

Much Ado About Nothing in Design-Defect Cases

The risk-utility test vs. the reasonable-safer-design test

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For most product liability cases involving design-defect claims, New Jersey’s Model Civil Jury Charges offer two options for instructing the jury on how to determine whether the design of the subject product was “defective.” Those two tests are known as the “risk-utility” test and the “reasonable safer design” test. See N.J. Model Civ. Jury Charge 5.40D-1 at 2-3 (Approved 4/99; Revised 5/10).

This article will briefly set forth the differences between those two tests and the contexts in which either is the appropriate option, but ultimately explains that there is not much of a practical difference between the two. Regardless of which test is selected in a design-defect case, the jury still must be instructed on the various risk-utility factors and evaluate whether the design of the product strikes an appropriate balance between the product’s risks and its usefulness.

The risk-utility test generally involves weighing a variety of factors to ascertain whether the product’s risks or dangers outweigh its usefulness and benefits to the particular user and the public as a whole. Those factors can be summarized as follows:

(1) the product’s usefulness and benefit, as designed, to the user and the public as a whole, i.e., whether there was a need for this specific design; (2) the product’s safety aspects, i.e., the likelihood that the product, as designed, would cause injury and the probable seriousness of any injury that could or should have been anticipated; (3) the availability of a substitute design at the time of manufacture that was feasible and practical in that it would meet the same needs and perform the same functions as the subject design without containing the alleged defect; (4) the manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; (5) the general industry standards, customs, and practices in place when the product was distributed; (6) the ability of foreseeable users to avoid danger by the exercise of care in using the product; and (7) the foreseeable user’s awareness of the product’s inherent dangers and the avoidability thereof, because of general public knowledge of the product’s obvious condition or the existence of suitable warnings or instructions.

N.J. Model Civ. Jury Charge 5.40D-3(a); see N.J.S.A. 2C:58C-3(a); [Cavanaugh v. Skil Corp.](#), 331 N.J. Super. 134, 162-65 (App. Div. 1999), [aff’d as modified on other grounds](#), 164 N.J. 1 (2000).

The risk-utility analysis is appropriate in cases in which the product at issue “may function satisfactorily under one set of circumstances and yet, because of a possible design defect, present an unreasonable risk of injury to the user in other situations.” [Jurado v. W. Gear Works](#), 131 N.J. 375, 385 (1993); [Mettinger v. W.W. Lowensten](#), 292 N.J. Super. 293, 307 (App. Div. 1993), [aff’d as modified on other grounds](#), 153 N.J. 371 (1998).

The reasonable-safer-design test asks whether the plaintiff has demonstrated the existence of a safe and reasonably feasible alternative to the defendant's product and whether, because of the omission of that safer alternative, the defendant's product was not reasonably safe as manufactured or sold. Congiusti v. Ingersoll-Rand Co., 306 N.J. Super. 126, 138 (App. Div. 1997). The reasonable-safer-design inquiry is the appropriate test in those cases in which the core issue is whether or not an alternative design would have reduced the risk or dangers of the product to the greatest possible extent without impairing the product's usefulness and availability to the public.

Despite some ostensible differences between the risk-utility test and the reasonable-safer-design test, as a practical matter, the two tests are not as different as they might appear. That is because, even if a court deemed the reasonable-safer-design test applicable in a given case, it nevertheless would have to charge the jury on the risk-utility factors. In any design-defect case, the risk-utility analysis is an indispensable aspect of the reasonable-safer-design test's inquiry into whether the defendant's failure to employ the proposed alternative actually rendered the product not reasonably safe.

In a footnote for the court's consideration, the Model Jury Charge on the reasonable-alternative-design test cites a particularly helpful comment from the Restatement and explains that "in determining whether the omission of [a] reasonable alternative design renders the product not reasonably safe," the jury must consider the same factors that comprise the risk-utility test. N.J. Model Civ. Jury Charge 5.40D-3(2)(a) at 8 n.9 (quoting Restatement (Third) of Torts: Products Liability §2, comment f (1998)). Comment f, in turn, provides that the "broad range of factors" to consider when "determining whether an alternative design is reasonable" and whether its omission renders the product unsafe includes, "among others, the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing." Further reflecting the reasonable-safer-design test's incorporation of the risk-utility factors, comment f emphasizes that "evidence of the magnitude and probability of foreseeable harm may be offset by evidence that the proposed alternative design would reduce the efficiency and the utility of the product."

Following the Restatement, New Jersey law requires consideration of the risk-utility factors even when the court elects to apply the reasonable-safer-design test as the jury's framework for determining design defect. See, e.g., *Lewis v. Am. Cyanamid Co.*, 155 N.J. 544, 571 (1998) ("Plaintiffs who assert that the product could have been designed more safely must prove under a risk-utility analysis the existence of an alternative design that is both practical and feasible."); *Cavanaugh*, 331 N.J. Super. at 162-63 ("[T]he fact remains that the risk-utility analysis is still used when a plaintiff posits" that "there was a reasonable alternative design and that the omission of that alternative design rendered the product not reasonably safe.").

Accordingly, the Model Jury Charge providing the specific instruction to be used in a reasonable-alternative-design case reflects the applicability of the risk-utility factors under that analysis. That instruction charges the jurors "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." N.J. Model Civ. Jury Charge 5.40D-3(2)(a) at 8. "If," the charge continues, "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."

Irrespective of which design-defect test applies in any given case, an essential element of the jury's analysis will be the weighing of the product's risks and dangers with its benefits and utility to the user and the public. Although of course there could be disputes over the relative significance of certain factors in certain cases, any dispute over whether the risk-utility factors should be a part of the jury's analysis—even in a reasonable-safer-design case—is "much ado about nothing."

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