The More Things Change ... Pennsylvania Products Liability Law

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By Bradley D. Remick

Back in November 2014, the Pennsylvania Supreme Court revolutionized the products liability landscape in their *Tincher v. Omega Flex* decision. At the time, we all believed that *Tincher* was going to redefine products liability law in the commonwealth. We were certain that the *Azzarello* standard, the artificial distinction between negligence and strict liability, was going to fade to some extent and strict liability defendants were going to be afforded the opportunity to present evidence that was relevant to their defenses. Instead, rather than adopting the Restatement (Third) of Torts, the court surprisingly adopted the risk utility and consumer expectation tests that were first developed in California.

The most important aspect of *Tincher* is that it raised more questions than it answered about what theories and defenses, trial evidence, and jury instructions would be proper going to infinity and beyond. In particular, *Tincher* overruled a key component of the prior law—the infamous 1978 *Azzarello* decision and its rigid "dichotomy" between strict liability and negligence—and replaced it with a "consumer expectations/risk-utility" analysis. This analysis was brand new in Pennsylvania (the clearest analog is California), so our lower courts were asked to create a new body of case law by applying the analysis, defining the burden of proof, and ruling on defenses, evidence, and jury charges in individual cases. Even better, in light of *Tincher*, there were no longer any valid, recognized instructions to guide juries in determining whether products are defective. Those were to be fought out on a case-by-case basis. Trial courts and lower appellate courts have been dealing with the fallout from *Tincher* for years and, frankly, despite clear language in the opinion, little has effectively changed.

In theory, *Tincher* "splits the baby" by overruling *Azzarello* and rejecting the Third Restatement of Torts. Having thrown out Pennsylvania's old standard for products liability cases (*Azzarello*'s "unreasonably dangerous") and rejected the long suggested replacement (the Third Restatement), the decision implemented an entirely new standard. The Supreme Court held that "the

cause of action in strict products liability requires proof, in the alternative, either of the ordinary consumer's expectations or of the risk-utility of a product." Therefore, plaintiffs must satisfy the consumer expectations test (which views the product from the perspective of the reasonable user) or the risk-utility test (which views the product from the perspective of a reasonable manufacturer), or both.

The Consumer Expectations Test

This test defines a "defective condition" as a product feature that, upon normal use, is dangerous beyond the reasonable consumer's contemplation. The test offers a standard of consumer expectations that, 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 relevant in assessing the reasonable consumer's expectations.

Notably, *Tincher* expressly disavows any position on "prior decisional law." Rather, *Tincher* invites "targeted advocacy" challenging it:

The second theory of liability is looked at from the perspective of the product manufacturer:

The Risk-Utility Test

This test states that a product is defective 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. Stated otherwise, a seller's precautions to avoid the danger should anticipate and reflect the type and magnitude of the risk posed by the sale and use of the product. Factors to be used in assessing this test are:

- The usefulness and desirability of the product—its utility to the user and to the public as a whole.
- The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
- The availability of a substitute product which would meet the same need and not be as unsafe.
- The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
- The user's ability to avoid danger by the exercise of care in the use of the product.
- 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 of the existence of suitable warnings or instructions.
- The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

This test looked like it created an opportunity to interject "conduct" evidence that has long been precluded by *Azzarello*'s dichotomy between strict liability and negligence, which trial courts applied more rigidly as *Azzarello* became more embedded in our law.

As a reasonable manufacturer assesses the risks and utility of its product, it obviously must assume that the product is being used correctly, as instructed, etc. Without that assumption, the risks are infinite and the test is, therefore, meaningless. Thus, if the product is not being used correctly, that fact must be relevant as the jury conducts a hindsight assessment of the manufacturer's balancing of the risks and utility.

The most interesting factor to those of us on the defense side is the user's ability to avoid danger by the exercise of care in the use of the product. We all know that evidence of a plaintiff's conduct—that is, how he used the product—was strictly forbidden under *Azzarello*. Yet under the fifth requirement of the risk-utility test, it seems that defendants should be allowed to argue that the user had every opportunity "to avoid danger" by using the product correctly, following instructions or his employer's training, not using the product while intoxicated, not putting a limb in an unguarded nip point, etc. In other words, while such evidence is not the "conduct" evidence that was previously precluded, the user's ability to avoid the danger by using the product reasonably is (and should be) an essential element of the jury's application of the risk-utility test to determine whether the product is "unreasonably dangerous."

But *Tincher* never specifies a jury charge to replace the *Azzarello* charge. Instead, it mentions only "the fashioning of suggested jury charges applicable to a particular case."

Thus, at the trial level, and as with other legal concepts, "it is incumbent upon the parties, through their attorneys, to aid courts in narrowing issues and formulating appropriate instructions to guide juries in their factual determinations." It is worth reiterating that "bright lines and broad rules always offer a superficially enticing option. However, we cannot elevate the lull of simplicity over the balancing of interests embodied by the principles underpinning [the jurisprudence of the relevant area of law]." The principal point is that judicial modesty counsels that we be content to permit the common law to develop incrementally, as we provide reasoned explications of principles pertinent to factual circumstances of the cases that come before the court.

One of the key takeaways from the risk-utility test was that whether a product complies with industry standards will help a jury determine whether the manufacturer is reasonable. And, of course, the jury can reject compliance with industry standards or not. Such standards are admissible in California (which developed the risk-utility test), and they are admissible in every state that has adopted the test.

'*Sullivan* v. Werner Ladder'

Recently, the Pennsylvania Supreme Court decided *Sullivan v. Werner Ladder*. Plaintiffs in *Sullivan* contended that industry standards should be inadmissible because the mere fact that a product meets or exceeds industry standards should not mean that the product itself is not defective. In other words, it is certainly possible that the industry standards themselves are defective. Plaintiffs in *Sullivan* also believed that there is a possibility that the entire industry may produce defective products and, therefore, evidence that the product in question complied with industry standards is not of import. The majority of jurisdictions have held that compliance with industry standards is admissible but not dispositive. It is merely an additional factor that jurors can evaluate

in determining whether or not a product is defective.

The *Sullivan* plaintiffs also argued that only the product—and not the conduct of the manufacturer—should be judged and that any consideration of compliance with industry standards is evidence of the manufacturer's conduct and not of the product's defectiveness.

In December 2023, the Pennsylvania Supreme Court issued its long-awaited opinion. In what is a blow to the defense bar and manufacturers, the court held that evidence of compliance with industry and governmental regulations is inadmissible to demonstrate that a product is not defective under the risk-utility test. "The focus in a design defect case must remain on the product and not on the manufacturer's conduct. Accordingly, we conclude that … evidence of a products' compliance with industry or government standards is not admissible in design defect case to show a product is not defective under the risk-utility theory."

While this is a plurality opinion, I think trial courts are going to run with it. Stay tuned.

Bradley D. Remick co-chairs the products liability practice group in the Philadelphia office of Marshall Dennehey. He is the author of the book, "Pennsylvania Products Liability," now in its sixth edition, published by ALM/The Legal Intelligencer. He can be reached at bdremick@mdwcg.com.