

Tincher and the Reformation of
Products Liability Law in Pennsylvania

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Restatement (Second) of Torts

§ 402a (1965)

- 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

Unreasonably Dangerous

- “Unreasonably dangerous is defined as meaning that the product had a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics.”
- “A defective product is unreasonably dangerous to the user or consumer when it is dangerous to an extent beyond that which would be contemplated by the ordinary user (consumer) possessing the knowledge of the product's characteristics which were common to the community.”

Pre-Tincher

- *Azzarello v. Black Bros.*
 - Plaintiff injured when he pinched his hand between two rubber rolls in a coating machine.
 - Plaintiff pursued a strict liability theory against the manufacturer; the manufacturer joined plaintiff's employer as a co-defendant, asserting employer's negligence was the cause of the injury.
 - Verdict in favor of the manufacturer
 - The court found that the use of the term "unreasonably dangerous" in the jury charge was misleading.
 - "[U]nreasonably dangerous tends to suggest considerations which are usually identified with the law of negligence."

Pre-Tincher

- *Azzarello v. Black Bros.*
 - “[A] supplier of products should be deemed to be the ‘guarantor of his products’ safety.”
 - “[T]he jury may find a defect where the product 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 its intended use.”
 - “[O]ur supreme court has been adamant that negligence concepts have no place in a strict liability action.”

Tincher Background

- ❑ Tincher's house burned down when a lightning strike energized "TracPipe," corrugated stainless steel gas piping manufactured and sold by Omega Flex.
- ❑ Tincher's insurer, USAA, pursued claim against Omega Flex on the Tincher's behalf to recover insurance proceed paid out.
- ❑ Tinchers asserted strict liability, negligence and breach of warranty theories.
- ❑ The jury found the TracPipe was defective and the defect was a cause of the fire.
- ❑ The jury awarded \$958,000.

Court's Opinion

- ❑ The Court's decision in *Azzarello v. Black Bros.* (1978) is overruled.
- ❑ The Court refused to adopt the Restatement (Third) of Torts; Pennsylvania remains a Restatement (Second) jurisdiction.
- ❑ A cause of action in strict liability requires proof, in the alternative, either of ordinary consumer's expectations or of the risk/utility of a product.

Azzarello Overruled

- “[T]he *Azzarello* Court issued a decision that conflated a determination of the facts and its related yet distinct conceptual underpinnings, which essentially perpetuated jury confusion in future strict liability cases, rather than dissipating it.”
- “The greater difficulty is that the *Azzarello* standard is impracticable.”
- “We agree that reconsideration of *Azzarello* is necessary and appropriate and, to the extent that the pronouncements in *Azzarello* are in tension with the principles articulated in this Opinion, the decision in *Azzarello* is overruled.”

Azzarello Overruled

- In overruling *Azzarello*, the Court opened the door to the introduction of negligence concepts into strict liability actions.
 - “[T]he *Azzarello* Court concluded that negligence-related rhetoric saddles plaintiff in a strict liability case with an additional and unwarranted burden of proof in every case.”
 - “The facts of *Azzarello*, when viewed with the appropriate judicial modesty, did not require such a pronouncement.”

Azzarello Overruled

- Now What?



New Burden of Proof

- Alternative Burdens of Proof:
 - Consumer Expectations
 - Risk-Utility
 - “[A]fter reviewing the provenance of the cause of action, the Second Restatement reporter’s choice of words, and the evolution of the cause of action in application, we hold that, in Pennsylvania, the cause of action in strict products liability requires proof, in the alternative either of the ordinary consumer’s expectation or of the risk-utility of a product.”

New Burden of Proof

- Plaintiff may prove a defective condition by showing either:
 - That the danger is unknowable or unacceptable to the average or ordinary consumer; or
 - That a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions.

Consumer Expectations Test

- “The consumer expectations test defines a ‘defective’ condition as a condition, upon normal use, dangerous beyond the reasonable consumer’s contemplations.”
- “The product is not defective if the ordinary consumer would reasonably anticipate and appreciate the dangerous condition of the product and the attendant risk of injury of which the plaintiff complains.”

Consumer Expectations Test

- “The test offers a standard of consumer expectations which, in typical common law terms, states that: the product is in a defective condition if the danger is unknowable and unacceptable to the average or ordinary consumer.”
- “The nature of the product, the identity of the user, the product’s intended use and intended user, and any express or implied representations by a manufacturer or other seller are among considerations relevant to assessing the reasonable consumer’s expectations.”
 - Test reflects the “*surprise*” element of danger.

Risk-Utility Standard

- The test offers a standard which, in typical common law terms, states that: a product is in a defective condition if a ‘reasonable person’ would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions.”
- Courts have generally cited to Dean Wade factors

Risk-Utility Standard

1. The usefulness and desirability of the product – its utility to the user and to the public as a whole.
2. The safety aspects of the product – the likelihood that it will cause injury, and the probable seriousness of the injury.
3. The availability of a substitute product which would meet the same need and not be as unsafe.
4. The manufacturer's availability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
5. The user's ability to avoid danger by the exercise of care in the use of the product.
6. The user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or the existence of suitable warnings or instructions.
7. The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Restatement (Third) Rejected

- The Court declined to adopt the Restatement (Third) of Torts.
- § 1.
 - (a) One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the product defect.
 - (b) A product is defective if, 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.

Restatement (Third) Rejected

- § 2. For purposes of determining Liability under § 1:
 - a) a product 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) a product 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) a product 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.

Tincher Aftermath

- “This Opinion does not purport to either approve or disapprove prior decisional law, or available alternatives suggested by commentators or the Restatements, relating to foundational or subsidiary considerations and consequences of our explicit holdings.”
- “The common law regarding these related considerations should develop within the proper factual contexts against the background of targeted advocacy.”

Unanswered Questions

- ❑ Burden of Proof – Shift
- ❑ State of the art
- ❑ Compliance with Standards
- ❑ Conduct evidence
- ❑ Contributory Negligence
- ❑ Comparative Negligence
- ❑ Joint & Several Liability
- ❑ Foreseeability
- ❑ Unforeseeable Substantial Change v. Reasonably Foreseeable
- ❑ Misuse/Abuse
- ❑ Intended User/Intended Use
- ❑ Presumed Knowledge

Risk/Utility

- Rapchak v. Haldex Brake Products Corp., No. 2:13-cv-1307, 2016 U.S. Dist. LEXIS 33148 (W.D. Pa. March 15, 2016)
 - Included Dean Wade factors

Consumer Expectations

- Yazdani v. BMW of North America, LLC, No. 15-01427, 2016 U.S. Dist. LEXIS 75157 (E.D. Pa. May 25, 2016)
 - The “[c]onsumer expectations test should not be applied to a product of relatively complex design whose danger is “outside the ordinary consumer’s contemplation.”

- *But see* Fassett Sears Holding Corp., No. 4:15-cv-00941, 2015 U.S. Dist. LEXIS 114329 (M.D. Pa. August 28, 2015)
 - Applied consumer expectations test to lawnmower fire

Conduct

- Sliker v. National Feeding Systems, Inc., No. 282-CD-2010 (CCP Clarion Co. October 19, 2015)
 - Although evidence of negligence of course does not constitute a complete defense comparable to contributory negligence, it may be relevant to the risk-utility standard articulated in *Tincher* and is therefore admissible for that purpose, subject to Pa. R.E. 401 and Rule 403 analyses.

- *But see* Wright v. Ryobi Technologies, Inc., No. 15-1100, 2016 U.S. Dist. LEXIS 42003 (E.D. Pa. March 30, 2016)
 - Discusses *Azzarello*-based causation analysis

Standards

- Sliker v. National Feeding Systems, Inc., No. 282-CD-2010 (CCP Clarion Co. October 19, 2015)
 - “[W]ithout affirmative authority from *Tincher* or any other post-*Tincher* precedential decision barring [industry standards] as a matter of law, the principles of *Tincher* counsel in favor of its admissibility, subject to Pa.R.E. 401 and Pa.R.E. 403 analyses.”

- *But see* Cancelleri v. Ford Motor Co., No. 267-MDA-2015 (Pa. Super. January 7, 2016)
 - “Our Supreme Court specifically has ‘held that [government and industry standards] should be excluded because it tends to mislead the jury’s attention from their proper inquiry,’ namely ‘the quality or design of the product in question.’”

Welcome to Philadelphia

- Martinez v. American Honda Motor Co., Inc., No. 03763, 2015 Phila. Ct. Com. Pl. LEXIS 276 (September 17, 2015)
 - “We did not believe then and do not believe now that *Tincher* requires a new trial in the instant case. The Supreme Court’s primary holding was its rejection of the Restatement (Third) of Torts in products cases. We do not believe that *Tincher* mandated any change in any legal or evidentiary ruling made by this Court in the instant matter.”

Unreasonably dangerous jury instruction

- Amato v. Bell & Gossett, 116 A.3d 607 (Pa. Super. 2015), *appeal granted*, 130 A.3d 1283 (Pa. 2016)
 - “Accordingly, 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.”
- *But see* Cancelleri v. Ford Motor Co., No. 2011-CIV-6060 (CCP Lackawanna Co. January 9, 2015), *aff’d. mem.*, No. 267-MDA-2015 (Pa. Super. January 7, 2016)
 - Charge identified manufacturer as a “guarantor” of the product’s safety
 - Charge included “lacked any element necessary” language from *Azzarello*

Jury Instructions: A Word to the Wise

- The Orderly Development of the Common Law vs. SSJI



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Questions?

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