

7 Takeaways From Pa. High Court's Tort Revamp

Law360, New York (January 06, 2015, 11:57 AM ET) --

In November 2014, the Pennsylvania Supreme Court reset the standard for a strict liability claim under Pennsylvania law. The majority slip opinion in *Tincher v. Omega Flex Inc.*^[1] sprawls more than 137 pages. But, most of those 137 pages are devoted to a detailed discussion of the case's procedural setting, the parties' contentions and musings on the development of Pennsylvania product liability law over the last 50 years. That lengthy exposition will have little, if any, relevance to practitioners or litigants going forward.



John Lavelle Jr.

What, then, are the key implications of *Tincher* for future cases? Below, we identify seven.

1. Azzarello Overruled

First and foremost, *Tincher* overruled *Azzarello*,^[2] the Pennsylvania Supreme Court decision that had defined strict liability under Pennsylvania law since 1978. Going forward, to paraphrase Richard Nixon, we won't have *Azzarello* to kick around anymore.^[3] Attorneys on both sides of the bar had widely anticipated the demise of *Azzarello*, which had sown confusion for decades.

Azzarello reasoned that the words "unreasonably dangerous" had no place in strict liability because they signaled to the jury that the plaintiff had the burden of proving an element of negligence. *Azzarello* established a two-pronged approach under which: (1) the trial court would first determine the preliminary question of whether a product was "unreasonably dangerous" under a risk-utility inquiry and then (2) the jury would consider the factual question of whether the product was in a defective condition lacking any element necessary to make it safe for its intended use.

This framework proved unworkable and was widely criticized. For example, the Third Circuit pointed out one fundamental inconsistency: while the trial court was only to make a preliminary determination of whether a product was "unreasonably dangerous" under risk-utility factors, juries in Pennsylvania were not instructed to weigh these factors themselves, effectively making the trial court's preliminary determination a final one.^[4] Commentators termed *Azzarello* one of "the most controversial opinions ever issued on the subject of strict products liability for alleged design defects"^[5] and observed that Pennsylvania generally has "developed a unique and, at times, almost unfathomable approach to products litigation."^[6]

Thus, the demise of Azzarello was long expected. After passing on several opportunities to reverse Azzarello in recent years, the Pennsylvania Supreme Court in *Tincher* at long last took the plunge. The majority in *Tincher* faulted Azzarello's inflexible bright-line rule that rigidly divorced concepts of strict liability and negligence.[7] In particular, the *Tincher* court rejected Azzarello's rationale that the phrase "unreasonably dangerous" is per se misleading to a jury, finding that its absence from the jury's inquiry did more harm than good.

2. No Restatement (Third) in Pennsylvania

While the reversal of Azzarello was widely anticipated, more surprising was the route charted to replace it. The Third Circuit had predicted that the Pennsylvania Supreme Court would adopt the Restatement (Third) of Torts, recognizing "the essential role of risk-utility balancing" and requiring proof of a reasonable alternative design.[8] That prediction proved to be incorrect.

Instead, *Tincher* retained Pennsylvania's formulation of strict liability under Section 402A of the Restatement (Second). In so doing, the court criticized a Restatement's ability to substitute for Pennsylvania decisional law. The court emphasized that a Restatement is intended to provide guidance and is not a legislative enactment, observing that even if the court has "adopted" a Restatement provision, those Restatements are merely a synthesis of American common law and are not to be considered controlling and unmoored from Pennsylvania common law.[9] The court went on to caution that when the circumstances of a case demonstrate that the "rule outruns reason[,] the court has the power, indeed the obligation, to refuse to apply the rule, a power for the most part unavailable where the rule is legislatively ordained." [10] Ultimately, the court concluded that Section 402A of the Restatement (Second) articulates the standard of proof for strict liability claims that is in harmony with Pennsylvania's common law — and that the Restatement (Third) does not.

The court's treatment of both Restatements as a potential source of guidance, not binding authority, is key to understanding the distinctive new standard that will replace Azzarello.

3. Two Options for Plaintiffs

Canvassing law from other jurisdictions and academic commentary, *Tincher* crafted a framework that allows strict liability design defect claims to proceed under either of two alternative legal tests: (1) consumer expectation or (2) risk-utility.[11]

Under the consumer expectation test, a product is considered defective if the danger is unknowable and unacceptable to the average or ordinary consumer. Stated another way, a 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." [12]

Alternatively, the risk-utility test is the legal equivalent of a cost-benefit analysis, under which 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." [13] This test, which reflects the "negligence roots" of strict liability, asks the fact-finder to balance a number of factors, including the usefulness of the product, existing safety features, the probability of injury, the ability to remedy the risk and the costs of eliminating the risk. Importantly, proof of an alternative safer design is not required.

While recognizing the weaknesses inherent in both tests, the court ultimately adopted an approach that allows plaintiffs to proceed using either test.

4. Battles to Come on Whether There is a Question of Fact for the Jury

By emphasizing the importance of the jury's fact-finding role, Tincher articulates an inherently fact-sensitive standard that may raise the bar to dismiss strict liability design defect claims via dispositive motion prior to trial. For example, under the risk-utility test, the jury is tasked with considering and balancing several factors,[14] while the consumer expectation test rests on whether a hypothetical ordinary consumer would be aware of a particular risk.

But Tincher does not hand plaintiffs a ticket to advance automatically to the jury. On the contrary, plaintiffs could fail to present sufficient evidence under either test, or fail to establish other essential elements, such as causation. Versions of these tests are used in other jurisdictions, and the court cited to authority in California and Illinois, for example, when articulating the standard Pennsylvania courts should use for strict liability design defect claims. Case law from these other jurisdictions may be instructive as lower courts begin to apply these tests in Pennsylvania. It will ultimately be left to future cases and courts applying Tincher, however, to provide a more complete picture of precisely what a plaintiff must establish in order to reach the jury under either of these tests.

5. Battles to Come on Failure-To-Warn and Manufacturing Defect Claims

Left open for another day is the effect of Tincher on strict liability failure-to-warn and manufacturing defect claims. Significantly, the Tincher court questioned whether liability may be imposed in circumstances where risks are either unforeseeable or unknown.[15] While Tincher explicitly reserved resolution of that question for a later date, the court's discussion illustrates that negligence concepts, such as state-of-the-art theories, cannot be entirely separated in evaluating whether a product is defective. Furthermore, part of the reasoning of Tincher — that strict liability is an evolution of negligence and warranty theories — leaves open the possibility that other negligence-based defenses may be imported into Pennsylvania strict liability.[16] Injection of negligence-based defenses such as state-of-the-art theories could be significant, especially in areas like asbestos litigation.

6. Battles to Come for Drug and Medical Device Manufacturers

One unique aspect of Pennsylvania's approach to product liability has long been the exclusion of prescription pharmaceuticals and medical devices from strict liability. Pennsylvania courts have applied the reasoning of Comment K to Section 402A of the Restatement (Second) to broadly prohibit strict liability claims with respect to prescription drugs and medical devices.[17] Because Tincher reaffirmed Pennsylvania's embrace of Section 402A of the Restatement (Second), and rejected the Restatement (Third) approach, the prohibition on strict liability claims for prescription drugs and devices should be unaffected. This restriction, which has long frustrated some members of the plaintiffs' bar, will likely come under attack once again with Tincher providing an excuse for rejoining battle.[18]

7. Changes in Jury Instructions

Since Azzarello, jurors have been instructed that "[t]he supplier of a product is the guarantor of its safety." [19] That instruction has been squarely rejected by Tincher.[20] The Pennsylvania Proposed Standard Jury Instructions based on Azzarello are no longer valid and should not be used.

In those cases that are currently awaiting trial, litigants and trial courts will need to develop jury instructions that do away with Azzarello's distinction between strict liability and negligence.[21] Pattern

jury instructions, which are drafted by the Pennsylvania Supreme Court's Committee for Proposed Standard Jury Instructions, are typically updated every 18 to 24 months. Since the most recent version of Pennsylvania's jury instructions were published in June 2014, litigants with cases ready for trial now will be writing instructions on a blank slate. In the interim, litigants can look to the proposed jury instructions from other jurisdictions for elements that should be implemented under Pennsylvania's new approach to strict liability design defect claims.[22]

In sum, the Pennsylvania Supreme Court's new take on strict liability paves the way for continued litigation under a product liability scheme that continues to be unique to Pennsylvania.

—By John Lavelle Jr. and Zachary Johns, Morgan Lewis & Bockius LLP

John Lavelle Jr. is a partner in Morgan Lewis & Bockius' Philadelphia and Princeton, New Jersey, offices and is co-chairperson of the firm's product liability and mass tort litigation practice.

Zachary Johns is an associate in Morgan Lewis & Bockius' Philadelphia office.

The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, Inc., or any of their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] No. 17 MAP 2013, --- A.3d --- (Pa. Nov. 19, 2014), available at <http://www.pacourts.us/assets/opinions/Supreme/out/J-80-2013mo%20-%201020173292832303.pdf?cb=1>.

[2] *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1022 (Pa. 1978).

[3] Richard Nixon's "Last" Press Conference (1962), YouTube.com, http://www.youtube.com/watch?v=_RMSb-tS_OM (last visited Dec. 21, 2014).

[4] *Moyer v. United Dominion Indus. Inc.*, 473 F.3d 532, 538 (3d Cir. 2007).

[5] John M. Thomas, Defining "Design Defect" in Pennsylvania: Reconciling *Azzarello* and the Restatement (Third) of Torts, 71 TEMP. L. REV. 217 (1998).

[6] James A. Henderson Jr. and Aaron D. Twerski, Achieving Consensus on Defective Product Design, 83 CORNELL L. REV. 867, 897 (1998).

[7] *Tincher* at *42-43.

[8] *Berrier v. Simplicity Mfg. Inc.*, 563 F.3d 38, 40 (3d Cir. 2009) (predicting that Pennsylvania would adopt Sections 1 and 2 of the Restatement (Third) of Torts).

[9] *Tincher* at *19-20.

[10] *Id.* at *19 (quoting *Coyle by Coyle v. Richardson-Merrell Inc.*, 584 A.2d 1383, 1385 (Pa. 1991)).

[11] *Id.* at *68.

[12] Id. at *49.

[13] Id. at *51.

[14] Id. at *52.

[15] Id. at *67.

[16] Id. at *71-72.

[17] Hahn v. Richter, 673 A.2d 888 (Pa. 1996); Creazzo v. Medtronic Inc., 903 A.2d 24, 31 (Pa. Super. Ct. 2006).

[18] See, e.g., Coben, Weiss and Ronca, Assessing the State of Products Liability Law Post-Tincher, 37 PENNSYLVANIA LAW WEEKLY 1165, 1174 (Dec. 9, 2014) (“Are the manufacturers of unsafe drugs now subject to strict liability independent of Comment K of the Second Restatement?”)

[19] Pennsylvania Suggested Standard Civil Jury Instruction 16.20; see also Azzarello, 391 A.2d at 559 n.12.

[20] See, e.g., Pennsylvania Suggested Standard Civil Jury Instruction 16.10 (“[s]trict liability is imposed even if [the defendant] has taken all possible care in the preparation and sale of the product.”); id. at 16.20 (“[t]he product must be provided with every element necessary to make it safe for [its intended] use, and without any condition that makes it unsafe for [its intended] use.”).

[21] Tincher at *68-70.

[22] See, e.g., Ill. Pattern Jury Instr.-Civ. 400.06A (defining the risk-utility test); Judicial Council Of California Civil Jury Instruction 1203 (defining consumer expectation test); id. at 1204 (defining risk-utility test and burden shifting).