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Products Liability

Pa. Justices Adopt New Standards for Strict Liability Claims

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Special to the Legal

When the Pennsylvania Supreme Court issued its much-anticipated decision in *Tincher v. Omega Flex*, No. 17 MAP 2013, it addressed the proper standard under Pennsylvania law for strict liability claims relating to allegedly defective products. Although the court declined to adopt the Restatement (Third) of Torts, it overruled its prior holding in *Azzarello v. Black Brothers*, 391 A.2d 1020 (Pa. 1978), which created roadblocks to the introduction by defendants of the reasonableness of their actions in designing products. Before rendering its decision, the court reviewed the history of strict products liability law as it developed in Pennsylvania and how *Azzarello* was impracticable in its application.

Strict liability for defective products developed from the social policy determination that the cost of injuries resulting from defective products should be borne by the manufacturers of the products rather than by the injured persons. For almost 50 years, strict liability under Pennsylvania law



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has been governed by Section 402A of the Second Restatement, which provides that "one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability [for the harm caused]."

The term "unreasonably dangerous" naturally involves a balancing between what is reasonable and what is not, which is similar to the fault-based

notions encompassed by negligence claims. However, in *Azzarello*, the Supreme Court drew a bright line between strict liability and negligence causes of action. The court refused to permit defendants to offer evidence relating to the reasonableness of their actions or to permit juries to evaluate whether a product was unreasonably dangerous. Judges made a preliminary finding of product defect without hearing the evidence at trial. Pennsylvania juries were instructed that a manufacturer is not an insurer of its products, although it is a guarantor of the safety of its products. Unfortunately, juries were given no guidance on the meaning of the terms "insurer" and "guarantor." As a consequence, Pennsylvania developed into a plaintiff-friendly jurisdiction for strict liability claims by eliminating the plaintiff's burden of showing that a product was unreasonably dangerous and by refusing to allow defendants to demonstrate that the utility of its products outweighed the risks of those products.

In *Tincher*, the court overruled the *Azzarello* decision, noting that the strict liability/negligence dichotomy under Pennsylvania law was not mandated by Section 402A of the Second Restatement and had proved to be

unfair and unreasonable over time, particularly in design defect cases. By overruling *Azzarello*, the court recognized that a gap was created in the strict liability law in Pennsylvania. The court noted that “strict liability in tort for product defects is a cause of action which implicates the social and economic policy of this commonwealth.” However, the court noted the long history of seeking guidance from the legislature on strict products liability without result made it unlikely the legislature would act in the near future to consider whether or not to adopt the Third Restatement. In its place, the court adopted an alternative standard for determining whether a product is defective under Section 402A:

“The plaintiff may prove defective condition by showing either that (1) the danger is unknowable and unacceptable to the average or ordinary consumer, or that (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions. The burden of production and persuasion is on plaintiffs by a preponderance of the evidence.”

In reaching this pronouncement of the law of Pennsylvania, the court specifically declined to adopt the requirement set forth in the Third Restatement that would require a plaintiff to demonstrate that foreseeable risks could have been reduced or avoided by use of a reasonable alternative design. The court found that the decision whether or not to adopt the Third Restatement properly belonged to the legislature. The court also reasoned that adopting the Third Restatement could be problematic, in part because it provides exemption from strict liability for certain classes of products. Such limitations

should only come from the General Assembly, reasoned the court.

In a concurring and dissenting opinion, Justices Thomas G. Saylor and J. Michael Eakin indicated that they would have adopted the Third Restatement’s alternative design requirement. The U.S. Court of Appeals had predicted that the state Supreme Court would adopt the Third Restatement. This had created a divergence between the law applied in state courts and federal courts. Now, it should not matter where a case is filed.

Interestingly, the court acknowledged that the proper allocation of risk between injured plaintiffs and manufacturers in the tort system is best determined by the legislature. However, given the legislature’s failure to enact a law establishing the parameters of a strict liability claim, the court felt compelled to act. The court has often asked the legislature to act on various issues it deems to be better suited for social policy decision-making. Whether the Pennsylvania Legislature will take up this invitation to act is unknown.

While the *Timcher* decision clarifies some issues regarding strict liability cases, there are many issues left to be determined by future case law. For example, the court did not adopt or endorse specific strict liability jury instructions. They will have to be developed on a case-by-case basis given the nature of the product and the claims. Nor did the court delineate the nature or type of evidence that will be admissible by plaintiffs and defendants to prove their claims or defenses. The admissibility of evidence relating to industry standards, alternative designs and known risks will have to be determined by trial courts with little guidance from the *Timcher* court. The court

acknowledged that the “risk-utility calculus has been suggested as a normative solution to cabin liability exposure regardless of the type of claim asserted.” The court declined to give more guidance on the risk-utility application, noting that it would await the appropriate case to speak on the issue.

The *Timcher* decision primarily addresses strict liability claims in the context of design defect allegations. Little guidance was provided regarding strict liability claims asserting failure-to-warn or manufacturing defect claims, although the court noted that its decision to overrule *Azzarello* “may have an impact upon other foundational issues regarding manufacturing or warning claims,” including the availability of “negligence-derived defenses.”

Therefore, the strict liability/negligence dichotomy established by *Azzarello* has been overruled and replaced with alternative consumer-expectation or risk-utility tests. How these tests will develop under Pennsylvania law over the coming years will be an incremental process decided by the courts, but likely will be influenced by the creativity of both the plaintiffs and defense bars. Products liability trials over the next year or two will provide the opportunity for trial courts and parties in strict products liability cases to interpret and apply the risk-utility and consumer-expectation tests and will allow some defenses previously precluded under *Azzarello*. •

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