

## Products Liability Cases in Pa. Face an Uncertain Road

Max Mitchell, The Legal Intelligencer

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If products liability law in Pennsylvania was messy, the state Supreme Court's decision last week in *Tincher v. Omega Flex* wiped the slate clean. But now many attorneys are wondering what's going to happen with the blank canvas they've been left with.

"Practicing products liability law is going to be like being out in Tombstone," said plaintiffs attorney Richard Jurewicz, of Galfand Berger. "It's going to be the wild, wild west where you're going to make the law as you go."

On Nov. 19, the Supreme Court decided that Pennsylvania courts would not adopt the Restatement (Third) of Torts, which would have allowed defendants to introduce elements regarding the foreseeability of a product's risks, and the availability of safer, alternative designs.

Although the U.S. Court of Appeals for the Third Circuit had been predicting that the justices would adopt the Third Restatement, the decision clearly established that Pennsylvania will continue to follow the Restatement (Second) of Torts, which focuses litigation on the characteristics of the products, and does not allow a fact-finder to consider the manufacturer's conduct, or the feasibility and practicality of an alternative design.

The holding additionally overruled the 1978 case *Azzarello v. Black Brothers*, which established the clear dividing line between products liability cases and negligence cases, and outlined jury charges that have been used in products liability cases ever since.

Now, that nearly 40-year-old jury charging scheme is no longer usable.

With the *Tincher* decision, plaintiffs now have the option of bringing claims under

consumer expectation theories, which allows juries to consider whether a product meets the safety expectations by reasonable consumers; risk-utility theories, which involves whether a product's risks outweigh its utility; or a combination of both. The risk-utility analysis had previously been performed only by trial judges.

These new theories, several attorneys agreed, allow cases to develop based on the facts of each case, and puts more decisions in the hands of the jury.

"You don't need to choose between [the theories], and you can take discovery on any matter that's relevant," said plaintiffs attorney Alan M. Feldman of Feldman Shepherd Wohlgelernter Tanner Weinstock & Dodig. "Now the jury gets the whole ball of wax and they get to decide."

However, what evidence might be relevant, what burdens each party will shoulder, and what charges might be allowed to go to a jury are all issues that the majority's decision left undecided.

According to defense attorney Keith D. Heinold of Marshall Dennehey Warner Coleman & Goggin, that seemed to be "by design," and what comes next will be a lot of trial, error and appeals.

"We've got a framework, but we're really going to have to put a lot of substance around that, and it's going to be on a case-by-case basis," Heinold said.

Feldman, and many others, agreed.

"I can understand that courts and practitioners will be a bit at sea in terms of just what specific instructions should be given, what specific evidence should be given," he said. "This is all going to have to evolve over time."

## **1. Separation of Liability and Negligence**

Perhaps the biggest shift, according to several attorneys, is that Pennsylvania's wide separation between negligence concepts and strict liability is gone.

The *Azzarello* decision had found the phrase "unreasonably dangerous" in the Second Restatement did not refer to issues of negligence, and determined that considerations of negligence are inappropriate in a strict liability case. Under the holding, defendants were precluded from introducing any evidence that brought up issues of negligence by a plaintiff. However, according to Jurewicz, those concepts "are now married, for better or worse."

Attorneys will now begin to figure out exactly what will be allowable in Pennsylvania courts.

Defense attorney William J. Ricci of Ricci Tyrrell Johnson & Grey agreed that, with the

introduction of the consumer expectation and risk-utility theories, the dichotomy is gone. He said he will push to introduce evidence that was previously off-limits, such as federal regulatory standards and factors designers or manufacturers relied on in developing the products.

"The jury will finally be able to evaluate the reasonableness of the design choices," he said.

Feldman, however, said he did not feel the decision was a vast change in the law.

The majority, he said, clearly indicated that products liability law should be consumer-friendly, and that the liability without fault concept "continues to be embraced by the Pennsylvania Supreme Court."

"It did not embrace the introduction of comparative negligence, it did not suggest that there are any new defenses that were not available before," he said.

## **2. Who Won?**

Although many considered the Second Restatement to be plaintiffs-friendly and the Third Restatement to be more pro-defendant, the *Tincher* decision does not pronounce a clear victor, and attorneys from both sides are claiming wins and losses.

Defense attorney James M. Beck of Reed Smith said, "While it's not a home run for the defendants, it's a stand-up double. It looks to me the defense got a lot of what it wanted there."

Beck said he would have preferred adopting the Third Restatement, and, while the plaintiffs will get the first crack at expanding the consumer expectation or risk-utility theories in any case, defendants will have the opportunity to "reel the plaintiffs back in."

"Those broad nasty rules are gone," Beck said.

According to William J. Conroy of Campbell Campbell Edwards & Conroy, who represented Omega Flex, "The most important thing that we wanted was to get *Azzarello* overruled, because anything was better than that case."

The ability to possibly introduce federal safety standards and risk-utility factors is also viewed by most to be a win for the defense bar. Ricci said this expansion might also allow issues of contributory negligence or reckless conduct to become factors in a case.

"By opening this up, you're going to relax those restrictions," he said. "If the manufacturer is going to talk about what it did and didn't consider, there's a lot more laxness from an evidentiary standpoint."

The overwhelming positive fallout for the plaintiffs bar is that the courts will now not

adopt the Third Restatement. The consumer expectation theory has also been claimed as a win for plaintiffs.

"One thing that's very good for plaintiffs is they've added a consumer expectation approach," said Clifford A. Rieders, who wrote an amicus brief in *Tincher* for the Pennsylvania Association for Justice. "It's very much in keeping with the reality of how juries look at these cases."

Federal courts, which can be more conservative than state courts on strict liability issues, must also apply the Second Restatement and leave questions regarding the risk-utility of a product to juries. And because many decisions are now left up to juries, defendants may be less likely to file summary judgment motions, some attorneys suggested.

"Unless [a case is] stone meritless on its face, you're going to get a jury trial," Jurewicz said.

But while many avenues are now opened, more decisions falling on the trial judge could be a signal that appellate courts will grant trial courts a wide berth of discretion.

"The judge is going to be making an awful lot of decisions," Ricci said. "That's where you really have to do your advocacy."

Attorneys agreed that many questions still linger regarding what to do with cases-in-progress involving decisions based on *Azzarello*, and about what happens to the case law based on *Azzarello* that was not overturned by *Tincher*.

Those questions, according to attorneys, just present more issues that will need to shake out over the next few years.

"I'm not sure anyone really knows how the new theory is going to be applied by trial courts in a practical sense," said Bradley D. Remick of Marshall Dennehey. "The trial court judges are going to have to have a learning period about what their role exactly is and what the law exactly is."

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