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# *New Design-Defect Jury Instructions: Catching 'Denny'*

The Committee on Pattern Jury Instructions (PJI) has now acknowledged that in *Denny v. Ford* the Court of Appeals held that there is a single cause of action for defective design.[1]

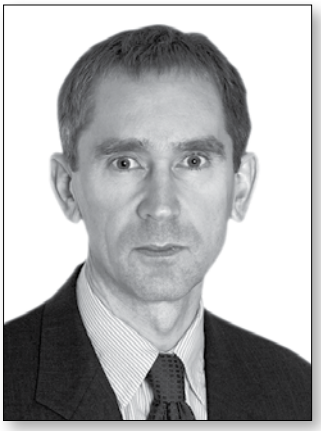
The new products liability instructions in the 2008 printing of the Third Edition of the PJI drop reference to a negligent design claim, and advise PJI users that design defect is covered by the strict liability instruction. The committee's revision of the design defect instructions should help end arguments over whether two distinct design defect claims survive *Denny*.

## Rise and Fall of Strict Liability

*Denny* was a step in a long-running debate about the nature of design defect; its significance is best seen by placing it in its historical context. All tort students learned the basic outlines of the development of strict products liability—the route from Justice Roger J. Traynor's 1944 concurrence in *Escola v. Coca Cola*[2] to the pronouncement in the Second Restatement of Torts that the rule in §402A "is one of strict liability, making the seller subject to liability…even though he has exercised all possible care."

The motivation for strict liability was undisguised: it promised to expand the scope of a manufacturer's liability to those injured by its products. Such expanded liability was good policy, strict liability proponents said, because it would make products safer and spread the cost of injury.

The apogee of the strict liability movement might well have been *Barker v. Lull Engineering*, decided 30 years ago this year.[3] In *Barker*, the California Supreme Court adopted a now-familiar risk-utility balancing test for strict liability design defect claims. But the court was sensitive to the accusation that by introducing factors such as the cost and feasibility of alternative designs, risk-utility balancing was reintroducing features of negligence. The court denied the charge: first, it held



that in risk-utility balancing, the jury is to focus on "the condition of the product itself" and not "the reasonableness of the manufacturer's conduct;" second, the court held that, in "focusing on the product," the jury could decide that the manufacturer is liable "if, upon hindsight, [it] concludes that the product's design is unsafe."

The court's first distinction between strict liability and negligence became a mantra repeated over and again by courts around the country struggling to make sense of strict liability design defect: focus on the product, not on the manufacturer's choices. Thus began the decades-long search for a test of whether a design is defective, divorced from the reasonableness of a manufacturer's choice of that design over alternative designs. We now recognize that the search was forlorn, for there is nothing inherent in a design that makes it defective. Rather, a design is defective only if it is unreasonably dangerous, but this determination almost always requires a comparison with other designs the manufacturer could have adopted.

*Barker's* second distinction had a shorter shelf life, for very few courts, even in California, have allowed a jury to find that a product was defectively designed because of dangers known at the time of trial that were unknowable at the time of manufacture. *Barker's* "hindsight" test was motivated by the fear that, on a negligence theory, a manufacturer could escape liability by being willfully ignorant of the product's dangers. But this fear hardly required the wholesale rejection of negligence, for the reasons described in an article upon which the court itself relied: Dean John Wade's seminal 1973 article, 'On the Nature of Strict Tort Liability for Products' (44 Miss. L.J. (1973)), the source of the risk-utility balancing test. According to Mr. Wade, "the major real difference between negligence and strict liability is the matter of scienter or knowledge of the dangerous condition of the product." But, Mr. Wade pointed out, "negligence has steadily become objective," in other words, by 1973 no one believed that a manufacturer could escape liability under a negligence test by being willfully ignorant of a product's dangers. Rather, on an objective test, the inquiry is into what a manufacturer should have known at the time of manufacture. "Whether this is called negligence or strict liability is not really significant," Mr. Wade concluded, and thus foresaw the time when "we would have a single cause of action" for design defect.[4]

Fast forward then to 1998 and the publication of the Third Restatement of Torts: Products Liability, the obituary of the strict liability design defect movement. Section 2(b) of the Third Restatement states that a product is defectively designed when there was a "reasonable alternative design" that the manufacturer could have adopted that would not have caused the injury, and "the omission of the alternative design renders the product not reasonably safe." The inquiry is "undertaken from the viewpoint of a reasonable person," the approach "also used in administering the traditional reasonableness standard in negligence." Cmt. d to §2. If this were not clear enough, Dean Twerski, one of the Restatement's Reporters, was perfectly straightforward in an important 2006 article: "with the exception of manufacturing defects, products liability is based on fundamental concepts of negligence."[5]

## 'Denny v. Ford'

Michigan was the first state to rebel against the strict liability design defect movement. In a 1985 decision, *Prentis v. Yale Mfg.*,[6] the Michigan Supreme

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Court adopted a risk-utility balancing test for design defect, but held that this inevitably required a negligence standard: "[t]hus we adopt, forthrightly, a pure negligence, risk-utility test in products liability…predicated on design defect."

New York followed suit 10 years later in *Denny*. *Denny* was primarily concerned with the difference between a strict liability design defect claim and a claim for breach of implied warranty; liability on the former claim, the court held, is to be determined by balancing risk against utility, whereas liability on the latter claim is to be determined by consumer expectations. But, the court held, "the reality is that the risk/utility balancing test is a 'negligence-inspired' approach, since it invites the parties to adduce proof about the manufacturer's choices." Strict liability and negligence design defect are thus "functionally synonymous," the court held, borrowing a term from a law review writer.

In retrospect, perhaps the Court of Appeals could have been clearer. Compared with the Michigan Supreme Court's "forthrightness," the court might seem to have been hedging its bets when it said that the risk utility test "brings the inquiry…closer to that used in traditional negligence cases," or when it said the test is "negligence-inspired," when the fact is it is a negligence test, not just something like it. These phrases have made some subsequent courts reluctant to believe that New York has really abandoned a difference between strict liability and negligent design defect. The U.S. Court of Appeals for the Second Circuit, in particular, has had a hard time believing this. Thus, for example, in *Jarvis v. Ford Motor Co.*,[7] the Second Circuit held that the Court of Appeals' statements in *Denny* concerning the "equivalence" of strict liability and negligent design defect were "dicta," and, "[g]iven the unsettled nature of the law," the court refused to conclude that there is a single design defect action.

But when *Denny* is read in its historical context, it seems clear that the court was taking a position in the ongoing debate about whether strict liability design defect could be distinguished from negligence, and that subsequent attempts to maintain a difference between these claims have been ill-conceived. The committee's revisions to the PJI reject any attempt to keep the claims separate.

## The New PJI

Before this year, the PJI products liability instructions began with an instruction titled "Manufacturer's Liability to Remote Consumer for Negligence—General Rule." This instruction (former PJI 2:120) described a manufacturer's duty to exercise reasonable care "in designing or making the [product] or in inspecting and testing it for defects" and instructed the jury that it should find the defendant negligent if it breached one of those duties. Former PJI 2:141 was headed "Strict Liability" and provided specific language to use when the plaintiff alleged strict liability design defect.

The 2008 PJI products liability instructions now start with strict liability, not negligence. The initial instruction (still numbered 2:120) is a revision of former 2:141. Negligence is now treated in 2:125, and all reference to design is dropped from that instruction; the instruction premises liability only on manufacturing, inspecting and testing. The comment to 2:125 refers the reader back to 2:120 for the instruction to use in a design defect case.

*The court said "the risk/utility balancing test is a 'negligence-inspired' approach, since it [has] the parties adduce proof about the manufacturer's choices." Strict liability and negligence design defect are "functionally synonymous."*

The committee has concluded, then, that there is just one claim for design defect under New York law. The committee has decided to call this a strict liability claim, even though the real lesson of *Denny* (and of course the Third Restatement) is that there is no such thing as strict liability for design defect: the claim is fundamentally one for negligence. The committee acknowledges that calling the claim strict liability "is actually a misnomer"; still, because the Court of Appeals in *Denny* insisted on calling the single claim a claim for strict liability, the committee's reluctance to give it its proper name is perhaps understandable.

So the committee has clarified New York products law in a welcome way. But, at the risk of appearing ungrateful, the committee missed the opportunity to clarify matters more, for the new 2:120, like the old 2:141 on which it is based, has a number of problems.

***1. The second paragraph of the new PJI 2:120 states*** that "[a] product is defective if it is not reasonably safe." The paragraph then goes on to define "not reasonably safe" as "so likely to be harmful…that a reasonable person who had actual knowledge of its potential for producing injury would conclude that it should not have been marketed in that condition." But when the instruction comes to define a design defect, the "not reasonably safe" language is dropped in favor of the "reasonable person" test. But now, it is not a reasonable person with actual knowledge, but "a reasonable person who knew or should have known" of the product's dangers. Introducing and then dropping the "not reasonably safe" language and adding the, here gratuitous, phrase "or should have known," is likely to confuse jurors.

***2. The new PJI 2:120 instructs that a design defect exists*** if a reasonable person who knew or should have known of the product's risks "and of the feasible alternative design[s]" would have concluded that the product should not have been marketed in that condition. But why is the crucial notion of an alternative safer design introduced so obliquely? One of the foundations of Anglo-American common law is the concept of the elements of a claim, conditions necessary and sufficient to state a claim. When a claim can be reduced to such elements, those elements should be listed for the jury, and the jury should be told they are potentially dispositive. Here, the jury should be told that it is the plaintiff's burden to show that there was a safer alternative design of the product, and if the plaintiff cannot meet that burden, the jury must find for the defendant.

***3. The notion of "should not have been marketed in that condition"*** is then defined in terms of a balancing, namely "balancing of the risks involved in using the product against (1) the product's usefulness and its costs, and (2) the risks, usefulness and costs of the alternative design[s] as compared to the product the defendant did market." This is problematic on a number of levels. First, there is the reference to the risks, usefulness and costs of "the product." What is really meant is "the product with the design that injured plaintiff," for it is fundamental that the risks and utilities of different designs are being assessed, not of different products. But, even if this problem were corrected, the instruction seems simply to invite jurors to throw all the risk/utility considerations into a pot and see what jumps out. This is a recipe for confusion.

## Conclusion

A better instruction can be given. Jurors should be instructed to undertake a two-step analysis. In the first step, they should determine whether there was a reasonable alternative design that the manufacturer could have used that would not have caused plaintiff's injuries; in determining whether there was such an alternative design, jurors are to determine the risks, usefulness and costs of the proposed alternative design.

If jurors find that there was a reasonable alternative design, they should then go on to determine whether a reasonable manufacturer would have employed that alternative design rather than the design in fact used, taking into account the risks, usefulness and costs of both designs.

1. *Denny v. Ford Motor Co.*, 87 NY2d 248 (N.Y. 1995).
2. *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d 453 (Cal. 1944).
3. *Barker v. Lull Engineering Co.*, 20 Cal.3d 413 (Cal. 1978)
4. Mr. Wade would have this single cause of action combine breach of implied warranty in addition to strict liability and negligence.
5. Aaron D. Twerski, "Chasing the Illusory Pot of Gold at the End of the Rainbow: Negligence and Strict Liability in Design Defect Litigation," 90 Marq. L. Rev. 7 (2006).
6. *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176 (Mich. 1985)
7. *Jarvis v. Ford Motor Co.*, 283 F.3d 33 (2d Cir. 2002). See also *Kosmynka v. Polaris Indus. Inc.*, 462 F.3d 74 (2d Cir. 2006).