husband who was killed when the helicopter crashed. *Id.* at 91, 337 A.2d at 897. The plaintiff alleged, *inter alia*, that the rotor system of the helicopter was defectively designed, the rotor blade was defectively designed and manufacturered, and that the helicopter was defective due to inadequate warnings regarding the risks involved in its use. *Id.* at 92, 337 A.2d at 897.

[^48]: For the text and discussion of § 402A of the *Restatement (Second) of Torts*, see notes 18-23 and accompanying text *supra*.

[^49]: 462 Pa. at 96, 337 A.2d at 900. According to the court, allowing the jury to consider the reasonableness of the seller’s actions would undermine the policy announced in **Salvador** that the manufacturer is the guarantor of his product's safety. *Id.* at 97, 337 A.2d at 902.

[^50]: *Id.* at 100, 337 A.2d at 902.

[^51]: *Id.* The court stated that “defective condition” is not limited to design or manufacturing defects. *Id.* An element which may make a product safe for its intended use may be a warning and/or instruction concerning use of the product. *Id.*

Pennsylvania law of strict products liability was in a state of flux after the **Berkebile** decision. See, e.g., **Bowman v. General Motors Corp.**, 427 F. Supp. 234 (E.D. Pa. 1977) (district court, applying Pennsylvania law, refused to follow **Berkebile**). Because the opinion was signed by only two justices, several courts refused to accord the
The plurality decision in *Berkebile* was subsequently clarified by the Pennsylvania Supreme Court in *Azzarello v. Black Brothers Co.*\(^52\) A unanimous court held that the term “unreasonably dangerous” has no place in instructions to a jury as to the question of defect.\(^53\) Justice Nix, writing for the court, stated that “the jury may find a defect where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use.”\(^54\)

The court went on to delineate the respective roles of judge and jury in determining whether a given product design is defective.\(^55\) Initially, the judge is to determine, in a risk-benefit analysis\(^56\) whether liability would be justified as a matter of law under plaintiff’s averment of the facts, considering the “social policy” underlying products liability law and proper placement of the risk of loss.\(^57\) If the judge finds that liability would be justified, decision precedential value. *See, e.g.*, *Beron v. Kramer-Trenton Co.*, 402 F. Supp. 1268, 1276 (E.D. Pa. 1975), aff’d mem., 538 F.2d 318 (3d Cir. 1976). The district court in *Beron* criticized the Pennsylvania Supreme Court’s failure to suggest an adequate replacement standard when they deleted the “unreasonably dangerous” standard. *Id.* The district court maintained that the phrase “defective condition unreasonably dangerous” is a “unitary concept” and its severance would frustrate the intent of the drafters. *Id.* at 1274.

\(^52\) 480 Pa. 547, 391 A.2d 1020 (1978), *noted in Note, supra note 12.* In *Azzarello*, the plaintiff’s right hand had been pinched between two hard rubber rollers in a coating machine which was manufactured by the defendant. *Id.* at 549, 391 A.2d at 1022. The issue on appeal was the appropriate form of jury instruction under § 402A in Pennsylvania. *Id.*

\(^53\) 480 Pa. at 559, 391 A.2d at 1027. In removing the concept of “unreasonably dangerous” from the jury’s determination, the court relied on a California case, *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 443 (1972). *Cronin* was greatly criticized because, in removing the “unreasonably dangerous” element, the California court provided no alternative definition of “defect” or “defective condition.” *W. KEETON, Products Liability, supra note 12,* at 256-57. To alleviate the confusion which followed the *Cronin* decision, the California Supreme Court adopted the two prong test set forth in *Barker v. Lull Eng’g*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). For a discussion of the *Barker* decision, see note 38 and accompanying text *supra.* The *Azzarello* court stated that the phrase “unreasonably dangerous” has no independent significance but, rather, represents a label to be used where it is determined that the risk of loss should be placed on the supplier. 480 Pa. at 556, 391 A.2d at 1025. Further, the court stated that the phrases “unreasonably dangerous” and “defective condition” are simply terms of art invoked when application of strict liability is appropriate. *Id.* at 558, 391 A.2d at 1026.

\(^54\) *Id.* at 559, 391 A.2d at 1027. The court opined that a jury instruction which embodies this language “expresses clearly and concisely the concept of ‘defect’ while avoiding interjection of the ‘reasonable man’ negligence terminology.” *Id.* at 559 n.12, 391 A.2d at 1027 n.12.

\(^55\) *Id.* at 556, 391 A.2d at 1025.

\(^56\) *Id.* at 558, 391 A.2d at 1026. Citing Dean Wade’s observation that a risk-benefit analysis should not be made by the jury, the court stated “[s]hould an ill-conceived design which exposes the user to the risk of harm entitle one injured by the product to recovery? . . . When does the utility of the product outweigh the unavoidable danger it may pose? These are questions of law and their resolution depends upon social policy.” *Id.*

\(^57\) 480 Pa. at 558, 391 A.2d at 1026.
the case is submitted to the jury "to determine whether the facts of the case support the averments of the complaint." 58

The Pennsylvania Supreme Court has not addressed the question of whether a manufacturer may be held strictly liable for injuries caused by the absence of a safety device when such device was removed at the request of a knowledgeable purchaser. 59 However, Arkansas, New York, and the Sixth Circuit applying Tennessee law have refused to impose liability on the manufacturer where the safety device was a standard feature removed at the purchaser's request,60 or an optional feature which the purchaser declined to

58. Id. The court reasoned that standards such as "unreasonably dangerous" are not adequate to guide a lay jury in determining the existence of a defect. Id.

Most courts leave the questions of "defectiveness," like negligence, to the jury. W. Keeton, supra note 21, at 237 n.4. The Azzarello court, on the other hand, held that the judge is to conduct a risk-benefit analysis to resolve the question of the appropriateness of liability prior to submitting a case to the jury for a determination of the truth of plaintiff's averment of facts. 480 Pa. at 558, 391 A.2d at 1026. Professor Henderson has suggested that the Pennsylvania court's bifurcation of the defect analysis was based on a misinterpretation of Dean Wade's proposal regarding cost-benefit analysis. See Henderson, Renewed Controversy, supra note 29 at 799. Id. (citing Wade, supra note 21, at 840). Wade had suggested that the seven factors for determining whether a product was unreasonably dangerous should not be submitted to the jury. Wade, supra note 21, at 840. The judge should consider these factors, but the jury should be instructed to consider whether a reasonably prudent manufacturer would have marketed the product with knowledge of its harmful character. Id. at 839-40. For a discussion of the use of this standard in determining "defect," see note 37 and accompanying text supra. Professor Henderson contends that the Pennsylvania court in Azzarello erroneously concluded that a risk-benefit analysis is useful to judges and lawyers, but not useful to lay juries to whom ultimate responsibility for a decision will be given in a close case. Henderson, Renewed Controversy, supra note 29, at 799.

59. The Pennsylvania Supreme Court has held that the lack of a safety device may constitute a design defect where such absence of a safety device causes accidental injury of a type which could be expected from normal use of the product. See Bartkewich v. Billinger, 432 Pa. 351, 354, 247 A.2d 603, 605 (1968). However, the Third Circuit reached a somewhat different result in Taylor v. Abbe, Inc., 516 F.2d 145 (3d Cir. 1975). In Taylor, the owner of a pebble mill ordered parts from the defendant supplier. Id. at 146. At the time of the sale the supplier offered to provide, for $110.00, a safety guard to cover the point where two gears meshed. Id. The mill owner rejected the offer and an employee subsequently lost his hand in an accident which could have been prevented by the guard. Id. at 146-47. The Third Circuit, applying Pennsylvania law, held that the supplier was not liable for the employee's injuries. Id. at 147. Stressing the fact that the supplier had offered the safety guard to the owner, the court stated that "a supplier should be required only to make a bona fide offer of a safety device." Id. at 148. Pointing out that this case involved only a supplier of parts, the court did go on to suggest that there would be a stronger argument for liability "[w]here a manufacturer sells a complete pre-assembled product minus only a safety device." Id. at 148-49.

60. See White v. Clark Equip. Co., 262 Ark. 158, 553 S.W.2d 280 (1977). In White, the plaintiff's husband was killed when the forklift he was operating fell backward. Id. at 159, 553 S.W.2d at 281. The plaintiff brought an action against the forklift manufacturer and distributor alleging that the forklift was defective because it was not equipped with any overhead protection. Id. at 161, 553 S.W.2d at 282. Because the employer had specifically ordered the forklift without an overhead guard to enable it to enter trailers with low ceilings, the court stated that there was "simply
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purchase. The Third Circuit, addressing what it characterized a "narrow issue," began its analysis in Hammond by reviewing the development of Pennsylvania's modern products liability law. The court then applied the legal framework set out in "the Pennsylvania products liability trilogy," Salvador, Berkebile, and Azzarello, to the facts of Hammond.

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Similarly, the Sixth Circuit Court of Appeals, applying Tennessee law, upheld a directed verdict in favor of the manufacturer and supplier of a bulldozer that was not equipped with an overhead guard. Orfield v. International Harvester Co., 535 F.2d 959 (6th Cir. 1976). In Orfield, the plaintiff was struck in the chest by a tree while operating a bulldozer on a construction site. Id. at 959-60. Plaintiff offered evidence that an overhead guard would not have adversely affected the operation of the bulldozer and would have prevented his injury. Id. at 960. Applying a "consumer expectations" analysis of strict liability under section 402A of the Restatement, the court held that because the plaintiff testified that he was aware of the condition of the bulldozer and the danger involved in its use, he failed to prove that the bulldozer was dangerous beyond his knowledge as an ordinary consumer and, therefore, failed to prove it was defective. Id. at 964.

61. Biss v. Tenneco, Inc., 64 A.D. 2d 204, 409 N.Y.S.2d 874 (App. Div. 1978), appeal denied, 46 N.Y.2d 711, 416 N.Y.S.2d 1025 (1978). In Biss, plaintiff's testator received fatal injuries when the loader he was operating collided with a telephone pole. Id. at 205, 409 N.Y.S.2d at 857. Plaintiff alleged that the loader was defectively designed because it lacked a ROPS and that this defect caused decedent's injuries. Id. at 206, 409 N.Y.S. at 875-76. Concluding that the action involved liability for "second-collision" defects, the court held that, in such a case, manufacturers and suppliers are held to the same standard applied in negligence cases generally, that is, reasonable care. Id. at 207, 409 N.Y.S. at 876. For a discussion of "crashworthiness" or "second collision" defects, see note 32 supra. The ROPS had been offered to the decedent's employer as an optional feature when he purchased the loader. 64 A.D.2d at 207, 409 N.Y.S.2d at 876. The New York court concluded that once the availability of safety options is explained to the purchaser, the duty to exercise reasonable care in selecting those appropriate to the product's intended use rests upon the purchaser. Id. at 207, 409 N.Y.S.2d at 876-77. Because the dangers incurred in the use of construction equipment vary according to the job and site for which the equipment is being purchased and used, the court reasoned that the purchaser is in the best position to make a judgment regarding the balance of cost and function. Id. Accord Wagner v. International Harvester Co., 611 F.2d 224 (8th Cir. 1979) (accepted Biss as a sound legal theory but found it inapplicable to facts of the case). See also Rainbow v. Albert Elia Bldg. Co., 79 A.D. 2d 287, 436 N.Y.S.2d 480 (1981) (purchaser in best position to make judgment regarding the necessity of crash bars on motorcycle).

62. 691 F.2d at 648. The court stated that the narrow question for review was whether a knowledgeable purchaser of farm equipment instructs the manufacturer of that equipment prior to delivery to remove a safety device incorporated as a standard feature in its product design, and an experienced employee of the purchaser who operates the equipment loses his life in an accident which probably would not have occurred if the standard safety device had been in place, may the manufacturer be held liable for the employee's death under Pennsylvania products liability law?

63. Id. at 649-50. For the development of Pennsylvania products liability law, see notes 43-58 and accompanying text supra.

64. For a discussion of Salvador, Berkebile and Azzarello, see notes 44-58 and accompanying text supra.

65. 691 F.2d at 650-52. For a discussion of the facts of Hammond, see notes 1-6 and accompanying text supra.
Affirming the district court's holding that the loader in question was "unreasonably dangerous" as a matter of law, the Third Circuit agreed that, under Azzarelo, the case was properly submitted to the jury. Judge Rosenn, writing for the court, was persuaded that a ROPS was an element necessary to make a front-end loader safe for use and therefore, under Azzarello and Berkebile, the loader without the ROPS was defective. The court opined that the fact that a ROPS is normally a standard feature on the International Harvester loader reflects the manufacturer's judgment that the ROPS should, for safety's safe, be equipped on every loader. As further evidence of the necessity of a ROPS, the court noted that regulations promulgated by the Occupational Safety & Health Administration (OSHA) require that a ROPS be attached to every tractor unless it is presently being used in or near a building with low clearance. Thus, if the OSHA regulations had been effective at the time of the sale of tractor in Hammond, they would have required the tractor to come equipped with a ROPS.

Further, the Third Circuit stated that it was irrelevant whether International Harvester acted reasonably or prudently in accepting an order for a tractor without a ROPS. Under Pennsylvania law, the court reasoned, a manufacturer's care or prudence has no bearing on a product's defectiveness. Defectiveness is determined solely by the condition in which the product is delivered to the consumer. Because International Harvester had both designed and manufactured the tractor in question, the court found that "it [was] wholly responsible for the condition in which the tractor was delivered."

66. 691 F.2d at 651.
67. Id. Under Azzarello, the judge is required to decide as a matter of law whether the facts alleged would justify the imposition of liability on the manufacturer. 480 Pa. at 558, 391 A.2d at 1026. If the court answers in the affirmative, the case is given to the jury for a determination of whether the facts alleged are true. For a discussion of Azzarello, see notes 53-58 and accompanying text supra.
68. 691 F.2d at 651.
69. Id.
70. Id.
71. Id. The ROPS could have been removed when being used to haul manure from the barn—the primary purpose for which it was purchased—but would have had to have been attached at the time of Hammond's accident. Id. OSHA regulations did not govern the Hammond case because the tractor in question was manufactured prior to the effective date of the regulations. Id. at 651.
72. Id. at 652.
73. Id.
75. Id. The court distinguished Taylor v. Abbe, 516 F.2d 145 (3d Cir. 1975), where the Third Circuit held that a parts supplier was not liable for injuries to a pebble mill employee caused by the lack of a safety device, on the ground that in Taylor, the defendant parts supplier "had neither designed nor manufactured the pebble mill." Id. For a discussion of the decision in Taylor, see note 59 supra.

The court further stated that additional cases cited by International Harvester...
Additionally, the court stated that decedent's failure to exercise due care was also irrelevant since he had no influence over the condition of the loader when purchased. The court reasoned that any risk assumed by the purchaser may not be imputed to an innocent employee.

The Third Circuit also rejected International Harvester's contention that the *Azzarello* jury charge was inapplicable to the facts of *Hammond*. The court briefly noted that a request not to apply the *Azzarello* charge amounts to a request to overrule *Azzarello*, a decision which was not within the province of a federal court sitting in diversity.

Reviewing the Third Circuit's decision, it is submitted that the court had no alternative but to apply *Azzarello* to the facts presented in *Hammond*. The product defect alleged in *Hammond* does not fall neatly into any defined category of defect. International Harvester consciously designed its front-end loader with a ROPS included as a standard feature, therefore, it was not a classic design defect. Moreover, it was not a typical manufacturer's defect, as those cases did not apply to the facts presented in *Hammond*. An additional point to consider is that *Hammond* was a decision of the Pennsylvania Supreme Court, and a federal court sitting in diversity is not free to second guess the wisdom of the Pennsylvania Supreme Court.

were inapposite to the facts in *Hammond*. 691 F.2d at 651-52 n.6 (citing Bowman v. General Motors, 427 F. Supp. 234 (E.D. Pa. 1977); Dreisonstok v. Volkswagenwerk, 489 F.2d 1066 (4th Cir. 1974); and Biss v. Tenneco, 64 A.D. 204, 409 N.Y.S.2d 874, 409 A.2d 204 (App. Div. 1978)). The court concluded that

Bowman and Dreisonstok address themselves to situations in which a manufacturer was consciously balanced considerations of safety, convenience, and cost and has settled upon a design which is not optimally safe. Biss concerns a situation in which the manufacturer was declined the balancing task and left the decision of whether to purchase optional safety devices to the consumer.

In the instant case, by contrast, the manufacturer balanced considerations of safety, convenience, and cost, and opted for a skid loader design that maximized safety by including the ROPS as standard operating equipment. Yet, at the purchaser's request, the manufacturer delivered the skid loader without a ROPS.

*Id.*

76. 691 F.2d at 652.

77. *Id.*

78. *Id.* at 650 n.4. For a discussion of *Azzarello*, see notes 53-58 and accompanying text *supra*. International Harvester had argued that the *Azzarello* charge was inapposite under the factual circumstances of *Hammond* because in a situation where the absence of a safety device is at issue, the "every element" standard removes the question of defect from the jury’s consideration. Brief for appellant at 10-12. The result is a guaranteed verdict for the plaintiff. *Id.* For a discussion of the "every element" standard set forth in *Azzarello*, see note 55 and accompanying text *supra*.

79. 691 F.2d at 650 n.4. The Third Circuit stated that, as a federal court sitting in diversity, the court was not free to second guess the wisdom of the Pennsylvania Supreme Court. *Id.*

80. For a discussion of the facts in *Hammond*, see notes 1-6 and accompanying text *supra*.

81. For a discussion of the categories of defects, see notes 29-32 and accompanying text *supra*.

82. Ordinarily a design defect is found when a manufacturer fails to realize the necessity of a particular safety device and designs his product without it. *See* note 32 and accompanying text *supra*. The finding of a design defect results in an indictment of an entire product line rather than just a single mismanufactured item. *See* W. KEETON, PRODUCTS LIABILITY *supra* note 12, at 364. In *Hammond*, on the other
ing defect since it was not the unintentional result of an error in the manufacturing process. The alleged defect resulted because the loader was customized at the purchaser's request to make it conform to the purchaser's needs. However, the Pennsylvania Supreme Court has held that a missing safety device can be a design defect when the lack of a device causes accidental injury of a type which results from normal product use and there is no indication that the Pennsylvania court would hold differently when only a single product was missing such a device.

It is submitted that this is an unfortunate result because application of Azzarello to the facts of Hammond denies the jury any real function. When a safety feature has been removed at the purchaser's request it quite obviously does not have "every element" necessary to make it safe. Thus, unless the judge determines as a matter of law that a product lacking such a safety device is not unreasonably dangerous, the jury is left with no alternative but to impose liability. It is submitted that the question of whether such a missing safety feature constitutes a "defect" should not be removed from the jury's determination.

It is suggested that the impact of the Hammond decision will be to convey to manufacturers the message that products should not be customized to suit an individual purchaser's needs if such customization entails removal of a safety device. Additionally, Hammond exemplifies the need for Pennsylvania Supreme Court delineation of limits to Azzarello's application.

hand, International Harvester designed the loader with a ROPS as a standard feature. See note 5 and accompanying text supra. The safety device was missing only on the one tractor and only because the purchaser requested its removal. 691 F.2d at 648.

83. For a discussion of manufacturing defects, see note 30 and accompanying text supra.
85. For a criticism of Azzarello's effect on the role of the jury, see note 58 supra.
86. It is submitted that making such a determination is not beyond the comprehension of a lay jury. Moreover, this would not be imposition of a negligence standard because the jury would look solely at the condition of the product. The manufacturer's state of mind would be irrelevant.
87. As the New York court noted in Biss, the dangers involved in construction vary from job to job. Thus, the purchaser is in the best position to balance cost and function to determine the safety standards necessary at a particular site. For a discussion of Biss, see note 61 supra. However, holding the manufacturers responsible provides employees with greater protection from management misjudgment regarding safety.
88. The Azzarello decision has left uncertainty regarding the appropriate test for determining when the risk of loss should be placed upon the supplier. D. Richman & J. Perry, Products Liability Update 5 (October 30, 1982) (Villanova Law School Center For Continuing Legal Education's Legal Development and Skills Program). Although the "every element" standard suggests perfect safety, the court suggested a risk-utility analysis when it said "when does the utility of a product outweigh the unavoidable danger it may pose? These are questions of law and their resolution depends on social policy." Id. at 3-4 (quoting 480 Pa. at 558, 391 A.2d at 1026). Moreover, the Azzarello court indicated that a consumer expectations approach may be appropriate when it stated that the Restatement formulation is "primarily
It is submitted that a further consequence of the Hammond decision may be to rekindle legislative attempts to change the substantive law of products liability in Pennsylvania and possibly encourage federal legislation applicable to all states. However, until limits are placed on the Azzarello decision by either the Pennsylvania Supreme Court or the state legislature, manufacturers will have, in effect, “absolute” rather than “strict” liability for any injuries caused by their products.

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designed to provide guidance for the bench and bar.” *Id.* at 4 (quoting 480 Pa. at 558, 391 A.2d at 1026).

There is also uncertainty over what instructions, if any, may be given the jury to explain the suggested instruction. *Id.* at 5. The court quoted Professor Wade’s suggestion that when one of the risk/utility factors “has special significance, it may be appropriate for the judge to make reference to it in suitable language.” *Id.* (quoting Wade, supra note 21, at 840).

89. In 1979, House Bill 1083 was introduced in the Pennsylvania House of Representatives. Pa. H.B. 1083, 1979 Sess.; Pa. S.B. 784, 1981 Sess. The bill called for, *inter alia*, the reinstatement of the “unreasonably dangerous” requirement as an element of strict liability and elimination from the jury instruction the language that the manufacturer is the “guarantor” of his product’s safety. An amended version of the bill was passed in the House of Representatives in February, 1980, but failed to be recommended by the House State Government Committee.
