Remarks by the Honorable John E. Keefe* at Seton Hall University School of Law†

I have been asked to moderate the discussion regarding how a plaintiff proves an alternative safer design case under the New Jersey Model Jury Charge.[1] We will assume, for the purpose of today's discussion, that the pending model charge that has been approved by the Model Civil Jury Charge Committee, after much hard work and discussion, will be approved by the Administrative Office of the Courts for use by trial judges and lawyers in the near future.

Arguably, the concept of an alternative safer design as the preferred method of proving product defect began in New Jersey when the Legislature passed the Product Liability Act in 1987.[2] The Act, often referred to simply as the PLA, provides an absolute defense for a manufacturer that can prove that, at the time its product entered the marketplace, no other practical and technically feasible alternative design would have prevented the harm incurred by the plaintiff without substantially impairing the reasonably anticipated or intended function of the product.[3] This statutory defense became known as the "state-of-the-art" defense and elevated Dean Wade's risk-utility factor number four to the status of an absolute defense.[4]

The practical effect of the defense is to cause plaintiffs to approach their cases from a different perspective than that used in the typical design defect case. Under the balancing approach of the risk-utility analysis, the global risks of the product are weighed against

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† Editor's Note: These remarks are based upon a presentation given at Seton Hall University School of Law's Seventh Annual Health Law Symposium on February 12, 1999.

[1] *See* NEW JERSEY MODEL JURY CHARGE ON DESIGN DEFECT (Proposed Official Draft 1998).

[2] *See* N.J. STAT. ANN. § 2A:58C-1 (West 1987).

[3] *See id.* § 2A:58C-3a(1).

[4] *See* John W. Wade, *On the Nature of Strict Liability for Products*, 76 MISS. L.J. 825, 837 (1973). Wade includes "[t]he manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility" within a series of factors to balance in judging whether an item is unreasonably dangerous. *See id.* The Supreme Court of New Jersey also has given due consideration to Dean Wade's approach. *See* Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 174, 386 A.2d 816, 826 (1978).

the general, global benefits from having the product on the market. Confronted with the state-of-the-art defense, however, plaintiffs are forced to examine a more specific issue of whether a technologically feasible, and economically practical, alternative design was available at the time of marketing that would have avoided the injury to the plaintiff. If able to present such proofs, the plaintiff has met the anticipated defense and has raised a jury question. As a practical matter, the vast majority of reported design defect cases have utilized this approach to proving design defect since the PLA was adopted.

Thus, the black letter law of the Restatement (Third) of Torts: Products Liability (Restatement (Third)) on the subject of design defects, that proof of an alternative safer design is the preferred and generally accepted method of proving product defect, is in accord with existent New Jersey case law.[5] If that proposition was ever in doubt, the recent case of *Lewis v. American Cyanamid Co.*,[6] in an opinion written by Justice Pollock, dispelled any skepticism. In *Lewis*, Justice Pollock cited comment f of section 2 of the Restatement (Third), writing, "To succeed on his design-defect claim, plaintiff was required to prove that a practical and feasible alternative design existed that would have reduced or prevented his harm."[7] The court then stated that, to determine whether plaintiff's proposed alternative design met that test, "the jury was required to perform a risk-utility analysis."[8]

Lewis, however, was a case in which the plaintiff chose to prove a design defect claim within the context of an alternative safer design claim. The question remains whether a plaintiff in New Jersey still has the option of proving the case simply by attempting to prove that the product's risks outweigh its utility in the global or macro sense and, thus, avoid the practical problems stemming from the statutory state-of-the-art defense. The answer is unclear. Justice Pollock's earlier comments notwithstanding, the *Lewis* court, in discussing who has the burden of proof in such matters, stated, "A plaintiff must prove either that the product's risks outweighed its utility *or* that the product could have been designed in an alternative manner so as to minimize or eliminate the risk of harm."[9]

The Restatement (Third), on the other hand, limits use of the

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[5] *Compare* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1997) *with* Lewis v. American Cyanamid Co., 155 N.J. 544, 560, 715 A.2d 967, 975 (1998).

[6] 155 N.J. 544, 715 A.2d 967 (1998).

[7] *Lewis*, 155 N.J. at 560, 715 A.2d at 975 (1998).

[8] *Id.*

[9] *Id.* at 570, 715 A.2d at 980 (emphasis added).

risk-utility analysis in its macro or global sense to certain categories of cases in which the product manifestly exhibits such low social utility and such a significant degree of danger that the design of the product is unreasonable without proof of an alternative design.[10] That concept actually tracks the exception to the state-of-the-art defense found in the PLA. The PLA provides that a defendant cannot assert the state-of-the-art defense when the plaintiff establishes by clear and convincing evidence to the court's satisfaction all three of the following factors:

> 1) The product is egregiously unsafe or ultra-hazardous; 2) The ordinary user or consumer of the product cannot reasonably be expected to have knowledge of the product's risks, or the product poses risk of serious injury to persons other than the user or consumer; and 3) the product has little or no usefulness.[11]

What does this mean in practical terms for a lawyer attempting to put together a design defect case? New Jersey law is in agreement with section 2 of the Restatement (Third) and its comments, but approaches the subject from a slightly different angle. More succinctly, New Jersey law requires that plaintiffs, except in the unusual case, must prove a safer alternative design.

The recent New Jersey appellate division case of *Truchan v. Nissan Motor Corp. in U.S.A.*[12] illustrates the ways of proving the alternative safer design case. In *Truchan*, the plaintiff suffered severe injuries when the automobile in which she was a rear-seat passenger struck a utility pole. The impact with the utility pole was apparently caused by the driver's inebriation and occurred at a relatively low rate of speed, estimated at between twenty-two and twenty-eight miles per hour.[13] After the accident, the plaintiff was found seated, wearing a two-point, lap-belt restraint, and leaning against the rear window. The driver and front seat passenger were not wearing seat belts at all; however, both sustained relatively minor injuries. The plaintiff did not fare as well. Her spinal column literally was ripped in half, thus disabling all parts of her body below the navel.[14] A post-accident physical examination of the plaintiff revealed a deep bruise beginning on the area below her navel and extending across her right side, ending on her right flank. The bruise, according to the treating doctor, was the result of blunt trauma caused by plaintiff's

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[10] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. e (1997).

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

[12] 316 N.J. Super. 554, 720 A.2d 981 (App. Div. 1998).

[13] *See id.* at 558, 720 A.2d at 983.

[14] *See id.* at 558-59, 720 A.2d at 983.

violent contact with the lap belt. The doctor attributed the cause of plaintiff's extensive internal injury to the lap belt holding her pelvis in the seat, while her torso was permitted to flex forward unrestrained.[15]

After settling a lawsuit with the owner and driver of the car, the plaintiff proceeded to trial against Nissan Corporation. She contended that Nissan equipped the automobile with a defectively designed lap belt and failed to warn passengers of the potential for enhanced injuries if worn above the lower abdomen. The plaintiff contended that she was seated in an upright position at the time of the accident. "The experts unanimously agreed that to minimize the possibility of injury, a rear seat occupant should wear a lap belt low on the hips, with the belt positioned on the anterior-superior portion of the passenger's iliac crest."[16] Experts for the plaintiff asserted that Nissan, contrary to federal motor vehicle standards, had installed the seat-belt anchors in an asymmetrical manner, causing the lap restraint to ride up too high on the passenger's abdomen. The plaintiff contended that a safer two-point lap belt, which would not rise above the passenger's hips, was a feasible alternative. The plaintiff's experts also testified that a three-point, shoulder-harness lap belt, similar to those that are typically provided for the driver and front-seat passenger, would have prevented the injuries.[17]

In addition to these specific proofs relative to safer alternative design, the plaintiff contended that the lap belt was inherently dangerous and breached consumers' reasonable expectations of safety. Secondly, the plaintiff claimed that Nissan failed to warn users of the dangerous qualities of the lap restraint. Nissan experts testified that the two-point restraint complied with all applicable federal standards. Based on the nature of the bruises on the plaintiff's body, and contrary to her testimony, Nissan's experts opined that the plaintiff was in a slumped position tilting forty-five to ninety degrees to her left with the seat belt positioned over her navel when the accident occurred.[18] Nissan's experts, therefore, concluded that her chosen position in the vehicle was the proximate cause of the catastrophic injury sustained. With regard to the three-point

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[15] *See id.* at 558, 720 A.2d at 983.

[16] *Id.* at 559, 720 A.2d at 983. The iliac crest is that portion of the hip bone in which large quantities of bone marrow are concentrated. *The On-line Medical Dictionary* (visited Oct. 22, 1999) <http://www.graylab.ac.uk/cgi-bin/omd?iliac+crest>.

[17] *See id.*

[18] *See Truchan*, 316 N.J. Super. at 559, 720 A.2d at 983.

restraint claim, the defense experts opined that the plaintiff would have sustained the same injuries had this style of restraint been used.[19] These experts stated that the shoulder belt would have locked upon the force of the collision, and "would have 'strategically . . . followed the lie of the lap belt.'"[20] The defense experts additionally concluded "that the torso would have 'follow[ed] a horizontal arc,' tearing the spinal column and resulting in the same injuries."[21]

The judge instructed the jury on all three of the plaintiff's defect theories: alternative safer design, consumer expectations, and failure to warn. The opinion does not tell us what instructions the judge gave the jury on the consumer expectation test for design defect. As for the alternative safer design theory, the judge instructed the jury that the "[p]laintiff must also prove . . . that there was available an alternative safer design, practicable under the circumstances, which would have eliminated the alleged defect in the internal restraint system and [would have] prevent[ed] her from being injured to the extent she was."[22] In addition to this charge, the judge instructed the jury on proximate causation. The judge told the jury that "proximate cause means that the defect in the product was a substantial factor, which singly or in combination with another cause, created plaintiff's injuries."[23] In another part of the charge, the judge instructed the jury that if it "were to conclude that 'plaintiff would have been injured . . . as she was, even if the vehicle had been designed differently, [then Nissan would be] entitled to a verdict because the alleged defect . . . could not have been a substantial factor in causing her injuries.'"[24]

Despite the fact that the case went to the jury on three separate theories of product defect and on the critically disputed fact issue of whether the plaintiff was seated upright or slouched, the trial judge asked the jury only two questions. First, Was the product defective and, second, Was the defect a proximate cause of the plaintiff's injuries?[25] The jury found that the product was defective but that the defect was not a proximate cause of the plaintiff's injuries. The plaintiff then moved for a new trial, and the motion was granted based on the trial court's cryptic observation that the verdict was

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[19] *See id.* at 559-60, 720 A.2d at 983.
[20] *Id.* at 560, 720 A.2d at 983.
[21] *Id.*, 720 A.2d at 983-84.
[22] *Id.*, 720 A.2d 984.
[23] *Id.* at 561, 720 A.2d at 984.
[24] *Truchan*, 316 N.J. Super. at 561, 720 A.2d at 984.
[25] *See id.*

against the weight of the evidence and resulted in a miscarriage of justice. Nissan's motion for leave to appeal was granted, as was the plaintiff's cross-appeal.[26]

The appellate division concluded that a new trial was warranted. The appellate division held that the trial judge's interrogatories to the jury invited an inconsistent verdict. Finding that, although a rational explanation for the jury's answers could be given, the appellate division was not satisfied that the jury was instructed properly so as to legitimize its conclusion that the product was defective, but was not a proximate cause of the plaintiff's injuries.[27] The appellate division pointed out that in the typical alternative safer design case, the issue of product defect subsumes the question of proximate causation.[28] That is so because the jury is instructed that a product is defective only if the risk of harm to the plaintiff could have been reduced or avoided by the adoption of an alternative design that was both practical and feasible, the omission of which renders the product not reasonably safe. If, under that instruction, a jury finds product defect, that jury also has determined the issue of proximate cause because the jury has already found that an alternative design would have prevented the plaintiff's harm.[29] Consequently, to ask the jury a second time whether the product defect was a proximate cause of plaintiff's injuries invites an inconsistent result.[30] The jury verdict in this case reflected either that the jury failed to appreciate that nuance or that the jury actually was focusing on another issue, such as whether the product was defective because it failed to warn plaintiff to sit upright in the vehicle while wearing the lap belt. The absence of the warning was of no moment, however, because the plaintiff would not have heeded it even if it were given.

As stated earlier, the judge instructed the jury on all three of plaintiff's defect theories. The verdict sheet did not disclose the theory upon which the jury decided. The case raises many questions that I will simply articulate now, but not answer. A series of questions come to my mind when I read *Truchan* in light of the issue of proving product defect after the Restatement (Third):

(1) Is the consumer expectation test incompatible with an alternative safer design case? The Model Civil Jury Charge

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[26] *See id.*

[27] *See id.* at 562, 720 A.2d at 985.

[28] *See id.* at 565, 720 A.2d at 986.

[29] *See id.* at 566, 720 A.2d at 987.

[30] *See Truchan*, 316 N.J. Super. at 568, 720 A.2d at 988.

and the Restatement (Third) seem to suggest that one excludes the other.

(2) Is this theory something that a plaintiff tactically wants to pursue?

(3) How does an attorney present proof on a person's expectation about seat belts, other than personal opinion?

(4) Will such proofs tend to distract the jury rather than focus it on the primary issue?

(5) Should the judge have asked the jury to answer a specific interrogatory on the fact issue of how the plaintiff was positioned in the car?

(6) What significance would it have had if the jury found that the plaintiff was seated upright, as she claimed to be?

(7) What significance would it have had if the jury found that the plaintiff was either lying down or tilting to the left at a forty-five degree angle?

(8) The opinion appears to have been written as a misuse case. What benefit does a defendant derive from interjecting misuse into the case?[31]

(9) When alternative safer design is the method of proving a product defect, is evidence regarding other risk-utility factors relevant?

(10) Are risk-utility factors one (its utility to the user and to the public as a whole) and three (the availability of a substitute product that would meet the need and not be as unsafe) relevant in this context?

(11) Are factors two, four, five, six, and seven any more than a particularized restatement of Learned Hand's formula for

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[31] In New Jersey, knowledge of the risk that the manufacturer knew that the plaintiff could have injured herself as she did is imputed to the manufacturer if the product is being used in its intended manner or a reasonably foreseeable manner. This is perhaps another way in which New Jersey case law differs somewhat from the Restatement (Third). Section 2(b) of the Restatement (Third) addresses the "foreseeable risks of harm posed by the product," suggesting that proof of foreseeability of the harm is the plaintiff's burden, although the plaintiff may have been using the product in the manner intended. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (1997). Surveying jurisprudence on the topic, the Restatement (Third) found, "Most courts agree that, for the liability system to be fair and efficient, the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution." *Id.* If, on the contrary, the product is being misused, the plaintiff has the burden of proving objective foreseeability of the misuse as well as the availability of a reasonable and practical design to meet the anticipated misuse.

imposing a tort duty?[32]

(12) Are not the proofs offered under those factors no more than an attempt to show the relative magnitude of the risk, the gravity of the anticipated injuries, and the fairness of requiring the defendant to bear the cost of avoiding the risk that caused injury to the plaintiff?

(13) What kind of evidence do you envision being offered under the remaining relevant factors?

As you can see, this issue has raised a multitude of questions. Now let's hear our distinguished panel's insights on this interesting topic.

[32] *See* United States v. Carroll Towing, 159 F.2d 169, 173-74 (2d Cir. 1947). Judge Hand's formula "proposed that whether an actor's conduct was negligent should depend on whether the burden of a precaution was greater than the gravity of the injury discounted by the probability that the injury would occur in the absence of the precaution . . . ." Michael Well, *Scientific Policymaking and the Torts Revolution: The Revenge of the Ordinary Observer*, 26 GA. L. REV. 725, 731 (1992).