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Beshada v. Johns-Manville Products Corp.: Evolution or Revolution in Strict Products Liability?

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BESHADA v. JOHNS-MANVILLE PRODUCTS CORP.: EVOLUTION OR REVOLUTION IN STRICT PRODUCTS LIABILITY?

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INTRODUCTION

FEW if any areas of the common law have evolved as quickly and dramatically as that of the law of products liability. Over the course of the last two decades, courts have consciously eroded the impediments to imposing liability on a manufacturer or distributor that places a defective product into the stream of commerce which ultimately injures the user or consumer.

Until the New Jersey Supreme Court's decision in *Beshada v. Johns-Manville Products Corp.*,[1] one such impediment to the imposition of liability was the state-of-the-art defense.[2] This defense can immunize a manufacturer or distributor from liability for product defects of which it could not have been aware at the time of marketing.[3] In rejecting the use of this defense in a strict products liability case, the *Beshada* court distinguished the theories of strict liability and negligence.[4] Drawing on a trilogy of its own recent decisions in which the

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Mr. Darnell argued for appellants in Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 447 A.2d 539 (1982). Mr. Placitella joined with him on the brief.

1. 90 N.J. 191, 447 A.2d 539 (1982).

2. *See* Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 748-49 (Tex. 1980).

3. The state-of-the-art defense should be distinguished from the defense that allows the manufacturer to prove that the technology that would prevent a certain risk of harm was unavailable at the time a product was produced. This latter defense is sometimes also referred to as the state-of-the-art defense. *See* 2 L. Frumer & M. Friedman, Products Liability § 16A[4][i], at 3B-176.2 to -176.4 (1982); Keeton, *The Meaning of Defect in Products Liability Law—A Review of Basic Principles*, 45 Mo. L. Rev. 579, 594-95 (1980). This latter defense could be invoked, for example, if the only means for reducing or preventing a risk of harm inhering in the use of a piece of machinery was to incorporate a laser beam to activate an automatic shutoff device. The defendant could prove that such technology was not available at the time the product was manufactured or distributed.

4. Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 208-09, 447 A.2d 539, 548-49 (1982).

same distinction was made,[5] the court firmly fixed the theory of strict liability in a position between the theories of negligence and absolute liability.

Contrary to the assertions of some commentators,[6] the holding and principles enunciated by the court in *Beshada* are not revolutionary but merely evolutionary. Accordingly, this Article suggests that criticism leveled against the *Beshada* decision is the result of misdirected fears of the practical implications of faithfully and forcefully applying well-recognized principles of strict products liability.

I. The Origins of Strict Products Liability

Before the advent of strict products liability, plaintiffs who brought actions against manufacturers or distributors for injuries caused by defective products sued on theories of negligence and breach of warranty.[7] Prevailing under these theories, however, often proved to be an insurmountable task. Plaintiffs whose actions were predicated on negligence were frequently unable to demonstrate that the defendant had failed to act reasonably in marketing its product or were barred from recovery because of their own contributory negligence.[8]

When suing under a warranty theory, a plaintiff had to show that the product was unreasonably constructed or unreasonably designed for its intended use.[9] Until the New Jersey Supreme Court opinion in *Henningsen v. Bloomfield Motors, Inc.*,[10] courts typically required that the plaintiff be in privity of contract with the defendant before he could initiate a suit for breach of warranty. Even after *Henningsen* removed the privity requirement,[11] however, the law of sales still presented certain obstacles to recovery on a warranty theory.[12]

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5. Freund v. Cellofilm Props., 87 N.J. 229, 239, 432 A.2d 925, 930 (1981); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 169, 406 A.2d 140, 149 (1979); Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 171-72, 386 A.2d 816, 825 (1978), *overruled on other grounds*, Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 177, 406 A.2d 140, 153 (1979).

6. 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, id.*, Jan. 17, 1983, at 18, col. 3; Berry, *The Implications of* Beshada *for Products Liability Actions: The Defense Viewpoint*, 5 Dictum 6 (N.J.B.A. Young Law. Div., Nov. 1982).

7. Interagency Task Force on Products Liability: Final Report (1978), *reprinted in* 5 L. Frumer & M. Friedman, *supra* note 3, at 681-82 app. G.

8. *Id.* at 681.

9. *Id.*

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

11. *Id.* at 413-14, 161 A.2d at 99-100.

12. For example, the Uniform Commercial Code requires that notice to the seller be supplied within a reasonable time after the buyer discovers a defect in the product. U.C.C. § 2-607(3)(a) (1977).

In 1963, the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*,[13] took a giant step forward in the evolution of products liability law by creating a new theory of recovery in tort. According to *Greenman*, a manufacturer is strictly liable in tort when it markets a defective product that ultimately causes personal injury to a reasonably forseeable user or consumer.[14]

A. *Is the Product Defective?*

For a plaintiff to succeed on a products liability claim, whether based on negligence, breach of warranty or strict liability, he must prove that the product was defective.[15] Basically, two categories or combinations of conditions may render a product defective—"manufacturing" and "design" defects.[16] Manufacturing defects, which are beyond the scope of this Article,[17] occur through error in the manufacturing or assembly process.[18] Design defects are those arising out of the dangers inherent in the product itself.[19] In a design defect case, even

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13. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

14. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700. The theory of strict products liability was first suggested by Justice Traynor in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944) (Traynor, J., concurring). The pronouncement of this doctrine had to await the *Greenman* case, however, in which Justice Traynor wrote for a unanimous court. During the following decade, the *Greenman* rule was made applicable to retailers, Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964), bailors and lessors, Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970), wholesalers and distributors, Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965), and sellers of mass produced homes, Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969). For ease of discussion, the use of the term "manufacturers" in this Article encompasses all other parties in the chain of distribution.

15. *See* 1 L. Frumer & M. Friedman, *supra* note 3, § 11.01[1], at 198.12; 2 *id.* § 16.03[4][a], at 3A-58; *id.* § 16A[4][e][i], at 3B-88.

16. Some commentators suggest that defects due to a failure to warn constitute a third category distinct from design defects. *See* 2 L. Frumer & M. Friedman, *supra* note 3, § 16A[4][f][i], at 3B-118.2 to -118.3.

17. When a strict products liability claim is predicated on a manufacturing defect, the plaintiff must show that the product "deviated either in some material way from the manufacturer's specifications or performance standards or from otherwise identical units of the same product line." *Id.* § 16A[4][f][iii], at 3B-132.1 (citation omitted). Because it is a deviation from the manufacturer's design that is at issue, rather than the design itself, the state-of-the-art defense and therefore the impact of *Beshada* are inapplicable.

18. Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 169-71, 386 A.2d 816, 824-25 (1978), *overruled on other grounds*, Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979); Wade, *On Product "Design Defects" and Their Actionability*, 33 Vand. L. Rev. 551, 551 (1980); *see* 2 L. Frumer & M. Friedman, *supra* note 3, § 16A[4][f][iii], at 3B-132 to -132.1.

19. *See* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 429-30, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978); Rucker v. Norfolk & W. Ry., 77 Ill. 2d 434, 439, 396

products that are properly constructed according to specifications may still be considered defective.[20] Claims based on design defects may attack the design of a single component part[21] or the finished product as a whole.[22] A product is defectively designed if the manufacturer either fails to include an adequate safety device[23] or fails to incorporate a proper warning regarding the product's dangers.[24]

The issue of when a product is "defective" in a design defect case predicated on strict liability is still unsettled and has been the subject of continuous debate by both courts and commentators.[25] Today, judges routinely borrow terminology from the law of warranty and negligence when instructing juries as to what constitutes a "defective" product.[26] In design defect cases the use of negligence terminology in jury charges is seemingly unavoidable because the adequacy of a product's design necessarily depends upon its reasonableness.[27] This

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N.E.2d 534, 536-37 (1979); Azzarello v. Black Bros., 480 Pa. 547, 555, 391 A.2d 1020, 1024-25 (1978). *See generally* 2 L. Frumer & M. Friedman, *supra* note 3, § 16A[4][f][iv], at 3B-132.1 to -136.2(v).

20. *See, e.g.*, Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 429, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978); Rucker v. Norfolk & W. Ry., 77 Ill. 2d 434, 439, 396 N.E.2d 534, 537 (1979); Azzarello v. Black Bros., 480 Pa. 547, 555, 391 A.2d 1020, 1024-25 (1978). *See generally* 2 L. Frumer & M. Friedman, *supra* note 3, § 16A[4][f][iv][D], at 3B-136.2.

21. *See, e.g.*, Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 386 A.2d 816 (1978), *overruled on other grounds*, Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 177, 406 A.2d 140, 153 (1979).

22. *See, e.g.*, Orthopedic Equip. Co. v. Eutsler, 276 F.2d 455 (4th Cir. 1960); Stevens v. Parke, Davis & Co., 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973); Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 447 A.2d 539 (1982).

23. *See, e.g.*, Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 157, 406 A.2d 140, 143 (1979); Phillips v. Kimwood Mach. Co., 269 Or. 485, 488-89, 525 P.2d 1033, 1035 (1974).

24. *See, e.g.*, Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 811 (9th Cir. 1974); Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 359 (E.D.N.Y. 1972); Freund v. Cellofilm Props., 87 N.J. 229, 242-43, 432 A.2d 925, 932 (1981).

25. *See, e.g.*, Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809 (9th Cir. 1974); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830 (Iowa 1978); Ulrich v. Kasco Abrasives Co., 532 S.W.2d 197 (Ky. 1976); Freund v. Cellofilm Props., 87 N.J. 229, 432 A.2d 925 (1981); Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974); 2 L. Frumer & M. Friedman, *supra* note 3, § 16A[4][f][i], at 3B-126; Hoenig, *Product Designs and Strict Tort Liability: Is There a Better Approach?*, 8 S.M.U. L. Rev. 109, 111 (1976).

26. *See* Freund v. Cellofilm Props., 87 N.J. 229, 236-37, 432 A.2d 925, 929 (1981); Wade, *On The Nature Of Strict Tort Liability For Products*, 44 Miss. L.J. 825, 838-41 (1973).

27. See *supra* note 26. For many years some authorities adhered to the anomalous view that there was little or no difference between strict liability and negligence in inadequate warning cases. *See, e.g.*, Sterling Drug, Inc. v. Yarrow, 408 F.2d 978, 994-95 (8th Cir. 1969); Rainbow v. Albert Elia Bldg. Co., 49 A.D.2d 250, 252, 373 N.Y.S.2d 928, 930 (1925).

practice has led to confusion over what differences, if any, exist between strict liability and negligence theories in design defect cases. The importance of identifying these differences becomes particularly acute when determining whether certain defenses to a claim of negligence, such as the state-of-the-art defense, are also available to a defendant in a strict liability case. Successful resolution of such an issue requires an appreciation of the essential differences between strict liability and negligence.

B. *Negligence vs. Strict Liability*

The availability of negligence as a theory of recovery in design defect cases was accepted long before the advent of strict liability.[28] The law of negligence requires that a manufacturer take precautions to avoid all unreasonable foreseeable risks of harm inhering in the product's intended use.[29] Whether the risk of harm is foreseeable depends upon what the manufacturer knew or should have known at the time of marketing.[30] Because many courts hold a manufacturer to the knowledge and skill of an expert with respect to its products,[31] a manufacturer must not only keep abreast of scientific advances,[32] but also must perform ongoing investigations of its product in search of undisclosed risks of harm.[33]

There can be little doubt as to the availability of the state-of-the-art defense in a negligence action in which the central issue is whether the

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28. *See, e.g.*, Goullon v. Ford Motor Co., 44 F.2d 310, 311 (6th Cir. 1930); Reusch v. Ford Motor Co., 82 P.2d 556, 559 (Wash. 1938); Coakley v. Prentiss-Wabers Stove Co., 182 Wis. 94, 105-06, 195 N.W. 388, 392 (1923).

29. Martin v. Bengue, Inc., 25 N.J. 359, 371, 136 A.2d 626, 632 (1957); Reusch v. Ford Motor Co., 82 P.2d 556, 558-59 (Wash. 1938); Restatement (Second) of Torts § 398 (1965).

30. Freund v. Cellofilm Props., 87 N.J. 229, 239, 432 A.2d 925, 930 (1981); Martin v. Bengue, Inc., 25 N.J. 359, 371, 136 A.2d 626, 632 (1957); Reusch v. Ford Motor Co., 82 P.2d 556, 560 (Wash. 1938); *see* Restatement (Second) of Torts § 398 (1965).

31. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1089 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); Howard v. Avon Prods., 155 Colo. 444, 454, 395 P.2d 1007, 1011 (1964); Braun v. Roux Distrib. Co., 312 S.W.2d 758, 763 (Mo. 1958); Gielskie v. State, 18 Misc. 2d 508, 510, 191 N.Y.S.2d 436, 438 (Ct. Cl. 1959), *rev'd on other grounds*, 10 A.D.2d 471, 200 N.Y.S.2d 691 (1960), *aff'd*, 9 N.Y.2d 834, 175 N.E.2d 455, 216 N.Y.S.2d 85 (1961).

32. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1089 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); Gielskie v. State, 18 Misc. 2d 508, 510, 191 N.Y.S.2d 436, 438 (Ct. Cl. 1959), *rev'd on other grounds*, 10 A.D.2d 471, 200 N.Y.S.2d 691 (1960), *aff'd*, 9 N.Y.2d 834, 175 N.E.2d 455, 216 N.Y.S.2d 85 (1961); *see* Martin v. Bengue, Inc., 25 N.J. 359, 371, 136 A.2d 626, 632 (1957); Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 581, 420 A.2d 1305, 1321 (Law Div. 1980).

33. *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1089-90 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 Yale L.J. 816, 853 (1962).

defendant knew or should have known of the unreasonable risks and foreseeable dangers posed by its products.[34] If the defendant can show that the dangerous propensities of the product were unknown or unknowable at the time he placed it into the stream of commerce, he will not be held responsible for injuries caused by such defects.[35]

Strict liability, on the other hand, imposes liability for damages without requiring proof of negligent conduct.[36] The theory of strict products liability was first applied in 1963. In *Greenman v. Yuba Power Products, Inc.*,[37] the Supreme Court of California, in an opinion authored by Justice Traynor, held that a manufacturer who elects to market a product incurs liability when the article proves to have a defect that causes personal injury to the user or consumer.[38] The principles of strict liability articulated in *Greenman* gained widespread acceptance with the adoption of section 402A of the Restatement (Second) of Torts.[39] This section would impose liability on the seller of a defective product that causes injury regardless of the degree of care exercised by the seller.[40] The policy behind section 402A seeks to place the "burden of accidental injuries caused by products intended for consumption . . . upon those who market them, [to] be treated as a cost of production against which liability insurance can be obtained."[41]

Viewed from this historical perspective, strict liability was clearly intended to shift the focus from the defendant's conduct to the product. This shift in focus away from the defendant's culpability undermines the applicability of the state-of-the-art defense in strict liability cases.

II. *Beshada*: A Logical Extension of Strict Liability

Critics have characterized the New Jersey Supreme Court's decision in *Beshada v. Johns-Manville Products Corp.*[42] as a radical departure from accepted principles of strict liability in tort.[43] Several New Jersey

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34. *See* Freund v. Cellofilm Props., 87 N.J. 229, 243-44, 432 A.2d 925, 932-33 (1981). *See generally* 1 L. Frumer & M. Friedman, *supra* note 3, § 12.01[4] (issue of admissibility of evidence of subsequent accidents not critical because notice or knowledge is more important); *id.* § 12.01[1] (notice or knowledge of danger is a prerequisite to a finding of negligence).

35. *See* 1 L. Frumer & M. Friedman, *supra* note 3, § 8.03[1], at 164-65.

36. Restatement (Second) of Torts § 402A(2)(a) (1965).

37. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

38. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

39. 2 L. Frumer & M. Friedman, *supra* note 3, §§ 16A[2]–16A[3].

40. Restatement (Second) of Torts § 402A(2)(a) (1965).

41. *Id.* § 402A comment c.

42. 90 N.J. 191, 447 A.2d 539 (1982).

43. Birnbaum & Wrubel, *supra* note 6, at 24; Platt & Platt, *supra* note 6, at 15; Berry, *supra* note 6, at 7. In general, these commentators assert that the *Beshada* decision will lead to absolute liability.

cases predating *Beshada*, however, recognized the functional and analytical differences between strict liability and negligence,[44] and thus demonstrate that the *Beshada* decision is more accurately described as a logical extension of strict liability principles.

A. *The New Jersey Trilogy*: Cepeda, Suter & Freund

In the seminal case of *Cepeda v. Cumberland Engineering Co.*,[45] the New Jersey Supreme Court responded to the invitation of Dean Wade to be "forthright in using a tort way of thinking and tort terminology [in cases of strict liability],"[46] and began a process of distinguishing the theories of strict liability and negligence in design defect cases. In *Cepeda*, the court adopted the "risk-utility" or "Wade-Keeton" analysis for determining whether a product is defectively designed for strict liability purposes.[47]

In the first step of the analysis, knowledge of a product's dangerous condition, as demonstrated at the time of trial, is imputed to the defendant as a matter of law.[48] In the second step, the inquiry is confined solely to the question whether a reasonably prudent manufacturer, possessed of such foreknowledge, would have placed the product as marketed into the stream of commerce.[49]

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44. Freund v. Cellofilm Props., 87 N.J. 229, 243, 432 A.2d 925, 932 (1981); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 158, 406 A.2d 140, 143-44 (1979); Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 168, 386 A.2d 816, 823 (1978), *overruled on other grounds*, Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 177, 406 A.2d 140, 153 (1979).

45. 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).

46. Wade, *supra* note 26, at 834; *accord* Keeton, *Product Liability and the Meaning of Defect*, 5 St. Mary's L.J. 30, 37-38 (1973).

47. 76 N.J. at 172-75, 386 A.2d at 825-27.

48. Keeton, *supra* note 46, at 37-38; *see, e.g.*, Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 812-15 (9th Cir. 1974); Welch v. Outboard Marine Corp., 481 F.2d 252, 256 (5th Cir. 1973); Hamilton v. Hardy, 37 Colo. App. 375, 383-85, 549 P.2d 1099, 1107-08 (1976); Ulrich v. Kasco Abrasives Co., 532 S.W.2d 197, 200 (Ky. 1976); Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 163, 386 A.2d 816, 821 (1978), *overruled on other grounds*, Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 177, 406 A.2d 140, 153 (1979); Phillips v. Kimwood Mach. Co., 269 Or. 485, 495-98, 525 P.2d 1033, 1037-39 (1974); Roach v. Kononen, 269 Or. 457, 465, 525 P.2d 125, 129 (1974); Reiger v. Toby Enters., 45 Or. App. 679, 682-83, 609 P.2d 402, 404 (1980); Little v. PPG Indus., 19 Wash. App. 812, 821, 579 P.2d 940, 946 (1978), *aff'd as modified on other grounds*, 92 Wash. 2d 118, 594 P.2d 911 (1979).

49. Dean Wade poses the question as "whether the magnitude of the risk created by the dangerous condition of the product was outweighed by the social utility attained by putting it out in this fashion." Wade, *supra* note 26, at 835. Dean Keeton poses, with different emphasis, the question as whether "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 marketed." Keeton, *supra* note 46, at 38 (emphasis in original). Under either

Adoption of this two-pronged analysis began the process of distinguishing the theories of strict liability and negligence. The critical distinction is made in the first step by imputing knowledge of the product's dangerous propensities to the defendant. It thereby relieves the plaintiff of the burden—imposed on him in a negligence action—of proving the defendant's knowledge. The function of the second step is to determine whether the product is "defective." This determination is reached by weighing the risks of using the product, known at the time of trial, against the product's utility.[50] If the product's risks outweigh its utility, the product is considered defective.[51] Although employing negligence terminology, the second step can more accurately be seen as limiting the tendency of the first step to render a defendant absolutely liable.

In *Suter v. San Angelo Foundry & Machine Co.*,[52] the New Jersey Supreme Court retained the two-pronged Wade-Keeton analysis for determining whether a product is defectively designed.[53] The *Suter* court altered, however, the complexion of the model jury instruction that the *Cepeda* court had formulated on the basis of the Wade-

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version of the risk-utility analysis, if it is determined that the risks of using the product outweigh its utility, the product is deemed to be in a "defective condition unreasonably dangerous" to users or consumers coming into contact with it. Any injury proximately caused by the so-defined defective product subjects its manufacturer to strict liability in tort.

50. Dean Wade outlines seven factors that can be considered in making this determination:

(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.

Wade, *supra* note 26, at 837-38.

51. Keeton, *supra* note 46, at 37-38; Wade, *supra* note 26, at 834-35; *accord* Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 172-75, 386 A.2d 816, 825-27 (1978), *overruled on other grounds*, Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 177, 406 A.2d 140, 153 (1979).

52. 81 N.J. 150, 406 A.2d 140 (1979).

53. *Id.* at 177, 406 A.2d at 153.

Keeton analysis.[54] Under the *Cepeda* instruction,[55] imposition of strict liability depended on a finding that a product was in a "defective condition unreasonably dangerous."[56] According to the court in *Suter*, this language "appears to impose a greater burden on plaintiff than is warranted, for it seems to require that plaintiff not only establish a defect but that in addition the condition created be unreasonably dangerous."[57] Thus, to avoid the possible misapprehension of a dual burden of proof, the court held that a jury should be given a general charge to the effect that "a manufacturer has an obligation to distribute products which are reasonably fit, suitable and safe for their intended or foreseeable purposes."[58] Reasonable fitness, suitability and safety were still to be measured under the risk-utility analysis.[59]

The last case in the trilogy of decisions leading to *Beshada* was *Freund v. Cellofilm Properties*.[60] *Freund* squarely presented the issue whether any meaningful distinction can be made between the theories of strict liability and negligence.[61] The trial court had ruled that the strict liability charge in a failure to warn case was superfluous in conjunction with a negligence charge because "any 'defect' in the adequacy of the warning would necessarily result from negligence by the defendant."[62]

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54. *Id.* at 174-77, 406 A.2d at 152-53.

55. The instruction reads:

> A [product] is [in a defective condition unreasonably dangerous] if it is so likely to be harmful to persons [or property] that a reasonable prudent manufacturer [supplier], who had actual knowledge of its harmful character would not place it on the market. It is not necessary to find that this defendant had knowledge of the harmful character of the [product] in order to determine that it was [unreasonably dangerous].

76 N.J. at 174, 386 A.2d at 827 (quoting Wade, *supra* note 26, at 839-40). This instruction was subsequently modified in Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 174-76, 406 A.2d 140, 152-53 (1979).

56. 76 N.J. at 174, 386 A.2d at 827.

57. 81 N.J. at 175, 406 A.2d at 152.

58. *Id.* at 177, 406 A.2d at 153. In Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972), the California Supreme Court also eliminated the terminology "defective condition unreasonably dangerous" from its model jury charge. *Id.* at 134-35, 501 P.2d at 1163, 104 Cal. Rptr. at 443. The court was concerned that the language might have a tendency to confuse the jury into believing that there exists a dual burden of proof in a design defect case. Such a burden would require that the plaintiff not only establish the existence of a defect, but also that the condition created be "unreasonably dangerous." *Id.* at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

59. 81 N.J. at 177, 406 A.2d at 153.

60. 87 N.J. 229, 432 A.2d 925 (1981).

61. *Id.* at 236, 432 A.2d at 929.

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

On appeal, the New Jersey Supreme Court seized the opportunity to synthesize its holdings in *Cepeda* and *Suter*. The court focused on step one of the risk-utility analysis, and stated that it contained the essential difference between the two approaches to liability: "[U]nder strict liability, the seller's knowledge is presumed; it is 'assume[d] the seller knew of the product's propensity to injure as it did.' . . . In negligence cases, such knowledge must be proved; the standard is what the manufacturer 'knew or should have known.' "[63]

In adopting the risk-utility analysis, the *Freund* court clearly rejected any notion that a plaintiff is required to prove that the manufacturer of the product knew or should have known of its danger. Rather, the court held, trial courts must charge juries that knowledge of the dangerous trait of a product is imputed to the manufacturer without regard to unforeseeable dangers or prevailing industry standards at the time a defective product was injected into the stream of commerce.[64]

B. Beshada *and its Progeny*

In *Beshada v. Johns-Manville Products Corp.*,[65] the New Jersey Supreme Court relied on the risk-utility analysis to strike the defendants' state-of-the-art defense.[66] The complaint alleged that the asbes-

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63. *Id.* at 239, 432 A.2d at 930 (citation omitted).

64. *Id.* at 242-43, 432 A.2d at 932. Prior to *Freund*, a Washington appellate court, in Little v. PPG Indus., 19 Wash. App. 812, 579 P.2d 940 (1978), *aff'd as modified on other grounds*, 92 Wash. 118, 594 P.2d 911 (1979), similarly held that the degree of care exercised by a manufacturer or the foreseeability of the dangers involved in the use of a product are not relevant factors in a strict liability case based upon a manufacturer's failure to warn. *Id.* at 822, 579 P.2d at 947. Notably, the holdings of both *Little* and *Freund* are inapposite to comment j of the Restatement (Second) of Torts § 402A (1965). Comment j imposes a duty to warn on the manufacturer when the manufacturer knows or should know of a product's dangers. Comment j's suggestion, however, that strict liability is based upon the manufacturer's knowledge or reasonable imputation of knowledge is inconsistent with the basic premise underlying strict liability because it shifts the emphasis away from the condition of the product and back to the reasonableness of the manufacturer's conduct. *See* Little v. PPG Indus., 19 Wash. App. 812, 821, 579 P.2d 940, 946 (1978), *aff'd as modified on other grounds*, 92 Wash. 118, 594 P.2d 911 (1979). Thus, while § 402A pays lip service to strict liability in failure to warn cases, comment j in fact expresses a negligence standard (fault requirements) that is clearly incongruous with strict liability principles. *Id.; see* Freund v. Cellofilm Props., 87 N.J. 229, 236-41, 432 A.2d 925, 929-31 (1981).

65. 90 N.J. 191, 447 A.2d 539 (1982).

66. *Id.* at 199-205, 447 A.2d at 544-47. Notably, in some cases *Beshada* has proven to be a two-edged sword for plaintiffs seeking punitive damages. *See* Wolf v. Proctor & Gamble Co., No. 82-130 (D.N.J. Dec. 22, 1982); Gold v. Johns-Manville Sales Corp., 553 F. Supp. 482 (D.N.J. 1982). In both *Wolf* and *Gold* the courts stated that because *Beshada* eliminates all notions of culpability or fault from a strict liability case, a punitive damage award is unavailable. This reading of *Beshada* is too

tos dust inhaled by the plaintiffs while working with products manufactured and distributed by the defendants caused them various types of pulmonary injuries.[67] The plaintiffs sought compensatory damages under the theory of strict liability in tort for the defendants' failure to warn of the health hazards posed by the products containing asbestos.[68]

The defendants asserted the state-of-the-art defense to the obligation to warn.[69] They argued that prior to 1964 no conclusive scientific or medical evidence indicated that a health hazard existed for those working with asbestos-containing products.[70] Thus, the *Beshada* defendants contended, they were not obligated to warn of hazards unknown, and more importantly, "unknowable," at the time their products were placed into the stream of commerce.[71]

Prior to trial, the plaintiffs filed a motion to strike the state-of-the-art defense, relying primarily on the *Freund* decision. The trial court denied the plaintiff's motion.[72] To reach this conclusion it reasoned that the imputation to defendants of knowledge of the product's dangerous propensities as manifested at the time of trial did not amount to an irrebuttable presumption.[73] Defendants have the right, according to the trial court, to introduce evidence that they did not have knowledge of the product's danger at the time of manufacture because at that time the danger was not "known to the world."[74]

The New Jersey Supreme Court reversed the lower court, holding that the state-of-the-art defense is incompatible with the principles of strict liability in design defect cases.[75] The court stated:

> *Essentially, [the] state-of-the-art [defense] is a negligence defense.* It seeks to explain why defendants are not culpable for failing to provide a warning. [Defendants] assert, in effect, that because they could not have known the product was dangerous, they acted reasonably in marketing it without a warning. But in strict liability

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restrictive. Arguably, a punitive damage award is consistent with *Beshada* to the extent that it tends to encourage manufacturers to take greater care in marketing their product. On the other hand, the *Beshada* court never purported to rely on the policies underlying punitive damage awards—punishment and deterrence—as a basis for its holding. In addition to proving that he has a right to compensatory damages when injured by a defective product, an injured plaintiff should also have the opportunity to prove that the defendant's acts were malicious or willful and wanton so as to justify an award of punitive damages.

67. 90 N.J. at 196, 447 A.2d at 542.
68. *Id.* at 196-97, 447 A.2d at 542.
69. *Id.* at 197, 447 A.2d at 542-43.
70. *Id.*
71. *Id.* at 196, 447 A.2d at 542.
72. *Id.*
73. *Id.* at 199, 447 A.2d at 543.
74. *Id.*
75. *Id.* at 202-09, 447 A.2d at 545-49.

> cases, culpability is irrelevant. The product was unsafe. That it was unsafe because of the state of technology does not change the fact that it was unsafe. Strict liability focuses on the product, not the fault of the manufacturer.[76]

The *Beshada* court explained that its holding is consistent with the risk-spreading policy upon which the doctrine of strict liability in tort is based.[77] The court reasoned that by imposing liability upon the manufacturer as opposed to the innocent plaintiff, "the costs of the product will be borne by those who profit from it: the manufacturers and distributors who profit from its sale and the buyers who profit from its use."[78] The court further commented that its decision would encourage better research and development:[79] "The 'state-of-the-art' at a given time is partly determined by how much industry invests in safety research. By imposing on manufacturers the costs of failure to discover hazards, we create an incentive for them to invest more actively in safety research."[80]

The *Beshada* court also noted that in addition to spreading the loss and encouraging safety research, its holding would simplify the fact-finding process for jurors.[81] The court explained that its decision would avoid confusing and costly battles, common to negligence actions, among experts who debate the "scientific knowability" of a product's dangers at the time it was marketed.[82] Finally, the court expressed its concern that the state-of-the-art defense might lead the jury to believe that fault, not the condition of the product, was at issue.[83]

While the court expressly limited its holding to failure to warn cases, it intimated in a footnote[84] that the defense would also be unavailable in a defective design case based upon the manufacturer's failure to include a safety device. Since *Beshada*, the New Jersey Supreme Court, in *Michalko v. Cooke Color & Chemical Corp.*,[85]

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76. *Id.* at 204, 447 A.2d at 546 (emphasis added).
77. *Id.* at 205-06, 447 A.2d at 547.
78. *Id.* at 205, 447 A.2d at 547.
79. *Id.* at 207, 447 A.2d at 548.
80. *Id.*
81. *Id.* at 207-08, 447 A.2d at 548-49.
82. *Id.* "Scientific knowability," according to the *Beshada* court,

> refers not to what in fact was known at the time, but to what *could have been* known at the time. In other words, even if no scientist had actually formed the belief that asbestos was dangerous, the hazards would be deemed "knowable" if a scientist could have formed that belief by applying research or performing tests that were available at the time.

Id. at 207, 447 A.2d at 548 (emphasis in original).
83. *Id.* at 208, 447 A.2d at 548.
84. *Id.* at 204 n.6, 447 A.2d at 546 n.6.
85. 91 N.J. 386, 451 A.2d 179 (1982).

strengthened the inference that it would disallow the state-of-the-art defense in all other design defect cases if given the opportunity to so rule. In *Michalko*, the court applied the principles set forth in *Beshada* to a case involving the failure to incorporate a safety device into an industrial machine.[86] Citing *Beshada*, the court reiterated the now well-established axiom that in a design defect case, knowledge of the product's dangerous propensities is imputed to the manufacturer.[87] Because the availability of the state-of-the-art defense was not an issue in *Michalko*, the court did not specifically preclude the assertion of the defense in a design defect case.[88] This would appear, however, to be the next logical step for the New Jersey Supreme Court to take.

Indeed, one court has expressly taken this step. In *Carter v. Johns-Manville Sales Corp.*,[89] the United States District Court for the Eastern District of Texas interpreted Texas law and expressly held that the state-of-the-art defense is unavailable in a strict products liability case based on design defects.[90] Interestingly, however, its interpretation of Texas law required it to hold that the defense was available in failure to warn cases.[91]

The unavailability of the state-of-the-art defense will have its greatest impact in toxic tort cases like *Beshada*, in which the plaintiff's injury does not manifest itself until some time after the first exposure to the defective product. For example, in *Wolf v. Proctor & Gamble Co.*,[92] the United States District Court of New Jersey applied *Beshada* in an action brought by a woman who had developed toxic shock syndrome allegedly as a result of using "Rely" tampons.[93] The defendants in *Wolf* argued that they had no duty to warn of the dangers they were unaware of at the time of marketing.[94] The court used *Beshada* to strike the defendant's state-of-the-art defense with respect to the strict liability claim, but allowed the defense to rebut the negligence

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86. *Id.* at 394-95, 451 A.2d at 183.

87. *Id.*

88. In *Michalko*, the court held that "an independent contractor who undertakes to rebuild part of a machine in accordance with the specifications of the owner can be held strictly liable for breach of its legal duty to . . . make the machine safe or to warn of the dangers inherent in its use." *Id.* at 403, 451 A.2d at 187-88. Interestingly, the court left open the issue whether placing adequate warnings on a machine would constitute a factual or legal defense to a claim of strict liability based on the failure to manufacture or rebuild an otherwise safe machine. *Id.* at 403 n.5, 451 A.2d at 187 n.5.

89. 51 U.S.L.W. 2552 (E.D. Tex. Mar. 1, 1983).

90. *Id.* at 2553.

91. *Id.* The court cited *Beshada* with approval, stating that New Jersey, unlike Texas, had brought "the failure to warn case in line with other strict liability cases." *Id.*

92. No. 82-130 (D.N.J. Dec. 22, 1982).

93. *Id.* slip op. at 1, 3-4.

94. *Id.* at 1-2.

claim.[95] It is equally conceivable that *Beshada* could appropriately be applied in the widely publicized formaldehyde and Agent Orange litigation. Two respected commentators have opined that the logic of *Beshada* would allow recovery for the first time even in cases brought against cigarette manufacturers for the diseases caused by the use of their tobacco products.[96]

The logical extension of strict liability principles in *Beshada* was neither surprising nor revolutionary. Its significance is heightened when considered in light of the fact that "New Jersey, along with California, has [in recent years] set the trend in most important developments in products liability law."[97] The New Jersey Supreme Court's preeminent role in the evolution of products liability law is likely to render its decision in *Beshada*, and more importantly, its practical implications, subject to close scrutiny by courts and commentators.

III. Is *Beshada* or Strict Liability at Fault?

Notwithstanding its relative youth, the *Beshada* decision has elicited much comment.[98] Certain critics of the decision have contended that if the danger was unknowable at the time of marketing, it is inconsistent to label a product defective at that time on the basis of knowledge subsequently obtained.[99] This argument finds some support in the court's own analysis. Two tests were suggested for determining if a product is defective: "(1) does its utility outweigh its risk? and (2) if so, has that risk been reduced to the greatest extent possible consistent with the product's utility?"[100] Thus, the critics note, the court seemingly contradicts itself by declaring that a manufacturer is liable for marketing a defective product regardless of its ability to know of the dangers while at the same time defining a defective product as one that has not been made safe to the "greatest extent possible."[101]

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95. *Id.* at 3-4.

96. 1 L. Frumer & M. Friedman, *supra* note 3, § 16A[4][f], at 3B-155 to -156. To date, there is no record of a plaintiff prevailing on this type of case within the 50 states. *Id.*

97. Platt & Platt, *supra* note 6, at 15, col. 4; *see, e.g.*, Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979); Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 386 A.2d 816 (1978), *overruled on other grounds*, Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979).

98. See *supra* note 6.

99. Birnbaum & Wrubel, *supra* note 6, at 24, col. 4.

100. Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 201, 447 A.2d 539, 545 (1982).

101. Birnbaum & Wrubel, *supra* note 6, at 24, col. 4.

According to the *Beshada* court, however, these two tests merely "explain the role of state-of-the-art in strict liability cases. In actuality, the only test for product safety is whether the benefit outweighs the risk."[102] Thus, although knowledge of safer alternatives at the time of manufacture is certainly a factor in determining whether a product's risks outweigh its utility, the unavailability of such knowledge does not constitute a complete defense to a strict liability claim.[103] By imputing knowledge that was unavailable at the time of marketing, the trier of fact is able to make an objective determination of the product's actual dangerousness without interference from misleading negligence concepts.[104]

Another, more significant criticism of *Beshada* is that its practical effect is to impose "absolute" liability on manufacturers.[105] This perception, however, is incorrect. Rather than imposing strict liability merely because the product caused injury, the *Beshada* court would impose liability only if the risk of the product outweighed its utility.[106] Thus, removing the state-of-the-art defense from the defendant's arsenal does not render him powerless. In all design defect cases, the defendant may escape liability if it can demonstrate that, as marketed, the product's utility outweighed its risk. To do so, the defendant has the opportunity to demonstrate that it would have been impossible to eliminate the unsafe character of the product without either incurring undue expense or destroying the product's usefulness.[107] Concededly, in cases in which it is the absence of a warning that renders the product defective, the value of this particular defense may be more theoretical than real, as placing a warning on a product is an easy task and will seldom detract from the product's utility.[108] Even in these situations, however, the defendant may escape liability if it can prove that "under the technological capabilities existing at the time the product was marketed, it was unfeasible to include a warning on the product."[109]

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102. 90 N.J. at 201 n.4, 447 A.2d at 545 n.4.

103. *See id.*

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

105. Birnbaum & Wrubel, *supra* note 6, at 24, col. 1; Platt & Platt, *supra* note 6, at 18, col. 3. According to the Platts, " '[d]efective' has now achieved a new meaning. It can be defined simply as 'a product which causes injury.' " *Id.*

106. 90 N.J. at 201, 447 A.2d at 545.

107. *See* Carter v. Johns-Manville Sales Corp., 51 U.S.L.W. 2552, 2553 (E.D. Tex. Mar. 1, 1983).

108. Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 202, 447 A.2d 539, 545 (1982); *see* Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 402, 451 A.2d 179, 187 (1982); Freund v. Cellofilm Props., 87 N.J. 229, 238, 432 A.2d 925, 929 (1981).

109. Carter v. Johns-Manville Sales Corp., 51 U.S.L.W. 2552, 2553 (E.D. Tex. Mar. 1, 1983).

Moreover, even after *Beshada*, the plaintiff must still prove that the product was defective and capable of producing the injuries incurred.[110] In addition, the plaintiff must demonstrate that the defendant's product was the proximate cause of the plaintiff's injuries.[111] Finally, the plaintiff must demonstrate that the defect existed when the product was distributed by and under the control of the defendant.[112]

Therefore, rather than imposing absolute liability on a manufacturer, *Beshada* correctly removes one of the vestiges of negligence and advances the goals and policies of strict liability. "To permit the defendant to defeat a strict liability claim by proving that it could not have foreseen the danger, in effect by proving that it was not negligent, would fly in the face of the entire history of strict liability."[113]

Another criticism of *Beshada* suggests that "[t]he fundamental flaw [in the decision] is that it utilizes the general [principle] of strict liability—to protect consumers from defective products—as a justification for emasculating the requirement that the product be defective before liability results."[114] This assertion unwittingly highlights what the critics' polemics otherwise obscure—rather than emasculating the requirement, *Beshada* merely applied it in accordance with the legal principles governing the cause of action asserted. *Beshada* was by no means the first case in which the focus of strict products liability was shifted from the fault of the tortfeasor to the safety of the consumer.[115] Apparently, then, it is the policy of strict liability itself, not *Beshada*, to which these critics object.

Given the academic nature of the defenses available in design defect cases premised on inadequate warning, the critics may not be incorrect in maintaining that *Beshada*, as a practical matter, decrees absolute liability when a plaintiff establishes all the elements of a prima facie case. Even so, this does not necessarily lead to the conclusion that *Beshada* is an aberration from the principles of strict liability. In fact,

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110. Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 394, 451 A.2d 179, 183 (1982).

111. For a discussion of causation or proximate cause in strict products liability actions, see Comment, *Products Liability—The Expansion of Fraud, Negligence, and Strict Liability*, 64 Mich. L. Rev. 1350, 1375-77 (1966).

112. Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 394, 451 A.2d 179, 183 (1982); Scanlon v. General Motors Corp., 65 N.J. 582, 590-91, 326 A.2d 673, 677 (1974).

113. Carter v. Johns-Manville Sales Corp., 51 U.S.L.W. 2552, 2553 (E.D. Tex. Mar. 1, 1983).

114. Platt & Platt, *supra* note 6, at 18, col. 4.

115. *E.g.*, Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 169, 406 A.2d 140, 149 (1979); *see* 2 L. Frumer & M. Friedman, *supra* note 3, § 16A[4][f][iv][A], at 3B-136.2(g) to -136.2(h); Restatement (Second) of Torts § 402A comment g (1965).

one court has stated that *Beshada* "has brought the failure to warn case in line with other strict liability cases."[116]

Beshada's solicitude for the injured plaintiff may well comport with the intentions of those instrumental in the development of strict liability. Justice Traynor, in his concurrence to *Escola v. Coca Cola Bottling Co.*,[117] stated that "it should now be recognized that a manufacturer incurs an *absolute liability* when an article that he has placed on the market . . . proves to have a defect that causes injury to human beings."[118] In 1957, Professor James similarly stated that "[s]trict liability is to be preferred over a system of liability based on fault wherever you have an enterprise or activity, beneficial to many, which takes a more or less inevitable accident toll of human life and limb."[119] In light of these and other similar expressions of the policies of strict liability,[120] it could be argued that *Beshada* actually falls short of implementing these objectives.

CONCLUSION

The debate concerning the proper limits of strict liability, or whether strict products liability should exist at all, is far from over. The *Beshada* decision, however, should not be viewed as a revolutionary decision in this debate. Rather, in proper perspective, *Beshada* is merely a logical consequence of the policies of strict liability. Critics who so vehemently denounce this decision are, in reality, attacking the very foundation of strict products liability. Acknowledgement of this underlying fact is essential to resolution of the difficult questions of policy that must be confronted.

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116. Carter v. Johns-Manville Sales Corp., 51 U.S.L.W. 2552, 2553 (E.D. Tex. Mar. 1, 1983).

117. 24 Cal. 2d 453, 150 P.2d 436 (1944).

118. *Id.* at 462, 150 P.2d at 440 (Traynor, J., concurring) (emphasis added).

119. James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 Tenn. L. Rev. 923, 923 (1957).

120. *See* Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L.J. 1055 (1972) (suggesting that the only issue is which party is the better risk-bearer); Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973) (suggesting that causation is the only issue).