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Design Defects Under the Proposed Section 2(b) of the *Restatement (Third) of Torts: Products Liability*- A Judge's View

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DESIGN DEFECTS UNDER THE PROPOSED SECTION 2(b) OF THE *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY*—A JUDGE'S VIEW

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The proposed section 2(b) of the Restatement (Third) of Torts: Products Liability *has caused a great deal of controversy, and many are concerned that this section represents a radical change in the law. This Article explains that section 2(b) in fact provides a pragmatic, workable tool for judges and attorneys to explain and prove a manufacturer's liability for a defective product. It sheds much of the baggage of the* Restatement (Second) of Torts *section 402A and its commentaries, yet preserves the essence of the theory behind section 402A. The criticisms of the new language are adequately met in the comments, except possibly for problems with (1) egregiously unsafe products, or (2) products with little or no efficacy that should not be marketed at all, but for which there is no safer design. Both problems can still be cured by commentary in the final draft to be passed upon in May 1997.*

This Article focuses, with suitable digressions, on the differences between the considerations faced by a judge treating a design defect claim under section 402A of the *Restatement (Second) of Torts* and a similar claim under the proposed section 2(b) of the *Restatement (Third) of Torts: Products Liability*. The proposed section 2(b) has caused controversy because it contains substantial textual changes from section 402A. The perception has been that these textual changes signal substantive changes. When section 2(b) is read together with the Reporters' extensive comments, however, it becomes clear that this perception is largely incorrect.

Against a background of section 402A and my experience in New Jersey with the development of products liability law, as well as additional references to applications in New York and other states, this Article reviews some of the major criticisms of section 2(b) and demonstrates that fears of a radical change are unfounded. This Article reflects twenty-three years' experience as a member of the New Jersey judiciary, in the belief that

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this background provides a vantage point in the area of products liability that probably mirrors that of judges in other states.

Section 2(b) states that

> a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.[1]

This Article argues that if the Reporters and the American Law Institute (ALI) have performed their functions correctly, there should be little or no difference in the treatment of the claims under the old or new *Restatements*.[2]

In putting forth a *Restatement*, we as members of the ALI basically invent nothing. Rather, we attempt to find a better way to describe an existing area of the law so that attorneys can advise clients, judges can charge juries, and professors can instruct students, all with more precision. In my opinion, the proposed *Restatement (Third)* does not make functional changes in the law. Rather, it makes existing law more comprehensible and usable.

An examination of the roots of section 402A and its subsequent adoption illustrates why I reach this conclusion. In the *Restatement (Second)*, section 402A included both manufacturing and design defects.[3] It then further explained in comment j that the section also covered warning defects.[4] Drawing upon the seminal cases of *Vandermark v. Ford Motor Co.*,[5] *Greenman v. Yuba Power Products, Inc.*,[6] *Henningsen v. Bloomfield Motors,*

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1. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (Proposed Final Draft, Preliminary Version, 1996) [hereinafter Proposed Final Draft].

2. Others, however, disagree. For example, Professor Marshall Shapo decries what he considers the new *Restatement's* flawed concepts and language. *See* Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 688–91 (1995); *see also* sources cited *infra* note 83.

3. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmts. g, i (1965). Comment g discusses the requirements for a product to be considered in "safe condition" when it is delivered. *See id.* § 402A cmt. g. Comment i discusses products that are inherently "dangerous to an extent beyond that which would be contemplated by the ordinary consumer . . . ." *Id.* § 402A cmt. i.

4. *See id.* § 402A cmt. j.

5. 391 P.2d 168 (Cal. 1964).

6. 377 P.2d 897 (Cal. 1963).

Inc.,[7] and *MacPherson v. Buick Motor Co.*,[8] the framers of section 402A declared that a manufacturer or seller was liable for selling an unsafe defective product.

Where the product contained a manufacturing defect, a plaintiff no longer was required to demonstrate that the manufacturer's quality control was unreasonable.[9] A manufacturer could no longer say that it should not be liable because it did all it could to prevent defective products from leaving the plant, it complied with industry standards, or the only way the defect could have been discovered would have been through destructive testing.[10] In this respect, section 402A, by following what was then a thin line of cases, reformed virtually the entire field of products liability law as applied to manufacturing defects. The departure was somewhat tentative in that the comments stated that the rule was "not exclusive" and did not "preclude liability based upon the alternative ground of negligence . . . ."[11] While the theories were clearly different, most commentators have agreed that in the area of manufacturing defects, the *Restatement* principle of strict liability subsumed and therefore has replaced the theory of negligence.[12] There is no substantial change in section 1(a) of the new proposed *Restatement*.

In the first several years after section 402A's adoption and acceptance into New Jersey law, case law stressed the differences in parallel claims brought under the respective theories of negligence, warranty, and strict liability.[13] Courts explained in some detail that the assessment of a design defect claim under a negligence theory required a focus upon the actions of the manufacturer in designing the product. Cases turned upon a determination of whether a manufacturer had acted reasonably

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7. 161 A.2d 69 (N.J. 1960).
8. 111 N.E. 1050 (N.Y. 1916).
9. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. a (1965).
10. *See id.* § 2(a).
11. *Id.* § 402A cmt. a.
12. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 99, at 695 (5th ed. 1984) (describing the liability scheme created by section 402A as "a far cry from negligence"); Proposed Final Draft, *supra* note 1, § 2 cmt. a (noting that liability for manufacturing defects is imposed regardless of whether the manufacturer acted reasonably).
13. *See, e.g.*, Santor v. A & M Karagheusian, Inc., 207 A.2d 305 (N.J. 1965) (discussing the possibility of maintaining an action under each of these theories and settling on strict liability); *see also* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 95 (4th ed. 1971) (discussing bringing actions under both negligence and strict liability, and claiming that warranty is a subsection of strict liability).

in deciding how to design the product.[14] For a warranty claim, however, courts looked at the way the product performed and determined whether the product met the standards for merchantability under section 2-314 of the Uniform Commercial Code (UCC).[15] For a strict liability claim, the court examined whether the product was defective when it left the manufacturer's hands.[16]

The theory under which plaintiffs brought claims dictated the relevant time frame to be examined. To assess a negligence claim, a judge looked at the manufacturer's conduct in designing the product both before and during the manufacturing process.[17] For a warranty claim, a judge focused on the performance and condition of the product as it was used and whether it was fit for its ordinary purposes. For a strict liability claim, the judge looked at the defect in the product as it left the loading dock.[18]

This method proved inadequate. When I had to charge a jury, or when matters came to me on appeal, my explanations required refinements that demonstrated that the theories substantially overlapped. Recognizing this overlap, in the early 1970s the New Jersey Supreme Court held that the strict liability claim subsumed both negligence claims and implied warranty claims that arose outside the commercial context.[19]

An article by Sheila Birnbaum,[20] written when she was teaching at New York University Law School, convinced me to question what I had accepted as basic doctrine: that strict liability as applied to design defects was a new, broader

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14. *See, e.g.*, Zaza v. Marquess & Nell, Inc., 675 A.2d 620, 627 (N.J. 1996) (holding that under New Jersey law the case turned on whether the manufacturer's design was reasonable); Feldman v. Lederle Lab., 479 A.2d 374, 385 (N.J. 1984) (holding that the reasonableness of manufacturer's conduct is a factor in determining liability).

15. *See, e.g.*, Realmuto v. Straub Motors, Inc., 322 A.2d 440, 443 (N.J. 1974); *see also* U.C.C. § 2-314(6) (1994).

16. *See, e.g.*, Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140, 149 (N.J. 1979) (holding that a manufacturer would be liable if the product were not safe at the time of distribution); Freund v. Cellofilm Properties, Inc., 432 A.2d 925, 929–30 (N.J. 1981) (holding that the case turned on an evaluation of the product, rather than on the conduct of the plaintiff).

17. *See, e.g., Freund*, 432 A.2d at 932 (discussing the trial court's use of a negligence-based focus on "knowledge and reasonable care," though also determining that this standard was not the correct one to apply).

18. *See, e.g., Santor*, 207 A.2d at 313 (discussing the focus on the product while it was "in the control of the manufacturer").

19. *See, e.g., Realmuto*, 322 A.2d at 443–44 (noting that the plaintiff had claims under all of these theories but deciding the case on a strict liability theory).

20. Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980).

principle, vastly different from negligence. The article primarily discussed the various tests for strict liability. Professor Birnbaum's initial point was that the historical reformulations from negligence theory through the Uniform Commercial Code (UCC) warranty language to *Restatement* section 402A were merely different views of the same type of liability.[21] The point was well taken. When one looked closely at the strict liability cause of action, it appeared to be quite similar to a negligence case.

Professor Birnbaum was not the first to note that strict liability in the design area did not constitute a radical departure from negligence. Dean Prosser had stated previously, "Since proper design is a matter of reasonable fitness, the strict liability adds little or nothing to negligence on the part of the manufacturer . . . ."[22] In addition, Professor Wade had noted, "There is little difference here between the negligence action and the action for strict liability."[23] The New Jersey Supreme Court eventually concluded, "Thus, once the defendant's knowledge of the defect is imputed, strict liability analysis becomes almost identical to negligence analysis in its focus on the reasonableness of the defendant's conduct."[24]

Under traditional negligence theory, if a plaintiff claimed that a product was negligently designed, the plaintiff was required to demonstrate that the manufacturer acted unreasonably in placing the product, designed as it was, on the market. How would one prove that the design was unreasonable? First, a plaintiff would have to demonstrate that the design was not reasonably safe for an intended or foreseeable use[25] and that this unsafe design aspect was reasonably knowable at the time the product was manufactured and placed into the stream of commerce.[26] Of course, the plaintiff was also required to establish the elements of proximate cause and damages.[27] The cost

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21. *See id.* at 601.

22. PROSSER, *supra* note 13, § 99, at 659 & n.72.

23. John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 841 (1973).

24. Feldman v. Lederle Lab., 479 A.2d 374, 385 (N.J. 1984).

25. *See, e.g.*, Schipper v. Levitt & Sons, 207 A.2d 314, 321 (N.J. 1965) (holding that a house builder could be found negligent for designing and installing a water faucet from which excessively hot water injured child of lessee).

26. *See* Jakubowski v. Minnesota Mining & Mfg., 199 A.2d 826, 829 (N.J. 1964) (holding that for a products liability action in negligence the unreasonably dangerous condition must have existed when the goods left the defendant's hands).

27. *See* Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140, 149 (N.J. 1984).

of such design defects would then fall either on manufacturers,[28] who could raise prices to cover the cost, or on purchasers throughout the industry who pay increased insurance premiums.[29]

For a strict liability claim under section 402A, the product would have to be proven "unreasonably dangerous to the user or consumer" and sold "in a defective condition."[30] In New Jersey, the "unreasonably dangerous" language has been abandoned in favor of requiring that the product be "reasonably fit, suitable and safe for its intended or foreseeable purposes."[31] Although semantically different, the meaning remained the same because New Jersey's courts have interpreted the fitness and suitability requirement as essentially meaning that the product must be "reasonably safe"[32] instead of, as section 402A provides, not "unreasonably dangerous."[33] This is a distinction without a difference.

What did it mean that the product was in a "defective condition?" In making this determination, analysis under strict liability did not differ much, if at all, from analysis under negligence.[34] A product was defective if it was sufficiently dangerous that a reasonable manufacturer, who was deemed to know of the product's harmful propensities, would not have placed it on the market.[35] Of course, when the key question

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28. *See* Santor v. A & M Karagheusian, 207 A.2d 305, 311–12 (N.J. 1965) (noting that such costs should be borne by manufacturers).

29. *See* Wade, *supra* note 23, at 837–38 (mentioning cost spreading as one factor to be considered in assessing liability).

30. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

31. *Suter*, 406 A.2d at 153. This language was codified and amended at N.J. STAT. ANN. § 2A:58C-2 (West 1987) (establishing that liability turns on whether the "product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it: a. deviated from the design specifications . . . b. failed to contain adequate warnings or instructions, or c. was designed in a defective manner"). Despite the additions to the *Suter* language, the statute did not change the courts' interpretation of New Jersey products liability law. *See* Fabian v. Minster Mach. Co., 609 A.2d 487, 493 (N.J. Super. Ct. App. Div. 1992) ("While this language departs slightly . . . no doctrinal change was intended." (citations omitted)); *see also* Jurado v. Western Gear Works, 619 A.2d 1312, 1317 (N.J. 1993) (explaining that the legislature did not "intend that the Act would effect a doctrinal change in the common law").

32. Ramos v. Silent Hoist & Crane Co., 607 A.2d 667, 672 (N.J. Super. Ct. App. Div. 1992) (noting installer's hypothetical duty to design winch conduits that are "reasonably safe" (citing N.J. STAT. ANN. § 2A:58C-2)); *see also* Smith v. Keller Ladder Co., 645 A.2d 1269, 1270–71 (N.J. Super. Ct. App. Div. 1994).

33. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

34. *See supra* text accompanying notes 22–23.

35. *See Suter*, 406 A.2d at 150 (noting that when a manufacturer knew of a product's risks, "the question then becomes whether the defendant was negligent to

becomes what a "reasonable" manufacturer would do, the analytical steps have been retraced from strict liability to negligence. When I came to this realization, I abandoned attempts to lecture, or even to instruct juries, that there was a difference between strict liability theory, which requires proof of the fact of a final defective design, and negligence theory, which requires proof of a process or conduct creating the defective design. Each requires us to look through the eyes of the reasonable manufacturer.

Some might claim that a difference exists because under a negligence theory the plaintiff must prove that the manufacturer knew or should have known of the harmful propensities of the product, while under a strict liability theory the manufacturer is deemed to know of such propensities. In fact, some New Jersey cases turned on this point.[36] Closer examination of a manufacturer's duties, however, reveals that even under negligence law, a manufacturer of a product is deemed to be an expert in the design and manufacture of the product and is required to keep up with advances in the field.[37] Thus, the obligations placed on the manufacturer are not limited to guarding against what the manufacturer in fact knew, but also entail defending against what the manufacturer should have known.

It is true that slight differences may remain, even in New Jersey, between negligence and strict liability analyses in the context of a design defect claim. In a negligence case, the plaintiff must prove the applicable standard of care that was breached.[38] In a strict liability case, a defendant/manufacturer

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people who might be harmed by that condition if they came into contact with it or were within the vicinity of it" (quoting Wade, *supra* note 23, at 835)).

36. *See, e.g.*, Freund v. Cellofilm Properties, Inc., 432 A.2d 925, 932 (N.J. 1981) (arguing that such knowledge should be imputed to a manufacturer and reversing a lower court ruling that would have required plaintiff to prove such knowledge).

37. *See, e.g.*, United States Gypsum Co. v. Mayor of Baltimore, 647 A.2d 405, 414–15 (Md. 1994) (upholding jury instructions stating that the manufacturer had a duty to "keep reasonably abreast of scientific knowledge and discoveries touching this product"); Bordeaux v. Celotex Corp., 511 N.W.2d 899, 905 (Mich. Ct. App. 1993) (upholding a manufacturer's liability where studies suggesting that asbestos is dangerous were known industry-wide), *appeal denied*, 530 N.W.2d 749 (Mich. 1995); Feldman v. Lederle Lab., 479 A.2d 374, 387 (N.J. 1984) (holding that the requirement to keep up with advances in the field includes all information reasonably obtainable in the industry and is not limited to material that experts produced).

38. *See* Jakubowski v. Minnesota Mining & Mfg., 199 A.2d 826, 829 (N.J. 1964) (stating that in a negligence action "the plaintiff must show that the goods of which he complains were unreasonably dangerous for their intended use"); *see also* O'Brien v.

claiming that the state-of-the-art standard did not encompass the technology to correct the defect must prove this fact.[39] Shifting the burden of proof is a minimal factor in most cases, however, because jurors' minds are seldom in exact balance after hearing all of the proofs. There is also a difference in the defenses available in these types of cases. In a negligence case, a defendant can attempt to show full comparative fault on the part of the plaintiff, while in a strict liability case, the defendant can only raise an assumption of the risk defense.[40]

This review leaves aside claims for breach of the implied warranty of merchantability under section 2-314 of the UCC. The analysis here runs along similar lines. Section 2-314 of the UCC speaks of goods as being able to "pass without objection in the trade," "of fair average quality," or most often "fit for the ordinary purposes for which such goods are used."[41] As with the strict liability claims, at least in the personal injury setting, what is "fit" refers back to goods that lacked a defect, which in turn refers back to products that a reasonable manufacturer would not have placed on the market. Again this claim is, or should be, subsumed within the negligence rubric and absorbed within a strict liability cause of action. New Jersey has excepted from this general rule only claims for commercial damages

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Muskin Corp., 463 A.2d 298, 303 (N.J. 1983) ("One of the policy considerations supporting the imposition of strict liability is easing the burden of proof for a plaintiff injured by a defective product . . . by eliminating the requirement that the plaintiff prove the manufacturer's negligence.").

39. *See Feldman*, 479 A.2d at 388. The New Jersey Products Liability Act of 1987 has made some changes to products liability law. *See* N.J. STAT. ANN. § 2A:58C-1 to -7 (West 1987). For example, the state-of-the-art defense is now an absolute defense, not a risk-utility factor. *See id.* § 2A:58C-3a(1); Beshada v. Johns-Manville Prod. Corp., 447 A.2d 539 (N.J. 1982). New Jersey courts toyed with the idea that the difference between negligence and strict liability would be that in a strict liability claim the manufacturer would be deemed to know even that which could not have been known at the time of distribution. The *Beshada* holding was limited to its facts two years later. See *Feldman*, 479 A.2d at 387, in which a manufacturer was held only to a duty of knowing that which is knowable, whether the claim rested on negligence or strict liability. *See id.* at 387.

40. *See* Cintrone v. Hertz Truck Leasing, Etc., 212 A.2d 769, 782 (N.J. 1965) (noting the availability of a contributory negligence defense to a strict liability claim where plaintiff has "unreasonably proceed[ed] to encounter a known danger" (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 95 (3rd ed. 1964))); *see also* Cepeda v. Cumberland Eng'g Co., 386 A.2d 816, 831 (N.J. 1978) (relying on *Cintrone*), *overruled by* Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140 (N.J. 1979). *Suter* then overruled *Cepeda* in worker's actions where a plaintiff's conduct cannot be used as a defense due to a lack of meaningful choice. *See Suter*, 406 A.2d at 148. This exception has, in turn, also been applied to negligence cases. *See* Green v. Sterling Extruder Corp., 471 A.2d 15, 20 (N.J. 1984).

41. U.C.C. § 2-314(2)(c) (1994).

where the loss is limited to the product itself or other purely economic losses.[42] The case law has left the parties in such cases to the UCC's contractual remedies.

A number of states have enacted statutes completely merging the two causes of action.[43] New Jersey permits an exception only for breaches of express warranties.[44] New York, which does not have such a statute, has recently broken with this approach, stressing the doctrinal differences between warranty and strict liability actions. In *Denny v. Ford Motor Co.*,[45] the New York Court of Appeals maintained the strict liability and warranty of merchantability distinction when answering certified questions from the Second Circuit.[46] There are difficulties with each of these approaches.

Turning first to *Denny*: After finding that the Ford Bronco II manufactured and sold by defendant Ford Motor Co. was not defective, ostensibly because its high center of gravity was appropriate for its intended off-road operation, the jury nonetheless found Ford liable for having breached its warranty of merchantability.[47] Upholding the continued viability of both causes of action, the New York Court of Appeals read the comments to the *Restatement (Third)* section 2(b) as supporting its analysis.[48] Under the Tentative Draft comments, however, alternative remedies in a personal injury setting are appropriate only in cases that involve "misrepresentation, express warranty and implied warranty of fitness for particular purpose,"[49] and not warranties of merchantability.

Moreover, as the *Denny* court noted, numerous other states have abolished the distinction between all separate causes of

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42. *See* Spring Motors Distrib. v. Ford Motor Co., 489 A.2d 660, 676 (N.J. 1985). This exception was codified by the New Jersey Products Liability Act, which defined recoverable "harm," as, inter alia, "physical damage to property, other than to the product itself." N.J. STAT. ANN. § 2A:58C-1b(2).

43. *See, e.g.*, CONN. GEN. STAT. § 52-572m(b) (1983); KAN. STAT. ANN. § 60-3302(c) (1994); WASH. REV. CODE ANN. § 7.72.010(4) (West 1992). These statutes appear to be in line with the standard proposed by the Department of Commerce in Section 102(D) of the Model Uniform Product Liability Act, 44 Fed. Reg. 62,715, 62,717 (1979).

44. *See* N.J. STAT. ANN. § 2A:58C-1(b)(3) (West 1987); *see also* ALA. CODE § 6-5-501(2) (1975) (permitting an exception for actions based on breach of written express warranties).

45. 662 N.E.2d 730 (N.Y. 1995), *reargument denied by* 664 N.E.2d 1261 (N.Y. 1996).

46. *See id.* at 739.

47. *See id.* at 733.

48. *See id.* at 737.

49. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. m illus. 14 (Tentative Draft No. 2, 1995) [hereinafter Tentative Draft No. 2]. This version was available to the New York Court of Appeals. The Proposed Final Draft, *supra* note 1, takes the same position.

action for express or implied warranties, negligence, and strict liability.[50] The court's conclusion may have been a natural outcome of its acceptance of the parties' arguments separating the vehicle's off-the-road use and its use as a general highway vehicle.[51] The court considered defendant's proofs regarding the vehicle's off-the-road use relevant to a strict products liability risk-utility equation, and plaintiff's proofs concerning defendant's promotion of the vehicle for general purposes as relevant to the "ordinary purpose" analysis and the vehicle's unfitness for such purposes.[52] I suggest that this dichotomy was unnecessary.

So long as the vehicle's general use was reasonably anticipated, that use provided a proper basis for virtually the same implied warranty of merchantability or strict liability claims. If the higher center of gravity was found necessary for the vehicle's off-the-road use, but the vehicle was also marketed to the public for general use, the alleged flaw was not a design defect at all but a possible warning defect, well beyond the breach of the warranty of merchantability.

If a particular buyer received express or implied warranties concerning the vehicle's safe use for the highway, other issues arise. The warranty of merchantability would be subsumed properly within a claim for strict liability, but the breaches of an express warranty or a warranty for fitness for a particular purpose properly would be left as additional or alternative claims of breach of contract.

By case law for the past twenty years[53] and by statute for the past eight years,[54] New Jersey has permitted separate claims, beyond strict liability, only for express warranties. While the 1987 New Jersey statute may have substantially codified New Jersey's common law, this statute and the comparable similar statutes in other states have left a gap that properly should be filled by the warranty for fitness for a particular purpose.[55] Its absence requires a strained interpretation, either of express warranty or of strict liability, to redress an obvious wrong if one occurs.

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50. *See Denny*, 662 N.E.2d at 736–37 (citing CONN. GEN. STAT. § 52-572(m) (1983); KAN. STAT. ANN. § 60-3302(c) (1994); OR. REV. STAT. § 30.900 (1995); WASH. REV. CODE ANN. § 772.010(4) (West 1992)).

51. *See Denny*, 662 N.E.2d at 738.

52. *See id.* at 738–39.

53. *See* Realmuto v. Straube Motors, Inc., 322 A.2d 440, 442 (N.J. 1974); Heavner v. Uniroyal, Inc., 305 A.2d 412, 420 (N.J. 1973).

54. *See* N.J. STAT. ANN. § 2A:58C-1b(3) (West 1987).

55. *See* U.C.C. § 2-315 (1994).

For example, assume that a police officer purchases a bulletproof vest by telling the dealer that the officer needs a vest that will protect against Teflon armor-piercing bullets. The dealer, without saying anything, hands the officer the best vest made at that time, but one that will not provide the required protection. There is no express warranty; there is no reasonable alternative product; and in traditional terms there is no defect. There is, however, a clear breach of the implied warranty of fitness for the particular purpose made known to the dealer.[56] The warranty is needed to provide legal recourse if the officer is later injured when the vest affords no protection against a Teflon bullet.

One could say that there was a warning defect in that there should have been a written or oral warning, and this proposition is perhaps true under a general negligence theory. Analysis of a warning defect takes into consideration the class of intended or reasonably anticipated users, not the particular user,[57] however, and it may well be that the class of users was generally aware of the lack of protection for the specific use that the particular buyer had expressed. While the New York approach may have gone too far in the preservation of all warranty claims,[58] and the New Jersey courts and legislature may have gone too far in superseding all but express warranties, the new *Restatement (Third)* approach properly preserves both the express warranty and the warranty of fitness for a particular purpose.[59]

Keeping this background in mind, I will now discuss the different considerations a judge faces when treating a design defect claim under the standards of either the *Restatement (Second)* or the proposed *Restatement (Third)*. As noted earlier, the purposes of the *Restatement* are to reflect the law as it is and to make the law more understandable.[60] Through the *Restatement (Second)* the ALI attempted to make the law more understandable and reflective of the developing cases concerning

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56. *See id.*

57. *See* Proposed Final Draft, *supra* note 1, § 2 cmts. h, i; *see also* O'Brien v. Muskin Corp., 463 A.2d 298, 303 (N.J. 1983) (noting the manufacturer's duty to warn "foreseeable users of the risks inherent in the use of that product"); Campos v. Firestone Tire & Rubber Co., 469 A.2d 943, 952 (N.J. App. Div. 1983) (Dreier, J., dissenting) (noting the distinction between duties to a class of uses of a product and to a particular user of a product), *rev'd*, 485 A.2d 305, 311 (N.J. 1984).

58. *See supra* text accompanying notes 45–52.

59. *See* Proposed Final Draft, *supra* note 1, § 2 cmt. n.

60. *See supra* text accompanying notes 1–3.

the distribution of defective products by permitting a court to tell a jury that it should focus on the defective nature of the product, rather than on conduct. In cases involving design defects, as opposed to manufacturing defects, this explanation permitted a focus upon the dangerous nature of a product that could have been made less dangerous. In practice, as noted above, design defect cases have remained negligence cases,[61] with perhaps a slightly shifted focus.

As the Reporters examined the cases decided under section 402A, they came to the conclusion that the cases, whether applying a consumer expectations test or a risk-utility analysis, possessed a common thread.[62] Most courts demanded that plaintiffs present alternative designs that would have made the product safer and would have reduced or avoided the risks that caused their injuries.[63] This was similarly true under negligence law, where a plaintiff had to prove that the product created an unreasonable risk of harm as designed by showing that another design would have been more reasonable.[64] Plaintiffs will continue to present the same proofs under section 2(b) of the *Restatement (Third)*. In fact, central to the *Restatement (Third)* is the explicit focus on the ability to prove that there would be a "reasonable alternative design" that would have reduced or avoided the foreseeable risks of harm, the omission of which rendered the product not reasonably safe.[65]

The simplicity of this new standard raises some eyebrows. One may ask: Where are the other elements of the risk-utility analysis? Are we to abandon the multi-part test that looked not only at the availability of a substitute product, but also at the usefulness, desirability, and safety aspects of the product? Also considered as part of the risk-utility equation were the manufacturer's ability to eliminate unsafe characteristics without impairing usefulness or increasing expense, the user's ability to avoid danger in the exercise of care, the public's anticipated awareness of dangers, and the manufacturer's risk-spreading.[66]

The easy answer to these questions is that all of these factors are and will remain proper elements in determining the

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61. *See supra* notes 19–24 and accompanying text.

62. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) cmt. c (Tentative Draft No. 1, 1994).

63. *See* Tentative Draft No. 2, *supra* note 49, § 2 reporters' note cmt. c.

64. *See id.*

65. *See* Proposed Final Draft, *supra* note 1, § 2(b).

66. *See* Wade, *supra* note 23, at 827 n.11.

feasibility of the alternative design. The problem with the current risk-utility formulation is that it has placed the alternative design, which is the central element to which the others merely relate, on an equal basis with the other factors. The Reporters have made this clear in comment a of section 2.[67]

One then may ask: What has happened to the "consumer expectations," "open and obvious," or "patent danger" tests? Again, these tests, often considered in opposition to a risk-utility test, are not really inimical to it in any way. Rather, they are factors used to determine whether there is a reasonable alternative design. The Reporters are clear in their notes 1 (Part V) and 4 to comment c that these factors bear upon whether an alternative design would have avoided or reduced the foreseeable risks of harm.[68]

Although most of the discussion concerning section 2 has focused upon the "reasonable alternative design," one must not forget that section 2(b) has two principal elements; the alternative design is not the sole standard. The second requirement, at the end of the section, is that "the omission of the alternative design renders the product not reasonably safe."[69] Implicit in this phrase is the need for reasonable safety to the user or others expected to come into contact with the product. This element permits us to focus upon the intended or foreseeable user to determine whether she would recognize possibly unsafe characteristics of the product and guard against them. The totality of section 2(b), therefore, presents a double objective test: the reasonable manufacturer determining what the ordinary consumer would expect.[70]

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67. *See* Proposed Final Draft, *supra* note 1, § 2.
68. *See id.* § 2 reporters' notes cmt. c, at 145–55, 167–72.
69. *Id.* § 2.
70. New Jersey provides an absolute defense if a manufacturer can prove that

> [t]he characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended . . . .

N.J. STAT. ANN. § 2A:58C-3(a)(2) (West 1987). An exception to this absolute defense is carved out for "industrial machinery or other equipment used in the workplace and . . . dangers posed by products such as machinery or equipment that can feasibly be eliminated without impairing the usefulness of the product." *Id.* Prior to this statute's adoption in 1987, these were merely factors that the jury could take into consideration to determine whether the product was defective. *See* Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140, 150–51 (N.J. 1979); Cepeda v. Cumberland Eng'g Co., 386 A.2d

The focus on alternative design and reasonable safety permits the jury to balance what the manufacturer has done against the plaintiff's specific claim of what the manufacturer should have done. If the product's design could have been rendered safer, the safer design will produce an alternative product that can be shown or described to a jury. The plaintiff must present the jury with the particulars of this design. Thus, a jury is not left to speculate whether some more reasonable design exists.

Other questions remain, such as whether an optional "extra cost" safety device, such as anti-lock brakes, automatically provides a plaintiff with an "alternative design" because such a safety feature could have been made standard. Such a device should not be an automatic alternative design, so long as the alternatives are offered, and the product without the option meets a suitable standard of reasonable safety, which is the second element of section 2(b).[71] In products such as these, a history of consumer acceptance of optional safety features can help define reasonableness. Some may disagree, particularly in cases where the plaintiff is a third party who has had no input into the selection of the safety option. Case development in this area, however, is no different than under the present section 402A using a risk-utility or consumer expectations analysis.

In cases where a plaintiff cannot pinpoint the nature of the defect, section 3 of the proposed *Restatement* permits an inference of a defect from circumstantial evidence in situations where res ipsa loquitur would apply.[72] This section usually will apply

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816, 827 (N.J. 1978). The statute has altered the entire concept of contributory fault. If a manufacturer can determine that the class of users would have appreciated and avoided the danger, the absolute defense is established. *See* N.J. STAT. ANN. § 2A:58c-3(a)(2). A jury never need reach the issue of whether the particular plaintiff proceeded in the face of a known danger, a requirement for contributory (comparative) fault in New Jersey in a products liability case. *See* Johansen v. Makita USA, Inc., 607 A.2d 637, 642 (N.J. 1992). In effect, the statute establishes an objective test as a bar to liability which, even if passed, still presents the plaintiff with a second bar based upon contributory fault.

71. *See* Proposed Final Draft, *supra* note 1, § 2.

72. The language of this section as set forth in Proposed Final Draft, *supra* note 1, § 3, represents a substantial change from Tentative Draft No. 1, *supra* note 62. Although the Proposed Final Draft may itself be further revised for its 1997 presentation to the ALI membership, the 1996 draft reads:

> § 3. Circumstantial Evidence Supporting Inference of Product Defect
>
> It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of the specific nature of the defect, when:
>
> (a) the incident that harmed the plaintiff was of a kind that ordinarily would occur only as a result of product defect; and

to manufacturing defect claims, but also can apply to a design defects claim in appropriate circumstances. Of course, a proper foundation must be established, but expert proof is not required where the presence of some defect reasonably can be inferred by a jury.

Under the proposed language of section 2(b), a defendant can now assess the plaintiff's claim in sharper focus. This focus should facilitate settlements. The requirement for a specified alternative design also provides a more definite standard for judges deciding summary judgment motions and for experts preparing reports and testimony. Vague statements that the design should have been safer or should have been different should no longer plague judges hearing summary judgment motions. The standard, implicit even under section 402A, is explicit under section 2(b).

This is not to say that a plaintiff must always present an expert. Experts may or may not be necessary to prove a plaintiff's claim under the *Restatement (Third)*'s new formulation, depending upon the complexity of the design. The use of experts under section 2(b) will be no different from the situation under section 402A, or even under negligence law. If the issue is beyond the common knowledge of a jury, the parties must produce experts. A reasonable alternative design that can be understood by a jury needs no expert to present it, although it may be tactically advisable to retain one.

The change in language is not radical. The standards of section 2(b) represent what actually has occurred in the many cases tried before me or that I have reviewed on appeal. Therefore, I see no break in the progress of the law inherent in the new terminology.

There is one possible problem with the language of section 2(b), which the Reporters have recognized. Section 2(b) focuses only upon whether there is a reasonable alternative design, thus measuring the product as marketed against a proposed alternative. But what if there is no reasonable alternative design

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(b) evidence in the particular case supports the conclusion that more probably than not:

(1) The incident that harmed the plaintiff was the result of a product defect rather than being solely the result of other possible causes; and

(2) the product defect existed at the time of sale or distribution.

Proposed Final Draft, *supra* note 1, § 3.

because the design defect in the product is such that it should not have been marketed in any form?

Two classes of cases raise this issue: first, egregiously unsafe or ultrahazardous products and, second, products that lack any efficacy.[73] As the Reporters state in note 1 to section 2 comment d,[74] the only recognition of the ultrahazardous claim has been in a statutory exception to the state-of-the-art defense rule in the New Jersey statute.[75] Pursuant to that statute, a state-of-the-art defense is not permitted where a "product is egregiously unsafe or ultra-hazardous" and a consumer could not reasonably be expected to know of the product's risks, or where the product poses risks to others and has little or no usefulness.[76] Examples given in the New Jersey Senate Committee Statement accompanying the bill were of "a deadly toy marketed for use by young children, or of a product marketed for use in dangerous criminal activities."[77]

Even with this description, it is difficult to find cases where one could not say there would be an alternative design. The most frequently given example centers on the lawn dart cases,[78] but one could posit easily an alternative design which used a velcro-tipped weighted beanbag head for the darts and a suitably prepared landing area. The alternative to the Saturday Night Special could be a somewhat more expensive, but properly manufactured, handgun. In *Moning v. Alfonso*,[79] a case involving a sling-shot, it might be difficult to come up with an alternative design, but there the case focused on marketing, not on the product itself.[80] Many dangerous products are simply not suitable for marketing to young children. One would not call most hunting implements defective merely because the market

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73. *See* Wilson v. Piper Aircraft Corp., 577 P.2d 1322, 1328 n.5 (Or. 1978) (noting that a jury could find liability even where no reasonable alternative design existed for the product in question if it determined that a "reasonable manufacturer would not have introduced such a product into the stream of commerce").

74. Proposed Final Draft, *supra* note 1, § 2 reporters' notes cmt. d.

75. *See* N.J. STAT. ANN. § 2A:58C-3(b).

76. *See id.* § 2A:58C-3.

77. Senate Judiciary Committee Statement, No. 2805-L.1987, c.197 (1987), *reprinted in* N.J. STAT. ANN. § 2A:58C-1; *see, e.g.*, Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1148 (Md. 1985) (involving a Saturday Night Special; rule overturned by subsequent statute); Moning v. Alfonso, 254 N.W.2d 759, 769–74 (Mich. 1977) (involving a sling-shot marketed as a toy).

78. *See, e.g.*, Atkins v. Arlans Dep't Store of Norman, Inc., 522 P.2d 1020, 1022 (Okla. 1974) (upholding a trial court ruling in favor of the defendants in part because plaintiffs had not alleged that the injury in question was caused by a design defect).

79. 254 N.W.2d 759 (Mich. 1977).

80. *See id.* at 766.

properly should be limited to responsible adults. This problem, however, may be met by new language proposed by the Reporters in comment d to section 2(b).

In the second potentially troublesome area—products lacking efficacy—I can foresee particular pharmaceutical cases in which there would be a claim of complete lack of efficacy so that the language of section 2(b) may be inadequate. Such cases might concern drugs that have no use but are still marketed, causing patients to turn away from other treatment with possible benefits. There is no alternative design, yet the product should not have been marketed at all.

These cases might best be handled as warning defect cases, or else should be left to administrative regulation. They are really extensions of cases where a product has a very limited range of use, and suitable instructions are needed. When this limited range narrows to zero, any danger outweighs the total lack of usefulness. The requirement to warn of such a total lack of efficacy presents a more understandable rule than one that would find the product defectively designed.

This efficacy issue usually arises in cases involving pharmaceuticals, and the Reporters have taken the entire area of prescription drugs and medical devices out of the ambit of section 2(b) and included the topic in a separate section (section 8) under Special Product Markets.[81] The presence of this issue, relating to this special class of products, should not disturb what is a more understandable general statement of design defect liability. Where the lack of efficacy relates to a nonmedical product (such as the example given earlier of the protective vest sold to protect against armor-piercing ammunition that cannot stop a Teflon bullet), the issue is not that of a design defect, but rather a warning defect, or possibly of a breach of an express warranty or a warranty of fitness for a particular purpose.

In short, theoretically there should be a black letter addition to section 2(b) regarding products that should not be marketed at all. This omission, however, has been explained in the reporters' notes,[82] and unless or until any sizeable number of these cases come to light, the Reporters have made a reasonable decision not to clutter the black letter rule of section 2(b) with the elements of a design defect claim based upon such products.

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81. *See* Proposed Final Draft, *supra* note 1, § 8.
82. *See id.* § 2 reporters' notes cmt. c., at 124–35.

I realize that there are many critics of the new language.[83] Some are concerned that judges or attorneys may not read the section with care or may not consult the comments, and thus may assume that section 2(b) envisions a radical change in the law. I do not share the critics' narrow views of judges' perceptions, and I have confidence that attorneys faced with interpretation problems will find textual answers in the section and comments that will satisfy a court.

Whether from the position of a judge explaining the matter to a jury, or from that of a litigant presenting or defending the case in court, it is easy to see that in section 2(b) the Reporters have defined the pivotal elements of a design defect case. The practical focus on alternative design and reasonable safety existed before section 402A. Indeed, these factors were at the very heart of section 402A. Under the proposed *Restatement (Third)* the law has not changed. Rather, the concepts behind it have been explained more precisely. As a result, it will now be easier to understand the law itself.

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83. *See, e.g.*, Angela C. Rushton, *Design Defects Under the* Restatement (Third) of Torts: *A Reassessment of Strict Liability and the Goals of a Functional Approach*, 45 EMORY L.J. 389, 419 (1996); Shapo, *supra* note 2, at 659; Frank J. Vandall, *The Restatement (Third) of Torts, Products Liability, Section 2(b): Design Defect*, 68 TEMP. L. REV. 167, 168 (1995). *See generally* Symposium, *On The ALI's Proposed Restatement (Third) of Torts: Products Liability*, 61 TENN. L. REV. 1043 (1994); Symposium, *Proposed Restatement (Third) of Torts, Products Liability*, 21 WM. MITCHELL L. REV. 369 (1995); Symposium, *Review of the System of Products Liability Law*, 36 S. TEX. L. REV. 227 (1995); John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns A "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493 (1996).