THE MISCHIEF OF THE STRICT LIABILITY LABEL IN THE LAW OF WARNINGS

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Although the introduction of strict liability in tort under section 402A of the *Restatement (Second) of Torts* for inherent product defects represented an important step in the progress of products liability law, the lack of clarity in the comments to that section have operated to confuse and distort the law in regard to a seller's duty to warn of the dangerous propensities of the product as well as the seller's duty to instruct as to use. The comments have misled courts into creating a cause of action for "strict liability for failure to warn" which has become a dragon. This article proposes slaying the dragon.

A seller of a product has a common law duty to warn of the product's "latent limitations" and propensities which are not open, obvious or known to the user.[1] The negligent failure to warn creates liability despite the fact that the product itself is not defective.[2] The drafters of the *Restatement (Second) of Torts* recognized this negligence-based liability for failure to warn in section 388, which provides:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
> (c) fails to exercise reasonable care to inform them of its dangerous condition or to the facts which make it likely to be dangerous.[3]

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[1] Martin v. Bengue, Inc., 25 N.J. 359, 367, 136 A.2d 626, 630 (1957) (quoting Tomao v. A.P. De Sanno & Son, 209 F.2d 544, 546 (3d Cir. 1954)).

[2] *Id.* at 366-67, 136 A.2d at 629-30.

[3] RESTATEMENT (SECOND) OF TORTS § 388 (1965).

Section 402A, which created strict liability for defective products, however, made no special provision for products which are "unavoidably unsafe," such as liquor, cigarettes or even products of greater social utility, such as prescription drugs.[4] Thus, the black letter rule of section 402A was patently unacceptable without modification for it would have created absolute liability for every danger of every product.[5] Oddly, the needed modification was made not in the body of the *Restatement*, but rather in a comment. The section 402A "comments" have been treated not merely as explanations or clarifications of the section, as other *Restatement* comments, but have actually been construed as creating new failure to warn liability as well as exceptions to the "restated" law. The comments are accepted as so integral to the black letter rule of section 402A that they are commonly treated as part of that rule.[6]

Three comments to section 402A deal with warnings. Comment h states that when a seller has reason to anticipate a misuse of the product, the product is "defective" if it is sold without warning of the danger of misuse. This is indeed the common law rule of *Martin v. Bengue, Inc.*,[7] a 1957 New Jersey decision, although the term "defective" as used in *Martin* was the equivalent of "negligently sold." The comment was obviously not intended to add anything to section 388.[8] Likewise, comment j provides that a product may be "unreasonably dangerous,"[9] and thus "defective" if it lacks directions and warnings. The test set forth is couched in terms of reasonable conduct, skill, and foresight. This comment likewise added nothing to section 388. Comment k deals with unavoidably unsafe products which may carry a high degree of risk but are "apparently useful and desirable product[s]."[10] Such products are not defective under comment k. However, they must be "accompa-

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4 *Id.* at § 402A.

5 Risk-utility balancing had not yet been conceived.

6 South Carolina has made the comments to § 402A the "legislative history" of that section, which has been adopted as the law in that state. S.C. CODE ANN. § 15-73-30 (Law Co-op. 1976).

7 25 N.J. 359, 136 A.2d 626 (1957).

8 *See* Knitz v. Minster Mach. Co., 69 Ohio St. 2d 460, 466 n.5, 432 N.E.2d 814, 818 n.5 (1982) (failure to warn does not give rise to action in strict liability); Hardiman v. Zep Mfg. Co., 14 Ohio App. 3d 222, 228, 470 N.E.2d 941, 944 (1984) ("Ohio does not recognize a strict liability cause of action arising from allegations of inadequate warning.").

9 The "unreasonably dangerous" language has been replaced with "unsafe" in both California and New Jersey. Cronin v. J.B.E. Olson Corp., 8 Cal.3d 121, 501 P.2d 1153, 104 Cal. Rptr. 443 (1972); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979).

10 RESTATEMENT, *supra* note 3, at § 402A comment k.

nied by proper directions and warning[s]."[11] Thus, although comment k did exempt certain products from the strict liability rule of section 402A,[12] it retained negligence liability for failure to warn of product dangers.[13] Courts soon misinterpreted this retention of liability as creating a new liability.[14] The waters of warning were frightfully muddied.[15]

If failure to warn can indeed render a product defective under *Restatement* section 402A(1), that product would appear to be subject to section 402A(2), which indicates that the strict liability rule applies to the product "although the seller has exercised all possible care in the. . .sale of his product. . . ."[16] Subsection (2) of section 402A, however, makes no sense when applied to a product charged with being "defective" for failure to warn. That subsection provides that the product is defective despite "all possible care in the . . . sale."[17] Thus, a product whose warnings were drawn with "all possible care" could be defective for failure to warn, if the subsection applied.

Courts which insist upon maintaining a distinction between strict liability failure to warn and negligent failure to warn have justified the dichotomy based upon the following alleged distinctions:

1. Under strict liability principles, it is unnecessary for a plaintiff to show that the seller knew or had reason to know that the product had a dangerous "trait."[18]
2. In strict liability warning cases, the defendant rather than the plaintiff has the burden of proving that information con-

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11 *Id.*

12 The exempted products are "incapable of being made safe for their intended and ordinary use," and include drugs. *See id.*

13 *Id.*

14 *See, e.g.*, Basko v. Sterling Drug, Inc., 416 F.2d 417, 426 (2d Cir. 1969) ("[t]here is no strict liability under comment k unless the consumer first establishes a breach of the manufacturer's duty to warn."); Sterling Drug, Inc. v. Yarrow, 408 F.2d 978, 992 (8th Cir. 1969) (standard of liability is "breach of the duty to give a proper (reasonable under the circumstances) warning. . ."); Seley v. G.D. Searle & Co., 67 Ohio St. 2d 192, 197, 423 N.E.2d 831, 836 (1981). (if inadequate warning, "the drug may be considered 'defective' and *unreasonably* dangerous, thereby subjecting the manufacturer to strict liability for resulting injuries.") (emphasis in original).

15 The Supreme Court of Oregon first held that there was no difference between negligence and strict liability failure to warn in Anderson v. Klix Chem. Co., Inc., 256 Or. 199, 472 P.2d 806 (1970), but subsequently decided there was a difference, Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974) (en banc).

16 RESTATEMENT, *supra* note 3, at § 402A(2).

17 *Id.*

18 Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 394-95, 451 A.2d 179, 183 (1982); Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 242-43, 432 A.2d 925, 932 (1981).

cerning the danger was not reasonably available or obtainable, and that it therefore lacked actual or constructive knowledge of the defect.[19]

3. In strict liability cases, the duty to provide an adequate warning attaches without regard to prevailing industry standards.[20]

4. The test for strict liability is whether the product is "reasonably safe."[21] It is not reasonably safe "if the same product could have been marketed more safely."[22]

5. In strict liability cases, knowledge of the risk that employers may not adequately warn their employees is imputed to the defendants.[23]

6. Evidence of subsequent warnings is admissible in a strict liability case. The repair doctrine does not apply to strict liability actions since fault is considered irrelevant.[24]

7. In strict liability cases involving failure to warn, warnings must cover "all foreseeable uses." This is a different test of foreseeability from the one involved in the concept of proximate cause under negligence theory.[25]

8. The product can present a degree of dangerousness, because of its lack of warning, which the law of strict liability will not tolerate, even though the actions of the seller were entirely reasonable in selling the article without a warning—considering what he knew or should have known at the time he sold it.[26]

9. There is a strict liability duty to warn although the danger is obvious.[27]

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19 Feldman v. Lederle Laboratories, 97 N.J. 429, 455-56, 479 A.2d 374, 388 (1984).

20 Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 242-43, 432 A.2d 925, 932 (1981).

21 Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 402, 451 A.2d 179, 187 (1982); Beshada v. Johns-Manville Prod. Corp., 90 N.J. 193, 201, 447 A.2d 539, 544-45 (1982); Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 242, 432 A.2d 925, 931-32 (1981).

22 Beshada v. Johns-Manville Prod. Corp., 90 N.J. 193, 201, 447 A.2d 539, 545 (1982).

23 Whitehead v. St. Joe Lead Co., Inc., 729 F.2d 238, 246-47 (3d Cir. 1984); Olencki v. Mead Chem. Co., 209 N.J. Super. 456, 463, 507 A.2d 803, 806 (Law Div. 1986).

24 Ault v. International Harvester Co., 13 Cal. 3d 113, 118-20, 528 P.2d 1148, 1150-52, 117 Cal. Rptr. 812, 814-16 (1974) (en banc).

25 Smith v. United States Gypsum Co., 612 P.2d 251, 254 (Okla. 1980).

26 Beshada v. Johns-Manville Prod. Corp., 90 N.J. 193, 204, 447 A.2d 539, 546 (1982); Phillips v. Kimwood Mach. Co., 269 Or. 485, 495-96, 525 P.2d 1033, 1038 (1974) (en banc).

27 *See* Campos v. Firestone Tire & Rubber Co., 98 N.J. 198, 207, 485 A.2d 305, 309-10 (1984).

Each of the above is incorrect or is a "distinction without a difference."[28]

NECESSITY OF PROVING A DANGEROUS "TRAIT"

Although courts had suggested that the reason for preserving a separate strict liability cause of action for failure to warn was the lack of necessity of proving the product's "dangerous trait,"[29] the New Jersey case of *Feldman v. Lederle Laboratories*[30] vitiated this reasoning when it held that, in fact, failure to warn strict liability required a finding that the manufacturer knew or should have known of the product danger.

EVIDENTIARY DISTINCTIONS

The distinctions appearing in items 2, 3 and 5 above involve what are suggested to be evidentiary distinctions between strict liability and negligent failure to warn theories. The *Feldman* case suggests a presumption that the manufacturer knew or should have known of the danger, so that the "burden of proof" shifts to the manufacturer. Without considering whether that presumption is well founded, it is no more appropriate to strict liability than to negligence. If, indeed, the burden should shift, it should shift for both negligence and strict liability claims. If prevailing industry standards are irrelevant as to whether a warning is adequate in strict liability, such standards should likewise be irrelevant in negligent failure to warn. Likewise, if such standards constitute some evidence, but not conclusive evidence of an adequate warning, then that principle should apply equally in both strict liability and negligence cases.[31]

ADMISSIBILITY OF SUBSEQUENT WARNINGS

Subsequent warnings are generally inadmissible to prove a negligent failure to warn.[32] However, in *Ault v. International Har-*

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28 H. FIELDING, THE HISTORY OF TOM JONES, ch. 13 (1749).

29 *See, e.g.*, Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 451 A.2d 179 (1982); Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 432 A.2d 925 (1981).

30 97 N.J. 429, 479 A.2d 374 (1984).

31 The Third Circuit Court of Appeals in *Whitehead v. St. Joe Lead Co., Inc.*, 729 F.2d 238 (3d Cir. 1984) suggested that the supplier of a product to an employer is irrebuttably presumed to know that the employer may not adequately warn his employee. Again, if such a presumption is valid, it should apply in negligence as well as strict liability. *See* RESTATEMENT, *supra* note 3, at § 388 comment n.

32 *See* FED. R. EVID. 407.

vester Co.,[33] the California Supreme Court held that the exclusionary rule in regard to post-accident remedial measures did not apply in a strict liability design case as the plaintiff did not have to prove negligence or other culpable conduct.[34]The New York Court of Appeals in *Caprara v. Chrysler Corp.*[35] likewise has allowed evidence as to a subsequent change in a manufacturing defect case. The *Caprara* court noted that it was reserving the question whether subsequent changes in design would be admissible if the strict liability theory was based upon a "design" defect.[36] However, in "failure to warn defect" strict liability cases, courts have recognized that the exclusionary rule should be applied because the test of liability relates specifically to the defendant's conduct and is, in fact, a negligence standard.[37]

In reviewing the evidence issue in a failure to warn case, the Court of Appeals for the Fourth Circuit in *Werner v. Upjohn Co., Inc.*[38] considered whether there was a difference between negligence and strict liability failure to warn and concluded:

> The elements of both are the same with the exception that in negligence plaintiff must show a breach of a duty of due care by defendant while in strict liability plaintiff must show the product was unreasonably dangerous. The distinction between the two lessens considerably in failure to warn cases since it is clear that strict liability adds little in warning cases. Under a negligence theory the issue is whether the defendant exercised due care in formulating and updating the warning, while under a strict liability theory the issue is whether the lack of a proper warning made the product unreasonably dangerous. Though phrased differently the issue under either theory is essentially the same: was the warning adequate?[39]

The court found no basis for distinction and, therefore, applied the exclusionary rule.[40] The Court of Appeals for the Fifth Circuit has likewise held that the exclusionary rule is applied in product liability failure to warn cases, noting that "the basis for liability more closely

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[33] 13 Cal.3d 113, 538 P.2d 1148, 117 Cal. Rptr. 812 (1974) (en banc).

[34] *Id.* at 117-18, 538 P.2d at 1150, 117 Cal. Rptr. at 814.

[35] 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981).

[36] *Id.* at 126, 417 N.E.2d at 551, 436 N.Y.S.2d at 257.

[37] *See, e.g.*, Oberst v. International Harvester Co., Inc., 640 F.2d 863 (7th Cir. 1980); Werner v. Upjohn Co., Inc., 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230 (6th Cir. 1980); Price v. Buckingham Mfg. Co., Inc., 110 N.J. Super. 462, 266 A.2d 140 (App. Div. 1970).

[38] 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981).

[39] *Id.* at 858.

[40] *See id.*

resembles negligence than strict liability."[41]

Thus, the suggestion that strict liability is required in failure to warn cases because it will permit the admission of subsequent remedial measures is fallacious and apparently universally rejected.

WARNING AS TO OBVIOUS DANGERS

Manufacturers have been held liable as a result of a strict liability duty to warn although the danger is obvious.[42] If public policy requires such a warning, then that public policy is equally applicable to both strict liability and negligence. Public policy does not screech to a halt at the borders of strict liability law, but has been an integral factor in negligence theory from its inception. Therefore, if this conclusion is impelled by public policy, it should apply with equal force regardless of the form of action. The situation is analogous to the issue of punitive damages in strict liability. The New Jersey Supreme Court had no problem conceiving that if a public policy exists for punitive damages in negligent failure to warn, they must also be available in strict liability failure to warn.[43] Further, in *Green v. Sterling Extruder Corp.*[44] that court recognized that if public policy requires that contributory negligence should not be available in a strict liability design defect case involving machinery guards, then that public policy also requires that contributory negligence not be available in a negligence action for failure to provide machinery guards.[45]

A HIGHER DEGREE OF CARE

Some cases have suggested that strict liability sets a more exacting standard than negligence in regard to failure to warn. New Jersey cases suggest that the test is whether the product is "reasonably safe."[46] Further, it has been suggested that a product is not reasonably safe "if the same product could have been made or marketed more safely."[47]

It is patent that "reasonably safe" requires nothing of a seller other than reasonable conduct, and that the use of the ad-

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41 Grenada Steel Indus., Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883, 887 n.3 (5th Cir. 1983).

42 Campos v. Firestone Tire & Rubber Co., 98 N.J. 198, 485 A.2d 305 (1984).

43 Fischer v. Johns-Manville Corp., 103 N.J. 643, 512 A.2d 466 (1986).

44 95 N.J. 263, 471 A.2d 15 (1984).

45 *Id.* at 271-72, 471 A.2d at 19-20.

46 *See* Beshada v. Johns-Manville Prod. Corp., 90 N.J. 193, 204, 447 A.2d 539, 546 (1982).

47 *See id.*

verb "reasonably" applied to the word "safe" is no different than its adjectival application to the conduct of the party who provides the warning. As to the suggestion that a product is defective "if the same product could have been made or marketed more safely," that concept has been rejected in subsequent failure to warn cases. It is a correct statement only if it is read to mean "if the same product could *reasonably* have been marketed more safely." If the actions of the seller are reasonable in selling the article without a warning or with the warning involved in the case then, of necessity, the product is "reasonably safe."

FORESEEABILITY

Some courts have suggested that warnings in strict liability cover "all foreseeable uses" and that this test somehow differs from the concept of foreseeability involved regarding proximate cause under negligence theory.[48] This view fails to take into account the modern meanings of foreseeability and proximate cause in negligence. As one treatise has noted, "[f]oreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct."[49] The concept of foreseeability in negligence is indeed, as described by that treatise, as "elastic and capable of expansion, but also . . . the particular manner in which the injury is brought about need not be foreseeable by any test."[50] Of necessity, if a use is foreseeable, then injury from negligent failure to warn is likewise "foreseeable."[51] Having identified the lack of substance in the arguments in favor of creating or preserving an action in strict liability for failure to warn, this article will examine the confusion for both courts and juries which accompanies the continuation of strict liability failure to warn as a cause of action separate from negligent failure to warn.

THE EFFECT OF MISAPPLICATION OF MANUFACTURING DEFECT PRINCIPLES TO FAILURE TO WARN CASES

State of the Art

The confused idea of failure to warn as a section 402A "de-

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48 *See, e.g.*, Smith v. United States Gypsum Co., 612 P.2d 251 (Okla. 1980).

49 3 HARPER, JAMES & GRAY, THE LAW OF TORTS 65 (2d ed. 1986).

50 *Id.* at 69-70.

51 *Compare* RESTATEMENT, *supra* note 3, at § 395 comment j (negligence) *with* § 402A comment h (strict liability).

fect" has led courts down blind alleys, from which they have eventually had to retreat, sometimes with ill grace. Perhaps the most embarrassing misadventure of this type was in *Beshada v. Johns-Manville Products Corp.*,[52] in which the New Jersey Supreme Court held that a manufacturer had to warn against "unknowable dangers."[53] The "state of the art" as to knowledge of dangers was, as a result, held irrelevant.[54] The opinion was a logical result of the application of section 402A(2) to a failure to warn "defect" case.

Two years later, the *Beshada* holding was essentially abandoned by the same court in *Feldman v. Lederle Laboratories*.[55] The New Jersey Supreme Court not only effectively overruled *Beshada* but rejected the application of subsection (2) of section 402A to either "design defect" or "failure to warn defect" cases, thereby restricting it to cases involving "manufacturing" defects.[56] The court stated:

> When the strict liability defect consists of an improper design or warning, reasonableness of the defendant's conduct is a factor in determining liability. . . . The question in strict liability design-defect and warning cases is whether, assuming that the manufacturer knew of the defect in the product, he acted in a reasonably prudent manner in marketing the product or in providing the warnings given. Thus, once the defendant's knowledge of the defect is imputed, strict liability analysis becomes almost identical to negligence analysis in its focus on the reasonableness of the defendant's conduct.[57]

Thus, in failure to warn cases, strict liability has been recognized as not strict after all. The error derived from an attempt to treat all "defects"—manufacturing, design, and warning—as homogeneous

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52 90 N.J. 191, 447 A.2d 539 (1982).

53 For an insightful criticism of *Beshada*, see Berry, Beshada v. Johns-Manville Products Corp.: *Revolution—or Aberration—in Products Liability Law*, 52 FORDHAM L. REV. 786 (1984).

54 *Beshada*, 90 N.J. at 204-05, 447 A.2d at 546-47.

55 97 N.J. 429, 479 A.2d 374 (1984).

56 The *Feldman* decision, however, did not overrule *Beshada* as to asbestos cases. *See In re* Asbestos Litigation Venued in Middlesex County, 99 N.J. 201, 491 A.2d 700 (1984). As to the constitutionality of the distinction, see *In re* Asbestos Litigation, 628 F. Supp. 774 (D.N.J. 1986), *aff'd*, 829 F.2d 1233 (3d Cir. 1987).

57 *Feldman*, 97 N.J. at 451, 479 A.2d at 385 (citations omitted). The court thus returned to the realization expressed by the New Jersey Appellate Division in 1979 that "the gist of the cause of action based on an alleged inadequate warning is the same under both § 388 and § 402A." Torsiello v. Whitehall Laboratories, 165 N.J. Super. 311, 320 n.2, 398 A.2d 132, 137 n.2 (App. Div.), *certif. denied*, 81 N.J. 50, 404 A.2d 1150 (1979). *Cf.* Higgins v. E.I. DuPont de Nemours, Inc., 671 F. Supp. 1055 (D. Md. 1987).

and applying the same set of principles and legal fictions to them equally and without further analysis. There is a significant amount of other "baggage" that accompanies the strict liability label which, like section 402A(2), is inappropriate to a failure to warn claim, but is an expected adjunct to general strict liability theory. As section 402A(2) caused problems for the *Beshada* court, other strict liability principles likewise have considerable potential for error if applied to failure to warn.

Risk-Utility Analysis

In *Cepeda v. Cumberland Engineering Co., Inc.*,[58] the risk-utility test was adopted in New Jersey.[59] Under that test, a product is defective if the risk, as observed by the jury at the time of trial, outweighs the benefits of the product.[60] Various factors were listed for consideration by a judge charged with the responsibility of determining whether the case should be submitted to a jury.[61] The court stated that it was not necessary for a jury to find that the defendant had knowledge of the harmful character of the product in order to determine that it was not defective.[62] Further, one of the risk-utility factors ("Wade Factors") for consideration involved "[t]he 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 or instructions."[63] As a result, the court held an appropriate jury charge would be: liability for a defect should be imposed if "a [product] . . . is so likely to be harmful to persons. . .that a reasonable prudent manufacturer . . . who had actual knowledge of its harmful character would not place it on the market."[64]

The risk-utility test is incapable of application to a failure to warn claim, and its presentation to a jury in such a case can only lead to utter confusion. The New Jersey Supreme Court has stated that "where the design defect consists of an inadequate warning as to safe use, the utility of the product, as counterbal-

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58 76 N.J. 152, 386 A.2d 816 (1978).

59 *Id.* at 174, 386 A.2d at 827.

60 *See* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 177, 406 A.2d 140, 153 (1979).

61 *Cepeda*, 76 N.J. at 173-74, 386 A.2d at 826-27 (quoting Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837-38 (1973)).

62 *See id.* at 174-75, 386 A.2d at 827.

63 *Id.* at 174, 386 A.2d at 827 (quoting Wade, *supra* note 61, at 838).

64 *See id.* (quoting Wade, *supra* note 61, at 839-40).

anced against the risks of its use, is rarely at issue."[65] In fact, the risk-utility test is inapposite and never at issue in judging liability in a failure to warn case although the presence or absence of a warning may be a factor in risk-utility analysis.

Not Necessary to Prove "Unreasonably" Dangerous

The New Jersey Supreme Court has rejected the *Restatement* definition of defect which includes the concept of "unreasonably dangerous." Thus, in *Freund v. Cellofilm Properties, Inc.*,[66] the New Jersey Supreme Court reversed a lower court decision because a negligence charge rather than a "strict liability" charge was given on the issue of failure to warn.[67] The court based its reversal upon the fact that "[t]he terminology employed by the trial judge was riddled with references to negligence, knowledge and reasonable care on the part of a manufacturer and industry standards, as well as terms of limitation."[68] If, however, the charge referred to in *Freund* is evaluated in the light of the opinion rendered three years later in *Feldman*, it is found to be an essentially adequate charge in terms of conduct, which by 1984 was recognized to be at the heart of a failure to warn claim. Thus, an additional danger of the application of a "strict liability label" to a failure to warn claim is that the judge and jury simultaneously may be instructed to consider and ignore the reasonableness of behavior.

Punitive Damages

Although *Beshada* was essentially overruled by *Feldman*, it has remained applicable to asbestos litigation. In *Fischer v. Johns-Manville Corp.*,[69] the New Jersey Supreme Court was faced with the issue of whether punitive damages could apply in an asbestos strict liability failure to warn case or whether such a claim could be made only in a negligence failure to warn case. Justice Clifford, writing for the majority, held that punitive damages could be awarded in a strict liability failure to warn claim, and concluded that, "[t]he right to recover punitive damages cannot sensibly, in this day and age, be made to turn on the form of

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65 Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 242, 432 A.2d 925, 932 (1981). *Cf.* Malin v. Union Carbide Corp., 219 N.J. Super. 428, 435, 530 A.2d 794, 797 (App. Div. 1987).

66 *Id.*

67 *See id.* at 243, 432 A.2d at 932.

68 *Id.*

69 103 N.J. 643, 512 A.2d 466 (1986).

pleading. . . ."[70]

In *Fischer*, however, Justice O'Hern filed a dissent in which Justice Garibaldi joined. Since only five members of the court participated in the decision, this left the majority with a one vote plurality. Apparently rejecting the court's prior description of the strict liability and negligence failure to warn causes of action as "functional equivalents," Justice O'Hern found "a strong doctrinal inconsistency in permitting a punitive-damages claim in an action based upon strict products liability."[71] Justice O'Hern further opined that "central to our analysis of strict tort liability is the premise that it is the condition of the product that determines liability, not the conduct of the manufacturer."[72] Further, disregarding the fact that *Feldman* had conceded that the crux of a failure to warn case is conduct, Justice O'Hern found that in a failure to warn case "the conduct of the manufacturer is largely irrelevant."[73] Thus, the dissent reemphasized the continued confusion that the strict liability concept has brought to failure to warn claims. As to asbestos (although perhaps in regard to no other product), state of the art in regard to knowledge of the seller remains irrelevant, while the *Fischer* majority insists that punitive damages are appropriate in an asbestos failure to warn claim.

Failure to Warn in Industrial Ingredients

Defendants in failure to warn cases have asserted that they have adequately warned the person in charge of the use of the product and could not reasonably be required to warn the plaintiff. In situations in which factory workers are injured due to their employers' failure to establish safe work practices to protect them from latent dangers in workplace materials (such as chemical ingredients employed in a manufacturing process), materials suppliers urge that their failure to communicate warnings to the factory worker is not negligent or unreasonable conduct.

In cases involving machinery used in the workplace, New Jersey courts applying strict liability have refused to permit the machinery designer and manufacturer to deny a duty to include guards on the grounds that it was the owner's (buyer's) duty to add guards to the machine.[74] The rule is well founded in that

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[70] *Id.* at 658, 512 A.2d at 474.

[71] *Id.* at 677, 512 A.2d at 484 (O'Hern, J., dissenting).

[72] *Id.* (O'Hern, J., dissenting).

[73] *Id.* at 678, 512 A.2d at 484 (O'Hern, J., dissenting).

[74] *See, e.g.*, Johnson v. Salem Corp., 97 N.J. 78, 477 A.2d 1246 (1984); Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 451 A.2d 179 (1982); Finnegan v.

one who sells a dangerous item for use in the workplace is the most logical individual to design and install the guard which will avoid injury from such danger.[75] Furthermore, creating a guarded machine will effectively keep injury from occurring. The manufacturer is in the best position to put the guards on the machine.

Recently, the New Jersey Superior Court, Appellate Division, in *Butler v. PPG Industries, Inc.*[76] held that in the workplace setting a supplier of materials cannot rely upon the employer to take the appropriate steps to warn and instruct the worker, even if the employer is bound to do so by law.[77] The court provided no exposition as to the "public interest" that required such a rule, nor did it discuss the equities involved. Instead, it cited two New Jersey "design defect" cases holding that a manufacturer of an industrial machine cannot rely upon an employer to install safety devices, such as guards but must install them itself.[78] *Butler* involved not a machine but a caustic soda supplier.[79] Mr. Butler, a plantworker, was unaware that an explosion could result if the caustic was mixed with hot water or steam.[80] Butler's employer was aware of the danger but allegedly failed to instruct Butler in the use of caustics.[81] The inevitable occurred—the employee was injured by an explosion resulting from the mixture.[82]

Even if the *Butler* court was correct in its perception of an overriding "public interest" in regard to the "duty" issue, one would anticipate the admission of testimony as to the employer's knowledge of the danger and failure to act on that danger as the law required him to act on the issue of proximate cause. However, the trial court rejected such evidence and the appellate division affirmed, holding that where "the allegation is that the purchaser failed to take reasonable steps to protect against the defect created by the manufacturer, a jury will not be permitted to infer that the purchaser's negligence was the exclusive proxi-

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Havir Mfg. Co., 60 N.J. 413, 290 A.2d 286 (1972); Bexiga v. Havir Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972).

75 *See id.*

76 201 N.J. Super. 558, 493 A.2d 619 (App. Div. 1985).

77 *See id.* at 563-64, 493 A.2d at 622.

78 *Id.* at 564, 493 A.2d at 622 (citing Brown v. United States Stove Co., 98 N.J. 155, 484 A.2d 1234 (1984) and Johnson v. Salem Corp., 97 N.J. 78, 477 A.2d 1246 (1984)).

79 *Id.* at 561, 493 A.2d at 620.

80 *See id.* at 562-63, 493 A.2d at 621.

81 *See id.*

82 *Id.* at 562, 493 A.2d at 621.

mate cause of the accident."[83] The *Butler* court has taken the wrong fork in the road in much the same manner as the *Beshada* court. By applying principles of strict liability law to a failure to warn case, the appellate division has effectively eliminated the main issues in most failure to warn cases; duty to warn and proximate cause, creating not strict, but absolute liability for failure to warn.

The ability of the seller of an ingredient used in a manufacturing process to warn and instruct its buyer's employees in the safe use of that ingredient is clearly inferior to the ability of the employer to do so. As two authors have so cogently described, it is difficult, if not impossible, for the supplier to identify and reach the employee-users of the ingredient.[84] Thus, although the logical party to place guards on a machine is the manufacturer, the logical party to warn and instruct in the workplace is the employer. By mechanically applying principles appropriate to strict liability claims to warnings and instructions, the appellate division has created pressure to warn and instruct upon that segment of industry least capable of effectively warning or instructing the industrial employee—the ingredient supplier. In doing so, the courts not only give no incentive to warn to the employer, but also provide the employer a disincentive to warn; a source from which the employer can expect reimbursement for the workers compensation expenses it incurs.[85] Again, labels of "defect" and "strict liability" have prevailed over analysis of the facts and policy involved.

CONCLUSION

What is to be gained by continuing to treat failure to warn as though it involved two causes of action—one for negligence and another under strict liability? The answer must be that nothing

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[83] *Id.* at 564, 493 A.2d at 622. Peculiarly, a New Jersey trial court has subsequently determined that "sophisticated user" evidence *is* admissible in the employment situation on plaintiff's claim for "negligent failure to warn" but not on his "strict liability failure to warn" claim. Olencki v. Mead Chem. Co., 209 N.J. Super. 456, 507 A.2d 803 (Law Div. 1986). The court reasoned that in strict liability "knowledge of the risk that an employer will not warn its employees is not imputed to a manufacturer." *Id.* at 463, 507 A.2d at 806. The court found no basis for such imputation in negligence, although it gave no basis for the differentiation. *See id.* at 463-64, 507 A.2d at 806-07.

[84] Schwartz & Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 CIN. L. REV. 38, 42-43 (1983).

[85] *See* N.J. STAT. ANN. § 34:15-40 (West 1985) (discussing liability of third parties).

has been gained other than a triumph of form over substance and the creation of vast opportunities for confusion. The law of *Martin v. Bengue, Inc.* was an effective treatment of failure to warn.[86] The intervening thirty years, and the contortions of attempting to treat negligence as something more esoteric than it is have done nothing to advance the law of warnings. Strict liability for failure to warn has served to confuse judges and juries with no discernible benefits.[87]

The *Restatement (Second) of Torts* section 402A represented dramatic liberalization of tort law as to latent defects in a product, imposing liability for a "defect" even if the product was made with "all possible care." However, the comments to section 402A were themselves defective to the extent that they implied the creation of strict liability for failure to warn. Concepts of negligence—failure to properly design, failure to warn, failure to instruct—have unfortunately become intertwined with strict liability. Courts' frequent use of the shibboleths "strict liability," "liability without fault," and "defect" in lieu of a careful consideration of the basic policies underlying the issues in a specific case have led to illogical and sometimes bizarre results. A manufacturing defect is a very different creature from a failure to warn "defect." The sooner the courts remove "strict liability" from failure to warn law, the sooner judges and juries will be able to deal with a sensible and coherent body of law as to negligent failure to properly warn and instruct, without further painful detours into the never-never land of strict liability.

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[86] *See supra* note 1.

[87] Johnston v. United States, 568 F. Supp. 351, 354 (D. Kan. 1983) ("indeed, it would be conceptually clearer simply to state that there is no such thing as a 'strict liability' claim for breach of a duty to warn.").