PRODUCTS LIABILITY—STRICT LIABILITY IN TORT—STATE-OF-THE-ART EVIDENCE RELEVANT TO RISK-UTILITY ANALYSIS IN DESIGN DEFECT CASES—*O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983).

The modern law of products liability reflects the ongoing efforts of courts and legislatures to balance the competing interests of consumers and producers.[1] Established public policy favors compensating injured consumers; countervailing policy, however, rejects the imposition of an insurer's liability upon sellers for every injury suffered through the use of their products.[2] As a result, the courts generally have disavowed any intention of imposing such absolute liability and have required that a product be either defectively designed or manufactured before holding a manufacturer or distributor responsible for injuries sustained by a consumer.[3] Recently, in *O'Brien v. Muskin Corp.*,[4] the New Jersey Supreme Court adopted a test for determining whether a product has been defectively designed. While refusing to advocate the imposition of absolute liability on manufacturers of defectively designed products, the court nevertheless effectively removed the judicially created safeguards which heretofore had shielded the manufacturer from such liability.[5]

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[1] For a survey of state legislation dealing with products liability see W. DREIR & H. GOLDMANN, PRODUCTS LIABILITY LAW IN NEW JERSEY: A PRACTITIONER'S GUIDE app. B (1983).

[2] Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 600-01 (1980). According to Professor Birnbaum:

> Underlying the whole body of tort law is an awareness that the need for compensation, alone, is not a sufficient basis for an award. . . . An award is not to be made unless there exists some reason other than the mere need of the victim for compensation. Otherwise, the award will be an arbitrary shifting of loss from one person to another at a net loss to society due to the economic and sociological costs of adjudication.

Id. at 601 (quoting P. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 242 (1965)). Responding to the need for compensation alone would require manufacturers and distributors to answer for any and all injuries resulting from the use of their products, thus imposing an "insurer's liability."

[3] *See* Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 877 (Alaska 1979); Birnbaum, *supra* note 2, at 600 n.32 (1982); *cf.* Jakubowski v. Minnesota Mining & Mfg., 42 N.J. 177, 185, 199 A.2d 826, 831 (1964) (manufacturer not under duty to furnish tools that will not wear out); Courtois v. General Motors Corp., 37 N.J. 525, 543, 182 A.2d 545, 554 (1962) (warranty of merchantability does not require perfection).

[4] 94 N.J. 169, 463 A.2d 298 (1983).

[5] *Id.* at 192, 463 A.2d at 310 (Schreiber, J., concurring and dissenting). In his concurring and dissenting opinion Justice Schreiber asserted that the majority had designed a test for absolute rather than strict liability. *Id.* It is perhaps more accurate to observe that although the majority's test theoretically distinguishes itself from absolute liability, the test is so expansive that, as a practical matter, sellers will face potential and unpre-

In 1971, Arthur Henry bought a pool manufactured by the Muskin Corporation from Kiddie City, Inc.[6] Assembled, the pool consisted of a twenty foot by twenty-four foot oval frame with four foot walls.[7] Within that frame, an embossed vinyl liner rested on a shallow bed of sand.[8] The water level in the filled pool was approximately three and one-half feet.[9] The manufacturer provided a warning against diving, which was written in half-inch high letters, on the outer wall of the pool.[10]

On May 17, 1974, twenty-three year old Gary O'Brien visited the Henry home uninvited.[11] He dove into their pool with his arms extended.[12] His hands slid apart when they contacted the vinyl liner, his head struck the bottom, and he was seriously injured.[13]

O'Brien sued both Muskin and Kiddie City.[14] He alleged that the pool was defective in design and that the defendants were strictly liable for his injuries.[15] He traced the defect to the slipperiness of the vinyl liner and the inadequacy of the manufacturer's warning.[16]

Conflicting testimony was presented at trial concerning the suit-

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dictable liability for almost any injury related to product use. *See infra* notes 170-83 and accompanying text.

6 *O'Brien*, 94 N.J. at 177, 463 A.2d at 362. Henry died prior to the time of the accident involved herein. *Id.* at 176, 463 A.2d at 301. His widow and estate were named as third-party defendants in the lawsuit. *Id.* Hereinafter, all reference to "the Henrys" is to the widow and the estate.

7 *Id.* at 177, 463 A.2d at 302.

8 *Id.*

9 *Id.*

10 *Id.* at 177-78, 463 A.2d at 302.

11 *Id.* at 178, 463 A.2d at 302.

12 *Id.* It was unclear from the record whether O'Brien dove from the pool platform or from the roof of an adjacent garage. *Id.*

13 *Id.*

14 *Id.* at 176, 463 A.2d at 301. The manufacturer and distributor each filed cross-claims for contribution and indemnification against the other. Kiddie City filed a third-party complaint against the Henrys, and Muskin cross-claimed. *Id.* Prior to trial, the claims against Kiddie City were dismissed by consent of the parties upon "the assumption that Kiddie City did not manufacture the vinyl liner and that it was merely a conduit between the manufacturer and the purchaser." *Id.* at 188, 463 A.2d at 307. The dismissal was not mandated by law. *See* Newmark v. Gimbel's, Inc., 54 N.J. 585, 600, 258 A.2d 697, 704-05 (1969) (distributor strictly liable for sale of defective product despite non-participation in manufacture and design); *cf.* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 406, 161 A.2d 69, 96 (1960) (car dealer liable on implied warranty of merchantability for injury due to manufacturer's flaw). The appellate division reversed the voluntary dismissal. *O'Brien*, 94 N.J. at 177, 463 A.2d at 302. The supreme court reinstated the trial court's dismissal of the claims against Kiddie City. *Id.* at 188, 463 A.2d at 308.

15 *O'Brien*, 94 N.J. at 178, 463 A.2d at 302.

16 *Id.*

ability of vinyl as a pool liner.[17] Muskin's expert testified that vinyl was the best material with which to line an above-ground pool.[18] He stated that the slipperiness of the liner allowed a diver's hands to glide along it, thereby preventing his head from striking the pool bottom.[19] Muskin's customer service manager, however, testified that a thicker vinyl bottom with a deeper embossing could have been used.[20]

At the close of the trial, the judge removed the issue of design defect from the jury's consideration, limiting the scope of its deliberations to the adequacy of the manufacturer's warnings.[21] In response to special interrogatories the jury found that, because the warnings were inadequate, the pool "was not reasonably fit, suitable and safe for its intended or reasonably foreseeable purposes"[22] when manufactured and that that defect was a cause of the plaintiff's injury.[23] The jury also determined that O'Brien had been a trespasser at the time of the accident[24] and that his injuries were eighty-five percent attributable to his own negligence.[25] The trial court then molded the verdict in accordance with New Jersey's comparative negligence statute[26] and barred the plaintiff from recovery.[27]

The appellate division held that the trial court erred in remov-

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17 *Id.* at 178-79, 463 A.2d at 302-03.

18 *Id.*, 463 A.2d at 303.

19 *Id.*

20 *Id.* at 179, 463 A.2d at 303. The supreme court concluded that "[a] fair inference could be drawn that deeper embossing would have rendered the pool bottom less slippery." *Id.*

21 *Id.* The trial court concluded that the plaintiff had failed to make out a prima facie case on the issue of design defect. *Id.* at 176, 463 A.2d at 301.

22 *Id.*

23 *Id.*, 463 A.2d at 301-02.

24 *Id.*, 463 A.2d at 302. O'Brien's trespasser status served to exculpate the Henrys. *See generally* Renz v. Penn Cent. Corp., 87 N.J. 437, 461-63, 435 A.2d 540, 553-54 (1981) (discussing landowner's common law duty to trespassers); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 58 (4th ed. 1971) (landowner not liable for trespasser's injury despite lack of reasonable care to put land in safe condition). Both the appellate division and the supreme court agreed that O'Brien's status need not be relitigated. *O'Brien*, 94 N.J. at 177, 463 A.2d at 302.

25 *O'Brien*, 94 N.J. at 177, 463 A.2d at 302.

26 N.J. STAT. ANN. § 2A:15-5.1 (West Cum. Supp. 1983-1984). The statute provides that:

> [c]ontributory negligence shall not bar recovery in an action . . . to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought or was not greater than the combined negligence of the persons against whom recovery is sought. Any damages sustained shall be diminished by the percentage sustained of negligence attributable to the person recovering.

Id. The comparative fault principles of the act were held applicable to strict liability

ing the question of defective design from the jury, reversed the judgment in favor of Muskin, and ordered a new trial.[28] The supreme court granted certification[29] and affirmed the appellate court's decision.[30] It held that the trial judge should have allowed the jury to determine whether the risks posed by the pool's dimensions and the slipperiness of its bottom so outweighed its utility as to constitute a defect.[31] The court also held that evidence of the state-of-the-art[32] at the time of manufacture could be considered by the jury in its risk-utility analysis.[33]

The law of products liability in New Jersey has developed out of the court's rejection of theories of recovery limited by contract and negligence principles.[34] In its landmark decision in *Henningsen v. Bloomfield Motors, Inc.*[35] the New Jersey Supreme Court refused to give effect to a manufacturer's disclaimer of liability, which was based on

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actions in Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 160-64, 406 A.2d 140, 145-47 (1979).

27 *O'Brien*, 94 N.J. at 176-77, 463 A.2d at 302. The trial occurred prior to the court's decision in Roman v. Mitchell, 82 N.J. 336, 413 A.2d 322 (1980), which mandated the use of an "ultimate outcome" charge advising the jury of the effect of its allocation of fault upon the plaintiff's right to recover. *Roman*, 82 N.J. at 345, 413 A.2d at 327. The appellate division ordered that the charge be given at the new trial. *O'Brien*, 94 N.J. at 177, 463 A.2d at 302. In ordering a new trial, however, the supreme court neither endorsed nor rejected this directive. *Id.* at 188, 463 A.2d at 307-08. The court's silence is significant in light of the *Roman* court's recognition of a trial judge's discretion to withhold the charge "in a complex case involving multiple issues and numerous parties." *Roman*, 82 N.J. at 346-47, 413 A.2d at 327. *Roman* involved a negligence action arising out of a highway accident. *Id.* at 340, 413 A.2d at 324. Thus, the *O'Brien* court's silence leaves unanswered important questions regarding the charge's applicability in a products liability case.

28 *O'Brien*, 94 N.J. at 177, 463 A.2d at 302.

29 O'Brien v. Muskin Corp., 91 N.J. 548, 453 A.2d 866 (1982).

30 *O'Brien*, 94 N.J. at 177, 463 A.2d at 302. The court modified the appellate court's order by reinstating the voluntary dismissal of the claims against Kiddie City. *See supra* note 14.

31 *O'Brien*, 94 N.J. at 184, 463 A.2d at 306.

32 The state-of-the-art refers to "the existing level of technological expertise and scientific knowledge relevant to a particular industry at the time a product is designed." *Id.* at 182, 463 A.2d at 305 (citing Robb, *A Practical Approach to Use of State of the Art Evidence in Strict Products Liability Cases*, 77 NW. U.L. REV. 1, 4-5 & n.15 (1982)). The state-of-the-art is not limited to the custom in a particular industry. *Id.* at 182, 463 A.2d at 305.

33 *Id.* at 184, 463 A.2d at 305. The New Jersey Supreme Court first employed a risk-utility analysis in a strict products liability case in Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 386 A.2d 816 (1978). *See* Beshada v. Johns-Manville Prod. Corp., 90 N.J. 191, 447 A.2d 539 (1982); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979).

34 *See infra* notes 35-47 and accompanying text. *See generally* Birnbaum, *supra* note 2, at 593-96 (outlining inadequacies of traditional contract and negligence-based theories of recovery).

35 32 N.J. 358, 161 A.2d 69 (1960).

the absence of contractual privity with the injured consumer.[36] The court held that an implied warranty of reasonable safety accompanied every product into the stream of trade, extending directly from manufacturers and sellers to all those who might reasonably be expected to use the product.[37] The court reasoned that the modern system of distribution, built upon sales by intermediaries, deprived consumers of the opportunity to deal directly with those responsible for product safety and thus removed the traditional protections afforded by the law of contracts.[38] According to the court, those who were in a position either to control the danger or to distribute equitably any losses that might occur should bear the costs of physical injuries suffered through the use of defective products.[39]

In *Santor v. A & M Karagheusian, Inc.*,[40] the supreme court expanded on the principles announced in *Henningsen* by holding that breach of an implied warranty of reasonable fitness gave rise to a cause of action against the manufacturer for economic as well as physical injuries.[41] In *Santor*, the plaintiff sued the manufacturer and the distributor to recover the cost of defective carpeting.[42] The court rejected the manufacturer's contention that the policy rationale sup-

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[36] *Id.* at 413, 161 A.2d at 99-100. In *Henningsen*, the plaintiff's husband purchased an automobile from a retailer. *Id.* at 364, 161 A.2d at 73. The plaintiff herself had no contractual relationship with either the dealer or the manufacturer. *Id.* at 365, 161 A.2d at 73. Retention of the privity requirement would have absolved those in the chain of distribution of any responsibility for Mrs. Henningsen's injuries. See W. PROSSER, *supra* note 24, § 96. Such a restriction had previously been rejected by the New York Court of Appeals. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 385, 111 N.E. 1050, 1053 (1916) (manufacturer's duty to buyer injured as a result of defects arises from foreseeability of injury, not from contract of sale, and therefore purchaser able to sue manufacturer directly).

[37] *Henningsen*, 32 N.J. at 413-14, 161 A.2d at 99-100. The court explained its blending of warranty and tort theories with the observation that warranty actions, historically, had been brought in tort and were based on deceit. *Id.* at 414, 161 A.2d at 100.

[38] *Id.* at 379, 161 A.2d at 81. The court contrasted the terms "buyer" and "consumer" to illustrate the features that differentiated the traditional from the modern marketplace. "Buyer" connoted one who met face to face with his seller on equal terms to purchase products that were relatively simple and of a readily discernible quality. A "consumer," on the other hand, implied the object of mass advertising campaigns in which manufacturers cultivated a demand for their products but avoided contact with the ultimate consumer through the employment of intermediaries. In the court's view, retention of the privity requirement under modern market conditions would unjustly insulate manufacturers from liability for consumer injuries. *Id.*

[39] *Id.* Thus the court, in its first modern products liability case, identified the dual purposes of products liability, that of encouraging manufacturers to market safe products and that of equitably distributing the losses suffered through the use of unsafe products. *See id.*

[40] 44 N.J. 52, 207 A.2d 305 (1965).

[41] *Id.* at 66, 207 A.2d at 312.

[42] *Id.* at 55, 207 A.2d at 306.

porting the abandonment of the privity requirement in cases involving personal injuries did not apply where economic losses alone were claimed.[43] The court stated that it could perceive no reason why the warranty that attached upon delivery of the article into the commercial stream should be actionable in the one instance and not the other.[44]

Although the *Santor* court grounded its decision upon an implied warranty of merchantability, it went on to adopt the doctrine of strict liability in tort as the preferred means of measuring a manufacturer's liability for consumer injuries.[45] The court held that an implicit representation of suitability and safety arose, as a matter of law, out of a product's presence on the market.[46] A product that did not meet this legal standard was considered defective, and its manufacturer would be responsible for all resulting injuries, irrespective of any showing of negligence or lack of care in the manufacturing process.[47]

Despite its preference for tort-based theories of liability, the court relied upon traditional warranty language in defining product defects.[48] By contrast, the definition adopted by the drafters of section 402A of the *Restatement (Second) of Torts* employed the negligence terms "unreasonably dangerous."[49] In the period immediately fol-

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[43] *Id.* at 57-59, 207 A.2d at 307-08.

[44] *Id.* at 60, 207 A.2d at 309.

[45] *Id.* at 63-67, 207 A.2d at 311-13. The California Supreme Court rejected such an expansive application of strict liability in Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), and held that the doctrine was inapplicable to cases involving only economic losses. In a subsequent decision the New Jersey court acknowledged California's rejection of *Santor* but expressly declined to reexamine its holding in that case. Rosenau v. City of New Brunswick, 51 N.J. 130, 141-42, 238 A.2d 169, 175 (1968) (asserting cause of action for physical damage to property).

[46] *Santor*, 44 N.J. at 64-65, 207 A.2d at 311-12. The significance of the court's holding lies in its recognition of a legal duty in tort running from the manufacturer to product users. The court thus established a theory of liability which was not dependent upon contract and warranty principles.

[47] *Id.* at 66-67, 207 A.2d at 312.

[48] *Id.*, 207 A.2d at 313. Although the *Santor* court expressly declined to adopt an all-encompassing definition of the term "defect," it nonetheless made clear that products that were "not reasonably fit for the ordinary purposes for which such articles are sold and used" would be considered defective. *Id.* This language is almost identical to that used by the *Henningsen* court to describe an implied warranty of merchantability. *See Henningsen*, 32 N.J. at 370, 161 A.2d at 76.

[49] RESTATEMENT (SECOND) OF TORTS § 402A (1965). The section provides that:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.

lowing *Santor*, the New Jersey Supreme Court apparently considered as unimportant the semantic differences between these two definitions.[50] Ultimately, however, in *Cepeda v. Cumberland Engineering Co.*,[51] the court, confronted with a case requiring the formulation of a working test for product defects, specifically adopted the *Restatement* standard.[52]

In *Cepeda*, the court determined that a manufacturer could be

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(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id. In the comments following this section, the authors stressed the differences between strict liability and warranty-based liability. *Id.* § 402A comment m.

50 In Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 92, 207 A.2d 305, 326 (1965), the court held that a homeowner could recover damages from a builder under implied warranty or strict liability principles where a design feature of his home proves to be both "unreasonably dangerous" and the proximate cause of his injury. The court's use of the "unreasonably dangerous" terminology parallelled, without reference, the "defective condition unreasonably dangerous" standard set out in section 402A of the *Restatement*. *Schipper* was decided two days after *Santor*, and the court apparently did not perceive any conflict between the warranty-based and the tort-based terminology employed in those decisions.

Similarly, in Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 410-11, 290 A.2d 281, 285 (1972), the court again employed a test for defect based on "an unreasonable risk of harm," which was derived independent of its consideration of section 402A. In *Bexiga*, the plaintiff was injured while operating a punch press that had been delivered by the manufacturer without safety devices. *Id.* at 405, 290 A.2d at 282. The manufacturer claimed that it was the custom of the trade for such devices to be installed by the ultimate purchasers. *Id.* at 406-07, 290 A.2d at 283. The supreme court held that where an unreasonable risk is presented by a machine without protective devices a "jury may infer that the machine was defective in design unless it finds that the incorporation by the manufacturer of a safety device would render the machine unusable for its intended purposes." *Id.* at 410-11, 290 A.2d at 285.

51 76 N.J. 152, 386 A.2d 816 (1978).

52 *Id.* at 179-80, 386 A.2d at 829. Prior to *Cepeda* the courts of California and Alaska had expressly rejected the *Restatement* formulation. Cronin v. J.B.E. Olson Corp., 8 Cal. 2d 121, 133, 501 P.2d 1153, 1159, 104 Cal. Rptr. 433, 442 (1972); Butaud v. Surburban Marine Sporting Goods, Inc., 543 P.2d 209 (Alaska 1975). The *Cronin* court interpreted the RESTATEMENT as requiring both a showing that the product was defective and that the defect rendered the product unreasonably dangerous. *Cronin*, 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442. The court held this dual requirement was unduly burdensome and inconsistent with its decision in Greenman v. Yuba Power Prods. Corp., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), which had required that strict liability be founded upon a "defect" but had not defined that term. *Cronin*, 8 Cal. 3d at 134, 501 P.2d at 1162, 104 Cal. Rptr. at 442. Although that position was adopted by a New Jersey court in Glass v. Ford Motor Co., 123 N.J. Super. 599, 601, 304 A.2d 562, 564 (Law Div. 1973), the *Cepeda* court subsequently rejected it. *Cepeda*, 76 N.J. at 179-80, 386 A.2d at 829.

In Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), the California court, while adhering to *Cronin*'s rejection of the *Restatement* language, modified its position with regard to leaving defect undefined, and established a

held liable for injuries sustained by an industrial worker who operated a machine with its safety guard removed.[53] Focusing on the manufacturer's ability to foresee such operation, the court reasoned that distribution of the machine without additional safety devices could render it defective and unreasonably dangerous.[54] The court concluded that the actual determination of the existence of the alleged design defect was to be made first by assuming that the manufacturer had knowledge of the danger and then by inquiring whether, given such knowledge, it had been negligent in placing the product on the market.[55] The manufacturer's actions thus were to be

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two-pronged test for evaluating alleged design defects. In presenting these alternative means of establishing a design defect the court provided that

> a court may properly instruct a jury that a product is defective in design if (1) the plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) the plaintiff proves that the product's design proximately caused injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.

Barker, 20 Cal. 3d at 426-27, 573 P.2d at 452, 143 Cal. Rptr. at 234. The California interpretation, minus the *Barker* test, was ultimately adopted by the New Jersey court in Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 174-76, 406 A.2d 140, 152-53 (1979), which overruled *Cepeda*'s use of the *Restatement* formula.

[53] *Cepeda*, 76 N.J. at 163-64, 386 A.2d at 821. The plaintiff was injured when his fingers were caught in the blades of a pelletizing machine which he had been operating with its finger guard removed. *Id.* at 164-65, 386 A.2d at 822. The guard was easily removed, and the plaintiff's expert testified that a mechanism to prevent operation of the machine without the guard was necessary to make the machine safe. *Id.* at 166-67, 386 A.2d at 823. The appellate division held that, as a matter of law, the machine had been delivered free of defects. *Id.* at 162, 386 A.2d at 821. The supreme court reversed and held that a jury question as to the defectiveness of the pelletizer had been established. *Id.* at 181-82, 386 A.2d at 830-31.

[54] *Id.* at 176-78, 386 A.2d at 828-29. In applying the *Restatement* standard the court required that the product be both defective and unreasonably dangerous. *Id.* at 179, 386 A.2d at 829. The court, however, noted a distinction between design and manufacturing defects and held open the possibility that if confronted with a case involving the latter it might dispense with the "unreasonably dangerous" requirement. *Id.*

[55] *Id.* at 172-73, 386 A.2d at 825-26 (citing Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 834-35 (1973)). Both Dean Wade and Dean Keeton have proposed tests for evaluating a manufacturer's conduct. Birnbaum, *supra* note 2, at 619 n.125. At least one commentator has noted a distinction between the degrees of knowledge to be imputed to the manufacturer under the Wade and Keeton analyses. Under the Wade formulation, Professor Birnbaum observes, a manufacturer's conduct in marketing a product is evaluated in light of the dangers which are shown to have existed at the time of manufacture. *Id.* This analysis implies that a manufacturer would not be strictly liable for injuries resulting from user exposure to dangers which were unknowable at the time of manufacture. *Id.* at 622-27. Professor Birnbaum notes that the Keeton "hindsight analysis," however, imputes knowledge of the dangers that are shown to exist at the time of trial. Thus, a manufacturer's decision to market a particular product may be deemed unreasonable on the basis of dangers that manifest themselves after the decision has been made. *Id.*; *see also* Keeton, *Manufacturer's Liability: The Meaning of "De-*

viewed in terms of "whether the magnitude of the risk created by the dangerous condition of the product was outweighed by the social utility attained by putting it out in this fashion."[56] A manufacturer would be deemed to have acted unreasonably, and the product found to be defective, if its utility did not outweigh the risks engendered by its use.[57]

Under *Cepeda*, risk-utility determinations were to be made on two levels.[58] Initially, the trial courts were to determine whether the manufacturer's liability was precluded as a matter of law.[59] This determination was based on the court's consideration of seven risk-utility factors, which included the product's usefulness, the likelihood and seriousness of injury, the availability of an alternative product, the user's ability to avoid the danger, and the manufacturer's ability to distribute losses through insurance and price setting.[60] If after balancing these factors the court determined that liability was not pre-

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fect" in the Manufacture and Design of Products, 20 SYRACUSE L. REV. 559, 570-71 (1969) (distinction between knowable and unknowable risks rejected). The *Cepeda* court, although citing both formulations with approval, endorsed the Keeton approach. *Cepeda*, 76 N.J. 172, 386 A.2d at 825; *see* Birnbaum, *supra* note 2, at 622-23. The court reiterated this position in subsequent decisions without acknowledging any distinction between the two approaches. Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 200, 477 A.2d 539, 544 (1982); Freund v. Cello Film Properties, Inc., 87 N.J. 229, 239-41, 432 A.2d 925, 930-31 (1981); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 171, 406 A.2d 140, 150 (1979). In *Beshada* the court expressly rejected any limitation of liability based upon the scientific unknowability of a particular hazard at the time of manufacture. *Beshada*, 90 N.J. at 200 n.3, 447 A.2d at 544 n.3.

56 *Cepeda*, 76 N.J. at 172, 386 A.2d at 826 (quoting Wade, *supra* note 55, at 834-35).

57 *Id.* at 173, 386 A.2d at 826.

58 *Id.* at 173-75, 386 A.2d at 826-28.

59 *Id.* at 173-74, 386 A.2d at 826-27.

60 *Id.* The seven factors were first set forth by Dean Wade. Wade, *supra* note 55, at 837-38. They are:

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
>
> (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
>
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
>
> (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 user's ability to avoid danger by the exercise of care in the use of the product.
>
> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings and instructions.
>
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id.

cluded, the case would be submitted to the jury.[61] In that instance, the jury was to be instructed to determine whether a reasonably prudent manufacturer, having knowledge of a product's dangerous propensities, would have placed it on the market.[62] The *Cepeda* court noted that this charge could be supplemented by advising the jury to consider those risk-utility factors for which there was specific proof or special significance in a case.[63]

Just one year after it decided *Cepeda*, the court reversed its position in *Suter v. San Angelo Foundry and Machine Co.*[64] In that case, it replaced the *Restatement* definition of defect with one which focused on whether the product was "reasonably fit, suitable and safe" for its intended or foreseeable uses.[65] The court held that a defect could be established by showing either that the product had failed to live up to the user's reasonable expectations of safety[66] or that the manufacturer had been negligent in marketing the product.[67] Trial courts considering claims based on allegedly improper marketing decisions were directed to employ the *Cepeda* risk-utility formulation.[68] The *Suter* court, however, further distinguished the functions of judge and jury in determining whether a defect existed.[69] Based upon its con-

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61 *Cepeda*, 76 N.J. at 174, 386 A.2d at 827.

62 *Id.*

63 *Id.* at 174-75, 386 A.2d at 827. The court remarked that "it would not always be appropriate for the court to include in the instructions to the jury all seven of the factors mentioned." *Id.* at 174, 386 A.2d at 827. Dean Wade suggests that the jury should normally not be told of the risk-utility factors. Wade, *supra* note 55, at 840.

64 81 N.J. 150, 406 A.2d 140 (1979).

65 *Id.* at 177, 406 A.2d at 153. Justice Clifford, joined by Justices Mountain and Sullivan, dissented from the court's rejection of the *Restatement* standard in a sharply worded concurring opinion. *Id.* at 178-92, 406 A.2d at 154-61 (Clifford, J., concurring). The concurrence felt that the majority's mixing of warranty concepts and negligence terminology was particularly unsuited to this type of tort action. *Id.* at 179, 406 A.2d at 154 (Clifford, J., concurring).

66 *Id.* at 170-71, 406 A.2d at 150; *see also* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) ("consumer expectations" test one means of proving design defect); *supra* note 52 (discussing *Barker*). This standard is used when "it is self-evident that the product is not reasonably suitable and safe and fails to perform, contrary to the user's reasonable expectation that it would 'safely do the jobs for which it was built.'" *Suter*, 81 N.J. at 170-71, 406 A.2d at 150 (quoting Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962)). The concurrence rejected the majority's adoption of the so-called "consumer expectations" test for design defects. *Id.* at 190, 406 A.2d at 160 (Clifford, J., concurring). The *Cepeda* court also had rejected this test as the sole means of evaluating design defects based on its observation that in the usual case the ordinary consumer would have no idea how safely a product could be designed. *Cepeda*, 76 N.J. at 176, 386 A.2d at 828.

67 *Suter*, 81 N.J. at 170-71, 406 A.2d at 150.

68 *Id.* at 171-73, 406 A.2d at 150-51.

69 *Id.* at 172-73, 406 A.2d at 151. The court observed that "[a]lthough the considerations for the jury are somewhat comparable to those of the trial court, their decisional

sideration of the seven risk-utility factors, a trial court was directed in *Suter* to determine whether a manufacturer owed a duty to consumers beyond the exercise of reasonable care in the design process.[70] If that duty was found to exist then the case was to be submitted to the jury, which was instructed to follow the general charge authorized in *Cepeda*, substituting the "reasonably fit, suitable and safe" standard for that of the *Restatement*.[71]

Subsequent to *Suter*, the court applied its strict liability principles in a case involving allegedly inadequate warnings. In *Freund v. Cellofilm Properties, Inc.*,[72] the trial court had refused to give a strict liability charge on the question of allegedly defective warnings that were provided with the product.[73] That court had held that an inadequate warning was the result of the manufacturer's conduct and that, therefore, the only relevant inquiry concerned the manufacturer's exercise of proper care in choosing the warning.[74] In reversing, the supreme court focused its attention on the product.[75] The court reasoned that the relevant inquiry concerned the reasonableness of the manufacturer's decision to market its product.[76] That decision was to be evaluated first by assuming that the manufacturer had knowledge of the dangers posed by the product, and then by

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functions differ. The court decides what protection should be given and the jury is concerned with reaching a just result as between the parties." *Id.* at 173, 406 A.2d at 151.

70 *Id.* While the *Cepeda* court had spoken in terms of an initial determination as to whether liability ought to be precluded as a matter of law, in *Suter* the court said that "it is the function of the court to decide whether the manufacturer has the duty and the obligation imposed by the strict liability principle." *Id.* at 172, 406 A.2d at 151. *Compare Cepeda*, 76 N.J. at 173, 386 A.2d at 826 *with Suter*, 81 N.J. at 172, 406 A.2d at 151. The "principle of strict liability" was defined in the following terms:

> If at the time the seller distributes a product, it is not reasonably fit, suitable and safe for its intended or reasonably foreseeable purposes so that users or others who may be expected to come into contact with the product are injured as a result thereof, then the seller shall be responsible for the ensuing damages.

Suter, 81 N.J. at 169, 406 A.2d at 149. Because the law presumed knowledge of a product's dangerous propensities, the duty imposed by this principle requires more than the exercise of reasonable care in the design and manufacturing processes. *Id.* at 171, 406 A.2d at 150. Thus, under the *Suter* formulation, trial courts were instructed to make a policy determination, based on the seven risk-utility factors, as to the applicability of this enhanced duty prior to submitting the case to the jury. *Id.* at 177, 406 A.2d at 153.

71 *Suter*, 81 N.J. at 176-77, 406 A.2d at 153. The jury would be charged only as to those specific risk-utility factors considered pertinent to a particular case. *Id.* at 176, 406 A.2d at 153.

72 87 N.J. 229, 432 A.2d 925 (1981).

73 *Id.* at 236, 432 A.2d at 928-29. The appellate division had affirmed the trial court's refusal to give the requested charge. *Id.*

74 *Id.* at 235-36, 432 A.2d at 928-29.

75 *Id.* at 236-40, 432 A.2d at 929-31.

76 *Id.*

asking whether a reasonable manufacturer with such knowledge would have delivered the product into the commercial stream without warning of those dangers.[77] Consequently, a manufacturer would be held strictly liable for its failure to incorporate adequate warnings into the product's design.[78]

The court applied this product-oriented analysis in *Beshada v. Johns-Manville Products Corp.*[79] and abolished the state-of-the-art defense in strict liability cases involving allegedly inadequate warnings.[80] In *Beshada*, former plantworkers and their survivors alleged injurious exposure to asbestos during the course of their employment at various industrial sites.[81] One of the plaintiffs' claims rested on the failure of manufacturers and distributors to warn of the dangers inherent in the use of asbestos or products that contained asbestos.[82] In response, the defendants asserted that the dangers were not scientifically cognizable at the time of manufacture.[83] On the plaintiffs' motion to strike this defense, the defendants argued that the knowledge imputed to the seller of a product under *Freund* was limited to that either in existence or technologically available at the time of manufacture.[84] The trial court ruled that *Freund* merely raised a presumption of knowledge which could be rebutted by proof that the dangers were "unknowable" when the product was manufactured.[85] The supreme court, after noting that a defendant's knowledge of the danger was irrelevant for strict liability purposes,[86] reversed and held that the state-of-the-art was essentially a negligence defense that was inapplicable in warnings cases.[87]

The *Beshada* court adopted a two-step analysis of product

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77 *Id.* The court noted that under a risk-utility analysis a manufacturer, deemed to know of his product's dangers, could almost always make his product safe by providing a warning that would not detract from its utility. *Id.* at 238 n.1, 432 A.2d at 930 n.1. The court maintained that a products liability jury charge must focus on the safety features of product warnings. *Id.* at 242-43, 432 A.2d at 932. Thus, the court concluded that "it must be explained that an adequate warning is one that includes the directions, communications and information essential to make the use of a product safe." *Id.* at 243, 432 A.2d at 932.

78 *Id.*

79 90 N.J. 191, 447 A.2d 539 (1982).

80 *Id.* at 209, 447 A.2d at 549; *see supra* note 32.

81 *Beshada*, 90 N.J. at 196, 447 A.2d at 542.

82 *Id.* at 196-97, 447 A.2d at 542-43.

83 *Id.*

84 *Id.* at 198-99, 447 A.2d at 543.

85 *Id.* at 199, 447 A.2d at 543.

86 *Id.* at 200 n.3, 447 A.2d at 544 n.3.

87 *Id.* at 204, 447 A.2d at 546. The court specifically limited its holding to warnings cases and declined to examine the defense's applicability in a case involving an allegedly defective safety device. *Id.* at 203 n.6, 447 A.2d at 546 n.6.

safety.[88] First, a product was to be evaluated to determine whether its utility outweighed the risks engendered by its use.[89] Where this was found to be the case, the focus shifted to whether the risks had been "reduced to the greatest extent possible consistent with the product's utility."[90] The court reasoned that a defendant could always reduce the risk of harm by providing a warning and, because he was deemed to have knowledge of the danger, his failure to do so would render the product defective.[91] The court acknowledged that its rationale sanctioned the imposition of liability for failure to warn against dangers that could not have been scientifically discovered at the time of manufacture.[92] To support this result, the court invoked the public policies underlying strict liability, relying primarily on the manufacturer's presumed ability to spread the cost of accidents.[93]

In *O'Brien*, which was decided slightly more than a year after *Beshada*, the court again endorsed the public policies supporting strict liability in design defect cases.[94] Foremost among those policies were the desire to ease the plaintiff's burden of proof and the need to insure that manufacturers act responsibly in marketing their products.[95] In the court's opinion, elimination of the requirement that an injured consumer establish a manufacturer's negligence was the most effective means of easing the plaintiff's burden.[96] Accordingly, the court reiterated its position that a consumer need only prove that

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88 *Id.* at 201, 447 A.2d at 544-45.

89 *Id.*, 447 A.2d at 545.

90 *Id.* In a footnote, the court asserted that this dichotomy was created for analytical purposes only and that "the only test for product safety is whether the benefit outweighs the risk." *Id.* at 201 n.4, 447 A.2d at 545 n.4.

91 *Id.* at 201-02, 447 A.2d at 545.

92 *Id.* at 204-05, 447 A.2d at 546-47.

93 *Id.* at 205-09, 447 A.2d at 547-48. The court concluded that manufacturers were in a better position than injured consumers to spread the costs of unforeseeable accidents and that the imposition of liability would spur industry efforts to design safer products. *Id.* at 206-07, 447 A.2d at 547-48. Additionally, the court found that the fact-finding process would be greatly simplified by eliminating "complicated, costly, confusing and time-consuming" state-of-the-art proofs. *Id.* at 207, 447 A.2d at 548.

94 *O'Brien*, 94 N.J. at 179-80, 463 A.2d at 303.

95 *Id.*; *see supra* note 93 and accompanying text.

96 *O'Brien*, 94 N.J. at 179, 463 A.2d at 303. Dean Wade has observed that, in a negligence action, the plaintiff must show not only the product's dangerous condition but also that the defendant was "negligent in letting the product get into that dangerous condition, or in failing to discover the condition and take reasonable action to eliminate it as well." Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV., 551, 552 (1980). The primary difficulty in proving such negligence arises out of the injured consumer's unfamiliarity with the manufacturing process itself. *See* Birnbaum, *supra* note 2, at 595-96 (citing Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436, 441 (1944) (Traynor, J., concurring)); *see also* Wade, *supra* note 55, at 825-26 (proving negligence by manufacturer or supplier often difficult or impossible).

"(1) the product was defective; (2) the defect existed when the product left the hands of the defendant; and (3) the defect caused injury to a reasonably foreseeable user."[97] By preserving the requirement that a product be proven defective before imposing liability, the court sought both to distinguish between strict and absolute liability and to rebut contentions that its formulation made manufacturers insurers of their products' safety.[98]

Although rejecting negligence proofs as an element of a plaintiff's case, the court employed the negligence principles of duty and foreseeability in conceptualizing a manufacturer's responsibility to the public.[99] The court ascertained a general duty running from a manufacturer to the foreseeable users of its products, which comprises both the duty to warn against inherent dangers and the duty to refrain from marketing unsafe products.[100] Predicating liability on a breach of this general duty, the court determined that, in marketing a product, "a manufacturer assumes responsibility to members of the public who are injured because of defects in that product."[101]

In determining whether a manufacturer had breached its duty to a consumer, the court focused on the product.[102] Thus, it considered the release of a defective product into the stream of trade, rather than the manufacturer's lack of care in the design or manufacturing process, to be the breach necessary to trigger strict liability.[103] The promulgation of a standard against which alleged product defects could be evaluated, therefore, constituted the central feature of the court's analysis.[104]

Initially, the *O'Brien* court recognized a basic distinction between manufacturing flaws and design defects and discussed the

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97 *O'Brien*, 94 N.J. at 179, 463 A.2d at 303 (citing Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 451 A.2d 179 (1982)).

98 *Id.* at 179-80, 463 A.2d at 303. In his dissent, Justice Schreiber argued that the majority's test for determining when a defect exists was so broad that it amounted to an imposition of absolute liability. *Id.* at 198, 463 A.2d at 313-14 (Schreiber, J., concurring and dissenting); *see infra* notes 132-38 and accompanying text.

99 *O'Brien*, 94 N.J. at 180, 463 A.2d at 303.

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.* The court noted that even if a product is carefully produced, the manufacturer will be liable for any injuries resulting from product defects. *Id.*

104 *Id.*, 463 A.2d at 303-04. The court recognized that "[t]he term is not self-defining and has no accepted meaning suitable for all strict liability cases. Implicit in the term 'defect' is a comparison of the product with a standard of evaluation; something can be defective only if it fails to measure up to that standard." *Id.* at 180-81, 463 A.2d at 304. The court's analysis, therefore, focused more on developing a means of identifying defective products than on defining the term.

standards of evaluation applicable in each case.[105] Where manufacturing defects are alleged, the court noted, the proper inquiry is whether the product was produced in conformity with the manufacturer's intentions.[106] In contrast, the court found much subtler considerations implicated in cases involving design defects[107] and endorsed the use of two tests to determine whether a product is so dangerous that it "create[s] a risk of harm outweighing [its] usefulness."[108]

The first test, which requires implementation of a risk-utility analysis, was considered appropriate in cases in which a product's design renders it safe for use in some situations but unsafe in others.[109] The court viewed the second test, a "consumer expectations test," as an alternative standard to be applied when a product has failed to live up to the user's reasonable expectations of safety.[110] Because Muskin's pool "fulfilled its function as a place for swimming"[111] but apparently presented a risk of injury when used for diving, the *O'Brien* court applied the risk-utility test to the alleged defect.[112]

In endorsing the continued use of the risk-utility factors first employed in *Cepeda*,[113] the court considered the state-of-the-art at the time of manufacture to be relevant to the evaluation of product defects.[114] Accordingly, it directed that "risks that the manufacturer knew or should have known would be posed by the product, as well as the adequacy of any warnings"[115] be weighed against the need for

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105 *Id.* at 180-82, 463 A.2d at 303. This same distinction was drawn by the court in *Cepeda*. *Cepeda*, 76 N.J. at 169, 386 A.2d at 824; *see also Suter*, 81 N.J. at 170-71, 406 A.2d at 150 (describing various tests applicable in design and manufacturing cases). Dean Keeton has suggested limiting use of the term "defect" to those cases involving manufacturing flaws. Keeton, *supra* note 55, at 562. He would substitute the term "dangerously designed" for "defectively designed." *Id.* at 565-67; *see also* Wade, *supra* note 55, at 831-32 ("defect" limited in natural application to flaw in manufacturing process).

106 *O'Brien*, 94 N.J. at 181, 463 A.2d at 304.

107 *Id.* Design defects were defined to include any feature of the product's design "including the absence or inadequacy of warnings." *Id.*

108 *Id.* at 181-82, 463 A.2d at 304.

109 *Id.*; *see infra* notes 114-22 and accompanying text.

110 *O'Brien*, 94 N.J. at 182, 463 A.2d at 304. Justice Clifford dissented from the court's endorsement of the "consumer expectations test." *Id.* at 188, 463 A.2d at 308 (Clifford, J., concurring). In his view, the test unduly limited consumer recovery. *Id.*; *see infra* notes 123-27 and accompanying text.

111 *O'Brien*, 94 N.J. at 182, 463 A.2d at 304.

112 *Id.*

113 *See Cepeda*, 76 N.J. at 176, 386 A.2d at 305; *supra* notes 53-63 and accompanying text.

114 *O'Brien*, 94 N.J. at 182-84, 463 A.2d at 305; *see supra* note 32 and accompanying text.

115 *O'Brien*, 94 N.J. at 183, 463 A.2d at 305.

a particular product, in light of available and safer design alternatives.[116] Although the plaintiff bears the burden of showing that a product's risks outweigh its benefits, the court held that the defendant "must prove that compliance with the state-of-the-art, *in conjunction with other relevant evidence*, justifies placing a product on the market."[117] Hence, under the court's risk-utility analysis, proof of compliance with the state-of-the-art, while relevant, does not exculpate the defendant.[118]

The majority concluded that it was not necessary for a plaintiff to prove the existence of an available design alternative in order to make out a prima facie case.[119] Rather, he need only "adduce sufficient evidence on the risk-utility factors to establish a defect."[120] In the case of above-ground pools, the court suggested that a plaintiff might seek to establish their recreational rather than therapeutic nature, the likelihood of injury due to their configuration, the insufficiency of the warnings, the use of vinyl as a liner, and the relative ease with which prominent warnings and a less dangerous liner could be provided.[121] Ultimately, it determined, if reasonable minds could conclude that the risk of injury outweighed the pool's utility, the question of defect must be resolved by a jury.[122]

In his concurring opinion, Justice Clifford addressed both the majority's tests for design defects and the difficulties that he found to be inherent in each.[123] While flatly rejecting the "consumer expectations" test,[124] he accepted, with reservations, the majority's use of the risk-utility test.[125] In Justice Clifford's view, the consumer's lack of

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116 *Id.* The majority, however, held that a plaintiff did not have to establish the existence of an available design alternative to make out a prima facie case on the issue of defect. *Id.* at 184-85, 463 A.2d at 306; *see infra* notes 135-38 and accompanying text.

117 *O'Brien*, 94 N.J. at 183, 463 A.2d at 305 (emphasis added). The practical effect of this dichotomization of proofs may be to shift the burden to the defendant upon the plaintiff's proof of a product-related injury. *See infra* notes 180-83 and accompanying text.

118 *O'Brien*, 94 N.J. at 183-84, 463 A.2d at 305. The majority was of the opinion that a product manufactured in conformity with the state-of-the-art might "still fail to satisfy the risk-utility equation." *Id.* at 184, 463 A.2d at 305.

119 *Id.* at 184-85, 463 A.2d at 306.

120 *Id.* at 185, 463 A.2d at 306.

121 *Id.*

122 *Id.* The court determined that even if no alternative methods of making pool bottoms existed, a jury might still find that the risks posed by pools with vinyl liners outweighed any utility gained by placing them on the market. *Id.*

123 *Id.* at 188-92, 463 A.2d at 308-10 (Clifford, J., concurring).

124 *Id.* at 188, 463 A.2d at 308 (Clifford, J., concurring).

125 *Id.* Justice Clifford reasoned that state-of-the-art evidence "is implicitly included in the factors employed in the risk/utility analysis adopted in *Cepeda*." *Id.* at 189, 463 A.2d at 308 (Clifford, J., concurring). Accordingly, he felt that the majority's reaffirma-

information regarding product design prevents him from developing a reasonable expectation of safety.[126] He believed, therefore, that the only true test for design defects should be based on the *Cepeda* risk-utility analysis.[127]

Justice Clifford expressed his concern over the continued effect upon trial courts of the distinction drawn in *Suter* between the decisional functions of judge and jury in risk-utility analysis.[128] Noting the inconsistent treatment of those functions in the model jury charges used by the state's judges, the concurrence rejected the *Suter* court's assertion that the jury was not to undertake a risk-utility analysis.[129] While the majority also rejected that view,[130] Justice Clifford concluded that a return to the language of the charge endorsed in *Cepeda* would both simplify the tasks of judge and jury and bring stability to the law of products liability.[131]

Justice Schreiber, in a concurring and dissenting opinion, expressed his belief that the majority had crossed the line separating strict from absolute liability.[132] He reasoned that the majority's imposition of liability where no design alternative existed amounted to an imposition of liability in the absence of a defect.[133] In his view, such liability was absolute and required the making of policy choices which juries are institutionally incapable of making.[134] He con-

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tion of the *Cepeda* formulation did nothing to advance the "exotic theory" presented in *Beshada*. *Id.*

126 *Id.* at 188, 463 A.2d at 308 (Clifford, J., concurring). Rather than expand on his reasons for rejecting this test, Justice Clifford adopted by reference the views expressed in his concurrence in *Suter*. *Id.* (citing *Suter*, 81 N.J. at 190, 406 A.2d at 160). In that opinion he espoused the view that the test failed to protect those whose use of the product, although foreseeable, was not a use for which the product had been designed. *Suter*, 81 N.J. at 190, 406 A.2d at 160.

127 *O'Brien*, 94 N.J. at 189-90, 463 A.2d at 308-09 (Clifford, J., concurring).

128 *Id.* at 190-92, 463 A.2d at 309-10 (Clifford, J., concurring). The *Suter* court had reasoned that "[a]lthough the considerations for the jury are somewhat comparable to those of the trial court, their decisional functions differ. The court decides what protection should be given and the jury is concerned with reaching a just result between the parties." *Suter*, 81 N.J. at 173, 406 A.2d at 151.

129 *O'Brien*, 94 N.J. at 191-92, 463 A.2d at 309-10 (Clifford, J., concurring).

130 *Id.* at 187, 463 A.2d at 307.

131 *Id.* at 192, 463 A.2d at 310 (Clifford, J., concurring). Justice Clifford observed that the *Cepeda* charge, which had utilized the "defective condition unreasonably dangerous" standard, could be modified to incorporate the *Suter* "reasonably fit, suitable and safe" test for design defects. *Id.*

132 *Id.* at 192, 463 A.2d at 310 (Schreiber, J., concurring and dissenting).

133 *Id.* at 198-200, 463 A.2d at 315 (Schreiber, J., concurring and dissenting).

134 *Id.* Justice Schreiber cited the *Restatement* for the proposition that decisions relating to the applicability of absolute liability to a particular activity are entirely within the province of the court. *Id.* at 196, 463 A.2d at 312 (Schreiber, J., concurring and dissenting) (citing RESTATEMENT (SECOND) OF TORTS § 520 comment 1 (1965)). Thus, he

cluded that the majority's delegation to the jury of the risk-utility analysis has added a new category of defects to the law of products liability, defects which would be defined only by subjective, unpredictable, and inconsistent determinations regarding the need for and desirability of a particular product.[135]

Justice Schreiber also considered the elements of a plaintiff's prima facie case, as set forth by the majority, to be so fluid that a jury would be justified in finding a defect in every case arising out of a product-related accident.[136] Instead, he would have had the court clearly delineate the functions of judge and jury, with courts making initial policy determinations using all seven risk-utility factors and juries evaluating only those products for which a trial court had determined liability was not precluded as a matter of law.[137] In this way, he would have confined the jury's consideration to those risk-utility factors deemed pertinent to a particular case, thus restricting the number of cases in which a defect could be found.[138]

The knowledge of product dangers that is imputed to commercial sellers as a matter of law distinguishes strict liability from negligence and other conduct-based theories of producer liability.[139] In *Beshada*, the court used a hindsight analysis wherein product sellers were deemed to have knowledge of those product dangers that were shown to exist at the time of trial.[140] That legal fiction rendered proof of the state-of-the-art at the time of manufacture inadmissible because what the manufacturer knew or could have known at that time was deemed irrelevant for strict liability purposes.[141] The *O'Brien* court, therefore, in conceding the relevance of evidence of the state-of-the-art at the time of manufacture retreated from the ex-

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reasoned that a jury should be precluded, in strict liability cases, from imposing such liability. *Id.* at 196-98, 463 A.2d at 312-13 (Schreiber, J., concurring and dissenting).

135 *Id.* at 200, 463 A.2d at 315 (Schreiber, J., concurring and dissenting). Justice Schreiber viewed the majority's formulation as encompassing "not only individual product flaw, improper design and inadequate warning cases, but also a fourth category of cases in which the jury decides that the risks outweigh the utility of the product." *Id.*

136 *Id.*

137 *Id.* at 196-98, 463 A.2d at 312-13 (Schreiber, J., concurring and dissenting); *see supra* notes 58-61 and accompanying text.

138 *O'Brien*, 94 N.J. at 196-98, 463 A.2d at 312-13 (Schreiber, J., concurring and dissenting).

139 *See* Birnbaum, *supra* note 2, at 619; *see also Beshada*, 90 N.J. at 203-04, 447 A.2d at 546 (defendant's knowledge irrelevant for strict liability purposes); *Freund*, 87 N.J. at 236-40, 432 A.2d at 929-31 (manufacturer's assumed knowledge distinguishes strict liability from negligence); *Suter*, 81 N.J. at 171, 406 A.2d at 150 (knowledge of harmful propensities assumed in design cases); *Cepeda*, 76 N.J. at 172, 386 A.2d at 825 (same).

140 *See supra* notes 113-18 and accompanying text.

141 *See supra* notes 81-91 and accompanying text.

treme position taken in *Beshada*.[142] More recently, in *Feldman v. Lederle Laboratories*,[143] the court abandoned the *Beshada* rationale and held that the knowledge to be imputed to a manufacturer in a warnings case is only such knowledge as is available at the time of manufacture.[144]

Despite its recent abandonment of the rule announced in *Beshada*, the court has stopped well short of signalling the total abnegation of the assumed knowledge principle.[145] In admitting evidence of a manufacturer's compliance with the state-of-the-art as relevant to risk-utility considerations, the *O'Brien* court restored the defense that was foreclosed in *Beshada*.[146] The limitations placed on the use of that defense, however, indicate the court's continued resistance to suggestions that manufacture in conformity with the state-of-the-art necessarily renders a product free from defects as a matter of law.[147] Thus, in cases involving design features other than warnings, the state-of-the-art is treated merely as one of the factors to be considered by the jury in making its risk-utility determinations.[148] Under this

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142 See *id.*

143 97 N.J. 429, 479 A.2d 374 (1984).

144 *Id.* at 452, 479 A.2d at 386 (in warnings cases, manufacturer's conduct measured by knowledge available at time of distribution). The court observed that "[a] warning that a product may have an unknowable danger warns one of nothing." *Id.* at 455, 479 A.2d at 388. With respect to the specific holding in *Beshada*, the court asserted that "[i]f *Beshada* were deemed to hold generally or in all cases, . . . that in a warning context knowledge of the unknowable is irrelevant in determining the applicability of strict liability, we would not agree." *Id.* at 454-55, 479 A.2d at 387. The court, however, did not overrule *Beshada* but instead restricted it "to the circumstances giving rise to its holding." *Id.* at 455, 479 A.2d at 388.

145 *See supra* notes 113-19 and accompanying text.

146 *Compare O'Brien*, 94 N.J. at 182-84, 463 A.2d at 305 (state-of-the-art relevant to risk-utility analysis) *with Beshada*, 90 N.J. at 202-08, 447 A.2d at 449-54 (state-of-the-art proofs irrelevant in strict liability action). In characterizing the majority's treatment of the state-of-the-art, Justice Clifford recognized that the court could "scarcely be more unambiguous in pointing out that state-of-the-art evidence is just one type of proof that may be relevant on the central issue of defect." *O'Brien*, 94 N.J. at 189, 463 A.2d at 308 (Clifford, J., concurring).

147 Justice Schreiber was of the opinion that there could be no defect in design unless there was "an alternative, technologically feasible design available at the time the product was designed." *O'Brien*, 94 N.J. at 193, 463 A.2d at 311 (Schreiber, J., concurring and dissenting).

148 *Id.* at 183-84, 463 A.2d at 305. The majority in *O'Brien* held that a defendant must prove that compliance with the state-of-the-art, together with "other relevant evidence," justifies the product's presence on the market. *Id.* Thus, the court felt that some products are "so dangerous and of such little use that under the risk-utility analysis" their presence on the market can not be justified even when manufactured in conformity with the state-of-the-art. *Id.* at 184, 463 A.2d at 305. This aspect of the court's analysis was soundly criticized by Justice Schreiber. *Id.* at 198, 463 A.2d at 313-14 (Schreiber, J., concurring and dissenting). It is unclear, however, whether this aspect of *O'Brien* survives *Feldman* where the adequacy of the warnings are challenged. In *Feldman*, there was

view, a plaintiff is not obliged to prove the existence of an available and safer design alternative in order to make out a prima facie case of defective design.[149]

The *O'Brien* court's treatment of the state-of-the-art defense clashes with the reasonably prudent manufacturer standard it endorses. By holding open the possibility that a product will be found defective where there is no available design alternative, the court sanctions liability where a manufacturer's decision to market its product should be considered reasonable. Where the inherent dangers posed by a product are known but there exists no technologically feasible way to eliminate the risks through alternate design, the focus shifts from the admittedly dangerous design features to the warnings that accompany the product.[150] Thus, an otherwise dangerous product may be rendered safe by providing a warning "sufficient to protect any and all foreseeable users from [the] dangers presented."[151] A manufacturer who provides a warning sufficient to protect the user from all known or knowable dangers can be found to have acted unreasonably only if he is held to a standard of conduct measured by

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no proof that the product was improperly designed. *Feldman*, 97 N.J. at 449, 479 A.2d at 385. Similarly, no claim was made that the product was so dangerous that it created a risk of harm outweighing its usefulness. *Id.* at 446 n.5, 479 A.2d at 383 n.5. In this context, the court required a manufacturer to provide warnings against dangers that it knew or should have known existed at the time of distribution. *Id.* at 458, 479 A.2d at 389. Under these circumstances, therefore, proof that the warning conformed to the state-of-the-art would constitute an absolute defense. It remains to be seen, however, whether this result will be confined to warnings cases alone or whether Justice Schreiber's views as to the reasonableness of manufacture in conformity with the state-of-the-art will gain ascendancy on the court.

149 *O'Brien*, 94 N.J. at 184-85, 463 A.2d at 545-46. Although *Beshada* dealt with a manufacturer's "duty to warn" against unknowable dangers, there are no conceptual differences between that duty and a duty to guard against those dangers through safer design.

150 *Id.* at 183, 463 A.2d at 305; *see* RESTATEMENT (SECOND) OF TORTS § 402A comment k (concerning unavoidably unsafe products). Prior to *Feldman*, the New Jersey courts had held that comment k exempted drug manufacturers from the duty imposed by strict liability principles. Feldman v. Lederle Labs., 189 N.J. Super. 424, 460 A.2d 203 (App. Div. 1983), *rev'd.*, 97 N.J. 429, 479 A.2d 374 (1984); *cf.* Brody v. Overlook Hosp., 66 N.J. 448, 332 A.2d 596 (1975) (blood transfusion given despite inability to detect known contaminant). Although the supreme court rejected such an exemption, *Feldman*, 97 N.J. at 449, 479 A.2d at 384, it adopted a standard under which "negligence and strict liability in warning cases may be deemed to be *functional equivalents.*" *Id.* at 452, 479 A.2d at 386 (emphasis added). By holding out the possibility that a product may be defective where it is perfectly manufactured, designed in conformity with the state-of-the-art, and accompanied by adequate warnings, however, the *O'Brien* court applied to a design case a stricter standard than would apparently be applied under *Feldman* to a pure warnings case.

151 *Freund*, 87 N.J. at 243, 432 A.2d at 932.

after-acquired knowledge.[152] Such a standard not only renders the state-of-the-art irrelevant but makes reference to objective or common notions of reasonableness impossible as well.[153]

Consistent application of the reasonably prudent manufacturer test would require that products whose design features and warnings comply with the state-of-the-art be found not defective as a matter of law.[154] One commentator has suggested the use of a two-step approach when applying the state-of-the-art defense in strict liability actions.[155] Under the first of these steps, a manufacturer who affirmatively pleads and proves compliance with the highest level of technology available at the time of manufacture would not be held strictly liable.[156] His failure to utilize that technology would trigger an evaluation of those factors that justify nonuse of the higher technology.[157] Thus, the second-step contemplates situations in which a manufacturer's decision to forego use of the available technology can be considered reasonable.[158] The factors to be weighed in making this second-step determination closely parallel the risk-utility factors employed by the New Jersey courts.[159] This approach, unlike that

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152 *See Beshada*, 90 N.J. at 209, 447 A.2d at 549. Despite its retreat from the *Beshada* "hindsight analysis," the *O'Brien* court's failure to recognize compliance with the state-of-the-art as an absolute defense renders its discussion of "reasonable conduct" unrealistic. By contrast, in *Feldman*, the court determined that, where warnings alone are challenged, the decision to market should be viewed as reasonable if the warnings conform to the then existing body of scientific and technical knowledge. *See supra* notes 152 & 156. Applying *O'Brien* and *Feldman* in tandem, therefore, results in the application of separate and distinct standards of "reasonableness" in design and warning cases. Given the court's past practice of treating design and warning cases interchangeably, it is doubtful whether such a distinction is either useful or desirable. See *Feldman*, 97 N.J. at 451, 479 A.2d at 385 (defendant's conduct relevant in design or warning cases); *O'Brien*, 94 N.J. at 181, 463 A.2d at 304 (same).

153 *See Beshada*, 90 N.J. at 200 n.3, 447 A.2d at 544 n.3. *Beshada*'s reliance on the "fiction" of assumed knowledge illustrates its incompatibility with a test based on objectively reasonable conduct. *Id.* In addition, *O'Brien*'s reliance on risk-utility determinations, unbounded by an absolute state-of-the-art defense in design cases, distinguishes reasonable conduct for strict liability purposes from conduct that an ordinary person would consider reasonable.

154 *See infra* notes 161-67 and accompanying text.

155 Robb, *supra* note 32, at 22-30. This approach is consistent with the reasonably prudent manufacturer test for design defects.

156 *Id.* at 20-22. This approach closely parallels that taken by the trial court in *Beshada*. *See supra* text accompanying notes 82-85. In treating the principle of assumed knowledge as presumptive rather than conclusive, the trial judge, in effect, would have required the *Beshada* defendants to prove both the level of scientific and technical knowledge existing at the time of manufacture and the provision of warnings conforming to that knowledge. *See Beshada*, 90 N.J. at 199, 447 A.2d at 543. As in the Robb analysis, such proofs would have exculpated the defendants. *Id.*

157 Robb, *supra* note 32, at 22-25.

158 *Id.*

159 *Id.* at 24; *see supra* note 59 and accompanying text.

taken in *O'Brien*, is founded upon the notion of a "correctable wrong."[160] Hence, under this approach, a manufacturer's decision to market a product can be unreasonable only where a safer one could have been made.[161]

Rather than determining, as a matter of law, that a manufacturer acts reasonably when he markets a product which conforms in design and warning to the state-of-the-art, the *O'Brien* majority left the question to the jury.[162] The jury must determine whether the risks presented by such a product outweigh its utility.[163] Placing this determination with the jury raises the possibility that whole product lines will be declared defective based upon a particular jury's subjective view of society's need for those products.[164] The extremely low threshold established for taking a case to the jury increases the risk of such declarations.[165]

By adopting a simple negligence standard to guide the trial court's initial evaluation of the plaintiff's strict liability proofs,[166] the majority dispenses with one of the essential features of the risk-utility analysis implemented in *Cepeda*[167] and *Suter*.[168] The distinct functions of judge and jury in the risk-utility process have long been recognized.[169] Dean Wade, author of the risk-utility standard adopted in *Cepeda*, has stated that "[c]ourt control of jury action is more extensive [in strict liability cases] than in the ordinary negligence ac-

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160 Robb, *supra* note 32, at 30-33.

161 *Id.*; *see also* Birnbaum, *supra* note 2, at 645 (liability predicated on faulty conduct provides incentive to design safer products). In treating compliance with the state-of-the-art as merely evidential, the *O'Brien* court sanctions liability where no safer product was possible. *See supra* notes 119-22. Such liability risks transforming strict liability into a system of no-fault compensation based on proof of injury alone. *See* Robb, *supra* note 32, at 30-31.

162 *See O'Brien*, 94 N.J. at 184-85, 463 A.2d at 306.

163 *Id.* at 185, 463 A.2d at 306.

164 *See id.* at 198, 463 A.2d at 314 (Schreiber, J., concurring and dissenting); *cf.* Wade, *supra* note 55, at 838 (decision involves policy questions distinct from factual issues jury customarily decides).

165 *See O'Brien*, 94 N.J. at 185, 463 A.2d at 306 (citing Dolson v. Anastasia, 55 N.J. 2, 5, 258 A.2d 706, 707-08 (1969)). The standard to be applied was "whether, viewing the evidence in the light most favorable to the plaintiff . . . the jury might conclude that the plaintiff had proved the existence of a defect." *Id.*

166 *See id.* This standard was generally applied prior to the court's formal adoption of the Wade risk-utility formulation in *Cepeda*. *See* Scanlon v. General Motors Corp., 65 N.J. 582, 597, 326 A.2d 673, 681 (1974); Finnegan v. Havir Mfg. Corp., 60 N.J. 413, 421, 290 A.2d 286, 291 (1972); Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 409, 290 A.2d 281, 284 (1972).

167 See *supra* notes 58-63 and accompanying text.

168 See *supra* notes 79-81 and accompanying text.

169 Wade, *supra* note 55, at 838-39.

tion."[170] The policy questions implicated in considering whole classes of allegedly defective products necessitate such control.[171] Under the court's earlier applications of the risk-utility formula, the trial courts were instructed to consider each of the seven risk-utility factors and to make a policy determination as to the applicability or inapplicability of strict liability.[172] Once a decision had been made to present the case to the jury, a charge including only those risk-utility factors especially pertinent to a particular case was to be given.[173]

Compounding the difficulties arising from the majority's limitation of the trial judge's function is the cursory treatment accorded by the court to the elements of a plaintiff's prima facie case.[174] Although the court offered examples of evidence that would be relevant to the plaintiff's risk-utility case, it provided no realistic standard by which to gauge the quantum of proof required to create a jury question.[175] Application of an unqualified negligence test to the plaintiff's proofs will result in decisions to send practically every case involving a product-related accident to the jury.[176] The only guidance provided to juries by the *O'Brien* court is its admonition that they determine whether a product's risks outweigh its utility.[177]

Currently in use throughout the state are two model jury charges that are applicable in products liability cases.[178] Although they do not constitute binding authority, these charges are generally

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170 *Id.* at 839.

171 *Id.* at 838.

172 *See supra* notes 63-68 & 74-76 and accompanying text.

173 *Id.*; Wade, *supra* note 55, at 840.

174 See *O'Brien*, 94 N.J. at 185, 463 A.2d at 306. The court stated that "the plaintiff should adduce sufficient evidence on the risk-utility factors to establish a defect." *Id.*; *see supra* notes 127-30 and accompanying text. The court then provided several examples of the type of evidence that a plaintiff might introduce but concluded that evidence on all of the alternatives need not be presented. *O'Brien*, 94 N.J. at 185, 463 A.2d at 306.

175 *See O'Brien*, 94 N.J. at 185, 463 A.2d at 306.

176 *See id.* at 200, 463 A.2d at 315 (Schreiber, J., concurring and dissenting). The California Supreme Court apparently reached this conclusion in Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). There, the court held that upon proof that a product's design had proximately caused an injury, the burden shifted to the defendant to prove that the product was not defective. *Barker*, 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237. Thus, under the California formulation, the plaintiff's prima facie case is made out upon proof of a product-related injury. Given the expanded role of the jury in the *O'Brien* risk-utility analysis, proof of such an injury, when viewed in the light most favorable to the plaintiff, would be sufficient to send a case to the jury. *See infra* note 179 and accompanying text.

177 *See O'Brien*, 94 N.J. at 186-87, 463 A.2d at 307.

178 W. DREIR & H. GOLDMANN, *supra* note 1; MODEL JURY CHARGES, PRODUCTS LIABILITY 5.27 (May 1980).

consulted by trial judges.[179] At present, the charges reflect the balance between the functions of judge and jury struck by the court in *Suter*.[180] The readjustment of that balance by the *O'Brien* majority raises serious questions about the present usefulness of the model charges.[181]

The *O'Brien* court's failure to recommend a specific jury charge for use in design defect cases will render its approach to the risk-utility analysis unwieldy for trial courts. If the trial courts are no longer to make the policy determinations contemplated in *Suter*, juries will require some positive guidelines against which to measure the legal reasonableness of a manufacturer's decision to market its product. Particularly where the court holds open the possibility that manufacturers may be deemed to have acted unreasonably in distributing a product that was perfectly manufactured, designed in conformity with the highest available technology, and accompanied by the most stringent warnings possible, a jury must be provided with some objective criteria for it to use in evaluating the reasonableness of the marketing decision.[182] In the absence of such guidelines, jury deliberations may be expected to devolve into philosophical debates concerning the relative social virtues of a particular product.[183] In light of the court's insistence upon a charge based solely on risk-util-

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179 *See O'Brien*, 94 N.J. at 191, 463 A.2d at 310 (Clifford, J., concurring).

180 See W. DREIR & H. GOLDMANN, *supra* note 1, at 53; MODEL JURY CHARGES, PRODUCTS LIABILITY 5.27 ii (May 1980).

181 *Compare O'Brien*, 94 N.J. at 185-87, 463 A.2d at 306-07 *with Suter*, 81 N.J. at 173, 406 A.2d at 151 *and* DREIR & GOLDMANN, *supra* note 1, at 52 *and* MODEL JURY CHARGES, PRODUCTS LIABILITY 5.27 ii (May 1980).

182 See *supra* notes 154-59 and accompanying text. "Reasonableness" as used by the court is not bounded by a layman's notion of what would be reasonable. Thus, under the majority formulation, a manufacturer might still be deemed to have acted unreasonably in marketing the safest, most advanced product possible. *See O'Brien*, 94 N.J. at 184, 463 A.2d at 306. This hindsight evaluation necessarily involves second-guessing by jurors who focus to a large extent on their own view of society's need for a particular product. *See* Birnbaum, *supra* note 2, at 632-34. It is precisely this type of evaluation that is avoided where the trial court plays a policy role in the risk-utility analysis. *See* Wade, *supra* note 55, at 838. Perhaps the most troubling effect of such evaluations is the uncertainty faced by manufacturers in marketing new products. The standard of "reasonableness" employed provides no basis upon which to evaluate and conform their conduct at the time of manufacture. *See* Birnbaum, *supra* note 2, at 645 (negligence standard for design defects would provide incentive for manufacturers to market safe products); Robb, *supra* note 32, at 30-31 (strict liability retains notion of "correctable wrongs"). Manufacturers would also be subjected to inconsistent and even contradictory jury verdicts, sending no clear signal of the type of products demanded of them.

183 See Birnbaum, *supra* note 2, at 632-34. Professor Birnbaum observes that a charge based merely on invocation of unqualified risk-utility considerations "leaves the trier of fact to rely on some visceral sense of whether the product was riskier than it was useful." She also notes that the presence of a seriously injured plaintiff could lead a sympathetic jury to conclude that a product's risks outweighed its benefits. *Id.*

ity principles, those courts seeking an informed decision would be well advised to develop a charge incorporating all of the risk-utility factors and instructing the jury to give reasoned consideration to each factor.[184]

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184 *But see* Wade, *supra* note 55, at 840. The court's departure from the clearly delineated functions of judge and jury leaves a void in which full consideration of the seven factors apparently becomes lost. As the court has expressed a preference for jury resolution of the risk-utility question, this determination ought to be made only after reasoned deliberation based on all of the risk-utility information formerly reserved for the trial judge.