PRESUMED KNOWLEDGE OF DANGER: LEGAL FICTION GONE AWRY?*

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I. INTRODUCTION

When a student of the law embarks upon an investigation of products liability law in New Jersey, inevitably, attention is focused on the "Wade-Keeton approach."[1] This approach represents an attempt by two preeminent legal scholars to articulate the conceptual difference between product liability actions grounded in negligence and those premised upon strict liability.[2] In negligence actions, the examination is focused on the conduct of the manufacturer that placed a product on the market, and whether the decision to do so was reasonable, given all the attendant circumstances.[3] In strict liability actions, "the issue is whether the product is defective, regardless of how or why it became defective."[4]

This article suggests that, while the legal fiction of presumed knowledge was useful in the embryonic stages of product liability

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* This article in no way reflects the position of the New Jersey courts.

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2 *See* Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 568 (1969); Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 761-64 (1983) [hereinafter Wade, *Knowledge Unavailable Prior to Marketing*]; Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 834-37 (1973) [hereinafter Wade, *On the Nature of Strict Tort*]; Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 15 (1965) [hereinafter Wade, *Strict Tort Liability*].

3 L. BASS, PRODUCTS LIABILITY § 2.05 (1986). "Under the theory of negligence, the standard of responsibility is the duty to exercise due care in supplying products that do not present an unreasonable risk of injury or harm to the public." *Id.*

4 *Id.* at § 2.06. "In distinguishing negligence from strict liability, negligence looks to the conduct of the manufacturer while strict liability focuses on the character of the product." *Id. See also* Keeton, *supra* note 2, at 563 (discussing the practical differences between a negligence and a strict liability action).

law,[5] the case law development in New Jersey indicates that this notion should either be reformulated or stricken from the language of strict liability law.[6] In order to establish that conclusion, this article will trace the development of strict liability with primary emphasis upon New Jersey case law, as well as an examination of essential cases from other jurisdictions. The analytical emphasis will rest upon the judicial interpretation of the Wade-Keeton construct and whether that construct has outlived its usefulness.

II. The Genesis of Strict Products Liability

Years before the New Jersey Supreme Court embarked upon its difficult journey into the realm of strict products liability, the seminal concepts of that doctrine were formulated in 1944 by the California Supreme Court in *Escola v. Coca Cola Bottling Co.*[7] In *Escola*, the California Supreme Court affirmed a jury verdict in favor of a waitress who was injured by an exploding soda bottle.[8] The court concluded that the facts entitled the plaintiff "to rely on the doctrine of res ipsa loquitur to supply an inference of negligence."[9]

In his concurring opinion, Justice Traynor articulated an innovative and radically different basis for the imposition of liability in similar fact situations. In words that would become the cornerstone of strict liability, Justice Traynor asserted that "it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, know-

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[5] In 1983, in a postscript to one of his numerous products liability articles, Dean Wade suggests as much, claiming that assumed knowledge is a legal fiction, "and, like all fictions, it can create difficulties if taken literally." Wade, *Knowledge Unavailable Prior to Marketing*, *supra* note 2, at 764. The general rule regarding manufacturer's knowledge has been that "[i]f a manufacturer is actually aware of a hazard, or should be aware, it will be liable for the injuries which occur from a foreseeable use of the product and its attendant hazardous qualities." L. Bass, *supra* note 3, § 3.07.

[6] This hypothesis has been most graphically illustrated in the New Jersey Supreme Court's decision in Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982). *See infra* notes 63-74 and accompanying text.

[7] 24 Cal. 2d 453, 150 P.2d 436 (1944).

[8] *Id.* at 461, 150 P.2d at 440. The plaintiff, a restaurant waitress, sustained injuries while placing bottles of soda into a refrigerator. *Id.* at 456, 150 P.2d at 437-38. The bottles, part of a larger soda delivery, had not been moved since they had been placed in the restaurant by the defendant's driver some thirty-six hours earlier. *Id.*, 150 P.2d at 437. As the plaintiff picked up one of the bottles and began to move it towards the refrigerator, the bottle exploded, causing serious injury to her hand. *Id.*, 150 P.2d at 438.

[9] *Id.* at 461, 150 P.2d at 440.

ing that it is to be used without inspection, proves to have a defect that causes injury to human beings."[10] Thus, the manufacturer would be forced to guarantee the quality and safety of a product even when there is no evidence of negligence.[11]

Nineteen years later, the California Supreme Court adopted the doctrine of strict liability in *Greenman v. Yuba Power Products, Inc.*[12] Writing for a unanimous court, Justice Traynor echoed his concurring opinion in *Escola* by stating that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[13] The imposition of such liability was designed "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[14]

The rationale supporting these early California cases was reflected in 1965 in section 402A of the *Restatement (Second) of Torts*. As opposed to the traditional examination of the manufacturer's conduct in a tort case sounding in negligence, section 402A dictates that liability will be imposed upon the seller of a defective product that causes injury despite the seller's reasonable conduct.[15] Section 402A places the responsibility to bear the costs of accidental injuries caused by defective products on the manu-

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[10] *Id.* (Traynor, J., concurring) (citations omitted). Citing public policy justifications, Justice Traynor stated that "[e]ven if there is no negligence . . . responsibility [must] be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." *Id.* at 462, 150 P.2d at 440 (Traynor, J., concurring).

[11] *See id.* at 465, 150 P.2d at 442.

[12] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[13] *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700. In *Greenman*, the court affirmed a jury verdict in favor of a consumer who sustained serious injuries as a result of the defective design and construction of a tool manufactured by the defendant. *Id.* at 59-60, 377 P.2d at 898-99, 27 Cal. Rptr. at 698-99.

> To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.

Id. at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

[14] *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

[15] RESTATEMENT (SECOND) OF TORTS § 402A (1965). The comment to section 402A clearly states that application of strict liability "is not exclusive, and does not preclude liability based upon the alternative ground of negligence of the seller, where such negligence can be proved." *Id.* at comment a.

facturers who place those products into the stream of commerce.[16] Furthermore, inquiry under this provision centers on the product and its defectiveness, rather than on the manufacturer's conduct.[17]

It was against this background that Wade and Keeton sought to formulate the meaning of defect in strict liability.[18] As an initial matter, it should be noted that this exploration of strict liability will be limited to the manufacturer's liability for a design defect, as opposed to a manufacturing defect.[19] In 1965, Wade posed a question which is fundamental to an analysis of strict liability cases: "[A]ssuming that the defendant had knowledge of the condition of the product, would he then have been acting unreasonably in placing it on the market?"[20] As for Keeton, his first pronouncement of these principles preceded both Justice Traynor's opinion in *Greenman* and section 402A.[21] In the con-

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16 *Id.* at comment c.

17 *See* Wade, *On Product Design Defects and Their Actionability*, 33 VAND. L. REV. 551, 553 (1980) (discussing emphasis placed on analysis of the product in strict liability actions).

18 Wade, *Knowledge Unavailable Prior to Marketing*, *supra* note 2, at 741-45; Wade, *Strict Tort Liability*, *supra* note 2, at 14-21.

19 Manufacturing defect implies that the product in question will fail to meet the manufacturer's own quality control standards. L. BASS, *supra* note 3, § 4.04. Two types of manufacturing defects can render a product defective: either flaws in the components or raw materials of a product or mistake in the assembly of component parts. *Id.* In such cases, the inquiry concerns "whether the defect is due to a mistake in manufacturing, normal wear and tear, or misuse. The test is whether the product was in the same defective condition at the time it left the defendant's control as at the time the plaintiff was injured." *Id.* (footnote omitted).

In design defect cases, however, all products are constructed according to the specifications of the manufacturer, but nevertheless, the product still contains an inherent danger.

> Design defects occur when a product does not adequately protect against risks of injury, fails to perform intended functions safely, does not protect adequately against the danger it was supposed to guard against (a smoke detector that causes a fire), creates unreasonably dangerous side effects (the drug DES), or fails to minimize avoidable consequences in the event of an accident.

L. BASS, *supra* note 3, § 4.03. *See also* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 418, 573 P.2d 443, 446, 143 Cal. Rptr. 225, 228 (1978) (dual standard test to determine if product design is defective). Design defect cases can take the form of an inadequate technological design or a finding of defect due to a failure to warn or an inadequate warning concerning the danger of the product. *See* Beshada v. Johns-Manville Prod. Corp., 90 N.J. 191, 447 A.2d 539 (1982) (warnings relating to dangers of asbestos considered inadequate); Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 432 A.2d 925 (1981) (inadequacy of warnings regarding the danger of nitrocellulose); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979) (product defective due to lack of guard apparatus).

20 Wade, *Strict Tort Liability*, *supra* note 2, at 15.

21 *See* Keeton, *Products Liability—Current Developments*, 40 TEX. L. REV. 193 (1961).

text of an implied warranty, he wrote:

> A product is not fit for the general purpose intended, if a reasonable man with full knowledge of all the properties and the danger therein, would continue to market the product because the utility of its use outweighs the danger. . . . The essential difference between warranty liability and negligence liability lies in the fact that excusable ignorance of a defect or the properties of a product is immaterial as regards warranty liability.[22]

Even at this early stage in the evolution of their hypotheses on this topic, subtle differences existed between the two commentators. For instance, Wade imputes the manufacturer with knowledge of the danger of the product,[23] while Keeton would impute both knowledge of the danger and knowledge of the defect.[24] It was not until 1973, in the wake of the California Supreme Court decision in *Cronin v. J.B.E. Olson Corp.*[25] that the differences between Keeton and Wade became evident.

In *Cronin*, the California Supreme Court reviewed a jury verdict in favor of a plaintiff who was injured as a result of the defective manufacture of metal hasps.[26] The plaintiff was a route salesman for a bakery and, in the course of his employment, drove a vehicle with built-in bread racks secured by metal hasps.[27] When the plaintiff's van was involved in a collision with another vehicle, one of the hasps broke, allowing loaded bread trays to strike the plaintiff and propel him through the windshield.[28] The plaintiff alleged that the metal hasp was defectively manufactured, rendering it too weak to withstand the impact of the collision.[29]

The California Supreme Court compared the *Greenman* test to determine a manufacturer's culpability to the "unreasonably dangerous" language of section 402A of the *Restatement (Second) of Torts*.[30] The court expressed concern that the phrase "defective

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22 *Id.* at 210.

23 *See* Wade, *Strict Tort Liability*, *supra* note 2, at 15-16.

24 Wade, *Knowledge Unavailable Prior to Marketing*, *supra* note 2, at 761-64.

25 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

26 *Id.* at 124-25, 501 P.2d at 1155-56, 104 Cal. Rptr. at 435-36.

27 *Id.* at 124, 510 P.2d at 1155, 104 Cal. Rptr. at 435.

28 *Id.*

29 *Id.*, 501 P.2d at 1156, 104 Cal. Rptr. at 436. The plaintiff alleged that the metal hasp was "exceedingly porous, contained holes, pits and voids, and lacked sufficient tensile strength . . . ." *Id.*

30 *Id.* at 131-32, 501 P.2d at 1161, 104 Cal. Rptr. at 441. Although the court noted that "the similarities between the *Greenman* standard and the Restatement formulation are greater than their differences," it did acknowledge that there was "an apparent divergence in the two formulations." *Id.*

condition unreasonably dangerous" as contained in section 402 would lead to the utilization of a bifurcated standard.[31] Such a standard would place a substantially onerous burden on the plaintiff in strict liability litigation.[32]

Additionally, the court indicated that the test articulated in *Greenman* could be easily applied "to the full range of products liability situations, including those involving 'design defects.' "[33] The California Supreme Court then dismissed the perceived distinction between defects in design and defects which arise due to manufacturing processes as untenable.[34] Such distinctions would only result in the creation of a more difficult burden of proof for the injured consumer.[35] Thus, the California Supreme Court effectively struck the "unreasonably dangerous" language of section 402A, instead announcing that:

> We believe the *Greenman* formulation is consonant with the rationale and development of products liability law in California because it provides a clear and simple test for determining whether the injured plaintiff is entitled to recovery. We are not persuaded to the contrary by the formulation of section 402A which inserts the factor of an "unreasonably dangerous" condition into the equation of products liability.[36]

This pronouncement by the California Supreme Court provoked criticism from many commentators, including Wade and Keeton.[37] In suggesting an appropriate test of a defective product, Keeton wrote:

> A product is defective if it is unreasonably dangerous as marketed. It is 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 trial* outweighed the benefits of the way the product was so designed and

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31 *Id.* at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442. A bifurcated test "would require the finder of fact to conclude that the product is, first, defective and, second, unreasonably dangerous." *Id.* (citation omitted).

32 *Id.*

33 *Id.* at 134, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

34 *Id.*, 501 P.2d at 1163, 104 Cal. Rptr. at 443. The court commented that the creation of a distinction between design and manufacturing defects would create situations where "it would be advantageous to characterize a defect in one rather than the other category." *Id.*

35 *Id.*

36 *Id.*

37 *See* Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339 (1974); Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973); Wade, *On the Nature of Strict Tort*, *supra* note 2; Comment, *Elimination of "Unreasonably Dangerous" from § 402A—The Price of Consumer Safety?*, 14 DUQ. L. REV. 25 (1975).

marketed.[38]

This however is significantly different from Wade's approach to the same issue. In 1973, Wade suggested the application of the following seven factors to evaluate the culpability of a manufacturer:

> (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.[39]

Thus, a dichotomy existed between Wade and Keeton concerning the point in time when knowledge was imputed.[40] With this theoretical distinction as a backdrop, the New Jersey Supreme Court embarked upon its journey through the vicissitudes of strict products liability law.

III. THE NEW JERSEY SUPREME COURT'S APPLICATION OF THE WADE AND KEETON APPROACHES

An examination into the New Jersey Supreme Court's analysis of strict products liability and its consideration of Wade and

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[38] Keeton, *supra* note 37, at 37-38 (emphasis in original). Clearly Keeton was imputing the defendant manufacturer with knowledge of dangers that are scientifically unknowable at the time of marketing.

[39] Wade, *On the Nature of Strict Tort*, *supra* note 2, at 837-38. Wade therefore limited the presumed knowledge of the dangerous condition of the product to that which was scientifically knowable at the time of marketing. *Id.* at 834.

[40] One of the first acknowledgments of this dichotomy noted that "[t]he Wade and Keeton formulations of the standard appear to be identical except that Keeton would impute the knowledge of dangers at time of trial to the manufacturer, while Wade would impute only the knowledge existing at the time the product was sold." Phillips v. Kimwood Mach. Co., 269 Or. 485, 492 n.6, 525 P.2d 1033, 1036 n.6 (1974) (citations omitted).

Keeton's ideas commences with the case of *Cepeda v. Cumberland Engineering Co.*[41] In *Cepeda*, the plaintiff sought relief on the theory of strict liability for defendant's defective design of its product.[42] The product in question was a machine that cut strands of plastic into small pellets.[43] The manufacturer had not made any provision to prevent the machine from operating if the safety guard was removed.[44] Thus, it was the failure of the manufacturer to equip the machine with such a safety device that constituted the design defect which formed the basis for the suit.[45]

In evaluating the application of the "unreasonably dangerous" requirement of section 402A to design defect cases, the majority reviewed the writings of Wade and Keeton.[46] However, the court opined that consideration of the "unreasonably dangerous" element was only appropriate "if understood to render the liability of the manufacturer substantially coordinate with liability on negligence principles."[47]

The New Jersey Supreme Court had occasion to again consider design defect issues in *Suter v. San Angelo Foundry & Machine Co.*[48] The alleged design defect was the lack of a guard apparatus which would have prevented the accidental activation of the machine.[49] The court began its examination of controlling principles in design defect cases by stating a maxim of strict products liability law.

> 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

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41 76 N.J. 152, 386 A.2d 816 (1978).

42 *Id.* at 161, 386 A.2d at 820.

43 *Id.* at 164, 386 A.2d at 822.

44 *Id.* at 164-65, 386 A.2d at 822. In addition to protecting the fingers of workers, "the guard was also designed (1) to aid production as a control over the direction in which the strands were fed to the rollers and (2) to contain stray pellets which might bounce out of the machine." *Id.* at 165, 386 A.2d at 822.

45 *Id.* at 161, 386 A.2d at 820. The electronic interlock mechanism, which would have prevented the machine from operating without the guard in place, was alleged to be readily available and could have been easily installed. *Id.*

46 *Id.* at 170, 171 & n.4, 172, 386 A.2d at 825 & n.4, 826 (citing Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 39 (1973); Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 562-63 (1969); Wade, *On the Nature of Strict Tort Liability For Products*, 44 MISS. L.J. 825, 837 (1973)).

47 *Id.* at 172, 386 A.2d at 825.

48 81 N.J. 150, 406 A.2d 140 (1979).

49 *Id.* at 157, 406 A.2d at 143.

damages.[50]

Next, the court emphasized the plaintiff's burden of proving that the product defect existed when the manufacturer placed the article into the stream of commerce.[51] According to the majority opinion, it would be proper in design defect cases for the jury to consider the reasonableness of the manufacturer's conduct in light of the state of the art at the time of distribution.[52] The court posited that "the state of the art refers not only to the common practice and standards in the industry but also to other design alternatives within practical and technological limits at the time of distribution."[53] It is interesting to note that in devising its design defect analysis, the New Jersey Supreme Court relied repeatedly on Wade's construct,[54] but omitted reference to Keeton altogether.

Two years after its decision in *Suter*, the New Jersey Supreme Court again addressed the issue of design defect in *Freund v. Cellofilm Properties, Inc.*[55] The plaintiff in that case was employed by the defendant corporation to maintain and unload drums of nitrocellulose.[56] This chemical, used in the manufacture of lacquers and paints, was extremely flammable.[57] The plaintiff was injured when some of the chemical spilled from the mixing machine where he was working and caught on fire.[58] The plaintiff then brought an action alleging that the warning provided by the manufacturer of the nitrocellulose inadequately informed him of the fire hazard posed by the chemical.[59]

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[50] *Id.* at 169, 406 A.2d at 149 (footnote omitted).

[51] *Id.* at 170, 406 A.2d at 150. The court noted that the plaintiff has no burden to demonstrate that the defect was created by the manufacturer. *Id.* However, the court further stated, "[w]hat is important is that the defect did in fact exist when the product was distributed by and was under the control of defendant." *Id.*

[52] *Id.* at 171, 406 A.2d at 150. State of the art is defined as "that level of scientific and technical knowledge that exists irrespective of whether that knowledge has been transformed into marketable products. L. BASS, *supra* note 3, § 4.18.

[53] *Suter*, 81 N.J. at 172, 406 A.2d at 151.

[54] *Id.* at 171, 172 n.9, 174 & n.10, 406 A.2d at 150, 151 n.9, 152 & n.10 (citing Wade, *On the Nature of Strict Liability for Products*, 44 MISS. L.J. 825, 830-31, 835-38 (1973)).

[55] 87 N.J. 229, 432 A.2d 925 (1981).

[56] *Id.* at 233, 432 A.2d at 927.

[57] *Id.* "Nitrocellulose is extremely flammable even in liquid form, but when allowed to dry the chemical dust becomes even more dangerous." *Id.*

[58] *Id.* at 234, 432 A.2d at 927.

[59] *Id.* The warning on the drums read as follows:

> Fire may result if container is punctured or severely damaged—Handle carefully—Do not drop or slide—Hazard increases if material is allowed to dry—Keep container tightly closed when not in use—In case of spill or fire soak with water—For further information refer to MCA Chemical Safety Data Sheet DS-96.

In holding that a plaintiff is entitled to a strict liability jury charge in this inadequate warning case,[60] the court emphasized that "there is a significant distinction between negligence and strict liability theory, at least in terms of imputing to the manufacturer knowledge of the dangers inherent in the product."[61] The court thus concluded 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. Moreover, and importantly, the charge must make clear that knowledge of the dangerous trait of the product *is imputed to the manufacturer*.[62]

The facts of *Freund* did not require the court to address the element of time to determine when knowledge was imputed. Indeed, it would appear that neither the Wade nor Keeton construct of presumed knowledge of the dangerous propensity of the product was relevant to the New Jersey Supreme Court's decision since the manufacturer already placed a warning on the product, albeit inadequate. By its nature, the warning indicated that the manufacturer was cognizant of a foreseeable harm in the use of its product.

The apparently settled issue of the time element for the imputation of knowledge in the strict liability design defect setting was altered by the court in the oft-critiqued case of *Beshada v. Johns-Manville Products Corp.*[63] The proliferation of asbestos litigation in New Jersey and throughout the country from the mid-1970s on provided the historical backdrop to *Beshada*.[64] Although it is not the intention here to explore the procedural history of *Beshada* in a detailed sense,[65] it will suffice to say that the case went to the New Jersey Supreme Court as a strict liability action, arising out of the failure to warn of the hazards posed by asbestos exposure.[66] Asserting a state-of-the-art defense, the defendants contended that their

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Id. at 235, 432 A.2d at 928.

60 *Id.* at 247-48, 432 A.2d at 934.

61 *Id.* at 240, 432 A.2d at 931.

62 *Id.* at 242-43, 432 A.2d at 932 (emphasis added).

63 90 N.J. 191, 447 A.2d 539 (1982).

64 *See* N.J. ADMIN. OFFICE OF THE COURTS COMM. ON CIVIL CASE MANAGEMENT & PROCEDURES ON TOXIC TORT LITIG., REPORT OF THE WORKING GROUP ON ASBESTOS LITIG. (Draft, Nov. 1983); Berry, *Beshada v. Johns-Manville Prod. Corp.: Revolution—Or Aberration—In Products Liability Law*, 52 FORDHAM L. REV. 786 (1984).

65 For such a discussion, see Berry, *supra* note 64, at 791-93.

66 *See Beshada*, 90 N.J. at 197, 447 A.2d at 542.

failure, prior to the 1960s, to warn of the dangers reflected the medical community's lack of knowledge regarding the hazards of asbestos at that point.[67] Citing *Freund*, the *Beshada* court declared that knowledge of product danger, as it exists at the time of trial, would be imputed to the defendant, thereby rendering the evidentiary state of the art defense irrelevant.[68]

However, this reliance upon *Freund* was misplaced, since *Freund* involved an analysis of inadequate warning situations as opposed to failure to warn.[69] In terms of the Wade and Keeton constructs, the *Beshada* court clearly adopted Keeton's approach of imputing to the manufacturer knowledge of the scientifically discoverable risks as they existed at the time of trial.[70] This declaration constituted a profound change in the New Jersey Supreme Court's philosophical development regarding products liability. As a practical matter, in a failure to warn case the imputation of knowledge of danger as of the time of trial results in a presumption of knowledge that the product was defective, as opposed to an imputation of knowledge of the reasonable foreseeability of harm.[71]

The distinction is not one of mere semantics. Evidently, if the presumption of knowledge of defect, as opposed to danger, is the essence of the strict liability calculus, all the plaintiff need prove is that the defendant's product was the proximate cause of injury. Instead of creating a rebuttable presumption that its product is dangerous,[72] defect is conclusively established and only the issue of

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67 *Id.*, 447 A.2d at 542-43.

68 *Id.* at 204, 447 A.2d at 546.

69 In *Freund*, the plaintiff was injured as a result of his use of an extremely flammable chemical, and the issue was framed clearly in terms of whether the plaintiff received sufficient warning of the chemical's danger. Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 233, 432 A.2d 925, 927 (1981).

70 *Beshada*, 90 N.J. at 205, 447 A.2d at 547. The concept of "scientific knowability" appears problematic for the defendant in *Beshada*. Rather than imputing the defendant with the existing knowledge at the time of distribution, defendant is held to a standard of knowing that would be ascertained through an unquantifiable amount of research and investigation. *Id.* at 206, 447 A.2d at 547.

71 *See id.* at 204, 447 A.2d at 546.

72 The trial court in *Beshada* was mindful of the opinion in Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). In *Barker*, the court noted that knowledge concerning feasibility and alternative design rests squarely with the defendants. *Id.* at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237. Hence, the court concluded "that once the plaintiff makes a *prima facie* showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective." *Id.* The genesis of the Wade-Keeton approach that fixes a rebuttable presumption of knowledge of danger on the defendant is reflected in the *Barker* opinion.

proximate cause stands between the defendant and the imposition of liability. The extension of the "legal fiction" of presumed knowledge in *Beshada* strayed far afield of New Jersey precedent, for previously, this notion had been nothing more than a theoretical construct by which to articulate the differences between strict liability and negligence.

If the *Beshada* opinion represented the "legal fiction"[73] of Dean Keeton taken to an extreme, the subsequent decisions of the New Jersey Supreme Court represent a well reasoned retraction. Although the first case after *Beshada* was essentially a reaffirmation of its principles,[74] the court in *O'Brien v. Muskin Corp.*,[75] later acknowledged the validity of the state-of-the-art defense in design defect cases when the risk-utility analysis was applied.[76] Moreover, unlike *Beshada* where the adoption of the Keeton approach in a failure to warn case translated into presumption of knowledge of defect by the manufacturer, thereby relieving the plaintiff of that burden,[77] the *O'Brien* court clarified the requirement that a plaintiff must prove defect as a necessary element of the prima facie case.

> Generally speaking, a plaintiff has the burden of proving that (1) the product was defective; (2) the defect existed when the product left the hands of the defendant; and (3) the defect caused injury to a reasonably foreseeable user. Proof that the product was defective requires more than a mere showing that the product caused the injury. The necessity of proving a defect in the product as part of the plaintiff's *prima facie* case distinguishes strict from absolute liability, and thus prevents the manufacturer from also becoming the insurer of a product.[78]

Although *O'Brien* was a technological design case, the court's opinion appeared to forecast a departure from Keeton's "time of trial" theory while positing that the presumption of knowledge of dangerousness was rebuttable.[79]

Decided in 1984, *Feldman v. Lederle Laboratories*[80] revealed yet another retreat from Keeton's theory. Like *Beshada*, *Feldman* in-

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73 *See generally* Wade, *Knowledge Unavailable Prior to Marketing*, *supra* note 2.

74 Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 451 A.2d 179 (1982). The *Michalko* case involved a defectively designed industrial machine, and the court, in accord with the precepts of *Beshada*, imputed the defendant with knowledge of the defect. *Id.* at 395-96, 451 A.2d at 183-84.

75 94 N.J. 169, 463 A.2d 298 (1983).

76 *Id.* at 182, 463 A.2d at 305.

77 *See Beshada*, 80 N.J. at 204, 447 A.2d at 546.

78 *O'Brien*, 94 N.J. at 179-80, 463 A.2d at 303 (citations omitted).

79 *See id.* at 183-84, 463 A.2d at 305.

80 97 N.J. 429, 479 A.2d 374 (1984).

volved strict liability in a failure to warn context, differing only in so far as it concerned prescription drugs as opposed to asbestos.[81] In its continued withdrawal from Keeton's "time of trial" approach, the New Jersey Supreme Court declared that the defendants would bear the burden of presenting proofs concerning "the status of knowledge in the field *at the time of distribution*."[82]

Soon after, the New Jersey Supreme Court was again called upon to decide a strict liability inadequate warning case in *Campos v. Firestone Tire & Rubber Co.*[83] The revitalization of rebuttable presumption of knowledge of dangerousness is clear in the court's depiction that in an inadequate warning case "[t]he adequacy of the warning is to be evaluated in terms of what the manufacturer actually knew and what he 'should have . . . known based on information that was reasonably available or obtainable and [that] should have alerted a reasonably prudent person to act.' "[84] Significantly, the *Campos* court imputed the manufacturer with knowledge of "the dangerousness of the product,"[85] as opposed to the stringent "presumption of defect" phraseology of *Beshada*. This subtle distinction comports with the requirement that a plaintiff prove the existence of a defect to establish a prima facie case in strict liability.

Most recently the New Jersey Supreme Court had occasion to consider the crux of a strict liability action in *Waterson v. General Motors Corp.*[86] In *Waterson*, the court completely eliminated the presumption of knowledge language while articulating the strict liability standard in the context of a products liability action.

> The essence of an action in strict liability is that the injured party is relieved of the burden of proving the manufacturer's negligence. The injured party need prove, for the party's prima facie case, only that the injury-causing product was un-

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81 *Id.* at 450, 479 A.2d at 385. During infancy, the plaintiff was administered a drug that was designed to prevent secondary infections arising from various childhood diseases. *Id.* at 436, 479 A.2d at 377. As a result of ingesting this drug, plaintiff's primary and secondary teeth became severely discolored. *Id.* at 437, 479 A.2d at 378. During the period that the plaintiff was taking the drug, there was increased evidence of a cause and effect relationship between the use of the drug and tooth discoloration. *Id.* at 437-39, 479 A.2d at 378-79. The New Jersey Supreme Court concluded that "a reasonably prudent manufacturer will be deemed to know of reliable information generally available or reasonably obtainable in the industry or in the particular field involved." *Id.* at 453, 479 A.2d at 387.

82 *Id.* at 456, 479 A.2d at 388 (emphasis added).

83 98 N.J. 198, 485 A.2d 305 (1984).

84 *Id.* at 206, 485 A.2d at 309 (quoting Feldman v. Lederle Laboratories, 97 N.J. 429, 452, 479 A.2d 374, 386 (1984)).

85 *Id.* at 205, 485 A.2d at 309.

86 111 N.J. 238, 544 A.2d 357 (1988).

> safe or unfit for its intended or foreseeable use at the time it left the manufacturer's control and that the injuries sustained arose from the unsafe or unfit condition of the product.[87]

Perhaps *Waterson* represents the New Jersey Supreme Court's adoption of Dean Wade's ultimate suggestion that "there is no longer any particular value in using the assumed-knowledge language."[88]

IV. CONCLUSION

As section 402A of the *Restatement (Second) of Torts* prepares to celebrate its twenty-fifth anniversary, perhaps the presumed knowledge theory of either Wade or Keeton would no longer survive its risk-utility analysis. Indeed, as witnessed in *Beshada*, the potential for undue and unintended consequences resulting from its invocation outweighs its utility as a theoretical construct to distinguish between strict liability and negligence. The New Jersey Supreme Court cases since *Beshada* evidence a return to presumption of knowledge of dangerousness as a rebuttable presumption, and the court's recent statement in *Waterson* appears to embrace Dean Wade's suggestion that the construct be abandoned. Only future cases, however, will decide the fate and the efficacy of this tortuous concept in strict products liability law in New Jersey.

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87 *Id.* at 267-68, 544 A.2d at 372. At issue in *Waterson* was "what effect, if any, plaintiff's failure to wear a seat belt has on her right to recover damages for the personal injuries she received as a result of the accident caused by the defective axle." *Id.* at 241, 544 A.2d at 358.

88 *See* Wade, *Knowledge Unavailable Prior to Marketing*, *supra* note 2, at 764.