

**Pennsylvania Supreme Court to Consider Whether Section 402A
of the Restatement (Second) of Torts (Strict Liability) Should Be Replaced by
Section 2 of the Restatement (Third) of Torts**

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On February 27, the Pennsylvania Supreme Court entered an order accepting allocatur to address the issue: “Whether this Court should apply § 2 of the Restatement (Third) of Torts in place of § 402A of the Restatement (Second) of Torts.” Section 2, which distinguishes among products liability based upon manufacturing defects, design defects, and failure to warn, effectively eliminates strict liability in product liability cases based on defective design and inadequate warnings, reserving it only for cases involving manufacturing defects. Should the court adopt Section 2 in place of Section 402A, the approach will give trial courts more guidance in hearing cases and instructing juries in product liability cases. The new standard could provide greater range to defendants to introduce arguments based on a risk/benefit balance, state of the art, industry standards, and obviousness of risk.

Currently, pursuant to the seminal Pennsylvania case *Azzarello v. Black Brothers Co.*, 391 A.2d 1020, 1022 (Pa. 1978), strict liability cases are controlled by Section 402A of the Restatement (Second) of Torts. Under Section 402A, the seller of a product is liable for harm caused by such product when it is sold in a “defective condition unreasonably dangerous to the user.” A product is deemed defective if it “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.” *Id.* at 1027. Under Section 402A, the imposition of strict liability for a product defect is not affected by the fact that the manufacturer or other supplier has exercised all possible care. Section 402A, while lacking detail on its application, has the intended upside of drawing a bright line between strict liability and negligence standards.

Applying Section 402A in *Azzarello* and its progeny, however, has left some trial courts struggling with how to instruct a jury in cases dealing with liability for design defects and failure to warn. While the idea behind strict liability was that the plaintiff avoids the burden of proving fault as in a negligence case, a determination of whether an object is “unreasonably dangerous,” and thus defective, necessarily involves negligence principles such as reasonableness or foreseeability. Section 402A’s lack of guidance on the extent to which negligence principles should enter the liability analysis has led to inconsistencies in Pennsylvania jurisprudence.

Section 2 of the Restatement (Third) of Torts, published approximately 30 years after Section 402A, incorporates much of the jurisprudence whereby the courts attempted to interpret and apply Section 402A. It maintains a traditional strict liability theory of recovery for claims of manufacturing defect, but, with respect to claims of design defect and inadequate warnings, incorporates an explicit balancing exercise that is more akin to a negligence analysis. Section 2 states:

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.

Thus, Section 2 adopts a reasonableness-based, risk-utility balancing test as the standard for adjudging the defectiveness of product designs and warnings. Section 2 makes it clear that even a dangerous product is not defective unless there is proof of a reasonable alternative design. *See* Restatement (Third) of Torts: Products Liability § 2 cmt. d. Comments to Section 2 also specify that the risk/benefit balancing done to judge product design must be done in light of knowledge attainable at the time the product was distributed. The comments also suggest that industry practice and the state of the art, although not dispositive, are relevant to the balancing analysis. With regard to warnings, Section 2 states that a seller is not liable for failing to warn of known risks and risk-avoidance measures that should be obvious. Note that Section 2 refers to separate sections for the standards of liability applicable to special product categories such as prescription drugs.

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