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RAMIFICATIONS OF *DENNY v. FORD MOTOR CO.*

*Peter J. Ausili**

I. INTRODUCTION

In *Denny v. Ford Motor Co.*,[1] on certified questions from the United States Court of Appeals for the Second Circuit, the New York Court of Appeals held, in a personal injury products liability action for defective design, that claims for strict liability and breach of implied warranty are not identical, and that jury findings against the defendant manufacturer on a breach of implied warranty claim but in favor of the defendant on a strict products liability claim are theoretically reconcilable.[2] There had been indications in an earlier Court of Appeals' opinion that the claims had become substantively indistinguishable.[3] However, in *Denny*, the court recognized for the first time, that "consumer

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[1] 87 N.Y.2d 248, 662 N.E.2d 730, 639 N.Y.S.2d 250 (1995) (ruling on certified questions from the United States Court of Appeals for the 2nd Circuit).

[2] *Id.*

[3] Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 345, 253 N.E.2d 207, 210, 305 N.Y.S.2d 490, 494 (1969).

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expectations" analysis determines "defect" in a breach of implied warranty claim for personal injury in a products liability action for defective design.[4] By contrast, the court confirmed that risk-utility analysis determines "defect" in a strict products liability claim for defective design.[5] Consumer expectations, the court held, require inquiry only into whether the product was fit for its ordinary purposes, without consideration of feasible alternative designs. Risk-utility analysis, on the other hand, requires a weighing of the product's dangers against its overall advantages, with a consideration of feasible alternative designs.

Although the *Denny* opinion, by recognizing a distinction between the claims, seemingly revitalized the breach of implied warranty claim--and consumer expectations analysis, it indicated that the distinction, "as a practical matter, may have little or no effect in most cases." Nevertheless, an important concern for lawyers (and their clients) is determining when the claims may both be asserted and separately charged to a jury and when, instead, the two claims are sufficiently similar that only one charge to the jury suffices.

First I will discuss the *Denny* case and the seemingly revitalized breach of implied warranty claim--and consumer expectation analysis. Then I will discuss the recent Second Circuit opinion in *Castro v. QVC Network, Inc.*,[6] construing and applying *Denny*. Finally, I will discuss various practical and substantive considerations of asserting or opposing a breach of implied warranty claim.

II. *DENNY V. FORD MOTOR CO.*

A. The *Denny* Case and Majority Opinion

Plaintiff Nancy Denny was injured when her Ford Bronco II, a four-wheel drive small utility vehicle, rolled over when she

[4] *Denny*, 639 N.Y.2d at 259, 662 N.E.2d at 739, 639 N.Y.S.2d at 265.
[5] *Id.* at 260, 662 N.E.2d at 740, 639 N.Y.S.2d at 265.
[6] 139 F.3d 114 (2d Cir. 1998).

slammed on the brakes to avoid a deer in the road.[7] She and her husband sued Ford Motor Co., the vehicle's manufacturer, asserting claims for negligence, strict products liability, and breach of implied warranty of merchantability.[8] The case was tried in October 1992.[9]

The trial evidence focused on the characteristics of "small" utility vehicles—down-sized versions of traditional utility vehicles, which are generally made for off-road use on uneven terrain.[10] Plaintiffs' evidence showed that small utility vehicles, and particularly the Bronco II, have significantly higher risk of rollover accidents than do ordinary passenger vehicles.[11] Specifically, plaintiffs showed that the Bronco II had a low stability index due to its high center of gravity and relatively narrow track width, and that its shorter wheel base and suspension system contributed to its instability.[12]

Ford argued at trial that these design features were necessary to the Bronco II's off-road capabilities.[13] Ford contended that the Bronco II was intended as an off-road vehicle and had not been designed to be sold as a conventional passenger vehicle.[14] Ford's engineer testified that he would not recommend the Bronco II for use as a passenger vehicle, since the features of a four-wheel drive utility vehicle were not helpful for that purpose and the vehicle's design made it inherently less stable.[15]

However, the plaintiffs argued that Ford marketed the Bronco II as particularly suitable for commuting and for suburban and city driving.[16] In support, plaintiffs introduced a Ford marketing manual which provided that a sales presentation should reflect the Bronco II's "suitab[ility] for commuting and for suburban and

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[7] *Denny*, 87 N.Y.2d at 251, 662 N.E.2d at 731, 639 N.Y.S.2d at 251.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 252, 662 N.E.2d at 731-32, 639 N.Y.S.2d at 251-52.
[11] *Id.* at 252, 662 N.E.2d at 732, 639 N.Y.S.2d at 252.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*

city driving," and that the vehicle's ability to switch between two-wheel and four-wheel drive would "be particularly appealing to women who may be concerned about driving in snow and ice with their children."[17] Indeed, the manual predicted that many buyers would be attracted to the Bronco II because utility vehicles were "suitable to contemporary life styles" and were "considered fashionable" in some suburban areas.[18] The plaintiffs testified that they were attracted to the Bronco II for the perceived safety benefits of its four-wheel drive capacity and were not interested in its off-road use.[19]

The district judge, over Ford's objection, submitted both the strict liability and breach of implied warranty claims to the jury.[20] The jury ruled in Ford's favor on the strict liability claim, but in plaintiffs' favor on the breach of implied warranty claim, awarding her $1.2 million.[21] Ford appealed.

On appeal, Ford argued that the jury's verdicts on the strict liability claim and the breach of implied warranty claim were inconsistent because the claims were identical.[22] Moreover, Ford contended that the contractually-based breach of implied warranty claim had been subsumed by the "more recently adopted, and

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[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 253, 662 N.E.2d at 732, 639 N.Y.S.2d at 253.
[21] *Id.* at 254, 662 N.E.2d at 733, 639 N.Y.S.2d at 253. The court also charged the jury on plaintiffs' negligence claim. On the verdict form, the jury found Ford was negligent in "designing, testing and marketing the Bronco II," but found that the negligence did not proximately cause Mrs. Denny's injuries. *Denny*, 42 F.3d at 109-10. However, the jury found that Ford was not negligent in failing to provide adequate warnings. *Id.* at 110. Thus, plaintiffs lost on their negligence claim. Apparently, plaintiffs did not assert a claim for strict liability based on failure to warn. On the strict liability claim based on defective design, the jury found that the Bronco II was not "defective", thereby disposing of that claim. *Id.* However, the jury proceeded to find that Ford had breached its implied warranty and that the breach was the proximate cause of Mrs. Denny's injuries. *Id.* The jury then found that Mrs. Denny was negligent and that her negligence contributed to her injuries by 60%. *Id.* The jury fixed the plaintiffs' compensatory damages at $3,000,000. and declined to award punitive damages. *Id.*
[22] *Denny*, 87 N.Y.2d at 253, 662 N.E.2d at 732, 639 N.Y.S.2d at 252.

more highly evolved," tort-based strict products liability theory.[23] The Second Circuit concluded that there was no controlling precedent in the New York Court of Appeals and certified the following questions to the Court of Appeals:

(1) whether the strict products liability and the breach of implied warranty claims are identical;
(2) whether, if the claims are different, the strict products liability claim is broader than the implied warranty claim and encompasses the latter; and
(3) whether, if the claims are different and a strict liability claim may fail while an implied warranty claim succeeds, the jury's finding of no product defect is reconcilable with its finding of a breach of warranty.[24]

Responding to the certified questions, a six-to-one majority of the Court of Appeals, in an opinion by Judge Titone, held that in a products liability case a strict liability claim is not identical to a breach of implied warranty claim, and that the latter is not necessarily subsumed by the former.[25] The court attributed the distinction in the claims to their "differing etiology and doctrinal underpinnings."[26] Upon tracing the development of these claims, the court concluded that the breach of implied warranty claim originated in contract law and focuses on the purchaser's disappointed expectations, whereas the more recently developed strict products liability claim originated in tort law and focuses on "social policy and risk allocation by means other than those dictated by the market place."[27]

The court held that despite a "high degree of overlap" in the substance of the two claims--often asserted together in an action--the core element of "defect" is "subtly different" in the two claims.[28] According to the court, "defect" for strict products

[23] *Id.*
[24] *Id., see also Denny*, 42 F.3d at 111-12.
[25] *Denny*, 87 N.Y.2d at 263, 662 N.E.2d at 739, 639 N.Y.S.2d at 259.
[26] *Id.* at 259, 662 N.E.2d at 736, 639 N.Y.S.2d at 256.
[27] *Id.*
[28] *Id.* at 256, 662 N.E.2d at 734, 639 N.Y.S.2d at 254-55.

liability for design defect requires a "weighing of the product's dangers against its over-all advantages"--a "negligence-inspired" approach known as risk-utility analysis.[29] By contrast, "the UCC's concept of a 'defective' product requires an inquiry only into whether the product in question was 'fit for the ordinary purposes for which such goods are used.'"[30]

Thus, *Denny* reaffirmed that, under New York law, a strict liability claim for defective design is determined by a risk-utility analysis.[31] Under risk-utility analysis, the product as designed is "not reasonably safe" if, assuming the design defect was known at the time of manufacture, a reasonable person would conclude that the product's utility did not outweigh the risk inherent in marketing a product designed in that manner.[32] A plaintiff establishes a prima facie case by showing that the defendant marketed a product designed so that it was "not reasonably safe" and that the defective design was a substantial factor in causing the plaintiff's injury.[33] The defendant, on the other hand, may

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[29] *Id.* at 258, 662 N.E.2d at 735-36, 639 N.Y.S.2d at 255-56.

[30] *Id.* (quoting N.Y. U.C.C. § 2-314(2)(c)). Under UCC § 2-314, a warranty that goods shall be "merchantable" is implied in a contract for the sale of goods if the seller is a "merchant with respect to goods of that kind." *Id.*

[31] *Denny*, 87 N.Y.2d at 257, 662 N.E.2d at 735, 639 N.Y.S.2d at 255;*see also* Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 450 N.E.2d 204, 463 N.Y.S.2d 398 (1983).

[32] *Denny*, 87 N.Y.2d at 257, 662 N.E.2d at 735, 639 N.Y.S.2d at 255; *see also Voss*, 59 N.Y.2d at 108, 450 N.E.2d at 208, 463 N.Y.S.2d at 402. In a risk-utility analysis, the jury should consider such factors as:

> (1) the product's utility to the public as a whole; (2) its utility to the individual user; (3) the likelihood that the product will cause injury; (4) the availability of a safer design; (5) the possibility of designing and manufacturing the product so that it is safer but remains functional and reasonably priced; (6) the degree of awareness of the product's potential danger that can reasonably be attributed to the injured user; and (7) the manufacturer's ability to spread the cost of any safety-related design changes.

Denny, 87 N.Y.2d at 257, 662 N.E.2d at 735, 639 N.Y.S.2d at 255 (citing *Voss*, 59 N.Y.2d at 109, 450 N.E.2d at 208-09, 463 N.Y.S.2d at 402-03).

[33] *Voss*, 59 N.Y.2d at 107, 450 N.E.2d at 208, 463 N.Y.S.2d at 402.

present evidence demonstrating that the product is a safe one, i.e., "one whose utility outweighs its risks when the product has been designed so that the risks are reduced to the greatest extent possible while retaining the product's inherent usefulness at an acceptable cost."[34]

But, *Denny* establishes, on the other hand, that a breach of implied warranty claim is determined under "consumer expectations" analysis.[35] A plaintiff establishes a prima facie case by showing that the product was not reasonably fit, and that the product was a substantial factor in causing the plaintiff's injury.[36]

Unfortunately, the *Denny* majority did little to define the parameters of the consumer expectations analysis. The court did explain, however, that the test "focuses on the *expectations for the performance of the product* when used in the customary, usual and reasonably foreseeable manners."[37] Such a claim, the *Denny* court further explained, is one involving true "strict" liability, since recovery may be had upon a showing that the product was not minimally safe for its expected purpose--without regard to the

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[34] *Id.* The *Denny* court explained that risk-utility analysis has become "functionally synonymous" to traditional negligence analysis:

> The adoption of this risk/utility balance as a component of the 'defectiveness' element has brought the inquiry in design defect cases closer to that used in traditional negligence cases, where the reasonableness of an actor's conduct is considered in light of a number of situational and policy-driven factors. While efforts have been made to steer away from the fault-oriented negligence principles by characterizing the design defect cause of action in terms of a product-based rather than a conduct-based analysis, 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 and ultimately requires the fact finder to make 'a judgment about [the manufacturer's] judgment.'

Denny, 87 N.Y.2d at 257-58, 662 N.E.2d at 735, 639 N.Y.S.2d at 255 (citations omitted).

[35] *See Denny*, 87 N.Y.2d at 258, 662 N.E.2d at 736, 639 N.Y.S.2d at 256.

[36] *Id. See also* Finkelstein v. Chevron Chem. Co., 60 A.D.2d 640, 641, 400 N.Y.S.2d 548, 549 (2d Dep't 1977).

[37] *Denny*, 87 N.Y.2d at 258-59, 662 N.E.2d at 736, 639 N.Y.S.2d at 256.

feasibility of alternative designs or the manufacturer's "reasonableness" in marketing it in that unsafe condition.[38]

Thus, in theory, the focus in a breach of warranty claim is not the designer's conduct (as in a negligence claim) nor whether there were safer designs available (an inquiry integral to a strict products liability claim), but whether the product was "fit" for its ordinary purposes.

Importantly, the *Denny* court noted that the theoretical distinction between the claims "may have little or no effect in most cases."[39] The facts in *Denny*, however, supported submission of both claims to the jury and the opposing verdicts on the breach of implied warranty and strict liability claims. As the court explained, under the strict liability claim, the fact finder was required to determine whether the Bronco II's value as an off-road vehicle outweighed the risk of rollover accidents during other driving uses. In this respect, Ford argued that the design features (i.e., high center of gravity, relatively narrow track width, short wheel base, and special suspension system) were necessary to effective off-road travel; Ford's proof was relevant to the strict products liability risk/utility analysis. On the other hand, the plaintiffs' proof focused on Ford's marketing and sale of the Bronco II for "suburban and city driving," and on the Bronco II's design characteristics that made it unusually susceptible to rollover when used on paved roads. The court viewed plaintiffs' evidence as sufficient to show that the "ordinary purpose" for which the Bronco II was sold was "routine highway and street driving" and that it was not "fit" or "safe" for that purpose.[40] The court was persuaded that the "nature of the proof and the way in which the fact issues were litigated" demonstrated "how the two causes of action can diverge."[41] Thus, the evidence was sufficient for the jury to conclude both that the Bronco II's "utility as an off-road vehicle outweighed the risk of injury resulting from rollover accidents

[38] *Id.*
[39] *Id.* at 262, 662 N.E.2d at 738, 639 N.Y.S.2d at 258.
[40] *Id.* at 263, 662 N.E.2d at 738, 639 N.Y.S.2d at 258.
[41] *Id.*

and that the vehicle was not safe for the 'ordinary purpose' of daily driving for which it was marketed and sold."[42] The court explained:

> [W]hat makes this case distinctive is that the 'ordinary purpose' for which the product was marketed and sold to the plaintiff was not the same as the utility against which the risk was to be weighed. It is these unusual circumstances that give practical significance to the ordinarily theoretical difference between the defect concepts in tort and statutory breach of implied warranty causes of action.[43]

B. The *Denny* Dissent

The decision has not been without criticism.[44] Foremost is Judge Simons' vigorous dissent. Judge Simons concluded that a strict products liability claim for defective design is substantively broader than and encompassed a breach of implied warranty claim.[45] He reasoned that, despite the claims' differing historical origins, in a personal injury action "[b]oth causes of action are torts and defectiveness for both should be determined by the same standard," namely a risk-utility analysis.[46] Moreover, in his view, a consumer expectations analysis is appropriate to commercial sales transactions, but "has no place in personal injury litigation alleging a design defect and may result in

[42] *Id.*

[43] *Id.* at 263, 662 N.E.2d at 738-39, 639 N.Y.S.2d at 258-59.

[44] *See, e.g.*, Victor E. Schwartz & Mark A Behrens, *An Unhappy Return to Confusion in the Common Law of Products Liability—Denny v. Ford Motor Company Should Be Overturned*, 17 PACE L. REV. 359 (1997) (arguing that the *Denny* opinion misunderstands the application of implied warranty claim to personal injury action alleging design defect, imposes "absolute liability under a hazy, undefined implied warranty theory," and is "out of step" with public policy approaches of other jurisdictions).

[45] *Denny*, 87 N.Y.2d at 264, 662 N.E.2d at 739, 639 N.Y.S.2d at 259 (Simons, J., dissenting).

[46] *Id.* at 264-65, 662 N.E.2d at 739-40, 639 N.Y.S.2d at 259-60 (Simons, J., dissenting).

imposing absolute liability on marketers of consumers' products."[47] He viewed consumer expectations as valuable only as a factor in determining the reasonableness of alternative designs or the public's perception of the product.[48] Judge Simons would have held that the jury's finding of "defect" for the strict liability claim was not reconcilable with its finding of "defect" for the breach of implied warranty claim.

III. CONSUMER EXPECTATIONS ANALYSIS

A majority of courts and scholars agree with Judge Simons' conclusion that a consumer expectations analysis is not appropriate for products liability claims based on defective design, at least as an exclusive test independent of risk-utility analysis.[49] Indeed, the recently adopted Restatement Third rejects consumer expectations as an "independent standard for judging defectiveness of product designs."[50] Instead, it recognizes that "the nature and strength of consumer expectations

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[47] *Id.* at 264, 662 N.E.2d at 739, 639 N.Y.S.2d at 259 (Simons, J., dissenting).

[48] *Id.* at 264-65, 662 N.E.2d at 739-40, 639 N.Y.S.2d at 259-60 (Simons, J., dissenting).

[49] *See* Restatement (Third) of Torts: Products Liability § 2, cmts. f, g. & reporters' note to cmt. d, II, III (1998) (hereinafter "Restatement Third"); *see also* James A. Henderson & Aaron D. Twerski, *Achieving Consensus on Defective Products Design*, 83 CORNELL L. REV. 867, 879-87 (1998) (hereinafter "Henderson & Twerski, Achieving Consensus") (discussing and concluding that in design defect cases, consumer expectations analysis is an "inappropriate" standard and risk-utility analysis is the "only sensible" standard); Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 611-18 (1980) (criticizing use of a consumer expectations test, either alone or in conjunction with risk-utility analysis). *See also* Castro v. QVC Network, Inc., 139 F.3d 114, 116-17 (2d Cir. 1998) (collecting cases indicating that certain states define design defect only by risk-utility analysis, others only by consumer expectations analysis, others by a "modified" consumer expectations test that incorporates risk-utility factors into consumer expectations analysis, and still others by both risk-utility and consumer expectations analysis).

[50] Restatement Third § 2, cmt. g.

regarding the product, including expectations arising from product portrayal and marketing" is a factor in determining whether an alternative design is reasonable.[51] As the reporters' note to the Restatement Third explains:

> [C]onsumer expectations about product performance and the dangers attendant to product use affect how risks are perceived and relate to foreseeability and frequency of the risks of harm, both of which are relevant under Subsection (b) [i.e., strict liability claim for defective design]. Such expectations are often influenced by how products are portrayed and marketed and can have a significant impact on consumer behavior. Thus, although consumer expectations do not constitute an independent standard for judging the defectiveness of product designs, they may substantially influence or even be ultimately determinative on risk-utility balancing in judging whether the omission of a proposed alternative design renders the product not reasonably safe.[52]

Nevertheless, in New York, consumer expectations analysis is recognized as an independent test for breach of implied warranty. Although *Denny* seemingly revitalized the claim and the consumer expectations analysis, the majority opinion provided little guidance for applying the consumer expectations analysis to the facts of a case. Indeed, Judge Simons faulted the majority for "not attempt[ing] to define the consumer expectation standard" which he concluded is "unworkable" in design defect cases.[53] For instance, the majority did not specify whether subjective,

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[51] *Id.* § 2, cmt. f. *See also* Henderson & Twerski, *Achieving Consensus*, 83 CORNELL L. REV. at 879-82 (concluding that consumer expectations fail as a standard for defective design independent from risk-utility analysis).

[52] Restatement Third § 2, cmt. g (citation omitted).

[53] *Denny*, 87 N.Y.2d at 264, 662 N.E.2d at 739, 639 N.Y.S.2d at 259 (Simons, J., dissenting).

objective, or a combination subjective/objective expectations are the appropriate measure.[54]

The majority did, however, offer significant clarification of the scope of the implied warranty of merchantability in footnote 4 of the opinion: "A warranty of fitness for ordinary purposes 'does not mean that the product will fulfill [a] buyer's every expectation.' Rather, it has been observed, such a warranty 'provides for a minimal level of quality.'"[55]

A review of the *Skelton* case, cited by the majority in *Denny*, was not a personal injury action for defective design and offers only slightly more guidance in understanding the scope of the implied warranty of merchantability in a design defect case for personal injury. In *Skelton*, car purchasers sought relief under the Magnuson-Moss Warranty Federal Trade Commission Improvement Act for defendant's alleged undisclosed substitution of automobile transmissions. The plaintiffs alleged, *inter alia*, that the substituted transmissions were "more expensive to maintain" and "less desirable to the purchasing public than [the original transmissions]."[56] In dismissing an implied warranty of merchantability claim, the court initially observed that the warranty "does not impose a general requirement that goods precisely fulfill the expectations of the buyer. Instead, it provides for a minimum level of quality."[57] As applied to automobiles, the court quoted an Illinois appellate court's observation in a case where a transmission fell out of a car on one occasion and the

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[54] *Cf.* Solow v. Wellner, 205 A.D.2d 339, 613 N.Y.S.2d 163 (1st Dep't 1994) (applying reasonable objective consumer expectations to implied warranty of habitability claim, noting that both the common law and statutory remedies for the implied warranty of habitability were not intended to correspond to "subjective contractual expectations analogous to the warranty of fitness for a particular purpose in sales cases (UCC 2-315), but to objective expectations akin to the warranty of merchantability (UCC 2-314)"), *aff'd*, 86 N.Y.2d 582, 658 N.E.2d 1005, 635 N.Y.S.2d 132 (1995).

[55] *Denny*, 87 N.Y.2d at 259, 662 N.E.2d at 736, N.Y.S.2d at 256 n.4 (citing and quoting 1 White & Summers, Uniform Commercial Code § 9-8, at 476 (Practitioner's 3d ed.); Skelton v. General Motors Corp., 500 F. Supp. 1181, 1191 (N.D. Ill. 1980), *rev'd on other grounds*, 660 F.2d 311 (7th Cir. 1981)).

[56] *Skelton*, 500 F. Supp. at 1192.

[57] *Id.* at 1191-92.

brakes failed on another: "Fitness for the ordinary purpose of driving implies that the vehicle should be in a safe condition and substantially free of defects. It should be obvious that any car without an adequate transmission and proper brakes is not fit for the ordinary purpose of driving."[58] By comparison, the court found the plaintiffs' allegations of substituted transmissions were insufficient to constitute breach of implied warranty, "since they do not suggest that the cars were unfit for driving or below a minimally acceptable standard of quality."[59]

Denny and *Castro* indicate, however, that significant considerations in determining consumer expectations are how the product was portrayed and marketed. Other potential indications of reasonable consumer expectations, and sources for determining whether a product is "merchantable," i.e., minimally safe, include government standards and regulations and the

[58] *Id.* (quoting Overland Bond & Investment Corp. v. Howard, 9 Ill.App.3d 348, 292 N.E.2d 168, 172-73 (1st Dist. 1972)).

[59] *Id.* at 1191-92. *See also* McDermott v. Sturm, Ruger & Co., No. 94-5405 (E.D.N.Y. Aug. 17, 1998) (dismissing breach of implied warranty claim for defective design in action by victims of Long Island Railroad massacre against manufacturers of gun, magazine, and bullets used by shooter because allegations insufficient to demonstrate that products were not reasonably fit for their ordinary purposes). Before *Denny*, lower New York courts recognized the applicability of the consumer expectation test to a breach of implied warranty of merchantability claim for personal injury involving certain products, such as food impurity cases. *See, e.g.*, Langiulli v. Bumble Bee Seafood, Inc., 159 Misc. 2d 450, 604 N.Y.S.2d 1020, 1021 (Sup. Ct. Westchester County 1993) (adopting "reasonable expectation" standard to implied warranty of merchantability claim rather than "foreign/natural" test in action by consumer who broke tooth when he bit tuna bone in can of tuna; in denying motion to dismiss claim, holding that liability for a breach of warranty is established "where the consumer is injured by conditions which he could not have reasonably anticipated to be present in the product purchased.'"); *cf.* Stark v. Chock Full O'Nuts, 77 Misc.2d 553,554, 356 N.Y.S.2d 403, 404 (N.Y. App. Term 1974) (adopting "reasonable expectation" test for breach of implied warranty of fitness under N.Y. U.C.C. § 2-315). Such cases, however, are akin to manufacturing defect cases. *Cf.* Restatement Third § 7 (adopting reasonable consumer expectations to determine manufacturing defect in commercially distributed food).

characteristics of goods of the same class manufactured by one other than the defendant.[60]

IV. THE "DUAL PURPOSE" REQUIREMENT: *CASTRO V. QVC NETWORK, INC.*

Thus, after *Denny*, it remains that under New York law a products liability action may be based on one or more of four theories: negligence, breach of express warranty, breach of implied warranty, or strict liability.[61] *Denny* demonstrates that a fact finder could, under appropriate circumstances, conclude that a design defect is not actionable in tort, because the product's utility outweighs the risk of injury, but is actionable in contract, because the product was not "fit" or "safe" for the "ordinary purpose" for which it was marketed and sold. Determining when the distinction has a practical "effect" in a case is an important question for lawyers (and clients). In other words, counsel must be able to establish and argue the existence (or absence) of circumstances demonstrating that the two causes of action are to be treated as separate, thereby allowing (or precluding) presentation of both to the fact finder. A recent Second Circuit opinion (in a case where the distinction had an effect) provides some guidance.[62]

In *Castro*, the plaintiffs, Loyda Castro and her husband, brought a diversity action in federal court against the manufacturer and seller of an allegedly defective roasting pan that injured Mrs. Castro, asserting claims for strict liability and breach of implied warranty of merchantability.[63] Trial was held

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[60] *Id. See also* McDermott v. Sturm, Ruger & Co., No. 94-5405 (E.D.N.Y. Aug. 17, 1998) (dismissing breach of implied warranty claim for defective design in action by victims of Long Island Railroad massacre against manufacturers of gun, magazine, and bullets used by shooter because allegations insufficient to demonstrate that products were not reasonably fit for their ordinary purposes).

[61] *See* Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 450 N.E.2d 204, 463 N.Y.S.2d 398 (1983).

[62] *See* Castro v. QVC Network, Inc., 139 F.3d 114 (2d Cir. 1998).

[63] *Id.* at 115.

in September 1995, three months before the New York Court of Appeals' opinion in *Denny*.

In early November 1993, defendant QVC Network, Inc. ("QVC"), operator of a cable television home-shopping channel, advertised the "T-Fal Jumbo Resistal Roaster".[64] The advertisement was put on in a one-day Thanksgiving promotion with the pan's manufacturer, defendant U.S.A. T-Fal Corp. ("T-Fal").[65] When QVC and T-Fal agreed to the Thanksgiving promotion, T-Fal did not produce a pan large enough to roast a turkey.[66] T-Fal, therefore, asked its parent company, located in France, to provide a suitable roasting pan.[67] The parent company provided a "roasting" pan by adding two small handles to a pan originally designed without handles and for other purposes, and T-Fal shipped the roasting pan to QVC for the Thanksgiving promotion.[68]

Mrs. Castro bought the roasting pan from QVC and used it to cook a 20-lb. turkey on Thanksgiving Day in 1993.[69] She was injured as she removed the turkey and roasting pan from the oven.[70] She testified that she took the pan out of the oven using insulated mittens by gripping the pan's handles using the first two fingers on each hand which was the maximum grip allowed by the small handles.[71] "As the turkey tipped toward her, she lost control of the pan, spilling hot drippings and fat" on her foot and ankle, causing serious burns.[72]

At trial, the district court rejected the plaintiffs' request to charge the jury separately on strict liability and breach of implied warranty, finding the two claims identical under the circumstances.[73] The district court, therefore, instructed the jury

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[64] *Id.*
[65] *Id.*
[66] *Id.* at 115 n.1.
[67] *Id* at 115.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 115-16.
[73] *Id.* at 116.

only on the strict liability claim.[74] The jury found for the defendants.[75]

Plaintiffs motion for a new trial was pending when the Court of Appeals decided *Denny*.[76] The district court concluded that the breach of implied warranty and strict products liability claims were identical under the circumstances and denied the motion.[77] The plaintiffs appealed.

On appeal, the Second Circuit, in an opinion by Judge Calabresi, held that under New York law the jury should have been instructed separately on each claim.[78] Accordingly, the Second Circuit reversed the order denying a new trial and remanded for a new trial on the breach of implied warranty claim.[79]

The Second Circuit determined that the case presented "precisely the situation" that *Denny* held sufficient to warrant separate charges on strict liability and breach of implied warranty claims.[80] That is, a situation where "the 'ordinary purpose' for which the product was marketed and sold to the plaintiff was not the same as the utility against which the risk was to be weighed."[81] The Second Circuit interpreted *Denny* as establishing a "dual purpose" requirement, which determines when the two claims "might meld and when, instead, they are to be treated as separate," i.e., when a jury must be charged on both strict liability and breach of implied warranty.[82] Where a "dual purpose" exists, the Second Circuit explained, "a product's overall benefits might outweigh its overall risks [but that] does not preclude the possibility that consumers may have been misled

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[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 115, 119.

[79] *Id* at 119-20. The breach of implied warranty claim is expected to be tried later this year.

[80] *Id.* at 119.

[81] Denny v. Ford Motor Company, 87 N.Y.2d 248, 259, 662 N.E.2d 730, 736, 639 N.Y.S.2d 250, 256 (1995).

[82] Castro v. QVC Network, Inc., 139 F.3d 114, 118 (2d Cir. 1998).

into using the product in a context in which it was dangerously unsafe."[83]

In the Second Circuit's view, the jury could have reached a verdict for the plaintiffs on the breach of implied warranty claim, notwithstanding the contrary verdict on the strict liability claim, because the purpose for which the pan was sold to Mrs. Castro (i.e., cooking heavy food) was different from the purpose considered in the risk-utility analysis (i.e., cooking "low-volume" food). The court considered the evidence sufficient for a jury to find that, although the pan was originally manufactured and sold in France as a multiple-use product for low-volume cooking, it was marketed and sold to Mrs. Castro as suitable for cooking a 25-lb turkey. Specifically, the plaintiffs introduced at trial a "videotape of a QVC representative demonstrating to a television audience that the pan," while suitable for "low-volume" foods (such as casseroles, cutlets, and cookies), was also suitable for cooking a 25-lb. Turkey."[84] T-Fal added handles to the pan in order to fill QVC's request for a roasting pan that it could use in its Thanksgiving promotion."[85] Thus, on the strict liability claim, the risk-utility analysis entailed weighing the pan's utility as a low-volume cooking pan against the risk of injury when cooking heavy food, such as a 20-lb. turkey. While the jury apparently found that the "roasting pan's overall utility for cooking low-volume foods outweighed the risk of injury when cooking heavier foods," it could have found that the product was "unsafe for the purpose for which it was marketed and sold--roasting a twenty-five pound turkey--and, as such, was defective under the consumer expectations test."[86] Under these circumstances, the plaintiffs were entitled to a separate charge on the breach of implied warranty claim.[87]

[83] *Id.*
[84] *Id.* at 119
[85] *Id.*
[86] *Id.*
[87] *Id.*

V. ESTABLISHING DUAL PURPOSE

Denny and *Castro* involved defendants that marketed and sold their products to be used in a manner or for a purpose other than that for which the products were designed. The "dual purpose" requirement was satisfied, giving practical distinction to the breach of implied warranty and strict liability claims, and supporting submission of both claims to a jury. Although *Denny* seemingly revitalized the breach of implied warranty claim, the theoretical distinction appears rarely to have had practical effect in cases, either because the circumstances satisfying "dual purpose" arise infrequently or because plaintiffs' lawyers have not had sufficient opportunities or need to demonstrate such a distinction.[88]

Nevertheless, plaintiff's counsel should be prepared to establish and argue the existence of a "dual purpose," as in *Denny* and *Castro*. The key, as the Court of Appeals stated in *Denny*, is "the nature of the proof and the way in which the fact issues [are] litigated."[89] Despite the strictures of this "dual purpose" requirement, the *Denny* case invites creative and strategic thinking by plaintiff's counsel pursuing both a strict liability claim and a breach of warranty claim--with its revitalized emphasis on consumer expectations. The *Denny* and *Castro* cases illustrate how marketing and advertising materials may be integral to distinguishing breach of implied warranty and strict products liability claims. Establishing the practical distinction begins when investigating the case and drafting the complaint, and carries

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[88] *See, e.g.*, Gonzalez v. Morflo Indus., Inc., 931 F. Supp. 159 (S.D.N.Y. 1996) (dismissing breach of implied warranty claim in products liability action for defective design of water heater on defendants' summary judgment motion because, among other reasons, court had dismissed strict liability claim based on risk-utility analysis and no dual purpose existed); Wyda v. Makita Elec. Works, Ltd., 232 A.D.2d 407, 408, 648 N.Y.S.2d 154, 155 (2d Dep't 1996) (dismissing breach of implied warranty claim found "coextensive" to strict liability claim in action by worker injured using saw, where court dismissed strict liability claim based on substantial material alteration to saw by plaintiff's employer, who removed safety feature on saw blade).

[89] *Denny*, 87 N.Y.2d at 258, 662 N.E.2d at 738, 639 N.Y.S.2d at 258.

through discovery and trial. Plaintiff's counsel's investigation and discovery should focus not only on documents and materials constituting the marketing and advertising but also on documents and materials that merely shed light on the marketing and advertising that may have influenced consumer expectations. Examples of relevant marketing and advertising material are the Ford marketing manual in *Denny* and the television advertisement in *Castro*. Another example in *Castro* is a "sell sheet" prepared by T-Fal describing for QVC salespersons the characteristics and uses of the "roasting" pan; these uses included cooking various low-volume foods, such as cake, lasagna, and stuffed potatoes, but also a 25-lb. turkey. The Second Circuit explained that "[w]hile the 'sell-sheet' was an internal document, and therefore, could not have influenced consumer expectations, it does shed light on the meaning of the videotaped commercial."[90]

In establishing dual purpose, counsel should carefully scrutinize marketing and advertising related material to determine whether they have influenced consumer expectations or are relevant to interpreting the marketing and advertising materials. Plaintiff's counsel's discovery, in this regard, should focus on pre-sale, point-of-sale, and even post-sale documents and materials. Counsel should not forget to request any "drafts" of relevant material. Relevant pre-sale material may include advertising material (e.g., print literature, radio transcriptions, and television video), catalogues, brochures, descriptive literature, promotional materials, and sales training materials. Focus group studies by or for the manufacturer or seller may also provide insight about consumer expectations for the product. Relevant point-of-sale material may include instruction manuals, training materials, and stickers, labels, and tags. Relevant post-sale material may include customer complaints to the manufacturer, seller, or a government agency, and other lawsuits.

Defendant's counsel, on the other hand, should be prepared to argue that no "dual purpose" exists under the circumstances. The determination depends on the evidence presented and how narrowly or broadly the court construes the "purposes" of the

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[90] *Castro*, 139 F.3d at 119 n.10.

product for the risk-utility and consumer expectations analyses. For example, in *Castro*, the defendants argued unsuccessfully, on appeal, that "[t]he roaster had only a single purpose which was to be a vessel for cooking."[91] The Second Circuit rejected the argument, concluding that the defendants' argument

> misses the point of the dual purpose test. Indeed, the same argument could have been made in the *Denny* case: that the Ford Bronco II had a single purpose, namely driving. What characterizes both of these cases, however, is that there was evidence before the jury of the 'dual purposes' to which the products could be put.[92]

Obviously, defendant's counsel does not have to wait until trial (by motion for a directed verdict or judgment as a matter of law) to challenge a breach of implied warranty claim. Summary judgment may be appropriate for eliminating the claim.[93]

For example, in *Gonzalez v. Morflo Industries, Inc.*,[94] an infant plaintiff and his mother sued the manufacturers of an alleged defective water heater and temperature control device for injuries sustained when the infant was scalded by hot tap water in a bath tub after being left unattended.[95] The plaintiffs asserted, among other claims, design defect claims based on negligence, strict liability, and breach of warranty.[96] On the defendants' motion for summary judgment, the district court dismissed the plaintiffs' strict liability claim because the plaintiffs failed to raise a genuine issue of material fact that the products were "not reasonably safe" under a risk-utility analysis.[97] In this regard, the plaintiffs argued, *inter alia*, that the water heater was "not reasonably

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[91] *Id.* at 119 n.11.
[92] *Id.*
[93] *See, e.g.*, Gonzalez v. Morflo Indus., Inc., 931 F. Supp. 159 (S.D.N.Y. 1996); Wyda v. Makita Elec. Works, Ltd., 232 A.D.2d 407, 408, 648 N.Y.S.2d 154, 155 (2d Dep't 1996).
[94] 931 F. Supp. 159 (S.D.N.Y. 1996).
[95] *Id.* at 162.
[96] *Id.* at 163.
[97] *Id.* at 165-67.

safe" because it was designed to raise the water temperature to a dangerously high level (between 130 and 140 degrees Fahrenheit), the utility of which did not justify the risk of injury.[98] The court disagreed, concluding that no rational jury could find the water heater defective. The court found that the plaintiffs failed to offer sufficient evidence to demonstrate (1) a feasible alternative design; (2) the lack of utility associated with the heater's ability to raise the water temperature to a level which could scald the human body (noting defendants showed utility in uses other than the bath, such as use in residential appliances); (3) a likelihood of the type of harm suffered; and (4) that the general public is unaware of or unable to avoid the dangers of hot water (noting the dangers could readily have been anticipated and eliminated with ordinary care).[99] Thus, the court concluded that no rational jury could find that the risk of harm from the design of the products outweighed the utility of having a heater that raised the water temperature to over 120 degrees.[100] Accordingly, the court dismissed the strict liability claim for defective design of the water heater.

The court then dismissed the breach of warranty claim because no "dual purpose" was shown and, alternatively, because plaintiff failed to raise a genuine issue of material fact as to whether the water heater was fit for the ordinary purpose for which it was used.[101] The court stated:

> [A 'dual purpose'] case presents itself infrequently; it requires a showing that the 'ordinary purpose' for which the product was sold and marketed is not the same as the purpose that provides the utility that outweighs the risk of injury.[102]

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[98] *Id.* at 164.
[99] *Id.* at 164 (citing Fallon v. Clifford B. Hannay & Son. Inc., 153 A.D.2d 95, 550 N.Y.S.2d 135 (3d. Dep't 1989).
[100] *Id.* at 167.
[101] *Id.*
[102] *Id.*

> These circumstances are not present in this case. The ordinary purpose of the Morflo water heater was to heat water for residential use -- for bathing and for residential appliances. Using the Morflo heater to heat more than just bath water was the 'ordinary purpose' of the heater. As discussed earlier, plaintiffs do not adequately set forth evidence to rebut defendants' claim that there was utility associated with the heater's ability to raise the temperature of water to a level which could scald the human body. Moreover, this heater performed in the exact manner in which it was expected to perform when it was used in the customary, usual, and reasonably foreseeable manner. For this reason, there is no genuine issue of material fact as to whether the Morflo water heater was fit for the ordinary purpose for which it was used."[103]

VI. FEASIBLE ALTERNATIVE DESIGN

The most important distinction between the strict liability and breach of implied warranty claims for defective design--and a distinction that should raise concerns particularly for defendants--is that the plaintiff need not prove a feasible (or reasonable) alternative design to establish a breach of implied warranty. Under strict liability, the plaintiff has the burden of establishing a feasible alternative design. Under risk-utility analysis, an alternative design is reasonable if, in essence, its marginal benefits exceed its marginal costs. As *Denny* emphasized, under a breach of warranty claim, the focus is not on whether there were safer designs available, but whether the product was "fit" for its ordinary purposes.[104] To recover, the plaintiff must show that the product was "not minimally safe" for its expected purpose, regardless of the feasibility of making the product safer, with the inquiry focusing on the "expectations for the

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[103] *Id.*
[104] Denny v. Ford Motor Company, 87 N.Y.2d 248, 259, 662 N.E.2d 730, 736, 639 N.Y.S.2d 250, 256 (1995).

performance of the product" when used in the customary, usual and reasonably foreseeable manners.[105]

Thus, a plaintiff may prevail on the claim even if the plaintiff is unable to offer evidence of a feasible alternative design. A defendant's uneasiness with this standard is understandable, particularly where an alternative design would reduce one risk but create a high probability of incurring another, greater risk.

VII. MANUFACTURING DEFECT CASES

In manufacturing defect cases, the plaintiff, by definition, charges that the product is "defective" because it does not conform to the manufacturer's specifications and standards, for example, because of physical flaw or incorrect assembly.[106] If such circumstances (and causation) are proven, then claims based on strict liability and breach of implied warranty of merchantability both impose liability irrespective of fault and risk-utility balancing. As recognized in the Restatement Third: "Products that malfunction due to manufacturing defects disappoint reasonable expectations of product performance."[107] In such a case, there would be no practical effect to the distinction between a strict liability claim and a breach of implied warranty of merchantability claim.[108] Thus, *Denny*'s reasoning appears not to apply in a manufacturing defect case.

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[105] *Id.*

[106] *See* Caprara v. Chrysler Corp., 52 N.Y.2d 114, 127, 417 N.E.2d 545, 552, 436 N.Y.S.2d 251, 258 (1981).

[107] Restatement Third § 2, cmt. a.

[108] *See id.* § 2, cmt. n "In connection with manufacturing defects, a § 2(a) tort claim [i.e., a strict tort claim for manufacturing defect] and an implied warranty of merchantability claim rest on the same factual predicate-the sale by the defendant of a product that departs from the manufacturer's specifications irrespective of anyone's fault. Thus, these two claims are duplicative and may not be pursued together in the same case."; *see also* *Denny*, 87 N.Y.2d at 262, 662 N.E.2d at 739, 639 N.Y.S.2d at 263 (Simons, J., dissenting). "[A] consumer may reasonably expect a product to be made in accordance with the manufacturer's standards and expect to be compensated for injuries resulting from the manufacturer's failure to meet them. The

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VIII. STATUTE OF LIMITATIONS

A four-year statute of limitations applies to breach of warranty claims under N.Y. U.C.C. § 2-725(1).[109] The limitations period begins to run on tender of delivery (except where the warranty explicitly extends to future performance).[110] The statute of limitations may begin to run on different dates as to each defendant in the distributive chain.[111]

By contrast, CPLR § 214[112] generally imposes a three-year statute of limitations on negligence and strict products liability claims for injury to person or property, with the limitations period running from the date of injury subject to various exceptions based on the nature of the product.[113] These periods apply to the respective claims even when they are both asserted in the same action. Accordingly, a limitations bar to one claim will not affect the other.

IX. SAMPLE JURY CHARGE AND VERDICT SHEET

A. Sample Jury Charge

A sample charge for breach of implied warranty is found in New York Pattern Jury Instructions:

PJI 2:142. Liability for Breach of Implied Warranty

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product is reasonably held defective because the manufacturer has not made the product as it intended." *Id.*

[109] Uniform Commercial Code 2-275 (McKinney's 1992).

[110] *Id.* § 2-275(2); *See* Heller v. U.S. Suzuki Motor Corp., 64 N.Y. 2d 407, 409, 477 N.E.2d 434, 435, 488 N.Y.S.2d 132, 133 (1985).

[111] *See id.* at 411, 477 N.E.2d at 436, 488 N.Y.S.2d at 134 (holding that "a cause of action against a manufacturer or distributor accrues on the date the party charged tenders delivery of the product, not on the date that some third party sells it to plaintiff.").

[112] N.Y. C.P.L.R. 214 (McKinney's 1997).

[113] *See, e.g.*, CPLR § 214-c (2) (special discovery rule for injury caused by latent effects of exposure to any substance).

> The law implies a warranty by a manufacturer (wholesaler, retailer) that places a product on the market that it is reasonably fit for the ordinary purposes for which such product is used. If the product is not reasonably fit to be used for its ordinary purposes, the warranty is breached.
>
> Plaintiff AB claims that Defendant CD's [state product] was not fit for its ordinary purposes because [state claim]. If you find that the product was fit for its ordinary purposes, you will find there was no breach of warranty, and you will find for CD on this issue. If you find that the [state product] was not fit for its ordinary purposes, you will find that CD breached its implied warranty.

The charge is simple, based on the language of UCC § 2-314 and the *Denny* case. Notably, the proposed charge does not use the word "defective." According to the charge commentary, this omission is supposed to avoid confusion with the strict products liability charge.

Defendant's counsel should urge the court to include in a breach of implied warranty charge the "clarifying" language of footnote 4 from the *Denny* opinion.

B. Sample Verdict Sheet

The verdict sheet is a must for the breach of implied warranty claim. Based on the PJI charge, above, the verdict sheet should contain the following two questions:

1. Did defendant CD breach its implied warranty in that its product was not reasonably fit for its ordinary purposes?

Yes ____ No ____

If "Yes," go to question "2."
If "No," go to question "3."

2. Was defendant CD's breach of implied warranty a substantial factor in causing plaintiff AB's injuries?

Yes ____ No ____

X. CONCLUSION

Whether one agrees or disagrees with the *Denny* opinion, a consumer expectations analysis presently governs breach of implied warranty claims under New York law. When both strict liability and breach of implied warranty claims are both asserted in an action for defective design, plaintiffs' counsel and defendants' counsel must be prepared to establish and argue the existence or absence of "dual purpose"--a circumstance which gives practical effect to the theoretical distinction between the claims. Whether such circumstances rarely occur or whether plaintiffs' counsel have not had sufficient opportunity or need to demonstrate such a distinction remains to be seen.