RISK UTILITY ANALYSIS OF UNAVOIDABLY UNSAFE PRODUCTS

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I. INTRODUCTION

The laudable goals of strict liability[1] have proven to be ar-

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[1] The purpose of strict liability as stated in the RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965) is:

> [T]he justification for . . . strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Id.

See also Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 570-71 (1969) (risk of improperly manufactured product should be allocated to maker) [hereinafter Keeton, *Manufac-*

ticulated far more easily than achieved. Attempts to develop a strict liability test flexible enough to accommodate all types of products and all kinds of defects have resulted in confusion and inconsistency. Courts have failed to reach a consensus on the

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turer's Liability: The Meaning of Defect]; Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1333 (1966) (one reason for strict liability is reduction of incidence of harm resulting from unfit and unsafe products) [hereinafter Keeton, *Products Liability—Some Observations*]; Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366 (1965) (strict liability provides incentive for producers to make safer products) [hereinafter Traynor, *The Ways and Meanings*].

Professor John W. Wade has stated the purpose of strict liability as follows:

> The idea is that the loss should not be allowed to remain with the injured party on whom it fortuitously fell, but should be transferred to the manufacturer, who, by pricing his product, can spread it among all consumers. The extent to which a manufacturer may be free to "spread the risk" created by his product can be the subject of some debate. A different way of expressing essentially the same idea is to say that the activity of making the particular product should pay its own way, that the enterprise should bear the liability.

Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 826 (1973) [hereinafter Wade, *Nature of Strict Tort Liability*]. With regard to the public's awareness of the inherent danger, Professor Wade noted that if a product's danger is so great, "it ought not . . . be marketed at all, despite the obviousness of the danger." *Id.* at 840-41. The New Jersey Supreme Court has consistently expressed its concern for the protection of the consumer through the allocation of risk of injury. In Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 205, 447 A.2d 539, 547 (1982), the court noted that:

> One of the most important arguments generally advanced for imposing strict liability is that the manufacturers and distributors of defective products can best allocate the costs of the injuries resulting from those products. The premise is that the price of a product should reflect all of its costs, including the cost of injuries caused by the product. This can best be accomplished by imposing liability on the manufacturers and distributors. Those persons can insure against liability and incorporate the cost of the insurance in the price of the product. In this way, the costs of the product will be borne by those who profit from it.

Id. at 205, 447 A.2d at 547. *See also* Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 398, 451 A.2d 179, 185 (1982) (noting that "it is in the public interest to motivate individuals in the context of commercial enterprise to invest in safety.") (citing Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 207, 447 A.2d 539, 549 (1982)); Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 238 n.1, 432 A.2d 925, 930 n.1 (1981) (stating that "[t]he theory is that only safe products should be marketed—a safe product being one whose utility outweighs its inherent risk, provided that risk has been reduced to the greatest extent possible consistent with the product's continued utility."); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 173, 406 A.2d 140, 151 (1979) (noting that strict liability law attempts "to minimize the costs of accidents and to consider who should bear those costs."); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 65, 207 A.2d 305, 312 (1965) (observing that "[t]he purpose of [strict] liability is to insure that the cost of injuries . . . resulting from defective products, is borne by the makers of the products. . .rather than the injured or damaged persons who ordinarily are powerless to protect themselves.").

appropriate standards to be used in product liability suits.[2] Nevertheless, many of the tests that have been adopted have been adequate in cases involving manufacturing flaws or simple design defects. When confronted with unavoidably unsafe products, however, the deficiencies in these various tests become manifest and the intent of strict liability law is frustrated.

New Jersey courts have undertaken a step-by-step approach to effectuate the aims of strict liability, and, through their adoption of a risk-utility analysis,[3] have produced the most workable analytical framework for determining when liability should be imposed. While stating that this standard applies to all products, including unavoidably unsafe ones, the courts have limited its application to pharmaceutical and other products whose benefits were presumed to outweigh their risks.[4] Only recently have the trial courts been called upon to decide the suitability of the risk

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[2] *See* Cippolone v. Liggett Group, 649 F. Supp. 664 (D.N.J. 1986), *cert. denied,* 107 S. Ct. 907 (1987) (applying risk utility analysis to cigarette litigation case); Dewey v. R.J. Reynolds Tobacco Co., 216 N.J. Super. 347, 523 A.2d 712 (Law Div. 1986) (applying risk utility analysis to cigarette litigation case); *but cf.* Patterson v. Gesellschaft, 608 F. Supp. 1206 (N.D. Tex. 1985) (rejecting risk utility analysis in hand gun litigation). See *infra* notes 143-168 and accompanying text for a more detailed discussion of these cases.

[3] The risk-utility analysis is a common law doctrine which was originally suggested and identified by Professor W. Page Keeton and Dean John Wade, two leading authorities in the field of tort law. *See* Keeton, *Product Liability and the Meaning of Defect,* 5 ST. MARY'S L.J. 30, 38 (1973) [hereinafter Keeton, *Meaning of Defect*]; Wade, *Strict Tort Liability of Manufacturers,* 19 SW. L.J. 5, 15 (1965). Keeton and Wade independently proposed a liability theory whereby the fitness or danger of the product would be determined by the condition of the product as marketed. Holford, *The Limits of StrictLiability for Product Design and Manufacture,* 52 TEX. L. REV. 81, 92 (1973). Dean Wade suggested that a product is "not reasonably safe" or "not duly safe" if the magnitude of the risk created by the dangerous condition of the product outweighs the social utility attained by marketing the product in this fashion. Wade, *Nature of Strict Tort Liability, supra* note 1, at 833, 835; *see also,* Whitehead v. St. Joe Lead Co., 729 F.2d 238, 246 (3d Cir. 1984) (weighing "utility of marketing lead. . .without warning against the risks to foreseeable users of lead. . . ."). Professor Keeton's formulation of the risk-utility test would render a product unreasonably dangerous "if a reasonable person would conclude that the magnitude of the scientifically perceivable danger *as it is proved to be at the time of the trial* outweighed the benefits of the way the product was so designed and marketed." Keeton, *Meaning of Defect,* 5 ST. MARY'S L.J. 30, 38 (1973) (emphasis in original) (footnote omitted). "The New Jersey Supreme Court adopted the Wade-Keeton [risk utility] formulation in Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 153, 386 A.2d 816 (1978)." Whitehead v. St. Joe Lead Co., Inc., 729 F.2d 238, 245 (1984).

[4] *See, e.g.,* Feldman v. Lederle Laboratories, 97 N.J. 429, 446 n.5, 479 A.2d 374, 383 n.5 (1984) (noting that no claim was made that " 'the standard to measure [a pharmaceutical product] reflects a policy judgment that [the product is] so dangerous that [it] create[s] a risk of harm outweighing [its] usefulness.' " (quoting O'Brien v. Muskin Corp., 94 N.J. 169, 181, 463 A.2d 298, 304 (1983)).

utility analysis to the unavoidably unsafe product which, when used as intended, results in greater harm than good.[5] By applying this analysis to such a product, the courts can take the next logical step in the evolution of products liability law and can conform to contemporary reality in the marketplace.

II. EVOLUTION OF THE RISK UTILITY ANALYSIS

A. *Backdrop*

To understand the application of risk utility analysis to cases involving unavoidably unsafe products, a review of the development of the law of strict products liability is necessary.[6] In response to changing social values and the growing complexity of new products rapidly being introduced into the marketplace, courts and commentators began to recognize that new legal safeguards were needed to achieve the appropriate balance between the interests of the commercial world and the protection of the consuming public.[7] A heightened concern developed that con-

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5 *See, e.g.*, Dewey v. R.J. Reynolds Tobacco Co., 216 N.J. Super. 347, 357-58, 523 A.2d 712, 717-18 (Law Div. 1986) (stating plaintiff's claim that tobacco manufacturers should be strictly liable in tort because their products are unavoidably unsafe and that the risks attendant to their use outweigh their utility); Cipollone v. Liggett Group, 649 F.2d 664, 669 (D.N.J. 1986), *cert. denied*, 107 S. Ct. 907 (1987) (attempting to apply risk utility analysis to unavoidably unsafe products). *See infra* notes 143-52 and accompanying text for a more detailed discussion of these cases.

6 *See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) (reviewing history of strict liability); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) (recounting the historical development of strict liability); *see also* Heavner v. Uniroyal Inc., 63 N.J. 130, 146-52, 305 A.2d 412, 421-24 (1973) (tracing development of strict liability law in New Jersey).

7 *See, e.g.*, Greenman v. Yuba Power Prod., Inc., 59 Cal.2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963) (stating that purpose of strict liability for manufacturers was to impose liability for cost of injuries resulting from defective products on manufacturer who put product into market rather than on injured person who is powerless to protect himself); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 64, 207 A.2d 305, 311 (1965) (strict liability was developed by courts as a stable principle of law that arose "from the reality of the relationship between manufacturers of products and the consuming public to whom the products are offered for sale"); Codling v. Paglia, 32 N.Y.2d 330, 340, 298 N.E.2d 622, 627, 345 N.Y.S.2d 461, 468 (1973) (noting that advances in technologies have made consumer products so sophisticated that consumers cannot understand how they operate or recognize dangers or defects present in their manufacture or design).

In addition to courts, legal commentators began recognizing the need for consumer protection. Dean Keeton noted that:

> The scientific and technological revolution through which our society is proceeding is accompanied by vast changes in existing products as well as a proliferation of new products, notably with respect to drugs, cosmetics, and other chemical products. For example, it has been noted

sumers, injured as a result of the use of certain products, were unfairly restricted in their ability to recover damages for such injuries.[8] This awareness became the genesis of strict liability law.[9]

Courts and legal scholars articulated a number of philosophical rationales for imposing this new form of liability on manufacturers.[10] Among these were risk spreading, cost avoidance, difficulties in proof of negligence, availability of insurance, and the hope that the imposition of such liability would provide an incentive for the development of safer products.[11] Attempts to develop strict liability law and theory, however, produced a tortuous path of confusing and contradictory judicial opinions and legal commentaries.[12]

> that three fourths of the prescriptions written by doctors in the United States today are for drugs and vaccines which were unknown in 1950.

Keeton, *Products Liability—Some Observations*, *supra* note 1, at 1329. Dean Keeton also observed that the increase in occurrence "of unintended harm occurring in the course of, or as a consequence of, the use of the products, together with the enhanced social concern for the victims of our modern devices, is bringing about a reexamination of the principles formerly utilized by the courts for shifting losses." *Id.* at 1329-30.

[8] *See* Codling v. Paglia, 32 N.Y.2d 330, 340, 298 N.E.2d 622, 627, 345 N.Y.S.2d 461, 468 (1973).

[9] As early as 1944, in Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436 (1944), Justice Traynor advocated the imposition of absolute liability on manufacturers for placing defective products that cause injury in the stream of commerce for public policy reasons. *Id.* at 461, 150 P.2d at 440 (Traynor, J., concurring). Justice Traynor stated that "the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one" where a coke bottle explodes. *Id.*

In 1973, Dean Wade commented that:

> The time has now come to be forthright in using a tort way of thinking and tort terminology. There are several ways of doing it, and it is not difficult. The simplest and easiest way, it would seem, is to assume that the defendant knew of the dangerous condition of the product and ask whether he was then negligent in putting it on the market or supplying it to someone else. In other words, the scienter is supplied as a matter of law, and there is no need for the plaintiff to prove its existence as a matter of fact. Once given this notice of the dangerous condition of the chattel, the question then becomes whether the defendant was negligent to people who might be harmed by that condition if they came into contact with it or were in the vicinity of it. Another way of saying this is to ask 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.

Wade, *Nature of Strict Tort Liability*, *supra* note 1, at 834-35.

[10] *See supra* notes 8, 9 (for a discussion of these reasons).

[11] *See* Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 204-07, 477 A.2d 539, 547-48 (1982); Wade, *Nature of Strict Tort Liability*, *supra* note 1, at 826.

[12] *See* Wade, *Nature of Strict Tort Liability*, *supra* note 1, at 825-38 (discussing how and why strict liability should be applied to defective products); Keeton, *Manufac-*

Beginning in such cases as *Henningsen v. Bloomfield Motors, Inc.*,[13] and *Greenman v. Yuba Power Products, Inc.*,[14] the judiciary began to assume responsibility for creating standards for the imposition of strict liability.[15] Contemporaneous with these efforts was a national trend towards the development of strict liability doctrine, manifested by the American Law Institute (ALI) in its promulgation of the *Restatement (Second) of Torts*, § 402A.[16] This section was designed to be the standard by which manufacturers of products could be held strictly liable in tort.[17] As evidenced by a review of the ALI proceedings, however, there were significant difficulties and disagreements in attempting to develop criteria for the imposition of strict liability.[18] Section 402A and its

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turer's Liability: The Meaning of Defect, *supra* note 1, at 559-75 (discussing liability for manufacturers of defective products); Keeton, *Products Liability—Some Observations*, *supra* note 1, at 1329-31 (discussing allocation of risk between consumer and manufacturer); Traynor, *The Ways and Meanings*, *supra* note 1, at 363-76 (discussing merits of applying strict liability to manufacturers as opposed to other theories of liability); Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965) (discussing development of strict liability for products and the future direction of this line of thinking). *See also infra* notes 33-79 and accompanying text (for a discussion of the development of strict liability law in New Jersey).

[13] 32 N.J. 358, 161 A.2d 69 (1960).

[14] 59 Cal.2d 57, 377 P.2d 897, 27 Cal.Rptr. 697 (1963).

[15] *See id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701. The *Greenman* court noted that: "a manufacturer is strictly liable in tort when an article he places on the market, knowing it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700. *See also infra* note 34 for a discussion of the law espoused in *Henningsen*.

[16] Section 402A of the RESTATEMENT (SECOND) OF TORTS 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 user or consumer, or to his property, if
>
> (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 is sold.
>
> (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.

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

[17] *See id.* comment a.

[18] *See* Page, *Generic Product Risks: The Case Against Comment k and for Strict Tort Liability*, 58 N.Y.U.L. REV. 853 (1983) [hereinafter Page, *Generic Product Risks*].

> Dean Prosser drafted the comment [comment k] in response to a proposal at the 1961 ALI meeting that prescription drugs be specifically excluded from section 402A. The arguments and the discussion that followed were notably unfocused. The motion under consideration failed to distinguish between harm from adverse reactions and other

accompanying comments failed to provide a workable formula for determining when strict liability should be imposed.[19] This shortcoming produced numerous scholarly articles advocating various standards for determining when a product should be considered defective.[20] Dean John Wade emerged as a prominent force in developing acceptable criteria to be employed in making such a determination.[21]

The concerns expressed by legal scholars regarding the deficiencies of § 402A were also recognized by the judiciary.[22]

> kinds of drug-induced harm, such as that caused by improper formulation of toxic ingredients. Since no one could argue seriously that the latter risks should escape strict liability, the failure to separate the two categories muddled the debate.

Id. at 864-65 (footnotes omitted). *See also* Wade, *Nature of Strict Tort Liability*, *supra* note 1, at 830-31 (for a recounting of ALI proceedings that resulted in substitution of "defective condition unreasonably dangerous" for original "dangerous" language of section 402A).

19 *See* Wade, *Nature of Strict Tort Liability*, *supra* note 1, at 830. Referring to the language of § 402A, Dean Wade stated that "[t]he Restatement uses two expressions [defective and unreasonably dangerous] which may seem redundant. They might have been joined together with an 'or' rather than an 'and.' But they were not and this has created some problems of its own." *Id.* In addition, Professor Page commented that:

> the Restatement's treatment of generic risks fall short on several counts. The requirement of a 'defect' as a distinct element of strict liability was inserted to serve a function already adequately addressed by the "unreasonably dangerous" test. The Restatement fails to make a clear distinction between known and unknown hazards, and never takes a forthright position on which of these two types of hazards strict liability should cover: either, neither or both.

Page, *Generic Product Risks*, *supra* note 18, at 871-72.

20 *See* Wade, *Nature of Strict Tort Liability*, *supra* note 1, at 828 n.12 for a comprehensive list of articles on the subject.

21 Dean Wade is credited with developing the first comprehensive list of factors to be balanced in determining whether a product is unreasonably dangerous or not duly safe. *See id.* at 837. Dean Keeton formulated a more restricted set of criteria to be used in deciding if a product is defective, including balancing the usefulness of the product, the manufacturer's ability to spread the risk, the user's expectation of the product's performance, and the manufacturer's knowledge or ability to understand the nature of the defect and to have it eliminated. Keeton, *Meaning of Defect*, *supra* note 3, at 37-38.

22 *See* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979). In *Suter*, the court stated that:

> Incorporation of the "defective condition unreasonably dangerous" language in the jury charge appears to impose a greater burden on plaintiff than is warranted, for it seems to require that plaintiff not only establish a defect but that in addition the condition created be unreasonably dangerous. It has been said inclusion of the phrase "unreasonably dangerous" in the Restatement formula is partially responsible for the confusion currently existing in products liability law.

Id. at 174-75, 406 A.2d at 152 (citing U.S. Department of Commerce, *Interagency*

Courts interpreting § 402A split over what constituted "a defective condition unreasonably dangerous to the user"[23] and how this language applied, if at all, to the determination of defect.[24] This schism resulted in the "consumer expectation"[25] and the "risk utility"[26] tests to determine liability. Jurisdictions adopting the consumer expectation test followed more closely the precise language of § 402A, and its accompanying comment i, which defines "unreasonably dangerous" as being more dangerous than an ordinary consumer could reasonably expect.[27] Many jurisdic-

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Task Force on Product Liability, Product Liability: 2 Final Report on the Legal Study 18 (1977)).

See also Barker v. Lull Eng'g Co., Inc., 20 Cal.3d 413, 417, 573 P.2d 443, 446, 143 Cal. Rptr. 225, 228 (1978) (stating that § 402A's "unreasonably dangerous" element should not be included in plaintiff's burden of proof in product liability suit); Cronin v. J.B.E. Olson Corp., 8 Cal.3d 121, 123, 501 P.2d 1153, 1155, 104 Cal. Rptr. 433, 435 (1972) (rejecting apparent imposition of dual burden of establishing that product defect proximately caused injuries and that defect made product unreasonably dangerous).

[23] RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

[24] *See* Wade, *Nature of Strict Tort Liability*, *supra* note 1, at 829. Dean Wade observed that although the Restatement was accepted in Greenman v. Yuba Power Prod., Inc., 59 Cal.2d 57, 377 P.2d 897, 29 Cal. Rptr. 697 (1963), "the Supreme Court of California has. . ., in the case of *Cronin v. J.B.E. Olson Corp.*, held that there is a difference between them ['defective' and 'unreasonably dangerous'], and that the California position is that the plaintiff needs to prove only that the product was defective, not that it was also unreasonably dangerous." Wade, *Nature of Strict Liability*, *supra* note 1, at 829 (footnotes omitted). *See also* Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U.L. REV. 734, 741-44 (1983) [hereinafter Wade, *On the Effect in Product Liability*] for a discussion of various judicial interpretations of § 402A.

[25] *See Barker*, 20 Cal.3d at 432, 573 P.2d at 455-56, 143 Cal.Rptr. at 237-38. The *Barker* court stated that "a product may be found defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *Id.*

[26] *See id.* at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238. In explaining the risk utility analysis, the court noted that, alternatively, a product may "be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design." *Id.*

[27] RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965). Comment i provides:

> *Unreasonably Dangerous.* The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from overconsumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the

tions, however, including New Jersey, were troubled by the phrase "unreasonably dangerous," finding it confusing and unduly burdensome on the plaintiff attempting to establish liability.[28] These jurisdictions opted for the risk utility analysis proposed by Dean Wade or some variation thereof.[29]

Dean Wade suggested that the test for determining defectiveness was to inquire whether a reasonably prudent manufacturer would have marketed the product in the form it did, or, if it had knowledge of the product's danger, whether it would have marketed the product in an alternative form.[30] He proposed the

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> ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking maybe harmful; but tobacco containing something like marijuana may be unreasonably dangerous.

Id. See also Barker, 20 Cal.3d at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236 (1978) (rejecting consumer expectation test as *sole* ground for imposing strict liability).

[28] *See Barker*, 20 Cal.3d at 430, 573 P.2d at 454, 143 Cal.Rptr. at 236 (1978) (rejecting consumer expectation test as *sole* ground for imposing strict liability); Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 241, 432 A.2d 925, 931 (1981) (where court noted that "we continue to adhere to the view that the language 'defective condition unreasonably dangerous' has the potential for misunderstanding, it is not apt and should be rejected); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 174-75, 406 A.2d 140, 152 (1979) (noting that "defective condition unreasonably dangerous" requires the plaintiff to establish both a defect and a condition unreasonably dangerous).

Dean Wade noted that:

> [t]he two terms ["defective condition" and "unreasonably dangerous"] are regarded as not entirely synonymous, and if it is either tautological or requiring too much to insist that the product be both defective and unreasonably dangerous, the question then arises as to which term is the more appropriate. There are difficulties with either one alone, as an analysis will show. . . .
>
> On the other hand, the term "unreasonably dangerous" raises difficulties of its own. It may suggest an idea like ultrahazardous, or abnormally dangerous, and thus give rise to the impression that the plaintiff must prove that the product was unusually or extremely dangerous.

Wade, *Nature of Strict Tort Liability, supra* note 1, at 831-32.

[29] Cepeda v. Cumberland Eng'r Co., 76 N.J. 152, 173, 386 A.2d 816, 826 (1978), *overruled in part*, 81 N.J. 150, 406 A.2d 140 (1979). The court in *Cepeda* observed that "[o]ur study of the decisions satisfies us that this risk-utility analysis rationalizes what the great majority of the courts actually do in deciding design defect cases where physical injury has proximately resulted from the defect. Several recent cases have expressly referred to and applied the stated analysis." *Id.* (citations omitted). *See also* Birnbaum & Wrubel, *State of the Art and Strict Product Liability*, TORT & INS. L.J., 30 (1985) (most jurisdictions have accepted risk utility balancing test in deciding whether the product is defective).

[30] Wade, *Nature of Strict Tort Liability, supra* note 1, at 839-40 (citation omitted).

following elements to be considered in determining this issue of defect; these elements have come to be known as the "risk-utility" or "Wade" factors:

> (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 or 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.[31]

An examination of how the New Jersey courts incorporated and modified this risk utility analysis is necessary to understand why it is the standard by which the unavoidably unsafe product should be scrutinized. It also provides the basis for identifying the role consumer knowledge and behavior may play in the imposition of strict liability.

B. *Adoption of Risk Utility Analysis in New Jersey.*

Although only fleetingly referred to by name,[32] strict liability

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[31] *Id.* at 837-38.

[32] *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 372, 161 A.2d 69, 77 (1960). The *Henningsen* court stated that:

> The transcendent value of the legislation, [Uniform Sale of Goods Law], particularly with respect to implied warranties, rests in the fact that obligations on the part of the seller were imposed by operation of law, and did not depend for their existence upon express agreement of the parties. And of tremendous significance in a rapidly expanding commercial society was the recognition of the right to recover damages on account of personal injuries arising from a breach of warranty. . . .The particular importance of their advance resides in the fact that under such circumstances strict liability is imposed upon the maker or seller of the product. Recovery of damages does not depend upon proof of negligence or knowledge of the defect.

began in New Jersey with the 1960 case of *Henningsen v. Bloomfield Motors, Inc.*.[33] In *Henningsen*, Justice Francis recognized an implied warranty by a manufacturer that a product was suitable for its intended purpose.[34] Justice Francis concluded that a party need not prove a manufacturer's negligence or knowledge of a defect to recover damages.[35] The rationale for permitting such recovery was based on fundamental public policy concerns.[36]

Five years later, in *Santor v. A & M Karagheusian, Inc.*,[37] the New Jersey Supreme Court defined this implied warranty theory as a hybrid form of action arising under both tort and contract theories.[38] Justice Francis observed that the purpose of imposing such liability was "to insure that the cost of injuries or damage . . . resulting from defective products, is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves."[39]

Id. (citations omitted).

33 32 N.J. 358, 161 A.2d 69 (1960).

34 *Id.* at 384, 161 A.2d at 84. The *Henningsen* court held that "[u]nder modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser." *Id.*

35 *Id.* at 372, 161 A.2d at 77.

36 *Id.* at 404, 161 A.2d at 95. The *Henningsen* court noted that:

> Public policy at a given time finds expression in the Constitution, the statutory law and in judicial decisions. In the area of sale of goods, the legislative will has imposed an implied warranty of merchantability as a general incident of sale of an automobile by description. The warranty does not depend upon the affirmative intention of the parties. It is a child of the law; it annexes itself to the contract because of the very nature of the transaction. . . .The judicial process has recognized a right to recover damages for personal injuries arising from a breach of that warranty.

Id. (citations omitted).

37 44 N.J. 52, 207 A.2d 305 (1965).

38 *Id.* at 64, 207 A.2d at 311. Ordinarily, no contract exists between the ultimate consumer of a product and its manufacturer. *Id.* In fact, as a public policy matter, a duty has been imposed on manufacturers to such consumers irrespective of any privity or contractual relationship. *Id.* "Such concept expressed in terms of breach of implied warranty of fitness or merchantability bespeaks a *sui generis* cause of action. Its character is hybrid, having its commencement in contract and its termination in tort." *Id.*

39 *Id.* at 65, 207 A.2d at 312. In stating the purpose for its holding, the *Santor* court stated that:

> [I]n this developing field of the law, courts have necessarily been proceeding step by step in their search for a stable principle which can stand on its own base as a permanent part of the substantive law. The quest has found sound expression, we believe, in the doctrine of strict

Having identified their goal, courts needed to provide more definitive guidelines for the imposition of strict liability. In *Schipper v. Levitt & Sons*,[40] the New Jersey Supreme Court recognized that "even under implied warranty or strict liability principles, the plaintiff's burden still remains of establishing to the jury's satisfaction from all the circumstances that the design was unreasonably dangerous."[41] By imposing the requirement that the product be proven "unreasonably dangerous," the court appears to have implicitly adopted the language of § 402A.[42]

It was not until 1978, in *Cepeda v. Cumberland Engineering Co.*,[43] that the court expressly adopted the seven Wade factors[44] as the test for determining whether a product is defective.[45] The court noted, however, that not all of the factors would necessarily be applicable in all cases.[46] The court went on to hold that, in applying Dean Wade's test, the trial court must first perform a risk utility analysis applying the relevant factors to decide whether to preclude or impose liability as a matter of law.[47] In cases in which liability is *not* determined as a matter of law, the trial court must determine which of the seven factors should be considered by the jury.[48] Although the supreme court adopted Dean Wade's seven factors, the court did not exactly accept his suggestion that the jury be charged that a product was defective if a reasonable manufacturer would not have placed it on the market.[49] Instead, the court substituted § 402A's "unreasonably

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> liability in tort. Such doctrine stems from the reality of the relationship between manufacturers of products and the consuming public to whom the products are offered for sale. . . .It must be said, therefore, that when the manufacturer presents his goods to the public for sale he accompanies them with a representation that they are suitable and safe for the intended use.

Id. at 64-65, 207 A.2d at 311.

[40] 44 N.J. 70, 207 A.2d 314 (1965).

[41] *Id.* at 96, 207 A.2d at 328.

[42] *See supra* note 16 for text of § 402A.

[43] 76 N.J. 152, 386 A.2d 816 (1978), *rev'd in part*, 81 N.J. 150, 406 A.2d 140 (1979).

[44] *See supra* note 31 and accompanying text (for a list of the seven Wade factors used in determining the issue of "defect.").

[45] *Cepeda*, 76 N.J. at 173-74, 386 A.2d at 826-27 (footnote omitted).

[46] *Id.* at 174-75, 386 A.2d at 827.

[47] *Id.* at 173, 386 A.2d at 826.

[48] *See id.* at 174, 386 A.2d at 827 (emphasis added).

[49] *Id.* Dean Wade suggested the following jury charge:

> A [product] is *not duly safe* if it is so likely to be harmful to persons [or property] that a reasonable prudent manufacturer [supplier], who had actual knowledge of its harmful character would not place it on the market. It is not necessary to find that this defendant had knowledge of the

dangerous" requirement for Dean Wade's proposed "not duly safe" standard.[50]

One year later, the New Jersey Supreme Court in *Suter v. San Angelo Foundry & Machine Co.*,[51] affirmed the wisdom of the *Cepeda*[52] court's adoption of the risk utility analysis but specifically rejected § 402A's "unreasonably dangerous" criterion as part of the jury charge.[53] The court chose instead to define defect in terms of whether the product is "reasonably fit, suitable, and safe for its intended or foreseeable purposes. . . .[54] The court rejected § 402A's language because of its potential for misunderstanding[55] and because it could be interpreted as placing more emphasis on the manufacturer's conduct than on the nature of the product.[56] Thus, the court opined that § 402A im-

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> harmful character of the [product] in order to determine that it was duly safe.

Id. (quoting *Wade, Nature of Strict Tort Liability, supra* note 1, at 839-40) (emphasis added).

50 *Id.* at 174, 386 A.2d at 827. The court specifically stated that:

> Subject to substituting the Section 402A language, "defective condition unreasonably dangerous," for the Wade preferred "not duly safe," we approve and adopt this instruction for incorporation into a charge in an action against a manufacturer for strict liability in tort based upon the design defect of a product. Such a charge would be usefully amplified by the judge calling to the attention of the jury for their consideration any of the Wade factors . . . going into the risk utility analysis for which there is specific proof in the case and especial significance.

Id. at 174-75, 386 A.2d at 827 (footnote omitted).

51 81 N.J. 150, 406 A.2d 140 (1979).

52 *See id.* at 172, 386 A.2d at 151.

53 *Id.* at 176, 406 A.2d at 153.

54 *Id.* The *Suter* Court noted that:

> Defining the strict liability principle in terms of a defect and an unreasonably dangerous condition does not advance an understanding of the concept and will not assist a jury's comprehension of the issues which it must resolve. Accordingly, the jury should be charged in terms of whether the product was reasonably fit, suitable and safe for its intended or foreseeable purposes when inserted by defendant into the stream of commerce and, if not, whether as a result damage or injury was incurred by the contemplated users or others who might reasonably be expected to come into contact with it. This is not to say that the jury should not receive additional instructions relative to the nature of the alleged defect. For example, a product may be unsafe because of inadequate instructions or, as in this case, the absence of safety features. The instruction should be tailored to the factual situation to assist the jury in performing its fact finding responsibility.

Id.

55 *Id.*; *see also supra* note 54 (for a discussion of the *Suter* court's holding on this issue).

56 *See Suter*, 81 N.J. at 169, 170, 406 A.2d at 149, 153. It must be remembered that when examining the risks and benefits, the focus must be on the product's *use*.

properly increased the plaintiff's burden of proof.[57]

It was not until 1982 in *Beshada v. Johns-Manville Products Corp.*,[58] that the New Jersey Supreme Court clearly focused on the risk utility analysis.[59] The court stated that the question of defect depends upon a comparison of a product's risks and its utility.[60] In determining this issue, the court recommended a two step test: (1) Does the product's utility outweigh its risks?; and (2) If so, has the risk been reduced to the greatest extent possible consistent with the product's utility?[61]

The initial inquiry considers the product in the condition in which it was actually marketed.[62] The court reasoned that if the product "caused more harm than good," then it was defective and strict liability could be imposed for related injuries, without requiring the plaintiff to prove the existence of an alternative safer design.[63] In such a case, the second step of the analysis is not reached.[64] In addition, the court cautioned that even if the product passes the risk utility test, the product can still be considered defective if it could have been marketed or made more safely by virtue of some feature of its design, including instructions or warnings.[65]

Shortly after its *Beshada* decision, the New Jersey Supreme Court in *O'Brien v. Muskin Corp.*[66] clarified that the risk utility analysis applies as much to unavoidably unsafe products as it does to improperly designed products.[67] The court recognized that some products, including some for which no safer design exists, are of such little benefit while at the same time being so dangerous, that strict liability should be imposed.[68] The court noted, however, that other unavoidably unsafe products may be

See Cipollone v. Liggett Group, Inc., 644 F. Supp. 283 (D.N.J. 1986). For example, whether substantial taxes are levied on a particular product is irrelevant as is the number of people employed in the industry producing the product in question. *Id.* The focus is on the risk and benefit to the user, *not* to the manufacturer. *Id.*

[57] *Suter*, 81 N.J. at 174-75, 406 A.2d at 152; *see also supra* note 22 (for a discussion of this shift in burdens of proof).

[58] 90 N.J. 191, 447 A.2d 539 (1982).

[59] *See id.* at 199-202, 447 A.2d at 544-45.

[60] *Id.* at 199, 447 A.2d at 544.

[61] *Id.* at 201, 447 A.2d at 545.

[62] *Id.*

[63] *Id.*

[64] *See id.*

[65] *See id.* at 201-02, 447 A.2d at 545 (footnote omitted).

[66] 94 N.J. 169, 463 A.2d 298 (1983).

[67] *See id.* at 183, 463 A.2d at 305.

[68] *Id.* at 184, 463 A.2d at 306.

marketed without imposition of liability so long as they have *great* social utility and are accompanied by adequate warnings.[69] Consistent with comment k to § 402A,[70] these warnings must provide sufficient information relating the risks associated with the use of the product so as to permit an informed consent by the user.[71]

The New Jersey Supreme Court's latest pronouncement on risk utility is *Feldman v. Lederle Laboratories*.[72] In *Feldman*, the de-

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69 *See id.* at 183, 463 A.2d at 305 (emphasis added). The court stated that:

> some products are unavoidably unsafe: the need for a product may be great, but the existing state of human knowledge may not make it safe. *Restatement* § 402A, comment k. With those products, the determination of liability may be achieved more appropriately through an evaluation of the adequacy of the warnings. In brief, risk-utility analysis is not a petrified, but a dynamic process. Where a particular product falls on the risk-utility continuum will depend on the facts of each case. A toy that poses undue risks to infants may be viewed differently from a therapeutic device that protects or prolongs life. As we proceed, as we must, on a case-by-case basis, risk-utility analysis provides the flexibility necessary for an appropriate adjustment of the interests of manufacturers, consumers, and the public.

Id.

70 RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965). Comment k provides that:

> *Unavoidably unsafe products.* There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidably high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

Id. (emphasis in original).

71 *See O'Brien*, 94 N.J. at 183, 463 A.2d at 305. *See also* Note, *Products Liability—Strict Liability in Tort-State-of-the-Art Evidence Relevant to Risk-Utility Analysis in Design Defect Cases*, 15 SETON HALL L. REV. 120 (1984) (complete discussion of *O'Brien*).

72 97 N.J. 429, 479 A.2d 374 (1984).

fendant urged that strict liability should not apply to certain unavoidably unsafe products[73] and that drug manufacturers should be immunized from liability for the side effects produced by prescription drugs.[74] Lederle based its contentions on comment k of the Restatement's § 402A.[75] In response, the court recognized that comment k may provide a defense for manufacturers of *certain* unavoidably unsafe products, that is, products whose risks are outweighed by their benefits. The court refused, however, to hold the manufacturers immune from liability as a matter of law.[76] The court also held that a "jury may be called upon to balance the risk utility factors and decide whether the products should fall within the immunized category."[77] Notably, no claim had been made that the risks of the particular drug in question outweighed its benefits.[78] Nonetheless, the court declined to rule that issue out of the case,[79] thereby emphasizing the importance of its applicability to unavoidably unsafe products.

The New Jersey Supreme Court has yet to consider a case in which it is alleged that the use of an unavoidably unsafe product results in greater risks than benefits. Although it has endorsed the risk benefit test for determining whether such products are defective, the court has yet to develop the specific mechanics of the analysis and to explore its effect on the issue of comparative fault.

III. Application of Risk Utility Analysis in Cases Involving Unavoidably Unsafe Products

A. *Unavoidably Unsafe Products versus Other Defect Cases*

It is important at the outset to note the existence of the different types of defect cases.[80] One category of products liability

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[73] *Id.* at 446, 479 A.2d at 383.

[74] *Id.* at 441, 446, 479 A.2d at 380, 383.

[75] *See id.* at 441, 479 A.2d at 380.

[76] *See id.* at 447, 479 A.2d at 383.

[77] *Id.* at 444-45, 479 A.2d at 382 (citing *O'Brien*, 94 N.J. at 169, 463 A.2d at 298).

[78] *Id.* at 446 n.5, 479 A.2d at 383 n.5 (citing *O'Brien*, 94 N.J. at 181, 463 A.2d at 304).

[79] *See id.* at 446-49, 479 A.2d at 383-84.

[80] *See O'Brien*, 94 N.J. at 180-81, 463 A.2d at 304. In *Feldman*, the court noted that "[t]he defect may take one of three forms: manufacturing flaw, a design defect, or an inadequate warning." *Feldman*, 97 N.J. at 449, 479 A.2d at 385 (citing *O'Brien*). In Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 240-42, 432 A.2d 925, 930-32 (1981), the court referred to failure to warn cases as a type of design defect case, that is, by describing the absence or inadequacy of a warning as a feature of its

cases involves manufacturing defects.[81] Determining the existence of a manufacturing defect is elementary. The question is: did the product perform as the manufacturer intended?[82] If, for example, a soda bottle explodes when used as intended the product would be considered defective. Since, after the fact, the defect is obvious and unintended, there is no need to conduct a detailed risk utility analysis utilizing the various Wade factors.[83]

Another category of cases involves design defects and is comprised of three subcategories:

(1) products for which an alternative safer design exists;[84]

(2) products that are dangerous but that may be used safely in accordance with appropriate warnings or instructions;[85] and

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design. The distinction is merely one of semantics since analysis of "defect" is identical under either view.

Although *Feldman* articulated three categories of defects, Dean Wade explained that:

> The second, "defective design," involves a design that, technologically and economically, may feasibly be made safer by eliminating or diminishing the danger in question. If the design cannot feasibly be made safer, actionability depends on whether the danger is so great that the product should not have been put on the market at all. . . .
>
> One way of diminishing a product danger generally available to the manufacturer is to append a warning to the product. Warnings (and instructions for use) are actually a part of the product design and properly should be viewed as one factor in determining whether the design is duly safe. Thus, although "failure to warn" usually is treated as a separate basis for finding a product actionable, "failure to warn" cases may properly be viewed as "defective design" cases.

Wade, *On the Effect in Product Liability*, *supra* note 24, at 740 (footnote omitted).

81 *O'Brien*, 94 N.J. at 181, 436 A.2d at 304 (1983):

> For example, the injury-causing product may be measured against the same product as manufactured according to the manufacturer's standards. If the particular product used by the plaintiff fails to conform to those standards or other units of the same kind, it is defective. An apt illustration is a mass-produced document that comes off the assembly line missing a part. The question in those cases becomes whether the product as produced by the manufacturer conformed to the product as intended.

Id. (citations omitted).

82 *Id.*

83 *See* Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 170, 386 A.2d 816, 825 (1978), *overruled in part*, 81 N.J. 150, 406 A.2d 140 (1979). When dealing with "a defect of a product in the sense of an abnormality unintended by the manufacturer, there would appear to be *prima facie* liability for physical harm proximately resulting from the defect to a user or consumer without any need for showing of unreasonable danger in any other sense." *Id.*

84 This category includes products whose design can be changed to make the products safer. *See* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979) (discussing how addition of guard on metal sheet rolling machine could have made machine safer).

85 This category includes products whose design probably cannot be changed to

(3) products that are unavoidably unsafe; that is, those that carry a risk of harm to consumers when used exactly as intended.[86]

All three types of products will be considered "defective" if their risks outweigh their benefits.[87] They may also be "defective," even if their benefits outweigh their risks, in certain circumstances.[88] Products falling in the first two subcategories are defective when the manufacturer fails to reduce the risk to the maximum extent possible by not designing the product more safely[89] or by not providing

make them safe but, with the addition of instructions or warnings, will permit the user to use the product without injury, *e.g.*, warnings on solvents advising that they are to be used in a well ventilated area. *See* Feldman v. Lederle Laboratories, 97 N.J. 429, 450, 479 A.2d 374, 385 (1984) (stating that "failure-to-warn strict liability classification is similar to the improper design category. . .[and] that an inadequate warning could constitute a design defect."); *see also* Keeton, *Products Liability—Inadequacy of Information* 48 TEX. L. REV. 398, 403 (1970) (stating that "[t]he question whether a product was properly designed is inseparable from the question whether adequate instructions are provided to insure safe usage.").

86 This category includes products that cannot be rendered safer through alternative designs or warnings. *See* Page, *Generic Product Risks*, *supra* note 18. Professor Page has stated that "examples of generic, nondesign risks abound: adverse reactions to drugs and exposure to harmful chemicals; the risk of cancer from smoking cigarettes; the risk of 'toxic shock' from using tampons; and the possibly deleterious effects of consuming food and beverages containing saccharin and caffeine. . . ." *Id.* at 858 (footnotes omitted).

87 *See* Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 201, 447 A.2d 539, 545 (1982). The *Beshada* court specifically stated that:

> For purposes of analysis, we can distinguish two tests for determining whether a product is safe: (1) does its utility outweigh its risk? and (2) if so, has that risk been reduced to the greatest extent possible consistent with the product's utility? The first question looks to the product as it was in fact marketed. If that product caused more harm than good, it was not reasonably fit for its intended purposes. We can therefore impose strict liability for the injuries it caused without having to determine whether it could have been rendered safer.

Id. (citation omitted).

88 *See id.*

89 *See id.* The *Beshada* court also noted that

> "[t]he second aspect of strict liability, however, requires that the risk from the product be reduced to the greatest extent possible without hindering its utility. Whether or not the product passes the initial risk-utility test, it is not reasonably safe if the same product could have been made or marketed more safely.
>
> Warning cases are of this second type. When plaintiffs urge that a product is hazardous because it lacks a warning, they typically look to the second test, saying in effect that regardless of the overall cost-benefit calculation the product is unsafe because a warning could make it safer at virtually no added cost and without limiting its utility. *Freund* recognized this, noting that in cases alleging "an inadequate warning as to safe use, the utility of the product, as counter-balanced against the risks of its use, is rarely at issue."

Id. at 201-02, 447 A.2d at 545 (citations omitted) (footnotes omitted).

the user with adequate warnings of the product's potential risks, thereby preventing him from using the product safely.[90] Products in the last subcategory, unavoidably unsafe products, may also be found defective, even when their benefits outweigh their harm, if the manufacturer fails to provide sufficient information to permit consumers to make an informed decision concerning the risks of using the products.[91] A clear delineation between these various types of defects must be made because the risk utility analysis employed will vary significantly depending upon the category in which the product falls.

The threshold question that must be resolved, regardless of the type of product or the nature of the design defect, is whether the product's risks outweigh its benefits.[92] If the product fails this preliminary test, it is defective.[93] Such a product is deemed to be so dangerous and of such little value to society that it should not be marketed at all, and its manufacturer should, as a matter of policy, pay the costs of the injuries.[94]

When a product falling in the first two subcategories passes the threshold risk benefit test, a further analysis using the relevant Wade factors must be performed.[95] As a practical matter, most of these design defect cases presuppose that the product satisfies the initial risk benefit test.[96] For example, it is presumed that products

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90 *See* Freund v. Cellofilm Properties Inc., 87 N.J. 229, 242-43, 432 A.2d 925, 932 (1981). In *Freund*, the plaintiff alleged that the manufacturer of a highly flammable chemical which was used to mix paints and lacquers failed to provide adequate warning as to how to use the product without causing a fire and resulting burns. *Id.* at 233-34, 432 A.2d at 927. The *Freund* court noted that "[a] products liability charge in an inadequate warning case must focus on safety and emphasize that a manufacturer, in marketing a product with an inadequate warning as to its dangers, has not satisfied its duty to warn, even if the product is perfectly inspected, designed, and manufactured." *Id.* at 242-43, 432 A.2d at 932.

91 *See* Feldman v. Lederle Laboratories, 97 N.J. 429, 448, 479 A.2d 374, 384 (1984) (citing Wade, *On the Effect in Product Liability*, *supra* note 24, at 745).

92 Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 199-202, 447 A.2d 539, 544-45.

93 *See id.*

94 *See, e.g.*, Wade, *On the Effect in Product Liability*, *supra* note 24, at 740, 742 ("If the design cannot feasibly be made safer, actionability depends on whether the danger is so great that the product should not have been put on the market at all.").

95 *See* Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 173-75, 386 A.2d 816, 826-27 (1978), *rev'd in part*, 81 N.J. 150, 406 A.2d 140 (1979).

96 *See* Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 238 n.1, 432 A.2d 925, 930 n.1 (1981). Relying on its decision in *Suter*, the court noted that "in the instruction or warning situation, safety is the predominant factor in determining the adequacy of the manufacturer's efforts." *Id.* at 242, 432 A.2d at 932. This is because "where the design defect consists of an inadequate warning as to safe use, the utility of the product, as counterbalanced against the risks of its use, is rarely at issue."

such as electric blenders, injection molding machines, and automobiles have benefits that outweigh their risks. A proper warning would have very little effect on the utility of such a product.[97] Therefore, whether a product in one of the first two subcategories will be considered defective depends upon an analysis of factors such as: the manufacturer's ability to eliminate the unsafe character of the product by alternate design or warning, without impairing its usefulness; the user's ability to avoid the danger by exercise of due care; the user's awareness of dangers inherent in the product and their avoidability; and the likelihood and magnitude of the injury the product will cause.[98] Implicit in this balancing test is the question of whether the manufacturer has reduced the danger or risk to the greatest degree feasible.[99] A product's failure to survive scrutiny under this analysis renders it defective. Conversely, if it passes, then the product is duly safe and liability will not attach.

An example of a product for which an alternative safer design exists is a lawnmower. It could be alleged that a lawnmower, a product whose benefits presumably outweigh its risks, is defectively designed because of the absence of a "dead man's" control. In such a case, the product's overall benefits verses risks would not be challenged.[100] Rather, evidence would be offered to establish the existence of a safer substitute design including a safety device, the manufacturer's ability to incorporate the device without impairing the lawnmower's usefulness or making it too expensive, and the likelihood that the lawnmower, absent the control, would cause a serious injury.[101]

A lawnmower might also be defective because of the user's inability to operate it safely in the absence of instructions or adequate warnings. Again, the usefulness of lawnmowers will not be challenged. Instead, the proofs would focus on the absence of warnings that would have allowed the user to avoid the dangers attendant to the use of the product.[102] Courts may also consider factors such as

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Id.; *see also Beshada*, 90 N.J. at 201, 447 A.2d at 545 ("whether or not the product passes the initial risk-utility test, it is not reasonably safe if the same product could have been made or marketed more safely"). (footnote omitted).

97 *Freund*, 87 N.J. at 238 n.1, 432 A.2d at 930 n.1.

98 *See supra* note 31 and accompanying text (list of Wade factors). *See also Cepeda*, 76 N.J. at 174, 386 A.2d at 826-27.

99 Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 171-72, 406 A.2d 140, 150-51 (1979).

100 *Beshada*, 90 N.J. at 201, 447 A.2d at 545.

101 *See supra* note 31 and accompanying text (for discussion of Wade factors (2), (3) and (4)).

102 *Beshada*, 90 N.J. at 201, 447 A.2d at 545.

the user's anticipated awareness of the dangers inherent in the use of the lawnmower and their avoidability because of the obvious condition of the product.[103] Usually, the addition of warnings or instructions regarding the safe operation of the product will not impair the usefulness of the product and, therefore, the absence of this information may render the product defective.[104] The absence of warnings or instructions, however, will not necessarily render a product defective as a matter of law. For example, a knife has no instructions or warnings advising the user to avoid contact with the sharpened blade. In this instance, however, the product is not defective since the danger is obvious and the user can avoid the dangers by exercising due care.[105]

The determination of defects in products that are unavoidably unsafe even when used as intended is more limited than for products in subcategories (1) and (2). In this type of case, the product is more likely to be challenged on the ground that the risks of use outweigh the benefits of the product.[106] This is so because a higher level of initial scrutiny is required for products that carry inherent

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[103] *See supra* note 31 and accompanying text (for discussion of Wade factor (6)).

[104] "Warnings are like seatbelts: regardless of the utility and risk of a product without warnings, a warning can generally be added without diminishing utility." *Beshada*, 90 N.J. at 201 n.5, 447 A.2d at 545 n.5. "In the case of a design defect consisting of an inadequate warning. . .imposing the requirements of a proper warning will seldom detract from the utility of the product." Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 238 n.1, 432 A.2d 925, 930 n.1 (1981).

[105] *See* Campos v. Firestone Tire & Rubber Co., 98 N.J. 198, 206, 485 A.2d 305, 309 (1984). The court recognized that "[i]f the use of the product is beyond its intended or reasonably anticipated scope. . .there may be no duty to warn. . . .Thus the manufacturer of a knife is not chargeable with a failure to warn that the knife is sharp and should not be used as a toothpick." *Id.* (citation omitted); *but cf.* Wade, *Nature of Strict Tort Liability*, *supra* note 1, at 842. The court thus reasoned:

> We turn next to consider whether a duty to warn exists when the danger is obvious. Although some jurisdictions have adopted an "obvious danger rule" that would absolve a manufacturer of a duty to warn of dangers that are objectively apparent in our state the obviousness of a danger, as distinguished from a plaintiff's subjective knowledge of a danger, is merely one element to be factored into the analysis to determine whether a duty to warn exists. A manufacturer is not automatically relieved of his duty to warn merely because the danger is patent.

Campos, 98 N.J. at 207, 485 A.2d at 309-10 (citations omitted). *See also* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 81, 207 A.2d 314, 320 (1965) (stating that knowledge of danger would not necessarily, as a matter of law, bar recovery in negligence action).

[106] *See* Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1274 (5th Cir. 1974). The court stated that "[u]navoidably unsafe product[s] always present at least a minimal danger of harm, but only if the potential harmful effects of the product. . .outweigh the legitimate public interest in its availability will it be declared unreasonably dangerous per se and the person placing it on the market held liable." *Id.* (footnote omitted).

risks of harm to all users.[107]

Initially, a determination of defect will be made by simply balancing the product's harm against its benefit. Whether this is characterized as a separate test or simply an application of the first two Wade factors is immaterial. In most instances, only the first two factors will be considered because the remaining factors are inapplicable.[108] For example, factor four, the manufacturer's ability to eliminate the product's unsafe characteristic, is by definition inapplicable to unavoidably unsafe products. Factors five and six, the user's ability to avoid danger by the exercise of due care and the user's anticipated awareness of the dangers inherent in the product and their avoidability, cannot be considered since the product under examination is one whose dangers cannot be avoided, regardless of the user's knowledge. Therefore, consumer knowledge and behavior is irrelevant to the issue of defectiveness under a risk utility analysis applied to an unavoidably unsafe product which is used as intended.[109]

Assuming the unavoidably unsafe product survives the initial risk benefit examination, the next question is whether the manufacturer provided the user with information sufficient to permit him to consent to the product's inherent risks.[110] If the manufacturer

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[107] *See* O'Brien v. Muskin Corp., 94 N.J. 169, 183, 463 A.2d 298, 305 (1983).

[108] Factor 3, "the availability of a substitute product which would meet some needs and not be unsafe" does not apply to the initial risk utility analysis. It is very similar to the second prong of the test for strict liability outlined in *Beshada*—has the product's risk been reduced to the greatest extent possible consistent with its utility—and comes into play only after an initial determination regarding risk utility has been made. As such, Factor 3 is basically incorporated into the *Beshada* test and therefore there is no need for a separate analysis of this factor. The availability, or lack thereof, of a safer substitute product does not affect the product's benefits nor its risks. The absence of a safer substitute product would only mitigate against the imposition of liability if the trier of fact first concludes that the use of the product in question produces a tolerable benefit-harm ratio.

[109] *O'Brien*, 94 N.J. at 186, 463 A.2d at 307. In *O'Brien*, the majority of the New Jersey Supreme Court noted that:

> Justice Schreiber [concurring and dissenting] would find that no matter how dangerous a product may be, if it bears an adequate warning, it is free from design defects if there is no known alternative. Under that hypothesis, manufacturers, merely by placing warnings on their products, could insulate themselves from liability regardless of the number of people those products maim or kill. By contrast, the majority concludes that the judicial, not the commercial, system is the appropriate forum for determining whether a product is defective with the resultant imposition of strict liability upon those in the commercial chain.

Id.

[110] Wade, *On the Effect in Product Liability*, *supra* note 24, at 745-46.

> Most products cannot be made completely safe. Some carry real dangers, but their utility is so much greater than their danger that they

failed to provide such information, the product will be considered defective.[111] On the other hand, an adequate warning as to these dangers will insulate the manufacturer from strict liability since the user would have assumed those risks as a matter of law.[112]

Unavoidably unsafe products are common in the area of pharmaceutical drugs which often carry risks of harmful side effects even when used as intended.[113] Justification for marketing these drugs is based on the significant benefits they provide in curing and preventing certain diseases.[114] For example, the polio vaccine carries a cer-

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> are not held to be actionable. And yet they should be made as safe as is feasible. If a product cannot be made completely safe from a physical standpoint, it may be that a warning will make it safer to the point that it may be found to be not actionable.
>
> A warning can prevent a product from being characterized as unreasonably dangerous in two types of situations: (1) the product produces a danger that can be avoided by the user if he is alerted to it and instructed how to avoid it, and (2) the product creates a danger that cannot be eliminated, but its utility is so great that it may be marketed without subjecting the manufacturer to liability, *provided the user is made aware of the danger and is given the opportunity to make an informed decision whether to expose himself to it. . . .*
>
> As for the second situation,. . .[i]f the danger is unavoidable in the sense that it cannot be physically eliminated, the legal effect of a warning that provides the user with an opportunity to determine whether to subject himself to the danger depends upon the closeness of the balance between the risk and utility of the product. If the utility and the risk are fairly equally balanced, the warning may tip the scales on the side of utility. *But if the risk is distinctly greater, the use of a warning will make no difference, and the product should not be put on the market at all. Calling the risk unavoidable cannot be a talisman to change this result.*

Id. (emphasis added) (footnotes omitted).

[111] *Id.*

[112] *See* Feldman v. Lederle Laboratories, 97 N.J. 429, 447-49, 479 A.2d 374, 383-84 (1984); RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965).

[113] *See* RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965); *see supra* note 70 for text of comment k; *see also Feldman*, 97 N.J. at 447, 479 A.2d at 383.

[114] *See* Keeton, *Products Liability—Some Observations*, *supra* note 1, at 1347.

> It is at least arguable that, in the absence of a miscarriage in the manufacturing process, the maker of a drug, especially one designed to save lives, should not be subjected to liability for the consequences to those who are harmed by its use, even if the drug, after an experimental period, is subsequently withdrawn from the market as an unreasonably dangerous product. Such an imposition of liability could produce socially undesirable results by discouraging the development of new drugs, and there may be better ways for society to compensate those who are injured during the experimental period. On the other hand, enterprisers engaged in distributing non-essential products like cosmetics may well be expected to bear the risks of any scientifically undiscoverable dangers that are ultimately the cause of the product's being withdrawn form the market.

Id.

tain percentage of morbidity and mortality, but in the overwhelming number of cases, it prevents the disease. Thus, the benefit of the product may be considered to outweigh the risk. Therefore, the manufacturer of such a product will not be strictly liable if adequate warnings accompany its product.

A significant factor to consider in resolving any risk benefit analysis is whether the product is a necessity, a luxury, or a leisure item.[115] Where the product falls on this continuum has to be considered in assessing how much greater the benefits must be than the risks before the product should be deemed defective.[116] When performing a risk utility test, the fact that a product is a necessity should require less proof of its benefits than for luxury or leisure items. The further one proceeds toward the luxury end of the line, the greater the benefit must be in order for the product to survive the scrutiny of the risk-utility framework.[117]

B. Consumer Knowledge and Behavior

Once it has been determined that an unavoidably unsafe product fails the risk benefit analysis, the question arises as to what, if any, effect consumer knowledge and behavior have on the issues of defect and comparative fault. As previously indicated, consumer knowledge regarding a product's hazards is irrelevant to the determination of the defect of an unavoidably unsafe product.[118] The reason for this is the user's inability to avoid the product's dangers, no matter how much he knows, and no matter how he uses the product. Unfortunately, many commentators have failed to distinguish between avoidable and una-

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[115] *See* O'Brien v. Muskin Corp., 94 N.J. 169, 184, 463 A.2d 298, 306 (1983). "The evaluation of the utility of a product also involves the relative need for that product; some products are essentials, while others are luxuries. A product that fills a critical need and can be designed in only one way should be viewed differently from a luxury item." *Id. See also supra* note 114 and accompanying text (for a discussion of the differences in liability between manufacturing necessities and luxury items).

[116] *See O'Brien*, 94 N.J. at 183, 463 A.2d at 305. "Where a particular product falls on the risk-utility continuum will depend on the facts of each case. A toy that poses undue risks to infants may be viewed differently from therapeutic device that protects or prolongs life." *Id.*

[117] *See* Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir. 1984). In *Ferebee*, the court noted that geography may also play a part in the jury's balancing of a product's risks and benefits (in this case paraquat). The court suggested that a jury in an agricultural state that used paraquat extensively may consider the product highly beneficial, while a jury in a state with limited agricultural industry might view the product less favorably. *Id.* at 1540.

[118] *See supra* note 109 and accompanying text (for a discussion of this proposition).

voidable risks in discussing the role of a consumer's knowledge in the determination of defect.[119] This has often resulted in the conclusion that a consumer's appreciation of a product's dangers, regardless of their avoidability, mitigates in favor of finding the product not defective.[120] The misconception in this conclusion becomes apparent in the following illustration. A consumer's awareness that a knife is sharp or that a speeding automobile is dangerous allows him to use the product safely by avoiding the knife's cutting edge or by driving within the speed limit. A smoker's awareness that smoking causes lung cancer, however, does not allow him to use the product in such a way as to avoid the risk.[121] In this latter instance, the only way to "avoid" the product's risk is not to use the product at all.

The more complex issue is whether consumer behavior and knowledge should result in a finding of comparative fault. When an unavoidably unsafe product is used as intended and fails the initial risk benefit inquiry, it is illogical and unsupportable to conclude that the consumer's proper use of the product results in comparative fault.[122] To permit a consumer's knowledge to be

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119 *See, e.g.*, Page, *Generic Product Risks*, *supra* note 18, at 887-88.

> The policy of satisfying justifiable consumer expectations also dictates the refusal to impose strict liability for harm from known generic risks. The ordinary consumer appreciates the danger posed by a speeding automobile or a sharp knife, and would therefore have no cause to believe that a manufacturer would do more than use due care to reduce these hazards. Contemporary smokers know of the risk of cancer from cigarettes. The presence of warnings on the label of prescription drugs makes physicians, acting on their patients' behalves, aware of the relevant risks. In each of these cases, consumers can make a rational judgment about the scope of the hazard and act accordingly.

Id.

120 *See id.*

121 Former California Chief Justice Traynor has stated that

> [t]he now patent risks of cigarettes are not comparable to those of, say, matches or knives. . . .
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> The cigarette cases illustrate the difficulties presented by the definition of defect in terms of deviation from common expectation. One of the purposes of the test [Restatement (Second) § 402A] is to exclude liability for the harmful effects of smoking. . . .Given the habit forming nature of cigarettes, it is questionable how voluntarily many consumers are continuing to smoke. Moreover, there are no warnings on cigarette packages of a sort to bring home the gravity of the risk. Important though it may be to scrutinize one man's meat for signs of nonconforming poison, it may more often prove necessary to scrutinize his conforming poison for signs of warning as to its use and even reminders as to its patent risks.

Traynor, *The Ways and Meanings*, *supra* note 1, at 370-71.

122 *See* Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability*

asserted as a defense when the court has determined that such knowledge does not affect the issue of defect would undermine the basic premise that some "products, including some for which no alternative exists, are so dangerous and of such little use that under the risk-utility analysis, a manufacturer would bear the cost of liability of harm to others. That cost might dissuade a manufacturer from placing the product on the market."[123]

To elevate the mere purchase and intended use of a legal product to the level of an unreasonable and voluntary assumption of a known danger, resulting in comparative fault, is inconsistent with accepted notions of strict liability.[124] For a manufacturer to suggest otherwise, however, would be tantamount to conceding that a reasonably prudent person would not purchase or use its product. Implicit in this position is the corollary that a reasonably prudent manufacturer would not have sold the product. In other words, to say it is unreasonable to buy such a product is to say it is unreasonable to sell it.

In the context of an unavoidably unsafe product that passes the initial risk benefit analysis, consumer knowledge is relevant to the issue of informed consent.[125] The very purpose of providing

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for Patently Dangerous Products, 48 N.Y.U.L. REV. 1065, 1088 (1973) ("[o]nce it is established that the defendant has a duty to protect persons from the consequences of their own foreseeable faulty conduct, it makes no sense to deny recovery because of the nature of the plaintiff's conduct."); *see also* Green v. Sterling Extruder Corp., 95 N.J. 263, 471 A.2d 15 (1984) (factory worker's contributory negligence not available as a defense to manufacturer); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 167, 406 A.2d 140, 148 (1979) ("The imposition of a duty on the manufacturer to make the machine safe. . .means that the law does not accept the employee's ability to take care of himself as an adequate safeguard of interests which society seeks to protect.").

[123] O'Brien v. Muskin Corp., 94 N.J. 169, 184, 298, 306 (1983).

[124] *See, e.g., Suter*, 85 N.J. at 166-67, 406 A.2d at 148. Quoting *Bexiga*, the court noted that the negligence of the plaintiff "was the 'very eventuality the safety devices were designed to guard against.' " The court also stated "that '[i]t would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against.' " *Id.* (quoting Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 412, 290 A.2d 281, 286 (1972)). *See also* RESTATEMENT (SECOND) OF TORTS § 402A comment n ("If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."). *But cf.* Cepeda v. Cumberland Eng'g. Co., 76 N.J. 152, 189-90, 386 A.2d 816, 834 (1978), *rev'd in part*, 81 N.J. 150, 406 A.2d 140 (1979) (The use of unreasonable and voluntary assumption of a known hazard as a defense "seems a fair balance of justice and policy" in the area of strict product liability).

[125] *See Cepeda*, 76 N.J. at 185, 386 A.2d at 823. The *Cepeda* court noted that "[i]t is implicit in comment n that only a limited range of a plaintiff's conduct—not contributory negligence in the sense of mere carelessness or inadvertence—can be a defense to an action for strict liability in tort for injuries sustained as the result of a

a warning to the user of such a product is to enable him to balance the product's dangers against its benefits, and then to make an informed decision whether to use the product or not. The presence of an adequate warning will avoid a finding that the product is defective.[126] If, however, the warning is inadequate, the product may be considered defective.[127] Even if the warning is adequate, consumer knowledge may be relevant on the issue of proximate cause.[128]

In certain instances a "consumer expectation" test may serve as the basis for imposing strict liability.[129] The "consumer expectation" test adopted in New Jersey is applied only where the user anticipated that the product would perform in a safe manner and it did not.[130] In the context of an unavoidably unsafe prod-

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product defect. . . ." *Id.* In addressing the applicability of the contributory negligence defense under comment n, the court stated that

> Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Id. (quoting RESTATEMENT (SECOND) OF TORTS § 402A comment n).

126 O'Brien v. Muskin Corp., 94 N.J. 169, 183, 463 A.2d 298, 305 (1983). "[S]ome products are unavoidably unsafe: the need for a product may be great, but the existing state of human knowledge may not make it safe. . . .With those products, the determination of liability may be achieved more appropriately through an evaluation of the adequacy of the warnings." *Id.*

127 Feldman v. Lederle Laboratories, 97 N.J. 429, 447-48, 479 A.2d 374, 383-84 (1984) (citations omitted).

128 Campos v. Firestone Tire & Rubber Co., 98 N.J. 198, 209, 485 A.2d 305, 311 (1984) (where court indicated that consumer's knowledge of danger might invalidate a claim that lack of warning caused plaintiff's resulting injury).

129 *See supra* note 25 (for an explanation of liability under the "consumer expectation" test). In a "consumer expectation" test, the consumer shows that the product's performance failed to meet the ordinary consumer expectations "when used in an intended or reasonably foreseeable manner." Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 429, 573 P.2d 443, 454, 143 Cal.Rptr. 225, 236 (1978).

130 *Suter*, 81 N.J. at 150, 406 A.2d at 140. The court noted:

> In some improper design situations the nature of the proofs will be the same as in other unintended defect cases. This occurs 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.

Id. at 170-71, 406 A.2d at 150 (quoting Greenman v. Yuba Power Prods. Inc., 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963)). It has been suggested that a consumer's expectation should govern the resolution of the issue

uct, a consumer's awareness of the product's potential dangers does not restrict the test of defect to "consumer expectations," but rather, invokes the broader balancing test of the risk-benefit analysis.[131]

C. *Judge's Role versus Jury's Role in Risk Utility Analysis.*

Both the court and the jury play a significant role in determining the issue of defect. Their respective responsibilities are dependent in large measure on the nature of the defect and the degree of disparity between the product's risks and benefits. In the first instance, if reasonable minds could not differ that the product's risks exceed its benefits, then the court would, as a matter of law, determine the product to be defective.[132] This is so regardless of whether the product is or is not unavoidably unsafe. In the case of an unavoidably unsafe product, where the court determines that the product's benefits outweigh its risks, however, the jury would simply determine whether the consumer was provided with an adequate warning of those unavoidable risks.[133] Conversely, if the court decides that fact questions exist as to whether the product's risks outweigh its benefits, the question will be resolved by the trier of fact.[134]

When confronted with a design defect that the manufacturer could rectify, the court will apply a more expansive risk utility analysis.[135] If, after this analysis, the court determines that reasonable minds could not differ in finding that the product's utility outweighs its risks, judgment would be entered in favor of the manufacturer.[136] If reasonable minds could differ, then the court would permit the jury to decide the question of defect with ap-

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of defect where the product is unavoidably unsafe. Although the New Jersey Supreme Court has apparently recognized that a defect may be proven by a product's failure to comport with consumer expectation, it has done so by noting that such a test is the "floor" not the "ceiling" for imposition of strict liability. *Id.* at 187, 406 A.2d at 159 (Clifford, J., concurring).

[131] *See* Cipollone v. Liggett Group, Inc., 649 F. Supp. 664, 670 n.2 (D.N.J. 1986), *cert. denied*, 107 S. Ct. 907 (1987)(citation omitted).

[132] *O'Brien*, 94 N.J. at 169, 463 A.2d at 298. "If the minds of reasonable men could not differ on whether the risks posed by a product outweigh its utility, or vice versa, then the court could make the appropriate determination as a matter of law. . . .If, however, there is a fact question whether the risks outweigh the utility of the product, then the matter is for the trier of fact." *Id.* at 186, 463 A.2d at 307 (citation omitted).

[133] *See id.*

[134] *Id.*

[135] *See supra* notes 92-105 and accompanying text.

[136] *See O'Brien*, 94 N.J. at 186, 463 A.2d at 307.

propriate instructions.[137] In the event that the court concludes that reasonable minds could not differ that the product's risks outweigh the product's utility, it would enter a judgment declaring the product defective, thus removing the case from the decisionmaking process of the jury.[138]

What the jury is instructed concerning the risk utility factors, or the issue of defect, depends in large measure on the nature of the defect in question. In most circumstances, the court will charge the jury that a product is defective if the 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."[139] If the court decides that specific Wade factors are highly relevant to a determination of defect, then the court will instruct the jury on those particular factors.[140] For example, with an unavoidably unsafe product that is used as intended, the court would charge the jury as follows: if the product is found to be so dangerous that its risks outweigh its benefits, it should not be marketed at all, despite the obviousness of the product's danger.[141]

IV. Judicial Application of Risk Utility Analysis to Unavoidably Unsafe Products

Because so few unavoidably unsafe products exist that result in more harm than good, and because of the Bar's failure to advocate the imposition of liability based on a risk utility test, the courts have had few opportunities to consider the applicability of the risk utility test to the determination of defect for such products.

Recently, two New Jersey courts have decided this issue in the context of cigarette litigation.[142] In *Cipollone v. Liggett Group, Inc.*,[143] the District Court of New Jersey specifically declared viable the plaintiff's claim "that whether or not a safer design was possible, cigarettes as currently designed are 'unreasonably un-

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[137] *See id.* (citation omitted).

[138] *See id* (citation omitted).

[139] Wade, *Nature of Strict Tort Liability*, *supra* note 1, at 839-40. *See also* Feldman v. Lederle Laboratories, 97 N.J. 429, 451, 479 A.2d 374, 385-86 (1984) (discussing when a product is considered defective).

[140] Cepeda v. Cumberland Eng'g Co., Inc., 76 N.J. 152, 174-75, 386 A.2d 816, 827 (1978), *overruled in part*, 81 N.J. 150, 406 A.2d 140 (1979).

[141] *See* Wade, *Nature of Strict Tort Liability*, *supra* note 1, at 840-41.

[142] *See infra* notes 142-152 and accompanying text.

[143] 649 F. Supp. 664 (D.N.J. 1986).

safe' under the 'risk utility' analysis promoted by Dean Wade and adopted by the New Jersey Supreme Court."[144] After noting that the risk utility theory advocates the marketing of safe products only,[145] the court held that a claim based on a simple risk benefit analysis may be pursued even if the product is unavoidably unsafe.[146] Furthermore, the court noted that the first prong of the risk utility analysis does not encompass a consideration of the adequacy of the warning labels since that issue is reached only if the product's benefits are deemed to outweigh its risks.[147] The court reiterated that some products, including those for which no alternative design exists, "are so dangerous and of such little use that under the risk benefit analysis a manufacturer" should bear the cost of harm to others.[148]

More recently, in *Dewey v. R.J. Reynolds Tobacco Co.*,[149] a New Jersey trial court recognized that a "determination of the existence of a defect is a function of the judicial, rather than the commercial, system."[150] The court held that a claim that cigarettes are defective because they present risks that outweigh their benefits could be pursued, regardless of the adequacy of cigarette warnings or the availability of a safer design for cigarettes.[151]

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144 *Id.* at 669-70 (citations omitted).

145 *Id.* at 669 (quoting Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 200, 447 A.2d 539, 544 (1982)).

146 *Id.* at 669-71.

147 *Id.* at 671.

148 *Id.* (quoting O'Brien v. Muskin Corp., 94 N.J. 169, 184, 463 A.2d 298, 306 (1983)). *See also* Cipollone v. Liggett, 644 F. Supp. 283, 288 (D.N.J. 1986) where Judge Sarokin stated that

> [n]otwithstanding defendants' attempts to extract such a meaning by means of selective citation, the New Jersey Supreme Court's decisions have never said that a product's utility may be established by looking to whether the defendant "reasonably" believed that its profits would be sufficient to maintain a livelihood, hire employees, or pay taxes by operating the company that placed a product on the market.
>
> The New Jersey Supreme Court's silence in this regard becomes all the more deafening upon an inspection of the principles underlying strict liability theory. Defendants' proposed evidence, when distilled to its essence, aims to establish their product is profitable, that some of those profits are disseminated to others in society, and that such benefits would be reduced or eliminated if liability were imposed. But strict liability law is, if anything, intended to temper the profit motive by making a manufacturer or marketer aware that it may be less costly in the long run to market a product more safely, or not to market it at all.

Id. (citation omitted) (footnote omitted).

149 Dewey v. R.J. Reynolds Tobacco Co., 216 N.J. Super. 347, 523 A.2d 712 (Law Div. 1986).

150 *Id.* (citation omitted).

151 *Id.*

Following the dictates of *O'Brien*, the court stated that a manufacturer cannot insulate itself from liability under all circumstances merely by placing warnings on its products. Accordingly, the court affirmed that the "risk utility analysis is the proper standard for evaluating. . .the claim that cigarettes are defective."[152]

In the context of an asbestos case, the Supreme Court of Louisiana held in *Halphen v. Johns-Manville Sales Corp.*[153] that a product is defective *per se* if a reasonable person would conclude that the dangers attendant to the use of the product, whether or not foreseeable, outweigh the product's utility.[154] The court recognized this to be the "purest form of strict liability," and held that liability can be imposed solely upon the basis of the products' intrinsic characteristics, irrespective of the manufacturer's knowledge, intent, or conduct.[155]

The view that the risk utility analysis should be applied in determining the issue of defect involving unavoidably unsafe products has not been uniformly adopted. For example, in deciding whether a handgun should be subjected to a risk utility analysis, a Texas federal district court in *Patterson v. Gesellschaft*[156] held that to do so would pervert the purpose of the risk utility balancing test as employed in Texas products liability cases.[157] The court concluded that the risk utility test incorporates the theory that a defect must be something that can be changed or remedied. Accordingly, the court held that the very facts that the jury is supposed to review when weighing risk and utility include the cost and feasibility of an improved design.[158]

The *Patterson* court's logic is flawed in two respects. First, the court assumed that *all* the risk utility factors proposed by Dean Wade must be implicated in every risk utility analysis;[159] and second, it presumed that the fact that handguns can be used illegally in some way exempts them from the risk utility analysis.[160] The real issue, in assessing whether or not the product is defective, should have been whether handguns, when used in the

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152 *Id.*

153 484 So. 2d 110 (La. 1986) (en banc) (on certification from Fifth Circuit Court of Appeals, 755 F.2d 393 (1985) to decide a question of Louisiana law).

154 *Id.* at 114.

155 *Id.* at 113-14.

156 608 F. Supp. 1206 (N.D. Tex. 1985).

157 *Id.* at 1212.

158 *Id.*

159 *See id.* at 1210-12.

160 *See id* at 1212-13.

manner intended by the manufacturer,[161] present risks to both the user and society that outweigh their benefits.

Following the reasoning in *Patterson*, the Maryland Court of Appeals in *Kelley v. R.G. Industries*[162] held that the risk utility analysis is inappropriate to resolve the issue of defect of a handgun that functioned as intended.[163] The court concluded that the risk utility analysis should apply only "when something goes wrong with a product."[164] The court felt compelled, however, to create a unique form of liability for "Saturday night special" handguns. The court reasoned that the law of strict liability is fluid and must change to fit the circumstances of a particular case in question,[165] and that this unique form of liability is consistent with the state's public policy.[166]

The only apparent difference between the "handgun" and the "cigarette" and "asbestos" cases is whether the product is susceptible to misuse or illegal use. One may argue that the harm resulting from the illegal use of a product should not be considered in the risk benefit equation. This rationale, however, requires a distinction without a difference—illegal use versus foreseeable misuse.[167] Whether a product may be misused, illegally or otherwise, should not exempt it from risk utility

161 Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 159, 406 A.2d 140, 144 (1979) ("In other words, plaintiff's misuse of the product sheds no light on whether the product is reasonably fit and safe for its intended or reasonably anticipated use.").

162 304 Md. 124, 497 A.2d 1143 (1985).

163 *Id.* at 138, 497 A.2d at 1149. The court noted, however, that no previous decision of the Court of Appeals had ever expressly rested upon an analysis under the risk utility test. *Id.* at 137, 497 A.2d at 1149. The court also declined to apply the consumer expectation test to handguns. *Id.* at 135-36, 497 A.2d at 1148.

164 *Id.* at 138, 497 A.2d at 1149.

165 *See id.* at 140, 497 A.2d at 1150-51.

166 *Id.* at 144, 497 A.2d at 1152-53. Although the court professed not to be applying risk-utility test in concluding that strict liability should be imposed, its holding was premised on the fact that the product in question "presents particular problems for law enforcement officials." *Id.* at 144-45, 497 A.2d at 1153-54 (footnote omitted). Saturday Night Specials are generally characterized by short barrels, light weight, easy concealability, low cost, use of cheap quality materials, poor manufacture, inaccuracy and unreliability." *Id.* at 145-46, 497 A.2d at 1153-54. "[T]he Saturday Night Special [is] particularly attractive for criminal use and virtually useless for the legitimate purposes of law enforcement, sport, and protection of persons, property and businesses." *Id.* at 146, 497 A.2d at 1154 (footnote omitted).

167 *See* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979). "Fitness and suitability are terms largely synonymous with safety. *Cepeda* extended strict liability to include not only intended but also reasonably foreseeable uses of the product." *Id.* at 169, 406 A.2d at 149. In Cepeda v. Cumberland Eng'g. Co., 76 N.J. 152, 386 A.2d 816 (1978), the court noted that

> abnormal use is not an affirmative defense; it is rather for the plaintiff, in

scrutiny.[168]

V. Conclusion

It is apparent that some courts continue to grapple with the scope of the risk utility analysis and its applicability to certain classes of products. This is due to their misunderstanding of or unfamiliarity with the test and to the far reaching ramifications of a finding that a particular class of products has greater risks than benefits.

This article suggests what *should* happen when the courts are finally confronted with the unavoidably unsafe product that, when used as intended, results in more harm than good. Whether the judiciary will stand behind its professed philosophy that such a product should not be marketed and that the manufacturer should bear the costs of injury remains to be seen. But it is clear that if the courts mean what they say, their oft-expressed concerns for the victimized consumer will be accommodated through the application of the risk utility test.

> undertaking to prove that the unreasonable dangerousness of the article caused the injury, to show there was no abnormal use.
>
> It is, however, clear that many, if not most jurisdictions now acknowledge that in applying strict liability in tort for design defects manufacturers cannot escape liability on grounds of misuse or abnormal use if the actual use proximate to the injury was objectively foreseeable.

Id. at 177, 386 A.2d at 828 (citations omitted).

168 *See Suter*, 81 N.J. at 105, 406 A.2d 140. The court summarized "[t]he principle of strict liability" as follows:

> 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 in contact with the product are injured as a result thereof, then the seller shall be responsible for the ensuing damages.

Id. at 169, 406 A.2d at 149 (footnote omitted).