Fordham Law Review

Volume 52 | Issue 5 | Article 3

1984

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Recommended Citation
Andrew T. Berry, *Beshada v. Johns-Manville Products Corp.: Revolution-Or Aberration-In Products Liability Law*, 52 Fordham L. Rev. 786 (1984).
Available at: https://ir.lawnet.fordham.edu/flr/vol52/iss5/3

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BESHADA v. JOHNS-MANVILLE PRODUCTS CORP.: REVOLUTION—OR ABERRATION—IN PRODUCTS LIABILITY LAW

*ANDREW T. BERRY**

INTRODUCTION

The elusive concept of design defect in strict products liability,[1] as it was interpreted by the New Jersey Supreme Court in *Beshada v. Johns-Manville Products Corp.*,[2] was recently examined in these pages.[3] In *Beshada*, the court held that defendants that sold asbestos products without warning of the products' dangers would be liable even though those dangers were "undiscoverable" at the time the products were marketed.[4] This result, including the court's rejection of the "state-of-the-art" defense,[5] was characterized in this journal as

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* McCarter & English, New Jersey; A.B. 1962, Princeton University; LL.B. 1965, Harvard University. Mr. Berry argued for certain appellees in Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 447 A.2d 539 (1982).

1. *See, e.g.*, O'Brien v. Muskin Corp., 94 N.J. 169, 181, 463 A.2d 298, 304 (1983); Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 Vand. L. Rev. 593, 600-02 (1980); Keeton, *Products Liability—Design Hazards and the Meaning of Defect*, 10 Cum. L. Rev. 293, 297-98 (1979); Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 Marq. L. Rev. 297, 304-05 (1977); Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 831-32 (1973) [hereinafter cited as Wade I].

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

3. Placitella & Darnell, Beshada v. Johns-Manville Products Corp.: *Evolution or Revolution in Strict Products Liability?*, 51 Fordham L. Rev. 801 (1983).

4. 90 N.J. at 196, 447 A.2d at 541.

5. *Id.* at 204-05, 447 A.2d at 546-47. The state-of-the-art defense relieves a manufacturer of liability if, under the scientific or technological standards existing at the time of sale, the dangers of a product were neither known nor "knowable" when the product was marketed. *See* 2 L. Frumer & M. Friedman, Products Liability § 16A[4][i], at 3B-176 to -176.4 (1983). In Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979), the New Jersey Supreme Court adopted what most would have regarded as the most expansive definition of state-of-the-art: industry standards plus other alternatives within scientific or technological limits at the time of distribution. *Id.* at 172, 406 A.2d at 151. Other authorities have adopted different definitions of state of the art, ranging from industry custom alone, to knowledge possessed by anyone at the time. Robb, *A Practical Approach to Use of State of the Art Evidence In Strict Products Liability Cases*, 77 Nw. U.L. Rev. 1, 4-5 (1982); *see* Note, *Product Liability Reform Proposal: The State of the Art Defense*, 43 Alb. L. Rev. 941, 945-53 (1979); Comment, *Requiring Omniscience: The Duty to Warn of Scientifically Undiscoverable Product Defects*, 71 Geo. L.J. 1635, 1635 n.2 (1983) [hereinafter cited as *Undiscoverable Product Defects*].

merely a well-reasoned "logical extension" of accepted principles of strict liability in tort.[6]

This Article suggests that *Beshada*, perhaps for case-specific reasons, was an unprecedented departure from prior products liability cases. In fact, the departure was sufficiently sharp to cause one of its two academic progenitors[7] to reject its logic,[8] and its judicial authors to restrict its holding.[9] This Article examines the prospects for the continued vitality of *Beshada* by reviewing the products liability law background from which it emerged, factors related to the case itself, the analysis relied on by the court, and the academic and judicial response to date. It concludes that *Beshada* can and should be limited to its unique factual situation.

I. The Background

By 1982, when *Beshada* was argued, the stream of products liability law in New Jersey had wound its way from the wellspring of *Henningsen v. Bloomfield Motors, Inc.*,[10] down through the main channels of *Cepeda v. Cumberland Engineering Co.*,[11] *Suter v. San Angelo Foundry & Machine Co.*,[12] and *Freund v. Cellofilm Properties, Inc.*[13] The latter group of cases all dealt with the slippery notion of design defect liability.[14]

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6. Placitella & Darnell, *supra* note 3, at 806-07.

7. *See* Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 172-75, 386 A.2d 816, 825-27 (1978) (citing Keeton, *supra* note 1; Wade I, *supra* note 1), *overruled*, Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 177, 406 A.2d 140, 153 (1979).

8. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. Rev. 734, 758-59 (1983) [hereinafter cited as Wade II]. Dean Keeton has yet to write his views on *Beshada*.

9. *See* O'Brien v. Muskin Corp., 94 N.J. 169, 183-84, 463 A.2d 298, 305 (1983). See *infra* notes 95-101 and accompanying text.

10. 32 N.J. 358, 161 A.2d 69 (1960).

11. 76 N.J. 152, 386 A.2d 816 (1978), *overruled*, Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 177, 406 A.2d 140, 153 (1979).

12. 81 N.J. 150, 406 A.2d 140 (1979).

13. 87 N.J. 229, 432 A.2d 925 (1981). For a review of the historical development of New Jersey strict products liability law, see Heavner v. Uniroyal, Inc., 63 N.J. 130, 146-52, 305 A.2d 412, 421-24 (1973).

14. The conceptual difficulties arise because the standard against which a defectively designed product is measured is more elusive than in the case of a manufacturing defect. *Compare* Smith v. Hobart Mfg. Co., 302 F.2d 570, 574 (3d Cir. 1962) (design defective if defendant should have expected plaintiff would remove safety guard or if guard would not have prevented injury) *and Suter*, 81 N.J. at 171, 406 A.2d at 150 (design defective if defendant failed to act in reasonably prudent manner in designing product) *with Cepeda*, 76 N.J. at 169, 386 A.2d at 824 (manufacturing defect exists if product as produced did not conform to product as intended). In a manufacturing defect case, the standard against which liability is measured is the

In *Cepeda*, the New Jersey Supreme Court, casting about for a standard against which to measure the concept of design defects in strict products liability, adopted the "risk-utility" or "Wade-Keeton" analysis.[15] Accepting Dean Wade's seven-factor threshold test,[16] the court approved a model jury instruction charging that a product is defective ("not duly safe") if it is "so likely to be harmful . . . that a reasonable prudent manufacturer . . . would not place it on the market."[17] The court did not address the time-related issue of scientific or technological feasibility but the product's "dangerous propensity . . . manifested at the trial [was] imputed to the manufacturer" in an attempt to establish an objective standard of foreseeability.[18]

The next year, in *Suter*, the court characterized the *Cepeda* holding as extending strict products liability "to include not only intended but also reasonably foreseeable uses of the product."[19] To avoid potential jury confusion, the court excised the "unreasonably dangerous" modifier of "defective condition" found in the Restatement (Second) of Torts[20] and held that the jury should determine only if "the product was reasonably fit, suitable and safe for its intended or foreseeable purposes when inserted by defendant into the stream of commerce."[21]

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manufacturer's own designs and specifications. O'Brien v. Muskin Corp., 94 N.J. 169, 181, 463 A.2d 298, 304 (1983). Failure to meet the standard proves the defect. *Id.* In contrast, design defect theory—attacking the judgment of the manufacturer in placing the product on the market as designed—does not provide a measuring standard and thus creates ambiguities in application. *See id.*; Birnbaum, *supra* note 1, at 599-600; Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 Tenn. L. Rev. 363, 367-68 (1965); Wade, *On Product Design Defects and Their Actionability*, 33 Vand. L. Rev. 551, 557 (1980) [hereinafter cited as Wade III].

15. 76 N.J. at 172, 386 A.2d at 825.

16. *Id.* at 174, 386 A.2d at 827. Dean Wade suggests that a court consider, among other things: "(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 . . . . (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance." Wade I, *supra* note 1, at 837-38.

17. 76 N.J. at 174, 386 A.2d at 827 (quoting Wade I, *supra* note 1, at 839-40).

18. *Id.* at 172, 386 A.2d at 825. The court's failure to deal clearly with the potential passage-of-time difficulties inherent in the imputed knowledge analysis could not have been inadvertent. Judge Conford, the Presiding Judge of the New Jersey Appellate Division who was temporarily assigned to the New Jersey Supreme Court, authored the opinion. He was a member of the American Law Institute while working on the opinion and, in May of 1977, had a discussion with Deans Wade and Keeton concerning the kind of knowledge that could be imputed to a defendant. Wade II, *supra* note 8, at 763.

19. 81 N.J. 150, 169, 406 A.2d 140, 149 (1979).

20. Restatement (Second) of Torts § 402A (1965). *Cepeda* had held that this language was a part of the strict liability test. 76 N.J. at 171-72, 386 A.2d at 825. To this extent, *Cepeda* was overruled by *Suter*. 81 N.J. at 177, 406 A.2d at 153.

21. 81 N.J. at 176, 406 A.2d at 153.

Moreover, in design defect cases, the jury should determine if the manufacturer, "being deemed to have known of the harmful propensity of the product, acted as a reasonably prudent one."[22] The court had earlier alluded to elements bearing on the issue of reasonable prudence, including:

> [T]he technological feasibility of manufacturing a product whose design would have prevented or avoided the accident, given the *known* state of the art. . . . [T]he 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.*[23]

Thus, the court apparently intended the reasonableness of the manufacturer's conduct, measured by what it could have done or known at the time of distribution, to be the standard for determining if a product is defective. *Suter*, however, did not draw a bright line between "conduct" and "product."

Rather than the conduct-oriented test found in *Cepeda*[24] and *Suter*,[25] the court in *Freund* applied a product-oriented test to a product that was defective because of an inadequate warning.[26] The court stated that the charge to the jury "must make clear that knowledge of the dangerous trait of the product is imputed to the manufacturer."[27] The court, however, was not presented with, and hence did not consider, exactly what knowledge was to be imputed—that discovered by the time of trial, or that available at the time of manufacture.[28] The court also noted that "where the design defect consists of

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22. *Id.* at 177, 406 A.2d at 153.
23. *Id.* at 172, 406 A.2d at 150-51 (emphasis added).
24. *Cepeda*, 76 N.J. at 174-75, 386 A.2d at 827.
25. *Suter*, 81 N.J. at 172, 406 A.2d at 150-51.
26. 87 N.J. 229, 239-241, 432 A.2d 925, 929-31 (1981). Justice Handler, writing for the court, eschewed the principle that cases ought to be decided on narrow grounds when possible. *Id.* at 243-44, 432 A.2d at 931-32. The plaintiff was injured by nitrocellulose, which, at the time of its sale, was known by the defendant to pose a risk of fire. *Id.* at 235, 432 A.2d at 928. This risk was acknowledged and admitted by the defendant at trial. *Id.* at 242-44, 432 A.2d at 932. That admission, as a matter of law, should have removed from the jury's consideration the issue of defendant's knowledge of the danger, and should have relieved the plaintiff of the burden of proving knowledge. Justice Handler could have reversed the verdict for the defense on that issue alone, and certainly could have reversed on that issue in part, thus permitting a characterization of much of his analysis as dictum.
27. *Id.* at 243, 432 A.2d at 932.
28. The cases relied upon by the court to support its product-oriented imputed knowledge approach involved dangers and risks known by the manufacturer, and thus did not implicate a "scientific unknowability" defense. *See, e.g.*, Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 810 (9th Cir. 1974) (highly flammable paint that the manufacturer admitted was "hazardous if not properly used under proper conditions"); Hamilton v. Hardy, 37 Colo. App. 375, 386, 549 P.2d 1099,

inadequate warning" the product's utility balanced against its risks is rarely at issue because a warning would not impair the product's utility.[29] As with the earlier cases, the court relied upon the seminal analysis of design defects in strict products liability law contained in the writings of Deans Keeton and Wade.[30]

While the New Jersey Supreme Court wrestled with the meaning of design defect in different contexts, it left intact the seemingly unexceptionable principles that a manufacturer is not the insurer of the safety of the product,[31] that the happening of an accident, without more, does not result in liability,[32] and that defendants would bear the burden of exculpating their product or conduct only in special, limited cases.[33] Against this background of legal principles and policies, *Beshada* began its journey to the New Jersey Supreme Court.

1109 (1976) (birth control pill; defendant deemed on notice from published medical literature); Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830, 832 (Iowa 1978) (power saw); Ulrich v. Kasco Abrasives Co., 532 S.W.2d 197, 199 (Ky. 1976) (abrasive wheel on portable grinding machine; recognized in industry that excessive speed would result in the disintegration of wheel); Phillips v. Kimwood Mach. Co., 269 Or. 485, 497, 525 P.2d 1033, 1038-39 (1974) (manufacturer knew of potential for injury caused by regurgitation of fibreboard from sanding machine); Berkebile v. Brantly Helicopter Corp, 462 Pa. 83, 92, 337 A.2d 893, 897-98 (1975) (rotor decay during climbing flight; recognized by manufacturer as danger associated with product use). In *Aller*, the defendants' knowledge "as of the time of the manufacture of the product" was the test used by the court. 268 N.W.2d at 837. In *Phillips*, the relevant test was whether the manufacturer knew of the danger "at the time the article was sold." 269 Or. at 494, 525 P.2d at 1037.

Although *Freund* was an inadequate warning case, the court ignored that part of the Restatement that specifically establishes the seller's obligation to warn of dangers "if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge." Restatement (Second) of Torts § 402A comment j (1965). Between *Cepeda* and *Suter*, the court had denied certification in Torsiello v. Whitehall Labs., 165 N.J. Super. 311, 398 A.2d 132 (App. Div. 1978), *certif. denied*, 81 N.J. 50, 404 A.2d 1150 (1979), which had relied on this comment in a prescription drug products liability context. *Id.* at 319-20, 398 A.2d at 136.

29. *Freund*, 87 N.J. at 242, 432 A.2d at 932. As to the consequences of this observation, see *infra* note 49.

30. 87 N.J. at 239, 432 A.2d 930 (citing Keeton, *Products Liability—Inadequacy of Information*, 48 Tex. L. Rev. 398 (1980); Wade II, *supra* note 8).

31. Traynor, *supra* note 14, at 366-67; Wade I, *supra* note 1, at 828.

32. *See* Mockler v. Russman, 102 N.J. Super. 582, 587, 246 A.2d 478, 480 (App. Div. 1968), *certif. denied*, 53 N.J. 270, 250 A.2d 135 (1969).

33. *See* Nopco Chem. v. Blaw-Knox Co., 59 N.J. 274, 284-85, 281 A.2d 793, 798-99 (1971); Anderson v. Somberg I, 134 N.J. Super. 1, 5-6, 338 A.2d 35, 37 (App. Div. 1973), *aff'd*, 67 N.J. 291, 338 A.2d 1, *cert. denied*, 423 U.S. 929 (1975). These cases shifted the ordinary burden of proving the cause of the accident because the defendants were in a significantly better position to identify the cause. Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 31-32, 427 A.2d 1121, 1127 (App. Div. 1981). This was not a factor in *Beshada* because the plaintiffs knew as well as the defendants the potential product hazards as they existed at the time of trial.

II. *Beshada*: Its Peculiar Facts and the Court's Analysis

Beshada is understood best not as a products liability case, but as an asbestos case. Thousands of such cases had been filed in state and federal courts throughout the country,[34] and hundreds were pending in the state courts of New Jersey.[35] At the time of the *Beshada* decision, a single trial judge had been specially assigned to hear all asbestos cases in the venue in which most of these cases in New Jersey were pending.[36] The attention the litigation had received from the media was significant, much of it sensational and almost all of it critical of the defendants.[37] Finally, an early, oft-cited asbestos case contained a harshly worded characterization of the asbestos defendants' liability.[38]

The lead complaint in *Beshada*, although pleading strict liability as a legal theory, specifically alleged that the defendants "knew or ought to have known" of the dangers of their asbestos products but had failed to warn the plaintiffs.[39] The plaintiffs thus assumed the burden of proof conventionally thought to be theirs under the Restatement.[40] Despite this, the plaintiffs in six consolidated cases, relying on *Freund*, moved for partial summary judgment on the state-of-the-art defense.[41] Although a state-of-the-art defense did not appear as a separate affirmative defense in the defendants' pleadings, the plaintiffs' characterization of their motion was the formulation ultimately accepted by the court.[42] The defendants opposed the motion on the

34. Nat'l L.J., Jan. 31, 1983, at 1, col. 1, 30, col. 1 (approximately 17,000 personal injury suits filed in connection with exposure to asbestos).

35. Committee on Civil Case Mgmt. & Procedures on Toxic Tort Litigation, N.J. Admin. Office of the Courts, Report of the Working Group on Asbestos Litigation 5 (Draft Nov. 1983) (available in files of *Fordham Law Review*) [hereinafter cited as Working Group on Asbestos Litigation].

36. *Beshada*, 90 N.J. at 198, 447 A.2d at 543.

37. *See, e.g*, *The Asbestos Peril*, Newsweek, May 8, 1978, at 66; *Asbestos: A Lethal Legacy*, Atlanta Constitution, Aug. 10, 1980, at 1F, col. 4; *Firms Using Asbestos Knew of its Dangers, Congressman Asserts*, Wall St. J., May 3, 1979, at 10, col. 2; *New Data on Asbestos Indicate Cover-up of Effects on Workers*, Wash. Post, Nov. 12, 1978, at A1, col. 5; *Asbestos Industry Accused of Conspiring to Suppress Warning of Health Hazards*, L.A. Times, June 28, 1978, at 8, col. 1; *You Can't Put a Price on Life*, Charlotte Observer, Feb. 28, 1978, at 1, col. 1; *Asbestos Absorption in People: The Long Range Effects*, ABC Nightline, Nov. 9, 1981 (Radio-TV Monitoring Service, Inc.) (available in files of *Fordham Law Review*); *See You in Court*, CBS Reports, July 9, 1980, at 9-11.

38. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1104 (5th Cir. 1973) (en banc) (calling warnings, when finally affixed to products in 1964, "black humor"), *cert. denied*, 419 U.S. 869 (1974).

39. Fifth Amended Complaint and Jury Demand at 8, Beshada v. Johns-Manville Prods. Corp., No. L-12930-79 (N.J. Super. Ct. Law Div. Nov. 19, 1979).

40. *See* Restatement (Second) of Torts § 402A comment j (1965).

41. *Beshada*, 90 N.J. at 198, 447 A.2d at 543.

42. *See id.* at 199, 447 A.2d at 543.

grounds that *Freund* should not apply to dangers unknowable at the time of distribution of the product, and that the motion was premature.[43]

Inasmuch as the factual record had been neither developed nor argued, the trial court regarded the motion as involving a question of law rather than fact.[44] Attempting to reconcile the conflicting strains in *Suter* and *Freund* in a manner that would apply throughout products liability law—not just asbestos cases—the trial judge denied the plaintiffs' motion and observed that the concept of knowledge at the time of manufacture is not conduct-oriented, but objective: "[W]hatever was known at the time of manufacture is imputed [to the manufacturer]."[45] The trial court thus found that knowledge of the product's hazards, as they were known at the time of manufacture, would be presumed, relieving the plaintiffs of the burden of going forward on the issue.[46] The defendants, however, would be permitted to rebut the presumption by showing the product's hazards were unknowable at the time of manufacture.[47] Plaintiffs' application to the New Jersey Appellate Division for leave to appeal the trial court's interlocutory

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43. Transcript of Motion to Strike State of the Art Defense at 37-39, Beshada v. Johns-Manville Prods. Corp., No. L-12930-79 (N.J. Super. Ct. Law Div. Oct. 9, 1981) [hereinafter cited as Transcript of Motion]. The defendants also pointed out that the defense involved evidence that would be relevant to plaintiffs' negligence and punitive damage claims. *See id.* at 39. In fact, plaintiffs in the *Beshada* case had prepared and served expert reports specifically addressing the knowledge available to the defendants at various points in time. It was not that plaintiffs were unable or unprepared to prove what defendants knew and when they knew it; instead, they declined that burden to preclude defendants' introduction of evidence that defendants did not know and could not have known of the dangers at the relevant times.

44. Transcript of Motion, *supra* note 43, at 51.

45. *Id.* at 53. The trial judge correctly read *Freund* and *Suter* to eliminate the reasonably prudent Tibetan monk defense. If the knowledge of a product's dangerous propensities exists and is generally available—which may be different from generally known, and which is almost certainly different from that known by the hypothetical monk—the reasonableness of a manufacturer in not acquiring the knowledge is not a defense. Furthermore, there will be little distinction between "could have known" and "should have known" in most instances because manufacturers are held to the standard of experts. 1 L. Frumer & M. Friedman, *supra* note 5, § 7.01[4], at 118.6(3)-.7.

46. Transcript of Motion, *supra* note 43, at 60-61.

47. *Id* at 54-55. On rebuttal, of course, plaintiffs could have controverted the defendants' assertions of "unknowability," using the same evidence they had already prepared for their case-in-chief. In reaching this burden shifting result, the trial judge may have been influenced by Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). That case required the defendant, once plaintiff established that the product's design proximately caused the injury, to prove by a preponderance of the evidence that the utility of the product outweighed its risks. *Id.* at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

order was denied, but leave to appeal was granted by the supreme court.[48]

The New Jersey Supreme Court relied primarily on a policy analysis in rejecting the use of the state-of-the-art defense in failure to warn cases based on strict liability.[49] The court, in reaching its conclusion, identified and analyzed three policies underlying strict products liability: risk spreading, accident avoidance, and simplification of the fact-finding process.[50]

The court advanced only one affirmative reason for using the risk-spreading rationale to extend liability for unknowable dangers to manufacturers—the "normative premise" that the cost of injuries should be spread among those who produce, distribute and purchase manufactured products instead of imposing it on "innocent victims who suffer illnesses."[51] This analysis has the virtue of simplicity, but simpler is not necessarily better when the interrelationship between economics and tort law is made even more complex by the peculiar time-related aspects of the case. When the time of trial is decades after the production of the product in question and knowledge of the risks is

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48. *Beshada*, 90 N.J. at 199, 447 A.2d at 543. Although there was no record below except the pleadings and the trial court's opinion, the standards for permitting an interlocutory appeal, N.J. Ct. R. 2:12-4, apparently were met by the need to provide guidance for the trial courts handling the hundreds of pending cases.

49. 90 N.J. at 205-09, 447 A.2d at 547-48. In undertaking this analysis, the court assumed that "a warning can generally be added without diminishing utility." *Id.* at 201 n.5, 447 A.2d at 545 n.5. If that is true, strict liability may have become absolute liability in the failure to warn context. Any warning of an unknown risk that a manufacturer might include with its product would, of necessity, be vague. Such a warning may be considered inadequate to warn of the risk and ineffective in protecting the manufacturer from liability. *See* Yarrow v. Sterling Drug, Inc., 263 F. Supp. 159, 163 (D.S.D. 1967), *aff'd*, 408 F.2d 978 (8th Cir. 1969); Mahr v. G.D. Searle & Co., 72 Ill. App. 3d 540, 562, 390 N.E.2d 1214, 1230 (1979); Baker v. St. Agnes Hosp., 70 A.D.2d 400, 406-07, 421 N.Y.S.2d 81, 86 (1979); Seley v. G.D. Searle & Co., 67 Ohio St. 2d 192, 198, 423 N.E.2d 831, 837 (1981). On the other hand, if such warnings were deemed adequate, all products that might involve an unknown risk would carry warnings. Any particular and precise warning against serious and known risks therefore would become less effective. *See* McCarthy, Robinson, Finnegan & Taylor, *Warnings on Consumer Products: Objective Criteria for Their Use*, 26 Proc. of Human Factors Soc'y 98, 100 (1982); Slovic, *The Psychology of Protective Behavior*, 10 J. Safety Research 58, 61-64 (1978). Furthermore, a warning might indirectly impair the utility of a product because an effective warning could only be given after research or the passage of time—both potentially costly—revealed precisely what to say. *See* Leibowitz v. Ortho Pharmaceutical Corp., 224 Pa. Super. 418, 432-34, 307 A.2d 449, 457-59 (1973) (per curiam).

50. *Beshada*, 90 N.J. at 205-07, 447 A.2d at 547-48.

51. *Id.* at 205-06, 447 A.2d at 547. The court also reasoned that if risk spreading is acceptable for unknown risks, it ought to be equally acceptable for unknowable risks. *Id.* at 206, 447 A.2d at 547. This reasoning, however, ignores the substantial overlap between known and knowable in the ordinary case. See *supra* note 45.

not available until the time of trial,[52] risk spreading as articulated in the earlier New Jersey cases may not work at all. If the product is no longer marketed at the time of trial, the loss cannot be spread through an increase in the product's price. This presents two possibilities: Losses may be spread by increasing the price of products wholly unrelated to those causing injury to pay for increased insurance premiums, reserves, settlements and judgments;[53] or the price of products sold in the past may have been raised in anticipation of some indefinite, unknowable contingent obligation that might arise at a future point from losses not susceptible of estimation at the time of manufacture. Both alternatives produce inefficient pricing policies.[54] Although the underwriting principles relating to casualty insurance risks are bound to have a measure of imprecision when insuring against losses from defectively designed products,[55] that imprecision is compounded if manufacturers must insure against unknowable risks that may not become apparent for many years.[56]

The court also incorrectly used a two-party model—the manufacturers and the plaintiffs—for its rudimentary risk-spreading analy-

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52. Many insulation manufacturers, including some of the defendants in *Beshada*, had substituted other materials for asbestos a number of years prior to trial. *See* I. Selikoff & D. Lee, Asbestos and Disease 464-67 (1978). At least one defendant in *Beshada* had been out of the insulation business for nearly a quarter of a century at the time of trial. Brief of Defendant-Respondent Owens-Illinois, Inc. at 15, Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 447 A.2d 539 (1982).

53. Comment, *Solving the Products Liability Insurance Crisis: A Study of the Role of Economic Theory in the Legislative Reform Process*, 31 Mercer L. Rev. 755, 765 (1980). Assuming an inelastic demand, the prices of the new products will be raised so the present consumers of useful products with no risk of harm will pay higher prices to cover losses from asbestos products sold in the 1940s. Alternatively, if demand is elastic, people may refrain from using a safe, efficient product.

54. The court's "normative" premise really focuses on moral judgments, not economic ones, and thus implicates questions of the proper distribution of wealth. Sachs, *Negligence or Strict Product Liability: Is There Really A Difference in Law or Economics?*, 8 Ga. J. Int'l & Comp. L. 259, 271-73 (1978). Thus, the blameless customers or blameless owners of a blameless company operated decades ago by blameless managers will transfer money to blameless users of the company's products.

55. *See* J. Kolb & S. Ross, Product Safety and Liability 302-03 (1980); Schweig, *Three Models of Products Liability Underwriting*, 3 J. Prods. Liab. 161 (1979).

The effectiveness of the asbestos defendants' risk spreading through insurance is in dispute nearly everywhere because many of the defendants are or have been involved in litigation with their insurers. *See* Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981); Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *aff'd on reh'g*, 657 F.2d 814, *cert. denied*, 454 U.S. 1109 (1981).

56. *See* Schweig, *supra* note 55, at 168 (possibility of claims arising from prior products was cited by almost 22% of surveyed underwriters as rationale for refusing to provide coverage). This problem is complicated further by the nature of business

sis.[57] Fifty-seven of the fifty-nine plaintiffs who joined in the summary judgment motion, however, were employed by three large companies and alleged their exposure to the asbestos products occurred at the companies' plants.[58] Inasmuch as plaintiffs' illnesses arose out of and in the course of their employment, the first method of loss spreading is the workers compensation system.[59] By ignoring this legislatively created compensation system, as well as the risk-bearing potential of the plaintiffs' employers,[60] the court's two-party model results in a risk-sharing rationale that does not reflect economic reality.

The patent inadequacy of the court's strict liability risk-spreading analysis was compounded because the court ignored the substantial inefficiencies of the tort system as a means for shifting and transferring losses.[61] This failure is particularly acute with respect to the asbestos cases.[62] A risk-spreading mechanism that includes a substantial factor for high transactional costs is bound to produce an econom-

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insurance. Large deductibles, self-insured retentions, and retrospective premium adjustments all have the effect of transferring accident-compensation costs to future periods when loss is incurred, instead of the years when the product causing the loss was sold. *See* J. Kolb & S. Ross, *supra* note 55, at 307. Under generally accepted accounting principles, businesses at the time of sale cannot establish reserves for unknown, uncertain and unquantifiable future losses. Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 5: Accounting for Contingencies ¶¶ 8, 26 (1976).

57. *See Beshada*, 90 N.J. at 205-06, 447 A.2d at 547.

58. *Id.* at 197-98, 447 A.2d at 543.

59. *See* N.J. Stat. Ann. §§ 34:15-1 to -127 (West 1959 & Supp. 1983-1984).

60. Eighteen of the plaintiffs were even employed by a regulated utility. *Beshada*, 90 N.J. at 197, 447 A.2d at 543. Assuming a relatively inelastic demand for electricity, the losses sustained by the utility from paying those it exposed to the dangerous product may be spread across all users of electricity because the utility is guaranteed a fair rate of return under the public utilities law. *See* N.J. Stat. Ann. §§ 48:2-21 to -21.2 (West 1969).

61. *See* R. Keeton & J. O'Connell, Basic Protection for the Traffic Victim 242 (1965); R. Posner, Economic Analysis of Law § 6.16, at 153-54 (2d ed. 1977).

62. The best estimate indicates that it presently costs the parties $2.71 to deliver $1.00 in net benefits to the typical asbestos plaintiff. J. Kakalik, R. Ebener, W. Felstiner & M. Shanley, Rand Inst. for Civil Justice, Costs of Asbestos Litigation viii (July 1983) (prepublication manuscript) (available in files of *Fordham Law Review*). This estimate, however, ignores the substantial indirect costs of judges, jurors, courthouses, and the like. This is not to suggest that products liability claims should be eliminated from the tort system. Economic justification for new rules of liability producing more instances of loss transfer, however, should take into account the costs that reduce net benefits to victims and society. As courts move further away from fault and other morally based determinants of decisions, they have an obligation to recognize and deal forthrightly with the "enormous complexity of the economic and jurisprudential issues involved" in risk spreading and accident avoidance. Birnbaum, *supra* note 1, at 596-97 n.18.

ically less efficient result than risk spreading with low transactional costs.[63]

The court's accident-avoidance analysis assumed that imposing liability for failure to discover safety hazards would increase incentives for industry to invest in safety research, thus leading to fewer accidents.[64] There are at least two, albeit contradictory, reasons why the court's assumption may be incorrect. First, manufacturers may be conducting research and development at a high level as a matter of economic strategy and competition rather than to avoid potential liability.[65] Second, if a manufacturer is liable for product hazards of which it could not have known, safety research might become static. No matter what the manufacturer learns about potential product hazards, it will continue to be liable for hazards of which it does not and cannot learn. Indeed, unless one posits an unusual case like *Beshada*, which involved a considerable passage of time during which

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63. Worker's compensation should have lower transactional costs than the tort system. Interagency Task Force on Prod. Liab., U.S. Dep't of Commerce, Product Liability: Insurance Study 4-73 to -74 (1977). The need to lower transactional costs is a principal argument advanced in favor of no-fault automobile insurance. *See* R. Keeton & J. O'Connell, *supra* note 61, at 3.

As to the plantworker-plaintiffs, their employers provide not only the conditions under which the plaintiffs work, but determine the risk incident to that work, and afford plaintiffs the benefits of group life, accident, health and disability insurance. The potential losses to groups of plaintiffs working under the same conditions could be as efficiently estimated as the unknowable risks of products used in that workplace. But because the employers are subrogated to plaintiffs' claims against the product manufacturer, N.J. Stat. Ann. § 34:15-40 (1959), yet another layer of inefficiency is added to an already malfunctioning system. Coupled with a rule of strict (absolute) liability, subrogation may also decrease accident-avoidance incentives. *See* R. Posner, *supra* note 61, § 6.11, at 138-39.

64. *Beshada*, 90 N.J. at 207, 447 A.2d at 548. The court did not suggest any authority, much less any empirical data, to support the proposition, and there may be "no basis for choosing between strict liability and negligence with reference to [the] goal" of accident prevention. R. Posner, *supra* note 61, § 6.11, at 141.

65. Concededly, the economic theory relating to research and development is complex. *See* Elliot, *Advertising and R&D Investments in the Wealth-Maximizing Firm*, 35 J. Econ. & Bus. 389 (1983). In addition to competition goals, safety research and development may be pursued in response to regulatory considerations, rather than potential tort liability. *See* J. Kolb & S. Ross, *supra* note 55, at 1-6; *Monsanto's "Early Warning" System*, Harv. Bus. Rev., Nov.-Dec. 1981, at 107. With research and development already responsive to profit and regulatory factors, manufacturers may choose to purchase insurance or self-insure, with the potential inefficiencies discussed *supra* notes 53-56 and accompanying text, rather than engage in additional research and development. The latter choice, of course, would not avoid accidents. *Undiscoverable Product Defects*, *supra* note 5, at 1651-52. Because the "could have known" standard usually should be only slightly different from the "should have known" standard, see *supra* note 45, any impetus for additional research and development to be gained by eliminating that slight difference is at best conjectural.

any single manufacturer's or industry's control over research and development became highly attenuated, a manufacturer might even restrict research that could prove the existence of a hazard from previously manufactured products in order to minimize potential tort liability.[66] Furthermore, a perfect accident-avoiding manufacturer would delay introduction of a new product until all possible information about that product had been obtained, which, by definition, would never occur.[67]

The court also suggested that eliminating the state-of-the-art defense would simplify the fact-finding process and save it from "vast confusion."[68] This observation is at odds with the customary reliance upon expert testimony to establish defects in products liability cases.[69] Moreover, in asbestos cases, the supposed simplification of issues is often nothing more than a fond hope.[70] Many cases include claims for punitive damages[71] that require the jury to consider conduct-oriented evidence even if the principal claim is based on strict liability.[72]

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66. If a manufacturer remedies such a hazard to protect against future liability, the remedy may prove to be a double-edged sword. Although subsequent remedial measures typically are not admissible to prove responsibility, Fed. R. Evid. 407; N.J. R. Evid. 51, they are admissible to prove feasibility of a new design because the risk-utility analysis implicates feasibility. *See* Note, *Products Liability—Strict Liability in Tort—State-of-the-Art Defense Inapplicable in Design Defect Cases*—Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982), 13 Seton Hall L. Rev. 625, 630 (1983) [hereinafter cited as *State-of-the-Art Defense*]. The remedy, therefore, may be used by plaintiffs to establish a defect due to failure to warn under *Beshada.*

67. The accident-avoidance rationale stands a substantial chance of keeping beneficial and useful products off the market because subsequently discovered hazards may create unmanageable liabilities. *See* Sheffield v. Eli Lilly & Co., 144 Cal. App. 3d 583, 597-99, 192 Cal. Rptr. 870, 878-880 (1983).

68. 90 N.J. at 207, 447 A.2d at 548.

69. *See* Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 Tex. L. Rev. 47, 53 (1977); Note, *The Right to Trial by Jury in Complex Litigation*, 20 Wm. & Mary L. Rev. 329, 355 (1978). *Beshada* does not eliminate the need for expert testimony. Even in a 20/20 hindsight case, in which the knowledge existing at the time of trial is imputed to the defendant, experts must testify as to what the manufacturer reasonably should know at the time of trial. Such an expert will take up no more time and money than if testifying as to what the defendant manufacturer could have known at the time of manufacture.

70. Asbestos cases retain difficult issues of medical causation and product identification even after *Beshada. See* Working Group on Asbestos Litigation, *supra* note 35, at 9-10. The causation and disease issues by themselves are sufficiently complex to make asbestos litigation "more like roulette than jurisprudence." Blue v. Johns-Manville Corp., No. 4001(127), slip op. at 25-26 (Pa. Ct. C.P. Civ. Div. Oct. 12, 1983) (citing two nearly identical cases in which one plaintiff received $15,000 while a less sick plaintiff received $1,200,000).

71. *See* Moran v. Johns-Manville Sales Corp., 691 F.2d 811 (6th Cir. 1982); Neal v. Carey Can. Mines, Ltd., 548 F. Supp. 357 (E.D. Pa. 1982); Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37, 39 (1983).

The court's reluctance to have the jury decide complex issues is a departure from the established view of the jury's proper role.[73] The suggestion that potential jury confusion is a basis for enunciating a new rule of tort liability is therefore suspect. Jurors may well be preferable to judges in tort cases[74]—fixing tort liability certainly requires "the imposition of sanctions" involving the jury as "a sort of ad hoc parliament convened from the citizenry at large to lend respectability and authority to the process."[75]

III. The Response to *Beshada*

The suggested bases for the court's holding lack convincing support in both precedent and practicality; thus, the response to the decision understandably has been unenthusiastic. As noted by its defenders in this journal, the New Jersey Supreme Court's decision in *Beshada* has indeed been subjected to "close scrutiny by courts and commentators."[76] Commentators' reactions have been nearly uniformly negative, ranging from the prompt, concise and critical,[77] through the longer but still critical,[78] and finally to the authoritative, critical

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72. Acosta v. Honda Motor Co., 717 F.2d 828, 840 (3d Cir. 1983); Neal v. Carey Can. Mines, Ltd., 548 F. Supp. 357, 378 (E.D. Pa. 1982); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 812-14, 174 Cal. Rptr. 348, 384-85 (1981); Fischer v. Johns-Manville Corps., No. A-2430-81T2, slip op. at 9 (N.J. Super. Ct. App. Div. Jan. 31, 1984); Note, Beshada v. Johns-Manville Prods. Corp.: *Adding Uncertainty to Injury*, 35 Rutgers L. Rev. 982, 1015 (1983). Alternatively, punitive damages can be tried separately, but that may be more inefficient than trying the different counts concurrently. This must be added to the theoretical increase in claims thought to occur from plaintiffs' increased propensity to sue and decreased propensity to settle, because prevailing on a strict liability claim is relatively likely. R. Posner, *supra* note 61, at 441-42. Asbestos cases are not settled easily: "The traditional practice of the settling of cases . . . prior to protracted and costly litigation has broken down in asbestos litigation." Working Group on Asbestos Litigation, *supra* note 35, at 12; *see* Judicial Administration Working Group on Asbestos Litig., Nat'l Center for State Cts., Final Report With Recommendations 13 (review draft June 1983) (available in files of *Fordham Law Review*).

73. *See In re* Clinton Oil Co. Sec. Litig., [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,015, at 91,559 (D. Kan. 1977); Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224, 227-28 (N.D. Ill. 1977); Sanzari v. Rosenfeld, 34 N.J. 128, 141-43, 167 A.2d 625, 632-33 (1961).

74. *See* Higginbotham, *supra* note 69, at 53-54.

75. *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1093 (3d Cir. 1980) (Gibbons, J., dissenting). "Juries should . . . continue to resolve the issue of scientific discoverability in strict liability cases." *Undiscoverable Product Defects*, *supra* note 5, at 1653.

76. Placitella & Darnell, *supra* note 3, at 814.

77. Birnbaum & Wrubel, *N.J. High Court Blazes New Path in Holding a Manufacturer Liable*, Nat'l L.J., Jan. 24, 1983, at 24, col. 1; Platt & Platt, *Moving from Strict to "Absolute" Liability*, Nat'l L.J., Jan. 17, 1983, at 18, col. 3.

78. Funston, *The "Failure to Warn" Defect in Strict Products Liability: A Paradigmatic Approach to "State of the Art" Evidence and "Scientific Knowability,"* Ins.

response of Dean Wade.[79] Initial criticism focused on the inherent contradiction in holding a manufacturer liable for selling an unsafe product although knowledge of the dangers was not available, while simultaneously defining a defective product as one not made safe "to the greatest extent possible."[80] The court's decision also was criticized for imposing absolute liability on manufacturers.[81]

The most telling criticism, however, has come from Dean Wade, upon whom the court in *Beshada* relied.[82] Dean Wade has expanded on the argument unsuccessfully advanced by appellees in *Beshada*:[83] the inability to distinguish—either on logical or policy grounds—between the risks inherent in products lacking a safety feature not technologically feasible at the time of manufacture, and products lacking a warning of dangers not technologically knowable at the time of manufacture.

> The technological feasibility of making the product safer by eliminating or minimizing certain known hazards depends on discovering or inventing a workable means of adapting the present product design. But if that way is known at the time of trial, it must have existed at all times, even though it was not discovered until after the product was marketed. . . .
>
> [T]here is no basis for drawing a distinction [between these] knowledge issues. If feasibility . . . [is] to be determined as of the time of manufacture, as virtually all courts hold, so should unknowable dangers.[84]

Couns. J. 39, 49 (1984) (*Beshada* court "blundered from their own jurisprudential quagmire into [the] swamp [of epistemology]"); *Undiscoverable Product Defects*, *supra* note 5, at 1653 ("broad generalities with little or no factual support"); *State-of-the-Art Defense*, *supra* note 66, at 635 ("logically unsound").

79. Wade II, *supra* note 8.

80. *See* Birnbaum & Wrubel, *supra* note 77, at 24, col. 2.

81. *See id.*; Platt & Platt, *supra* note 77, at 18, col. 3; *State-of-the-Art Defense*, *supra* note 66, at 642. This is true if *Freund* was correct and a warning always reduces risk without impairing utility. *See* Freund v. Cellofilm Props., Inc., 87 N.J. 229, 238 n.1, 432 A.2d 925, 930 n.1 (1981). But see *supra* note 49 (warning may impair utility). Assuming *Beshada* is correct, no-warning trials will often be reduced to questions of proximate cause. Recovery will be based merely on the plaintiff's showing that an injury resulted from use of a product that carried no warning of its potential dangers. If *Beshada* is given this broad reading, it indeed may impose absolute liability rather like that imposed for abnormally dangerous activities. *See* Restatement (Second) of Torts §§ 519-524A (1965).

82. *See* 90 N.J. at 200, 201 n.4, 447 A.2d at 544, 545 n.4.

83. Brief on Behalf of the Johns-Manville Defendants at 19-20, 37-38, Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 447 A.2d 539 (1982); Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment at 9, *Beshada*.

84. Wade II, *supra* note 8, at 759.

Dean Wade points out that the standard is not the subjective knowledge of the manufacturer, but "the state of human knowledge in general . . . an objective test."[85] This standard, of course, was the one suggested by the *Beshada* trial court.[86]

Outside of New Jersey, *Beshada* has received a mixed judicial reception. Two trial courts have followed *Beshada* in asbestos cases,[87] but the first state supreme court to consider the decision rejected it.[88] Within New Jersey, *Beshada* was promptly cited for the proposition that a defendant could be held strictly liable for products defectively designed by virtue of inadequate warnings,[89] and was applied by the Federal District Court for the District of New Jersey in a case involving the state-of-the-art defense.[90]

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85. *Id.*

86. See *supra* notes 46-47 and accompanying text. Perhaps, as Dean Wade observes, *Beshada* "involves a strained effort to create an unreasonable distinction between strict liability and negligence." Wade II, *supra* note 8, at 756.

87. Carter v. Johns-Manville Sales Corp., 557 F. Supp. 1317 (E.D. Tex. 1983); Rocco v. Johns-Manville Corp., No. 80-0608, slip op. (E.D. Pa. Sept. 9, 1982). *Carter* found that Texas would reject *Beshada* in a failure to warn case because a manufacturer has a duty to warn only of "dangers that the exercise of reasonable foresight would have revealed." 557 F. Supp. at 1319. On the other hand, the *Carter* court, without citing *Beshada*, also held that the manufacturer could not defend a defectively designed product on the basis of dangers unforeseeable at the time of marketing, and would have to establish instead that the "technological capability" to include a warning did not then exist. *Id.* at 1320-21.

88. Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983).

> In recent years, some courts have held manufacturers liable for defects which, at the time of sale, were "scientifically unknowable." *See, e.g., Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 202-09, 447 A.2d 539, 545-49 (1982). By imposing what amounts to "absolute" liability upon manufacturers, such judicial decisions sever the traditional connection between tort liability and fault. To hold Ford Motor Company to today's standard of scientific knowledge when determining liability for an injury caused by a Model T bought in 1921 appears to us to be clearly unreasonable.

Id. at 298-99. Although the New Hampshire Supreme Court was construing a recently enacted statute providing for a state-of-the-art defense, N.H. Rev. Stat. Ann. § 507-D:4 (1983), it found *Beshada* to be inconsistent with its own pre-statute decisions and those of many of "our sister states." *Id.* at 299.

Subsequently, in Hayes v. Ariens Co., 391 Mass. 407, 460 N.E.2d ___ (1984), the Supreme Judicial Court of Massachusetts cited *Beshada* in dictum for the proposition that fault, and therefore state-of-the-art, are irrelevant in a strict products liability inadequate warning case. *Id.* at 413, 460 N.E.2d at ___.

89. Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 402, 451 A.2d 179, 187 (1982) (not involving state-of-the-art defense).

90. Wolf v. Procter & Gamble Co., 555 F. Supp. 613, 617 (D.N.J. 1982). The court refused to grant plaintiffs' motion to preclude defendant's introduction of lack of knowledge, noting that plaintiffs' claims of negligence and reckless misconduct implicated the reasonableness of defendant's behavior. *See id.* This illustrates the neat dilemma facing plaintiffs under a pure application of the *Beshada* rule. If they try a case including negligence and punitive damage claims by introducing evidence

Then, in *Feldman v. Lederle Laboratories*,[91] the New Jersey Appellate Division, at the direction of the supreme court, reconsidered in light of *Beshada* its affirmance of a verdict for a prescription drug manufacturer.[92] The lower court refused to apply the *Beshada* rule to prescription drugs:

> In areas involving public health there are weighty policy considerations on both sides of any question as to whether strict liability should be applied. . . . Admittedly, *Beshada* speaks in broad terms, but absent a direct expression that prescription drug-type cases are no longer to be separately treated we do not, nor can we, regard *Beshada* as effecting a policy change of such dimension.[93]

The *Feldman* rationale is equally valid for products other than medicines that have substantial social utility.[94] The court's policy analysis and judicial restraint,[95] therefore, may merely be the first of a number of exceptions that could ultimately swallow the general rule of *Beshada*.

In 1983, the New Jersey Supreme Court in *O'Brien v. Muskin Corp.*[96] reconsidered the state-of-the-art defense in a case involving a swimming pool allegedly defectively designed. The court, while giving lip service to the product-oriented approach,[97] acknowledged that the risk-utility analysis implicates the reasonableness of the manufacturer's conduct and, therefore, "strict liability law continues to manifest that part of its heritage attributable to the law of negligence."[98] The court's delicate retreat from *Beshada*[99] culminated in a much-

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of defendants' alleged knowledge and disregard of the hazards to which the plaintiffs were exposed, the defendant will be permitted to introduce exculpatory evidence, including scientific and technical unknowability. On the other hand, if plaintiffs try a case in which the worst that can be said about defendants is that they did not warn in the 1940's of dangers not scientifically established until the 1960's, they cannot prove an essential element of a negligence claim and may increase the risk of an adverse verdict on all claims.

91. 189 N.J. Super. 424, 460 A.2d 203 (App. Div. 1983), *cert. granted*, 94 N.J. 594 (1983). *Feldman* was argued before the New Jersey Supreme Court on January 10, 1984. Letter from Stephen W. Townsend, Clerk, N.J. Sup. Ct., to John L. McGoldrick, McCarter & English (Jan. 3, 1984) (available in files of *Fordham Law Review*.

92. 189 N.J. Super. at 426, 460 A.2d at 204.

93. *Id.* at 434, 460 A.2d at 208-09. The court properly relied on Restatement (Second) of Torts § 402A comment k (1965), but also found support for its holding in comment j to that section. 189 N.J. Super. at 435, 460 A.2d at 209.

94. For example, high temperature asbestos insulation that saves a sailor from steam-line burns aboard a naval vessel may well be as useful as an ointment that cures a sailor burned by contact with uninsulated steam-lines.

95. 189 N.J. Super. at 434-36, 460 A.2d at 208-10.

96. 94 N.J. 169, 178, 463 A.2d 298, 302 (1983).

97. *Id.* at 180, 463 A.2d at 303-04.

98. *Id.* at 181, 463 A.2d at 304.

99. The court stated: "[T]he risk side of the equation may involve, among other factors, risks that the manufacturer knew or should have known would be posed by

restricted definition of *Beshada's* significance: "Although state-of-the-art evidence may be dispositive on the facts of a particular case, it does not constitute an *absolute* defense apart from risk-utility analysis."[100]

The court apparently adopted the burden-shifting analysis employed by the trial judge in *Beshada*,[101] requiring a defendant who wishes to justify marketing a product to prove compliance with the state of the art.[102] Thus, the unresolved tension between *Suter* and *Freund* returns in a slightly different context: Under what circumstances will a manufacturer, defending its product against claims of defective design, be permitted to introduce evidence of scientific or technological infeasibility at the time of manufacture?[103]

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the product, as well as the adequacy of any warnings." *Id.* at 183, 463 A.2d at 305. This is the standard set forth in the Restatement (Second) of Torts § 402A comment j (1965).

100. 94 N.J. at 183, 463 A.2d at 305 (emphasis added) (citing *Beshada*, 90 N.J. at 202-05 & n.6, 447 A.2d at 545-47 & n.6).

101. See *supra* notes 45-47 and accompanying text.

102. *O'Brien*, 94 N.J. at 183, 463 A.2d at 305. The court also indicated that state-of-the-art evidence "may support a judgment for a defendant." *Id.* at 184, 463 A.2d at 305. Concededly, the defendant did not suggest the existence of hazards that were unknowable at the time the swimming pool was sold. The facts of the case, however, presented the court with an opportunity to distinguish the state-of-the-art issue in failure to warn cases from that issue in other design defect cases. The inference is that no such distinction was intended by the New Jersey Supreme Court, and the kind of evidence held inadmissible in *Beshada* was expressly held admissible in *O'Brien*.

The majority's retreat from *Beshada* may have been spurred by Justice Schreiber's and Justice Clifford's "thinly-disguised discomfort with *Beshada*" and its "exotic theory." *Id.* at 189, 463 A.2d at 308 (Clifford, J., concurring). Justice Clifford suggests that *O'Brien* and *Beshada* may be irreconcilable because *Beshada* "foreclosed the use of state-of-the-art as a defense to a design-defect-warning case," while *O'Brien* "could scarcely be more unambiguous in pointing out that state-of-the-art evidence . . . may be relevant on the central issue of defect and that it may, in certain instances, support a judgment for defendant." *Id.*

O'Brien does not share *Beshada's* reluctance to let a jury decide design defect issues. Indeed, it suggests that the jury may perform the risk-utility analysis. *Compare id.* at 184-85, 463 A.2d at 306 (jury competent to undertake risk-utility analysis) *with Beshada*, 94 N.J. at 186-87, 447 A.2d at 548 (jury unlikely to be competent to resolve complex issues). The difference may be the result of a change in the composition of the court. Justice Schreiber, who approved the state-of-the-art defense in *Suter*, and Justice Clifford recused themselves in *Beshada* but returned for *O'Brien*. Justice Pashman, who wrote for the court in *Beshada*, retired before *O'Brien*.

103. Seeking to make sense out of *Beshada* and *O'Brien*, the *Beshada* trial court subsequently gave a two-pronged charge on design defect. On risk-utility the jury was told:

> [T]he nature of the injury *that could have been anticipated* . . . [and] evidence . . . of . . . the existing level of technological expertise and scientific knowledge relevant to the asbestos injury *at the various times that this product was designed and sold* [have] some relevance on the utility risk analysis . . . . It may or may not have bearing on whether the manufacturer *knew or should have known* that risks would be posed by the use of the product . . . . [T]he Defendant's compliance with the technology and scien-

CONCLUSION

Without empirical support, *Beshada* carried the policy-based reasons for strict products liability beyond previously established limits. There has been relatively little time since the decision to assess—with hindsight—the accuracy or consequences of this reasoning. The academic doubts and the judicial restrictions that quickly followed, however, may have rightfully consigned *Beshada* to a relatively limited significance in strict liability.[104]

Excessive adherence to the doctrinal purity of a product-oriented approach in design defect failure-to-warn cases leads to anomalous results: A manufacturer that could not eliminate a manufacturing defect because of the scientific limitations of manufacturing processes existing at the time of sale can escape liability, while a manufacturer that could not eliminate a design defect by warning of its risks because of the inadequacy of scientific knowledge existing at the time of sale cannot. *O'Brien* suggests that this anomaly eventually will be resolved, perforce by a limited reading of *Beshada* that recognizes the continuing vitality of objective state-of-the-art evidence to provide an appropriate standard against which a claim of design defect can be measured.

> tific knowledge *as of the date of manufacture . . . doesn't constitute an absolute defense* . . . . [T]he burden is on the Defendant to prove that compliance with technology and scientific knowledge as of the date of manufacture . . . justifies placing the product on the market.

Transcript of Charge at 31-33, Dall'Ava v. Porter-Hayden Co., No. L-70930-79 (N.J. Super. Ct. Law Div. Oct. 6, 1983) (emphasis added). As to warnings, however, the same jury was told:

> [T]he law imposes upon the manufacturer and seller, knowledge of the dangers [sic] propensities of its product. The Plaintiff does not have to prove that the seller knew or should have known that asbestos can cause injury and the Defendant cannot defend by saying that it lacked knowledge of the product's potential to cause harm.

Id. at 36. The trial court's adherence to the seemingly contradictory teachings of *Beshada* and *O'Brien* is impressive, but the confusion between knowledge of risks at the time of manufacture and knowledge of risks imputed by law must strain even the most diligent jury's capacity.

104. If *Beshada* stands for the proposition that state of the art is not a *complete* defense, see *supra* note 100, it adds very little to the analogous principle, established over 50 years ago, that industry custom is not a complete defense. *Cf.* The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).