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Products Liability

A Practical Defense Perspective on the 'Tincher' Ruling

Bill Ricci, William J. Conroy and Katherine A. Wang, The Legal Intelligencer

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On Nov. 19, 2014, the Pennsylvania Supreme Court decided *Tincher v. Omega Flex*, 2014 Pa. LEXIS 3031, significantly changing the landscape of the state's products liability law by adopting a new design-defect test for strict products liability cases and unanimously overruling *Azzarello v. Black Brothers*, 391 A.2d 1020 (Pa. 1978). While *Tincher* did not expressly adopt the Restatement (Third) of Torts, the decision was, by its own terms, a "paradigm shift" in products cases from the errant course that very court had chartered in *Azzarello's* problematic wake.

The Supreme Court's 137-page decision in *Tincher* was clearly a watershed event. Pennsylvania remains a Second Restatement, Section 402A jurisdiction, as in *Webb v. Zern*, 220 A.2d 853 (Pa. 1966), but without the trappings of *Azzarello* and its progeny. Indeed, while the Supreme Court recently referred to Pennsylvania law under *Azzarello* as "almost unfathomable," in *Beard v. Johnson & Johnson*, 41 A. 3d 823, 836 (Pa. 2012), much of what has developed since *Webb* is fundamental to Section 402A cases and remains intact post-*Tincher*.

Tincher overruled *Azzarello* because the court determined that the *Azzarello* framework was fatally flawed in three fundamental respects: it removed from the jury's consideration the central question under the Second Restatement, in determining if a product was defective, whether it was "unreasonably dangerous" at the time of sale; *Azzarello*'s standard of proof—namely, holding a manufacturer liable for a product manufactured without "every element necessary to make it safe"—was "impractical"; and *Azzarello*'s "bright-line separation" of negligence concepts from strict liability ignored the reality that the manufacturer's conduct could not be segregated from a typical strict liability case.

'Unreasonably Dangerous'

First and foremost, *Azzarello* was flawed because it removed Section 402A's "unreasonably dangerous" question from the jury. As the *Tincher* court observed, this was because *Azzarello*'s interpretation of Section 402A followed statutory construction principles, particularly in parsing the terms "defective condition" and "unreasonably dangerous" for precise meaning and intent. *Tincher* criticized this approach because the restatement does not serve the same role as a legislative pronouncement, and the restatement reporters are not a legislative body due the same weight as the drafters of a statute.

The flaw of *Azzarello*'s construct was that it removed the "unreasonably dangerous" requirement from the definition of defect as provided by Section 402A itself. *Azzarello* required the trial judge to determine as a prima facie "social policy" matter the question of whether a product could be found unreasonably dangerous (as opposed to a formal determination). Because the jury inevitably decided whether the product was defective, but not whether it was unreasonably dangerous, a jury verdict against a manufacturer resulted without any formal finding by the judge or jury that the product was unreasonably dangerous when sold, as required by Section 402A.

As explained in *Tincher*, the "critical inquiry" in affixing strict liability under Section 402A is "whether the product is 'unreasonably dangerous,'" an inquiry that *Tincher* gives back to the jury. Thus, *Tincher* expressly overruled *Azzarello*'s approach of asking juries to determine whether a product was defective in a vacuum, overruling *Azzarello*'s holding that the court determines whether a product is unreasonably dangerous and the jury then determines whether it is defective without any reference to the concept of "unreasonably dangerous" or consideration of the facts and factors that would enable such a decision.

'Every Element'

Azzarello's standard of proof—holding a manufacturer liable for a product manufactured without "every element necessary to make it safe"—originated in an earlier discussion of alleged warning defects and "was quoted subsequently out of context by the majority in *Azzarello* as the standard of proof in a strict liability action," the *Tincher* court said, citing *Berkebile v. Brantly Helicopter*, 337 A.2d 893 (Pa. 1975), which held that some products require a warning as a necessary element to make them safe, thus the notion of defect includes claim for failure to warn, in addition to claims for manufacturing and design defects.

Azzarello's adoption of that language as a proper jury charge in design-defect cases not only "essentially perpetuated jury confusion in future strict liability cases," but also "operated to discourage the exercise of judicial discretion in charging the jury." *Tincher*, therefore, found that standard of proof "impractical" and ill-suited for design-defect cases, and the "guarantor" language, intended to describe the scope of a manufacturer's liability, to be a "term of art, with no further explanation of [its] practical import."

After abandoning the "every element" standard of proof, *Tincher* adopted two complementary tests for determining whether a design is defective: a "consumer expectations" test and a "risk-utility" test. The opinion said, "The plaintiff may prove defective condition by showing either that (1) the danger is unknowable and unacceptable to the average or ordinary consumer, or that (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions."

Artificial Elimination of Negligence Concepts

Tincher found *Azzarello*'s bright-line separation of negligence from strict liability, including how that rigid distinction affected evidentiary standards, to be legally flawed. *Tincher* observed that the negligence/strict liability dichotomy, originating from *Azzarello*'s divorce of the concept of "unreasonably dangerous" from "defective," was outdated and increasingly unworkable, as *Lewis v. Coffing Hoist Division, Duff-Norton*, 528 A.2d 590 (Pa. 1987), and other of Azzarello's progeny continued to emerge. *Tincher* explained that *Azzarello*'s decision to remove the term "unreasonably dangerous" from jury consideration as a "negligence concept" was based on now-overruled case law from California and New Jersey. In contrast with *Azzarello*'s mandatory rigid exclusion of

negligence concepts from strict liability cases, *Tincher* expressly recognizes that, in the "typical case ... the character of the product and the conduct of the manufacturer are largely inseparable."

So, what does this all mean as a practical matter today in products cases in Pennsylvania?

• Pennsylvania is a Second Restatement jurisdiction.

• The definition of "defect" and standard of proof of defect are two separate issues.

• The definition of "defect" is inexorably entwined with the concept of "unreasonably dangerous" and thus courts must use that language in jury instructions.

• As to the standard of proof of defect, the manufacturer as "guarantor of the product's safety" language is symbiotically linked to the expressly rejected *Azzarello* "lacking any element needed to make it safe" standard of proof. Therefore, neither phrase should be part of the jury instructions in any case.

• *Azzarello*'s progeny should be abrogated—any court decision based on *Azzarello*'s quarantine of negligence concepts in products cases should be considered the "fruit of the poisonous decision."

• *Tincher* necessarily calls for an expanded presentation to the fact-finder about design quality, including factors like government standards, design and performance standards of independent professional organizations, industry customs and practice and state of the art.

• Unrealistic standards for limiting the jury's consideration of causative conduct on the part of the plaintiff and others—tied into the post-*Azzarello* myopia—should be eliminated.

• Although *Tincher* did not adopt the Third Restatement to be applied across the board, it expressly acknowledged that its guidelines are pertinent in most product design cases. For example, as recently confirmed by the Superior Court in *Parr v. Ford Motors*, __ A.3d ___ (Pa. Super. Dec. 22, 2014), crashworthiness plaintiffs still must prove the existence of an alternative safer design at the time the product was sold.

• It is the exceptional case in which the plaintiff does not proffer an alternative safer design in order to persuade the jury of the merits of his or her design theories. Once a plaintiff proffers the need for a different design, a case-specific risk-utility standard of proof should apply, allowing the jury to evaluate the manufacturer's complex design choices in the historical context in which those decisions were made, and taking into account all factors the manufacturer considered as part of its design evaluation.

• California and Illinois common law offer practical insight and precedent for dealing with application of the consumer-exception test.

• Burden shifting is necessarily limited to very few cases and issues, and even then may shift back to the plaintiff.

• Circumstantial proof of a defect is likewise limited to an extremely small category of cases, and never appropriate when the risk-utility test is applied.

• The post-*Azzarello* line of cases dealing with a plaintiff's comparative fault needs to be reevaluated.

• *Tincher*'s prescriptions should not be limited to design cases.

Bill Ricci *is national, regional, lead trial and appellate counsel for major automotive, motorcycle, industrial, construction, aircraft, printing press, recreational and consumer product manufacturers in products liability and commercial cases.*

William J. Conroy *is a shareholder at Campbell Campbell Edwards & Conroy and a fellow in the American College of Trial Lawyers. He serves as national trial counsel for numerous product manufacturers and has defended products liability cases in Pennsylvania for the past 30 years.*

Katherine A. Wang *is an associate at Campbell Campbell. She defends product manufacturers in catastrophic injury cases in the state and federal appellate courts.*
