Product Liability Update 2018

Jim Ronca
Ryan Hurd
Anapol Weiss P.C.
Philadelphia
Cherry Hill NJ, & Scottsdale AZ

jronca@anapolschwartz.com
www.anapolschwartz.com

INDUSTRY STANDARDS

Are they Admissible in a Product Liability Case?

Merriam Webster

Standard noun

- something established by authority, custom, or general consent as a model or example **:** ”quite slow by today's *standards” (Industry custom and Practice?)*
- something set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality *(Industry standard?)*

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au·thor·i·ty noun

1. The power or right to give orders, make decisions and enforce obedience.
2. A person or organization having power or control in a particular, typically political or administrative sphere.

Merriam Webster

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Black’s Law Dictionary

General. Written limit, definition or rule that is (1) approved and monitored by an agency (2) as the minimum benchmark acceptable. “Technical specifications contained in a document that lays characteristics of a product such as levels of quality, performance, safety or dimensions. Standards may include a deal exclusively with terminology, symbols, testing and methods, packaging or labeling requirements as they apply to a product”.

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“Product Safety Standards” A set of regulations to the design and production of consumer products to makes sure of the safety of consumer and to not represent any hazard. In the United States, the Consumer Products Safety Commission administers such regulations of consumer product standards.

After *Tincher*, Government and Industry Standards are not Admissible in a Strict Liability Case.

Dunlap v. Federal Signal Corp., 194 A.3d 1067 (Pa. Super 2018)

247 firefighters sued Federal Signal alleging siren was unreasonably dangerous for causing hearing loss. Plaintiff's expert opined that Siren should have a "shroud" to direct sound to the front, reduce sound hitting the firefighters and still meet industry standards for protecting the public.

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Federal Signal filed a summary judgement motion on the issue of whether the shroud would keep the siren reasonably safe for **all users**, not just the firefighters. This argument related to the risk/utility factors and the feasibility of the proposed alternative design. The trial court granted summary judgement on both strict liability and negligence.

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First and foremost, the Superior Court clearly stated that industry standards are ***NOT* admissible**, citing *Webb v, Volvo*.

"Although evidence of government or industry standards had its genesis in the now overruled *Azzarello v.Black Bros. Co.*, … the overruling of *Azzarello* did not provide a sufficient basis to disregard the evidentiary rule espoused in *Lewis v. Coffing Hoist Div*, and *Gaudio v. Ford Motor Co.*,, that a product's compliance with government standards is irrelevant and inadmissible in a strict products liability action. In particular, we found that *Tincher* did not undermine the concern, identified in *Lewis*, that defective design could be widespread in the industry, and hence, evidence that a product comported with industry standards was not proof of non-defectiveness.

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How did the court get there?

First, it was Plaintiff who offered the standard to prove the feasibility of the alternative safer design.

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How did the court get there?

First, it was Plaintiff who offered the standard to prove the feasibility of the alternative safer design.

Second, the standard fit into the risk/utility factors, plaintiff had to prove under *Tincher* :

1. The usefulness and desirability of the product – its utility to the user and the public as a whole.
2. The safety aspects of the product – the likelihood that it will cause injury, and the probable seriousness of the injury.
3. The availability of a substitute product which would meet the same need and not be as unsafe.
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 or the existence of suitable warnings or instructions.
7. The feasibility of spreading the loss by setting the price of the product or carrying liability insurance

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This was a 2-1 decision –
The dissent argued that *Webb* had not established the inadmissibility of industry standards. Further, the majority opinion, while clear that *Lewis* and *Gaudio* were not overruled, were unclear as to whether the standard was inadmissible alone or needed supporting expert testimony.

Ultimately the dissent would have allowed the offer of the standard by the plaintiff to defeat summary judgement.

Webb v. Volvo Cars of N. AM.

"It is possible that government/industry standards evidence could be admissible under both theories, one and not the other, or neither. It is also possible that the admissibility of such evidence will depend upon the circumstances of a case. The *Tincher* Court noted the possibility of shifting the burden of production and persuasion to the defendant under the risk-utility theory. This burden shift, if it becomes law, may provide defendants a basis to advocate for the admissibility of government or industry standards evidence in risk-utility cases."

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Also, comments by both the majority and the dissent raise questions:

The majority was unclear whether the standard was inadmissible because standards are always inadmissible, or inadmissible in this case because there was no expert testimony about the standards.

The dissent said this:

It remains, though, that paramount to strict product liability theory, as *Lewis* and *Gaudio* suggest, is the understanding that liability attaches regardless of the reasonableness of a manufacturer's actions even if the defendant exercised all possible due care. *See* Restatement (Second) of Torts § 402A. Accordingly, to prove a strict products liability claim, a plaintiff need only show that a seller (i.e., a manufacturer or distributor) placed in the market a product in a defective condition. Post-*Tincher* analysis should focus on the product itself rather than the reasonableness of the manufacturing, design, or distribution the product. Therefore, I agree that nothing in *Tincher*, as recognized by *Webb*, necessarily allows factfinders to consider governmental or industry standard evidence as dispositive in strict liability cases

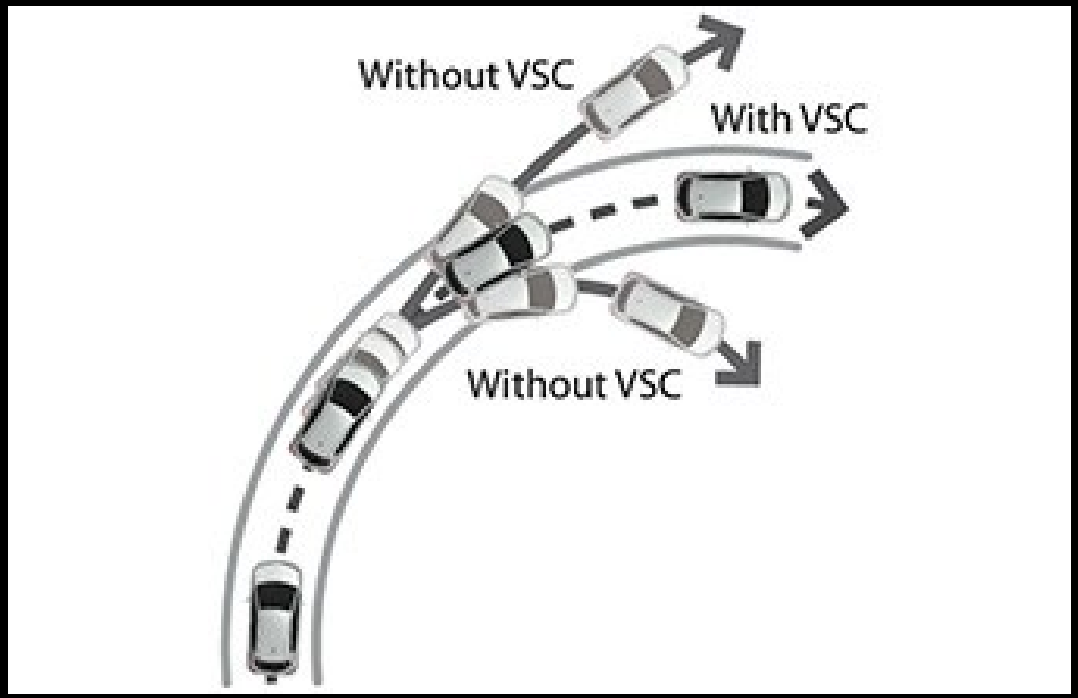
Tincher relied heavily on the California Supreme Court decision in *Barker v. Lull Engineering.*
Where does California law stand on the standards issue?

Barker established that the focus is on product, not conduct.
Two lines of cases developed.

1. Industry custom and practice **not** admissible because not relevant that manufacturer took reasonable precautions. Only issue is whether there is something wrong with product.
2. Industry custom and practice **may** be admissible because they are sometimes relevant to the adequacy of the design. There are tradeoffs in the adoption of a design and jury should know what the industry does to better understand those tradeoffs.

Under California Law as defined by Barker v. Lull Engineering, Industry Custom and Practice may be admissible depending on Circumstances
***Kim v. Toyota Motor Corp.* 6 Cal. 5th 21 (Supreme Court 2018)**

While trying to avoid another vehicle that had come over the centerline, Kim lost control of his 2005 Tundra, went off the road and down a cliff. He was rendered quadriplegic. Kim sued Toyota because is Tundra did not have vehicle stability control (VSC), which was only offered as an option at the time.



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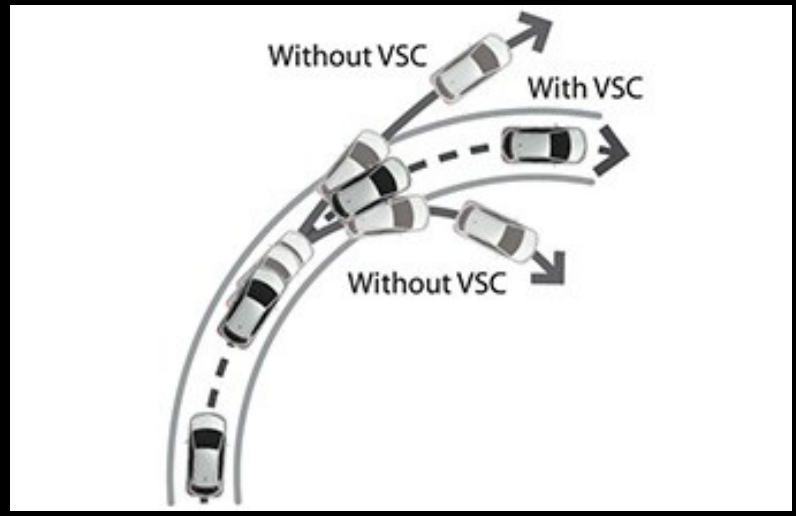

The case took an odd strategic twist. Plaintiff filed motion in limine to prevent admission of industry practice to not make VSC standard. Plaintiff then reversed position, arguing that industry practice should be admissible because it explained why Toyota did not make VSC standard (competition and price) but with a limiting instruction that only offered for that purpose.

At trial, plaintiff proved through Toyota witnesses that SUV's had VSC standard but pickup did not, as Toyota was trying to meet customer need based on price (a tradeoff).

Verdict was no defect.

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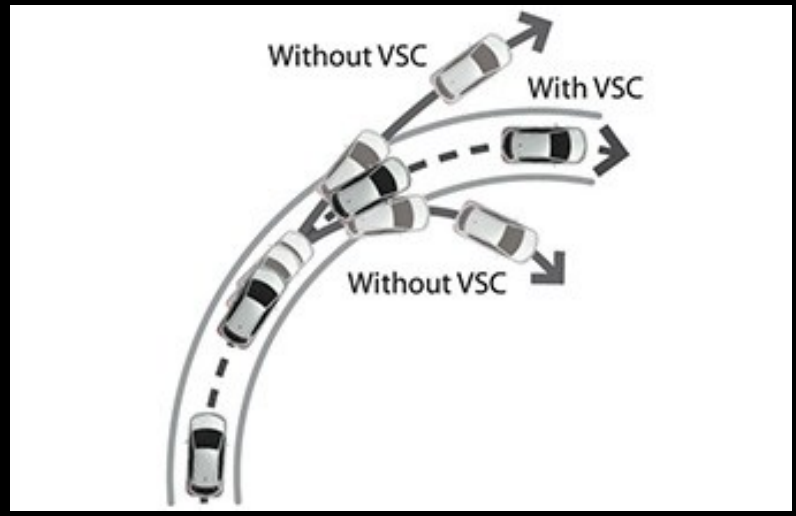

The Court of Appeals staked out a middle ground:
Industry custom and practice **may** be admissible when if reflects "legitimate, independent research and practical experience regarding the appropriate balance of product safety, cost, and functionality."

The evidence may also be relevant to the feasibility of a safer alternative design under the risk benefit factors.

The California Supreme Court took the case on this question:

"Did the trial court commit reversible error in admitting, as relevant to the risk-benefit test for design defect, evidence of industry custom and practice related to the alleged defect?"

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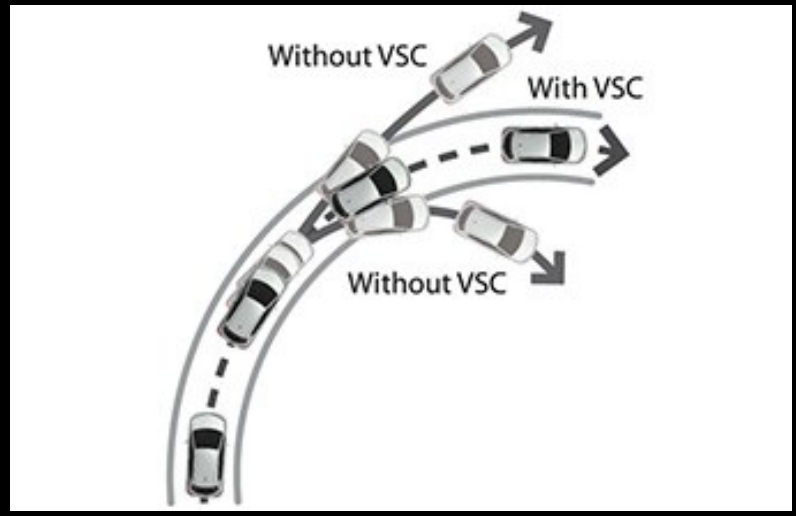

The California Supreme Court ruled the evidence <u>may</u> be admissible, depending on circumstances. In so doing, it commented on the admissibility of "industry wide technical standards", which "shed some light on the appropriate balance of safety risks and benefits."

The Cal. Supreme Court said such evidence "is not dispositive", and the opponent of the evidence could argue that the entire industry "unduly lagged" and that standards "can and should be more stringent", BUT the evidence is clearly relevant.

BUT note, *Barker* places burden on the defendant to demonstrate the benefits of the challenged design outweigh the risks, reversing the normal burden of proof.

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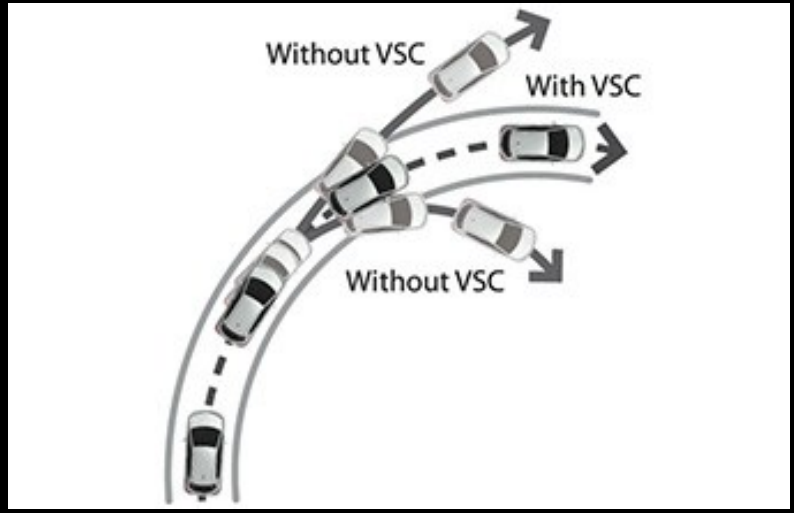

The evidence is neither automatically admissible nor excluded. The inquiry as to admissibility is to follow these steps.

<u>First</u>, The evidence must relate to one of the risk/utility factors in determining whether the product was designed "as safely as it should have been."

The proponent must show that it is reasonable to conclude other manufacturers choices reflects legitimate independent research and practical experience regarding the appropriate balance of safety, costs and functionality.

Even then, the opponent could argue little weight should be given.

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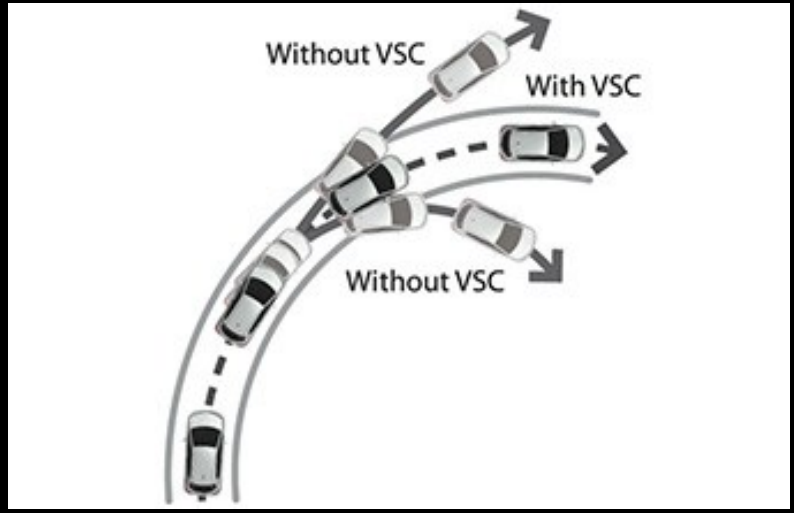


<u>Second</u>, even if this burden is met, the trial court can exclude the evidence if the probative value is substantially outweighed by the probability that the admission will either necessitate undue consumption of time or create substantial danger of undue prejudice, confusing issues or misleading the jury.

<u>Third</u>, if the party opposing the admission requests, the court must instruct the jury on how the evidence is to be considered.

Admissibility of ANSI Standards – Standards Admissible
Mercurio v. Louisville Ladder Inc. **2018 WL 2465181 Middle District PA May 31, 2018**

Plaintiff fell off a ladder. Plaintiff's expert said the ladder was defective because it could move to an unstable 3 point contact position when the person on the ladder was on the 4th step or higher.

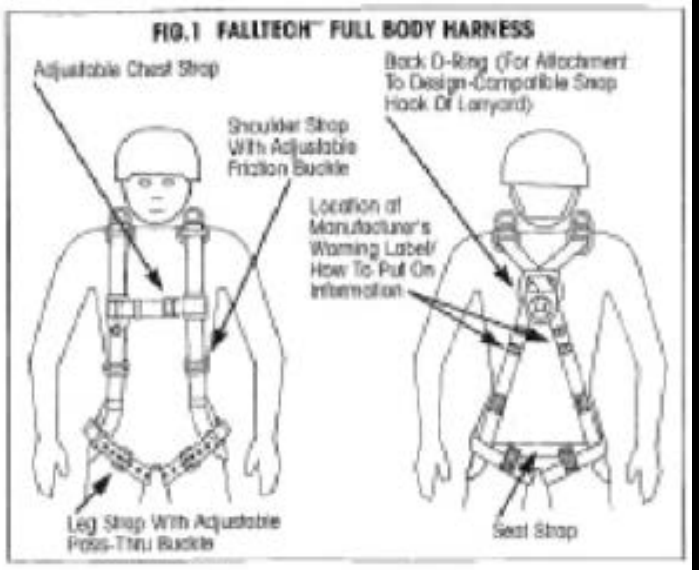
Plaintiff argued *Gaudio* and *Lewis,* and also that admitting standards would mislead the jury.

Court ruled, although *Gaudio* and *Lewis* not specifically overruled by *Tincher*, they were based on *Azzarello* which was. Further, standards were relevant to the risk utility test. So, admissible although not dispositive. The case was decided before *Dunlap v. Federal Signal.*

PLAINTIFFS CONDUCT

Instructions and Warnings a good defense?

Misuse and Highly Reckless Conduct defined for Defense of Strict Liability and Negligence Claims – Standard for Unforeseeable Conduct
***Zimmerman v. Alexander Andrew Inc.*, 189 A.2d 447 (Pa. Super. 2017)**



Plaintiff used a FallTech safety harness while helping cut down a dead tree. Plaintiff did not thoroughly read the instructions although he noted that the harness was rated to support his weight. He testified he was familiar with similar harnesses. He put the harness on backwards so the main support D ring was on his chest. He strapped himself to the tree using the D rings on the sides, not the main D ring. When he tried to change position, he put all weight on the harness, which failed and he fell sustaining serious injuries.

Misuse and Highly Reckless Conduct defined for Defense of Strict Liability and Negligence Claims – Standard for Unforeseeable Conduct
***Zimmerman v. Alexander Andrew Inc.*, 189 A.2d 447 (Pa. Super. 2017)**

Plaintiff claimed design defect and insufficient warnings.

Falltech filed summary judgement motion contending the harness was designed for construction projects, with trained users. Use on a tree without training was unforeseeable and misuse. The trial court granted summary judgement stating that Plaintiff's failure to follow the clear instruction was misuse and unforeseeable.

The Superior Court looked at the standard for misuse:

To establish misuse of the product, **the defendant must show that the use was "unforeseeable or outrageous."** Highly reckless conduct is akin to evidence of misuse and requires the defendant to prove that [the plaintiff would have been injured despite the curing of the alleged product defect, or that] the use was so extraordinary and unforeseeable as to constitute a superseding cause.

Misuse and Highly Reckless Conduct defined for Defense of Strict Liability and Negligence Claims – Standard for Unforeseeable Conduct
***Zimmerman v. Alexander Andrew Inc.*, 189 A.2d 447 (Pa. Super. 2017)**

The Superior Court reversed.

First, "foreseeability" relates to the likelihood of the occurrence of a **general** type of risk, rather than the likelihood of the occurrence of a precise chain of events leading to injury.

> If the [defendant's] has created or increased the risk that a particular harm to the plaintiff will occur and has been a substantial factor in causing that harm, it is immaterial to the [defendant's] liability that the harm is brought about in a manner which no one in his position could possibly have been expected to foresee or anticipate.

Second, Plaintiff produced evidence from an expert that plaintiff used the harness for a reasonable application, its design was defective (side D rings were identical to back D ring), and instructions were not only confusing but applied to several models (for example, did not explain use of side D rings nor explain applications not appropriate for use).

The Superior Court reversed.

Failure to follow Product Instructions and heed Product Warnings results in Summary Judgment for the Defense.
Chandler v. L'Oreal USA Inc., WD PA September 14, 2018, 2018 WL 4385239

"Important – Read & Follow Safety Instructions"

Warnings

Plaintiff bought this hair straightener, but it was not the product she previously used.

She did not read warnings. She read the instructions but violated them in two respects.

1. Did not do a strand test which determines how long to keep product on hair.
2. She did not have help, but did it alone as she had done before with another similar product from the same manufacturer.

Plaintiff's hair fell out and she sued L'Oreal.

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Court said product can be defective if insufficient warnings and instruction.
Negligent failure to warn can also apply under Restatement 388.
There is overlap in the theories as in either plaintiff must prove the inadequacies of the warning.

Judge ruled adequacy of warnings a question of law. "If the product contains a sufficiently clear warning and the purchaser or user disregards that warning and is injured, the manufacturer is not liable as a matter of law.

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Potential errors by plaintiff:

- Plaintiff did not offer alternative warning
- Plaintiff tried to make case on malfunction theory without expert
- No evidence in the opinion that instructions on other product were the same. (in fact, they were exactly the same!)

"Important – Read & Follow Safety Instructions"

Warnings

Is Plaintiff's Conduct Admissible in a Strict Liability Case?

Preclusion of Evidence of Plaintiff's Conduct prior to the Injury caused by Defect.

***Dyvex Industries, Inc. v. Agilex Flavors & Fragrances, Inc.*, 2018 WL 446939 M.D. PA. September 18, 2018.**

Dyvex's plant burned down. Dyvex placed the cause on Agilex fragrance oil Dyvex had placed in its mixing machine because Agilex failed to warn the oil had a 93 degree flashpoint (!). Defendant Agilex blamed the fire on Dyvex because their plant violated OSHA fire regulations and the local fired codes.

Defendant argued the violations were relevant under the risk/utility test especially factor 5, "The user's ability to avoid danger by the exercise of care in using the product."

Is Plaintiff's Conduct Admissible in a Strict Liability Case?

Preclusion of Evidence of Plaintiff's Conduct prior to the Injury caused by Defect.

***Dyvex Industries, Inc. v. Agilex Flavors & Fragrances, Inc.*, 2018 WL 446939 M.D. PA. September 18, 2018.**

1. User's negligence not relevant to excuse defective product
2. User's negligence can be relevant as it relates to causation **but only if the injury is <u>solely</u> the result of the plaintiff's conduct and not connected in any way to the defect. User's negligence is not relevant if the product defect contributed in any way to the harm.**
3. Exceptions that allow user's conduct as a defense: Assumption of risk, misuse or highly reckless conduct. "Highly reckless conduct means plaintiff would have been injured despite curing of the defect.

Is Plaintiff's Conduct Admissible in a Strict Liability Case?

Preclusion of Evidence of Plaintiff's Conduct prior to the Injury caused by Defect.

***Dyvex Industries, Inc. v. Agilex Flavors & Fragrances, Inc.*, 2018 WL 446939 M.D. PA. September 18, 2018.**

The 5th Wade factor makes no difference. The risk utility analysis inquires into the manufacturer's choices **before** the product is brought to market. The post-marketing conduct of a particular user is irrelevant for purposes of determining whether the product itself is defective. The 5th Wade factor relates to the class of ordinary users and whether they could avoid injury through the exercise of care in using the product. The factor is objective and relates to the manufacturer's design choices.

The manufacturer is responsible for making the product safe for all foreseeable uses.

JURY INSTRUCTIONS

Is a manufacturer a guarantor required to supply the product with every element to make it safe?

Jury Instructions: it is error to include "guarantor" and "every element to make it safe"

***Tincher v. Omega Flex Inc.,* 180 A.3d 386 (Pa. Super. 2018) [*Tincher 2*]**

This is the remand of the original case. The judge had charged the jury under the old law and

Jury Instructions: it is error to include "guarantor" and "every element to make it safe"

***Tincher v. Omega Flex Inc.,* 180 A.3d 386 (Pa. Super. 2018) [*Tincher 2*]**

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THE CHARGE

A product is defective when it is not safe for its intended purpose. That is, **it leaves the suppliers' control lacking any element necessary to make it safe for its intended use**. The inquiry is whether or not there is a defect, not whether the defendant['s] conduct was negligent. In strict liability there is no consideration of negligence. It is simply, was the product defective or wasn't it defective.

* * *

Defective design. **The manufacture[r] of a product is really a guarantor of its safety**. When we talk about strict liability, **the product must be provided with every element necessary to make it safe for its intended use** [a].

The imposition of strict liability is not meant to transform manufacturers into insurers of all injuries that are potentially possible at the hands of product. A manufacturer of a product may be a guarantor of the product ['] s safety, but under no circumstances is the manufacturer an insurer of the safety of the product.

Jury Instructions: it is error to include "guarantor" and "every element to make it safe"

***Tincher v. Omega Flex Inc.,* 180 A.3d 386 (Pa. Super. 2018) [*Tincher 2*]**

The Superior Court said that there was "no question" that the jury charge was erroneous.

The trial court's opinion said, "we charged as required by Azzarello". All of *Azzarello* was overruled by *Tincher.* The Superior Court called this fundamental error (*actually not an error at all but consistent with the law at the time, now overruled).*

In addition, the Superior Court noted that the issue of whether a product was unreasonably dangerous was no longer an issue for the court under *Azzarello,* but was an issue for the jury under *Tincher 1.*

Case Review

The Interplay between Negligence and Strict Liability Counts has Strong Influence over Admissibility of Evidence.

Vitale v. Electrolux Home Products, **(Magistrate Judge Memorandum opinion, E.D. Pa. 2018 WL 3868671 (August 14, 2018)**

1. Plaintiff motion in limine to preclude compliance with ANSI standard – Denied primarily on the fact that standard would show reasonableness of Electrolux conduct under the **negligence claim.**
2. **Electrolux motion to preclude evidence of prior claims – partially granted. Court allowed evidence of prior incidents where the theory of the fire is the same, even if model was not. Evidence of prior lawsuits deemed too prejudicial.**
3. **Electrolux motion to exclude evidence that it sold flexible foil venting. Denied because Electrolux claimed comparative negligence by plaintiffs.**

The Interplay between Negligence and Strict Liability Counts has Strong Influence over Admissibility of Evidence.

Vitale v. Electrolux Home Products, **(Magistrate Judge Memorandum opinion, E.D. Pa. 2018 WL 3868671 (August 14, 2018)**

4. Electrolux motion to prohibit evidence of a later adopted design. Denied because it was evidence of the feasibility of a safer alternative design. Although a subsequent remedial measure, evidence was allowed on the issue of feasibility.

5. Plaintiff motion to preclude evidence that the dryer had not been recalled. Granted. Lack of administrative action could be for a lot of reasons. Court left door open if CPSC completes investigation before trial.

END

Have a great day!

Spring is coming!