PRODUCTS LIABILITY—STRICT LIABILITY IN TORT—STRICT LIABILITY APPLICABLE IN INADEQUATE WARNING CASES—*Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229, 432 A.2d 925 (1981).

With the development of a strict liability theory in the area of products liability, courts can more readily hold manufacturers liable for manufacturing[1] and design[2] defects in the goods they produce and for failing to give adequate warnings.[3] Because the terms used to define strict liability in tort are borrowed from warranty[4] and negligence law,[5] courts have struggled with the issue of whether there is in fact a difference between negligence and strict liability in cases involving design defects and inadquate warning. The Supreme Court of New Jersey recently addressed this issue in *Freund v. Cellofilm Properites, Inc.*[6]

From March 25 until July 11, 1974, Elmer Freund was employed as a maintenance worker by the Cellofilm corporation.[7] His work frequently brought him in contact with nitrocellulose, a highly flam-

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[1] *See* Messick v. General Motors Corp., 460 F.2d 485 (1972) (action against automobile maker for defective manufacture of steering and suspension mechanism); Kroeger v. Bowman, 411 S.W.2d 339 (Ky. 1967) (soft drink bottler and grocery store held strictly liable for injuries sustained by customer when bottle fell from defectively manufactured carton).

[2] *See* Barker v. Lull Eng'g Co., 20 Cal.3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) (manufacturer and rental agent of high-lift loader held strictly liable for design defect which precipitated plaintiff's accident); Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972) (manufacturer held strictly liable for defective design of punch press).

[3] *See* Jackson v. Coast Paint and Lacquer Co., 499 F.2d 809 (9th Cir. 1974) (case remanded on issue of adequacy of warning label on paint can). It should be noted that some courts consider design defects and inadequate warnings to be two distinct types of defects, *see* Mayberry v. Akron Rubber Mach. Corp., 483 F. Supp. 407, 412 (N.D. Okla. 1979), while other courts include inadequate warnings in the category of design defects.

[4] Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979). The *Suter* court's formulation of the principle of strict liability requires that at the time a seller markets a product it must be "fit, suitable, and safe." *Id.* at 169, 406 A.2d at 149.

[5] Section 402A of the Second Restatement of Torts includes the words "unreasonably dangerous" in its definition of strict liability which states:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

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

[6] 87 N.J. 229, 432 A.2d 925 (1981).

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

mable component of paints and lacquers.[8] On July 11, plaintiff and two co-workers were assigned to clean a chute which had been used to dump liquid nitrocellulose into a mixer.[9] One of the workers began to sweep the nitrocellulose dust which had spilled around the mixer when fire suddenly engulfed the entire area.[10] Freund and a co-worker suffered severe injuries.[11]

Freund and his wife instituted an action against Hercules, Inc. in the Superior Court of New Jersey.[12] The dispute centered on the exact cause of the fire[13] and on the adequacy of the warnings issued by Hercules.[14] Plaintiff Elmer Freund admitted that he was aware of the existence of the warning, although he had never read it.[15] Plaintiff's expert conceded that this accident would not have happened if the warning, which stated that nitrocellulose was highly flammable and must be saturated with water in the event of a spill,[16] had been observed.[17] The plant superintendent explained that this was the cleanup procedure which employees were expected to follow.[18]

Seeking compensatory and punitive damages, plaintiffs requested that the jury be charged on the issues of negligence, strict liability,

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[8] *Id.*

[9] *Id.* at 234, 432 A.2d at 927. A shield had been placed around the mixer's hatch during the dumping of the chemical to avoid spilling an excessive quantity of nitrocellulose which, in its dry form, is even more flammable than in its liquid form. *Id.*

[10] *Id.*

[11] *Id.* Freund's co-worker died as a result of the accident while Freund suffered severe second and third degree burns. *Id.* at 232, 432 A.2d at 927.

[12] *Id.* at 233, 432 A.2d at 927. In the original action, plaintiffs also named the owner of the site of the accident, Cellofilm Properties, Inc., and Freund's employer, Cellofilm Corp., as defendants. Both of these parties were dismissed from the action through motions in the trial court. *Id.*

[13] *Id.* at 234, 432 A.2d at 927. Plaintiff's expert pinned the origin of the fire on the nitrocellulose dust cloud lighted by electrostatic effects. Defendant's experts testified that the fire started when the vapors from the mixer ignited. *Id.*, 432 A.2d at 927-28.

[14] *Id.* at 234, 432 A.2d at 927. The warning read as follows:

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

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

[15] *Id.* at 235, 432 A.2d at 928.

[16] For example, in *Freund* the workers had been instructed to wet the nitrocellulose spills before sweeping. At trial, plaintiff admitted that he was aware of the warning but had never read it. *Id.*

[17] *Id.*

[18] *Id.* A poster distributed by Hercules and displayed in the employees' locker room gave identical instructions. *Id.*

and concurrent negligence.[19] The trial court refused to give an instruction on strict liability, reasoning that a finding of the inadequacy of the warning would automatically follow from a finding of the defendant's negligence.[20] In addition, the court reasoned that a charge of negligence adequately covered the issue of concurrent negligence,[21] thus concluding that an independent instruction on this issue was unnecessary.[22] In a unanimous verdict, the jury found that Hercules was not negligent.[23] After moving unsuccessfully for a new trial, plaintiffs appealed. The appellate division affirmed the trial court's decision without an opinion,[24] and the Supreme Court of New Jersey granted certification.[25]

In *Freund v. Cellofilm Properties, Inc.*, the Supreme Court of New Jersey for the first time addressed the issue of whether a products liability case concerning inadequate warnings should be considered under a strict liability theory or a negligence theory.[26] To resolve this issue and the question of whether the trial judge erred when he instructed the jury only on the theory of negligence,[27] the court applied a three-step analysis. Justice Handler, writing for the majority,[28] explained the difference between negligence and strict liability in inadequate warning cases,[29] defined the elements of an appropriate charge to a jury,[30] and compared the newly formulated charge with that which the trial judge gave.[31] On the basis of this analysis, the court concluded that the plaintiff had been prejudiced by the deficient charge and that a new trial was warranted.[32] Because the case was to

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[19] *Id.*

[20] *Id.* at 236, 432 A.2d at 928. The plaintiffs submitted a charge directing the jury to find the manufacturer strictly liable if the inadequate warning rendered the product defective and proximately caused injury. The proposed charge specified that "[p]roof of the manufacturer's negligence is not required." *Id.* at 235, 432 A.2d at 928. The court suggested that the charge was incorrect in that an inadequate warning would "necessarily result" from the negligence of the defendant. *Id.* at 236, 432 A.2d at 928.

[21] *Id.* at 246, 432 A.2d at 933.

[22] *Id.* at 236, 432 A.2d at 928.

[23] *Id.*

[24] *Id.*

[25] Freund v. Cellofilm Properties, Inc., 85 N.J. 453, 427 A.2d 555 (1980).

[26] 87 N.J. at 240, 432 A.2d at 930. In Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979), and Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 386 A.2d 816 (1978), the court applied the theory of strict liability in tort to design defects, whereas the *Freund* court had to deal with the problem of an inadequate warning.

[27] 87 N.J. at 236, 432 A.2d at 928.

[28] *Freund* was a unanimous decision.

[29] *Id.* at 236-41, 432 A.2d at 929-31.

[30] *Id.* at 241-43, 432 A.2d at 931-32.

[31] *Id.* at 243-45, 432 A.2d at 932-33.

[32] *Id.*

be remanded, the court also addressed the secondary issue of concurrent negligence.[33] The majority held that a trial judge should give a separate charge on concurrent negligence when more than one tortfeasor is involved in an accident.[34]

In discussing what differentiated the negligence and strict liability theories of recovery for inadequate warning design defects, the court analyzed the terminology used to describe those theories.[35] Justice Handler indicated that terms associated with negligence[36] and warranty[37] were often used to define strict liability and that this was the primary reason for the confusion surrounding the negligence and strict liability theories of recovery.[38] The court conceded that there was no particularized language for the theory of strict liability in tort and that the use of negligence terminology, therefore, could not be avoided.[39] To illustrate how elusive the distinctions between the different theories of recovery were, the court mentioned two jurisdictions which considered both concepts to be identical in the area of inadequate warning.[40] The court clearly indicated, however, that

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[33] *Id.* at 245, 432 A.2d at 933.

[34] *Id.* at 247, 432 A.2d at 934. Plaintiffs requested such a charge to counter the effect of defendant's argument that Cellofilm, Inc. and the two workers assigned to the cleaning job with Freund were responsible for the fire. *Id.* at 245, 432 A.2d at 933.

[35] *Id.* at 236-41, 432 A.2d at 929-31.

[36] A negligence theory was used by injured parties to recover against manufacturers before the concept of strict liability was formulated. For a broad treatment of the law of negligence in products liability, see Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957).

[37] Because negligence on the part of the manufacturer or supplier was usually very difficult if not impossible to prove, courts turned to the law of warranty to hold manufacturers strictly liable. *See* Simpson v. Powered Prod., Inc., 24 Conn. Supp. 409, 192 A.2d 555 (C.P. 1963) (lessee of faulty golf cart can sue retailer under breach of warranty theory); Thomas v. Leary, 15 A.D.2d 438, 225 N.Y.S.2d 137 (1962) (plaintiff injured when dental chair collapsed deemed to have cause of action for breach of warranty).

[38] 87 N.J. at 236-37, 432 A.2d at 929.

[39] *Id.* at 237, 432 A.2d at 929.

[40] *Id.* In Sterling Drug, Inc. v. Yarrow, 408 F.2d 978 (8th Cir. 1969), plaintiff's vision was permanently impaired after she used a prescription drug manufactured and sold by defendant for the treatment of rheumatoid arthritis. *Id.* at 980. The court of appeals stated that both the negligence and strict liability sections of the Second Restatement of Torts were applicable to this case where the action was a "breach of the duty to give a proper (reasonable under the circumstances) warning resulting in injury to appellee." *Id.* at 992. In Rainbow v. Albert Elia Bldg. Co., 49 A.D.2d 250, 373 N.Y.S.2d 928 (1975), plaintiff sustained injuries while driving at night on a road under construction. He first sought recovery on the basis of negligence, but later amended his complaint and sued defendant for strict liability in tort. *Id.* at 251, 373 N.Y.S.2d at 929. The New York court decided that "[u]nder either theory, the recovery ultimately depends upon a subjective determination by the trier of facts of what constitutes reasonable warning under all circumstances." *Id.* at 253, 373 N.Y.S.2d at 931. *See also* Skaggs v. Clairol Inc., 6 Cal. App. 3d 1, 85 Cal. Rptr. 584 (1970) (additional instructions on strict liability unnecessary where jury was fully instructed on negligence regarding labeling of hair dye).

the recent trend favors distinguishing strict liability from negligence.[41]

To distinguish these two concepts, the court examined the approach taken under each theory.[42] It noted that in negligence cases the trier of fact must focus on the conduct of the manufacturer,[43] whereas in strict liability cases the court must focus on the product itself.[44] Relying upon the Oregon case of *Phillips v. Kimwood Machine Co.*,[45] the court examined the concept of dangerousness in the context of strict liability.[46] The *Phillips* court, which recognized a distinction between negligence and strict liability based on the conduct/product orientation dichotomy, stated that the dangerousness of a product could be determined by imputing to the manufacturer the knowledge of such propensity for harm and then deciding whether the manufacturer acted negligently when he marketed his product without proper warning.[47] Noting that this definition of strict liability seemed to include the issue of manufacturer conduct, the *Freund* court acknowledged that the difference between the conduct and product-oriented approaches was difficult to ascertain.[48] The court explained that the ambiguity stemmed from the underlying risk-utility theory in which a product's safety is determined by weighing its utility against the risk inherent in its use.[49] Because the requirement of a

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[41] 87 N.J. at 237, 432 A.2d at 929. Justice Handler cited several cases to this effect, including Hamilton v. Hardy, 37 Colo. App. 375, 549 P.2d 1099 (1976); Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830 (Iowa 1980); and Ulrich v. Kasco Abrasives Co., 532 S.W.2d 197 (Ky. 1976).

[42] 87 N.J. at 238, 432 A.2d at 929.

[43] Professor Wade stated: "The essential difference between an action in negligence and one in strict liability (or breach of warranty) lies not in the condition of the product but in the requirement in the negligence action of additional proof regarding the nature of the defendant's conduct." Wade, *On Product "Design Defects" and their Actionability*, 33 VAND. L. REV. 551, 553 (1980).

[44] 87 N.J. at 238, 432 A.2d at 929. In Jackson v. Coast Paint & Lacquer Co., 449 F.2d 809 (9th Cir. 1974), the court stated that "[i]t is the unreasonableness of the condition of the product, not of the conduct of the defendant, that creates liability." *Id.* at 812. In Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979), the court observed that the theory of strict liability shifts the focus from the conduct of the manufacturer, as in negligence law, to the inherent qualities of the product itself. *Id.* at 169, 406 A.2d at 149. *See also* Hamilton v. Hardy, 37 Colo. App. 375, 549 P.2d 1099 (1976) (plaintiff entitled to instructions on strict liability where plaintiff suffered stroke allegedly caused by physician's negligent administration of birth control pill and by manufacturer's failure to give adequate warning).

[45] 269 Or. 485, 525 P.2d 1033 (1974). Plaintiff was injured when a sheet of fiberboard was regurgitated by the sanding machine which he was operating. *Id.* at 488, 525 P.2d at 1034.

[46] 87 N.J. at 238-39, 432 A.2d at 929-30.

[47] 269 Or. at 498, 525 P.2d at 1039.

[48] 87 N.J. at 238, 432 A.2d at 930. In Ulrich v. Kasco Abrasives Co., 532 S.W.2d 197 (Ky. 1976), the Kentucky Supreme Court arrived at a similar conclusion despite using the unreasonably dangerous standard of section 402A of the Second Restatement of Torts. "Although strict liability does not depend upon negligence, a degree of kinship, between the two does inhere in the term 'unreasonably dangerous.' " *Id.* at 200.

[49] 87 N.J. at 239 n.1, 432 A.2d at 930 n.1. Professor Wade gave a list of factors that might be considered in a risk-utility analysis:

warning would rarely alter the utility of a product, a manufacturer who failed to give the necessary warnings which would render his product safe without affecting its utility could easily be found negligent.[50]

Despite the similarities between the concepts of negligence and strict liability, the court found one real difference: "under strict liability, the seller's knowledge is presumed. . . . In negligence cases, such knowledge must be proved."[51] This basic distinction which has been recognized as valid by commentators[52] was, for the *Freund* court, the main substantive reason for finding the trial court's instructions deficient.[53] The *Freund* court's survey of New Jersey law revealed that a foundation for this principle had already been laid in the cases of *Cepeda v. Cumberland Engineering Co.*[54] and *Suter v. San Angelo Foundry and Machine Co.*[55] In these cases the Supreme Court distinguished between manufacturing and design defects[56] and imputed the knowledge of the product's propensity for harm to manufacturers in design defect cases.[57] Noting the difference between negligence and strict liability, the *Freund* court concluded that "in inadequate warning design defect cases, a strict liability charge should be given."[58]

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(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, *On the Nature of Strict Liability for Products*, 44 Miss. L.J. 825, 837 (1973).

[50] 87 N.J. at 238-39 n.1, 432 A.2d at 930 n.1.

[51] *Id.* at 239, 432 A.2d at 930.

[52] *See* Wade, *supra* note 49, at 834. *See also* Keeton, *Products Liability—Inadequacy of Information*, 48 Tex. L. Rev. 398, 404-08 (1970).

[53] 87 N.J. at 243, 432 A.2d at 932.

[54] 76 N.J. 152, 386 A.2d 816 (1979).

[55] 81 N.J. 150, 406 A.2d 140 (1978).

[56] 76 N.J. at 169, 386 A.2d at 824.

[57] *Id.* at 171-72, 386 A.2d at 825.

[58] 87 N.J. at 240-41, 432 A.2d at 931. In Shatz v. Tec Technical Adhesives, 174 N.J. Super. 135, 148-49, 415 A.2d 1188, 1195 (App. Div. 1980), the court similarly held that a strict liability charge should be given in inadequate warning cases.

Justice Handler supplied two reasons in support of this holding. The first pertained to a fundamental concept in strict product liability[59]—protection of the consumer. The second was "the need for uniformity and consistency in products liability cases."[60] Because the court assumed that inadequate warnings were design defects, and because strict liability charges are employed in defective design cases, it logically followed that the same kind of instructions should be given in cases of inadequate warning.[61]

After concluding that strict liability applies in inadequate warning cases, the court discussed the elements of an appropriate charge.[62] The court relied upon *Suter*, where a distinction between self-evident and non-self-evident defects had been made.[63] In *Freund* the court assumed that an inadequate warning was a non-self-evident defect and thus required a charge including, at the very least, the elements of proximate cause, reasonably foreseeability, and a specific instruction on a duty to warn.[64]

The *Suter* court rejected the "defective condition unreasonably dangerous" language of section 402A of the Second Restatement of Torts,[65] and stated that "the jury should be charged in terms of whether the product was reasonably fit, suitable and safe for its intended purposes."[66] In *Freund* the supreme court reiterated its repudiation of the section 402A language noting that such language

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[59] 87 N.J. at 240, 432 A.2d at 931. *E.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal.2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962) ("The purpose of strict liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves"); *see* Birnbaum, *Unmarking the Test for Design Defect: From Negligence to Warranty to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 596 (1980).

[60] 87 N.J. at 240, 432 A.2d at 931.

[61] *Id.* at 240 n.3, 432 A.2d at 931 n.3.

[62] *Id.* at 241, 432 A.2d at 931.

[63] 81 N.J. at 170-71, 406 A.2d at 150. Self-evident defects seem to include manufacturing defects and some design defects. Non-self-evident defects, which include some design defects such as inadequate warnings, lack the above qualities and " 'the question then becomes whether the defendant was negligent to people who might be harmed by that condition if they came into contact with it or were in the vicinity of it' " *Id.* (quoting Wade, *supra* note 49, at 835).

[64] 87 N.J. at 241, 432 A.2d at 931. It appears that the *Freund* court considered proximate cause and reasonable foreseeablity to be normal elements of a jury charge in a non-self-evident defect case. The explicit instruction on a duty to warn, however, was viewed as being peculiar to inadequate warning cases. *Id.*

[65] 81 N.J. at 174-76, 406 A.2d at 152-53. *See* note 5 *supra*.

[66] 81 N.J. at 176, 406 A.2d at 153. It should be noted that the language of section 402A was accepted by the Supreme Court of New Jersey in *Cepeda*, 76 N.J. at 180, 386 A.2d at 829, and was rejected by the same court one year later in *Suter*, 81 N.J. at 174-76, 406 A.2d at 152-53.

could be interpreted by a jury as placing a double burden on the plaintiff: that of showing a defect and that of proving that the defect created an unreasonably dangerous condition.[67] The *Freund* majority emphasized that jury instructions should vary according to the type of defect involved.[68] The court maintained that safety was a more appropriate means of determining the adequacy of a warning than fitness or suitability which were related directly to the utility of a product.[69] In any event, the court concluded that fitness and suitability were subsumed in safety and that "the charge in an inadequate warning case, must focus on safety."[70] After covering the different elements of a charge, the court emphasized that at its most basic level the charge must specify that the knowledge of the product's danger is to be imputed to the product's manufacturer.[71] Furthermore, Justice Handler more precisely defined the scope of the duty to warn. That duty would extend to all foreseeable users[72] and attach without regard to prevailing industry standards.[73]

Having established that a strict liability charge should be given and having clarified the elements of the charge, the court compared the proposed charge with the negligence instructions given by the trial judge[74] and concluded that the trial judge erred in a manner prejudi-

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[67] 87 N.J. at 241-42, 432 A.2d at 931.

[68] *Id.* at 242, 432 A.2d at 931.

[69] *Id.*, 432 A.2d at 932.

[70] *Id.*

[71] *Id.* at 243, 432 A.2d at 932.

[72] *Id.*

[73] *Id.* This statement is consistent with the position the court took when industry standards were used as a defense. *See Cepeda*, 76 N.J. at 161, 386 A.2d at 820; Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 411, 290 A.2d 281, 285 (1972).

[74] 87 N.J. at 243, 432 A.2d at 932. By way of a footnote, the court highlighted the charge presented to the jury at the trial level:

> To recover, the party suing must establish that the the party being sued, whom we call the defendant, was negligent and that this negligence was a proximate cause of the happening of the accident. . . . By the term proximate cause the law means that the negligent conduct of a defendant, the party being sued, must have been the efficient producing cause of the damages claimed by the the parties suing who, of course, we call the plaintiffs. The test you are going to apply in determining the issue of negligence is whether or not the defendant exercised under the circumstances involved, the time and place and so forth, the degree of care which a reasonably prudent manufacturer of chemical products . . . would have exercised. If the party exercised that care, then the defendant would not be liable. The manufacturer is under a duty to exercise reasonable care in the production, packaging and labeling of its product to protect those who may reasonably be expected to be in the area of the use of the product from unreasonable risk of harm while it is being used for the purpose it was intended. . . . This, of course, does not mean every conceivable risk.

cial to plaintiff.[75] The court reasoned that the jury might have been misled to believe that Hercules would have fulfilled its duty to warn had it acted as most manufacturers would in similar circumstances, and had it exercised due care in the formulation and display of the warning.[76] In addition, the court criticized the negligence charge which was worded so as to encompass only intended uses rather than all foreseeable uses.[77] The court also observed that the charge may have put the burden of showing industry standards on the plaintiff, a requirement which the court had already rejected.[78] Finally, the jury was never specifically informed that knowledge of dangerousness is imputed to the defendant. Thus, although Hercules had admitted such knowledge, plaintiff was never formally relieved of this burden.[79] For all these reasons the court decided that "the use of the negligence charges was not a harmless error."[80]

Having decided to remand the case, the court proceeded to address the issue of concurrent negligence.[81] This issue had been raised by the plaintiff to counter Hercules' defense tht Cellofilm Inc. and Freund's co-workers negligently caused the fire.[82] The trial court refused to instruct the jury on this theory,[83] reasoning that the instruction on defendant's conduct being *a* proximate cause rather than *the* proximate cause adequately covered the law.[84] Support for this position was found in *Panas v. N.J. Natural Gas Co.*[85] In *Panas*, the New Jersey Supreme Court upheld a jury charge that the defendant's act need only be a proximate cause of the injury, not the proximate cause.[86] The court in *Freund*, however, distinguished *Panas* on the facts, noting that in *Panas* there was only one defendant. A concurrent negligence charge would not, therefore, have affected the out-

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That may not even be possible in all circumstances. You must bear in mind the circumstances.

Id. at 243 n.4, 432 A.2d at 932 n.4.

[75] *Id.* at 243, 432 A.2d at 932.

[76] *Id.* at 244, 432 A.2d at 932-33.

[77] *Id.*

[78] *Id.*, 432 A.2d at 933.

[79] *Id.*

[80] *Id.* at 245, 432 A.2d at 933.

[81] *Id.* Although the court recognized that a determination of the issue of concurrent negligence was not necessary in light of the decision to remand the case, it discussed the issue "to clarify the point for the benefit of the parties and the trial judge." *Id.*

[82] *Id.* at 245, 432 A.2d at 933.

[83] *See* note 19 *supra* and accompanying text.

[84] 87 N.J. at 246, 432 A.2d at 933.

[85] 58 N.J. 255, 281 A.2d 520 (1971).

[86] *Id.* at 259, 281 A.2d at 522.

come of the case.[87] The court concluded that "in situations where the conduct of more than one tortfeasor is implicated in the causation of an accident, a charge based on concurrent negligence, as reflected in the model jury charge, should be given, particularly when requested."[88]

In a concurring opinion,[89] Justice Clifford limited himself to state, as he had done more fully in the *Suter* case,[90] that the "defective condition unreasonably dangerous" standard put forth in section 402A of the Second Restatement of Torts was the correct one.[91] Justice Clifford protested that in *Freund*, as in *Suter*, the majority, which looked at the conduct of the manufacturer rather than the product itself, misconstrued "the risk-utility ingredient of its strict-liability in tort analysis."[92] To support this position, he listed numerous cases from other jurisdictions which expressly adopted section 402A.[93]

The theory of strict liability in tort was formulated by the courts when it became evident that negligence and warranty actions no longer met the needs of the injured consumer in his quest for recovery.[94] In *Greenman v. Yuba Power Products*,[95] the Supreme Court of California adopted the strict liability in tort concept in a defective products case stating that "a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[96]

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[87] 87 N.J. at 247, 932 A.2d at 934.

[88] *Id.* The model charge reads as follows:

> When the negligence of two or more persons combines to produce an injury and damages to the plaintiff, the parties concurring in such negligence and bringing about the result are jointly and severally liable for the injury and damages proximately caused thereby, regardless of the degree of their negligent participation.

Id. at 246, 432 A.2d at 933.

[89] *Id.* at 248, 432 A.2d at 934 (Clifford, J., concurring). Justice Clifford was joined by Justice Sullivan in this opinion.

[90] 81 N.J. at 178, 406 A.2d at 154 (Clifford, J., concurring).

[91] 87 N.J. at 248, 432 A.2d at 935 (Clifford, J., concurring).

[92] *Id.* In *Suter*, Justice Clifford demonstrated how in his view the majority had linked the proofs required in defective design cases to the conduct of the manufacturer while they should only relate to the product itself. 81 N.J. at 180-81, 406 A.2d at 155 (Clifford, J., concurring).

[93] 87 N.J. at 249-50, 432 A.2d at 935-36 (Clifford, J., concurring). Justice Clifford had actually started this list in the *Suter* case. 81 N.J. at 191-91, 406 A.2d at 161 (Clifford, J., concurring).

[94] *See* Birnbaum, *supra* note 59, at 596. Professor Birnbaum sees economic and social considerations as furnishing a rational basis for the doctrine of strict liability: manufacturers are in a better position to eliminate the risks created by defective products and they can better shoulder the cost of injuries resulting from such products. *Id.*

[95] 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

[96] *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

Since the *Greenman* decision, courts have struggled with the concept of defect, especially in the areas of design defect and inadequate warning, and have continued to use negligence and warranty language to describe the term.[97] The Supreme Court of New Jersey first considered the issue in *Cepeda*. In *Cepeda*, the plaintiff lost four fingers while operating a pelletizing machine and sued the manufacturer for negligence and breach of warranty.[98] Using the theory of strict liability the court carefully distinguished manufacturing defects from design defects[99] and adopted the "defective condition unreasonably dangerous" language of section 402A of the Second Restatement of Torts as a standard for design defects.[100] Although the court focused upon whether the manufacturer acted reasonably under the circumstances, it drastically departed from a traditional negligence approach by imputing knowledge of the product's dangerousness to the manufacturer.[101] The following year the *Suter* court reconsidered the question of strict liability for defective design cases and modified the standard adopted in *Cepeda*. The *Suter* court rejected the *Cepeda* analysis in favor of a strict liability charge given in terms of reasonable fitness, suitability and safety.[102] The opinion identified two categories of design defect and established what was described by one commentator as "a rather muddled variation of the test put forth in *Barker v. Lull Engineering Company.*"[103]

In *Barker*, the Supreme Court of California established a two-prong test for design defect cases. First, a product could be defective if it failed to meet the expectations of an ordinary consumer.[104] In the alternative, it could be defective if the consumer proved that the design was the proximate cause of his injury and the manufacturer failed to establish that the benefit of such design outweighed its risk.[105] In *Suter* the New Jersey Supreme Court distinguished be-

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[97] 87 N.J. at 436-37, 432 A.2d at 929. *See* Birnbaum, *supra* note 59, at 599. Professor Birnbaum explains the problem as follows: Much of the confusion that continues to plague courts in applying the doctrine of strict liability products liability can be traced to the dual legacy of *Greenman* on the one hand, with its singularly bald notion of product defect, and section 402A on the other, with its amorphous terminology. *Id.*

[98] 76 N.J. at 160, 386 A.2d at 820.

[99] *Id.* at 169, 386 A.2d at 824. The court defined a manufacturing defect as a "variance, latent or patent, from the manufacturer's intent," and a design defect as a condition "where the product is made as intended, but is asserted to be dangerous in some way." *Id.*

[100] *Id.* at 171-72, 386 A.2d at 825.

[101] *Id.* at 163, 386 A.2d at 821.

[102] *Id.* at 174, 406 A.2d at 152. *See* note 66 *supra* and accompanying text.

[103] Birnbaum, *supra* note 62, at 624. 20 Cal.3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

[104] 20 Cal. 3d at 426-27, 573 P.2d at 455, 143 Cal. Rptr. at 234.

[105] *Id.* For a critical analysis of this decision, see Henderson, Jr., *Renewed Judicial Controversy over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773, 782-96 (1979).

tween self-evident design defects and non-self-evident ones.[106] The first category of defects would be judged in terms of reasonable consumer expectations while the second group, which existed in the absence of such expectations, would be evaluated in terms of whether the manufacturer acted negligently.[107] Although the court illustrated its concept of a self-evident defect, the court failed to provide a similar description for non-self-evident defects, thus, leaving that term open for interpretation.[108] This distinction was attacked by Justice Clifford who qualified it as "a mixture of the apples of warranty with the oranges of negligence."[109]

In *Freund*, the Supreme Court of New Jersey adopted a strict liability standard for inadequate warning cases.[110] Although it recognized that strict liability is product-oriented,[111] the court injected conduct-oriented elements into its analysis. The court stated that the jury would have to be instructed in terms of safety, "the predominant factor in determining the adequacy of the manufacturer's efforts,"[112] and that the charge must make clear that a manufacturer which sold its product without an adequate warning "has not satisfied its duty to warn."[113] Arguably, once the knowledge of the product's dangerousness is imputed to the manufacturer, as it was in *Freund*,[114] it does not matter whether the trier of fact looks at the product[115] or at the conduct[116] of the manufacturer.[117] Nevertheless, because the *Freund* court set out to formulate a strict liability test, it would appear that Justice Clifford's position in favor of the "defective condition unreasonably dangerous" standard[118] would have provided a better solution since a manufacturer would be "subject to strict liability for personal

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[106] 81 N.J. at 170-71, 406 A.2d at 150. *See* note 63 *supra* and accompanying text.

[107] 81 N.J. at 170-71, 406 A.2d at 150.

[108] *Id.* To illustrate a self-evident defect, the majority gave as an example "a bicycle whose brakes did not hold because of an improper design." *Id.*

[109] *Id.* at 184, 406 A.2d at 157 (Clifford, J., concurring).

[110] 87 N.J. at 240-41, 432 A.2d at 931.

[111] *Id.* at 238, 432 A.2d at 929.

[112] *Id.* at 242, 432 A.2d at 932.

[113] *Id.* at 243, 432 A.2d at 932.

[114] *Id.*

[115] The *Suter* court advocated this approach in cases of self-evident defects. 81 N.J. at 171, 406 A.2d at 150.

[116] The *Suter* court took this view in cases of non-self-evident defects, 81 N.J. at 171, 406 A.2d at 150. This view was expanded upon in *Freund*. 87 N.J. at 241-43, 432 A.2d at 931-32.

[117] The Supreme Court of Oregon explained that "the two standards are the same because a seller acting reasonably would be selling the same product which a reasonable consumer believes he is purchasing." *Phillips*, 269 Or. at 493, 525 P.2d at 1037.

[118] *See* note 4 *supra*.

injury caused by its product if plaintiff proves that the injury was caused by a defective condition in the product that rendered it unreasonably dangerous for use."[119] By focusing on the product, this approach is more in line with the product-oriented strict liability theory. At the same time, it "encompass[es] in a general way a notion of reasonable and prudent behavior on a manufacturer's part."[120]

Another alternative, and perhaps the most appropriate, was advocated by the Arizona court of appeals in *Brady v. Melody Homes Manufacturer*.[121] In *Brady*, a mobile home owner brought a products liability action against the home's manufacturer for the allegedly defective design of the home which lacked smoke detectors and provided only one exit.[122] In deciding the case, the Arizona court adopted a bifurcated test. The manufacturer would be held strictly liable for defects that fell within the Restatement definition of "defective condition" and its objective standard of reasonable consumer expectation.[123] On the other hand, a negligence standard would be used for non-self evident defect cases in which the reasonable consumer expectation test did not apply. The manufacturer would incur liability if it could have made a safer product,[124] and the trier of fact would utilize a risk/utility test, which is effectively inseparable from a consideration of the reasonableness of the manufacturer's conduct.[125] Since overtones of negligence are unavoidable when using a risk/utility analysis, a similar approach could have been adopted by the Supreme Court of New Jersey for inadequate warning cases. Self-evident defects, defined in terms of consumer expectations in *Suter*,[126] could be analyzed under a strict liability standard, whereas non-self-evident defects, including inadequate warnings, could undergo a negligence analysis.

To use a negligence standard in cases of inadequate warnings would alleviate problems raised by the *Freund* decision regarding the extent of the manufacturer's liability and the availability of contribu-

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[119] 87 N.J. at 248, 432 A.2d at 935.

[120] 81 N.J. at 181, 406 A.2d at 155.

[121] 121 Ariz. 253, 589 P.2d 896 (1978).

[122] *Id.* at 255, 589 P.2d at 898.

[123] "Defective condition" is defined in the Restatement of Torts as "a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." RESTATEMENT (SECOND) OF TORTS § 402A, comment g (1965). "Unreasonably dangerous" is explained in comment i as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer." *Id.*, comment i.

[124] 121 Ariz. at 257-59, 589 P.2d at 900-02.

[125] 121 Ariz. at 259, 589 P.2d at 902 (quoting *Barker*, 20 Cal.3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237).

[126] 81 N.J. at 170, 406 A.2d at 150.

tory or comparative negligence as a defense. Since a manufacturer is imputed with knowledge of the dangerousness of the product, it could be held liable for dangerous propensities not technologically discoverable when the product was marketed.[127] This point is important when considered in the context of a risk/utility analysis which, as a balancing test, should include all factors which reflect upon the manufacturer's decision to market the product. A manufacturer should not be held liable, however, when it has no actual knowledge of the product's dangerousness.

An area left unclear by the *Freund* court is the question of contributory negligence. Under the defenses of contributory and comparative negligence, a plaintiff may be barred from recovery if he knowingly and voluntarily assumes a risk of which he was aware.[128] In *Suter*, the Supreme Court of New Jersey created an exception for cases where the plaintiff is an employee.[129] In those cases contributory negligence is unavailable as a defense because "an employee engaged at his assigned task . . . has no meaningful choice."[130] While the *Freund* court failed to consider whether this exception is applicable to the facts of *Freund*, it would appear that the *Bexiga* and *Suter* bar against its application in the employment area is still applicable. Application of the *Suter* exception in an inadequate warning case such as *Freund* may be misplaced, however, since in such a case an employee could have a choice of abiding by the manufacturers warning or ignoring it.

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[127] Birnbaum, *supra* note 59, at 622. For Professor Birnbaum, the liability is close to being absolute. "[This] raises the question of whether there is any point short of the absurd at which the manufacturer can be said to have reasonably discharged its duty not to expose users of its product to unreasonable danger." *Id.* at 623.

[128] In his treatise, Professor Prosser described contributory negligence as a defense "which consists of proceeding voluntarily to encounter a known unreasonable danger and which tends to overlap the defense of assumption of risk." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 102, at 671 (4th ed. 1971). *See also* Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 458-59, 212 A.2d 769, 783 (1965). New Jersey enacted a Comparative Negligence Act whereby:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages sustained shall be diminished by the percentage sustained of negligence attributable to the person recovering.

N.J. Stat. Ann. § 2A:15-5.1 (West Cum. Supp. 1981-1982).

[129] 81 N.J. at 167-68, 406 A.2d at 148. The *Suter* court stated: "We see no reason to depart from *Bexiga's* elimination of contributory negligence where an employee is injured due to a defect (whether design or otherwise) in an individual accident while using a machine for its intended or foreseeable purposes." *Id.*

[130] *Id.* at 167, 406 A.2d at 148. In Bexiga v. Havir Mfg. Co., 60 N.J. 402, 402, 412, 290 A.2d 281, 286 (1972), the court stated that it would be anomalous to bar recovery on the grounds that the plaintiff was negligent because the plaintiff's negligence "was the very eventuality the safety devices were intended to guard against." *Id.*

The *Freund* court mentioned, but failed to discuss, the issue of proofs.[131] In *Torsiello v. Whitehall Laboratories*,[132] the appellate division noted that the proofs required in negligence and strict liability actions for inadequate warning were identical.[133] Other courts,[134] as well as several commentators,[135] have reached a similar conclusion. The *Freund* court's reluctance to deal with the issue can be interpreted as indicating tacit approval of the *Torsiello* dictum since *Torsiello* was noted in the decision. Thus, assuming that proofs sufficient to establish strict liability are sufficient to show negligence, plaintiffs bear the same burden under either theory.[136]

The real shortcoming of the *Freund* decision is the court's continued use of negligence terminology to describe what it purports to be a strict liability tort. The *Freund* court points to consumer protection as a reason for the application of strict liability in inadequate warning cases.[137] This argument does not carry the weight it formerly did.[138] Under the bifurcated *Brady* analysis advocated above,[139] consumers would still be protected and manufacturers would know with more certitude what is expected of them. In addition, courts would be able to charge juries with clear instructions, thus avoiding the unsavory position of mixing legal theories.

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[131] 87 N.J. at 240, 432 A.2d at 930.

[132] 165 N.J. Super. 311, 398 A.2d 132 (App. Div.), *certif. denied*, 81 N.J. 50, 404 A.2d 1150 (1979).

[133] *Id.* at 320 n.2, 398 A.2d at 137 n.2.

[134] *See, e.g.*, Sterling Drug, Inc. v. Yarrow, 408 F.2d 978, 992 (8th Cir. 1969) (both negligence and strict liability standards applicable to case of inadequate warning); Rainbow v. Albert Elia Bldg. Co., 49 A.D.2d 250, 253, 373 N.Y.S.2d 928, 930-31 (1975) (same proofs required in negligence and strict liability causes of action).

[135] *See* Rheingold, *Proof of Defect in Product Liability Cases*, 38 TENN. L. REV. 325, 325 (1971); Wade, *supra* note 49, at 836-37.

[136] *See* Birnbaum, *supra* note 59, at 648. Professor Birnbaum states that plaintiffs not only have ample opportunity to get to the information needed to show the manufacturer's negligence, but they already come forward with this information in strict liability actions. *Id.*

[137] 87 N.J. at 240, 432 A.2d at 931. *See* notes 94-95 *supra* and accompanying text.

[138] Professor Birnbaum states: "The time has come to ask candidly whether some courts, in their eagerness to provide recovery for injured plaintiffs, have not over zealously emphasized and relied upon the risk-spreading rationale of strict products liability with a resultant abandonment of any serious consideration of the reasonableness of the manufacturer's conduct, which is the very essence of a system of tort recovery." Birnbaum, *supra* note 59, at 643.

[139] *See* notes 121-27 *supra* and accompanying text.