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# Post-*Tincher* Products Liability: Where Things Stand

**By Brian S. Kane**

It has been five years since the Pennsylvania Supreme Court waded into the mire of the state's products liability law, and upon emerging, handed down its seminal decision, *Tincher v. Omega Flex*., 104 A.3d 328 (Pa. 2014). Jettisoning the rigid separation between negligence and strict liability long-since held by *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978), the *Tincher* court expressly adopted the Restatement (Second) of Torts, section 402A, including the definition that a defective product is one that is "unreasonably dangerous," and did away with *Azzarello*'s cumbersome requirement that a defective product is one lacking "any element necessary to make it safe."

In its place, *Tincher* instituted a "composite" standard for proving a design defect, consisting of both a consumer expectations test and a risk–utility test. *Tincher*, 104 A.3d at 400–01. Unfortunately, those expecting any sight of terra firma free from ambiguity were sorely disappointed. Despite the high court's clear command in some regards, and because of the vacuum of instruction in others, the past five years have seen only further confusion over the direction that courts, and advocates, are to take in product liability actions.

Before both *Tincher* and *Azzarello*, any consideration of the plaintiff's conduct was generally barred except when, on the issue of causation, the plaintiff "assumed the risk," "misused the product, or "engaged in highly reckless conduct." *Dillinger v. Caterpillar, Inc.*, 959 F.2d 430, 445 (3d Cir. 1992). These exceptions were grounded in the pre-*Azzarello* adoption of the Restatement (Second) of Torts section 402A comment n. *See McCown v. Int'l Harvester Co.*, 342 A.2d 381, 382 (Pa. 1975). For the most part, except in the warning defect context, as in *Cloud v. Electrolux Home Products, Inc.*, which held that the jury was to consider whether plaintiff conduct in not "heeding instructions" that "a reasonable consumer" would have followed was part of the design-defect analysis (2017 WL 3835602, at *2–3 (E.D. Pa. Jan. 26, 2017), federal district courts, applying Pennsylvania law, have chosen to retain these principles post-*Tincher*, holding that "the 'post-marketing' conduct of a particular user is irrelevant for the purposes of determining whether the product itself is defective." *Rapchak v. Haldex Brake Prod. Corp.*, 2016 WL 3752908, at *6 (W.D. Pa. July 14, 2016). In the Pennsylvania state courts, however, the comprehensive *Sliker v. Nat'l Feeding Systems, Inc.* leads the way in its effort to fill in the gaps left in *Tincher*'s wake, holding that evidence of the plaintiff's negligence is admissible either for causation or "for the purpose of determining whether the product was defective under the risk-utility test." 2015 WL 6735548, at *4 (Pa. Com. Pl. Clarion Cnty. Oct. 18, 2015).

Another contested issue post-*Tincher* has been the admission of state-of-the-art evidence. *Lewis v. Coffing Hoist Div., Duff-Norton Co.* originally precluded industry standards, based upon *Azzarello*'s divisions of negligence and strict liability. 528 A.2d 590 (Pa. 1987). But while *Tincher* did not mention *Lewis*, it only made sense to assume that overturning *Azzerello*'s artificial separation meant that *Lewis*, too, was effectively overturned. This is the logic that some state courts, such as the cogent *Sliker* court, have persuasively followed in finding that "a manufacturer's conduct and reasonableness is relevant to the determination of product defect." 2015 WL 6735548, at *7 ("[t]he Lewis majority's reasoning, based on *Azzarello* and the then-impermissible comingling of negligence and strict liability concepts, conflicts with *Tincher*'s pronouncement that a manufacturer's conduct and reasonableness is relevant to the determination of product defect."). In *Renninger v. A&R Machine Shop*, for example, the superior court affirmed a decision that admitted evidence of both industry standards and regulatory compliance. 2017 WL 1326515 (Pa. Super. Ct. Apr. 11, 2017). *See also Webb v. Volvo Cars of N. Am., LLC*, 148 A.3d 473, 483 (Pa. Super. Ct. 2016) ("The *Lewis* and *Gaudio* Courts both relied primarily on Azzarello to support the preclusion of government or industry standards evidence, because it introduces negligence concepts....").

Yet some lower courts have had difficulty following this, and *Azzarello's* ghost continues to haunt. In *American Honda Motor Co. v. Martinez*, 2017 WL 1400968 (Pa. Super. Ct. Apr. 19, 2017), for example, the superior court, ignoring the various Shepherd's and KeyCite tools at its fingertips, blindly adhered to Lewis and its exclusion of industry standards. In fact, the court rejected the defendant's argument

that the plaintiff's alternative design was unlawful under federal regulations. To add insult to injury, the court's decision on industry compliance was limited to one paragraph, concluding, with a rather hollow thud, that *Tincher* did not affect Lewis. Unfortunately, other post-*Tincher* decisions have reached the same conclusion, also with disappointingly little analysis. *See, e.g., Cancellari v. Ford Motor Co.*, 136 A.3d 1027 (Pa. Super. Ct. 2016).

Federal courts have been better in adhering to *Tincher*, with the Western District of Pennsylvania relying heavily on the *Sliker* decision to hold that "the principles of *Tincher* counsel in favor of [industry standards] admissibility." *Rapchak*, 2016 WL 3752908, at *3 (quoting *Sliker*); *Cloud*, 2017 WL 3835602, at *2 (holding that "[a]fter *Tincher*, courts should not draw a bright line between negligence theories and strict liability theories regarding evidence of industry standards."). In turn, both the Middle and Eastern Districts of Pennsylvania also followed the Western District to admit industry standards, "which of course is not dispositive, but it is relevant and probative given the post hoc evaluation of a manufacturer's conduct that *Tincher* invites." *Mercurio v. Louisville Ladder, Inc.*, 2018 WL 2465181, at *7 (M.D. Pa. May 31, 2018) (citing *Cloud*, 2017 WL 3835602, at *2). Such decisions from the federal bench offer some guiding light in the post-Tincher swamp.

Yet despite these efforts, nowhere is the blinding stench of the post-*Tincher* bog so pungent as in the quagmire of suggested jury instructions. In 2016, the Pennsylvania Bar Institute published the Products Liability Suggested Standard Jury Instructions (SSJI). After reading the SSJI, one must question whether the Pennsylvania Bar Institute knew that *Tincher* even existed. Perhaps most puzzlingly, the SSJI preserves *Azzarello*'s holding that a product is defective if it "lacked any element necessary to make it safe for its intended use." This flies directly in the face of *Tincher*, which branded the "any element" standard as "impractical." *Tincher*, 104 A.3d at 380, 391.

Further, no matter how thorough an examination one might take of the SSJI, the keen eye will not see any mention of the words "unreasonably dangerous," despite that being a "normative principle" upon which the Restatement and the defect analysis each "depends." *Id.* at 383, 400. *See also id.* at 387 (quoting Restatement (2d) of Torts §402A cmt. i, which notes, "Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous."). This glaring and indefensible omission only muddies any clear waters that *Tincher* may have provided. After all, the use of an erroneous jury instruction is a reversible error. *See Tincher v. Omega Flex, Inc.*, 180 A.3d 386 (Pa. Super. Ct. 2018). Similarly, under *Tincher*'s formulation of the consumer expectations test, a product is unreasonably dangerous by reason of a defective condition that makes the product "upon normal use, dangerous beyond the consumer's contemplations." *Tincher*, 104 A.3d at 394. Indeed, the danger must be a "surprise" and "unknowable and unacceptable to the average or ordinary consumer." *Id.* Just as with "unreasonably dangerous," the SSJI fails to follow *Tincher* and perplexingly omits any mention of the danger being "unknowable and unacceptable." Meanwhile, the Pennsylvania Defense Institute, in its proposed alternative, adheres to *Tincher*'s adoption of Restatement section 402A, a move that is in line with most post-*Tincher* decisions. *See, e.g.*, *High v. Pennsy Supply, Inc.*, 154 A.3d 341, 347 (Pa. Super. Ct. 2017) ("the *Tincher* Court concluded that the question of whether a product is in a defective condition unreasonably dangerous to the consumer is a question of fact that should generally be reserved for the factfinder, whether it be the trial court or a jury"); *Amato v. Bell & Gossett*, 116 A.3d 607, 620 (Pa. Super. Ct. 2015) ("in *Tincher*, the Court returned to the finder of fact the question of whether a product is 'unreasonably dangerous,' as that determination is part and parcel of whether the product is, in fact, defective"); *Hatcher v. SCM Group, Inc.*, 167 F. Supp.3d 719, 727 (E.D. Pa. 2016) ("a product is only defective…if it is 'unreasonably dangerous'"); *Rapchak*, 2016 WL 3752908, at *2 ("the *Tincher* Court also made clear that it is now up to the jury not the judge to determine whether a product is in a 'defective condition unreasonably dangerous' to the consumer"); *Nathan v. Techtronic Industries North America.*, Inc., 92 F. Supp. 3d 264, 270–71 (M.D. Pa. 2015) (holding that issues of defect are questions of fact for the jury).

In a similar regard, the SSJI reinterprets the risk-utility test and adopts a revisionist view of *Tincher*, finding that the court opted for *Barker v. Lull Engineering Co.*, a Californian interpretation of Dean John Wade's influential "Wade factors." 573 P.2d 443 (Cal. 1978). *Barker*'s central holding is the adoption of the risk-utility test as an alternative to the consumer expectations test—something that *Tincher*, and many other courts, have found influential. Tincher did not explicitly adopt *Barker*, however. Importantly, *Tincher* did not adopt *Barker*'s attempt to shift the burden of proving defect to the defendant. Instead, Tincher cited other jurisdictions that have adopted the risk-utility test but had not altered the traditional burden of proof that falls upon the plaintiff, such as *Knitz v. Minster Machine Co.,* 432 N.E.2d 814, 817 (Ohio 1982), which rejected a burden shift

as "provok[ing] needless questions of defect classification," and *Lamkin v. Towner*, 563 N.E.2d 449, 458 (Ill. 1990), which held that plaintiffs who "fail[] to provide any evidence to support their allegations" of design defect have no basis to seek recovery. But the California Supreme Court also considered the Wade factors and opted for a more simplified approach, citing factors that did not consider user conduct, as Wade did.

While the *Tincher* court did cite Barker for various reasons, nowhere did it explicitly adopt the California court's reinterpretation of Wade and exclusion of user conduct, as the SSJI attempts to show it did. In fact, *Tincher* did not even adopt *Barker*'s overall reasoning. The California court reinforced the dichotomy between strict liability and negligence—something fundamentally out of step with *Tincher*. Instead, the *Tincher* court addressed and listed the Wade factors in favor of its balancing test approach. The Pennsylvania Defense Institute follows *Tincher*, and it also finds the Wade factors formative, while the SSJI tries to bypass Wade and *Tincher*'s consideration of the user's conduct, opting instead for simplified *Barker*'s factors. *Tincher*, in adopting the risk-utility test, was certainly influenced by *Barker*, among other things. But the SSJI wrongly considers *Barker*—and not *Tincher*—to be the final authority in this regard.

In its effort to preserve the now-repudiated bright line between negligence and strict liability, SSJI 16.122 does not allow any "state-of-the-art" evidence, including industry standards. But this is incompatible with *Tincher*'s reasoning and merely perpetuates the *Azzarello/Lewis* strict prohibition on negligence principles. And as well as overruling *Azzarello*'s wall of separation, *Tincher* explicitly refused to "either disapprove or approve prior decisional law." *Tincher*, 104 A.3d at 410. Thus, such strong adherence by the SSJI to *Azzarello*-era decisions is out of step with both *Tincher* and post-*Tincher* decisions. *See Pennsy Supply*, 154 A.3d at 350 n.5 (holding that expert industry standards compliance testimony is relevant to a product's "nature" in the consumer expectations approach); *Amato*, 116 A.3d at 622 (holding that defendants may defend on "state–of–the–art" grounds after *Tincher*).

And by turning a blind eye to *Tincher*'s consideration of the Wade factors, SSJI 16.122 also ignores *Tincher*'s consideration of the plaintiff's conduct, barring all. Alternatively, the Pennsylvania Defense Institute adopts the same line as other courts in reading *Tincher* to allow evidence of plaintiff conduct when such evidence would make the risk-utility factor of avoidance of danger through exercise of care more or less probable. *See Cloud*, 2017 WL 3835602, at *2–3 (holding that plaintiff conduct in not "heeding instructions" that "a reasonable consumer" would have followed is admissible); *Punch v. Dollar Tree Stores*, 2017 WL 752396, at *11 (Mag. W.D. Pa. Feb. 17, 2017) ("a jury could conclude that the Plaintiffs might have avoided the injury had they exercised reasonable care with the product"); *Sliker*, 2015 WL 6735548, at *4 (plaintiff conduct "may be relevant to the risk–utility standard articulated in *Tincher* and is therefore admissible for that purpose"). Not so for the SSJI.

This comparison between the SSJI and the Pennsylvania Defense Institute's alternative charge became even more relevant in February 2018 when, in reviewing the trial court's new judgment on remand, the superior court handed down what's known as *Tincher II*. *Tincher v. Omega Flex, Inc.*, 180 A.3d 386 (Pa. Super. Ct. 2018). The *Tincher* II court held that the trial court's jury charge, "including a definition equating a defective product with one that 'leaves the suppliers' control lacking any element necessary to make it safe for its intended use,' and a declaration that a manufacturer 'is really a guarantor of [a product's] safety' but not 'an insurer of [that] safety,'" was a fundamental error and required a new trial. *Tincher II*, 180 A.3d at 397. Thus, it should be clearer now more than ever that the SSJI are out of step with current law.

Although the *Tincher* court recognized that overruling *Azzarello* "may have an impact upon…subsidiary issues constructed from *Azzarello*, such as the availability of negligence-derived defenses," it noted that it did "not purport to either approve or disapprove [of] prior decisional law, or available alternatives suggested by commentators or the Restatements, relating to" such issues. *Id.* at 432. Instead, the court explained, "[t]he common law regarding these related considerations should develop within the proper factual contexts against the background of targeted advocacy." *Id.* In other words, our journey through the swamp goes on. And absent any intervention by the Pennsylvania General Assembly, as requested in *Tincher*, it will take decades of litigation before we find the way out. *Tincher*, 104 A.3d at 381 ("Overruling *Azzarello* leaves a gap, going forward, in our strict liability jurisprudence. The preferable solution may be to have the General Assembly address this arena of substantive law.").

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