Appellate Advocacy and Decisionmaking in State Appellate Courts in the Twenty-First Century

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I am the sixth justice on our seven person court in terms of seniority. Therefore, my remarks may not represent the views of other members of my court. Indeed, in a given case, they may not even represent my own views. Nonetheless, I will endeavor to unravel the mystery still surrounding the workings of appellate courts.

The adversarial system, created for the case-by-case administration of law, of which the appellate courts are a part, is structured like a tripod. In addition to the parties, the participants are (1) the lawyers for both the plaintiffs and the defendants, (2) a single neutral judge at the trial level, and (3) multiple neutral judges or justices at the appellate level. Although the foundation for an appeal is established in the trial courts, my remarks will focus on the appellate process in state courts—that of advocacy and decisionmaking in the context of products liability cases.

Each state, as well as the District of Columbia, has a court of last resort. Forty-seven states use "Supreme Court" in their highest courts' titles and identify their members as "justices."[1] The District of Columbia, Maryland, and New York use "Court of Appeals" in their highest courts' titles rather than "Supreme Court," and they refer to their members as "judges."[2]

I. HYPOTHETICAL FACTS

As points of reference, let us consider two hypothetical cases. In the first case, A's job required him to clean a cheese and meat slicing machine. The machine was manufactured and sold in 1980. He was instructed to remove the blade guard and to leave the machine run-

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[1] *See* John B. Wefing, *State Supreme Court Justices: Who Are They?*, 32 NEW ENG. L. REV. 49, 50 nn.6-7 (1997).

[2] *See id.*

ning in order to clean it quickly and thoroughly. While cleaning the machine in February 1994, A was involved in an accident. Four of his fingers were severed when they came into contact with the revolving unguarded blade. He sued the manufacturer on two theories of liability: (1) a design defect because the machine lacked an interlock guard that would prevent its operation when the guard was removed from the blade and (2) a warning defect based on the assertion that (a) no labels, manuals, or place cards were provided to warn a user of the danger and (b) adequate warnings were not supplied during the period between the sale in 1980 and A's injury in 1994.

A jury credited A's design defect claim and awarded him three million dollars. The intermediate appellate court affirmed. The state supreme court accepted the manufacturer's petition for review, limited, however, to the defective design issue.

In the second hypothetical case, B purchased a new luxury boat from a boat dealer. Three months after the purchase, the boat was destroyed by an electrical fire. No other property was damaged, and no one sustained personal injuries. B filed a products liability claim against the manufacturer, alleging that the electrical system was defectively designed. The trial court dismissed the case, holding that a purchaser could not maintain an action in strict liability for economic loss to the product itself. The intermediate appellate court disagreed and reinstated the complaint. The state supreme court granted the manufacturer's petition for review.[3]

Although both hypothetical cases involve a design defect theory in products liability law, I will focus on the process typically followed by the highest court in a state in arriving at its decision rather than forecasting what the outcome should be. In other words, I will discuss how decisional law is made.

II. BRIEFS

Once a state's highest court has accepted an appeal, the next step in the process is to prepare the merits briefs. I regard brief writing as a science and an art. Logic, organization, and coherence are essential. A brief writer should strive quickly to capture the intended audience. When reviewing the factual and procedural history, the writer should remember that from the perspective of an appellate judge, the cold trial record "is like a dehydrated peach; it has neither the substance nor the flavor of the peach before it was dried."[4] Lu-

[3] *See, e.g.*, Alloway v. General Marine Indus., 149 N.J. 620, 695 A.2d 264 (1997).

[4] Trusky v. Ford Motor Co., 19 N.J. Super. 100, 104, 88 A.2d 235, 237 (App.

gubrious recitation of unnecessary procedural and factual statements should be avoided.

State the issues early, clearly, accurately, and concisely. They should be articulated in a manner that tends to pull the court toward your conclusion. Present your strongest points first to try to capture votes early. The brief writer has a unique and uninterrupted opportunity to accomplish that objective. Doing otherwise creates the risk that an appellant's brief will be cast aside in favor of a respondent's brief. Briefs should be thorough in terms of applicable, controlling and helpful precedents, scholarly articles, learned treatises, and out-of-state authority. These sources should give the court the benefit of the leading scholarship on the subject as well as the *Restatement of the Law* if available. Thoroughness does not equate with filing overlong briefs.

Many products liability cases are complicated. Interpretation and application of section 402A of the *Restatement (Second) of Torts*[5] in light of a jurisdiction's existing public policy often leads to longer and more elaborate briefs. The same can be expected regarding section 2(b) of the *Restatement (Third) of Torts: Products Liability*.[6] Complicated cases, by necessity, require briefs and oral arguments to be focused.

The brief for the manufacturer of the slicing machine would likely argue that the court should follow the newly adopted section 2(b). The brief would likely urge the court to reverse the jury award because the plaintiff failed to establish that a reasonable alternative design was available when the machine was manufactured and sold in 1980. The manufacturer would argue in the alternative that, even if section 2(b) is not adopted by the court, a reversal is required under section 402A of the *Restatement (Second) of Torts* because the plaintiff failed to satisfy either the consumer expectations test or the risk/utility standard.

The brief for the manufacturer of the boat would likely argue that the court should adopt section 21 of the *Restatement (Third) of Torts: Products Liability*. That section "defines economic loss to exclude recovery under tort theories for damage to a product itself."[7] In addition, the brief would argue that the Uniform Commercial Code provides the most appropriate remedy for economic loss to the product caused by a defective design. Those two appeals would be

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[5] *See* RESTATEMENT (SECOND) OF TORTS § 402A (1977).

[6] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1997).

[7] *Alloway*, 149 N.J. at 636, 695 A.2d at 272.

listed for oral argument back-to-back on the same day before the highest court in the jurisdiction.

III. ORAL ARGUMENT

Many times, the argument of an appeal is the climax of the case. Most appellate courts in this country permit some form of oral argument, either by order of the court or at the request of an attorney for one of the parties. In New Jersey, a timely request by counsel for either party requires the intermediate appellate court to hear oral argument. All appeals before the New Jersey Supreme Court are argued.

In New Jersey, the chief justice presides over oral arguments in the supreme court and the presiding judge of a panel presides over oral arguments in the intermediate appellate court. The New Jersey appellate courts, and, I suspect, most throughout the country, are "hot courts." That means most appellate judges have read the briefs in advance of oral arguments.

Nevertheless, oral arguments serve several important purposes. First, they afford the court and counsel an opportunity to explain matters that are ambiguous, unclear, or missing from the appendices. Second, they afford the attorneys an opportunity to answer the questions a judge or justice might have after studying the briefs and the record in the case. The New Jersey Supreme Court permits attorneys to use the first five minutes of oral argument to present an overview of the case without interruption for questions. After making the opening statement, an oral advocate should remember that judges and justices like a dialogue more than a monologue/lecture.

A lawyer must be prepared to present his or her arguments with precision. Unlike the five days Daniel Webster and other counsel consumed when arguing *Gibbons v. Ogden*[8] before the United States Supreme Court in February 1824, appellate courts today operate more efficiently. In a typical case in New Jersey, each side is allowed thirty minutes to argue. The time restraints are imposed not because of the court's increasing impatience with oral arguments, but rather because of the increase in the business of the court. Court opinions often will be more concise than the 210 pages in the *Gibbons* decision.

There are gradations in the tone and style of questioning during oral arguments. It should not be viewed as a period of entertainment. "Oratorical frippery" should be avoided. After one oral

[8] 22 U.S. (9 Wheat.) 1 (1824).

advocate repeated that he was being "perfectly honest" with the court, our late Chief Justice Wilentz was prompted to say "you will tell us when you are not being perfectly honest as well, won't you?"

Justices are no longer passive during oral argument. Oral argument at the Wisconsin Supreme Court was, at one time, described as being so quiet that you could hear the justices' arteries clog.[9] Former Wisconsin Chief Justice Marvin B. Rosenberry is credited with telling the story of a farmer and his son visiting the court during oral argument one hot summer afternoon. After counsel had argued for sometime, a fly landed on the brow of a justice, who waved it away. When the justice waved the fly away a second time, "the farmer's boy nudged his father and exclaimed quite excitedly, 'Look, Dad, one of them is alive!'"[10] I think it is safe to say that the era of a quiet bench in both federal and state appellate courts ended at least a decade ago.

An oral advocate should be prepared to respond to hypothetical questions posing slightly different factual scenarios from that before the court. If an advocate's research reveals that the court in the past has been split on the same or similar issues presented in the advocate's case, an advocate should assume the split will continue. If one or more new members have been added to the court since a relevant decision was rendered, an advocate should attempt to gain the sympathy of the newer judge or justice without offending a perceived sympathetic vote. This is indeed a delicate balancing act.

In a multi-judge or multi-justice court, an oral advocate must be cautious about what he or she concedes, or the way he or she answers questions. Advocates should never give an answer simply to please the questioner. What pleases one member of the court may displease another. A justice who has been displeased by an oral advocate may have been the vote needed to win. The advocate should take care not to tip the scale in favor of an adversary.

Typically, a lawyer must distill into a thirty minute argument all the reasons why that lawyer's client should prevail. Intense questioning by the court may cause the attorney to feel that the arguments were not effective. That feeling can be reduced by good preparation, including rehearsal strategies, such as being grilled with the kinds of questions one might expect to receive from the court. Ideally, the

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[9] *See* Shirley S. Abrahamson, *Homegrown Justice: The State Constitution*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 315 (Bradley McGraw ed., 1985).

[10] 1 SELECTED WRITINGS OF ARTHUR T. VANDERBILT 28 (Fannie J. Klein & Joel S. Lee eds., 1967).

oral advocate should play an active role in writing the brief; this can enhance the advocate's level of confidence.

It is not uncommon for counsel admitted pro hac vice to argue before a state's highest court. Before appearing, counsel should determine how many votes are needed to win in that state's highest court. Twenty-five states have seven justices or judges, eighteen states have five justices or judges, six states have nine justices or judges, and Louisiana stands alone with eight justices.[11] Therefore, in seven states, an oral advocate must convince five justices or judges to win an appeal. An optimist might suggest that in those seven states, the intent is to encourage counsel to prepare as if he or she were arguing before the United States Supreme Court.

Oral argument should be viewed as more of an art form than brief writing. Using the judges' or justices' minds as a canvas, the oral argument affords the attorney the opportunity to paint a Mona Lisa of his or her case. But like the Scarecrow in *The Wizard of Oz*,[12] there are times when the decision can go either way. Many times, a judge's or justice's tentative pre-argument position changes based on the oral argument. Careful preparations are required, but much of an oral advocate's performance must be spontaneous.

IV. CONFERENCE

The conferences conducted in appeals after oral arguments are perhaps the most sacred and secretive of all aspects in the appellate process. This helps to explain why there is a great deal of mystery surrounding the process. The "unknown" aspect of appellate courts is one of the reasons that Bob Woodward's book *The Brethren—Inside the Supreme Court*[13] became so popular in 1979. Little has changed since then. Because I perceive that the public continues to be curious about the inner sanctum of our highest courts, I will share those aspects of the process that I can without violating the rules of professional or judicial responsibility.

The primary function of the conference is to discuss the appeal, decide the case, assign the opinion, re-discuss the appeal after an opinion has been circulated, critique the opinion in terms of substance and language, reconsider in light of any circulated dissenting or concurring opinions, and then reach consensus on the opinion of

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[11] *See* Wefing, *supra* note 1, at 52-53.

[12] L. FRANK BAUM, THE WONDERFUL WIZARD OF OZ (George M. Hill Co. ed., 1900).

[13] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN (1979).

the court that is to be filed in the case. The ultimate opinion reflects the combined thoughts of all the justices.

In our court, the conference involves a modified Socratic dialogue in that each justice is asked to express his or her thinking and disposition of each issue raised by the parties. The chief justice, who is appointed (the position does not rotate), presides over the conference. The chief justice calls on one of the justices to lead the discussion. Generally, the justices have no advance notice of who will be called on to lead the discussion. Obviously, then, each justice must be prepared to discuss each case.

Many ideas expressed at the conference are later incorporated into the opinion. At the conclusion of those discussions, the chief justice, if she is in the majority, assigns the opinion. When the chief justice is in the minority, the senior justice in the majority assigns the opinion. The senior justice in the minority assigns the dissenting opinion.

My anecdotal research reveals that not all jurisdictions conduct business the way that we do in New Jersey. Arthur T. Vanderbilt, the first Chief Justice of the New Jersey Supreme Court under the 1947 Constitution, inaugurated the practice we still follow and once criticized the ways other appellate courts conduct business. Chief Justice Vanderbilt was especially critical of a single-justice opinion system in which one justice is assigned to write on a rotating basis. The chief justice observed:

> In more than half of the appellate courts in the several states, opinions are assigned in rotation in advance of oral argument. Judges, you can be sure, listen more attentively to the arguments in the case where they are to write the opinion than they do to the arguments in other cases. There is an art, I am told, of seeming to listen. In some jurisdictions the practice of rotation has been exalted to a cardinal principle; judges have been called upon to write an opinion for the majority of the court with which they did not agree, but then they have been permitted to accompany such a majority opinion with a dissenting opinion of their own expressing their true views. There are other courts in which there is no conference at all after the argument, but the judge to whom the case is assigned in rotation writes an opinion which is circulated and, if nobody dissents, it becomes the opinion of the court without any discussion in conference whatsoever. If a judge disagrees with the opinion writer, he may prepare a dissenting opinion and circularize it, but a mere description of this process discloses its weaknesses. The result of internal court practices such as this, unknown except to those on the appellate court itself, cannot but produce one-man opinions that are, in fact, a

> fraud on the litigants and the public. While the judges on courts resorting to methods such as I have been describing have a variety of excuses for so doing, all are grounded in expediency and cannot be justified.[14]

At the conference in the case of the meat slicing machine, let us assume that the chief justice of my court called on me to lead the discussions. I would begin by identifying the issues presented and my proposed resolution to those issues. In the interest of time, I limit my reasoning to supporting the decision on each issue for the opinion.

The jury found that the slicing machine was flawed by a defective design when the manufacturer sold it to A's employer. The manufacturer argued that the trial court erroneously instructed the jury to utilize the consumer-expectations test rather than a risk/utility analysis to determine whether the slicing machine was defectively designed. I would express the view that the consumer-expectations test was the proper standard under the New Jersey Products Liability Act.[15] The design of the slicing machine without an interlock was "self-evidently" defective. There were no relevant considerations that made the hazard inherent in the product or reasonably necessary to its functioning.

At the conference concerning the luxury boat, let us also assume that I was asked to lead the discussions. The manufacturer of the luxury boat persuasively argued that a cause of action in strict liability should not be cognizable for *only* economic loss to the product itself. Unless a state statute requires otherwise, and New Jersey's statutory law does not, a claim for breach of an implied warranty should be the exclusive remedy for loss of benefit of the bargain. The facts of the case do not compel us to decide whether a distinction should be made between a commercial purchaser and a consumer because the boat is a luxury.[16]

I would also discuss broader considerations such as (1) spreading of risk (a) among all customers rather than allowing the loss to fall on one purchaser and (b) through insurance with slight premium increases throughout the industry so the cost of all similar

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[14] 2 SELECTED WRITINGS OF ARTHUR T. VANDERBILT 175 (Fannie J. Klein & Joel S. Lee eds., 1967).

[15] N.J. STAT. ANN. § 2A:58C-1 to -11 (West 1987) (amended 1995).

[16] *See* Alloway v. General Marine Indus., 149 N.J. 620, 626, 632-42, 695 A.2d 264, 267, 270-75 (1997); Spring Motors Distrib., Inc. v. Ford Motor Co., 98 N.J. 555, 580, 489 A.2d 660, 672-73 (1985); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 21 (1997).

products reflects the loss and (2) how the statutes of limitations in warranty actions (four years from sale) versus products liability actions (two years from loss) would affect the claims. The availability of insurance would also be considered.

V. THE OPINION—TEACHING V. LAWMAKING

A.

The justices are viewed as monks in the high judicial cloister who speak only when an opinion emerges. Unlike the Vatican when a new Pope is elected, we generally do not send any signals when an opinion is about to emerge.

The opinion in a case serves two significant purposes: (1) dispute resolution and (2) lawmaking or teaching from above. The dispute resolution is exclusively made at the conference, while the lawmaking largely occurs in the writing of the opinion. Structurally, the opinion is that portion of the appeal that is preserved in the vault of stare decisis. In some instances, the opinion becomes part of the literature of the law.

The opinion should reflect that the scales of justice are balanced and steady. At the same time, the opinion must reflect an awareness of the impact the court's opinion will have on the parties to the case and on society in general, while also recognizing the need for stability in the law without stagnation. That process generally requires a delicate balancing of various considerations, including the views of the dissenting and concurring justices.

Appellate judicial decisions are not merely the imposition of the justices' values. They are also the products of patterns of reasoning and justification. Those patterns generally include intellectual and moral instincts that are shared by other justices and judges. Frequently, the patterns also identify why a particular *Restatement of the Law* is accepted or rejected.

There was a time when it was virtually uncontroverted that the mission of the *Restatement* was to reflect the law as it is, and to make the law more understandable. Recently, that mission has been called into question during the American Law Institute's (ALI) deliberations regarding the newly adopted section 2(b) of the *Restatement (Third) of Torts: Products Liability.* Some commentators have suggested that the ALI's role changed from restating the law to that of issuing pro-manufacturer political documents.[17] Although that de-

[17] *See* Frank Vandall, *Constructing a Roof Before the Foundation Is Prepared: The Re-*

bate continues, and it appears clearer now that section 2(b) is not the reactionary statement that it was feared to be, I will consider the role of the *Restatement* in the making of decisional law.

One gains insight into whether to adopt a section of the *Restatement* by considering the decisional law of the state, the law of other jurisdictions, and scholarly commentary on the issues presented.[18] Dean Prosser's comments about whether legal causation should be decided as a matter of law helps to inform the decision whether to adopt a section of the *Restatement.* Dean Prosser said that the decision whether to submit causation issues to a jury is frequently based on policy rather than legal issues of causation:

> Often to greater extent, however, the legal limitation on the scope of liability is associated with policy—with our more or less inadequately expressed ideas of what justice demands, or of what is administratively possible and convenient.[19]

Thus, it is fair to say that whether the *Restatement* is applied in a given case depends on whether it furthers the *policy* the court wishes to advance. Products liability law is largely policy driven. Certainly, this notion is evident in New Jersey, beginning with the seminal case of *Henningsen v. Bloomfield Motors, Inc.*[20]

An independent judiciary is crucial to the appellate decision-making process. The existence of an independent judiciary forms the heart and soul of the American legal system. It has been recognized since the formation of our Republic that

> "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution," *The Federalist No. 78,* at 484 (A. Hamilton) (H. Lodge ed. 1888); that any "lessening [of] the independence of the judiciary [attacks] not only the judicial power, but the democratic republic itself," A. de Tocqueville, *Democracy in America* 289 (Vintage Books 1945); that "we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power, or factional passion, approves any measure we may enact," S.Rep. No. 711,

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statement (Third) of Torts: Products Liability Section 2(b) Design Defect, 30 U. MICH. J.L. REFORM 261, 279 (1997).

[18] *See* Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 619-20, 626 A.2d 445, 461-62 (1993) (adopting section 219 of the *Restatement (Second) of Agency* (1957)).

[19] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 264 (4th ed. 1971).

[20] 32 N.J. 358, 161 A.2d 69 (1960).

75th Cong., 1st Sess. 14 (1937) (rejecting the 1937 court-packing plan).[21]

I will not debate the majoritarian and the counter-majoritarian philosophies. I am persuaded, however, that the judicial selection process, when viewed against a national movement for tort reform, may have some influence, albeit lessened with extended judicial service, on the way a justice or judge votes in a given case. That conclusion is confirmed by an article published recently in the *American Bar Association Journal.* It reported that a 1994 survey of state court judges by the American Judicature Society indicated that 27.6% of judges said that retention elections made them increasingly sensitive to public opinion, while 15.4% conceded that they would avoid controversial rulings and cases.[22] The same percentages may apply to supreme court justices because 67.6% of them had prior judicial experience[23] and at least half of the states use some form of judicial elections.[24]

Professor Daniel R. Pinello has concluded from an empirical study that judges and justices who are selected by an appointment process are likely to be more independent than those who are elected.[25] If that statistical model applies to state supreme courts, an advocate in a controversial case may lose almost two justices' votes based on the selection process. An advocate in such a case would be left with the daunting task of winning four of five remaining votes on a seven-justice court.

An independent judiciary, however, should not be viewed as having a license to legislate. In products liability cases, as in other areas of the law, there must be an appreciation of the relative roles of the legislative and judicial branches in defining rights and duties. While an independent judiciary has considerable latitude in deter-

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[21] *In re* Randolph, 101 N.J. 425, 435-36, 502 A.2d 533, 583 (1986).

[22] *See* John Gibeaut, *Taking Aim*, 82 A.B.A. J. 50, 53 (Nov. 1996).

[23] *See* Wefing, *supra* note 1, at 80.

[24] State supreme court justices are elected in partisan elections in Alabama, Arkansas, Illinois, Mississippi, New Mexico, North Carolina, Pennsylvania, Tennessee, Texas, and West Virginia. Non-partisan contested elections are held in Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, and Wisconsin. *See* Peter Applebome, *Texas Court Fight Puts Focus on Elected Judges*, N.Y. TIMES, Jan. 22, 1988, at B4.

"Yes-no" retention elections are currently utilized in Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Utah, and Wyoming. *See id.*

[25] *See* DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME COURT POLICY: INNOVATION, REACTION, AND ATROPHY 142-43 (1995).

mining rights and duties, it must be mindful of the role the legislative and executive branches play.

The role of appellate courts in providing stability without stagnation is two-fold. At times, they must change the law to respond to changing times. Occasionally, they must also change the law to force the times to change. A court that strikes a proper balance between the two is characterized as moderate. A court that goes too far in either direction is characterized as liberal or conservative, depending upon the direction it takes.

New Jersey has been in the vanguard of products liability jurisprudence. We abandoned the "buyer beware" and "privity" concepts in defective-product-injury cases in 1960 and applied implied warranty principles.[26] Five years later we adopted section 402A of the *Restatement (Second) of Torts*.[27] The same principle was also applied to leased products[28] and to products contained in mass-produced homes.[29] We view the social policy underlying the law of products liability as "spreading the risk to society at large for the cost of injuries from defective products."[30] I suspect that social philosophy contributed to tort reform.

Under the pre-tort reform economic paradigm, the underlying policy question was which party is the "cheapest cost avoider." We asked which party "*is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made.*"[31] New Jersey concluded that a manufacturer is in a better position to make this decision than a factory employee or a typical product user. Those were policy decisions made by the judicial branch until the executive and legislative branches of government found tort reform to be politically beneficial.

The tort reform movement of the 1980s and 1990s was no doubt fueled in part by proactive judges' and justices' expansions of evolv-

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[26] *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 378-84, 161 A.2d 69, 80-84 (1960).

[27] *See* Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 64-65, 207 A.2d 305, 311 (1965).

[28] *See* Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 452, 212 A.2d 769, 779 (1965).

[29] *See* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 90, 207 A.2d 314, 325 (1965).

[30] Ramirez v. Amsted Indus., Inc., 86 N.J. 332, 350, 431 A.2d 811, 820 (1981); *accord* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 169-72, 406 A.2d 140, 149-50 (1979); Heavner v. Uniroyal, Inc., 63 N.J. 130, 146-52, 305 A.2d 412, 421-24 (1973).

[31] Guido Calabresi & John T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972).

ing common law. The self-regulating mechanism known as judicial restraint was perceived as ineffectual by some members of the legislative and executive branches of government. That perception prompted some members of the other two branches of government, and some academics, to pose a question similar to the one Roman poet Decimus Junius Juvenal (55-130 A.D.) asked in another context when questioning Plato's Republic: "But who is to guard the guards themselves?"[52] The modern day response to that ancient question was tort reform.

Approximately ten years ago, New Jersey and other jurisdictions became part of a national tort reform movement. New Jersey adopted its Products Liability Act in 1987.[53] In 1991, four years after New Jersey enacted this law, the ALI initiated a project to reform the *Restatement (Second) of Torts* and to create the *Restatement (Third) of Torts.* Some of the recent debates that preceded the adoption of the *Restatement (Third) of Torts: Products Liability* in May 1997 suggest that a new economic paradigm of products liability has been created.[54] I do not believe, however, that an independent judiciary will interpret new legislation and the *Restatement (Third) of Torts* as an economic vehicle divorced from social and humanistic concerns. Indeed, Judge Dreier has identified many areas in which section 2(b) does not change the existing law in some jurisdictions.[55]

B.

We turn now to applying the foregoing principles to the first hypothetical involving the slicing machine. Recall that the machine was manufactured and sold to the plaintiff's employer in 1980, and the accident occurred in 1994.

The New Jersey Products Liability Act (the Act), adopted roughly eight years before the slicing machine accident, should be applied. Section 2 of the Act defines a defective product as one that was not "reasonably fit, suitable, or safe for its intended purpose" because of a design defect, a manufacturing defect, or a warning de-

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[52] JOHN BARTLETT, FAMILIAR QUOTATIONS 109 (Justin Kaplan ed., 16th ed. 1992).

[53] 1987 N.J. Laws 197, § 7 (effective July 22, 1987) (codified at N.J. STAT. ANN. § 2A:58C-1 to -7 (West 1987) (amended 1995)).

[54] *See generally* ROSCOE POUND FOUNDATION, POSSIBLE STATE COURT RESPONSES TO THE ALI'S PROPOSED RESTATEMENT OF PRODUCTS LIABILITY, REPORT OF THE 1996 FORUM FOR STATE COURT JUDGES (1997).

[55] *See generally* William A. Dreier, *Design Defects Under the Proposed Section 2(b) of the Restatement (Third) of Torts: Products Liability—A Judge's View,* 30 U. MICH. J.L. REFORM 221 (1997).

fect.[36] Section 2 of the *Restatement* incorporates the same three categories of product defects.[37]

Suppose the manufacturer of the slicing machine relies on the statutory defense that, at the time the product left its control in 1980, "there was not a practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product."[38] Thus, the Act converted a single factor in a common-law risk/utility analysis into an absolute state of the art affirmative defense.[39] Section 2(b) of the *Restatement* provides the same defense. Thus, before section 2(b) of the *Restatement* was adopted, tort reform in New Jersey changed the methodology of analyzing products liability cases.[40]

The manufacturer's alternative-design defense must fail in the slicing machine case. Under our Act, a manufacturer bears the burden of proof of that defense, while under section 2(b), the plaintiff must prove that a reasonable alternative existed. Under our case law, not changed by the Act, the manufacturer must prove the technological state-of-the-art when the product was manufactured, and a plaintiff must prove that the product deviated from the state-of-the-art. Under both the Act and section 2(b), counsel and the courts will have to deal with the emerging scientific evidence discussed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[41] and *General Electric Co. v. Joiner*.[42]

The evidence reveals that an alternative design existed and that the machine the plaintiff used deviated from the state-of-the-art because the machine could readily have been manufactured with an interlock. Interlock technology had been used for many years in various industries at the time the slicer was manufactured, including the food industry. In 1980, however, no food slicer had incorporated an interlock that would be triggered by the removal of the guard. In 1984, the manufacturer discontinued production of the machine the plaintiff was using and introduced a new model. The new machine was substantially identical to the old machine in appearance and op-

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[36] *See* N.J. STAT. ANN. § 2A:58C-2 (West 1987) (amended 1995).

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

[38] N.J. STAT. ANN. § 2A:58C-3 (West 1987) (amended 1995).

[39] *See, e.g.*, Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 96, 577 A.2d 1239, 1252-53 (1990); Fabian v. Minster Mach. Co., 258 N.J. Super. 261, 271, 609 A.2d 487, 492 (App. Div. 1992).

[40] *See Dewey*, 121 N.J. at 96, 577 A.2d at 1252-53.

[41] 509 U.S. 579 (1993).

[42] 118 S. Ct. 512 (1997).

eration except that the newer version was built with a blade interlock. There was no change in the relative technology between 1980 and 1984. The manufacturer did not remotely suggest that the incorporation of a blade guard interlock impaired the functionality of the machine. Although there was some dispute about the feasibility and cost of retrofitting the old machines with blade guard interlocks, both of the experts presented by the parties agreed that modifying the design to incorporate the interlocks during production would not have required either a substantial design effort or a significant additional cost.

Next, I turn to whether the risk/utility standard or the consumer-expectations test should have been applied to this case. The manufacturer's argument that the trial judge erroneously instructed the jury to utilize the consumer-expectations test rather than the risk/utility analysis to determine whether the machine was defectively designed should be rejected.

Although the Act defines the standard for determining the adequacy of warnings,[43] it does not define the standard for determining when a design defect has caused a product not to be "reasonably fit, suitable, or safe for its intended purpose."[44] Therefore, the Act must be read in conjunction with our decisional law to determine whether a design defect exists.

Unlike a manufacturing defect, where the focus is on whether the particular product was manufactured according to design specifications, a design defect case focuses on whether the design specifications used to manufacture an entire product line created an unreasonable risk. To answer that question, the court must apply a standard that goes beyond the manufacturer's specifications. The standards utilized in New Jersey are the consumer-expectations test and the risk/utility standard.

Under our common-law risk/utility standard, the usual multipart test looks at factors such as the availability of an alternative design, the usefulness, desirability and safety aspects of a product, and the manufacturer's ability to eliminate unsafe characteristics without impairing the usefulness or increasing the cost of the product.[45] Under the *Restatement*, the factors considered are the availability of an alternative design and whether "the omission of the alternative

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[43] *See* N.J. STAT. ANN. § 2A:58C-4 (West 1987) (amended 1995).

[44] N.J. STAT. ANN. § 2A:58C-2 (West 1987) (amended 1995).

[45] *See* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 181-82, 406 A.2d 140, 155-56 (1979) (Clifford, J., concurring).

design renders the product not reasonably safe" for use.[46] The *Restatement* points out that this "reasonable alternative design" is a non-exclusive test in unusual cases.[47] It "is the predominant, yet not exclusive, method for establishing defective design."[48]

The "risk/utility analysis provides the flexibility necessary for an appropriate adjustment of the interests of manufacturers, consumers, and the public."[49] Furthermore, the risk/utility analysis includes other factors such as the state-of-the-art at the time of the manufacture of the product.[50]

The risk/utility analysis is an objective test that focuses on the product. The consumer-expectations test is more subjective but it also focuses on the product. The consumer-expectations test was recognized in New Jersey in 1979 at the same time the risk/utility analysis was also accepted.[51] We apply a narrow version of the consumer-expectations test. In *Suter v. San Angelo Foundry & Machine Co.*, the court instructed that the consumer-expectations test is applicable only where the product, like "a bicycle whose brakes did not hold because of an improper design," is "self-evident[ly] . . . not reasonably suitable and safe and fails to perform, contrary to the user's reasonable expectation that it would 'safely do the jobs for which it was built.'"[52]

I am persuaded that the trial court properly applied the consumer-expectations test in the slicing machine case. The accident occurred while the plaintiff was cleaning the machine. A delicatessen slicing machine cannot be used satisfactorily without frequent and thorough cleaning of its blade. The manufacturer contemplated that the blade would be cleaned while it was revolving. A food slicing machine that is designed to be cleaned without the guard in place and while the blade is revolving is clearly not "reasonably fit, suitable, or safe for its intended purpose."[53]

It is apparent that in this design defect case, some negligence principles have been applied. The establishment of a design defect

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[46] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1997).

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

[48] *Id.*

[49] O'Brien v. Muskin Corp., 94 N.J. 169, 183, 463 A.2d 298, 305 (1983).

[50] *See* Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 174, 386 A.2d 816, 826-27 (1978).

[51] *See* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 170-71, 406 A.2d 140, 149-50 (1979).

[52] *Id.* at 170-71, 406 A.2d at 150 (quoting Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962)).

[53] N.J. STAT. ANN. § 2A:58C-2 (West 1987) (amended 1995).

requires proof of what a reasonable manufacturer would do once it knows that its product is dangerous. This focuses on the manufacturer's conduct rather than on the product. Therefore, by having to prove that the manufacturer's process contributed to the defective design, some negligence principles are necessarily applied. Under both strict liability and negligence principles, a manufacturer of a product is deemed to be an expert in the design and manufacture of that product, and is required to keep up with advances in its industry.[54] In addition, although the plaintiff could not be found contributorily negligent by virtue of the Act and our common law, the jury was nonetheless permitted to consider his knowledge as relevant to the issue of causation. More specifically, in a design defect case, a consumer's or user's knowledge of the danger represented by a product raises a question about whether the ultimate injury was caused by the dangerous product or by the conduct of the user in the face of this danger. Here, the jury concluded that the design defect was the proximate cause of the injury. I doubt that the conclusion would be different under the *Restatement.*

C.

Finally, I turn to the hypothetical involving the boat. Recall that the plaintiff seeks damages for the cost of repair and for the boat's loss of value at trade-in. There is no allegation that other property was damaged or that anyone sustained personal injuries.

Ordinarily, economic loss encompasses actions for a recovery of damages for the cost of repairs, replacement of defective goods, inadequate value, and consequential loss of profits.[55] Economic loss further includes "the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold."[56]

The real question posed is whether the plaintiff should be permitted to proceed with a products liability design defect claim or whether the damages should be limited to contract principles. "Generally speaking, tort principles . . . are better suited for resolving claims" for personal injuries or damages to other property.[57] Con-

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[54] *See* Feldman v. Lederle Lab., 97 N.J. 429, 452-53, 479 A.2d 374, 386-87 (1984).

[55] *See* 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE §§ 11-4 to 11-6, at 534-40 (3d ed. 1988); *see also* Note, *Economic Loss In Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966).

[56] Comment, *Manufacturers' Liability To Remote Purchasers For "Economic Loss" Damages—Tort or Contract?*, 114 U. PA. L. REV. 539, 541 (1966).

[57] Spring Motors Distrib., Inc. v. Ford Motor Co., 98 N.J. 555, 579-80, 489 A.2d

tract principles are better suited to resolving claims for economic loss caused by damage to the product itself.[58] Implicit in the tort/contract distinction is the notion that a tort duty of care protects against the risk of accidental harm, whereas a contractual duty preserves the satisfaction of consensual obligations.

Also relevant to the distinction is the relative bargaining power of the parties and the allocation of the loss to the better risk-bearer in a modern marketing system. Although a manufacturer may be in a better position to absorb the risk of loss from physical injury or property damage, a purchaser may be better situated to absorb the risk of economic loss caused by the purchase of a defective product. The purchaser of a luxury item such as a boat can easily guard against the risk of loss by purchasing insurance. In addition, when New Jersey adopted the Uniform Commercial Code (U.C.C.), it embraced a comprehensive system for compensating consumers for economic loss arising from the purchase of defective products.[59] The U.C.C. represents the legislature's attempt to strike a proper balance in the allocation of the risk of loss between manufacturers and purchasers for economic loss arising from injuries caused by defective products.

Last term, our court in *Alloway v. General Marine Industries*[60] joined the rest of the country in holding that, under this hypothetical, the plaintiff is limited to pursuing an implied warranty claim and may not pursue a products liability cause of action. Since our court decided *Santor v. A & M Karagheusian, Inc.*,[61] permitting a strict liability claim against a manufacturer for loss of value of a defective carpet, New Jersey subsequently adopted the Products Liability Act (the Act). Under the Act, the definition of "harm" means "physical damage to property, other than to the product itself."[62] Similarly, the *Restatement* excludes economic harm to the product itself as a recoverable item in a products liability claim.[63] Section 21, comment d, states that "[w]hen a product defect results in harm to the product itself, the law governing commercial transactions sets forth a comprehensive scheme governing the rights of the buyer and seller."[64]

660, 672 (1985).

[58] *See id.* at 580, 489 A.2d at 672.

[59] *See id.* at 577, 489 A.2d at 671.

[60] 149 N.J. 620, 695 A.2d 264 (1997).

[61] 44 N.J. 52, 207 A.2d 305 (1965).

[62] N.J. STAT. ANN. § 2A:58C-1(b)(2)(a) (West 1987) (amended 1995).

[63] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 21 (1997).

[64] *Id.* cmt. d.

I leave for another day whether section 21 of the *Restatement* should be applied to consumer goods. The implied warranty expires after four years from the date of purchase of the product. For many consumer products, such as heating units and refrigerators, the expected life of the product exceeds ten years. Thus, the four-year statute of limitations appears to be too harsh as applied to these goods.

VI. CONCLUSION

I began by stating that an opinion has two main purposes: (1) dispute resolution and (2) lawmaking. Issue-framing for an opinion writer is as important as it is for a brief writer. Unless the issues are clearly identified, the opinion is likely to be poorly organized. The writer should frame the issues before making a long factual presentation. I usually state the type of case and the principal issue in the first sentence of the opinion and then follow with the court's holding. The writer should use plain language at all times. The writer should avoid using "fifty cent" words, Latin expressions, legalese, obscure terms, and inflated language. Clarity and precision are key.

A signed opinion has advantages and disadvantages. Above all, it tells the world who to blame for mistakes. The most famous opinion writer of all time, "per curiam," cannot be blamed. The truth of the matter is that signed opinions should also be consensus or teamwork opinions. Whether written by "per curiam" or a named judge or justice, the opinion should always represent the combined efforts of the court. As Judge Learned Hand explained, the institution of the courts should be the primary focus and not the individual proclivities of the judges.[65] Although an appellate court is comprised of individual contributors, the court as an institution represents more than the sum of its parts.

Good opinion writing involves creativity. Justice Cardozo once said, "I have grown to see that the [judicial] process in its highest reaches is not discovery, but creation. . . ."[66] Judge Learned Hand said essentially the same thing when he wrote, "I like to think that the work of a judge is an art. . . . It is what a poet does, it is what a sculptor does."[67]

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[65] *See* LEARNED HAND, THE BILL OF RIGHTS 71-72 (1958).

[66] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166 (1921).

[67] THE ART AND CRAFT OF JUDGING: THE DECISIONS OF JUDGE LEARNED HAND xiii (Hershel Shanks ed., 1968).

The tone and breadth of an opinion reflect the writer's style. Some judges and justices paint in bold colors, while others work in pastels. Some view their opinions as masterpieces such as the Sistine Chapel or a Mona Lisa. I prefer to view my opinions as an Art Buchwald article that is simple, direct and strikes one as a still-life watercolor.

In the area of products liability law, judges and justices are both consumers of products and law givers. This dichotomy may influence a judge to "think feelingly."[68] Appellate judges and justices, like trial judges, make choices that reflect their perceptions of the judicial role. "A judge's perception of community values influences such basic choice as the . . . interpretation of a [products liability] statute, [and] the extension of the common law."[69]

Brush stroke by brush stroke, appellate judicial opinions in New Jersey, and perhaps across the country, have been painting a new jurisprudence of products liability since the tort reform movement commenced in the 1980s. In New Jersey, we have abrogated a common-law products liability cause of action outside of the statute when a design defect in consumer products only causes damage to the product itself.[70] We have also departed from our common law and have held that the manufacturer of component parts to be assembled into a machine or a finished product has no duty to warn unless a design or manufacturing defect is proven.[71] Despite our prior decisional law,[72] we recently adopted section 5 of the *Restatement (Third) of Torts: Products Liability*.[73]

Some respectable lawyers and scholars will not be submitting advance bids to Sotheby's for the emerging portrait of products liability jurisprudence for the twenty-first century. Neither judges nor artists can totally escape the time and place in which they live. To some extent, judicial opinions rendered by independent judges and justices are likely to reflect some of the pressures of the time. Our cutting-edge decisions in *Henningsen* and *Suter* may represent New

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[68] Paul Gewirtz, *On "I Know It When I See It,"* 105 YALE L.J. 1023, 1032 (1996) (discussing judicial perspective on pornography).

[69] Stewart G. Pollock, *The Art of Judging*, 71 N.Y.U. L. REV. 591, 595 (1996) (discussing artistry of judicial work).

[70] *See* Alloway v. General Marine Indus., 149 N.J. 620, 643-44, 695 A.2d 264, 275-76 (1997) (Handler, J., concurring).

[71] *See* Zaza v. Marquess & Nell, Inc., 144 N.J. 34, 58-63, 675 A.2d 620, 632-35 (1996).

[72] *See* Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 397-402, 451 A.2d 179, 184-87 (1982).

[73] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 (1997).

Jersey's finest contributions to the changing products liability jurisprudence.[74]

The critical lesson to be learned from tort reform is that in the meandering course of products liability jurisprudence there is time for visions and revisions. As they say on Wall Street, the market corrects itself.

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