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Strict Products Liability after Bustos v. Hyundai: UJI 13-1407 and the Requirement to Show Reasonable Alternative Designs in Automobile Crash Cases

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STRICT PRODUCTS LIABILITY AFTER *BUSTOS V. HYUNDAI* : UJI 13-1407 AND THE "REQUIREMENT" TO SHOW REASONABLE ALTERNATIVE DESIGNS IN AUTOMOBILE CRASH CASES

Anand S. Chellappa*

I. INTRODUCTION

In *Bustos v. Hyundai,*[1] the New Mexico Court of Appeals reaffirmed its holding in *Brooks v. Beech Aircraft Corp.*[2] that tort claims arising from an automobile's lack of crashworthiness can be based on strict product liability. In affirming *Brooks*' "unreasonable risk of injury" test, the New Mexico Court of Appeals held that Plaintiff in this case was not required to prove the feasibility of a reasonable alternative design as requested by Defendant. The court ruled that a jury could examine risk-benefit considerations using UJI 13-1407 NMRA and affirmed the jury award of $4.2 million to Plaintiff.

Neither *Brooks* nor *Bustos*, however, provide an answer for how a trial court should take into account the seven risk-benefit factors listed in the Committee Commentary of UJI 13-1407. A showing of reasonable alternative designs is one of these seven factors. *Brooks* held that a plaintiff is not "required" to prove that reasonable alternative designs were available and that the defendant did not implement them. But say in a given case that the other six factors are irrelevant or neutral to both parties' cases: if the showing of reasonable alternative designs is the factor left standing, would this not require a plaintiff to make its case based on this factor?

In an effort to answer this question, this note applies the risk-benefit factors to the facts of *Bustos*. The note concludes that three of the seven factors are irrelevant to the case, one relates to causation and its fit in

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1. Bustos v. Hyundai Motor Co., 2010-NMCA-090, 149 N.M. 1, 243 P.3d 440, *cert. quashed*, No. 32,534 (June 5, 2012).

2. Brooks v. Beech Aircraft Corp., 1995-NMSC-043, 120 N.M. 372, 902 P.2d 54.

proving design defect is questionable, one is neutral to both parties, and one favors Defendant. This note submits that the seventh factor—a showing of reasonable alternative designs—was necessary to prove design defect in *Bustos*. Next, this note examines the burdens of proof the *Bustos* court placed on Plaintiff and Defendant. *Bustos* places a low burden on the plaintiff to show reasonable alternative designs. In contrast, Defendant (a manufacturer with deep pockets) is faced with a high burden to disprove the feasibility of Plaintiff's alternative designs.

Finally, to streamline the uniform application of UJI 13-1407, this note recommends that courts explicitly weigh risk-benefit considerations during trial. Additionally, this note presents an amended version of UJI 13-1407 for consideration. In the meantime, defendant product manufacturers should appreciate that the plaintiff's showing of reasonable alternative design is part of UJI 13-1407 while also taking note of *Bustos*'s burden requirement, which has the appearance of burden shifting underpinned by policy.

II. STATEMENT OF THE CASE

On a Sunday morning in July 2004, Marcos (Lee) Baca, a twenty-one-year-old student at New Mexico State University, and his fiancée were driving to Santa Teresa in a 2002 Hyundai Accent. His fiancée, who was driving, lost control of the vehicle. The vehicle veered off the roadway, rolled over three-and-one-half times, and came to rest on its roof. Mr. Baca, who was riding in the front passenger seat, was killed in the accident.[3]

His fiancée, however, was able to walk away.[4] The Office of the New Mexico Medical Examiner found that positional asphyxia caused Mr. Baca's death because his body was stuck in such a way that the "vehicle weighed down against his head and neck and compressed his chin into his chest."[5]

"When the driver lost control, the [car] was traveling at a speed of approximately sixty-four miles per hour, but . . . had slowed down to between thirty-two and thirty-four miles per hour by the time it began to roll over."[6] "[T]he roof over the passenger seat crushed downward and inward[, and] the roof rail dropped down vertically to the top of the passenger seat headrest[,] and horizontally[,] such that approximately half of

3. This version of the facts drawn from the brief of Plaintiffs-Appellees at 1, *Bustos v. Hyundai Motor Co.*, 2010-NMCA-090, No. 28,240 (2010).

4. *Id.* at 2.

5. *Bustos*, 2010-NMCA-090, ¶ 6, 149 N.M. 1.

6. *Id.* ¶ 3.

the headrest extended outside the plane of the side window."[7] Consequently, "the A-pillar, which connects the front of the door frame along the windshield to the roof rail, had crushed 10.9 inches[,] and the B-pillar, which connects the back of the door frame to the roof rail, had crushed 10.8 inches."[8] The "roof above the driver's side of the Accent was not as severely deformed."[9] With the vehicle upside down, Mr. Baca was "buckled into his safety belt in the passenger seat," but his "head was outside the passenger side window[,] and [rested] atop a CD changer, which had become dislodged from the vehicle."[10]

Art Bustos, on behalf of Mr. Baca's estate, and survivors ("Plaintiff" and "Appellee"), brought suit against Hyundai Motor Company, Hyundai Motor America, and Borman Motor Company ("Defendant" and "Appellant") for "negligence, [breach of] implied warranty, and strict products liability, asserting that the roof structure of the car was defectively designed."[11] Plaintiff relied on expert testimony to establish (1) the existence of a design defect in the car, and (2) the causation link between the design defect and the injury enhancement of death.[12] John Stilson, an automotive and safety consultant, examined the vehicle four times along with Hyundai representatives.[13] He testified that, as a result of defective roof design,[14] the passenger "survival space within the Accent was reduced to below what would be necessary for rollover protection."[15] In addition, Joseph Burton, a forensic pathology and forensic medical consultant, "explained that merely hanging upside down in the vehicle would not have caused Mr. Baca to asphyxiate."[16] He testified that Mr. Baca's body was "forced into compression . . . resulting in Mr. Baca's head being placed outside of the vehicle and on top of the CD changer."[17] The resulting compression of his rib cage impaired Mr. Baca's regular breathing.

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7. *Id.* ¶ 4.
8. *Id.* For a technical analysis of rollover impact on the occupants of a vehicle, *see* Brief of Defendants-Appellants at Exhibit B, *Bustos v. Hyundai Motor Co.*, 2010-NMCA-090 (No. 28,240) (James Raddin, Joseph Cormier, Brian Smyth, Jeffrey Croteau & Eddie Cooper, *Compressive Neck Injury and its Relationship to Head Contact and Torso Motion During Vehicle Rollovers*, SAE Technical Paper 2009-01-0829, (2009)).
9. *Busto*s, 2010-NMCA-090, ¶ 5, 149 N.M. 1.
10. *Id.*
11. *Id.* ¶ 1.
12. *Id.* ¶ 7.
13. *Id.* ¶ 18.
14. *Id.* ¶ 23.
15. *Id.* ¶ 7.
16. *Id.* ¶ 8.
17. *Id.*

Dr. Burton testified that Mr. Baca died from "positional asphyxiation caused by the condition the vehicle put his body in when it came to rest.[18]

Plaintiff argued that although the vehicle did not cause the crash or the rollover, "defects in the car's door and roof designs caused enhanced injuries distinct from those caused by the crash."[19] On the other hand, Defendant used undisputed expert testimony to show that "the 2002 Accent had a roof strength equal to *3.2 times* its curb weight—far in excess of the 1.5 [factor] required by the [National Highway Traffic Safety Administration ("NHTSA")] standard."[20] The jury, however, found in favor of Plaintiff on all claims and awarded Plaintiff $4.2 million.[21] The district court entered judgment on the verdict and denied Defendant's motion for post-trial judgment as a matter of law and motion for a new trial or remittur under Rule 1-059 NMRA.[22]

On appeal, Defendant argued that Plaintiff "sought to fill critical gaps in the proof of their claims with expert testimony that created a vague *impression* that [D]efendant bears some responsibility for the injuries" that led to Mr. Baca's death.[23] Defendant stated that the Accent "satisfies, and in many cases far exceeds all pertinent federal safety standards [for door latch mechanisms and roof strength] imposed by [NHTSA]."[24] Defendant argued that (1) the district court abused its discretion in admitting expert testimony as to the design defect and enhanced injury; (2) Plaintiff failed to prove that a design defect caused the enhanced injury; and (3) the district court erred as a matter of law by failing to specifically instruct the jury that Plaintiff was required to prove the feasibility of a reasonable alternative design that could have eliminated the alleged defect.[25] The court of appeals addressed each argument and ultimately affirmed the district court's judgment.[26] The New Mexico Supreme Court initially granted certiorari on October 18, 2010; it quashed certiorari on June 5, 2012.[27]

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18. *Id.*

19. Brief of Defendants-Appellants at 3, *Bustos v. Hyundai Motor Co.*, 2010-NMCA-090, No. 28,240 (2010).

20. *Id.* at 5.

21. *Bustos*, 2010-NMCA-090, ¶ 1, 149 N.M. 1.

22. Brief of Defendants-Appellants at 12, *Bustos v. Hyundai Motor Co.*, 2010-NMCA-090, No. 28,240 (2010).

23. *Id.* at 1.

24. *Id.* at 4. *See also id.* at 4–5 (discussing relevant NHTSA safety standards).

25. *Bustos*, 2010-NMCA-090, ¶ 9, 149 N.M. 1.

26. *Id.*

27. 2012-NMCERT-006 (No. 32,534, June 5, 2012).

III. BACKGROUND

This case note examines the rationale and impact of the court's holding that in a New Mexico strict products liability suit, a plaintiff is not required to prove the feasibility of a reasonable alternative design. The court rejected Defendant's argument that New Mexico should adopt the Restatement (Third) of Torts[28] by requiring a plaintiff to prove that the defendant failed to implement a reasonable alternative safer design.[29] The court found that Defendant's argument conflicted with New Mexico law.[30] Following *Brooks*,[31] the court affirmed the policy that UJI 13-1407 "adequately and correctly conveyed the applicable legal standard" in New Mexico.[32] According to the definition of "unreasonable risk of injury" in UJI 13-1407, "consideration of alternate designs is but one of several risk-benefit considerations that a jury may balance in determining whether a product created an unreasonable risk of injury."[33] The court found that the trial court properly denied Defendant's request because Defendant "misstated the test for a design defect by focusing the jury too narrowly on a reasonable alternative design."[34] The court followed *Brooks*, and stated that it had no authority to amend UJI 13-1407.[35] Additionally, the court noted that the New Mexico Supreme Court has interpreted the Restatement (Second) of Torts to require courts to use UJI 13-1407 in every strict products liability case.[36]

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28. *Bustos*, 2010-NMCA-090, ¶ 50, 149 N.M. 1. States (minority) that have adopted sections of the Restatement (Third) of Torts include Iowa, New Jersey, Rhode Island and Wisconsin. *See* Spencer H. Silvergate, *The Restatement (Third) of Torts: Products Liability-The Tension Between Product Design and Product Warnings*, 75 FLA. B. J. 10, 17 n.34 (2001); Heather M. Bessinger & Nathaniel Cade, Jr., *Who's Afraid of the Restatement (Third) of Torts*, (posted Sep. 17, 2010), *available at* http://wislawjournal.com/2010/09/17/whos-afraid-of-the-restatement-third-of-torts/.

29. *Bustos*, 2010-NMCA-090, ¶ 57, 149 N.M. 1.

30. *Id.* ¶¶ 51–57 (citing *Brooks*, 1995-NMSC-043, 120 N.M. 372).

31. In *Brooks*, the wife of an airline pilot who was killed in a plane crash in 1988 sued Beech Aircraft based on negligence and strict liability for an alleged design defect. *Brooks*, 1995-NMSC-043, ¶ 1, 120 N.M. 372. She claimed that the absence of a shoulder harness caused her husband's death. *Id.* The trial court granted defendant manufacturer's motion for summary judgment. *Id.* On appeal, the supreme court reversed and remanded. *Id.* The court held that a design-defect claim may be proved without showing that the manufacturer violated standards applicable to the plane that was manufactured in 1968. *Id.*

32. *Bustos*, 2010-NMCA-090, ¶ 52, 149 N.M. 1.

33. *Id.* ¶ 54.

34. *Id.*

35. *Id.* ¶ 55.

36. *Id.* (citing Supreme Court Order No. 09-8300-011).

IV. RATIONALE

The court affirmed the district court's rejection of Defendant's requested jury instruction for reviewing strict products liability design defects in New Mexico. The instruction in question was based on the Restatement (Third) of Torts and required Plaintiff to make a specific showing of a reasonable alternative design in strict products liability design defect cases:

> 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 by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the *alternative design renders the product not reasonably safe*.
>
> . . .
>
> The test is whether *a reasonable alternative design* would, at reasonable cost, *have reduced the foreseeable harm* posed by the product and if so, whether the omission of the alternative design by the seller rendered the product not reasonably safe.[37]

Citing *Morales*,[38] Defendant argued that New Mexico courts had favorably viewed sections of the Restatement (Third) of Torts on strict products liability law.[39] Defendant wanted a jury instruction that required a "specific showing of a reasonable alternative design in strict products liability design defect cases."[40] Defendant suggested that an alternative design would serve as a benchmark against which the jury could compare the alleged defective design while conducting the risk-benefit analysis New Mexico law requires.[41]

The *Bustos* court distinguished *Morales* by pointing out that *Morales* only requires a plaintiff to propose an alternative design when the plaintiff's case in chief depends solely on "criticiz[ing] a product[.]"[42] The court

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37. *Id.* ¶ 50 (emphasis added).

38. In *Morales*, the plaintiff was injured by an asphalt distributor machine. Morales v. E.D. Etnyre & Co., 382 F. Supp. 2d 1278, 1279 (D.N.M. 2005). Plaintiff sued manufacturer, claiming that the product was unreasonably dangerous for its intended purpose, pointing to four design defects and offering five solutions. *Id.* The jury returned verdict for the defendant manufacturer, finding no defect in the machine. *Id.* at 1280.

39. *Bustos*, 2010-NMCA-090, ¶ 56, 149 N.M. 1 (citing *Morales*, 382 F. Supp. 2d at 1283–84 (D.N.M. 2005)).

40. *Id.* ¶ 50. *See* Restatement (Third) of Torts: Prod. Liab. § 2 (1998).

41. *Bustos*, 2010-NMCA-090, ¶ 50, 149 N.M. 1.

42. *Id.* ¶ 57.

then added that Plaintiff here had done "more than merely criticize the design of the Accent's roof structure."[43] The court noted that Plaintiff had used expert testimony to identify alternatives that would prove to be safer in a rollover and prevent enhanced injuries such as Mr. Baca's death.[44]

The court stated that an enhanced injury is "that portion of damage or injury caused by the design defect over and above that which would have resulted from the original accident had the vehicle not been defective."[45] The court concluded that the concern *Morales* identified did not exist in this case and said "[u]nder New Mexico law, the existence of a reasonable alternative design is a relevant consideration by a jury . . . [but] a specific finding on this issue is not required."[46]

The court turned to *Brooks* to guide its decision. In *Brooks*, the New Mexico Supreme Court declared that a "defect giving rise to strict products liability is not measured by comparison with a prototype."[47] The Court noted that the "unreasonable risk of injury" test in UJI 13-1407 would allow an "argument under any rational theory of defect" instead of being solely dependent on the considerations of reasonable alternative designs.[48]

Under UJI 13-1407, when a plaintiff asserts that the product's design presents an unreasonable risk of injury, the jury should examine the product at the time of the injury and not at the time of manufacture.[49] The *Bustos* court explained:

> An unreasonable risk of injury is a risk which a *reasonably prudent person* having full knowledge of the risk would find unacceptable. This means that a product does not present an unreasonable risk of injury simply because it is possible to be harmed by it.
>
> [The design of a product need not necessarily adopt features which represent the ultimate in safety. You should consider the ability to *eliminate the risk without seriously impairing the usefulness of the product or making it unduly expensive.*]

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43. *Id.*
44. *Id.*
45. *Id.* ¶ 28 (citing Duran v. Gen. Motors Corp., 1983-NMCA-121, 101 N.M. 742, 749–50, 688 P.2d 779, 786–87, *overruled on other grounds by Brooks*, 1995-NMSC-043, 120 N.M. 372).
46. *Id.* ¶ 54.
47. *Id.* (citing *Brooks*, 1995-NMSC-043, 120 N.M. 372) (internal quotation marks omitted).
48. *Id.*
49. *Id.* ¶ 53.

> Under products liability law, you are not to consider the reasonableness of acts or omissions of the supplier. *You are to look at the product itself* and consider only *the risks of harm from its condition or from the manner of its use at the time of the injury*. [The question for you is whether the product was defective, even though the supplier could not have known of such risks at the time of supplying the product.][50]

Following *Brooks*, the court listed seven risk-benefit factors that a jury may balance in determining whether a product created an unreasonable risk of injury:

> (1) the usefulness and desirability of the product;
> (2) the availability of other and safer products to meet the same need;
> (3) the likelihood of injury and its probable seriousness, i.e., "risk";
> (4) the obviousness of the danger;
> (5) common knowledge and normal public expectation of the danger (particularly for established products);
> (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings); and
> (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.[51]

The court noted that a jury *may* consider alternate designs as part of the seventh factor.[52] In accordance with *Brooks*, the court of appeals in *Bustos* found that the lower court properly rejected Defendant's proposed jury instruction because it focused too narrowly on a reasonable alternate design requirement.[53]

Plaintiff's and Defendant's briefs did not weigh the evidence in terms of the risk-benefit factors to compel a finding that supports their respective arguments. One can summarize the issue in question as follows: Defendant believed that the unreasonable risk of injury test should boil down to a single requirement that Plaintiff must show that a reasonable and safer alternative design was available and that Defendant failed to adopt this design. Defendant implied, that in the absence of this requirement, a strict product liability claim in New Mexico would, by default, favor Plaintiff. On the other hand, Plaintiff argued that the

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50. *Id.* (alteration in original) (emphasis added).
51. *Id.* ¶ 54 (citing *Brooks*, 1995-NMSC-043, 120 N.M. 372).
52. *Id.* (emphasis added).
53. *Id.*

balancing test *Brooks* advocated must stand but did not apply the facts to the test. The court agreed with Plaintiff and noted that Plaintiff had used expert testimony to prove that a "safer alternate design" was available. Does this mean that the Plaintiff had met the requirement that Defendant wanted?

Brooks held that a plaintiff does not need to produce evidence of an alternate design in order to make a design defect claim, and expressly approved UJI 13-407's broader risk-benefit calculation.[54] *Brooks* and UJI 13-1407, however, both allow the jury to consider evidence of an alternative design as *a* factor in determining whether a product presents an "unreasonable risk of injury."[55] Additionally, *Brooks* stated that New Mexico does not subscribe to the consumer expectation test[56] or to the risk-utility test[57] in evaluating whether a product is defective but, instead, allows "proof and argument under any rational theory."[58] With the supreme court quashing certiorari in this case, manufacturers may think twice about doing business in New Mexico because the State's policy-driven strict liability practice[59] appears to favor a plaintiff by default.[60] To chal-

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54. *Brooks*, 1995-NMSC-043, ¶ 32, 120 N.M. 372.

55. *Id.* ¶ 35; UJI 13-1407 NMRA, annot. (emphasis added).

56. *Brooks*, 1995-NMSC-043, ¶ 31, 120 N.M. 372. The consumer expectation test is described as follows: A "product is not defectively dangerous '[i]f the average consumer would reasonably and fully appreciate the attendant risk of injury.'" BESSINGER & CADE, *supra* note 28 (citing Vincer v. Williams All-Aluminum Swimming Pool Co., 69 Wis. 2d 326, 332, 230 N.W.2d 794, 798 (1975)).

57. "The risk-utility test finds a product defective as designed only if the magnitude of the risk created by the design is greater than the utility of the product." BESSINGER & CADE, *supra* note 28. "Under the risk-utility test, the plaintiff need only show that the design of the product was the proximate cause of his injury, and the burden then shifts to the product manufacturer to demonstrate that the benefits of the particular design outweigh the risks." *Id.*

58. *Brooks*, 1995-NMSC-043, ¶ 31, 120 N.M. 372 (explaining that the unreasonable-risk-of-injury test is flexible enough to accomodate other theories such as the consumer expectations test, risk-utility test, and defect-is-defect test). *See also infra* notes 65–66.

59. *See Brooks*, 1995-NMSC-043, ¶¶ 13–23, 120 N.M. 372 (explaining four primary policies that underpin strict products liability in New Mexico). I have intentionally couched my observations and comments using indefinite words such as "seem" and "appears to." I do not intend this article to be a thesis on products liability or tort law. I point out that the current UJI 13-1407 is "wishy-washy," under the guise of flexibility, and recommend clarification and fair application to both plantiffs and defendants.

60. New Mexico practice breeds the type of legal uncertainty that discourages businesses from locating in New Mexico. *See* Brief for Association of Commerce and Industry as Amicus Curiae Supporting Defendant-Appellant at 15, *Bustos v. Hyundai Motor Co.*, 2010-NMCA-090, No. 28,240 (2010). See also *infra* Part VI.

lenge the validity of this perception, this note applies the risk-benefit factors to the facts of *Bustos*. This note then examines the issue of burden shifting, whereby a defendant would have to "convincingly" demonstrate that a plaintiff's reasonable alternative designs are not feasible and calls for systematic applications of the unreasonable risk-of-injury test. Finally, it demonstrates that in strict product liability automobile crash cases, such as the instant case, a plaintiff would be hard-pressed to convince a jury without some evidence that a "reasonable alternative design" was available and that the defendant did not employ it in the product.

V. ANALYSIS

A. Under the seven risk-benefit factors listed in the commentary of UJI-1407, the "unreasonable risk of injury" test required Plaintiff to show a reasonable alternative design to prove that the 2002 Accent's roof was defective.

This note explores the risk-benefit factors listed in the commentary of UJI 13-1407 below. Although analysis in hindsight on how a jury might have decided if it had weighed the risk-benefit factors is tricky business, the author has tried to remain objective in applying these factors. Moreover, analyzing the factors within the context of *Bustos* helps illustrate how trial courts can make the application of New Mexico products liability law more consistent and predictable in future cases. The reader can decide whether the result in *Bustos* can be explained as resulting from tactical choices made by Defendant, or from an inherent unfriendliness to defendants in products liability actions in New Mexico.

1. The Usefulness and Desirability of the Product

The committee commentary for UJI 13-1407 indicates that a jury should examine this factor against UJI 13-1419 NMRA for "unavoidably unsafe products":

> There are some products which, even when properly prepared and labeled, cannot be made safe for their intended and ordinary use. Because of the *nature of ingredients or natural characteristics of the products,* use of these products involves substantial risk of injury, and some users will necessarily be harmed. Such products are said to be *unavoidably unsafe*.
>
> Unless the product unreasonably exposes users to risk of injury, there is no liability for supplying an unavoidably unsafe product. Whether users are unreasonably exposed to risk of injury turns

> upon a balancing of the dangers and benefits resulting from the product's use.[61]

The use note for UJI 13-1419 states:

> This instruction must be given only in cases in which the generic condition of the product gives rise to the risk of injury, for example, certain chemicals and drugs. The risk arises from *the nature of the product and not from inadequacies of design, manufacture or labeling*. It shall be used only where the plaintiff presents sufficient evidence that the product's *hazardous characteristics* are of such magnitude that the product should not have been put in the channels of commerce. Applicability of the instruction is further limited by the requirement that the injury result from an intended use of the product.[62]

This factor therefore applies only to inherently and unavoidably unsafe products. The product in this case is an automobile. An "automobile is not an inherently dangerous article."[63] Therefore, this factor is not relevant to this case.

2. The Availability of Other and Safer Products to Meet the Same Need

The committee comment for UJI 13-1407 indicates that one should examine this factor against UJI 13-1408[64] for strict liability–evidence:

> Under the "products liability" claim, what is customarily done by those engaged in the supplier's business is evidence of whether a risk of injury would be acceptable to a reasonably prudent person. However, the acceptability of a risk of injury is determined by the conduct of a reasonably prudent person having *full knowledge of the risk*, whether such conduct is usually followed or not.
>
> Compliance with [*industry [customs] [standards] [codes]* [rules__ [or] [governmental [rules] [standards] [codes__ is evidence of the acceptability of the risk, *but it is not conclusive*.[65]

This inquiry involves two steps: (1) supplier's compliance with codes and standards; and (2) a reasonably prudent person's conduct in view of this compliance and knowledge of the associated risk. With regard to the first

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61. UJI 13-1419 (emphasis added).
62. UJI 13-1419 (use note) (emphasis added).
63. MacPherson v. Buick Motor Co., 217 N.Y. 382, 384, 111 N.E. 1050, 1051 (1916).
64. *See* UJI 13-1407 comm. cmt.
65. UJI 13-1408 NMRA (emphasis added).

step, Defendant's undisputed evidence showed that the 2002 Hyundai Accent's door latch mechanism was "in full compliance" with Standard 206, a federal safety standard that the NHTSA imposes for door-latch mechanisms.[66] Defendant also established through undisputed evidence that the Accent's roof was more than twice as strong as required by NHTSA Standard 216.[67] The 2002 Accent had a roof strength equal to 3.2 times its curb weight—in excess of the 1.5 times the curb weight the safety standard applicable in 2002 required—and was even in compliance with the 3.0 times the curb weight the safety standards required at the time of trial.[68] Defendant also tried to introduce evidence (which the judge excluded at trial) that the Accent had a "stronger roof design than approximately 95 percent of vehicles to which it was compared based on the Standard 216 testing."[69] Defendant's Accent 2002 was therefore in compliance with customary codes and standards.[70]

Concerning the second step, which appears to be a variant of the "consumer expectations" test,[71] Plaintiff argued that although the Accent may have met NHTSA standards, it was nevertheless not crashworthy. Plaintiff introduced evidence to show that the "door came open during the second roll of the accident because of a defect"[72] and that "[the lack of a door] enhanced the amount of roof crush sustained."[73] The court also found that Plaintiff had produced sufficient evidence to allow the jury to find that the roof was "defective in design."[74] The court stated that a jury could have agreed with Plaintiff's expert that the "2002 Accent roof design [was] defective and unreasonably dangerous because it lack[ed] adequate strength or crush resistance to provide reasonable protection in this particular low speed rollover."[75] Defendant argued that Plaintiff's expert's "roof-testing knowledge was from static drop tests performed on vehicles other than a 2002 Hyundai Accent and that such tests were not

66. Brief of Defendants-Petitioners at 4, *Bustos v. Hyundai Motor Co.*, *cert. quashed*, No. 32,534 (Dec. 14, 2010).

67. *Id.*

68. *Id.* at 4–5.

69. *Id.* at 5.

70. *See also* text accompanying notes 156–64.

71. *See* BESSINGER & CADE, supra note 28 (citing *Vincer v.Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, 332, 230 N.W.2d 794 (1975)).

72. Brief of Plaintiffs-Respondents at 15, *Bustos v. Hyundai Motor Co.*, *cert. quashed*, No. 32,534 (Dec. 14, 2010).

73. *Id.* at 16.

74. *Bustos*, 2010-NMCA-090, ¶¶ 30–34, 149 N.M. 1.

75. *Id.* ¶¶ 31, 33 (internal quotation marks omitted).

analogous to the rollover at issue here."[76] In response, the court stated that Defendant should have "brought this issue to the jury's attention."[77]

The above argument suggests that a reasonable prudent person would consider the car an unreasonable risk despite being compliant with NHTSA standards. A conclusion to this effect, however, rests on the understanding that this was a low-speed rollover crash. But looking at the undisputed evidence introduced by Defendant, this does not seem to be the case. According to the court of appeals, both Defendant's and Plaintiff's experts accepted the fact that the likely speed of the vehicle was between 32.46 miles per hour and 34.43 miles per hour and that it was close to Defendant's own rollover tests that Defendant had conducted on other 2002 Accents going approximately thirty miles per hour.[78] Defendant's expert testified, however, that this was an "unusually severe accident [because] the car left the road at 60 mph and rolled 3.5 times."[79] It appears that the driver reached for her cell phone and lost control of the car.[80] Defendant also indicated in its brief to the supreme court, but not in its brief to the court of appeals, that it introduced undisputed evidence at trial that the outcome of a rollover accident is not only based on speed but upon a "sum total of several factors."[81] These factors included the "angle of the initial roll, the number of rolls . . . and the nature of the roll,"[82] which may explain why the driver was able to walk away from the accident, while the accident killed Mr. Baca. Defendant implied that Plaintiff's expert did not mimic these characteristics during the "generic"[83] drop tests. The record suggests that Defendant did not "convincingly" prove,[84] during trial and on appeal, that the unusual nature of the accident, as opposed to a design defect, caused the roof to collapse. Instead, Defendant tried to discredit the expertise of Plaintiff's expert[85] or to suppress his testimony on grounds that it was "too generalized" and

76. *Id.* ¶ 34.

77. *Id.*

78. *Id.* ¶ 19.

79. Brief of Defendants-Appellants at 11, *Bustos v. Hyundai Motor Co.*, 2010-NMCA-090, No. 28,240 (2010). It is not clear why the court did not examine Defendant's assertion that this accident was "unusually severe."

80. *Id.* at 3.

81. Brief of Defendants-Petitioners at 9, *Bustos v. Hyundai Motor Co.*, *cert. quashed*, No. 32,534 (Dec. 14, 2010).

82. *Id.*

83. *Id.* at 8.

84. *See infra* Part V.B (discussing Defendant's burden of proof).

85. *Bustos*, 2010-NMCA-090, ¶ 34, 149 N.M. 1.

"unreliable" to meet the pre-requisites for expert testimony outlined in *State v. Alberico*.[86]

A reasonable, prudent person with "full knowledge of the risk"[87] involved with driving a car on a highway could very well conclude that the 2002 Accent was compliant with NHTSA standards and that the crash was a freak rollover accident that no one could expect a passenger car to withstand. That is, a person could conclude that there was no reasonable way to eliminate or reduce the collapse of the roof in this case without "impairing the usefulness of the product or making it unduly expensive."[88] This factor seems to favor Defendant, although the evidence does not point definitively either way.

3. The likelihood of a design defect causing injury and its probable seriousness, i.e., "risk"

This factor relates to causation. It is unclear why the proof of design defect incudes it. It is possible that the inclusion of this factor is a vestige of the risk-benefit test, wherein a "plaintiff need only show that the design of the product was the proximate cause of the injury, shifting the burden to the product manufacturer to demonstrate that the benefits of the particular design outweigh the risks."[89] While this factor addresses risk, it does not show how the jury should assess the unreasonableness of that risk. The Committee Commentary of UJI 13-1407 also does not provide guidance on how to assess likelihood of injury.[90]

Plaintiff's expert testified that as a result of the rollover accident, the roof pillars had deformed inward and downward by as much as 10.9 inches and thereby reduced Mr. Baca's survival space.[91] The court noted that "Defendant[ ] never argued . . . that the physiological forces from the accident were so severe that Mr. Baca could not have survived even if the cabin . . . had preserved adequate survival space."[92] Defendant's expert testified, however, that this was an unusually severe accident because the car left the road at more than 60 miles per hour, rolled three and one half times, and that the damage to the Accent resulted from approximately

86. *Id.* ¶¶ 11–14 (explaining that the State v. Alberico, 116 N.M. 156, 166, 861 P.2d 192, 202 (1993) "prerequisites for expert testimony are applied somewhat differently by New Mexico courts than by federal courts applying Daubert[,]" in that expert testimony is restricted to testimony based on scientific knowledge, and does not include testimony based on experience or training).

87. *See* UJI 13-1408 NMRA.

88. *See Bustos*, 2010-NMCA-090, ¶ 53, 149 N.M. 1 (citing UJI 13-1407).

89. *See* BESSINGER & CADE, supra note 28.

90. *See infra* text accompanying notes 145–55.

91. *Bustos*, 2010-NMCA-090, ¶ 32, 149 N.M. 1.

92. *Id.* ¶ 43.

four tons of force.[93] The court noted that Defendant "did not present any testimony that Mr. Baca would necessarily have been rendered unconscious even if the roof of the car had not crushed as much as it did."[94] The third factor presented an opportunity for Defendant to argue that Plaintiff's death was not caused by a defective design but instead by a combination of factors that no reasonable alternative design could have protected Plaintiff from. It appears that Defendant did not adequately challenge Plaintiff's proof of causation during trial. Several factors may cause the death of a passenger during a rollover crash.[95] One cannot presume a design defect from Mr. Baca's death. The third factor therefore relates to causation, and it is questionable how it fits with proving design defect.

4. The obviousness of the danger

The committee commentary for UJI 13-1407 states that one should examine this factor in view of UJI 13-1412 NMRA and UJI 13-1415 NMRA. UJI 13-1412 states:

> In connection with the claim under "products liability," a product may present an unreasonable risk of injury even though the risk is obvious or may be known to the user. An obvious risk of injury is unacceptable and must be avoided by [product design] [or] [the adoption of a suitable safety device] where a reasonably prudent supplier having full knowledge of the risk *would expect that the user will fail to protect [himself] [herself] or others, despite awareness of the danger*.[96]

Further, the use note for UJI 13-1412 states: "[t]his instruction shall be given where a submissible issue is the adequacy of product design and defendant contends that the risk of injury associated with the design is obvious." The committee commentary for UJI 13-1412 clarifies that obviousness of a danger "eliminates a duty to warn of that danger (UJI 13-1415)." It then states, "[i]n the design of a product, a supplier may be required by ordinary care to consider and guard against an obvious danger."[97] Finally, it states that "[w]ith increasing frequency, products liability cases are predicated upon the supplier's failure to adopt a plan or

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93. Brief of Defendants-Appellants at 11, *Bustos v. Hyundai Motor Co.*, 2010-NMCA-090 (No. 28,240).

94. *Bustos*, 2010-NMCA-090, ¶ 43, 149 N.M. 1.

95. *See also infra* text accompanying notes 145–155.

96. *See* UJI 13-1407 comm. cmt.; UJI 13-1412 NMRA (emphasis added). *See* also UJI 13-1412 use note; UJI 13-1412 comm. cmt.

97. *See* UJI 13-1412 comm. cmt.

design which incorporates features to reduce or eliminate obvious hazards."[98] Plaintiff did not contend that the risk of injury associated with the Accent was obvious. Therefore, this factor is not relevant to this case.

5. Common knowledge and normal public expectation of the danger (particularly for established products)[99]

The committee commentary for UJI 13-1407 states that one should examine this factor in view of UJI 13-1403 NMRA, UJI 13-1406 NMRA, and UJI 13-1418 NMRA. The committee commentary for UJI 13-1403 states "[a]s with *any negligence action*, in products liability cases founded upon negligence, foreseeability of the risk of injury is an essential element and restricts the scope of an actor's liability."[100] Since this case was based on a strict products liability claim, UJI 13-1403 is not relevant here.

UJI 13-1406 states:

> Under the "products liability" claim, a supplier in the business of putting a product on the market is liable for harm caused by an unreasonable risk of injury resulting from a condition of the product or from a manner of its use. Such a risk makes the product defective. This rule applies *even though all possible care* has been used by the supplier in putting the product on the market.[101]

The supreme court chose a "reasonably prudent person standard of 'unreasonable risk of injury,' rather than the Restatement's user-oriented standard of danger 'to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.'"[102] The instruction therefore has "universal application . . . for strict products liability [cases] relating to production flaw defects, unsafe design or formulation, warning inadequacies, safety options and products which are unavoidably unsafe, with a risk of harm not justified by usefulness or de-

98. *Id.*

99. *See* UJI 13-1407 comm. cmt.; UJI 13-1403 NMRA.

100. UJI 13-1406 NMRA (emphasis added).

101. *See* UJI 13-406 NMRA (2009) comm. cmt. (citing Stang v. Hertz Corp., 1972-NMSC-032, 83 N.M. 730, 497 P.2d 732 (S. Ct. 1972)).

102. *See id. See also supra* Part V.A.2 (describing a variant of the consumer expectations test that is applied from the standpoint of a reasonable prudent person). The Committee on Uniform Jury Instructions for Civil Cases considers and recommends proposed amendments to the Uniform Jury Instructions for the Supreme Court's consideration.

sirability of the product."[103] Therefore, UJI 13-1406 forms the foundation for strict product liability in New Mexico that courts apply through UJI 13-1407.

UJI 13-1418 relates to a supplier's duty to warn or duty to give directions for use and "is to be given only if there is a jury issue as to the adequacy of a warning or directions for use communicated by a supplier."[104] Plaintiff here did not assert a breach of Defendant's duty to warn, and, therefore, this instruction is not relevant here. Instead, this factor simply confirms that UJI 13-1407 is the relevant instruction for examining strict product liability in New Mexico because it is neutral to both parties.

6. The avoidability of injury by care in use of the product (including the effect of instructions or warnings)

Similar to the fifth factor, the committee commentary for UJI 13-1407 indicates that one should consider this factor in view of UJI 13-1403, UJI 13-1406, and UJI 13-1418. In its strict liability claim, Plaintiff did not raise Defendant's lack of care by way of instructions and warnings, or the relevant standard of care. Accordingly, this factor is not relevant to this case.

7. The ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive

Bustos stated that this "seventh consideration most directly addresses what the jury may consider with respect to *alternative design*, and this language is included in the actual jury instruction as something the jury 'should consider.'"[105] The trial judge had instructed the jury to this effect.[106] The seventh risk-benefit factor is examined in detail below.[107]

In sum, a reasonable person would likely find that factors 1, 4, and 6 are not relevant to this case. The second factor seems to favor Defendant. The third factor relates to causation and its fit in proving design defect is questionable. The fifth factor is neutral to both parties. Therefore, the seventh factor, which relates to proving the presence or absence of an alternative safer design, is crucial to proving design defect in this case. Defendant argued that the court must *require* proof of a reasonable alter-

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103. *See* UJI 13-1406 comm. cmt. *See also Bustos*, 2010-NMCA-090, ¶ 55, 149 N.M. 1. (explaining that UJI "UJI 13-1407[ ] must be used in every strict products liability case based upon Restatement (Second) of Torts § 402A.").

104. *See* UJI 13-1418 NMRA comm. cmt.

105. *Bustos*, 2010-NMCA-090, ¶ 54, 149 N.M. 1 (emphasis added).

106. *Id.*

107. *See infra* Part V.B.

native design without which there could be no design defect liability.[108] Additionally, the court stated that New Mexico's UJI 13-1407 was unlike the jury instructions that the majority of other United States jurisdictions use.[109] UJI 13-1407, however, covers Defendant's request because the court indicated that Plaintiff did offer reasonable alternative design options to support its case.[110] That is, Plaintiff did meet the requirement that Defendant requested. The court of appeals' explicit statement to this effect, preceded by a balancing of these factors during trial, would have prevented the tortuous play of semantics that occupied the Defendant, Plaintiff, and the court. The discussion below examines the court's treatment of reasonable alternative designs in this case.

B. In New Mexico, the plaintiff's low burden for showing a reasonable alternative design requires the defendant to "convincingly" demonstrate that plaintiff's alternatives are not feasible.

The court of appeals found that Plaintiff did in fact "identif[y] alternatives that could have been implemented to improve [the car's] performance in a rollover."[111] Defendant wanted Plaintiff to show that the testing of these alternatives in a prototype under simulated conditions would prove that, "but for a defective design, the Accent's roof would have crushed to a maximum of three inches"[112] instead of the 10.9 inches that actually occurred during this accident.[113] *Brooks*, however, rejected this level of certainty requirement for product liability claims in New Mexico, stating: "defect giving rise to strict products liability is not measured by comparison with a prototype."[114] The court in this case agreed with *Brooks*: in the absence of a prototype, Plaintiff's burden to show alternative designs can be somewhat speculative.

Plaintiff's expert stated that, based on his experience and inspection of information provided by Defendant, three alternatives[115] could have improved the strength or crush resistance of the 2002 Accent's roof and provided reasonable protection in this low-speed rollover. These alternatives were: (1) filling the hollow A-pillar with structural foam, which

108. *Bustos*, 2010-NMCA-090, ¶ 50, 149 N.M. 1 (emphasis added).

109. Brief of Defendants-Petitioners at 39, *Bustos v. Hyundai Motor Co.*, *cert. quashed*, No. 32,534 (Dec. 14, 2010).

110. *Bustos*, 2010-NMCA-090, ¶ 31, 149 N.M. 1.

111. *Id.* ¶ 57.

112. *Id.* ¶ 30 (internal quotation marks omitted).

113. "[Plaintiff] never attempted to show that those alternative designs would have been effective in this particular accident." Brief of Defendants-Appellants at 45, *Bustos v. Hyundai Motor Co.*, 2010-NMCA-090, No. 28,240 (2010).

114. *Brooks*, 1995-NMSC-043, ¶ 31, 120 N.M.372.

115. *Bustos*, 2010-NMCA-090, ¶ 31, 149 N.M. 1.

would have increased the structural strength of the roof by 10–20 percent, (2) otherwise reinforcing the pillars, and (3) using an integrated rollover cage, which could have "provide[d] adequate rollover protection under the conditions of this rollover."[116] The court ruled that, based on the expert's testimony, the jury "could have found that the Accent's roof was defective in that it failed to provide adequate survival space."[117]

In this case, it is not clear what exactly one expected of Defendant. On the one hand, *Brooks* did not require a comparison with a prototype that would demonstrate a product defect with some certainty. On the other hand, *Bustos* only requires the plaintiff to meet a low standard of reasonableness to prove that alternate designs were available to defendant. Further, a plaintiff's expert can demonstrate this reasonableness by using a patchwork of different pieces of information. The court of appeals found that it would have been reasonable for the jury to infer from the totality of the expert's testimony that Defendant's use of a rollover cage would have been feasible in this vehicle.[118] The court then noted that the Defendant did not "demonstrate[ ] how such inferences [on the part of the jury] would [have been] improper."[119]

The court of appeals' reasoning suggests that the burden of proof shifts[120] to Defendant to convincingly demonstrate, using evidence from testing or from using prototypes, that Plaintiff's reasonable alternative designs were in fact not feasible. The court set the bar much higher for Defendant. While the court did not require Plaintiff to show certainty as to the feasibility of alternative designs, it appears that the court required Defendant to show certainty or close to certainty as to the non-feasibility of the alternative designs. This seems to be the law in New Mexico. In effect, Defendant should have demonstrated that a rollover cage would not have been feasible in the Accent. Defendant failed to carry this burden. In the court's opinion, Defendant's strategy was woefully inadequate.

Instead of demonstrating that the expert's three alternative designs were not feasible, Defendant argued that the expert's testimony was "unreliable because it was too generalized and [was] not based on the specific facts of this case."[121] The court rejected Defendant's argument by stating that the expert had "inspected the vehicle involved in the accident four

116. *Id.* ¶¶ 23, 31.
117. *Id.* ¶ 33.
118. *Id.*
119. *Id.*
120. In a manner similar to the risk-utility test of the Restatement (Third) of Torts where the burden of proof shifts to defendant. *See* BESSINGER & CADE, supra note 28.
121. *Bustos*, 2010-NMCA-090, ¶ 11, 149 N.M. 1.

times,"[122] "inspected the bare structural elements in order to assess how they performed in the crash,"[123] "reviewed [Defendant's] materials on the vehicle, including pre-production design information, testing protocols and results,"[124] and "reviewed . . . technical data from . . . a rollover test conducted by [Defendant] on other 2002 Accents similar to that involved in this case."[125] Although the expert did not "calculate the actual forces at work in the crash,"[126] and based his recommendations for design alternatives in part on "another vehicle that employed an integrated roll cage,"[127] the court found that the expert had recommended reasonable alternative designs.[128]

In New Mexico, this discrepancy in burden of proof between a plaintiff and a defendant in a strict product liability suit is underwritten by policy considerations. The policy of risk distribution or cost distribution underpins the principle that "the risk of injury can be insured by the manufacturer and distributed among the public as the cost of doing business."[129] The goal is to "minimize the cost of accidents and to consider who should bear those costs."[130] A defendant in a strict liability suit in New Mexico must be aware that plaintiff's proposed alternatives need only pass a "reasonableness" bar, which then "shifts" the burden to defendant to convincingly prove the non-feasibility of those alternatives.[131] This note discusses some implications of this strict liability practice in New Mexico below.

VI. IMPLICATIONS

New Mexico case law is unclear about where the nexus rests between law and equity in strict product liability design defect automobile crash cases. This note calls for systematic application of the unreasonable risk-of-injury test for the following reasons. First, this test includes some

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122. *Id.* ¶ 18.
123. *Id.*
124. *Id.* ¶ 19.
125. *Id.*
126. *Id.* ¶ 24.
127. *Id.*
128. *Id.* ¶ 31.
129. *Brooks*, 1995-NMSC-043, ¶ 14, 120 N.M. 372 (citing Escola v. Coco Cola Bottling Co., 24 Cal.2d 453, 462, 150 P.2d 436, 441 (1944)).
130. *Id.* ¶ 15 (citing Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 173, 406 A.2d 140, 151 (1979)).
131. *See id.* ¶ 22 ("[I]n the interest of fairness, providing relief against the manufacturer who—while perhaps innocent of negligence—cast the defective product into the stream of commerce and profited thereby.").

elements of both the consumer expectation test and the risk-utility test. *Bustos* confirmed that one could use the risk-benefit factors listed in the Committee Commentary of UJI 13-1407 to examine strict product liability for design defects in New Mexico. By consistent application of this test, some level of certainty and predictability would attach to the balancing and weighing of the factors that make up UJI 13-1407. In some other areas of law and over the course of many years, the law has streamlined tests that involve balancing factors. For example, the federal circuit courts have molded and developed the likelihood of confusion test used to examine trademark infringement claims by assigning different weights and rules to the eight or nine factors that make up this test.[132] To promote systematic use of UJI 13-1407, juries should be required to make individual findings on each of the risk-benefit factors using special verdict forms or other means. This practice would be consistent with the recommendation that, in strict product liability cases, the jury should collect and carefully weigh risk-benefit factors.[133] In the absence of this requirement, a jury could sympathize with, and favor a plaintiff, especially a deceased young plaintiff, in strict product liability cases.

A suitable amendment to UJI 13-1407 could read as follows:[134]

> An unreasonable risk of injury is a risk which a reasonably prudent person having full knowledge of the risk would find unacceptable. This means that a product does not present an unreasonable risk of injury simply because it is possible to be harmed by it.
>
> The design of a product need not necessarily adopt features which represent the ultimate in safety. You *must*[135]examine whether the product was defective by balancing the following factors:[136]
>
> *(1) the usefulness and desirability of the product; (2) the availability of other and safer products to meet the same need; (3) the likeli-*

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132. Barton Beebe, *An Empirical Study of The Multifactor Tests for Trademark Infringement,* 94 CAL. L. REV. 1581, 1587 (2006).

133. John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L. J. 825, 838 (1973).

134. Emphasis added represents my recommended amendments to UJI 13-1407. The balancing factors have been relocated from the commentary of UJI 13-1407 to the main body of the proposed instruction.

135. "should" replaced by "must." *See* Brief for Products Liability Advisory Council, Inc. as Amicus Curiae Supporting Defendant-Appellant at 11, *Bustos v. Hyundai Motor Co.*, 2010-NMCA-090 (No. 28,240).

136. The inserted new language replaces "consider the ability to eliminate the risk without seriously impairing the usefulness of the product or making it unduly expensive," because the deleted language is repeated in the seventh factor.

> *hood of injury and its probable seriousness, i.e., "risk"*[137]*; (4) the obviousness of the danger; (5) common knowledge and normal public expectation of the danger (particularly for established products); (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings); and (7) the ability to eliminate the danger [using reasonable alternative designs]*[138] *without seriously impairing the usefulness of the product or making it unduly expensive.*
>
> Under products liability law, you are not to consider the reasonableness of acts or omissions of the supplier. You are to look at the product itself and consider only the risks of harm from its condition or from the manner of its use at the time of the injury. The question for you is whether the product was defective, even though the supplier could not have known of such risks at the time of supplying the product.

The recommended amendments do not deviate from *Brooks*' holdings. Based on existing policy considerations, the burden to demonstrate nonfeasibility of the alternative designs offered by a plaintiff could continue to fall on a defendant. However, if a court does not require a plaintiff to demonstrate the feasibility of alternative designs using a prototype then the same standard should apply to a defendant product manufacturer. Certain factors may become irrelevant under particular facts and circumstances (such as the nature of the product or the maturity of the product). As noted previously, the weight one should attach to these factors, and the practical nuances of balancing these factors, would require systematic application of the instruction during trial and development over time. Currently, courts use several jury instructions containing ambiguous language to explain the application of UJI 13-1407. For example, UJI 13-1406 just confirms that UJI 13-1407 is the relevant jury instruction for strict product liability.[139] As another example, UJI 13-1403 relates to product liability claims that sound in negligence theory.[140] The courts should eliminate these ambiguous instructions and incorporate relevant instructions under the UJI 13-1407's use note.

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137. *See supra* Part V.A.3. This factor has the appearance of a causation element. The use note of the amended instruction should clarify that this factor requires a plaintiff to introduce evidence regarding the likelihood of types of injury, and the seriousness of injury.

138. The added phrase "using reasonable alternative designs" makes explicit what was previously implied.

139. *See supra* Part V.A.5.

140. *See supra* Part V.A.5.

Second, to a product manufacturer, this case may suggest that Defendant could not have done anything to alter the verdict. A closer review of the record, however, suggests that Defendant's strategy, perhaps more than any design defect in the Accent, was a key factor that influenced the outcome of the case. Defendant's attempt to negate the application of UJI 13-1407 was questionable at best. Defendant sealed its fate when it attempted to mount a facial challenge to New Mexico's law but was ill prepared to show how UJI 13-1407 was fundamentally unfair to its case and to other product manufacturers as well.[141] The court of appeals does not have authority to change jury instructions,[142] and so Defendant was hoping that the supreme court would hear its appeal. By rejecting Defendant's appeal, one can assume the supreme court signaled its rejection of Defendant's argument and satisfaction with the jury instructions as they are. Defendant did not demonstrate why the seven-factor test did not support Plaintiff's case but instead embarked on an unproductive excursion.[143] For example, Defendant did not address the fact that the safer alternative design elements that the Plaintiff's expert had proposed, while technically feasible, were not practical because they would have "seriously made the product unduly expensive."[144] The court stated "it would have been reasonable for the jury to infer . . . that a roll cage could have been feasible in the subject vehicle."[145] Further, the court stated: "Defendant[ ] ha[s] not demonstrated how such inferences would be improper."[146] Roll cages, while integrated into some high-end vehicles and sports utility vehicles such as the Volvo XC-90, are not typically inte-

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141. At trial, Defendant wanted a jury instruction that sounded in negligence theory pursuant to the Restatement (Third) of Torts. *See Bustos*, 2010-NMCA-090, ¶ 50, 149 N.M. 1. But later, Defendant seems to have accepted that defective design can sound in strict liability, and argued that the proof of a feasible alternative design must be made mandatory in New Mexico instead of being "one relevant consideration." *See* Brief of Defendants-Petitioners at 24, *Bustos v. Hyundai Motor Co.*, *cert. quashed*, No. 32,534 (Dec. 14, 2010).

142. *Bustos*, 2010-NMCA-090, ¶ 55, 149 N.M. 1.

143. Defendant stated: "[r]ather than making this alternative design requirement explicit, however, New Mexico has so far allowed the practice of 'letting the lawyers argue.'" *See* Brief of Defendants-Petitioners at 44, *Bustos v. Hyundai Motor Co.*, No. 32,534 (Dec. 14, 2010). "But that approach provides little guidance to the jury[ ] and little or no predictability for potential litigants[ ] as to the standards of conduct applicable under New Mexico law." *Id.* "Unless the [c]ourt wishes to see New Mexico tort law transformed from a fault-based system to what amounts to an insurance system, the judgment below must be reversed." Brief of Defendants-Appellants at 45–46, *Bustos v. Hyundai Motor Co.*, 2010-NMCA-090 (No. 28,240).

144. *See* UJI 13-1407 comm. cmt. (seventh factor).

145. *Bustos*, 2010-NMCA-090, ¶ 33, 149 N.M. 1.

146. *Id.*

grated into in economy passenger cars such as the Accent.[147] Furthermore, some studies have shown that fatality in rollover crashes is not uncommon and have demonstrated that the "actual injuries received by an occupant in a rollover, are also partially dependent on 'luck'—e.g., the exact position of the occupant's body as the vehicle rolls."[148] In one study, 19 percent of fatal crashes resulted from a rollover;[149] in another, 5.7 percent of rollover accidents involving passenger cars resulted in a passenger's death.[150] Further, due to electronic control and other safety systems, "when seen in terms of rollover-fatalities per million registered vehicles . . . [f]rom 1998 to 2009, SUV rollover driver fatality rates decreased from 43 per million to 12 [per million]. The rate for car drivers dropped from 21 per million to 13 [per million]."[151] The outcome of a rollover accident therefore is contingent not only on the use of rollover cages and roof-strength but also on other variables (driver negligence, and safety warnings) that the jury should weigh and balance before concluding that a manufacturer should be liable for its design.

Finally, Defendant's amicus suggests that the unreasonable risk of injury test currently implemented deters businesses from operating in New Mexico.[152] The 2002 Accent had passed NHTSA standards. It had a roof strength equal to 3.2 times its curb weight—in excess of the 1.5 times the curb weight requirement of the safety standard applicable in 2002—and was even in compliance with the 3.0 times the curb weight require-

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147. Barry Winfield, *Is SUV now short for "Sport-Utility-Volvo"?*, Car and Driver (October 2002), *available at* http://www.caranddriver.com/reviews/volvo-xc90-first-drive-review-safety-is-a-priority-page-3 (last visited Oct. 26, 2012).

148. George Rechnitzer & John Lane, *Rollover Crash Study-Vehicle Design and Occupant Injuries*, Monash University Accident Research Centre-Report #65-1994, at 6 (1994) (available at http://www.monash.edu.au/miri/research/reports/muarc065.html (last visited Oct. 30, 2012)).

149. *Id.* at 1.

150. *See Review of NMVCCS Rollover Variables in Support of Rollover Reconstruction*, DOT HS 811 235, U.S. Department of Transportation, National Highway Traffic Safety Administration (Jan. 2010) (calculated from the data presented in Table 16 showing 10,531 deaths from 184, 271 passenger car accidents. This review post-dates the trial date of this case, is cited as a representative source of data available, and analyzed 6,949 roll-over crashes in the U.S. from 2005–2007).

151. *Rollover 101: How Rollovers Happen And What You Can Do To Avoid One*, Consumer Reports, http://www.consumerreports.org/cro/2012/02/rollover-101/index.htm (last updated, March 2012). *See generally* http://www.safercar.gov/Rollover (last visited Nov. 24, 2012).

152. New Mexico practice breeds the type of legal uncertainty that discourages businesses from locating in New Mexico. Brief for Association of Commerce and Industry as Amicus Curiae Supporting Defendant-Appellant at 15, *Bustos v. Hyundai Motor Co.*, 2010-NMCA-090, No. 28,240 (2010).

ment of the standard at the time of trial.[153] In *Brooks*, the court's reluctance to accept industry standards as conclusive evidence stems from the Second Circuit's 1932 ruling in *The T.J. Hooper*,[154] that states: "[a manufacturer] may never set its own tests, however persuasive be its usages."[155] The *Brooks* court held that design-defect claims "may be proved without showing that the manufacturer has violated regulations, codes, or standards."[156] The court affirmed that UJI 13-408, which states: "[i]ndustry customs . . . are evidence of the acceptability of the risk, but they are not conclusive"[157] and "should be given in cases involving a claimed design defect."[158] What amounts to conclusive evidence is left unsaid. Certainly, automobile industrial practice has come a long way since 1932. Cars are subject to NHTSA standards; an automobile manufacturer or an associated lobbying group do not set these standards. How high a burden of proof did Defendant have to meet? Did the court require Defendant to show that the car must withstand the effects of what appears to be a freak accident when the car rolled-off Interstate I-10[159] because the driver reached over to get her cell phone?[160] As this note previously discussed, it appears that the court and jury wanted Defendant to prove that a prototype of the car was safe when replicating the rollover accident.[161] NHTSA safety certification was not enough. Was this a reasonable standard for Defendant? Resolving these questions requires the courts to establish the scope and implementation of UJI 13-1407. Until then, a defendant product manufacturer or supplier in a New Mexico product liability case must be prepared to present its case, assuming the burden of proof under a standard that is well north of preponderance of the evidence.

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153. Brief of Defendants-Petitioners at 4–5, *Bustos v. Hyundai Motor Co.*, *cert. quashed*, No. 32,534 (Dec. 14, 2010).

154. *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932)

155. *Brooks,* 1995-NMSC-043, ¶ 40, 120 N.M.372 (citing *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932)).

156. Id. ¶ 1.

157. *See supra* Part V.A.2.

158. *Brooks*, 1995-NMSC-043, ¶ 41, 120 N.M.372.

159. According to Defendant's expert, this was an unusually severe accident because the car left the road at sixty miles per hour and rolled 3.5 times. *See* Brief of Defendants-Petitioners at 12, *Bustos v. Hyundai Motor Co.*, *cert. quashed*, No. 32,534 (Dec. 14, 2010).

160. Brief of Defendants-Petitioners at 3, *Bustos v. Hyundai Motor Co.*, *cert. quashed*, No. 32,534 (Dec. 14, 2010).

161. *See supra* Part V.B.

VII. CONCLUSION

In this case, Defendant mounted what appears to be a facial challenge against New Mexico's UJI 13-407. As UJI 13-1407 is flexible enough to include any rational theory that is suitable for any product, the supreme court's action in quashing certiorari was appropriate. Nonetheless, UJI 13-1407's application is unclear. In automobile crash cases, it is unlikely that a plaintiff will be successful without proving that a safer design alternative was available.[162] It appears, however, that a plaintiff could simply use experts to postulate reasonable design alternatives; the jury would view a defendant's failure to incorporate these features in the car as a design defect. In contrast, due to burden shifting, a defendant has to carry a heavy burden to prove that a plaintiff's proposed alternative designs are not feasible. That is, a defendant must prove that it is not possible to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive. An amicus brief supporting Defendant's arguments asserts that the legal practice in New Mexico breeds the type of legal uncertainty that discourages businesses from locating their businesses in the State.[163] A recent study also lends support to this assertion, ranking New Mexico 45th for jury fairness in the United States and 44th for overall tort and contract litigation.[164] This case does not help to debunk this assertion. Even those who question the accuracy or relevancy of the above survey must agree that New Mexico law needs clarity in applying UJI 13-1407 to streamline strict product liability litigation in New Mexico.

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162. This statement is based on the analysis of this case, and is expected to extend to other automobile crash cases. The balancing of these risk-benefit factors during a strict products liability suit that arises from defects in other products, for example, new or dangerous products and chemicals, may not require a showing of reasonable alternate designs.

163. Brief for Association of Commerce and Industry as Amicus Curiae Supporting Defendant-Appellant at 15, *Bustos v. Hyundai Motor Co.*, 2010-NMCA-090, No. 28,240 (2010).

164. U.S. Chamber Institute of Legal Reform: *2012 State Liability Systems Survey on Lawsuit Climate* (Sept. 2012). Survey summary can be downloaded from http://www.instituteforlegalreform.com/states (last visited Oct. 30, 2012). *See also* Dennis Domrzalski, *US Chamber Ranks NM Low on Biz Legal Climate*, Albuquerque Business First (Sep. 10, 2012), http://www.bizjournals.com/albuquerque/news/2012/09/10/us-chamber-ranks-nm-low-on-biz-legal.html