Tincher After Ten Years: How Pennsylvania Product Liability Law Has Changed and Remained the Same

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Just over ten years ago on November 19, 2014, the Pennsylvania Supreme Court issued its opinion in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), a much-anticipated opinion that was heralded as a victory by both sides of the bar. The defense bar touted *Tincher* as a "fundamentally overhaul[ing]" Pennsylvania product liability law, while the plaintiffs' bar emphasized the Court's limited holding and its adoption of two new tests for proving a product defect, which were taken from the plaintiff-friendly California courts. Ten years later, Pennsylvania practitioners have begun to see the true effects of *Tincher* in practice.

In *Tincher*, the Pennsylvania Supreme Court granted the defendant's appeal to examine the limited issue of whether Pennsylvania should adopt the Restatement (Third) of Torts or continue to apply the Restatement (Second) of Torts Section 402A with regard to product liability cases. The Third Circuit had predicted that Pennsylvania would adopt the Third Restatement and abandon Section 402A.

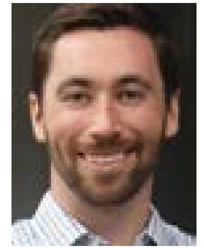
The Third Restatement offered a "negligence-derived standard" that would require plaintiffs to prove foreseeability of the risk, a reasonable alternative design, and that the failure to use that alternative design caused the product to be "not reasonably safe." *Tincher*, 104 A.3d at 372. In other words, the Third Restatement shifts focus from the product itself to the product supplier's conduct, thereby blending negligence with strict liability. The Section 402A approach that Pennsylvania had followed since 1966 held that the product itself is on trial. The plaintiff prevailed under Section 402A if she showed the product was defective, meaning unreasonably dangerous to the user or consumer.

The defense bar advocated the adoption of the Third Restatement, while plaintiffs' attorneys wanted to continue applying Section 402A. The nine amicus curiae briefs filed were evidence of the weight that the legal profession and product manufacturers placed on this case.

While considered monumental for product liability cases involving personal injury, <u>Tincher</u> was not actually a personal injury case. The plaintiffs in *Tincher* were homeowners whose property was significantly damaged when a lightning strike caused a small puncture in the natural gas piping leading to the plaintiffs' fireplace, which in turn caused a fire. Fortunately, no one was injured. The plaintiffs filed a complaint against the natural gas pipe supplier for their out-of-pocket losses above their insurance limits. At trial, the court instructed on only Section 402A and rejected requests to apply the Third Restatement. The jury awarded the plaintiffs just over $1 million after delay damages were added.

When the *Tincher* trial occurred, there was no question that Pennsylvania trial courts were required to apply Section 402A. The defendant in *Tincher* was seeking to change Pennsylvania law and asked the Commonwealth's highest court to adopt the Third Restatement.

In *Tincher*, the Supreme Court ultimately recommitted to Section 402A, but also overturned the 1978 Pennsylvania Supreme Court opinion in *Azzarello v. Black Bros. Co.* The Court also commented that some of the post-*Azzarello* lower court opinions had possibly gone too far in drawing such rigid prohibitions of negligence concepts in strict liability cases. However, *Tincher* stopped short of explicitly overturning or casting doubt on any particular lower court opinions.



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Other than the decision to still follow Section 402A, the lasting legacy of *Tincher* has been and will be the adoption of two new tests to prove a product is defective. After *Tincher*, plaintiffs must prove a defect under either the risk-utility test or consumer expectations test (or both). These tests were not previously part of Pennsylvania law and were borrowed largely from California case law that the Pennsylvania Supreme Court cited at length.

Under *Tincher*'s risk-utility standard, "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." *Tincher*, 104 A.3d at 389.

For the first nine years after *Tincher*, exactly what factors went into the risk-utility test remained a fight. Defendants advocated for the "Wade factors," named for a 1973 law review article by Vanderbilt Law School's Dean John Wade. By contrast, plaintiffs argued for the *Barker* factors, named for the California Supreme Court case *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978), which *Tincher* cited with approval. The Pennsylvania Supreme Court referenced both in *Tincher* but

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specifically described the limitations of the Wade factors. 104 A.3d at 398-99.

In 2023, the Pennsylvania Supreme Court put the question of what factors go into the risk-utility test to bed: "the *Tincher* Court adopted the composite test as set forth by the California Supreme Court in *Barker*…." *Sullivan v. Werner*, 306 A.3d 846, 861 (Pa. 2023); *see_also* Pa.SSJI (Civ.) § 16.20; 3 West's Pa. Prac., Torts: Law and Advocacy § 9.4.50.

The risk-utility factors in Pennsylvania, therefore, are (1) the gravity of danger posed by the challenged design, (2) the likelihood that such danger would occur, (3) the mechanical feasibility of a safer alternative design, (4) the financial cost of an improved design, and (5) the adverse consequences to the product and to the consumer that would result from an alternative design.

Tincher's consumer expectations test can be captured more succinctly: a product is defective if "the danger is unknowable and unacceptable to the average or ordinary consumer." *Id.* at 387. The jury instruction on the consumer expectations test also provides factors for the jury to consider: (1) the nature of the product, (2) the identity of the user, (3) the product's intended use, (4) the intended user of the product, and/or (5) any express or implied representations by the product supplier. Pa.SSJI (Civ.) § 16.20.

In a showing of judicial restraint, *Tincher* left undecided certain key issues in product liability cases, "such as the availability of negligence-derived defenses, bystander compensation, or the proper application of the intended use doctrine." 104 A.3d at 409-410. In the wake of *Tincher*, these issues were primed to be relitigated, particularly by the defense bar, which sought to erode the strict prohibition of negligence concepts in Pennsylvania strict liability cases.

Now, ten years since *Tincher*, it may seem to many observers that the more things change, the more they have stayed the same. The primary impact of *Tincher* has been to change the test (and jury instructions) for what constitutes a defect. The risk-utility test and/or consumer expectations test, described above, are now part of every product liability case.

Another change after *Tincher* is that more determinations are reserved for the jury, which may make summary judgment on product liability cases more difficult to grant. Under *Azzarello*, "the balancing of risks and utilities, when implicated, was ***an*** issue of law dependent upon social policy to be decided by the trial court. The jury would then resolve any 'dispute as to the condition of a product,' as a separate question." *Tincher*, 104 A.3d at 406. Now, the risk-utility determination is reserved for the jury and is not to be performed by the trial court, except where reasonable minds could not possible differ. *Id.* at 406-07.

While the test for a defective condition changed as a result of *Tincher*, the Pennsylvania Supreme Court's decision has not opened the floodgates for introducing negligence concepts into product liability cases. A recurring issue in product liability cases is the admissibility of industry standards. Defendants seek to introduce evidence of compliance with industry standards—which are sometimes standards the product supplier helped author—to show the product was not defective. Before *Tincher*, evidence of compliance with industry standards was always inadmissible. Despite renewed efforts by the defense bar, compliance with industry standards remains inadmissible post-*Tincher*. *Sullivan*, 306 A.3d 846; *Webb v. Volvo Cars of North America, LLC*, 148 A.3d 473 (Pa. Super. 2016).

In *Sullivan*, the Pennsylvania Supreme Court reaffirmed *Tincher*, but also made clear that *Tincher* had not upended decades of Pennsylvania case law when it overruled *Azzarello*. Viewing *Tincher* through the lens of *Sullivan*, Pennsylvania's prohibition of negligence defenses in strict liability cases remains steadfast: "to maintain the distinction between strict liability and negligence, we cannot permit negligence concepts such as fault and due care to creep into strict liability." *Sullivan*, 306 A.3d at 862.

In the immediate aftermath of *Tincher*, the lengthy opinion was a sort of Rorschach test: depending on your point of view, Pennsylvania practitioners could see it as a dramatic shift or basically an affirmation of the status quo. In the decade since *Tincher*'s publication, there have certainly been changes: how "defect" is defined and how it can be proven are traced back solely to *Tincher*. But the opinion has not been the sea change that some lawyers initially predicted.

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[1] James M. Beck, *Rebooting Pennsylvania Product Liability Law: Tincher v. Omega Flex and the End of Azzarello Super-Strict Liability*, 26 Widener L.J. 91 (2017).

[2] Arthur L. Bugay, *A New Era in Pennsylvania Products Liability Law—Tincher v. Omega-Flex, Inc.: The Death of Azzarello*, 86 Pa. Bar Ass'n Q. 10 (2015); Frank J. Vandall, *Tincher Unmasked*, 3 U. Pa. J. L. & Pub. Aff. 91 (2018).