A "Safer Mousetrap": The Evolution of a Model Charge for Alternative Safer Design Cases

The Hon. William J. Cook, J.S.C. *

Five years ago, an article entitled *A Better Mousetrap: The Heart of a Product Liability Case*[1] appeared in the New Jersey State Bar Association Civil Trial Bar Section Newsletter. The author of the article urged that, because most product liability design defect claims are grounded on the alternative safer design, or "better or safer mousetrap," theory of liability, a new model charge encompassing that theory should be adopted.[2] At that time, the design defect model charge for New Jersey courts, 5.34B.2, covered only those cases grounded on the risk-utility theory, i.e., the claim that a product's risk(s) outweighed its utility.[3] There was no separate model charge for alternative safer design or "better mousetrap" cases, despite the fact that such cases constituted the bulk of design defect claims.

In addition to the sheer number of such claims, the need for a separate model charge for New Jersey was self-evident because the gist of the alternative safer design claim is *not* that the product flunks the risk-utility test. The risk-utility theory requires a jury to undertake the rather cumbersome and complex task of weighing as many as six different "risk-utility factors" in order to determine whether a product's risks or dangers outweigh its usefulness.[4] Those factors, first suggested by Dean Wade in a 1973 law review article,[5] and thereafter adopted by the New Jersey Supreme Court in *Cepeda v. Cumberland Engineering Co.*,[6] may be difficult for a jury to understand and assess. Moreover, the risk-utility analysis is irrelevant in

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1 William J. Cook, *A Better Mousetrap: The Heart of a Product Liability Case*, CIV. TRIAL B. SEC. NEWSL. (New Jersey State Bar Association), Spring/Summer 1993, at 9.

2 *See id.*

3 *See* N.J. MODEL JURY CHARGES: CIVIL § 5.34B.2 (N.J. Institute for Continuing Legal Educ. 1989).

4 *See id.*

5 *See* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973).

6 76 N.J. 152, 174-75, 386 A.2d 816, 826-27 (1978).

alternative safer design cases because the evaluation of factors in the risk-utility test is not used to determine whether there was an available safer design that would have prevented the accident without impeding the reasonably anticipated uses of the product.[7] Instead, the test is used to answer the much broader question of whether the product's risk outweighed its utility, an issue that need not be addressed in alternative safer design cases.

Thus, for those design defect cases limited to the "safer mousetrap" theory of design defect liability, a risk-utility model charge does not fit the mold. The claim in those cases is *not* that the product's risk(s) outweighed its usefulness. Rather, the "safer mousetrap" theory claims that the manufacturer failed to equip the product with an alternative safer design, such as a guard, alarm, or other safety system or device, which was available or within the state-of-the-art, and which would have prevented the injury or death that occurred without being excessively costly or unduly hindering the product's utility or usefulness.

Examples of the alternative safer design basis of product liability include the classic illustration of the car without seatbelts presented in *Beshada v. Johns-Manville Products Corp.*,[8] in which the New Jersey Supreme Court stated:

> For purposes of analysis, we can distinguish two tests for determining whether a product is safe: (1) does its utility outweigh its risk? and (2) if so, has that risk been reduced to the greatest extent possible consistent with the product's utility? . . . . *Whether or not the product passes the initial risk-utility test, it is not reasonably safe if the same product could have been made or marketed more safely* . . . . Because of the great utility of cars, few would dispute that even without seatbelts, a car's utility to society outweighs its risks. Thus, cars would be considered safe under the first aspect of the test. However, since seatbelts make cars safer without hindering utility, cars without seatbelts are deemed unsafe.[9]

Another notable "safer mousetrap" scenario is the landmark and universally cited case of *Schipper v. Levitt & Sons, Inc.*,[10] which involved burning-hot water coming from bathroom faucets that were not equipped with temperature-reducing mixing valves.[11] Other

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[7] *See* Fiorino v. Sears Roebuck and Co., 309 N.J. Super. 556, 563-64, 707 A.2d 1053, 1056-57 (App. Div. 1998).

[8] 90 N.J. 191, 447 A.2d 539 (1982).

[9] *Id.* at 201, 202 n.5, 447 A.2d at 545 n.5 (emphasis added).

[10] 44 N.J. 70, 207 A.2d 314 (1965).

[11] *See id.* at 74-75, 207 A.2d at 316-17.

examples of the use of the "safer mousetrap" theory include *Johnson v. Salem Corp.*,[12] which dealt with machines that did not contain interlocked guards,[13] *Bexiga v. Havir Manufacturing Co.*,[14] which dealt with punch presses that did not have two-hand palm buttons,[15] and *Tirrell v. Navistar International, Inc.*,[16] which dealt with trucks and trailers that did not have back-up alarms.[17]

The New Jersey Supreme Court first recognized the alternative safer design or "better mousetrap" theory as a separate basis for design defect liability in *Freund v. Cellofilm Properties, Inc.*[18] In that case, the court pointed out that, if an alternative safer design would reduce the risk presented by a particular product to the greatest extent possible without sacrificing the product's continued utility, the product as designed and marketed is not safe and is thus defective.[19] Besides *Freund* and *Beshada*, the New Jersey Supreme Court decision of *Michalko v. Cooke Color & Chemical Corp.*[20] also recognizes the alternative safer design theory as a separate basis for product liability.[21] In *Michalko*, the court stated that "[a]t the core of our strict liability cases is the requirement that 'the risk from the product be reduced to the greatest extent possible without hindering its utility.' '[I]t is not reasonably safe if the same product could have been made or marketed more safely.'"[22]

In the years since the "safer mousetrap" article appeared in 1993, confluent forces have been at work. These point to the recognition of the alternative safer design theory as a basis for design defect liability and to the desirability of a separate model charge for "safer mousetrap" cases. First, preparation of the Restatement (Third) of Torts: Products Liability (Restatement (Third)) began, which included proposed revisions to the sections relating to design defect liability. Specifically, proposed section (b) provided:

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[12] 97 N.J. 78, 477 A.2d 1246 (1984).

[13] *See id.* at 89, 477 A.2d at 1252 (stating that, in determining whether a design defect exists, one of the factors that must be considered is whether there were "available design alternatives").

[14] 60 N.J. 402, 290 A.2d 281 (1972).

[15] *See id.* at 409-11, 290 A.2d at 285 (noting that an "alternative basic safety device" could have been placed on the product in question).

[16] 248 N.J. Super. 390, 591 A.2d 643 (App. Div. 1991).

[17] *See id.* at 401-02, 591 A.2d at 649 (noting that a manufacturer has a duty to install existing safety devices).

[18] 87 N.J. 229, 238 n.1, 432 A.2d 925, 930 n.1 (1981).

[19] *See id.*

[20] 91 N.J. 386, 451 A.2d 179 (1982).

[21] *See id.* at 402, 451 A.2d at 187.

[22] *Id.* (quoting *Beshada*, 90 N.J. at 201, 447 A.2d at 544-45).

> 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 . . . and the omission of the alternative design renders the product not reasonably safe.[23]

Then, in 1994, the alternative safer design revisions of proposed section 2(b) were recognized in *Smith v. Keller Ladder Co.*[24] The court in *Smith* quoted the comment to the proposed section, which states that, "[t]o establish a prima facie case of defect, plaintiff must prove the availability of a technologically feasible and practical alternative design that would have reduced or prevented plaintiff's harm."[25]

In 1998, the Restatement (Third) was approved, with the above provisions and comments remaining intact.[26] Later that year, and once again in the context of a "safer mousetrap" claim, the New Jersey Appellate Division referred to the alternative safer design theory provisions of section 2(b) of the Restatement, observing:

> [I]n this case, as in most other design defect cases that are not controlled by the absolute defenses to design defect claims in the Product Liability Act, *N.J.S.A.* 2A:58C-3a, the issue centers upon whether, in the words of the Restatement (Third) of Torts: Products Liability § 2(b) (1997 Proposed Final Draft), there was a "reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe."[27]

Authoring the opinion, Judge Dreier also pointed out that only in "the unusual case" would other risk-utility elements control.[28] Such cases, the judge explained, would involve those design defect claims that are not confined to a "safer mousetrap" theory.[29]

Section 2(b) of the Restatement (Third) was again cited with approval in 1998 by the New Jersey Appellate Division in *Fiorino v. Sears Roebuck and Co.*[30] In *Fiorino*, the court stated that a successful design defect claim can be proven by demonstrating a reasonable alternative design that would have prevented or made plaintiff's

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[23] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (Proposed Final Draft 1997).

[24] 275 N.J. Super. 280, 284, 645 A.2d 1269, 1271 (App. Div. 1994).

[25] *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (Tentative Draft No.1 1994)).

[26] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998).

[27] Congiusti v. Ingersoll-Rand, 306 N.J. Super. 126, 138-39, 703 A.2d 340, 346 (App. Div. 1997).

[28] *See id.* at 139 n.3, 703 A.2d at 346 n.3.

[29] *See id.*

[30] 309 N.J. Super. 556, 707 A.2d 1053 (App. Div. 1998).

injury less likely, without impeding the reasonably anticipated uses of the product.[31] Then, in *Green v. General Motors Corp.*,[32] Judge Dreier noted that, unless other risk-utility factors are relevant in a particular case, "the issue upon which most claims will turn is the proof by plaintiff of a 'reasonable alternative design . . . the omission . . . [of which] renders the product not reasonably safe.'"[33] In July 1998, the New Jersey Supreme Court acknowledged and approved the "safer mousetrap" theory of design defect, stating that, in a design defect case, "[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.*"[34] Finally, through the efforts of the New Jersey Product Liability Model Jury Charge Subcommittee, which has existed since 1994, there is now a new model charge for "safer mousetrap" cases. Under the new alternative safer design charge, jurors would be instructed as follows:

> Reasonable Safer Design
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> Plaintiff claims that the [*product*] was defectively designed because it did not employ a reasonable safer design. To establish his/her claim of design defect, [*plaintiff*] must prove by the greater weight of the credible evidence that:
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> a. The product was designed in a defective manner.
>
> A design defect exists if the foreseeable risks of harm posed by the [*product*] could have been reduced or avoided by the adoption of a reasonable safer design and the omission of the alternative design renders the product not reasonably safe.
>
> (*Presumption of Knowledge*)
>
> In proving a defect in the design of a product, [*plaintiff*] need not prove that [*defendant manufacturer/seller*] knew that the accident in this case could happen as it did. Knowledge of the dangers of the product and the possibility of such an event is legally placed upon the manufacturer/seller. The question for you to decide is whether, assuming the defendant(s) knew the dangers of the product, it (they) were nevertheless reasonably careful in the manner in which it (they) designed (marketed or

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[31] *See id.* at 563-65 & n.3, 707 A.2d at 1056-57 & n.3 (stating that, under section 2(b) of the Restatement (Third), plaintiff may prove "a reasonable alternative design . . . the omission . . . [of which] renders the product not reasonably safe").

[32] 310 N.J. Super. 507, 709 A.2d 205 (App. Div. 1998).

[33] *Id.* at 517, 709 A.2d at 210 (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (Proposed Final Draft 1997)).

[34] Lewis v. American Cyanamid Co., 155 N.J. 544, 570-71, 715 A.2d 967, 980 (1998) (emphasis added).

sold) the [*product*].

[*Plaintiff*] claims that the [product] should have contained the following: [*briefly describe reasonable safer design feature*].

[*Defendant*] on the other hand claims that the [*product*] should not have contained the reasonable safer design because [briefly describe the reasons for rejecting the proposed reasonable safer design feature].

You are to decide whether the safety benefits from altering the design as proposed by [*plaintiff*] were greater than the resulting costs or disadvantages caused by the proposed design, including any diminished usefulness or diminished safety. If the failure to incorporate a practical and technically feasible safer alternative design made the [*product*] not reasonably safe, then the [*product*] was designed in a defective manner.

If, on the other hand, [*plaintiff*] has not proven there existed a practical and technically feasible safer alternative, or if you find that the [*product*] as designed was reasonably safe, then the [*product*] was not designed in a defective manner.[35]

[35] N.J. MODEL JURY CHARGES: CIVIL § 5.34C-3.2 (N.J. Institute for Continuing Legal Educ. 1998). The Honorable Raymond F. Drozdowski, J.S.C. has ably chaired the Subcommittee responsible for the "safer mousetrap" charge for the past four years. Judge Drozdowski has been assisted by George W. Conk, Esq., a products liability practitioner and noted adjunct professor at Seton Hall University School of Law by Dennis Donnelly, Esq., another products liability practitioner, and by the author of this Note and the 1993 "Better Mousetrap" article.