

Admissibility of Industry Standards in Strict Products Liability Actions

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Editor's note: This is the first in a two-part series.

This two-part article will discuss the admissibility of a product's compliance with industry standards at trial in strict products liability actions. The first part provides an overview of the admissibility of industry standards in Pennsylvania before *Tincher* was decided and then discusses the court's holding in *Tincher*, focusing on its overruling of earlier, infamous Pennsylvania cases *Azzarello* and *Lewis*. The second part of this article will provide an analysis of cases addressing the admissibility of industry standards after *Tincher* and argue that defendants in strict products liability cases should now be permitted to introduce evidence of their products' compliance with industry standards.

Admissibility of Industry Standards Pre-'Tincher'

Before the Pennsylvania Supreme Court's decision in *Tincher v. Omega Flex*, 104 A.3d 328 (Pa. 2014), the law was relatively clear; evidence of a product's compliance with industry standards was inadmissible in strict products liability cases, as held in *Lewis v. Coffing Hoist Division, Duff-Norton*, 528 A.2d 590 (Pa. 1987); and *Azzarello v. Black Brothers*, 391 A.2d 1020 (Pa. 1978).

In *Lewis*, the Supreme Court majority held that in a strict products liability case, evidence of industry standards and a product's compliance with industry standards is inadmissible. The court cited to *Azzarello* for the principle that "the 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." It noted that *Azzarello*'s holding acted to shift the jury's focus to the condition of the product itself, not the reasonableness of the manufacturer's conduct. The court reasoned that *Azzarello* held "if not expressly, then certainly by clear implication, that negligence concepts have no place in a case based on strict liability."

The *Lewis* court explained that courts in other jurisdictions that had adopted the theory that negligence principles should be kept out of strict liability cases had also excluded attempts by manufacturer defendants to admit evidence that the product at issue comported with industry standards (citing *Lenhardt v. Ford Motor*, 102 Wash.2d 208, 683 P.2d 1097 (1984)). For example, the Washington court in *Lenhardt* indicated that whether a defendant has complied with industry standards improperly focuses on the quality of the defendant's conduct in making its design choice, and not on the attributes of the product itself. Therefore, *Lenhardt* found that such evidence should be excluded because "it tends to mislead the jury's attention from their proper inquiry."

Relying on those principles, the *Lewis* court concluded that evidence of industry standards relates to the reasonableness of the defendant's conduct in making its design choice and improperly brings concepts of negligence law into a strict liability case. It stated that such evidence "created a strong likelihood of diverting the jury's attention from the appellant's [product] to the reasonableness of the appellant's conduct in choosing its design," and thus, such evidence is irrelevant and inadmissible.

In a dissenting opinion, Justice William D. Hutchinson joined by Justice John P. Flaherty commented that industry standards are written by specialized individuals with superior knowledge of product design. The concurring justices would have held that evidence of such standards is admissible because it is relevant to the issue of defect. *Tincher* and

courts interpreting its holding would later cite to Hutchinson's dissent with approval.

After *Lewis*, in *Hicks v. Dana Companies*, 984 A.2d 943 (Pa. Super. Ct. 2009), the court went a step further and held that evidence of a product's compliance with mandatory government standards was likewise inadmissible pursuant to *Azzarello* and *Lewis*. Specifically, the court noted that "governmental regulations are inadmissible in strict liability cases ... based upon the general premise that the introduction of such evidence has the effect of shifting the jury's attention from the existence of a defect to the reasonableness of the manufacturer's conduct, which is irrelevant in strict liability actions.

'Tincher v. Omega Flex' Decision

The Supreme Court in *Tincher v. Omega Flex*, 104 A.3d 328 (Pa. 2014), explicitly overruled its holding in *Azzarello*, and changed the landscape in Pennsylvania for products liability actions. It stated that "*Azzarello* articulates governing legal concepts which fail to reflect the realities of strict liability practice and to serve the interests of justice." The court noted that after "*Azzarello*, decisional focus in strict liability cases shifted to reflect an increasing concern with segregating strict liability and negligence concepts." This "segregation" prompted exclusion of industry standards as "negligence" evidence (citing to *Lewis*) as well as evidence of mandatory government standards and comparative negligence. The court noted: "Subsequent decisional law has applied *Azzarello* broadly, to the point of directing that negligence concepts have no place in Pennsylvania strict liability doctrine; and ... those decisions essentially led to puzzling trial directives that the bench and bar understandably have had difficulty following in practice.

The court engaged in a bit of foreshadowing, stating that "the decision to overrule *Azzarello* ... may have an impact ... upon subsidiary issues constructed from *Azzarello*, such as the availability of negligence-derived defenses." Implicit in this statement is that such defenses and evidence pertaining to those defenses should now be admissible.

The court then articulated new standards for determining whether a product will be found to be "defective" under Pennsylvania law. Specifically, it 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."

Under the consumer expectation test, "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."

The "risk/utility" standard involves a "test balancing risks and utilities or, stated in economic terms, a cost-benefit analysis." Importantly, the court noted that "the risk-utility test offers courts an opportunity to analyze post hoc whether a manufacturer's conduct in manufacturing or designing a product was reasonable, which obviously reflects the negligence roots of strict liability."

This statement directly contradicts the principles articulated in *Lewis*. The court further noted that in applying the risk-utility test, courts have cited the following "Dean Wade" factors

- 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 (citing John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837-38 (1973)).

The court acknowledged that “the theory of strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty.” Strict liability “is a theory that effectuates a further shift of the risk of harm onto the supplier than either negligence or breach of warranty theory by combining the balancing of interests inherent in those two causes of action.” The court further explained that “the standard of proof in a strict liability cause of action properly reflects this duality of purpose” and the alternative test standard the court adopted is a composite formulation that “articulate[s] a standard of proof which stated the consumer expectations test and the risk-utility test in the alternative.”

Thus, it is evident that *Tincher* expressly overruled *Azzarello* and rejected the separation of negligence and strict liability concepts, upon which the exclusions in cases like *Lewis* were predicated. While *Tincher* did not expressly decide the issue of whether industry standards should be admissible, its rejection of *Azzarello*, its discussion of the overlap of negligence and strict liability principles, and its reasoning that risk/utility allows a court to evaluate the reasonableness of the manufacturer’s conduct, should act as to implicitly overrule a case such as *Lewis*. •

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Admissibility of Industry Standards After ‘Tincher’

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Editor’s note: This is the second in a two-part series.

This is the second part of a two-part article analyzing the admissibility of a product’s compliance with industry standards at trial in strict products liability actions. In the first part, we provided an overview of the admissibility of industry standards in Pennsylvania before *Tincher* was decided and discussed the court’s holding in *Tincher*, focusing on its overruling of earlier, infamous Pennsylvania cases *Azzarello* and *Lewis*. In this part, we will provide an analysis of cases addressing the admissibility of industry standards after *Tincher* and argue that defendants in strict products liability cases should now be permitted to introduce evidence of their products’ compliance with industry standards.

• Post-‘Tincher’ case law addressing the admissibility of industry standards.

Since the Pennsylvania Supreme Court decided *Tincher v. Omega Flex*, 104 A.3d 328 (Pa. 2014), cases are still making their way through the Pennsylvania courts to address the admissibility of so-called “negligence-based defenses.” There are three cases worth noting that were decided after *Tincher* which have addressed the issue of whether evidence of industry standards is admissible at trial.

In *Sliker v. National Feeding Systems*, No. 282 CD 2010 (C.P. Clarion Co. Oct. 19, 2015), the court denied the plaintiff’s motion in limine to preclude the defendants from introducing evidence of the product at issue’s compliance with industry standards. In *Sliker*, the plaintiff was injured while he was trying to repair a silo unloader. The plaintiff filed a design defect claim against the manufacturer, alleging that the unloader was defective because it did not have a permanently affixed guard.

The court denied the plaintiff’s motion in limine to preclude the admission of evidence of comparative negligence. The court held that evidence of a user’s negligence while using a product is relevant to determining whether the product is defective under the risk utility test. The court explained that “a user’s ability to avoid danger by the exercise of due care in the use of a product will logically factor into a reasonably manufacturer’s conduct” and thus, a user’s negligence, when compared to conduct that the manufacturer may reasonably anticipate reflects the negligence roots of strict liability. Although the court limited the weight of such evidence, stating that “evidence of negligence of course does not constitute a complete defense comparable to contributory negligence,” it nevertheless permitted the product defendants to present evidence of the plaintiff’s negligence in support of their defenses at trial. The *Sliker* court then addressed the admissibility of evidence of a product’s compliance with industry standards in light of the Supreme Court’s recent ruling in *Tincher*. The plaintiff argued that the manufacturer’s reasonableness in designing the product is irrelevant to determining whether a product is defective under Pennsylvania law. The court rejected this argument, finding that “whether a product comports with industry standards is particularly relevant to factor of the *Wade* factors enumerated above, specifically ‘the safety aspects of the product—the likelihood that it will cause injury, and the probably seriousness of the injury.’”

The court in *Sliker* then provided a thorough analysis of Pennsylvania Supreme Court’s decision in *Lewis v. Coffing Hoist Division*, 528 A.2d 590 (Pa. 1987). The court noted that *Lewis* precluded industry standards solely based on “*Azzarello* and the then-impermissible commingling of negligence and strict liability concepts,” since this evidence would “go to the reasonableness of the manufacturer’s conduct in making its design choice.” The court stated that although the *Tincher* court did not explicitly overrule *Lewis*, the *Tincher* court did overrule *Azzarello* “to the extent its pronouncements ... are in tension with the principles” outlined in the opinion in *Tincher*. The *Sliker* court then noted that the *Lewis* majority’s reasoning (based on *Azzarello*) that it was improper to commingle negligence and strict liability concepts—

because it focuses on the reasonableness of the manufacturer's conduct instead of the product itself and distracts the jury—conflicts with “*Tincher*’s pronouncement that a manufacturer’s conduct and reasonableness is relevant to the determination of a product defect.” Accordingly, the court held that the defendant would be permitted to introduce evidence of its product’s compliance with industry standards at trial. The court cautioned, however, that evidence of compliance with industry standards would not be dispositive of plaintiff’s products liability action by acting as a complete defense, “without affirmative authority from *Tincher* or any post-*Tincher* precedential decision barring such evidence as a matter of law, the principles of *Tincher* counsel in favor of its admissibility.”

Alternatively, in *Cancelleri v. Ford Motor*, No. 267 MDA 2015 (Pa. Super. Ct. Jan. 7), the Pennsylvania appellate court held, in an unpublished, nonprecedential opinion, that *Tincher* did not affect the applicability of previous court rulings that prohibited evidence of government and industry standards in a strict products liability case.

In *Cancelleri*, the plaintiff suffered serious injuries when his vehicle collided with another automobile and his airbag did not deploy. Trial began on Aug. 11, 2014, and the plaintiff proceeded on crashworthiness design defect and malfunction theories. The jury unanimously found in favor of the plaintiff and awarded \$5 million in damages. The defendant filed a post-trial motion, and while that motion was pending, *Tincher* was decided. The defendant then filed a post-argument submission asserting that *Tincher* warranted a new trial, which was denied.

On appeal, the court concluded that the defendant’s argument that a new trial was necessary based upon *Tincher* was “unpersuasive because *Tincher* did not involve a crashworthiness case, nor did it mandate specific jury instructions to be used in any type of strict liability matter.” The court noted that “in crashworthiness cases, the jury is required to determine whether the vehicle was defective in design as well as whether an alternative, safer, and practicable design existed at the time of design. ... Thus, the jury’s considerations in crashworthiness cases ... already involve ‘proof of risks and utilities’ regarding whether ‘the harm suffered was due to the defective condition of the product.’”

The court also stated that “the fact that the instant matter is a crashworthiness case also bears on defendant’s contention that a new trial must be granted because the trial court improperly precluded defendant from introducing evidence of applicable government and industry standards.” It noted that the Supreme Court in *Gaudio v. Ford Motor*, 926 A.2d 524, 532 (Pa. Super. Ct. 2009), relying on *Lewis*, held that in crashworthiness cases, evidence of industry standards are inadmissible because it misleads the jury’s attention from the proper inquiry—the quality or design of the product. The *Cancelleri* court found that “*Tincher* does not, nor does it purport to, affect the applicability of the rulings in *Gaudio* and *Lewis*.” It further noted that “based on precedent that remains unchanged, the trial court determined that the proposed evidence was inadmissible” and affirmed the trial court’s preclusion of the evidence. It can be argued that the *Cancelleri* court believed that since crashworthiness cases already take into account risk/utility factors, evidence of industry standards is not relevant to the separate risk/utility analysis promulgated in *Tincher*. This reasoning may be a way to distinguish *Cancelleri* from *Sliker* in arguing that evidence of a product’s compliance with industry standards is admissible in noncrashworthiness cases.

It should also be noted that the U.S. District Court for the Western District of Pennsylvania nearly decided the issue of whether it would permit evidence of industry standards in *Rapchak v. Haldex Brake Products*, No. 2:13-CV-1307, (W.D. Pa. July 14, 2016). The court cited heavily to *Sliker* and its reasoning that *Tincher* had implicitly overruled *Lewis*’ prohibition on evidence related to industry standards; however, it noted that neither party specifically identified any evidence that defendant intended to produce with respect to industry standards, and thus, it could not assess its relevancy to the risk-utility test or its admissibility.

Accordingly, defendants in strict products liability cases in Pennsylvania now have a solid basis for the argument that, after *Tincher*, evidence of a product’s compliance with industry standards should be admissible at trial. *Tincher* and its progeny have confirmed that such evidence is relevant to the evaluating the reasonableness of the manufacturer’s conduct in manufacturing or designing a product, which is expressly contemplated by the tests for determining whether a product is defective articulated in *Tincher*. •

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