A New Era In Pennsylvania Products Liability Law—*Tincher* v. *Omega-Flex, Inc.*: The Death of *Azzarello*

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ABSTRACT

In Tincher *v.* Omega-Flex, Inc.,[2] *the Pennsylvania Supreme Court overruled* Azzarello *v.* Black Bros., Co., *which defined Pennsylvania's strict products liability law for the past thirty-six (36) years.*[3] *In an opinion, written by Justice Ronald Castille—joined by Justices Baer, Todd, and Stevens—the Pennsylvania Supreme Court held that (1)* Azzarello *is overruled;*[4] *(2) a "defective condition" may be established in the alternative, by using the consumer expectations test, or by using the risk/utility test, or by using both tests;*[5] *(3) strict liability is a cause of action that "sounds in tort," a consequence that implicates public policy and evidence;*[6] *(4) Pennsylvania's products liability policies, as reflected by the history of Pennsylvania products liability law, "has not been challenged" and remains largely uncontroverted;*[7] *(5) the standard of proof for the burden of production and persuasion in a products liability action is a preponderance of the evidence; (6) juries are charged with determining whether a product was sold in a "defective condition" and judges may not remove a case from a jury unless it is "clear that reasonable minds could not differ on the issue" of defect; and (7) Pennsylvania shall remain a Restatement (Second) of Torts jurisdiction; the Restatement (Third) of Torts is expressly rejected.*

INTRODUCTION—THE IMMEDIATE IMPLICATIONS OF *TINCHER*

This article discusses the immediate implications from *Tincher* on pending Pennsylvania products liability actions. For example, after *Tincher*, fewer cases will be dismissed pretrial than before. No longer are judges "gatekeepers" who act as "social philosophers" to determine whether, as a matter of law, a product may be deemed to be defective by the finder of fact.[8]

1. Partner, Galfand Berger, LLP.
2. *See, Tincher* v. *Omega Flex, Inc.*, ___ A.3d ___ (Pa. 2014), *slip op*. at 1. This article refers to pages in the slip opinion.
3. 391 A.2d 1020 (Pa. 1978).
4. *Tincher* states: "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." *Tincher, supra at 75*. (*Emphasis added*).
5. *Tincher* Opinion at 119. "[W]e hold that, in Pennsylvania, 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."
6. *Id*. at 118. "[T]he strict liability cause of action sounds in tort".
7. *Id*. at 118, n.25. "While the Second Restatement formulation of the principles governing the strict liability cause of action in tort may have proven substantially less than clear, the policy that formulation embodies has not been challenged here and has largely remained uncontroverted."
8. In *Azzarello*, the Pennsylvania Supreme Court mandated a threshold analysis by the trial court wherein the court would determine, as a matter of law, whether the product at issue was "unreasonably dangerous". This determination was a deferential review, drawing all inferences in favor of the plaintiff. The threshold question presumed the plaintiff's claims of defect. *See, Tincher* at 79-80.

Instead, the jury is charged with determining defect pursuant to the consumer expectations test, a balancing (risk/utility or cost/benefit) test, or both. In some respects, *Tincher* brings a welcome improvement to Pennsylvania products liability law.

Another positive change from *Tincher* will be that Pennsylvania ***federal*** product liability cases will be decided pursuant to the Restatement (Second) of Torts and not, as they have been since 2011,[9] pursuant to the Restatement (Third) of Torts. As discussed in a prior article,[10] Pennsylvania federal courts have been, in the opinion of many, violating the *Erie* doctrine,[11] by applying the Restatement (Third) to Pennsylvania products liability actions, even though Pennsylvania has always been a Restatement (Second) jurisdiction and despite several recent Pennsylvania Supreme Court decisions which continue to expressly apply the Restatement (Second) of Torts.[12] In *Tincher,* the Pennsylvania Supreme Court clearly rejected the Restatement (Third) as follows:

> It is difficult to imagine a modern court simply adopting something broad-based and legislative in character as an outside organization's Restatement of the law, even if it is the product of an esteemed organization.[13]

In *Tincher,* the Pennsylvania Supreme Court clearly rejected the Restatement (Third). . .

Tincher's immediate effect is that federal courts will no longer apply the Restatement (Third) of Torts: Products Liability to Pennsylvania products liability cases. As a direct consequence of *Tincher*, the holdings of the United States Court of Appeals of the Third Circuit in *Berrier* v. *Simplicity Manufacturing, Inc.*[14] and *Covell* v. *Bell Sports, Inc.*[15] can no longer be applied. Further, cases that are currently pending appeal, based on the erroneous application of the Restatement (Third) of Torts, should now be remanded for reconsideration to the trial court, with instructions to apply the proper legal standard, Section 402A of the Restatement (Second) of Torts. Moreover, cases with pending dispositive motions, premised upon the Restatement (Third), should be decided in favor of the plaintiff, with the matters set for trial.[16] In fact, in *Tincher*, after overruling *Azzarello*, the Supreme Court remanded the case to the trial court with instructions to reconsider the post-trial motions pursuant to a Restatement (Second) of Torts, Section 402A analysis.[17] This is another welcome consequence of the *Tincher* decision.

However, while *Tincher* provides a detailed discussion of Pennsylvania products liability law, it leaves many questions unanswered. These include (1) whether strict liability extends to protect bystanders; (2) the role of foreseeability in a strict liability action; (3) the inadmissibility of state of the art evidence; (4) the inadmissibility of industry standards or regulations; (5) the inadmissibility of alleged plaintiff negligence; (6) the scope of evidence relating to the factors establishing product defect; (7) whether Pennsylvania should adopt the *Barker's* shifting burden approach in strict product liability cases; and (8) what new jury instructions should now be given.

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9. *See, Berrier* v. *Simplicity Mfg*, 563 F.3d 38 (3d Cir. 2009); *Covell* v. *Bell Sports, Inc.*, 651 F.3d 357 (3d Cir. 2011).
10. *See*, Bugay and Bazarsky, *The Future of Pennsylvania Products Liability As Applied by Federal and State Courts*: *Covell* v. *Bell Sports, Inc.*, Pa. B.Q. 139 (October 2012).
11. In *Erie Railroad Co.* v. *Tompkins, 304 U.S. 64 (1938)*, the United States Supreme Court held that a federal court, sitting in diversity jurisdiction, must apply the law of the forum state. Since the United States Court of Appeals for the Third Circuit decided *Covell* v. *Bell Sports, Inc., 651 F.3d 357 (3d Cir. 2011)*, there has been a split between Pennsylvania federal courts, which have applied the Restatement (Third), and Pennsylvania state courts, which continue to apply the Restatement (Second). This resulted in the creation of federal common law in violation of the *Erie* Doctrine.
12. *See, Schmidt* v. *Boardman, 11 A.3d 924 (Pa. 2011)*; *Beard* v. *Johnson & Johnson, Inc., 41 A.3d 823 (Pa. 2012)*; *Barnish* v. *KWI Building Co., 980 A.2d 535 (Pa. 2009)*; *Reott v. Asia Trend, Inc., 55 A.3d 1088 (Pa. 2012)*.
13. *Tincher* at 33. The Pennsylvania Supreme Court also acknowledged the criticism of the Restatement (Third) where its "drafts were largely comprised by those representing corporate interests and who failed to leave the client at the door." *Id*. at 35, note 7. *See also, Bugay, Pennsylvania Products Liability at the Crossroads: Bugosh, Berrier and the Restatement (Third) of Torts*, 81 Pa. B.Q. 1 (Jan. 2010).
14. 563 F.3d 38 (3d Cir. 2009).
15. 651 F.3d 357 (3d Cir. 2011).
16. Pursuant to *Tincher*, these matters must be reconsidered by the trial court as a matter of law. *Tincher* at 136.
17. *Id*. The Court also invited the parties to file supplemental memoranda on remand.

PENNSYLVANIA'S CALIFORNIA APPROACH TO PRODUCTS LIABILITY

Tincher essentially adopts the defect standard established by the California Supreme Court's 1978 decision in *Barker* v. *Lull Eng'g Co*.[18] and refined by *Soule* v. *General Motors Corp*.[19] *Barker* held that a defendant possesses the burden of proof with regard to establishing that its product is not defective, pursuant to the risk/utility test.[20] However, in *Tincher*, the Pennsylvania Supreme Court left this question—whether there should be a shifting burden with regard to the factors relevant to the risk/utility defect determination—open for future debate.[21]

On the one hand, the *Tincher* Court found this burden problematic because it arguably requires the defendant to prove a negative—that the product is not defective. However, the Court found merit in this shifting burden analysis since manufacturers possess the information about the product and its development.[22]

Essentially, in *Tincher*, the Pennsylvania Supreme Court struck down *Azzarello* and returned Pennsylvania products liability law to the year 1978, with the conclusion that the *Azzarello* Court would have done better if it had simply traveled the same path that California did in *Barker* and *Soule*. Moreover, *Tincher* cited with approval decisions in New Hampshire,[23] Connecticut,[24] Illinois,[25] Indiana,[26] Kansas,[27] Wisconsin,[28] Maryland,[29] and Missouri,[30] which all rejected the Restatement (Third) and expressly declined to follow the reasoning of other states—South Carolina,[31] Iowa,[32] Mississippi,[33] and Washington[34]—which adopted the Restatement (Third). *Tincher* also cites favorably to the "hindsight" test of product defect, applied in the risk/utility analysis in *Barker, supra*.

To understand where Pennsylvania Courts are headed, it is essential for attorneys to understand key California decisions—*Cronin*,[35] *Barker, and Soule*—cited in *Tincher*. Specifically *Tincher* states that Pennsylvania will now decide the question of defect pursuant to *Barker* v. *Lull Engineering Co*.[36]

In *Barker*, a high-lift load operator was seriously injured after he jumped from the loader's operational compartment when the loader shifted and was about to tip over. Mr. Barker jumped from the cab and was struck by a piece of falling lumber, suffering serious injuries. At trial, he contended that the loader was defective in design, because it lacked outriggers, a

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18. 573 P.2d 443 (Cal. 1978).
19. 882 P.2d 298 (Cal. 1994).
20. In *Barker*, the California Supreme Court held that "a trial judge may properly instruct the jury that a product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the relevant factors discussed above, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design."
21. *Tincher* at 133-135, stating "The parties obviously have not briefed the question of burden-shifting in risk-utility cases—they had no reason to—and we need not decide it to resolve this appeal, nor is it apparent that it will matter upon remand. We note, however, that whatever may be the merit of the *Barker* Court's concerns, countervailing considerations may also be relevant. . . . The ultimate answer to the question best awaits balancing in an appropriate case, specifically raising the question, with attendant briefing from parties."
22. *Id*.
23. *Vautour* v. *Body Masters Sport Ind., Inc*., *784 A.2d 1178, 1182-84 (N.H. 2001)*.
24. *Potter* v. *Chicago Pneumatic Tool Co*., *694 A.2d 1319 (Conn. 1997)*.
25. *Mikolajczyk* v. *Ford Motor Co*., *901 N.E.2d 329 (Ill. 2008)*.
26. *TRW Vehicle Safety Sys., Inc.* v. *Moore*, *936 N.E.2d 201 (Ind. 2010)*.
27. *Delaney* v. *Deere & Co*., *999 P.2d 930 (Kan. 2000)*.
28. *Green* v. *Smith & Nephew AHP, Inc*., *629 N.W.2d 727 (Wis. 2001)*.
29. *Halliday* v. *Sturm, Ruger & Co*., *792 A.2d 1145 (Md. 2002)*.
30. *Rodriguez* v. *Suzuki Motor Corp*., *996 S.W.2d 47 (Mo. 1999)*.
31. *Branham* v. *Ford Motor Co., 701 S.E.2d 5 (S.C. 2010)*.
32. *Scott* v. *Dutton Lainson Co., 774 N.W.2d 501 (Iowa 2009)*.
33. *Williams* v. *Bennett, 921 So.2d 1269 (Miss. 2006)*.
34. *Ruiz-Guzman* v. *Amvac Chem. Corp., 7 P.3d 795 (Wash. 2000)*.
35. *Cronin* v. *J.B.E. Olson Corp., 501 P.2d 1153 (1972)*. In *Cronin,*, the California Supreme Court held that it was error to include the phrase "unreasonably dangerous" when charging a jury on the definition of defect because it creates a "double burden" problem, requiring the plaintiff to prove a defect that rendered the product "unreasonably dangerous." The Court held that this was not a result intended by the policies underlying strict products liability. In *Cronin*, a bakery truck driver was catapulted through the truck's windshield after he was struck by bread trays that disengaged after an aluminum safety hasp broke during a collision. The plaintiff's metallurgist testified that the metal hasp was defectively manufactured. The California Supreme Court affirmed the plaintiff's verdict, stating that "We think that a requirement that a plaintiff also prove that the defect made the product "unreasonably dangerous" places upon him a significantly increased burden and represents a step backward in the area pioneered by this court. We recognize that the words 'unreasonably dangerous' may also serve the beneficial purpose of preventing the seller from being treated as the insurer of its products. However, we think that such [a] protective end is attained by the necessity of proving that there was a defect in the manufacture or design of the product and that such defect was a proximate cause of the injuries."
36. *Tincher* at 78.

roll bar, or seat belts. Plaintiff's expert stated that these features were "essential to protect the operator" and that their absence was a proximate cause of the plaintiff's injuries.

At trial, the court charged that "strict liability for a defect in design . . . is based on a finding that the product [is] unreasonably dangerous for its intended use." The jury returned a defense verdict. On appeal, the California Supreme Court held that this instruction was reversible error and ordered a new trial. Significantly, *Barker* expressly held that the jury instruction "misinformed the jury that the defectiveness of the product must be evaluated in light of the product's 'intended use' rather than its 'reasonably foreseeable use.'"[37] Accordingly, to the extent *Tincher* replaces *Azzarello* with *Barker*, the Pennsylvania Supreme Court (1) continues to hold that charging a jury that a plaintiff must prove a product's design defect by showing that the defect rendered the product "unreasonably dangerous" is reversible error; and it has (2) broadened Pennsylvania's existing law by re-introducing the doctrine of foreseeability in strict products liability actions.

Tincher cites the *Barker* defect standard with approval, essentially adopting it as the definition of defect in Pennsylvania.[38] In *Barker*, the California Supreme Court stated:

> [W]e have concluded . . . that a product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors discussed below, the benefits of the challenged design do not outweigh the risk of danger inherent in such design.[39]

Barker holds that the plaintiff's burden in a strict liability case is limited to proving that the product possessed a design defect—pursuant to either the consumer expectations standard (referenced as number one above) or by relevant factors identified in a balancing standard—and showing that the defective condition caused the plaintiff's injuries.[40] Notably, *Barker* holds that the burden in the balancing test is allocated between the plaintiff and the defendant as follows:

> [A] trial judge may properly instruct the jury that a product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the relevant factors discussed above, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.[41]

Barker identifies the following factors as relevant to the balancing test on a design defect: (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.[42] Significantly, *Barker* defines these relevant factors in terms of precedent, and not mechanically, as Pennsylvania did in *Azzarello*, in terms of what now are known as the "Wade" factors.[43]

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37. *Barker,, 573 P.2d at 43*5. The *Tincher* Court did not address this portion of the *Barker* decision. However, the *Tincher* Court did reference "reasonably foreseeable use." *Id*. at 60, *citing Lewis* v. *Coffing Hoist Div., Duff-Norton Co., 528 A.2d 590 (Pa. 1987)*.

38. *Tincher* Opinion at 132. Pennsylvania now joins other jurisdictions in adopting *Barker's* alternative defect test. These include Alaska, *see, Caterpillar Tractor Co.* v. *Beck, 593 P.2d 871 (Alaska 1979)*; *Alaska Civ. J.I. 7.03*; Hawaii, *Tabieros* v. *Clark Equip. Co., 944 P.2d 1279 (Haw. 1997); Haw. J.I. Nos. 11.1-11.4*; and Illinois.

39. *Barker, supra*, 573 P.2d at 418. *Barker*t reasoned that "This dual standard for design defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety, or that, on balance, are not as safely designed as they should be. At the same time, the standard permits a manufacturer who has marketed a product which satisfies ordinary consumer expectations to demonstrate the relative complexity of design decisions and the trade-offs that are frequently required in the adoption of alternative designs. Finally, this test reflects our continued adherence to the principle that, in a product liability action, the trier of fact must focus on the product, not on the manufacturer's conduct, and that the plaintiff need not prove that the manufacturer acted unreasonably or negligently in order to prevail in such an action." *Id*.

40. *Barker*, like *Cronin*, held that it was error to charge the jury that a plaintiff must prove that the defect rendered the product unreasonably dangerous.

41. *Barker, supra at 435*.

42. *Id. at 431*.

43. *See, Barker, supra at 428, citing Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L. J. 825 (1973)*. While *Barker* cites to Wade, it did not expressly adopt the "Wade" factors. Instead, *Barker* quoted Wade's criticism of using the term "unreasonably dangerous" in a strict products liability case, quoting Wade as follows: (1) "[The] natural application [of the term 'defective] would be limited to the situation in which something went wrong in the manufacturing process, so that the article was defective in the sense that the manufacturer had not intended it to be in that condition. . . . [Such a limitation] is almost to ensure that [the jury] will be misled; and (2) "In many situations. . . the consumer would not

Barker's factors are simpler than those set forth by John Wade, in the law review article referenced by *Azzarello*. Specifically, *Barker's* factors ***do not include*** an evaluation of the product's overall "usefulness" or the "user's anticipated awareness of the dangers inherent in the product" or the existence of suitable warnings or instructions. *Barker's* factors also ***do not include*** any reference to a "user's ability to avoid danger by the exercise of care in the use of the product." In a clear and direct application of *Barker,* evidence relating to these factors are irrelevant to a strict liability case.[44] *Tincher*, like *Barker*, preserves Section 402A's policy of protecting the public from unsafe products. As the *Barker* Court noted:

> The technological revolution has created a society that contains dangers to the individual never before contemplated. The individual must face the threat to life and limb not only from the car on the street or highway but from a massive array of hazardous mechanisms and products. The radical change from a comparatively safe, largely agricultural, society to this industrial unsafe one has been reflected in the decisions that formerly tied liability to the fault of a tortfeasor but now are more concerned with the safety of the individual who suffers the loss.As Dean Keeton has written,"The change in the substantive law as regards the liability of makers of products and other sellers in the marketing chain has been from fault to defect. The plaintiff is no longer required to impugn the maker, but he is required to impugn the product." (Keeton, Product Liability and the Meaning of Defect (1973) 5 St. Mary's L. J. 30, 33).[45]

Tincher expressly preserves these established policies.[46] It maintains a manufacturer's strict liability non-delegable duty to sell a safe product.[47] All sellers in the chain of sale may be held strictly liable for the sale of a defective product.[48] Product sellers are still the "guarantors" of their product's safety.[49] As *Tincher* states, "Thus, in placing a product on the market, the manufacturer acts to design (and manufacture) the product and, along with other dis-

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know what to expect, because he would have no idea how safe the product would be made." After *Tincher*, the *Barker* factors will replace Wade, which the Supreme Court cited in *Azzarello*, now overruled. These Wade factors are:

1. The usefulness and desirability of the product—its utility to the user and to the public as a whole (Usefulness).
2. The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury (Safety and severity of injury).
3. The availability of a substitute product which would meet the same need and not be as unsafe. (Feasibility of Alternative Design).
4. 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.
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/or avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
7 The feasibility, on the part of the manufacturer, of spreading the loss [of the injury by] setting the price of the product or [by] carrying liability insurance.

44. Apart from overruling *Azzarello* and defining the standard for defect, *Tincher* preserves existing Pennsylvania products liability law. It cites prior Pennsylvania Supreme Court decisions in *McCown* v. *International Harvester Co., 342 A.2d 381 (Pa. 1975)* (Opinion at 63, note 14) and *Lewis* v. *Coffing Hoist Div, Duff-Norton Co., 528 A.2d 590 (Pa. 1987)* (Opinion at 60-61), noting that the *Lewis* Court "observed that jurisdictions with various approaches agreed that relevant at trial is the condition of the product rather than the reasonableness of the manufacturer's conduct." *Id*. In *Lewis, supra*, the Pennsylvania Supreme Court held that industry standards are irrelevant as a matter of law.

45. *Barker, supra* at 435. These social policies are well established in Pennsylvania law.

46. *Tincher* Opinion at 88."Strict liability in tort for product defects is a cause of action which implicates the social and economic policy of this Commonwealth. . . . [T]hose who sell a product . . . are held responsible for damage caused to a consumer by the reasonable use of the product. *See Miller* [v.. *Preitz], 221 A.2d [320] at 334-35*. . . . The risk of injury is placed, therefore, upon the supplier of products. . . . A broad reading of this policy statement suggests that liability would attach absolutely, once the consumer or user suffers harm. . . . *See, e.g., Escola* v. *Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 440 (Cal. 1944)*. . . ." "This reasoning explains the nature of the non-delegable duty articulated by the Second Restatement and recognized in *Webb*. Stated affirmatively, a person or entity engaged in the business of selling a product has a duty to make and/or market the product—which 'is expected to and does reach the user or consumer without substantial change in the condition in which it is sold'—free from 'a defective condition unreasonably dangerous to the consumer or [the consumer's] property.' *Accord*, Restatement (2D) of Torts, Section 402A(1)."

47. *Id*. This is a duty that cannot be transferred to another. It is still Pennsylvania law that "safety is not an option." Manufacturers cannot properly contend that an employer purchaser of their product possessed an independent duty to guard or place safety devices on products sold without such safety features because this duty cannot be delegated. *See, Sheehan v. Cincinnati Shaper Co., 555 A.2d 1352 (Pa. Super. 1989)*.

48. *Tincher Opinion* at 122, *quoting*, Prosser, "The Assault upon the Citadel, 69 Yale L.J. 1099, 1116-17 (1960), which explains a key difference between strict liability and product negligence claims, since pass-through sellers do not have a duty to test or inspect in negligence."

49. *See, Tincher* Opinion at 52, n.12, *quoting Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903, 907 (Pa. 1974)*."Today . . . a manufacturer by virtue of [S]ection 402A is effectively the guarantor of his products' safety. . . . [A manufacturer] may not preclude an injured plaintiff's recovery by forcing him to prove negligence in the manufacturing process."

tributors, to sell the product, including making the product attractive for sale by making implicit representations of the product's safety."[50]

Like *Barker, Tincher* does not adopt the Wade factors; it merely references them.[51] Instead, it adopts *Barker's* statement of defect and invites lower courts to debate whether to adopt *Barker's* burden shifting standard.[52]

In *Tincher*, the Pennsylvania Supreme Court overruled *Azzarello* with regard to the threshold analysis. In its place, *Tincher* adopts *Barker's* preclusion of the term "unreasonably dangerous," replacing it with the consumer expectations and risk/benefit test to define "defect" at trial.

HINDSIGHT, FORESEEABILITY, AND STATE OF THE ART

Tincher also invites a hindsight analysis of defect that recognizes a seller's constructive notice of a product's defect. As *Tincher* states:

> A manufacturer, in designing a product, engages in a risk-utility calculus; the policy-driven, post hoc risk-utility calculus necessary to determine whether a design choice thus made may justly require compensation for injury explains the relevance of that standard of proof in strict liability. Meanwhile, a seller of the product—implicitly represents by placing a product on the market that the product is not in a defective condition unreasonably dangerous.[53]

Indeed, this strict liability standard has been called the "hindsight" test:

> [Under the hindsight regime] it is not the conduct of the manufacturer or designer which is primarily in question, but rather the quality of the end result; the product is the focus of the inquiry. The quality of the product may be measured, not only by the information available to the manufacturer at the time of design, but also by the information available to the trier of fact at the time of trial. [The question is] whether a reasonable manufacturer would continue to market his product in the same condition as he sold it to the plaintiff with knowledge of the potential dangerous consequences.[54]

Constructive knowledge and foreseeability are related[55] tort concepts.[56] *Tincher's* adoption of *Barker's* combined defect test, referencing a hindsight analysis, suggests that Pennsylvania has re-incorporated foreseeability into strict liability.

A practical limitation of the hindsight risk/utility test occurs where there is no actual knowledge or ability to know the dangers of a product. In such cases, defendants will argue that the product was made pursuant to the "state of the art." However, in Pennsylvania, this is precluded as irrelevant at trial.[57] *Tincher* does not change this result. One reason is because the hindsight approach charges the seller with knowledge of all information available through the time of trial.[58]

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50. *Id. at 122. See, e.g., Baxter v. Ford Motor Co., 12 P.2d 409, 415-16 (Wash. 1932).*

51. *Tincher* at 99, *citing, Calles* v. *Scripto-Tokai Corp., 864 N.E.2d 249, 260-61 (Ill. 2007)*.

52. *Tincher* at 101, "We should be mindful that public policy adjusts expectations of efficiency and intuitions of justice considerations, informing a seller's conduct toward consumers as a group, and ensuring proper compensation in individual cases by judicial application of the strict liability cause of action."

53. *Tincher* Opinion at 124, *citing Blue* v. *Envt'l Eng'g, Inc., 828 N.E.2d 1128, 1140-47 (Ill. 2005)*.

54. *Dart v. Wiebe Mfg., Inc., 709 P.2d 881 (Ariz. 1985)*. The Pennsylvania Supreme Court cited to Oregon law, when referencing, albeit indirectly, the hindsight test. *Tincher* Opinion at 123, *citing Markle* v. *Mulholland's Inc., 509 P.2d 529, 532 (Or. 1973)*. In *Phillips* v. *Kimwood Machine Co., 525 P.2d 1033 (Or. 1974)*, the Oregon Supreme Court stated this test as follows:

> We see no . . . inconsistency between a seller-oriented standard and a user-oriented standard when, as here, each turns on foreseeable risks. They are two sides of the same standard. A product is defective and unreasonably dangerous when a reasonable seller would not sell the product if he knows of the risks involved or if the risks are greater than a reasonable buyer would expect.

Id. at 1037, quoting Welch v. Outboard Marine Corp., 481 F.2d 252, 254 (5th Cir. 1973). In *Tincher*, the Pennsylvania Supreme Court quoted *Welch* several times. *Id.* at 89, 95, 98, and 102.

55. *See*, Owen, Montgomery, & Davis, Products Liability and Safety: Cases and Materials (6th Ed. Found. Press) at 77, note 6 at B, *citing, First Nat. Bank* v. *Nor-Am Agr. Prod., 537 P.2d N.M. App. 1975)*.

56. Even before 1966, manufacturers have been deemed to be experts with regard to their products, responsible for all foreseeable harm that arises from their product's use. *See, Maize* v. *Atlantic Refining Co., 41 A.2d 850, 851 (Pa. 1945), quoting MacPherson* v. *Buick Motor Co., 111 N.E. 1050, 1053 (NY 1917)*, "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence can be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."

57. *See, Carrecter* v. *Colson Equipment Co., 499 A.2d 326 (Pa. Super. 1985)*, where the Pennsylvania Superior Court precluded state of the art evidence, which it defined as including (1) industry custom; (2) government regulatory and licensing standards; and (3) technological feasibility or capability.

58. *See, e.g. Beshada* v. *Johns-Manville Prod. Corp., 447 A.2d 539 (N.J. 1982)*: "[S]trict liability is product oriented, asking whether the product was reasonably safe for its foreseeable purposes. . . . Essentially, [the] state-of-the-art [defense] is a negligence defense. It seeks to explain why defendants are not culpable for failing to provide a warning. . . . However,

Tincher reaffirms Pennsylvania as a strict liability state. With regard to state of the art, *Tincher* demonstrates Pennsylvania's continued refusal to permit such evidence at trial as follows:

> [I]t must be remembered that designers are properly deterred by strict liability from using consumers as guinea pigs."[59]

After *Tincher*, Pennsylvania Courts should continue to preclude state of the art and industry standards evidence and should permit evidence of foreseeable use.[60]

CONSUMER EXPECTATIONS

Tincher adopts consumer expectations as an alternative test to define defect.[61] However, it suggests that it has limits and cites *Soule* v. *General Motors Corp*.[62] to define them. In *Soule*, Ms. Soule alleged that her injuries were enhanced because defendant's Camaro was not designed to safely survive a foreseeable accident.[63] Plaintiff's 1982 Camaro was struck by another car with an impact that bent the Camaro's frame, near the driver's side front wheel, and tore loose a metal bracket, attaching the wheel assembly to the frame. The Camaro's wheel collapsed rearward and struck the car's "toe pan", the slanted area under the pedals, crumpling it upward into the vehicle compartment. Plaintiff suffered severe, permanent injuries to both ankles.

Plaintiff proceeded to trial on a manufacturing defect claim,[64] stating the toe pan crumbled because the bracket weld was defective. The jury was charged it could find the Camaro defective if it "failed to perform as safely as an ordinary consumer would expect." The jury returned a verdict for plaintiff for $1.65 Million and GM, appealed. The California Superior Court upheld the verdict, stating that a plaintiff claiming defect under consumer expectations may use expert testimony to state "what level of safe performance an ordinary consumer would expect under particular circumstances." However, the California Supreme Court disagreed, stating that:

> [T]he consumer expectations test is reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design. . . [W]here the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect. Use of expert testimony for that purpose would invade the jury's function . . . and would invite circumvention of the rule that the risks and benefits of a challenged design must be carefully balanced whenever the issue of design defect goes beyond the common experience of the product's users. . . . [Further,] the jury may not be left free to find a violation of ordinary consumer expectations . . . [u]nless the facts actually permit an inference that the product's performance did not meet the minimum safety expectations of its ordinary users[.] . . . [If such an inference cannot be made] the jury must engage in the balancing of risks and benefits required by the second prong of *Barker*.[65]

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a major concern of strict liability—ignored by defendants—is the conclusion that if a product was in fact defective, the distributor of the product should compensate its victims for the misfortune that it inflicted on them." *See also, Feldman* v. *Lederle Laboratories, 479 A.2d 374 (N.J. 1984)* ("[W]ould a person of reasonable intelligence or of the superior expertise of the defendant charged with such knowledge conclude that defendant should have alerted the consuming public? [In answering this question, it should be remembered that"a manufacturer is held to the standard of an expert in the field"] and should be keep abreast of scientific advances.").

59. *Tincher* at 125.

60. The foreseeability doctrine is an indelible part of Pennsylvania products liability law. Both warranty and tort use foreseeability as part of the duty/breach analysis. Foreseeability is also part of the analysis in evaluating causation. *See, Bugay*, Pennsylvania Products Liability at the Crossroads: *Bugosh, Berrier* and the Restatement (Third) of Torts, Pa B. Q. (Jan. 2010) at 2, 3, 67, 9, 11, 14, 17-18.

61. *Tincher* at 94-98.

62. 882 P.2d 298 (Cal. 1994).

63. *Tincher* refers to a similar theory, one which it identified as the "fireworthiness doctrine." The Tinchers argued that the defendant's product caused their fire because it was not designed with sufficient thickness to withstand a lightning strike. The Pennsylvania Supreme Court rejected the defendant's argument that the plaintiff's claim had previously been rejected by the Court in *Pa. Dep't of Gen. Serves.* v. *U.S. Mineral Prods.Co., 898 A.2d 590 (Pa. 2006)* ("General Services"), stating that General Services is distinguishable on its facts. After *Tincher*, the continued relevance of *General Services* is questionable.

64. Like the plaintiff in the *Cronin* case, discussed above, Ms. Soule's metallurgist expert opined that the metal bracket was excessively porous and this was due to improper welding techniques.

65. *Soule*, 882 P.2d at 309.

With this standard, the California Supreme Court held that the trial court has erred in charging the jury on the consumer expectations standard. However, it found the charge harmless because there was other evidence relevant to the risk/utility analysis.[66] *Tincher* cites *Soule* to describe a practical limit to the consumer expectations test. *Soule* provides examples of the range of cases where consumer expectations may apply in Pennsylvania cases going forward.

CONCLUSION

Tincher silences the debate about which Restatement to apply. It replaces *Azzarello's* threshold analysis with California law as it existed through 1978-1992, pursuant to the *Barker/Soule* combined test for defect. *Tincher* preserves existing law. Parties will continue to debate the admissibility of industry standards, state of the art evidence, and party/non-party negligence. *Tincher* states that counsel for victims, injured by defective products, are "the master of the[ir] claim[s] in the first instance." They must argue against the admissibility of this evidence, and must carefully decide which defect standard to apply. As *Tincher* states:

> [C]ounsel must articulate the plaintiff's strict liability claim by alleging sufficient facts to make a prima facie case premised upon either a "consumer expectations" or "risk-utility" theory, or both. The calculus for a plaintiff . . . in choosing to pursue either theory or both will likely account, among other things, for the nature of the product, for the theoretical limitations of either alternative standard of proof, for whether pursuing both theories simultaneously is likely to confuse the finder of fact and, most importantly, the evidence available or likely to become available for trial.[67]

In some respects, Pennsylvania strict products liability law will be different. Jury instructions will be developed for consumer expectations and risk/utility. California Instructions provide one example.[68] However, *Tincher* shows that these tests are not intended to make a strict liability case harder to prove. Just because the plaintiff is injured by a complex product, does not mean that his case should be harder to prove than someone injured by a simple product where, under consumer expectations, no expert may be needed at trial.

Barker/Soule clearly state that strict liability is intended to protect users and bystanders. Pennsylvania already has a bystander instruction for strict products liability.[69] Section 402A should extend to bystanders. Injured parties should not have to resort to negligence principles for bystanders to be protected by strict products liability law. *Webb* v. *Zern*,[70] which adopted 402A, is a bystander case.

Tincher will unleash a torrent of litigation and legislative activity, ranging from lobbying for a Pennsylvania products liability statute, to intensifying litigation in strict products liability cases. Insurance and manufacturing interests will be working "without and within" the Courts to create a new future for Pennsylvania products liability law. Attorneys representing product victims must direct the path within *Tincher's* framework. Reliance upon products liability doctrine is an important guidepost through this litigation process.

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66. *Id*. at 311. *Soule* also reaffirmed the California Supreme Court's shifting burden approach for risk/utility, which it stated in *Barker, supra*.

67. *Tincher* at 130.

68. *See, e.g*., California Civil Jury Instructions (CACI) 1203-1204:

> Plaintiff claims that the product's design was defective because it did not perform as safely as an ordinary consumer would have expected it to perform. To establish this claim, plaintiff must prove all of the following: (1) defendant manufactured/supplied/sold the product; (2) the product did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way; (3) the plaintiff was harmed; and (4) the product's defective condition (established through this test) was a substantial factor in causing plaintiff's harm. CACI 1203.
>
> Same premise as above for risk/benefit test with the following elements of proof: (1) same; (2) the plaintiff was harmed; (3) the product's design was a substantial factor in causing harm to plaintiff. If plaintiff has proven these three facts, then your decision on this claim must be for the plaintiff unless the defendant proves that the benefits of the product's design outweigh the risks of the design. In deciding whether the benefits outweigh the risks, you should consider the following factors: (a) the gravity of the potential harm resulting from the use of the product; (b) the likelihood that this harm would occur; (c) the feasibility of an alternative safer design at the time of the manufacture/sale of the product; (d) the cost of an alternative design; and (e) the disadvantages of an alternative design. CACI 1204.
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> With regard to factor (e), Pennsylvania has rejected the Restatement (Third). As such, the factors identified in comment (f) to Section 2 should be irrelevant. However, it is anticipated that this will be a contested area in pending and future cases.

69. Pennsylvania Jury Instruction 8.10 defines Liability for harm to bystanders as follows: "The seller is liable for all harm for which his or her defective product is the factual cause, whether such harm be to a user, consumer, or bystander. The seller by placing his or her product into the stream of commerce, is responsible to all who come within the boundaries of its use."

70. 220 A.2d 853 (Pa. 1966).