The Move toward a Negligence Standard in Strict Products Liability Failure to Warn Cases

Patricia Kurp Masten
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I. INTRODUCTION

The doctrine of strict products liability evolved in this country according to changing societal concerns regarding the relationship between manufacturers or sellers of products and individual consumers. This concept manifested the abandonment of traditional notions that absolved suppliers of chattels of any liability to third persons in the absence of negligence or privity of contract. Inspiration for this change in legal philosophy stemmed from the rationale that the risk of loss for injury resulting from defective products should be shouldered by those who market the products, principally because they are in the best position to absorb the loss

1. In an effort to alleviate the plaintiff's burden of proving the negligence of the supplier in manufacturing and marketing its product, the drafters of the RESTATEMENT (SECOND) OF TORTS adopted the rule of strict liability under § 402A. Section 402A provides:
   (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.

RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter RESTATEMENT]. See id. comment c at 349-50 (by marketing product manufacturer assumes special responsibility to stand behind product).

2. See id. at comments b and l. This transformation mirrored a shift from nineteenth century social attitudes which favored protection of the manufacturing industry to the twentieth century notion that it was the consumer who should be protected. See Azzarello v. Black Bros. Co., 480 Pa. 547, 553, 391 A.2d 1020, 1023-24 (1978). The early decision of Winterbottom v. Wright, 152 Eng. Rep. 402 (Excl. Ch. 1842), required privity of contract as a condition precedent to liability based on negligence. The privity requirement was subsequently altered in Thomas v. Winchester, 6 N.Y. 397 (1852), to allow recovery for injury caused by products that were considered eminently dangerous to human life. In the landmark decision of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), the manufacturer's duty was extended to all persons injured by products which by their nature are reasonably certain to result in danger when negligently made. In Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), the Supreme Court of California rejected the doctrines of negligence, privity and warranty, and endorsed a theory of strict liability for defective products.
by distributing it as a production cost against which liability insurance can be obtained.  

Section 402A of the Restatement (Second) of Torts was adopted and made a part of the substantive law of Pennsylvania by the Pennsylvania Supreme Court in Webb v. Zern. Following formal adoption in Webb, Pennsylvania courts have repeatedly embraced the theory of strict products liability as imposing liability upon suppliers of defective products for injuries caused without proof of negligence. To justify placing such liability upon a supplier, however, a plaintiff must prove: (1) that the product was defective; (2) that the defect arose while the product was still in the hands of the defendant; and (3) that the defect caused the injury. Thus, the pivotal question in most strict products liability cases is whether a product is defective. Defects may be categorized as either manufacturing defects, design defects, or defects resulting from the failure to warn of the inherent dangers of a product. In a manufacturing defect case, it is relatively simple to ascertain whether the product is defective simply by comparing the product


4. See Restatement, supra note 1.


6. It has been argued that in order to assure the benefits of strict liability as an effective weapon in the consumer's battle against suppliers of defective products, the law had to be purged of negligence concepts. See Foley v. Clark Equip. Co., 361 Pa. Super. 599, 615, 523 A.2d 379, 387 (1987).


8. In determining whether a product is defective in a strict liability action, the focus is on the condition of the product rather than the conduct of the manufacturer. See Keeton, Products Liability—Design Hazards and the Meaning of Defect, 10 Cumb. L. Rev. 293, 315 n.87 (1979) (negligence evaluates reasonableness of conduct of manufacturer whereas strict liability focuses on condition of product); Weinstein, Twerski, Piehler & Donaher, Product Liability: An Interaction of Law and Technology, 12 Duq. L. Rev. 425, 429 (1974) (negligence linked to reasonableness of conduct of manufacturer whereas strict liability evaluates condition of product); Comment, Is There a Distinction Between Strict Liability and Negligence in Failure to Warn Actions?, 15 Suffolk U.L. Rev. 983, 984-85 (1981) (negligence theory places burden of proof on plaintiff to prove manufacturer's conduct).

that caused the injury with other products that were manufactured according to specifications. In a defective design case, however, the question is whether a safer design was possible in the initial conceiving, sketching or planning stage of the product. Finally, when dealing with a defect arising from the failure to warn, the issue is whether the manufacturer provided consumers with adequate warnings of the dangers of the product and instructions as to the proper use of the product.

Although defects arising from faulty manufacture or design and defects arising out of inadequate warnings are covered under the same rule, the standards are conceptually different. A production or design defect is something over which a manufacturer has control, while the danger for which a warning is required is not in the manufacture, but in the use of the product. Thus, in failure to warn cases it is the lack of adequate warnings or instructions as to the dangers of a product, rather than the components of the product itself, that renders a product defective and unreasonably dangerous.

Theoretically, strict liability under section 402A purports to completely eradicate the plaintiff's burden of proving negligence.

10. See Prosser, supra note 3, at 659. Manufacturing defect cases frequently arise in food and beverages. For example, in Slonsky v. Phoenix Coca-Cola Bottling Co., 18 Ariz. App. 10, 11, 499 P.2d 741, 742 (1972), a plaintiff who sustained injuries from drinking a bottle of cola containing metal fragments was permitted to recover against the company upon a showing that the metal fragments entered the cola or the bottle at some point during the manufacturing process. Id. at 13, 499 P.2d at 744.

11. See Prosser, supra note 3, at 65. Design defects frequently occur in automobiles, even though automobile manufacturers have an affirmative duty to design crashworthy vehicles. See generally Golden, Automobile Crashworthiness- The Judiciary Responds When Manufacturers Improperly Design Their Cars, 46 INS. COUNSEL J. 335, 336 n.8, 340-48 (1979) (discussing majority and minority views regarding the design defects in automobiles).

12. Either the inadequacy of a warning or the complete lack of a warning may render a product defective. See, e.g., Basko v. Sterling Drug, Inc., 416 F.2d 417, 426 (2d Cir. 1969) (inadequate or total lack of warning breaches manufacturer's duty to warn); Hamilton v. Hardy, 37 Colo. App. 375, 382 n.3, 549 P.2d 1099, 1106 n.3 (1976) (manufacturer liable for either complete lack of warning or inadequate warning).

13. See Restatement, supra note 1, at § 402A comment j, at 353 (seller may be required to give directions or warnings to prevent product from being unreasonably dangerous).

14. See Restatement, supra note 1, at § 402A.

15. For example, some products contain latent dangers such as flammability, volatility and explosiveness. See Keeton, Products Liability—Inadequacy of Information, 48 Tex. L. Rev. 398, 404 (1970).

16. See Incollingo v. Ewing, 444 Pa. 263, 287, 282 A.2d 206, 219 (1971). A product, as to which adequate warning of danger involved in its use is required, sold without such warning is in a defective condition. See Restatement, supra note 1, at § 402A comment h.
on the part of the manufacturer. However, a plaintiff in a failure to warn action may find hidden in comment j the imposition of proving that the manufacturer knew, or by exercising reasonable foresight, should have known of the risks or hazards about which it failed to warn. Thus, notwithstanding the traditional notion that strict liability focuses upon the condition of the product rather than the conduct of the manufacturer, some courts have held that a claimant who seeks recovery on the basis of failure to warn must prove that the manufacturer was negligent. It is the infusion of such negligence concepts into the field of strict products liability which has created the current state of confusion and controversy among the courts.

A growing number of jurisdictions have held that the liability arising from failure to warn is not strict in the same sense as liability arising from defective manufacturing. Other courts have ap-

17. The elements of an action for negligent failure to warn are presently articulated in RESTATEMENT (SECOND) OF Torts § 388, at 300-01 (1965). Section 388 requires a plaintiff to establish that the manufacturer knew or had reason to know that the product contained inherent or latent dangers. Id. at 301. Under § 388, a manufacturer has a duty to exercise reasonable care to obtain and to provide information detailing the dangers of the product. Id. at 304, comment g.

18. Comment j of § 402A sets forth the strict liability for failure to warn doctrine. See RESTATEMENT, supra note 1, § 402A comment j, at 353. Although comment j specifically refers to directions and warnings relative to the dangers of ingredients in food and drugs, this duty also extends to other types of products, including equipment and household goods. See Prod. Liab. REP. (CCH) § 4095 (1979). The duty to warn in strict liability also emanates from other comments of § 402A. Comment g, for instance, recognizes that certain precautions may be necessary to make a product safe. See RESTATEMENT, supra note 1, § 402A comment g, at 351. Comment h states that if a manufacturer had "reason to anticipate" that its product may be hazardous for a certain use, then the manufacturer may have a duty to warn. See RESTATEMENT, supra note 1, § 402A comment h, at 351-52.

19. See RESTATEMENT, supra note 1, § 402A comment j, at 353 (seller liable for failure to warn only if he knew or through exercise of reasonable human skill and foresight had reason to know of the dangers of the product).

20. See supra note 8.

21. As Dean Keeton wrote:
   Notwithstanding what some courts have said, in establishing this ground of recovery, the plaintiff in most states must prove negligence in the failure to warn properly. There will be no liability in these cases without a showing that the defendant knew or should have known of the risk or hazard about which he failed to warn. Moreover, there will be no liability unless the seller or manufacturer failed to take the precautions that a reasonable person would take in presenting the product to the public. Keeton, The Meaning of Defect in Products Liability Law, supra note 9, at 586-87, quoted in Dambacher v. Mallis, 336 Pa. Super. 22, 74, 485 A.2d 408, 435 (1984), appeal dismissed, 508 Pa. 643, 500 A.2d 428 (1985). See generally Parke-Davis & Co. v. Stromsodt, 411 F.2d 1390 (8th Cir. 1969); Sterling Drug, Inc. v. Yarrow, 408 F.2d 978 (8th Cir. 1969); Tinnerholm v. Parke-Davis & Co., 285 F. Supp. 432 (S.D.N.Y. 1968), modified, 411 F.2d 48 (1969).

plied a rule of reasonableness with respect to the duty to warn. Still other courts, either by judicial decision or legislative enactment, have made comparative negligence principles applicable to strict products liability.

Although Pennsylvania courts have uniformly upheld the notion of strict liability as being devoid of negligence principles, recent decisions involving failure to warn cases suggest the beginning of "cracks" in the solidified approach against the intermingling of these concepts. These decisions support the possibility that the Pennsylvania courts are now ready to recognize the interplay between strict liability and negligence principles in failure to warn cases.

This comment will analyze the doctrine of strict liability in the context of the apparent conflict which has emerged from the application of negligence concepts in strict products liability cases involving determinations of whether adequate warnings or the complete lack of warnings render a product defective. The recent trend in Pennsylvania case law, which appears to suggest that a change


may be imminent, will be specifically examined. Finally, this com-
ment will suggest that the Pennsylvania courts may now be amena-
table to joining the growing consensus of American jurisdictions al-
lowing the introduction of negligence concepts into strict products 
liability failure to warn cases.

II. OVERVIEW OF THE DEVELOPMENTS OF PENNSYLVANIA LAW IN 
FAILURE TO WARN CASES

The intermingling of negligence concepts within an area labeled 
"strict liability" has been a source of confusion and accounts for 
much disarray in the opinions of Pennsylvania's courts. In the 
past, Pennsylvania courts have been emphatic in divorcing prin-
ciples of negligence from strict products liability cases. The warn-
ing signals against separation of the two tort concepts have come 
in many forms.

In one of the first modern Pennsylvania cases which wrestled 
with the issue, the Pennsylvania Supreme Court determined in 
Berkebile v. Brantly Helicopter Corporation that if a product is 
defective in the absence of adequate warnings, and the defect is 
the proximate cause of the plaintiff's injury, the supplier is strictly 
liable without proof of negligence. Examining section 402A, Chief 
Justice Jones, joined by Justice Nix, stated that a manufacturer is 
responsible for injury caused by its defective product even if the

27. See, e.g., Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975); 

28. See Baker v. Outboard Marine Corp., 595 F.2d 176 (3d Cir. 1979) (applying Penn-
sylvania law) (jury instructions regarding negligence should be kept out of § 402A cases); 
Vizzini v. Ford Motor Co., 569 F.2d 754 (3d Cir. 1977) (applying Pennsylvania law) (Penn-
sylvania courts do not permit the introduction of comparative negligence principles into a § 
(section 402A expressly implies that the exercise of all possible care by a manufacturer does 
not affect the imposition of strict liability for a product defect). See also Sherk v. Daisy-
Heddon, 498 Pa. 594, 605, 450 A.2d 615, 621 (1982) ("The liability imposed on manufactur-
ers of defective products is denominated strict, or without fault. . . .") (Hutchinson, J., 
concurring).

29. 462 Pa. 83, 337 A.2d 893 (1975). Plaintiff's decedent was killed in a helicopter 
crash. Plaintiff brought wrongful death and survival actions, including a claim in strict lia-
bility, against the manufacturer of the helicopter. Id. at 91-92, 337 A.2d at 897-98. The court 
stated that it was reversible error where the FAA had promulgated standards as to warnings 
required of a manufacturer, and violation of these standards itself was considered a detect-
tive condition. Id. at 103, 337 A.2d at 903.

30. Id. The Berkebile court did not address the issue of whether warnings were re-
quired, but dealt primarily with the question of whether the required warnings were ade-
quate. Id. at 103, 337 A.2d at 903. See also RESTATEMENT, supra note 1, at § 402A comment h.
manufacturer has exercised all possible care in the manufacturing and marketing of his product.\(^{31}\) The chief justice opined that the inclusion of the term "unreasonably dangerous" in section 402A was not intended to import negligence principles into a strict liability case, but rather, was intended to prevent a manufacturer from being held liable as an insurer instead of as a guarantor of a product's safety.\(^ {32}\)

Although the precedential authority of Berkebile was for a time uncertain,\(^ {33}\) the uncertainty was eliminated by the supreme court's subsequent decision in Azzarello v. Black Brothers Company.\(^ {34}\) There, the supreme court, in a unanimous opinion by Justice Nix, approved and adopted the decision in Berkebile.\(^ {35}\) In doing so, the court went one step further than it had in Berkebile in holding that the purpose of the term "unreasonably dangerous" in section 402A is to impose on the trial court the responsibility of deciding, as a matter of law, whether strict liability should be placed upon a supplier.\(^ {36}\) Reiterating that the supplier's liability is that of a guarantor, not an insurer,\(^ {37}\) the court set forth a model jury instruction

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  \item \textit{Berkebile}, 462 Pa. at 91, 337 A.2d at 899 (quoting \textsc{Restatement (Second) of Torts} § 402A(2)(a) (1965)).
  \item \textit{Id.} at 93, 337 A.2d at 894.
  \item \textit{Berkebile} was a plurality opinion written by then Chief Justice Jones, joined by Justice (now Chief Justice) Nix. \textit{Id.} at 83, 337 A.2d at 893.
  \item 480 Pa. 547, 391 A.2d 1020 (1978). Plaintiff, who was injured when his hand was pinched between two hard rubber rolls in a coating machine manufactured by the defendant, relied solely on the theory of strict liability under the \textsc{Restatement (Second) of Torts} § 402A. In giving the jury instructions, the trial court repeatedly used the phrase "unreasonably dangerous" taken verbatim from § 402A. \textit{Id.} at 550, 391 A.2d at 1022. The Pennsylvania Supreme Court determined that the phrase "unreasonably dangerous" should not be used in framing the issues for the jury, but instead is a term of art which should only be considered by the court in making an initial determination as to whether strict liability is appropriate. \textit{Id.} at 558, 391 A.2d at 1026.
  \item \textit{Id.} at 559, 391 A.2d at 1027.
  \item \textit{Id.} at 556-57, 391 A.2d at 1025-26. The supreme court stated that: [T]he phrases 'defective condition' and 'unreasonably dangerous' as used in the Restatement formulation are terms of art invoked to determine when strict liability is appropriate. It 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. \textit{Id.} at 558, 391 A.2d at 1026 (emphasis in original).
  \item \textit{Id.} at 553, 391 A.2d at 1024. The difference in regarding the manufacturer as an insurer versus a guarantor of a product was explained by Dean Wade as follows: What do we mean when we speak of strict liability of a manufacturer for harm caused by his product? Is it sufficient for a plaintiff to show that he used the defendant's product and that he was injured? The answer to this is no. If the plaintiff's theory is breach of warranty, he must prove the breach—i.e., that the article was not merchantable or was not fit for the purpose sold. If the theory is strict liability in tort,
devoid of negligence concepts. It is noteworthy, however, that although the defect alleged in Azzarello was one of design and not failure to warn, the Pennsylvania Supreme Court did recognize that the test of reasonableness might be appropriate in the initial determination of whether warnings were required.

Perhaps the most stringent stand against the intermingling of negligence concepts in strict products liability failure to warn cases came in the Pennsylvania Superior Court decision of Dambacher v. Mallis. Relying upon the supreme court's analysis in Azzarello, the court reaffirmed the distinction between strict products liability and negligence standards of proof. To buttress its position, the court delineated the theoretical differences between traditional strict liability cases, products liability cases, and ordinary negligence cases. Based on these distinctions, the court reasoned that a jury in a strict products liability case should be instructed that it

the plaintiff must still prove that the article was unsafe in some way. Thus, the liability is not that of an insurer; it is not absolute in the literal sense of that word.
is only to consider whether the product was safe in the absence of warnings or in light of the warnings given, and not to determine whether the warning given by the manufacturer was reasonable. 47

Judge Wieand, who both concurred and dissented in Dambacher, 48 vehemently disagreed with the majority's proposition that the reasonable man standard for determining negligence has no place under section 402A for the failure to warn. 49 Instead, he suggested that in strict products liability cases based upon failure to warn, the duty to warn should be assessed against the negligence concepts of foreseeability and reasonableness. 50 In support of his position, Judge Wieand listed nine cases from nine different jurisdictions which have held that the issue of failure to warn should be governed by a negligence standard. 51

One of the most complete discussions of strict liability failure to warn actions is found in the 1987 Pennsylvania Superior Court decision of Staymates v. ITT Holub Industries. 52 Although the court

47. Id. at 57, 485 A.2d at 426.

48. Judge Wieand concurred with the majority's opinion that the judgment should be vacated and the case remanded for a new trial, but dissented from the majority's analysis regarding the proper jury instructions in strict liability failure to warn cases. Id. at 89-90, 485 A.2d at 443.

49. Id. at 74-75, 485 A.2d at 435-36. Judge Wieand stated that: "Perhaps as a matter of academic purity, an attempt to eliminate standards of reasonableness from strict liability in products liability cases can be applauded. In actual practice, however, such an approach is not feasible in failure to warn cases." Id. at 75, 485 A.2d at 436 (emphasis added).

50. Id. at 77-78, 485 A.2d at 437. Judge Wieand suggested that the majority's standard—that a product is defective if a supplier has failed to give warnings adequate to make its product safe—imposes upon suppliers an absolute duty to insure a product's safety by warning users of any injury which may result from use of the product. Id. at 76, 485 A.2d at 436. Under the majority's standard, for example, a manufacturer of knives will be considered to have manufactured a defective product if it fails to warn that a knife may cut. Id. Similarly, an automobile manufacturer who fails to warn of the inherent dangers of operating an automobile at excessive speed will be considered to have manufactured a defective product. Id. Judge Wieand also opined that the majority's standard is simply unworkable with respect to risks or hazards about which the manufacturer was unaware until after the product was manufactured. Id. at 76-77, 485 A.2d at 437.


52. 364 Pa. Super. 37, 527 A.2d 140 (1987). Plaintiff was injured when he accidentally put his hand into a dust collecting machine that had malfunctioned. Id. at 40, 527 A.2d at 141. It was alleged that the product's defective condition was the proximate cause of plaintiff's injury. Id. at 41, 527 A.2d at 142. Following a jury award in favor of the plaintiff, the
continued to uphold the separation of negligence and strict liability principles,\textsuperscript{53} the first signs of recognition of countervailing considerations appeared. Throughout its opinion, the \textit{Staymates} court acknowledged the emerging consensus in courts of other jurisdictions on the use of comparative negligence principles in strict products liability suits.\textsuperscript{54} In what appears to be an inordinate attempt to justify the court's refusal to join this growing consensus, a complete synopsis of the historical development of strict products liability law in Pennsylvania was presented.\textsuperscript{55} Recognizing that it was not within its province to change the strict liability principles adopted and announced by the supreme court, the \textit{Staymates} court declined to imitate its sister states in taking the initiative to apply comparative negligence principles to a strict products liability case.\textsuperscript{56} Accordingly, the Pennsylvania Superior Court suggested that any modification of section 402A should appropriately come from either the Pennsylvania Supreme Court or the legislature.\textsuperscript{57}

Interestingly, the \textit{Staymates} court's pronouncement on the issue of complete separation of negligence and strict products liability concepts was followed by a detailed analysis of a manufacturer's liability for failure to warn.\textsuperscript{58} Emphasizing that failure to warn can be defeated by the absence of either unreasonable danger or proximate cause,\textsuperscript{59} the court stated that before the issue of causation may be submitted to a jury, the evidence must support a \textit{reasonable} inference, rather than a guess, that the damages may have been

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\item defendants appealed on the basis that the trial court had erred in refusing to submit the issue of plaintiff's comparative negligence to the jury. The case was one of first impression. \textit{Id.} at 42, 527 A.2d at 142.
\item \textit{Id.} at 43, 527 A.2d at 143.
\item The \textit{Staymates} court acknowledged that it was "quite aware that a number of states have taken the initiative, be it by judicial decision or legislative enactment, to apply comparative negligence principles to strict products liability." \textit{Id.} at 46-47, 527 A.2d at 145.
\item \textit{Id.} at 42-47, 527 A.2d at 142-45.
\item \textit{Id.}
\item \textit{Id.} at 47, 527 A.2d at 145. The court stated that it was not within its province to alter the existing law regarding the use of comparative negligence principles in strict liability suits. Accordingly, the court stated that:
\begin{quote}
[I]n the absence of any indication from our Supreme Court that it is willing to alter its stance . . . favoring a retention of the dichotomy between strict liability and comparative negligence in the area of products liability, we find it inauspicious at this time to follow suit with some of our sister states who have opted to mold strict liability principles with notions of comparative negligence.
\end{quote}
\textit{Id.}
\item \textit{Id.} at 51-54, 527 A.2d at 147-48.
\item Liability for failure to warn arises when the absence of a warning is both "unreasonably dangerous and the proximate cause of the accident." \textit{Id.} at 51, 527 A.2d at 147 (quoting Greiner v. Volkswagenwerk Aktiengesellschaft, 540 F.2d 85, 96 (3d Cir. 1976)).
\end{itemize}
prevented if an adequate warning had been given. In sum, although the court denied the defendant's requested relief on the grounds that negligence and strict liability concepts cannot be mixed, the judgment in favor of the plaintiff was ultimately reversed by treating failure to warn as a separate issue.

III. The Present State of Strict Products Liability Failure to Warn Cases in Pennsylvania

After several years of confusion, the July 1, 1988, superior court decision in Ellis v. Chicago Bridge & Iron Company began to provide some insight and structure to the Pennsylvania courts' analysis of strict products liability in failure to warn cases. For the first time, a Pennsylvania court clearly and unequivocally acknowledged that the resolution of whether a product is unreasonably dangerous without adequate warnings, and thus defective for purposes of strict liability, necessarily involves examination of negligence principles such as reasonableness and foreseeability. Jus-

60. Id. at 51, 527 A.2d at 147. See also Conti v. Ford Motor Co., 743 F.2d 195, 198 (3d Cir. 1984), cert. denied, 470 U.S. 1028 (1985); Sherk v. Daisy-Heddon, 498 Pa. 594, 450 A.2d 615 (1982). In Sherk, the Pennsylvania Supreme Court upheld a jury verdict in favor of a manufacturer of a BB gun which caused injury. Although the court's analysis focused on whether the absence of warnings was the "proximate cause" of the injury, and not whether a warning was necessary, the court concluded that the trial court had erred in excluding evidence of whether the danger or possibility of danger of the gun was generally known and appreciated in the community of which plaintiff was a member. Id. at 597 n.2, 450 A.2d at 617 n.2.

61. See supra notes 54-59 and accompanying text.

62. Staymates, 364 Pa. Super. at 53-54, 527 A.2d at 148. The court reversed and remanded on the grounds that they could not ascertain whether the jury's finding of a "defect" was based on the design of the machine or the lack of an adequate warning. Id. Moreover, the court stated that the failure to warn would not be a proper basis for the award since there was no evidence that a different or additional warning would have altered the result. Id.

63. 545 A.2d 906 (1988). This case involved a shipment of steel plates, fabricated at Chicago Bridge & Iron Company's plant in Greenville, Pennsylvania. The plates were to be sent to the United States Arab Emirates by barge via Philadelphia. Chicago Bridge provided no instructions concerning the handling of the plates in transit. Id. at 907. When a longshoreman was killed while handling the plates, a suit was brought under the theory of strict liability. Id. at 908. The contention was that Chicago Bridge & Iron Company had failed to provide appropriate instructions. Id.

64. The issue addressed by the court was whether the trial court erred in allowing the question of strict liability to be taken to the jury based upon the plaintiff's allegations that a product, not alleged to be defective for use in its intended purpose, became defective as to intermediate shippers by the manufacturer's failure to provide instructions or warnings. Id. at 910.

65. Id. at 912-13. Specifically, the Chicago Bridge court stated that:

As further indication that the rule of reasonableness applies with respect to inade-
tification for this exception in failure to warn cases was based on
the court's belief that the liability deriving from inadequate warn-
ings is not "strict" in the same sense as liability arising from man-
ufacturing design defects.66

In Chicago Bridge, the superior court pointed out that almost
every industrial product is capable of inflicting injury67 and that
warnings cannot be reasonably required in the marketing of every
product.68 Therefore, in the absence of a rule as to the circum-
stances under which a warning is required, the court reasoned that
every product would be considered defective,69 and every manufac-
turer would be an insurer rather than a guarantor of its product.70
To avoid this harsh result, the court recommended that a rule of
reasonableness as to standards of conduct be applied to ascertain
the circumstances under which a warning is required.71

Thus, the Chicago Bridge decision definitively establishes that
the infusion of negligence principles into strict products liability
actions is indeed appropriate in failure to warn cases.72 Moreover,
the court's reliance upon negligence concepts in making its initial
determination of whether a strict liability action should be submit-
ted to a jury upholds the separation of negligence and strict liabil-
ity concepts while allowing "reasonableness," as well as other fac-
tors, to negate the manufacturer's duty to warn.73 Consequently,

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66. Id. at 913.
67. Id. at 912.
68. Id. at 909.
69. Id. For example, the court stated that "a product is not defective without warnings
where the danger is obvious or where the injured person, his employer, or an expert or
technically trained person under whom he was working, knew of the danger." Id. at 913.
70. Id. at 909.
71. Id. See supra note 37.
72.Negligence principles are considered, however, only at the pleading stage where a
judicial determination is made as to whether the case is appropriate for treatment under
strict products liability. Chicago Bridge, 545 A.2d at 909, 913. The Chicago Bridge court's espoused standard of reasonableness is consistent with the Azzarello court's earlier recognition that the test of reasonableness might be appropriate in the initial determination of whether warnings were required. See supra notes 39-41 and accompanying text.
73. Id. at 913. The court emphasized that a supplier is liable only if it knew or should have known of the product's danger, or where the dangerous use to which the product might
the court implied that a lower standard—embodying negligence concepts—could be used to determine whether the duty to warn arises. Only after this test is passed would the stringent standards of strict liability come into play.

IV. CONCLUSION

Although Pennsylvania case law has historically been against the commingling of strict liability and negligence concepts, a recent trend of caselaw suggests that change may be imminent in strict products liability cases involving the failure to warn. The most noteworthy of these changes is the recent decision in Chicago Bridge, where the Pennsylvania Superior Court expressly indicated not only that the liability arising from inadequate warnings is not strict in the same sense as liability arising from manufacturing or design defects, but also that a proper determination of whether a product without adequate warnings is defective necessarily involves negligence principles such as reasonableness and foreseeability. Based on the court's analysis in Chicago Bridge, it appears that the Pennsylvania courts are now prepared to join the growing consensus of jurisdictions which have carved an exception in traditional strict liability analysis by determining that where the alleged defect is the failure to give adequate warning, the introduction of negligence concepts is not precluded.

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74. *Id.*

75. *Id.* at 913.


77. *Chicago Bridge*, 545 A.2d at 912.

78. *Id.* at 911-12.