After 'Tincher,' Evidence of Industry Standards Should be Admissible in PI Litigation

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As many personal injury practitioners are no doubt aware, the landmark Pennsylvania Supreme Court decision, *Tincher v. Omega Flex*, 104 A.3d 328 (Pa. 2014) marked a seismic shift in this state's products liability law. *Tincher* overruled the seminal *Azzarello v. Black Bros.*, 391 A.2d 1020 (Pa. 1978) decision, instituted two new standards for proving a product defect—risk-utility and consumer expectations—and cast doubt on four decades of evidentiary rulings stemming from the prior *Azzarello* regime. Despite recognizing the far-reaching impact of its holdings, the *Tincher* court declined to offer guidance on these now-unsettled, "subsidiary issues," instead inviting "targeted advocacy" in appropriate future cases.

One such subsidiary issue is the admissibility of government and industry standards. Should the jury hear that an allegedly defective product complied with the relevant ANSI or UL standards? Or that an automobile met the government-mandated Federal Motor Vehicle Safety Standards? Before *Tincher*, the answer was "no." Because *Azzarello* and its progeny instituted a strict wall of separation between strict liability and negligence concepts, and compliance with government and industry standards was believed to be relevant only to the reasonableness of the manufacturer's conduct, such evidence was held to be inadmissible in a strict liability case. *See Lewis v. Coffing Hoist Division, Duff-Co*, 528 A.2d 590, 594 (Pa. 1987) (industry standards); *Gaudio v. Ford Motor*, 976 A.2d 524 (Pa. Super. 2009) (government standards).

Tincher, though, brought down the unnatural wall separating negligence concepts from strict liability claims, thus calling into question the rationale for the exclusion of evidence of government and industry standards. *See*, e.g., *Webb v. Volvo Cars*, 148 A.3d 473, 482-83 (Pa. Super. 2016). Since *Tincher*, courts have come down on both sides of the issue, some admitting such evidence and some excluding it. One can compare *Cloud v. Electrolux Home Products*, Case No. 2:15-CV-00571, at *1-2 (E.D. Pa. Jan. 26, 2017) where the court decided that evidence of industry standards is relevant and probative, though not dispositive; with

Mercurio v. Louisville Ladder, Case No. 3:16-CV-412, at *7 (M.D. Pa. Apr. 17, 2019) where the court found that evidence of government/industry standards is inadmissible unless the plaintiff first opens the door to the issue. Most recently, the Pennsylvania Superior Court, recognizing the lack of clarity on the issue, found that a trial court did not abuse its discretion in excluding evidence of industry standards, but noted that *Tincher* had indeed cast doubt on the *Lewis/Gaudio* rule and that the Supreme Court may yet expressly permit the admissibility of government/industry standard evidence. *See Sullivan v. Werner*, 253 A.3d 730 (Pa. Super. 2021).

Indeed, evidence of a product's compliance with industry and government standards should be admissible after *Tincher*. As the *Tincher* court explained, the central question in a strict liability action is whether the product is in a "defective condition unreasonably dangerous" to the consumer. The word "unreasonably" is an important one because products liability in Pennsylvania is strict, not absolute. The *Tincher* court also reaffirmed that Pennsylvania remains a "Second Restatement jurisdiction" and Restatement (Second) of Torts Section 402A recognizes that some products cannot be made entirely safe: knives are sharp, butter clogs arteries, gas ranges produce a flame. Such products are not "defective" merely because they can pose a risk of harm. Some risk of harm must be accepted in society; it is only when that risk is no longer "reasonable"—when the product crosses the line and is "unreasonably dangerous"—that liability may be imposed on the manufacturer. Where to set that line between acceptable and unacceptable risk can often be a difficult question. Independent benchmarks set by the government or by industry experts, based on consensus wisdom, experience and research, can help answer that question.

A common counter-argument is that the standards at issue may be lax and that, notwithstanding compliance with the standard, the product may still be defective. But a categorical rule excluding evidence of governmental and industry standards leaps too far in the other direction, effectively making the determination that the entire industry may be populated with defective products without any such evidence or argument being presented to the jury, and when the opposite conclusion may be true. More to the point, the mere possibility that a particular standard may be too lax simply means that evidence of compliance with the standard is not dispositive of the issue of product defect. However, such evidence is still relevant. *See*, e.g., *Kim v. Toyota Motor*, 424 P.3d 290, 300 (Cal. 2018) ("But although counsel may argue that industry standards can and should be more stringent, evidence that all product designers in the industry balance the competing factors in a particular way clearly is relevant to the issue before the jury.")

If we dig deeper into *Tincher* and the two standards of product defect it instituted, we see that evidence of government and industry standards is squarely relevant to both inquiries. In laying out the contours of the risk-utility test, the Supreme Court explained that it "obviously reflects the negligence roots of strict liability" and "offers courts an opportunity to analyze post hoc whether a manufacturer's conduct in manufacturing or designing a product was reasonable." While the focus

of the strict liability cause of action remains the condition of the product itself, there is room after *Tincher* to consider the decision-making process of the manufacturer. (And evidence of compliance with industry or government standards does implicate the condition of the product: it is the product, not the manufacturer, that must meet the applicable standard.)

Further, the specific risk-utility factors laid out by the court include several that are implicated by standards evidence. The most obvious is the second factor, "the safety aspects of the product," as any standard worth discussing would likely be relevant to safety. Further, in the appropriate circumstances, a defendant should be permitted to argue that a plaintiff's proposed alternative design would not comply with a relevant standard or regulation, thus implicating the third *Tincher* factor, the availability of a substitute product. One can readily contemplate other scenarios where standards evidence could also speak to the usefulness of a product and, therefore, be relevant to the fourth *Tincher* factor: the ability of a manufacturer to eliminate the unsafe character of the product without impairing its usefulness.

Similarly, the consumer expectations test offers avenues to introduce evidence of government or industry standards. This test, according to the *Tincher* court, may be said to reflect the "warranty law roots of strict liability in tort" whereby a consumer is entitled to rely on express or implied safety representations made about a product. Indeed, the court noted that among the pieces of evidence relevant to the consumer expectations test are "any express or implied representations by a manufacturer or other seller." If a product manufacturer represents that its product meets a certain standard, reaches a certain benchmark or holds a particular certification, that may be considered a safety promise made about the product. The jury should be entitled to hear what that safety promise is and whether the product lived up to it.

You don't have to take my word for it. Courts in many other jurisdictions that apply a Second Restatement paradigm to their product liability cases readily admit evidence of government and industry standards. The *Tincher* court looked expressly to California law in adopting its two new standards of product defect; California permits not just evidence of industry standards, but of industry custom in strict liability cases. In *Kim v. Toyota Motor*, 424 P.3d 290 (Cal. 2018) the court decided that evidence of industry custom may be admissible to show the appropriate balance of product safety, cost and functionality; and the feasibility of a safer alternative design. The Connecticut Supreme Court likewise found in *Wagner v. Clark Equipment*, 700 A.2d 38 (Conn. 1997) that a product's compliance with safety regulations was relevant and admissible to the issue of design defect. The Supreme Court of Georgia has held likewise. In *Doyle v. Volkswagenwerk Aktiengesellschaft*, 481 S.E. 2d 518 (Ga. 1997), the court decided that "Under the risk-utility test, compliance with federal standards or regulations is a factor for the jury to consider…". So has Illinois in *Moehle v. Chrysler Motors*, 443 N.E. 2d 575 (Ill. 1982) where the court decided that compliance with government safety standards is relevant and admissible; and Nevada, too, in *Robinson v. G.G.C.*, 808 P.2d 522 (Nev. 1991). To the extent some

Pennsylvania courts continue to follow the *Lewis/Gaudio* rule, they represent an outlier on this issue.

From the original institution of the evidentiary rule in Lewis, the courts' primary concern has been that evidence of compliance with industry standards impermissibly injects consideration of a manufacturer's conduct into a strict liability case. As we have seen, though, *Tincher* permits the jury to consider a manufacturer's design decisions, at least within the risk-utility test. More importantly, evidence of government and industry standards is also relevant to the condition of a product generally and to the specific considerations of the consumer expectations and risk-utility tests. Critically, though compliance with standards may not be dispositive of the issue of product defect, it still may be relevant. *Tincher* opened the door to the admissibility of such evidence, and courts should not hesitate to accept that invitation, especially as it applies to personal injury litigation, in future cases.

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