

UNIVERSITY of PENNSYLVANIA
JOURNAL of LAW & PUBLIC AFFAIRS

Vol. 3

Aug. 2018

No. 2

TINCHER UNMASKED

*Frank J. Vandall**

INTRODUCTION	91
I. A SHORT HISTORY OF PRODUCTS LIABILITY LAW.....	92
II. AZZARELLO AND TINCHER	95
A. <i>Azzarello: Pennsylvania Strict Products Liability Before 2014</i>	95
B. <i>Tincher and Its Holding</i>	96
III. “REBOOTING PENNSYLVANIA PRODUCTS LIABILITY LAW”	99
IV. A CRITIQUE OF THE TEN OLD SHIBBOLETHS PRESENTED IN “REBOOTING”	100
V. HOUSE KEEPING POINTS	104
A. <i>Tasks of the Judge and Jury in a Strict Liability Products Case</i>	104
B. <i>Should the Burden of Proving a Safe Product Be Shifted to the Seller?</i>	104
VII. TINCHER CAPTURES OUTSIDE INTEREST	105
CONCLUSION.....	105

INTRODUCTION

Over 76 years ago, Justice Traynor of the California Supreme Court called for the adoption of strict liability for products liability cases and for the rejection of negligence in such cases. The Supreme Court of Pennsylvania recently agreed in *Tincher v. Omega Flex, Inc.*¹ Strict liability leads to corporate

* Professor of Law, Emory University School of Law. B.A. 1964, Washington and Jefferson College; J.D. 1967 Vanderbilt University School of Law; L.L.M. 1968, S.J.D. 1979, University of Wisconsin Law School.

¹ 104 A.3d 328 (Pa. 2014).

liability and this results in increased payments to victims and slightly lower profits. Corporations responded to strict liability with a firm embrace of the negligence cause of action, which puts both parties on an equal footing. This results in corporations winning more cases. The PLAC (an association of corporations that file amici briefs defending corporations) argued for negligence in *Tincher*.

In this Article, I argue in favor of strict liability and support the Pennsylvania Supreme Court's decision in *Tincher*.

I. A SHORT HISTORY OF PRODUCTS LIABILITY LAW

The Pennsylvania Supreme Court provided critical clarification of strict products liability in *Tincher v. Omega Flex, Inc.* Because the Pennsylvania Supreme Court modified strict products liability in Pennsylvania, it is important to understand the development of this type of cause of action.

Products liability has long-existed in the United States. In 1942 in *Escola v. Coca Cola Bottling Co.*, the Supreme Court of California held that because the plaintiff presented sufficient evidence to satisfy the requirements of *res ipsa loquitur*, an inference of negligence could be drawn.² The Supreme Court of California also reiterated that when a defendant presents evidence to rebut an inference of negligence under *res ipsa loquitur*, a question of fact whether the inference has been dispelled arises.³ However, the importance of *Escola* is Justice Traynor's concurring opinion where he argues that manufacturers should be held to the standard of strict liability.⁴ In his concurrence, Justice Traynor explained that negligence was not working in products liability cases because such cases were costly, circular, and often led to bad results.⁵ "[P]ublic policy demands that responsibility be found wherever it will most effectively reduce the hazards to life and health interest in defective products that reach the market."⁶

In the years following *Escola*, the Supreme Court of California again heard various products liability cases and further developed its jurisprudence. In 1963, the Supreme Court of California was presented with another products liability case.⁷ Writing for the majority, Justice Traynor was able to turn his concurrence in *Escola* into law. The Supreme Court of California in *Greenman*

² 150 P.2d 436, 440 (Cal. 1944).

³ *Id.*

⁴ FRANK J. VANDALL, A HISTORY OF CIVIL LITIGATION 27 (2011).

⁵ *Escola*, 150 P.2d at 441 (Traynor, J., concurring).

⁶ *Id.* at 440 (Traynor, J., concurring).

⁷ *Greenman v. Yuba Power Prods.*, 377 P.2d 897, 900 (Cal. 1963).

concluded that the manufacturer of a produce is strictly liable “when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”⁸

Years later in *Barker v. Lull Engineering Co.*, the Supreme Court of California outlined two tests.⁹ In *Barker*, the defendant company’s high-lift forklift lacked outriggers, which made the forklift more susceptible to turning over.¹⁰ Indeed, the defendant company’s high-lift forklift fell over because of the absence of outriggers and ultimately injured Barker, the operator of the equipment.¹¹ Barker, injured by the defendant company’s high-lift forklift sued the company, alleging that the forklift accident was caused by one or more defects in the forklift loader.¹² Hearing the appeal, the *Barker* majority adopted a strict liability standard, holding that strict liability applied to defective products.¹³

In 1965, the American Law Institute (ALI) adopted a *Greenman*-like statement of strict products liability in the Restatement (Second) of Torts.¹⁴ Specifically, the Restatement (Second) of Torts § 402A provides:

Special Liability of Seller of Product for Physical Harm to User or Consumer.

- (1) 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 physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

⁸ *Id.* at 900.

⁹ 573 P.2d 443 (Cal. 1978). The Supreme Court of California “reiterate[d that] a product may be found defective in design, so as to subject a manufacturer to strict liability for resulting injuries under either of two alternative tests.” *Id.* at 455. “First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.” *Id.* at 455-56. “Second, a product may alternatively be found defective in design if the plaintiff demonstrates that the product’s design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.” *Id.* at 456.

¹⁰ *Id.* at 447.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 446.

¹⁴ Restatement (Second) of Torts § 402A.

- (2) The rule stated in Subsection (1) applies although
 - (a) the user or consumer has not bought the product from or entered into any contractual relation with the seller.¹⁵

Justice Traynor persuasively laid out the reasons for shifting from the negligence standard to the strict liability standard.¹⁶ As provided in his concurring opinion in *Escola*, Justice Traynor wrote:

I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs [strict liability] when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. . . . Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market, it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.

It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly

¹⁵ *Id.*

¹⁶ *Escola*, 150 P.2d 436.

. . . As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trademarks

Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trade mark¹⁷

Writing for the majority in *Greenman*, Justice Traynor took the opportunity to “make clear that the liability [of manufacturers of defective products] is not one governed by the law of contract warranties but by the law of strict liability in tort.”¹⁸ These policies established in California regarding strict products liability form the foundation of the Pennsylvania Supreme Court’s decision in *Tincher*.

II. AZZARELLO¹⁹ AND TINCHER

A. *Azzarello: Pennsylvania Strict Products Liability Before 2014*

The Pennsylvania Supreme Court decided *Azzarello* in 1978. In *Azzarello*, the plaintiff suffered an injury to his hand following an incident involving a coating machine.²⁰ As a result of having his right hand crushed in the rollers of a coating machine, the plaintiff sued the manufacturer of the machine in strict liability and the manufacturer joined the employer as a co-defendant.²¹ The Pennsylvania Supreme Court held that the language from § 402A “unreasonable dangerous” had no place in a strict liability charge to the jury.²² This decision tracked the California case of *Cronin v. J.B.E. Olson, Corp.*, which

¹⁷ *Escola*, 150 P.2d at 440 (Traynor, J., concurring).

¹⁸ *Greenman*, *supra* note 7, at 901.

¹⁹ *Azzarello v. Black Bros, Co.*, 391 A.2d 1020 (Pa. 1978).

²⁰ *Id.* at 1022.

²¹ *Id.*

²² *Id.*

involved a defective bread rack in a delivery truck.²³ In *Cronin*, the Supreme Court of California approved a charge on “defect” and rejected giving a charge containing the phrase “reasonably dangerous.”²⁴ It reasoned that those words sounded of negligence and were inappropriate in a strict liability charge.²⁵

Likewise, the *Azzarello* Court said “unreasonably dangerous” wrongly “signaled to the jury that the consumer has the burden to prove . . . negligence.”²⁶ The Court concluded “in strict liability cases, burdening a plaintiff with proof of negligence is unwarranted; the sellers liability is sufficiently limited” by the necessity of proving that there was a defect in the manufacture or design of the product²⁷

Azzarello divided the tasks for the court and jury in a strict liability case and can be summarized as follows: the court shall determine the applicability of the phrases “defective condition” and “unreasonably dangerous” which are indicators of “whether recovery would be justified.”²⁸ Such determinations are issues of law and policy “entrusted solely . . . to the trial court.”²⁹ In contrast, “the inquiry into whether a plaintiff has proven the factual allegations . . . is a question for the jury.”³⁰

In a stroke of the pen, the *Azzarello* Court went too far thirty-nine years ago when it, without necessity, added “the seller is a ‘guarantor’ of the product.”³¹ The addition of this term is misleading and not needed to implement strict liability in products cases. What followed in Pennsylvania was thirty-five years of high wind and rough waters. The first fifty-nine pages of the *Tincher* decision outline the nature of these numerous legal problems. *Azzarello* would have been clearer and less troublesome for Pennsylvania if it had merely said that the manufacturer of a defective product would be held liable.

B. *Tincher* and Its Holding

Tincher is a simple products liability case. The manufacturer of flexible stainless steel pipe designed to carry natural gas into a house-marketed pipe that was very thin (“the thickness of four sheets of paper”).³² Lightning struck

²³ 501 P.2d 1153 (Cal. 1972).

²⁴ *Id.*

²⁵ *Id.*

²⁶ John Lavelle, Jr., 7 *Takeaways from Pa. High Court’s Tort Revamp*, Law 360 (Jan. 6, 2015), <https://www.law360.com/articles/607722/7-takeaways-from-pa-high-court-s-tort-revamp>.

²⁷ *Tincher*, 104 A.3d at 367 (discussing the Court’s reasoning and analysis in *Azzarello*).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 337.

the pipe at the Tinchers.³³ The house burned and was severely damaged.³⁴ The issue raised was should the pipe manufacturer, Omega Flex, bear the loss caused by the thin pipe.³⁵ The thin pipe was alleged to be defective because it did not meet the gold standard of thick cast iron pipe.³⁶

Following almost forty years of debate about the meaning of strict products liability, the Pennsylvania Supreme Court decided to use *Tincher* to clarify the law by putting negligence theory in products cases to rest.³⁷ First it reversed the lower court that had followed *Azzarello*.³⁸ Second, the Pennsylvania Supreme Court adopted the holding in the California case of *Barker*³⁹, which provides a two-part test for defect. *Tincher* states that proving either test will suffice: “[w]e hold that, in Pennsylvania, the cause of action in strict products liability requires proof in the alternative, either of the ordinary consumers expectations test or the risk-utility test.”⁴⁰

Earlier in the *Tincher* opinion the Pennsylvania Supreme Court defined these two tests. 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.”⁴¹ Quoting comment (i) to the Restatement, the Court said “The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”⁴² A court may consider several factors: “the nature of the product, the identity of the user, the products intended use and intended user, and any express or implied representations by the manufacturer or seller”⁴³

Attention was also given in *Tincher* to defining the risk-utility test. “The test offers a standard which . . . states that: a product is in a defective condition if a ‘reasonable person’ would conclude that the probability and seriousness of harm caused by the product outweighed the burden of the costs of taking precautions.”⁴⁴ The important distinction between strict liability and negligence is manifest in the charge to the jury. In negligence the jury is asked

³³ *Tincher*, 104 A.3d at 335-36.

³⁴ *Id.*

³⁵ *Id.* at 335.

³⁶ *Id.* at 335-36.

³⁷ *Id.* at 335.

³⁸ *Tincher*, 104 A.3d at 335.

³⁹ *Id.* at 368.

⁴⁰ *Id.* at 401.

⁴¹ *Id.* at 335.

⁴² *Id.* at 387.

⁴³ *Tincher*, 104 A.3d at 387.

⁴⁴ *Id.* at 389 (citations omitted).

whether the design team was negligent, did they exercise care. In contrast, in strict liability the jury only looks at the product and weighs whether the product was defective, the care of the design team is irrelevant.⁴⁵ This is often made clear by saying that “care” by the manufacturer is not admitted before a jury in a strict liability products case.⁴⁶ In strict liability, the court is often criticizing the product design program of a large corporation by calling the design defective. Thus the outrage on the part of corporations because they believe they are the experts.⁴⁷

Strict liability beat out negligence in the products arena for the reasons stated earlier by Justice Traynor and because it is cheaper and more efficient.⁴⁸ Under §402A of the Restatement (Second), all sellers of the defective product are strictly liable: the retailer, wholesaler, distributor, importer and the manufacturer.⁴⁹ But, under the old discredited negligence cause of action, separate, costly and time consuming suits must be brought against each entity in the chain of distribution from retailer to manufacturer.⁵⁰ The goal of this long expensive negligence process was to exhaust the funds and resolve of the victim. It usually worked. Because victims often lost suits that they should have won, the A.L.I adopted the Restatement (Second) of Torts § 402A in 1963.⁵¹

The Supreme Court deserves academic support for seeing through the political haze and clearly rejecting the Restatement (Third) of Torts § 2b. The Restatement (Third) of Torts is a corporate white paper advocating max-negligence and rests on a foundation of misrepresentation. It says the view of the majority of courts in 1993 is that a “reasonable alternative design” must be shown.⁵² John Vargo unearthed this fabrication in his 400 page article that reviewed every decided products case, “reasonable alternative design” was only followed by a few cases and was far from being the holding of the majority

⁴⁵ *Id.* at 368 (citations omitted).

⁴⁶ *Id.* at 362-63. Seventy-three years ago, Justice Traynor argued: “[I]t is to the public interest to place the responsibility for injury upon the manufacturer even if he is not negligent in the manufacture of the product, [he] is responsible for it reaching the market.” *Escola*, 150 P.2d at 438-41 (Traynor, J., concurring).

⁴⁷ See LEE PATRICK STROBEL, RECKLESS HOMICIDE: FORD’S PINTO TRIAL 27 (1980).

⁴⁸ See VANDALL, *supra* note 4, at 23-4 (quoting Professor Mitch Polinsky).

⁴⁹ Restatement (Second) of Torts § 402A.

⁵⁰ In Judge Traynor’s concurring decision in *Escola*, he made clear the victim under negligence must sue the immediate seller. *Escola*, 150 P.2d at 442-44 (Traynor, J., concurring). If the immediate seller (dealer) loses, the dealer must sue the distributor. If the seller is bankrupt, the victim recovers nothing. *Id.* at 442. In strict liability, anyone in the product chain can be sued: manufacturer, distributor, importer, or immediate seller. See Restatement (Second) of Torts, 402A.

⁵¹ VANDALL, *supra* note 4, at 30.

⁵² *Id.* at 89.

of cases.⁵³ Further, the approach set forth in the Restatement (Third) of Torts is not one of simple negligence; rather, it is one of maxi-negligence because it demands that a “reasonable alternative design” be shown by the victim in all products cases.⁵⁴ It is designed to hobble the plaintiff, eliminate strict liability, and force her to show more than mere negligence.⁵⁵ As noted by the Court in *Tincher*, all states, with the exception of Iowa, rejected the Restatement (Third) Products Liability § 2(a).⁵⁶ With this background, the *Tincher* Court reversed the Superior Court and awarded a new trial.⁵⁷

III. “REBOOTING PENNSYLVANIA PRODUCTS LIABILITY LAW”

“Rebooting Pennsylvania Products Liability Law”⁵⁸ should be titled “A Retro Look at Pennsylvania Products Liability Law” because it begs to return to laws of pre-1963 in order to assist the injuring corporations as in the old days. “Reboot” is simply a rehash of old law. The author, James Beck strives to reintroduce negligence in order to help injurers, on the basis of the law of 1963. At that time, negligence offered a neutral balancing of interests in the courtroom. This meant the defendant corporation usually won because it had the experts, the knowledge, the foresight, the staying power and the money.⁵⁹ In 1963, underfunded plaintiffs were routinely knocked-out by well-funded defendants. This unacceptable result demanded that the American Law Institute adopt the Restatement (Second) of Torts § 402A in 1964. The foundation of § 402A is that the manufacturer of a defective product is liable to an injured consumer or user.⁶⁰ It is not a neutral balancing of interests between parties when a product is defective as is found in negligence.

⁵³ *Id.* at 98-9. See also *Tincher*, 104 A.3d at 353, n. 6; 355, n. 7; 386.

⁵⁴ VANDALL, *supra* note 4, at 89.

⁵⁵ See *id.* at 90 (Section 2(b) does not advance progress because (1) “it neither relies on nor furthers traditional products liability policies”; (2) “it does not accurately reflect the practice of courts today” and (3) “it does not benefit consumers.” Rather, Section 2(b) “solely benefits sellers.”).

⁵⁶ *Tincher*, 104 A.3d at 349 (citing Frank J. Vandall and Joshua F. Vandall, *A Call for an Accurate Restatement (Third) of Torts: Design Defect*, 33 U. MEMPHIS L. REV. 909 (2003)).

⁵⁷ *Id.* at 335.

⁵⁸ James M. Beck, Esq., “Rebooting Pennsylvania Products Liability Law: *Tincher v. Omega Flex* and the End of *Azzarello* Super Strict Liability, 26 WIDENER L. J. 91 (2017)

⁵⁹ Townsley & Hanks, *The Trial Courts Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 CAL. W.L. REV. 275, 276-77 (1988).

⁶⁰ Restatement (Second) of Torts § 402A.

IV. A CRITIQUE OF THE TEN OLD SHIBBOLETHS PRESENTED IN “REBOOTING”

1. James Beck argues the decision in *Tincher* is a “revolutionary” expansion of product liability [law].⁶¹ Not so. The Restatement (Second) of Torts § 402A (1965) is a foundation of products law. In fact, Justice Traynor in *Escola* foreshadowed it twenty-two years earlier in 1942.⁶² He argued that negligence in product’s cases was a waste of time, money and judicial resources and that strict liability was needed.⁶³ Therefore, strict liability is 75-years-old and hardly revolutionary.
2. Beck argues for a return to contributory negligence in defective products cases.⁶⁴ Contributory negligence has been rejected by numerous courts in products cases because it reintroduces negligence and would lead to bad results.⁶⁵ Contributory negligence may be present, but it is more efficient to put the loss on the seller, because he can take preventative measures.⁶⁶
3. The author of “Rebooting” bemoans the fact that the “reasonable man” concept is no longer present in a products jury charge.⁶⁷ The “reasonable man,” concept was rejected in 1972 in *Cronin*.⁶⁸ *Cronin* involved a defective bread-tray latch. While stopping the truck, the trays flew

⁶¹ Beck, *supra* note 58, at 93.

⁶² *Escola*, 150 P.2d at 440 (Traynor, J., concurring) (internal citations omitted) (“In my opinion it should now be recognized that a manufacturer incur an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.”).

⁶³ See VANDALL, *supra* note 4, at 13 (stating that Justice Traynor’s concurring opinion advocates a position whereby “recovery in products liability cases should rest upon absolute liability.”).

⁶⁴ Beck, *supra* note 58, at 101.

⁶⁵ Pennsylvania rejected contributory negligence in 1975. See *McCown v. Int’l Harvester Co.*, 342 A.2d 381 (Pa. 1975) (“Adoption of contributory negligence . . . would defeat our acceptance of 402A.”). For example, an automobile driver may be speeding (driving at 75 miles per hour in a 70 miles per hour speed zone) when his car flips and the defective roof collapses, breaking the driver’s neck. Yes, the driver was contributorily negligent in speeding, but it makes more sense to hold car manufacturer strictly liable than to throw out the case under contributory negligence. Roofs should not be defectively weak and many people are negligent and travel over the speed limit. Here, strict liability will help make cars safer, reduce healthcare costs, and save lives.

⁶⁶ The Court in *Azzarello* stated that “it is now the consumer who must be protected . . . the risk of loss must be placed upon the supplier of the defective product without regard to fault.” *Azzarello*, 391 A.2d at 1023-24.

⁶⁷ Beck, *supra* note 58, at 112.

⁶⁸ *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153 (Cal. 1972).

forward and hit the driver in the back and propelled him through the windshield.⁶⁹ Defendant argued that the jury must be charged on the “reasonable man” concept, but the California Supreme Court rejected that because it “sounded of negligence.”⁷⁰

4. The financial reality today is that many cars, trucks and machines are leased rather than sold. The lessor is treated as the “seller” under § 402A⁷¹, but Beck argues for financial unreality by suggesting that lessors should not be treated as “sellers,” not be treated as part of the chain of distribution.⁷² This, even though a large lessor can spread the loss as well as a large seller. A huge portion of cars and trucks are leased. The lessor will profit if he is not held liable. Today he is a member of the distributive chain and must be liable as a seller.⁷³ Ignoring financial reality is attractive to Beck because it leaves victims without a monied defendant.

5. A key concept in products law is that the seller should be liable for a defective product because the victim is often innocent.⁷⁴ Pennsylvania has held “it is now the consumer who must be protected. Courts have . . . adopted the position that the risk of loss must be placed upon the supplier of the defective product”⁷⁵ This is because the victim lacks knowledge of the defect and can do nothing to prevent it. For example, people who were burned to death in the crashes of Pinto automobiles could do nothing to prevent them, but Ford knew of the risk the gas tank would explode in a rear-end crash and has since changed the design of their tanks.⁷⁶ Beck argues that, as in yore, the loss should rest on the innocent victim who could do nothing to prevent the rear-end crashes that were a cause in fact of the Pinto fires.⁷⁷

⁶⁹ *Id.* at 1155-56.

⁷⁰ *Id.*

⁷¹ *See Cintrone v. Hertz Truck Leasing*, 212 A.2d 769 (N.J. 1965) (as an example of the dramatic growth of strict liability in products liability law).

⁷² Beck, *supra* note 58, at 104.

⁷³ Strict liability applies to a lessor of trucks because “(1) [t]he risk of harm to the lessee . . . and members of the public is great; (2) the representations of the lessor that the vehicle is fit . . . ; [and] (3) the reliance of the lessee. [T]he inducement offered to the consumer through advertising and solicitation encourages reliance.” *Cintrone*, 212 A.2d at 781.

⁷⁴ *See Escola*, 150 P.2d 436.

⁷⁵ Beck, *supra* note 58, at 105.

⁷⁶ VANDALL, *supra* note 4, at 22, n. 51 (citing LEE PATRICK STROBEL, RECKLESS HOMICIDE: FORD’S PINTO TRIAL 27 (1980)).

⁷⁷ *See Beck*, *supra* note 58, at 105-07.

6. When a product has a defect and causes damage, sometimes “bystanders” are injured. Beck rejects recovery by “bystanders”, however.⁷⁸ In *Elmore v. American Motors Corp.*, the defective drive shaft of a rear-drive car dropped down and pole-vaulted the car into the on-coming lane.⁷⁹ The issue was whether the automobile seller should be liable to the victim. The court held the seller should be liable, because he manufactured the automobile, knew of the defect and could prevent it in the future.⁸⁰
7. One thing corporations do well is to evaluate and take financial risks. This may result in huge profits, but may also result in bankruptcy and this often leaves no one for the victim to sue.⁸¹ The product issue becomes whether the victim should be able to sue the successor corporation, the one that follows the bankruptcy or sale of the corporation. Logic and the law argue that he should be able to sue the successor corporation. Beck cries foul.⁸² The simple answer to this problem is for the new corporation to do due-diligence and research before the purchase of the corporations, to find-out if any products suits are pending or likely to be filed. They should reduce the size of the offer by the amount of the outstanding risk. Again “Reboot” ignores financial reality.
8. Try this next exercise. Read your tire’s sidewall and report the manufacturers preferred inflation level. This is usually obscure and hard to decipher even though getting the tire pressure wrong can cause death from an exploding tire. “Reboot” prefers corporate inaction, even at the risk of death. “The winning claim in *Dambacher*⁸³ was modest – that a warning should have been embossed on the tire.”⁸⁴ Beck fails to explain why embossing a warning on a tire’s sidewall is costly and difficult. The fallacy in his argument is reflected in the fact that sidewall warnings are commonly available today.

⁷⁸ *Id.* at 107.

⁷⁹ 451 P.2d 84 (Cal. 1969).

⁸⁰ *Id.*

⁸¹ Beck, *supra* note 58, at 108.

⁸² *Id.* at 108.

⁸³ *Dambacher v. Mallis*, 485 A.2d 408 (1984) (en banc), *appeal dismissed*, 500 A.2d 428 (1985), *overruled sub silentio on other grounds*, *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1008 (2003) (as to negligence claim).

⁸⁴ Beck, *supra* note 58, at 109.

9. Clearly judges have a different task than juries. However, Beck argues: “Although courts engage in multi-factorial analysis to evaluate ‘unreasonable dangerous defect initially, juries were not allowed to consider these same factors under the *Azzarello* ‘any element’ standard.”⁸⁵ A few more sentences to clarify his point would have helped. He probably meant that the jury should be charged to weigh these factors. But, such a charge would sound in negligence.

10. The reason industry standards are unreliable and not controlling in strict liability cases is because they were written by the defendant corporations or their associations in order to maximize profits and often not to promote safety.⁸⁶ Beck calls for industry standards to nevertheless control in products case.⁸⁷ *Tincher* rejected that argument: [The] Pennsylvania Supreme Court [] held ‘industry standards’ go to the negligence concept of reasonable care, and . . . under our decision in *Azzarello* such a concept has no place in an action based on strict liability in tort.”⁸⁸

In summary, “Reboot” has failed to persuade because the author ignores products liability history, legal progress and economic reality. He claims “*Tincher* represents a sea-change in the products liability field.”⁸⁹ But that is demonstrably wrong. Products theory emerged 75 years ago in *Escola* and was codified by the A.L.I. 53-years-ago in the Restatement (Second) of Torts § 402A. Further, *Tincher* rests on the history of perhaps 5,000 decided products cases.⁹⁰

He is further mistaken in concluding “negligence concepts of reasonableness and foreseeability have returned to the strict liability battlefield.”⁹¹ *Tincher* holds just the opposite. The Pennsylvania Supreme Court followed the approach established by the California Supreme Court and stated that “we

⁸⁵ *Id.* at 111 (citations omitted).

⁸⁶ See VANDALL, *supra* note 4, at 74-5 (citation omitted) (“The effectiveness of manufacturers in influencing administrative agencies to adopt certain safety standards is well-known. Manufacturers thus may prefer to have agencies rather than courts set standards.”).

⁸⁷ Beck, *supra* note 58, at 114-15.

⁸⁸ *Id.* at 113.

⁸⁹ *Id.* at 182.

⁹⁰ In 1992, Professor James Henderson said there were 3,000 cases. I am assuming there are perhaps 2,000 more now. James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, n.1.

⁹¹ Beck, *supra* note 58, at 182.

follow the Restatement (Second) of Torts § 402A and *Barker*.⁹² The injured person is free to choose either the consumer expectation test or the risk-utility test.⁹³ This is the Pennsylvania system of strict products liability largely disconnected from negligence.

V. HOUSE KEEPING POINTS

A. *Tasks of the Judge and Jury in a Strict Liability Products Case*

The task of the court is to determine whether sufficient evidence of defect has been presented by the victim to send the case to the jury. The *Tincher* Court stated: “[C]ounsel must articulate the . . . 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.”⁹⁴

However, the jury may not be left to guess: “[T]he jury may not be left free to find a violation of . . . consumer expectations whenever it chooses. Unless the facts . . . permit an inference that the product . . . did not meet the minimum safety expectations of . . . ordinary users, the jury must follow the second test and engage in the balancing of risks and benefits . . .”⁹⁵ The judge is still the gatekeeper. If the victim fails to show sufficient evidence under the consumer expectation test, then “the jury must be instructed solely on the . . . risk-benefit theory of design announced in *Barker*.”⁹⁶ To be sure the jury is left to decide the factual questions in the case such as the thickness of the Omega-flex pipe, if that is contested.

B. *Should the Burden of Proving a Safe Product Be Shifted to the Seller?*

The second prong of *Barker* held: “once the plaintiff makes a *prima facie* showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective.”⁹⁷ In *Tincher*, the Pennsylvania Supreme Court is troubled by this uncommon burden shift.⁹⁸ The Court, however, refused to decide the burden shift question because it had not been briefed. It said, “shifting the burden of proof onto a defendant places the risks

⁹² *Tincher*, 104 A.3d at 406.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 392.

⁹⁶ *Id.* at 407, n. 29.

⁹⁷ *Barker*, 573 P.2d at 455-56.

⁹⁸ *Tincher*, 104 A.3d at 406.

of an erroneous decision upon the defendant. . . . Pennsylvania does not presume a product to be defective . . . proving a negative is generally not desirable . . . because of fairness concerns.”⁹⁹ Although the above discussion is dicta, the Court here foreshadows that it may reject the *Barker* burden shift.

VII. TINCHER CAPTURES OUTSIDE INTEREST

As I write to evaluate *Tincher*, professional critics have also commented on it. The Products Liability Advisory Council (PLAC) argued for negligence.¹⁰⁰ Winning a suit is a matter of percentages. The negligence action favors manufacturers and strict liability favors victims. The PLAC represents their corporate members by arguing for the negligence cause of action through amici briefs in product cases.

The task of PLAC is not to do research. Instead they are professional Amici.¹⁰¹ Their goal is to get two bites at the apple for defendant corporations. They are a club for corporations and they produce briefs that take the injurers view. Of course this view has already been thoroughly presented by the defendant corporation so PLAC hopes to persuade the court by adding weight: two groups (injurer and PLAC) make the same argument. The *Tincher* Court perceptively saw through this charade and concluded: “The *amici* offer essentially the same legal and policy arguments as those parties in support of whom their briefs were filed.”¹⁰²

CONCLUSION

Tincher did much to clarify Pennsylvania products liability law and thus assist the victim to recover. It adopted a two-part test for design defect that originated in 1963. It rejected the defense of contributory negligence and the maxi-negligence concept of the Restatement 3rd, therefore, a victim need not

⁹⁹ *Id.* at 408-09.

¹⁰⁰ The Pennsylvania Supreme Court noted that the PLAC as amici supported Omega Flex. *Id.* at 394, n. 23. Because Omega Flex supported negligence, it follows that the PLAC also supported negligence and opposed strict liability. *Id.*

¹⁰¹ In *Escola*, Justice Traynor argued that strict liability should rest on the manufacturer because the manufacturer placed the product into the market, advertised the product, and could spread the loss. 150 P.2d at 440-44. Strict liability is easier to show for the victim because she can sue the local seller, the distributor, or the manufacturer. Only a product defect need be shown. In contrast, under negligence, someone must be shown to have failed to have used care and a lawsuit must be brought against the local seller, who may in fact be bankrupt. This is a steep road to victory for the victim. Therefore, I assume there are more victories under strict liability than under negligence.

¹⁰² *Tincher*, 104 A.3d at 386, n. 23.

show a “reasonable alternative design.” The Pennsylvania Supreme Court held in *Tincher* that the court must first determine that there are grounds for holding that the product is defective before sending the question of defect to the jury. Importantly, Pennsylvania’s highest court rejected the PLAC’s argument for negligence and held fast to strict liability and protecting the victim.

Well done, Pennsylvania!