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Articles

An Unhappy Return to Confusion in the Common Law of Products Liability—*Denny v. Ford Motor Company* Should be Overturned

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I. Introduction

The New York Court of Appeals has a long history as one of the most distinguished and influential courts in the United States. Echoing its great Chief Justice Benjamin Cardozo, most of its judges have striven to formulate sound rules of tort law—rules that are balanced and fair. Whether one agrees or disagrees with the outcome of the Court's various decisions, accuracy has been a hallmark of the Court. That history and tradition made the 1995 case of *Denny v. Ford Motor Co.*¹ a maverick ruling by the Court.

In *Denny*, the Court affirmed a \$1.2 million jury award to a personal injury plaintiff under an "implied warranty" theory, even though a jury found that the product was "reasonably safe" and not "defective" under a strict products liability theory.² As this article will explain, the Court's decision could reverse sound and fair public policy developments in products liability law and create misunderstandings and confusion in product liability jurisprudence. In a nutshell, this is why.

First, by permitting plaintiffs to take "two bites at the apple" to establish liability—one under an implied warranty "consumer expectations" test and another under a strict liability "risk/utility" test—the decision will fuel unnecessary, prolonged litigation. The decision is out of step with public policy approaches of other state courts, state legislatures, the new draft *Restatement of the Law of Torts: Products Liability*, and the Council of the European Communities' Directive on product liability, which have established one coherent and clear set of rules regarding when a manufacturer or product seller will be subject to liability.³

Second, by holding manufacturers and sellers subject to absolute liability under a hazy, undefined implied warranty theory, the decision departs from the clear trend in almost every

1. 87 N.Y.2d 248, 662 N.E.2d 730, 639 N.Y.S.2d 250 (1995).

2. *See id.*

3. *See generally* RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY § 2 (Tentative Draft No. 2, 1995); Victor Schwartz & Mark Behrens, *The Road To Federal Product Liability Reform*, 55 Md. L. Rev. 1363 (1996); Council Directive 85/374, 1985 O.J. (L 210/29). Sections 1-2, *inter alia*, of the new products liability *Restatement* was given tentative approval by the body of the American Law Institute in May 1995. *See* 17 A.L.I. Rep. 4, at 1 (1995).

state: a recognition that fault must be the bottom line basis of liability in design defect and failure to warn cases.

Third, and perhaps most disturbing, is the fact that the Court's decision is formed around a misunderstanding of two key predicates: (1) how the implied warranty cause of action is applied in personal injury cases alleging design "defect," and (2) the basic meaning of the new draft *Restatement of the Law of Torts: Products Liability*.⁴ In light of the Court's prestige and credibility in the community of judges, we are concerned that these misunderstandings could be replicated elsewhere.

Respectfully, it is submitted that the New York Court of Appeals should overrule the *Denny* decision.

II. The Facts In *Denny v. Ford Motor Co.*

Plaintiff Nancy Denny was injured in June 1986 when the four-wheel drive vehicle she was driving, a Ford Motor Company ("Ford") Bronco II, overturned during an evasive maneuver to avoid a deer that had walked directly into her vehicle's path.⁵ Ms. Denny and her husband sued Ford in federal court in New York, alleging claims for negligence, strict products liability, and breach of the implied warranty of merchantability.⁶ The case went to trial in October 1992.⁷

The trial focused on the design characteristics of small four-wheel-drive utility vehicles.⁸ Plaintiffs' counsel argued that small "4x4" vehicles in general, and the Bronco II in particular, are less stable and present a higher risk of rollover than conventional passenger automobiles during everyday on-road travel.⁹ Plaintiffs' counsel also argued that Ford's marketing of the Bronco II stressed the vehicle's suitability for commuting and for suburban and city driving.¹⁰ Plaintiffs testified that

4. See RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY § 2 (Tentative Draft No. 2, 1995).

5. See *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 251, 662 N.E.2d 730, 731, 639 N.Y.S.2d 250, 251 (1995).

6. See *id.*

7. See *id.*

8. See *id.* at 252, 662 N.E.2d at 731, 639 N.Y.S.2d at 251.

9. See *id.* at 252, 662 N.E.2d at 732, 639 N.Y.S.2d at 252.

10. See *id.*

they were attracted to the Bronco II for its perceived safety benefits and were not interested in its off-road capabilities.¹¹

Ford's counsel argued at trial that the Bronco II had been intended to be sold as an off-road vehicle and not as a conventional passenger automobile.¹² Ford also contended that the Bronco II's design characteristics of which plaintiff complained—high center of gravity, short wheel base, and specially tailored suspension system—were important to preserve the vehicle's ability to drive over obstacles, such as fallen logs and rocks, and over uneven and rugged terrain.¹³

At the close of evidence, the trial court submitted plaintiffs' claims to the jury, despite Ford's objection that the strict products liability and breach of implied warranty causes of action were identical.¹⁴ The jury ruled in favor of Ford on the strict liability claim, finding that the Bronco II was not "defective."¹⁵ The jury found for the plaintiff, however, on the implied warranty claim, and awarded a \$1.2 million judgment.¹⁶

Ford subsequently moved for a new trial, arguing that the jury's finding on the breach of implied warranty claim was irreconcilable with its finding on the strict products liability claim.¹⁷ The trial court rejected Ford's argument, holding that the "inconsistency issue" had been waived and that, in any event, the verdict was not inconsistent.¹⁸

Ford appealed the trial court's decision to the Second Circuit Court of Appeals.¹⁹ In December 1994, a majority of the Second Circuit held that Ford's trial conduct had not resulted in a waiver of the inconsistency issue.²⁰ In addition, the Second Circuit, reasoning that the outcome of the appeal depended

11. *See id.* at 252-53, 662 N.E.2d at 732, 639 N.Y.S.2d at 252.

12. *See id.* at 252, 662 N.E.2d at 732, 639 N.Y.S.2d at 252.

13. *See id.* at 252, 662 N.E.2d at 731-32, 639 N.Y.S.2d at 251-52.

14. *See id.* at 253, 662 N.E.2d at 732, 639 N.Y.S.2d at 252.

15. *See id.* at 254, 662 N.E.2d at 733, 639 N.Y.S.2d at 253. Plaintiffs' cause of action for negligence was also submitted to the jury, but the claim was rejected on proximate cause grounds. *See id.* at 254 n.1, 662 N.E.2d at 733 n.1, 639 N.Y.S.2d at 253 n.1.

16. *See id.* at 254, 662 N.E.2d at 733, 639 N.Y.S.2d at 253.

17. *See Denny v. Ford Motor Co.*, 1993 WL 219759, at *1 (N.D.N.Y. June 15, 1993).

18. *See id.* at *4.

19. *See Denny v. Ford Motor Co.*, 42 F.3d 106, 107 (2d Cir. 1994).

20. *See id.*

upon the proper application of New York law, certified three issues to the New York Court of Appeals: (1) whether the strict products liability claim and the breach of implied warranty claim are identical; (2) whether, if the claims are different, the strict products liability claim is broader than the implied warranty claim and encompasses the latter; and (3) whether, if the claims are different and a strict liability claim may fail while an implied warranty claim succeeds, the jury's finding of no product defect is reconcilable with its finding of an implied warranty breach.²¹ The New York Court of Appeals accepted the Second Circuit's certified questions in January 1995.²²

On December 5, 1995, the New York Court of Appeals, in an opinion written by Judge Vito Titone, held: (1) under New York's "risk/utility" balancing test for determining whether a design is defective for purposes of imposing strict liability, the jury could properly find that the Bronco II's utility as an off-road vehicle outweighed the risk of injury resulting from rollover accidents and that the vehicle was, therefore, not "defective"; (2) under the contract-based "consumer expectations" test, the jury could also find that the same features which make a Bronco II desirable for off-road use made the vehicle at issue unfit for the "ordinary" purpose of suburban driving on paved roads, thus violating the implied warranty of merchantability; and (3) the jury could simultaneously have concluded that the Bronco II's utility as an off-road vehicle outweighed the risk of injury from rollover accidents, while at the same time, finding that the vehicle was not safe for the "ordinary purpose" of routine driving on paved public roads.²³

21. See *id* at 107-08, 111-12.

22. See *Denny v. Ford Motor Co.*, 84 N.Y.2d 1018, 647 N.E.2d 117, 622 N.Y.S.2d 911 (1995).

23. See *Denny v. Ford Motor Co.* 87 N.Y.2d 248, 254, 264, 662 N.E.2d 730, 733, 739, 639 N.Y.S.2d 250, 253, 259 (1995). For subsequent history confirming answer to certified question, see *Denny v. Ford Motor Co.*, 79 F.3d 12 (2d Cir. 1996).

III. The New York Court Finds Subtle Differences In Determination of "Defect" Under Strict Liability In Tort And U.C.C.-Based Implied Warranty Theory And Affirms The Jury's Award

The majority in *Denny* reasoned that, while claims of strict products liability and breach of the implied warranty of merchantability coexist and are often used interchangeably, there is, nevertheless, a subtle difference in the way "defect" is determined under each theory.²⁴ The Court apparently found this distinction to be a defining difference.

Under New York law, the Court wrote, imposition of strict liability for an alleged design "defect" is to be determined by reference to a risk/utility calculus which involves consideration of a number of "policy-driven factors."²⁵ As the Court observed, this test is functionally synonymous with the "reasonableness" inquiry used in traditional negligence cases.²⁶

By way of comparison, the Court wrote, the notion of "defect" in U.C.C.-based breach of implied warranty claims requires an inquiry only into whether the product was "fit for the ordinary purposes for which such goods are used."²⁷ The test focuses on consumer expectations and involves "true 'strict' liability," since recovery may be obtained without regard to fault on the part of the manufacturer.²⁸

The Court explained the dichotomy it found between the negligence-like "defect" analysis applied in strict products liability actions and the "consumer expectations" analysis applied

24. See *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 256, 622 N.E.2d 730, 734-35, 639 N.Y.S.2d 250, 254-55 (1995).

25. See *id.* at 257, 662 N.E.2d at 735, 639 N.Y.S.2d at 255. Factors to be considered by the trier of fact include: (1) the product's utility to the public as a whole; (2) the product's utility to the individual user; (3) the likelihood that the product will cause injury; (4) the availability of a safer design; (5) the possibility of designing and manufacturing the product so that it is safer, but remains functional and reasonably priced; (6) the degree of awareness of the product's potential danger that can reasonably be attributed to the injured user; and (7) the manufacturer's ability to spread the cost of any safety-related design changes. See *id.* (citing *Voss v. Black and Decker Mfg. Co.*, 59 N.Y.2d 102, 450 N.E.2d 204, 208-09, 463 N.Y.S.2d 398 (1983)).

26. See *Denny*, 87 N.Y.2d at 258, 662 N.E.2d at 735, 639 N.Y.S.2d at 255.

27. See *id.* at 258, 662 N.E.2d at 736, 639 N.Y.S.2d at 256 (citing UCC § 2-314(2)(c)).

28. See *id.* at 258-59, 662 N.E.2d at 736, 639 N.Y.S.2d at 256.

in breach of implied warranty actions as springing from different "doctrinal underpinnings."²⁹ Implied warranty actions, the Court said, have their origins in contract law and attempt to provide a remedy for a purchaser's disappointed expectations.³⁰ In contrast, strict liability actions are a part of tort law and involve policy questions regarding whether and to what extent costs for physical injury or property damage should be shifted to those who make and sell products.³¹

Applying the two diverse methods for determining "defect" to the evidence presented at trial, the Court noted that Ford took the position that the design features of the Bronco II of which the plaintiffs complained (*i.e.*, high center of gravity, short wheel base, and specially tailored suspension system) were important to preserve the vehicle's utility over the highly irregular terrain that typifies off-road travel.³² Ford's proof in this regard was relevant to the strict products liability risk/utility calculus, which required the jury to determine whether the Bronco II's utility as an off-road vehicle outweighed the risk of injury resulting from rollover accidents when the vehicle was used for other driving tasks.³³

Plaintiffs' proof, on the other hand, focused on the marketing of the Bronco II for suburban driving and everyday road travel.³⁴ Plaintiffs also adduced proof that the same design characteristics which allow the Bronco II to be used off-road may make the vehicle more susceptible than conventional automobiles to rollover accidents during evasive maneuvers on paved roads.³⁵ This evidence was used to support plaintiffs' argument that routine highway and street driving was the "ordinary purpose" for which the Bronco II was sold and that it was not "fit" for that purpose.³⁶

In light of the overall evidence, the Court held that the jury could have simultaneously concluded that the Bronco II was not defective for purposes of strict products liability, because its

29. *See id.* at 259, 662 N.E.2d at 736, 639 N.Y.S.2d at 256.

30. *See id.*

31. *See id.*

32. *See id.* at 262, 662 N.E.2d at 738, 639 N.Y.S.2d at 258.

33. *See id.*

34. *See id.* at 263, 662 N.E.2d at 738, 639 N.Y.S.2d at 258.

35. *See id.*

36. *See id.*

utility as an off-road vehicle outweighed the risk of injury from on-road rollover accidents, and that the vehicle was not safe for the "ordinary purpose" of routine driving on paved public roads.³⁷ Accordingly, the Court answered the Second Circuit's first two certified questions in the negative and certified question number three in the affirmative.³⁸ The Court's holding is distinctive because the utility against which the risk was to be weighed for strict liability purposes was not the same as the "ordinary purpose" for which the product was allegedly marketed and sold to the plaintiff.³⁹

IV. The Dissent's Position

The majority's decision to permit plaintiffs "two bites at the apple"—one under a strict liability "risk/utility" test and another under an implied warranty "consumer expectations" test—came under solid criticism by Judge Richard D. Simons, who wrote a strong and well-reasoned dissent.⁴⁰

Judge Simons accepted the majority's holding that strict products liability and breach of implied warranty causes of action are not identical, but argued that a strict products liability claim is broader than and encompasses an implied warranty claim in the context of personal injury tort litigation.⁴¹ In addition, Judge Simons strongly suggested that the majority should have adopted "risk/utility" as the single standard for determining "defectiveness" in all personal injury design defect actions.⁴² The consumer expectations standard, he emphasized, has "no place" in personal injury tort design defect litigation.⁴³

Judge Simons concluded that, under a uniform "risk/utility" standard, the jury could not logically determine that the Bronco II was not defective for purposes of strict liability and then find for plaintiffs on the breach of implied warranty

37. *See id.*

38. *See id.* at 264, 662 N.E.2d at 739, 639 N.Y.S.2d at 259.

39. *See id.* at 263, 662 N.E.2d at 738-39, 639 N.Y.S.2d at 258-59.

40. *See Denny v. Ford Motor Co.* 87 N.Y.2d 248, 264-73, 662 N.E.2d 730, 739-45, 639 N.Y.S.2d 250, 259-65 (1995).

41. *See id.* at 264, 662 N.E.2d at 739, 639 N.Y.S.2d at 259 (Simons, J., dissenting).

42. *See id.* at 265, 662 N.E.2d at 739-40, 639 N.Y.S.2d at 259-60.

43. *See id.* at 265, 662 N.E.2d at 739, 639 N.Y.S.2d at 259.

claim.⁴⁴ Accordingly, Judge Simons indicated that he would answer the Second Circuit's first two certified questions "no and yes," and would, therefore, find it unnecessary to answer the third certified question.⁴⁵

V. The Denny Opinion Reflects An Unsound Step Backward In Tort Law

A. The Evolution of Strict Products Liability

Prior to New York Judge Cardozo's landmark decision in *MacPherson v. Buick Motor Co.*⁴⁶ in 1916, tort relief against negligent manufacturers was effectively barred under the privity rule set forth almost seventy-five years earlier in *Winterbottom v. Wright*.⁴⁷ *MacPherson* removed the privity barrier in negligence cases and marked the beginning of the modern negligence law of products liability.⁴⁸ After *MacPherson*, courts moved along two different paths toward imposing strict liability in tort on commercial distributors of defective products.

On the tort/negligence path, courts expanded the doctrine of *res ipsa loquitur*⁴⁹ to ease the considerable evidentiary burden on plaintiffs of proving fault on the part of manufacturers.⁵⁰ This development was of some help to plaintiffs, but it did not provide a sure-footed path for plaintiffs to prevail when products had a real defect in manufacture or construction.⁵¹ A man-

44. See *id.* at 266, 662 N.E.2d at 740, 639 N.Y.S.2d at 260.

45. See *id.* at 264, 662 N.E.2d at 739, 639 N.Y.S.2d at 259.

46. 217 N.Y. 382, 111 N.E. 1050 (1916).

47. 152 Eng. Rep. 402 (Ex. 1842).

48. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 96, at 682-83 (5th ed. 1984); JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 699 (9th ed. 1994).

49. *Res ipsa loquitur* is defined as "[t]he thing speaks for itself. Rebuttable presumption or inference that defendant was negligent, which arises upon proof that instrumentality causing injury was in defendants' exclusive control, and that the accident was one which ordinarily does not happen in absence of negligence." BLACK'S LAW DICTIONARY 1305 (6th ed. 1990).

50. See *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944). See generally Fleming James, Jr., *Proof of the Breach in Negligence Cases (Including Res Ipsa Loquitur)*, 37 VA. L. REV. 179, 225-28 (1951).

51. Plaintiffs who litigated without the benefit of a *res ipsa* inference faced several roadblocks to recovery, including (1) limitations on the manufacturer's duty of care, (2) difficulties in proving that the defendant was in fact negligent, especially given the fact that the product at the time of the accident was in the control of the user and not the defendant, (3) rules pertaining to proximate cause,

ufacturer could dispel the inference of defect by presenting sufficient evidence to show that due care was used in the manufacture of the product (e.g., by presenting evidence of the use of quality control measures)⁵² or by suggesting alternative causes for the accident.⁵³

At about the same time, strict liability was also developing in the form of the implied warranties of merchantability and fitness for a particular purpose.⁵⁴ These warranties were initially developed to insure that products properly performed the job that the buyer contracted to obtain,⁵⁵ but were soon interpreted to also embrace reasonable safety and provide recovery for personal injury.⁵⁶

The technique of implying a warranty meant that the obligation became a part of the contract and suggested that only persons in privity with the defendant could recover.⁵⁷ Yet, by employing a number of new theories, courts began to use their ingenuity to eliminate the privity requirement in contract cases resulting in personal injury.⁵⁸

and (4) defenses such as contributory negligence and assumption of risk. See Page Keeton, *Manufacturer's Liability: The Meaning Of "Defect" In The Manufacture And Design Of Products*, 20 SYRACUSE L. REV. 559, 560 (1969) [hereinafter *Manufacturer's Liability*]; W. Page Keeton, *Products Liability—Design Hazards And The Meaning Of Defect*, 10 CUMB. L. REV. 293, 296 (1979) [hereinafter *Products Liability*].

52. See Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 595 (1980).

53. See Aaron D. Twerski, *From Risk-Utility To Consumer Expectations: Enhancing The Role of Judicial Screening In Product Liability Litigation*, 11 HOFSTRA L. REV. 861, 906 (1983).

54. See generally Dix W. Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963, 1013-14 (1957).

55. See John W. Wade, *On The Nature Of Strict Tort Liability For Products*, 44 MISS. L.J. 825, 829 (1973) [hereinafter *On the Nature Of Strict Tort Liability*].

56. See John W. Wade, *Strict Tort Liability For Products: Past, Present And Future*, 13 CAP. U. L. REV. 335, 341 (1984).

57. See *Products Liability*, *supra* note 51, at 301.

58. See, e.g., *Mazetti v. Armour & Co.*, 135 P. 633, 634 (Wash. 1913) (noting the development of several exceptions to the general privity requirement, including: (1) where the thing causing the injury is of a noxious or dangerous kind; (2) where the defendant has been guilty of fraud or deceit in passing off the article; and (3) where the defendant has been negligent in some respect with reference to the sale or construction of a thing not imminently dangerous). For instance, courts resorted to ideas such as agency relationships, covenants flowing with the goods, and of third-party beneficiary. See Marc A. Franklin, *When Worlds Collide: Lia-*

Finally, in 1960, the New Jersey Supreme Court's epochal decision in *Henningsen v. Bloomfield Motors, Inc.*,⁵⁹ brought an end to the barrier of privity in implied warranty actions involving personal injury.⁶⁰ Still, recovery for plaintiffs remained complicated by procedural hurdles found in other contract aspects of warranty law, such as the notice requirement and availability of defendants to issue disclaimers.⁶¹ Untutored consumers often found themselves barred from bringing a warranty action.⁶²

The first clear decision to recognize privity-free strict liability in tort was *Greenman v. Yuba Power Products, Inc.*,⁶³ a 1963 California Supreme Court case, where Judge Traynor declared that a "manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."⁶⁴ A year later, Justice Traynor's watershed decision proved effective in persuading the American Law Institute to apply "strict liability" to all products in Section 402A of the *Restatement (Second) of Torts*.⁶⁵ Thereafter, the rule of strict product liability rapidly swept the country and became the common law of most states.⁶⁶ Its reign, however, has not been entirely smooth.

bility Theories and Disclaimers in Defective-Product Cases, 18 STAN. L. REV. 974, 991 (1966).

59. 161 A.2d 69 (N.J. 1960).

60. William L. Prosser, *The Fall Of The Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) [hereinafter *Fall Of The Citadel*]. Dean Prosser was Reporter for the *Restatement (Second) of Torts* when Section 402A was adopted. See *Restatement (Second) of Torts* introduction at viii (1965).

61. See Page Keeton, *Products Liability—Proof of the Manufacturer's Negligence*, 49 VA. L. REV. 675, 676-77 (1963); *Manufacturer's Liability*, *supra* note 51, at 560; *Products Liability*, *supra* note 51, at 296.

62. See KEETON ET AL., *supra* note 48, § 96, at 691; Birnbaum, *supra* note 52, at 595.

63. 377 P.2d 897 (Cal. 1963).

64. *Id.* at 900.

65. See RESTATEMENT (SECOND) OF TORTS § 402 A (1965).

66. See WADE ET AL., *supra* note 48, at 717. See generally John W. Wade, *Tort Liability For Products Causing Physical Injury And Article 2 Of The U.C.C.*, 48 MO. L. REV. 1, 24 (1983) (explaining that the *Greenman* decision and Section 402A of the *Restatement (Second) of Torts* were welcomed because they offered a "more logical and more satisfactory explanation of the central underlying idea behind the cases" in which courts used various tactics to avoid contract rules and impose what was essentially strict liability against product liability defendants).

B. *Flirtation and Rejection of Liability Without Defect*

It has taken thirty years to develop settled logical structure in strict products liability law. Most courts now accept that the test for imposing liability against a manufacturer for alleged defect based on design or failure to warn is essentially the same. A fair number of courts accept that the test is the same whether the suit is based on strict liability or negligence.⁶⁷ True "strict liability" is applied as the authors of the *Restatement (Second) of Torts* intended—to manufacturing or construction defects.⁶⁸ In this context, the doctrine has operated well. By way of contrast, most courts have recognized that the application of true "strict liability" in design or warnings cases is unfair and unsound, because it can produce uncertain, open-ended liability, stifle innovation, and create pockets of uninsurability.⁶⁹

Accordingly, most courts have rejected arguments of some plaintiff lawyers that manufacturers should make their products safer than is technologically feasible or that manufacturers warn of unknowable risks.⁷⁰ Similarly, almost all courts have

67. See generally RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY § 2 (Tentative Draft No. 2, 1995).

68. See *id.* § 2(a).

69. See generally James A. Henderson, Jr., *Judicial Review Of Manufacturers' Conscious Design Choices: The Limits Of Adjudication*, 73 COLUM. L. REV. 1531, 1554 (1973) ("Despite the institutional advantages it might hold, absolute manufacturers' liability had been unanimously and emphatically rejected by the courts.").

70. See RESTATEMENT (SECOND) OF TORTS § 402 A cmts. *j* and *k* (1965); RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY § 2 cmts. *j* and *k* (Tentative Draft No. 2, 1995). The principal founding court of modern products liability law, the Supreme Court of California, recognized this fact in *Brown v. Superior Court*, 751 P.2d 470, 477, 480 (Cal. 1988). A five-year study conducted by Reporters of the American Law Institute came to the same conclusion. See AMERICAN LAW INSTITUTE, 2 REPORTERS' STUDY ENTERPRISE ON RESPONSIBILITY FOR PERSONAL INJURY 56 (1991). See also John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 740 (1983). Exceptions include *Halphen v. Johns-Manville Sales Corp.*, 484 So.2d 110 (La. 1986) (holding asbestos manufacturer liable even though the manufacturer established that it did not know and reasonably could not have known of the inherent danger posed by its product), *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982) (holding that manufacturers of asbestos products may not raise "state of the art" defense, i.e., that the danger of which they failed to warn was undiscovered at the time the products were marketed and that it was undiscoverable given the state of the scientific knowledge at that time), and *Simmons v. Monarch Mach. Tool Co.*, 596 N.E.2d 318 (Mass. 1992) (holding machine manufacturer liable despite its contention that the risk involved was not reasonably foreseeable). *Halphen* and

refused to impose liability for risks which cannot be eliminated without depriving the consumer of the usefulness or desirability of the product.⁷¹

In sum, the majority of courts have understood that good public policy supports the application of true "strict liability" only in manufacturing defect cases, not in cases alleging defect in design or warnings.⁷² Consequently, they have wisely adopted the rule of "reasonableness" as the governing standard for liability in design defect and failure to warn cases.⁷³

As will be detailed below, this modern jurisprudence of products liability has been incorporated in the new tentative draft of the *Restatement of the Law of Torts: Products Liability*.⁷⁴

C. *Denny Case Amounts To Rejection of Clear Trend Based on Sound Policy*

Contrary to the clear, logical trend in the law toward the use of fault-based concepts in design defect and failure to warn cases, the *Denny* case moves New York liability law in the *oppo-*

Beshada were subsequently overruled by legislation so as to require proof of defect. See N.J. REV. STAT. § 2A:58C-3(a)(3) (1987); LA. REV. STAT. ANN. § 9:2800.56(1) (1991).

71. This principle is supported by comment *i* to Section 402 A of the *Restatement (Second) of Torts*. See RESTATEMENT (SECOND) OF TORTS § 402 A cmt. *i* (1965). Courts have generally supported this principle regardless of whether the court believed it was a "good idea" for people to use such products as tobacco, *see, e.g.,* *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189 (E.D. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988), alcohol, *see, e.g.,* *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385 (Tex. 1991), convertible automobiles, *see, e.g.,* *Delvaux v. Ford Motor Co.*, 764 F.2d 469 (7th Cir. 1985), or motorcycles, *see, e.g.,* *Kutzler v. AMF Harley-Davidson*, 550 N.E.2d 1236 (Ill. App. Ct. 1990). An exception was *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985) (holding handgun manufacturer strictly liable for injury resulting from properly functioning "Saturday Night Special"). *Kelley* was subsequently overruled by legislation. See MD. ANN. CODE art. 27, § 36-I(h)(1) (1996).

72. *See generally* Birnbaum, *supra* note 52, at 593; Victor E. Schwartz, *The Death of "Super Strict Liability": Common Sense Returns To Tort Law*, 27 GONZ. L. REV. 179, 180 (1991/92) [hereinafter *Death of "Super Strict Liability"*].

73. *See* James A. Henderson, Jr., & Aaron D. Twerski, *A Proposed Revision Of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1532-33 (1992). These sound rules have been incorporated into the new *Restatement of the Law of Torts: Products Liability*. See RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY §§ 1-2 (Tentative Draft No. 2, 1995).

74. *See generally* RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY § 2 (Tentative Draft No. 2, 1995).

site direction. The New York Court of Appeals, by adopting an illogical version of the "consumer expectations" standard which allows for liability to be imposed regardless of fault,⁷⁵ decided that the rule of "reasonableness" should not apply in New York—manufacturers and sellers (e.g., Ford) of nondefective products (e.g., Ford Bronco II vehicles) can be held absolutely liable under implied warranty law for personal injuries.⁷⁶

The Court's decision means that a plaintiff who chooses to allege liability under a breach of implied warranty theory can argue that any evidence relevant only to the risk/utility analysis or regarding the feasibility of alternative designs should be excluded.⁷⁷ If that argument is accepted, the jury would not learn that alternative designs may be impossible or would make the product unsafe or unfit in other respects.⁷⁸

75. Some versions of the "consumer expectations" tests will *not* allow for decisions that go beyond what is feasible in design cases and which is known in warnings cases. See generally Birnbaum, *supra* note 52, at 615-17.

76. See *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 662 N.E.2d 730, 639 N.Y.S.2d 250 (1995). The Court's holding is particularly ironic in light of the fact that strict products liability was developed by courts as a *cure* for the procedural hurdles that often complicate recoveries for plaintiffs in implied warranty actions. In an unusual twist, the *Denny* decision will sometimes result in an implied warranty claim proving *superior* to a strict liability claim for plaintiffs involved in personal injury design defect actions.

77. See James A. Henderson, Jr., & Aaron D. Twerski, *Closing The American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1263, 1295 (1991) (noting that, where design defect liability is divorced from reasonableness, a defendant can be held liable even if it is established "that an alternative design would [be] more dangerous than the one actually used").

78. See generally *Hayes v. Larsen's Mfg. Co., Inc.*, 871 F. Supp. 56, 60 (D. Me. 1994) (fire extinguisher attached to wall in school hallway presents risk that persons who sit beneath it may bump their heads, but the location makes the product more accessible in the event of a fire); *Mowery v. Mercury Marine Div. of Brunswick Corp.*, 773 F. Supp. 1012, 1016 (N.D. Ohio 1991) (installing propeller blade on boat may reduce risk of being struck by blade, but may also result in injuries from decreased ability to maintain control at normal speeds); *Self v. General Motors Corp.*, 116 Cal. Rptr. 575, 579 (Cal. App. 1974) (protection provided by a vehicle for "head-on collisions may be at the expense of protection against one that is broad-side, for like an army in battle the vehicle can't be uniformly strong at all points and under all conditions"), *overruled on other grounds sub nom.* *Soule v. General Motors Corp.*, 882 P.2d 298 (Cal. 1994); *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 384 (Tex. 1995) (front-end loaders with non-removable rollover protection devices may be safer in open areas, but the device may have no utility in low clearance areas where the product cannot be used at all unless the device is removed).

D. *"Consumer Expectations" Is An Inappropriate Test For Design Liability*

The New York Court of Appeals' version of the "consumer expectations" test is neither appropriate nor useful. It provides no standard for determining legitimate consumer expectations.⁷⁹

As the late distinguished Dean John Wade, a Reporter for the *Restatement (Second) of Torts*, said: "In many situations, particularly involving design matters, the consumer would not know what to expect, because he would have no idea how safe the product could be made."⁸⁰ Indeed, "[t]he vague expectations of consumers probably oscillate between never expecting a product to injure them (on the theory that 'it will never happen to me') and actually expecting some products to be 'lemons.'"⁸¹ As the *Denny* case demonstrates, the former notion can result in the identification of products as being dangerously defective when they are not.⁸²

Thus, the drafters of the Model Uniform Product Liability Act⁸³ did not include the consumer expectations test in their definition of defect.⁸⁴ They wrote: "The consumer expectation test takes subjectivity to its most extreme end. Each trier of fact is likely to have a different understanding of abstract consumer expectations. Moreover, most consumers are not famil-

79. See Twerski, *supra* note 53, at 901.

80. *On The Nature Of Strict Tort Liability*, *supra* note 55, at 829. See also Paul D. Rheingold, *What Are The Consumer's "Reasonable Expectations"?*, 22 BUS. LAW. 589, 593 n.17 (1967).

81. William C. Powers, Jr., *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 796-97 (1983). See also James E. Montgomery & David G. Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. REV. 803, 823 (1976); David A. Fischer, *Products Liability—The Meaning Of Defect*, 39 MO. L. REV. 339, 348-52 (1974).

82. See *Products Liability*, *supra* note 51, at 303. See also *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 270, 662 N.E.2d 730, 743, 639 N.Y.S.2d 250, 263 (1995) (Simons, J., dissenting).

83. See MODEL UNIFORM PRODUCT LIABILITY ACT, *reprinted in* 44 Fed. Reg. 62,714 (1979). The Model Uniform Product Liability Act was authored by the United States Department of Commerce Task Force on Product Liability and Accident Compensation, chaired by one of this article's authors. See generally Victor E. Schwartz, *The Uniform Product Liability Act—A Brief Overview*, 33 VAND. L. REV. 579, 580-82 (1980).

84. See MODEL UNIFORM PRODUCT LIABILITY ACT § 104, *reprinted in* 44 Fed. Reg. 62,714, at 62,721 (1979).

iar with the details of the manufacturing process and cannot abstractly evaluate conscious design alternatives.⁸⁵ Others have also noted that the test tends to be unworkable for third parties and bystanders who do not have any expectations about product performance.⁸⁶

VI. The Majority Opinion Misunderstands The Application Of Implied Warranty In Personal Injury Tort Cases

The New York Court of Appeals based its holding, in part, on its assumption that breach of the implied warranty of merchantability is a separate and independent remedy from strict products liability, because the former is retained in New York's version of the Uniform Commercial Code (U.C.C.), while the latter is found in the common law.⁸⁷ Assuming that the Court wishes to continue to mix the state's tort law with a contract doctrine, the Court should clarify how implied warranty is applied in personal injury actions.

Contrary to the Court's suggestion, the concept of implied warranty's historical and doctrinal roots, when utilized in cases regarding personal injury or damage to property, is grounded in tort, not contract.⁸⁸ The principle of "reasonableness" that controls the "risk/utility" framework is an integral part of implied warranty of merchantability under the U.C.C.⁸⁹ The fact that

85. MODEL UNIFORM PRODUCT LIABILITY ACT § 104 Analysis, *reprinted in* 44 Fed. Reg. 62,714, at 62,724 (1979).

86. See Twerski, *supra* note 53, at 907.

87. See *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 256, 662 N.E.2d 730, 734, 639 N.Y.S.2d 250, 254 (1995).

88. See, e.g., *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427, 429 (N.D. Ind. 1965) (stating that strict liability in tort is "hardly more than what exists under implied warranty when stripped of the contract doctrines of privity, disclaimer, requirements of notice of defeat, and limitation through inconsistencies with express warranties"). See also KEETON ET AL., *supra* note 48, § 96, at 680-81; Page Keeton, *Product Liability And The Meaning Of Defect*, 5 ST. MARY'S L.J. 30, 36-37 (1973); William Prosser, *Spectacular Change: Products Liability in General*, 36 CLEVELAND BAR ASS'N J. 149, 167-68; *Fall Of The Citadel*, *supra* note 60, at 802; John W. Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 552-53 (1980); Roger J. Traynor, *The Ways And Meanings Of Defective Products And Strict Liability*, 32 TENN. L. REV. 363, 365-66 (1965).

89. For example, the Official Comment to § 2-314 provides, among other things, that whether "the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the [implied] warranty [of merchantability] was in fact broken." U.C.C. § 2-314 cmt. 13 (emphasis added).

the U.C.C. provides a separate statutory remedy, and is governed by unique *procedural* requirements, does not mean that one must engraft *substantive* differences on implied warranty of merchantability.⁹⁰

The historical underpinning of the implied warranty of merchantability does not require the "merchant" to do the impossible. Consumer expectations must be reasonable under the circumstances. The standard should not permit recovery in a design defect case where no alternative feasible design was possible. It also should not permit recovery in a failure to warn case where the merchant neither knew nor could have known about a risk.

VII. The Majority Opinion Misinterprets A Core Component Of The New Restatement (Third) of Torts

Perhaps the most surprising aspect of the New York Court of Appeals' opinion in *Denny* is the Court's misinterpretation of a fundamental section of the new draft *Restatement of the Law of Torts: Products Liability*.⁹¹ In support of its decision to rec-

Numerous other provisions of the U.C.C. also contain "reasonableness" standards. See U.C.C. § 2-103(b) ("Good faith" defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing"); U.C.C. § 2-607(3)(a) ("the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller . . . or be barred from any remedy"); U.C.C. § 2-706 (requiring that resale be made in a commercially reasonable manner). See generally Debra L. Goetz et al., *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1207 (1987) ("For the most part, courts use a reasonableness standard to determine whether section 2-314(2)'s requirements have been met.").

90. See, e.g., *Larsen v. Pacesetter Sys., Inc.*, 837 P.2d 1273, 1284 (Haw. 1992) ([A]n implied warranty claim for personal injuries "should be governed by the same policies which . . . shape the elements of a tort strict products liability claim."); *Huddell v. Levin*, 537 F.2d 726, 733 (3d Cir. 1976) (examining New Jersey law) ("Since 1960 the terminology of liability has changed from 'implied warranty' to 'strict liability' but the jural foundation of liability has remained unchanged," and, accordingly, strict liability and implied warranty are substantively the same.); *Bachner v. Pearson*, 479 P.2d 319, 326 n.15 (Alaska 1970) ("[A]uthorities have agreed that there should be no distinction made in products liability cases between recovery under an implied warranty theory and recovery under strict liability in tort.").

91. See RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY § 2 (Tentative Draft No. 2, 1995).

ognize implied warranty as a claim independent of strict liability in tort,⁹² the Court said:

[A]lthough the drafters of the Third Restatement have endorsed risk/utility analysis for design defect cases sounding in tort, they also have made clear that claims based on warranty theories are "not within the scope" of the newly drafted section and are, in fact, "unaffected by it" (Restatement [Third] of Torts: Products Liability, [Tentative Draft No. 2, March 13, 1995] § 2, comment *m*, at 42). Further, the drafters have noted that "[w]arranty law as a body of legal doctrine separate from tort may impose legal obligations that go beyond those set forth" in the Restatement of Torts (*id.*, comment *q*, at 46).⁹³

Contrary to the Court's opinion, however, Comment *m* to Section 2 explains:

Claims based on product defect at time of sale or other distribution must meet the requisites set forth in § 2(a), § 2(b), or § 2(c). As long as these requisites are met, the traditional doctrinal categories of negligence, strict liability, or implied warranty of merchantability may be utilized in doctrinally characterizing the claim.⁹⁴

Clearly, the new draft *Restatement* does not support the Court's interpretation.

The Court's error may have stemmed from a sentence found in the last paragraph of Comment *m*, which states:

Claims based on misrepresentation, *express warranty*, and *implied warranty of fitness for particular purpose*, in particular, are not within the scope of the Sections in this Chapter and thus are unaffected by it.⁹⁵

These warranty theories were *not* at issue in the *Denny* action and do *not* support the New York Court of Appeals' holding.

The distinction that the new draft *Restatement* draws between claims for implied warranty of merchantability, the claim at issue in the *Denny* action, and other warranty claims, *i.e.*, misrepresentation, express warranty, and the implied warranty

92. See *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 261, 662 N.E.2d 730, 737, 639 N.Y.S.2d 250, 257 (1995).

93. *Id.* (emphasis added).

94. RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY § 2 cmt. *m* (Tentative Draft No. 2, 1995) (emphasis added).

95. *Id.* (emphasis added).

of fitness for particular purpose, is an important one to maintain in the case law. Otherwise, as the new *Restatement* cautions: "To allow . . . factually identical risk-utility claims to be brought under different doctrinal labels generates confusion and may result in inconsistent verdicts."⁹⁶ This concern is validated by the inconsistent jury verdict in the *Denny* case.

VIII. Conclusion

The respect given the New York Court of Appeals has developed from generations of reasoned, careful decisionmaking. The Court's opinion in *Denny v. Ford Motor Co.* departs from that tradition. Because of that tradition, however, courts in other states could look to the *Denny* case as a beacon of the law, not as an opinion that is based on an erroneous interpretation of the doctrine of implied warranty of merchantability and the new draft *Restatement of the Law of Torts: Products Liability*. Most important, the decision represents unsound public policy. Courts and legislatures throughout this country, the international community, and the Reporters for the new *Restatement of the Law of Torts: Products Liability*, have recognized that sound public policy demands clear, uniform, single standards for liability based on design defects and failure to warn.

For those standards to prevail they should be fault-based.⁹⁷ A return to multiple rules for design and warning liability will cause unnecessary litigation, jury confusion, chill innovation, and perhaps worst of all destroy what should be a cornerstone of the common law—common sense.

The New York Court of appeals is sophisticated enough to recognize the error of its ways. Respectfully, the Court should overrule *Denny* and the Court's opinion should be ignored by courts of other states.

96. *Id.*

97. See *Death of "Super Strict Liability," supra* note 72, at 179.