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Viva Cepeda! Products Liability and Employee Protection

John Jeffrey Ross

Widener referred to Justice Harlan's concurring opinion in *Dutton*, 400 U.S. at 97: ". . .the whole question is not whether the testimony is truthful; rather, the issue is whether there has been such "adequate 'confrontation' " as to satisfy the requirements of the Constitution's Sixth Amendment. 574 F.2d at 1139.

In stating his belief that the admission of Brown's grand jury testimony violated the right of the defendants to confront him, forcing a reversal of the trial court convictions and remanding the case for new trial, Judge Widener reiterated that "the confrontation clause invokes a means of trial procedure which provides a minimal, or threshold level of protection to the defendant."

Citing *Barber v. Page*, 390 U.S. 719 (1968), Judge Widener stated: ". . .the essence of the confrontation clause is the judgment that, the defendant is entitled, at the very least, to the presence of the accuser before him and the jury." 574 F.2d at 1140.

As the dissent of Judge Widener concludes, this writer believes that the issue of the inclusion at trial of grand jury testimony of an unavailable witness, testimony controlled by the prosecutor's leading questions and not subject to cross-examination, is one that the Supreme Court must address. In *West*, the majority may have extended the residual hearsay exception under §804 (b) (5) of the Federal Rules of Evidence to a point that infringed on the basic procedural right of confrontation of the defendants.

VIVA CEPEDA! Products Liability and Employee Protection

Products liability actions typically involve complaints against parties who distribute products that cause physical injury to persons or property. These suits are generally based upon theories of negligence, breach of warranty, and strict liability in tort,[1] with the latter cause of action at the vanguard of recent developments in "actionable products" litigation.

Two issues of particular concern to the products liability attorney are the concepts of defect and contributory negligence in a strict liability action.[2] The New Jersey Supreme Court recently addressed these points in *Cepeda v. Cumberland Engineering Co., Inc.*, 76 N.J. 152, 386 A.2d 816 (1978), a decision which offers a viable solution to the problems of setting the standard for defining the defectiveness of a product, but continues the controversy over the degree and kind of contributory negligence on the part of the injured plaintiff which will bar his recovery.

The doctrine of strict liability in tort is expressed in the Restatement (Second) of Torts (1965) as follows:

> Section 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The Rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of its product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

It is immediately apparent that in a strict liability action one neither needs to prove negligence on the part of the seller, nor establish privity as a requirement to sue. The inquiry in the strict liability suit is directed towards the product; such liability is *strict* in that the seller's compliance with a negligence standard of care is irrelevant. Moreover, inasmuch as the requirement of privity is abolished, the intricacies of the law of commercial transactions[3] no longer must receive the attention of the jury; again, the proper focus is shifted to the product, and thus a workable definition of what constitutes defectiveness under the Restatements formula assumes great importance.

There are three modes of defectiveness precedent to finding that a product is actionable:[4] defects from design, a manufacturing error, and defects from a failure to affix to hazardous products warnings and instructions necessary to ensure their safe and proper use.[5] Because strict liability does not mean absolute liability, the plaintiff must prove that there was a defect in the product at the time it left the defendant's control. *See*, Note, 17 FORDHAM L. REV, 943, 944 (1974). This need for a standard of defectiveness is particularly important because a juror may intuitively find a product to be defective simply because the plaintiff was injured while using the product—the juror would believe that the presence of injury means that something was "wrong" with the product. This is clearly absolute liability. As Dean Wade has stated: "Strict liability for products is clearly not that of an insurer. If it were, the plaintiff would need only to prove that the product was a factual cause in producing his injury. Thus, the manufacturer of a match would be liable for anything burned. . ." Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 828 (1973); *see also*, Note, *supra*, 17 FORDHAM L. REV. 943, 944-946.

1. One commentator has stated that there are "at least nine distinct legal theories on which a plaintiff may rely." Tort theories are: negligence, negligent misrepresentation threatening physical harm, strict liability for defective product, and strict liability for innocent misrepresentation; Contract theories: breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and breach of express warranty; Also, "two hybrid theories that may involve a breach of some 'extra-U.C.C.' implied or express warranty." Darling, *The Patent Danger Rule: An Analysis of its Vitality*, 29 MERCER L. REV. 583, 584-585 (1978).

2. *See*, Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L. J. 30 (1973).

3. For example, the seller may exclude warranties under U.C.C. §2-316 (although such disclaimer is unconscionable in personal injury cases). *But see*, MD. COMMERCIAL LAW CODE §2-316.1. A statute of limitations may defeat even a timely products liability complaint where it runs from the date of sale, and the injury may not occur until after the sales transaction. Further, the plaintiff's action may fail due to lack of privity, although some versions of U.C.C. §2-318 allow for actions by third party beneficiaries not in privity to the sale.

4. Wade, *A Conspectus of Manufacturer's Liability for Products*, 10 INDIANA L. REV. 755, 756 (1977). The term "actionable" is Wade's-it signifies a product's state or characteristic which would support a cause of action.

5. A treatment of this third aspect is beyond the inquiry of this article.

The language of the Restatement does not end with the term "defect," however, but further qualifies it with the phrase "unreasonably dangerous." This additional language was deemed necessary to give substance and clarity to the concept of defect in actions involving product design. The manufacturing defect needs no explanation; the product was unsuccessfully made and it is judged, in effect, against those properly completed on the same assembly line. The design defect, on the other hand, is more abstract. A design defect appears in a product that is manufactured as intended, but which falls below societal expectations of *reasonable safety*. The Restatement articulates the rationale for the qualifying language as follows in commentary to section 402A:

> comment i. *Unreasonably dangerous.* The rule stated in this section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption. . .The article sold must be dangerous to an extent beyond that which would be contemplated by an ordinary consumer. . .with the ordinary knowledge common to the community as to its characteristics. . .

The standard contemplated by the Restatement, then, is the community expectation of safety in that product design. This qualification to what constitutes defectiveness also reflects the concern that some useful products are dangerous if overused or abused; absolute liability might be imposed although the manufacturer has a "good" design which necessarily entails some risk in use. For example, gasoline is very dangerous when used to clean auto parts in a closed shop. Its volatility, however, makes it desirable as a fuel; it would be unreasonably dangerous if it exploded every time a fuel tank was being filled.

The Restatement's required element of "unreasonable danger" has received some criticism. The consumer may not possess the expertise to develop a reasonable expectation as to the safety of a particularly complex product; the product may be held in low esteem by consumers in a particular area, thus lowering the threshhold of safety a product must reach for it to win the jury's approval. *See* P. Keeton, *Product Liability and the Meaning of Defect,* 5 ST. MARY'S L.J. 30, 37 (1973). Dean Wade notes that "unreasonable danger" might be taken either as a completely separate element the plaintiff must prove, or as a redundant term, or perhaps as a suggestion that the product be "superhazardous." Wade, *ante,* 44 MISS.L.J. at 830-833.

The "unreasonable danger" standard was criticized and rejected in *Cronin v. J.B.E. Olson Corp.,* 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). *Cronin* exemplifies the *Greenman* [*v. Yuba Power Products, Inc.,* 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963)] rule which posits liability where a product is merely defective and causes personal injury. *See* Wade, *ante,* 44 MISS.L.J. at 829. Intending to simplify jury instructions, the court in *Cronin* also strove to prevent a revival of a negligence cause of action and its attendant high burden of proof which it stated would be a retreat from the social policy behind the adoption of strict liability.

Stating at 8 Cal.3d 133, 501 P.2d 1162, 104 Cal. Reptr. 442 that

> a bifurcated standard requiring a showing of defect and unreasonable danger is of necessity more difficult to prove than a unitary one. . .and proclaiming that the phrase "defective condition unreasonably dangerous" requires only a single finding would not purge that phrase of its negligence complexion,

the court established what it thought was a "clear and simple test for liability determination" as well as a departure from a term which "rings of negligence." *Id.*

A number of courts have joined *Cronin* in excising the "unreasonable danger" criterion from strict liability in tort instructions. *See,* for example, *Butaud v. Suburban Marine and Sporting Goods, Inc.,* 543 P.2d 209 (Alaska 1975), *modified on other grounds* 555 P.2d 42 (1976). *Berkebile v. Brantley Helicopter Corp.,* 462 Pa. 83, 337 A.2d 893 (1975);[6] *Glass v. Ford Motor Co.,* 123 N.J. Super. 599, 304 A.2d 562 (L.Div. 1973). Of these, *Berkebile* perhaps has the most cogent criticism of the supposed superfluity of the unreasonable danger standard in strict liability cases. Articulating the premise that proof of defect is sufficient without qualification to establish liability, the Pennsylvania Supreme Court stated at 96, 337 A.2d 900:

> We hold today that the "reasonable man" standard in any form has no place in a strict liability case. The salutary purpose of the "unreasonably dangerous" qualification is to preclude the seller's liability where it cannot be said that [the product was defective in manufacture]; [this purpose can be fulfilled by requiring proof of defect or perhaps a design source of the injury].

See generally, Note, 21 VILLANOVA L. REV. 802, 807 (1976). *Contra, Beron v. Kramer—Trenton Company,* 402 F.Supp. 1268 (E.D.Pa.), *aff'd* 538 F.2d 318 (3rd Cir. 1976) (" [W]e believe that the phrase 'defective condition unreasonably dangerous to users' is a unitary concept and that the purpose of the draftsmen would be frustrated by severing from it 'unreasonably dangerous' without substituting another suitable phrase which tends to clarify the meaning of defective condition."); Comment, *Elimination of "Unreasonably Dangerous" from §402A—the Price of Consumer Safety,* 14 DUQ. L. REV. 25 (1975).

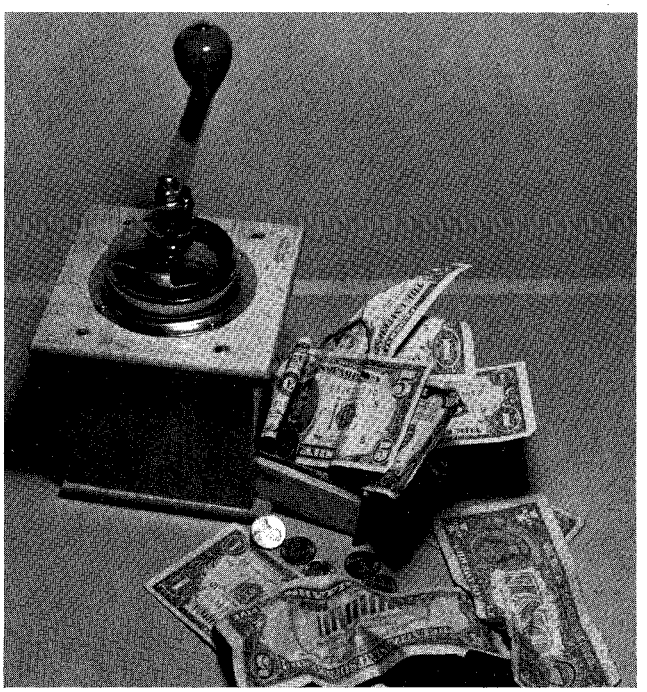

Photo by J.J.R.

6. The precedential value of *Berkebile* is questionable as only two justices signed the opinion, with the rest only concurring in the result.

Cepeda v. Cumberland Engineering Co., Inc., 76 N.J. 152, 386 A.2d 816 (1978), takes its place with this constellation of authorities as a potentially formidable influence which may substantially affect the controversy over the interpretation of the Restatement's language.

The product before the court in *Cepeda* was an industrial pelletizing machine manufactured by the defendant. The machine functioned to "draw strands of plastic. . .into position for cutting into very small pellets." Page 165 of 76 N.J., 386 A.2d at 822. Prior to cutting, the strands were drawn past a horizontal opening, through rollers and finally over a rotating drum equipped with knives. Because of the danger to a person's hand, the engine was designed to accommodate a guard which would pass the plastic strands but was too small to allow introduction of a worker's limbs. The court noted that the guard was often removed for maintenance and cleaning and the machine operated without it.

The guard was absent when Jose Francisco Cepeda arrived for work one night in April, 1968. During the operation of the pelletizer, his hand became caught in one of the plastic strands, was drawn into the machine, and Cepeda was seriously injured.

Cepeda sued the manufacturer, basing his action on negligence and breach of warranty causes of action, alleging that the machine was defectively designed from a safety viewpoint because it could be operated without the safety guard. Plaintiff alleged that if the machine had been designed with an interlock which frustrated operation without the guard, the accident would have been an impossibility.

After submitting the issue of strict liability in tort to the jury, the trial court rendered a judgment on a verdict for the plaintiff. The Appellate Division reversed, 138 N.J.Super. 344, 351 A.2d 22 (1976), on the theory that the manufacturer was entitled to expect normal use—i.e. operation with the guard in place. This court in effect decided that the machine was not defectively designed, because failure to operate the pelletizer with the guard in place was not a contingency for which the product needed to be designed.

In reversing, the New Jersey Supreme Court concluded that the Appellate Division failed to "give the plaintiff the benefit of all proofs and of all legitimate inferences therefrom favorable to the plaintiff, before deciding the fact issues. . .against him. "76 N.J. 163, 386 A.2d 821. As to the issue of defectiveness, the court stated that the evidence supported a reasonable inference that the defendant indeed could have foreseen misuse, and given such foresight, it was incumbent upon the designer to produce a machine in such a way as to counteract any anticipated use or misuse.[7]

In its opinion, the court expressed approval of a risk/utility analysis[8] for the resolution of design defect cases. At page 163, 386 A.2d 821, the court stated:

> Authoritative interpretation of section 402A. . .justifies our adopting the rule that knowledge of the dangerous potentiality of a machine design as reflected by the evidence at trial is imputable to the manufacturer, and that the remaining determinative question as to affirmative liability is whether a reasonably prudent manufacturer with such foreknowledge would have put such a product into the stream of commerce after considering the hazards as well as the utility of the machine. . .and such other factors as would bear upon the prudence of a reasonable manufacturer in so deciding whether to market the machine.

While this approach imparts a "ring of negligence" to a strict liability action, requiring as it does a determination of the defendant's "prudence" in marketing a dangerous product, the jury's decision is based on an examination of the product. With the

7. To be inferred from the court's discussion of both foreseeability and risk/utility is that a manufacturer should foresee the risks involved in "second collision" or "enhanced injury" situations. In these cases, while the defect does not cause the accident, it may play a major role in aggrevating injuries after the original accident. A good example is a case where a Ford Pinto, a notorious fire bomb, is "rear-ended" and bursts into flames. The design defect alleged is usually poor placement of the fuel tank behind the rear axle, unsafe fuel filler design, and protrusions from the rear bumper area which are aimed at the fuel tank in a manner that allows them to puncture the cell and cause an explosion. These defects do not cause collisions, but they do minimize the survival chances of the car's passengers.

Many cases have held that the manufacturer should not be held liable in the second collision situation. *See, e.g.*, Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966), *cert. den.* 385 U.S. 836 (1966). The better reasoned cases, however, recognize that it is reasonable to expect that a significant number of products will be involved in accidents and that their design and manufacture should account for this possibility. *See, e.g.*, Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737 (1974). *Cf.* Cepeda v. Cumberland Engineering Co., Inc., 76 N.J. 152, 386 A.2d 816 (1978) ("The fact that the instant machine was commercially 'reasonably fit for its intended purpose' of pelletizing plastic strands is obviously irrelevant to the postulate of strict tort liability to a workman injured by reason of the unsafety of the machine due to a design defect.").

8. *See* n. 7, *supra*. Obviously, "second collision" considerations are subject to a balance of risk inherent in the design with its utility. A Sherman tank poses little "second collision" danger, but is not too fuel-effective. In any event, a court would follow a case by case approach: in some circumstances, it would be impossible to design a "collision-safe" automobile and still keep it as a useful vehicle.

element of scienter imputed to the defendant as a matter of law, the plaintiff need not shoulder the burden of proof to demonstrate it as a matter of fact. Wade, *ante*, 44 MISS. L.J. at 834-835. The qualities of the product itself allow an inference that the defendant made an unreasonable marketing decision. *See* Keeton, *supra*, 5 ST. MARY'S L.J. 30, 37-38. Moreover, the court stated that the misuse of the product, if objectively foreseeable, presents no defense where the product is defectively designed and marketed in a condition "not duly safe." *See Cepeda, ante* at 177, 386 A.2d 828-829.

In adopting the risk/utility approach, the court retained the "unreasonable danger" qualification in design defect cases while deeming it an unnecessary element in those actions involving alleged defects in manufacture. Page 170 of 76 N.J., 386 A.2d 825. This holding effectively overrules *Glass v. Ford Motor Co., supra*, which had eliminated the unreasonable danger standard entirely.

After finding for the plaintiff as to the unreasonably dangerous nature of the product design, the court retreated from its enlightened vision of the issues involved and relied upon the assumption of risk issue as a reason to remand the case.

At the first trial, the defendant manufacturer had argued that Cepeda was contributorily negligent in operating the machine without the guard, and that this lapse on his part should be interposed between the defendant's unreasonable decision to market the machine and the plaintiff's injury. The trial court presented this issue to the jury, instructing both as to carelessness and as to the assumption of risk aspect (the voluntary and unreasonable encounter with the danger) of contributory negligence.

The jury decided that Cepeda was contributorily negligent, but that this "misbehavior" was not a substantial factor in bringing about the accident. While the Appellate Division did not reach this apparent inconsistency, the Supreme Court remanded the case to consider the effect of plaintiff's conduct on the issue of liability. Instructing the second trial court, on remand, to limit the trial to the issue of voluntary unreasonable exposure to danger, the court stated at 189, 386 A.2d 834:

> Until such time as consideration is given in this State to extending the principle of comparative negligence or fault to strict liability in tort. . .the continuance of unreasonable voluntary exposure of oneself to a known danger as a defense to strict liability in tort seems a fair balance of justice and policy in this area.

The opinion notes that because a finding of assumption of risk necessarily entails a finding that plaintiff's conduct, not the product, was the proximate cause of plaintiff's injury the verdict of the jury that Cepeda was contributorily negligent *and* not a substantial factor in causing the accident was unsatisfactory. See page 191 of 76 N.J., 386 A.2d 835. Three justices disagreed.

The dissenting justices read the evidence as incapable of establishing that Cepeda was either contributorily negligent or as a factor in the chain of causation. Moreover, concerning the assumption of risk issue as to the employment milieu, they questioned its very applicability as a proper defense in this case.

There is extensive commentary and authority which tends either to reject the theory outright or closely circumscribes the range of its vitality in industrial accident cases. *See, e.g., Bexiga v. Havir Manufacturing Corp.*, 60 N.J. 402, 290 A.2d 281 (1970); *Rhoads v. Service Machine Co.*, 329 F.Supp. 367, 380 (E.D. Ark. 1971); A. Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1, 27 (1974); D. Noel *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L.REV. 93, 126-127 (1972)("It would seem that when a manufacturer supplies a dangerous machine for use by employees, the workman injured because of the unsafe design is subject to. . .economic pressure and that his consent. . .is . . .not free and voluntary.").

At first glance the test for assumption of risk articulated by the majority is fair and just because the *reasonable* plaintiff will not fail to recover in spite of such a defense.[9] The genesis of the requirement that assumption of risk as a defense should be based upon unreasonable exposure to the risk created by the defendant is found in comment *n* to section 402A of the second Restatement, which reads insofar as is pertinent:

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

The key word here is *unreasonable*. As stated by the court, a reasonable voluntary exposure to a known hazard should not excuse a defendant from liability for marketing an unreasonably dangerous machine. 76 N.J. 189 n.9, 386 A.2d 834 n.9. The question becomes one of interpreting the plaintiff's actions and his subjective state of mind. That the court was divided as to the need for a new trial on this issue suggests that some objective content needs to be imparted to the word "unreasonable" if consistency in these actions is to be maintained. Moreover, a close adherence to a "comment *n* standard" can lead to an unconscionable result.

The use of the assumption of risk defense often leads to an unfair comparison of the respective choices of the parties. How can the jury compare a hurried decision by an employee, which might lead to injury, with the unreasonable marketing decision of the defendant, carried out with substantial planning and foresight? An example of this situation is *Bartkewich v. Billinger*, 432 Pa. 351, 247 A.2d 603 (1968), where an employee reached into a machine to prevent it from jamming. With reflection it might seem that his action was unreasonable. Surely the court thought so because it reversed a jury verdict for the plaintiff. However, the court ignored the exigency of a normal factory situation, equating the decision by the plaintiff on the job with the designer who, in a more relaxed atmosphere, opted not to equip the device with a safety barrier or emergency switches. In commenting on *Bartkewich*, Aaron Twerski wrote:

> There is something terribly distasteful about this result. . .Is it not common knowledge that employees who work with dangerous machinary develop psychological resistance to the danger level? And shouldn't the safety features be

9. *See* 76 N.J. 152, 189 n.9, 386 A.2d 816, 834 n.9.

> embodied to care for one who may make voluntary and unreasonable choices?. . .Should not the product have been manufactured so as to protect a *Bartkewich*-type plaintiff from his own foolish decision making?

Twerski, ante, 60 IOWA L. REV. at 33. *See also,* for a particularly unfortunate decision, *Patten v. Logeman Bros. Co.,* 263 Md. 364, 283 A.2d 567 (1971).

A number of commentators have questioned the role of assumption of risk in the strict liability field, *See, e.g.,* F. James, *Assumption of Risk: Unhappy Reincarnation,* 78 YALE L. J. 185 (1965); A. Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Product Liability Era,* 60 IOWA L. REV. 1 (1974), and have reasoned that the courts should examine the extent of the defendant's *duty* instead. That courts have done this to some extent was shown in *Cepeda,* where at page 177, 386 A.2d 828, the court noted that "many, if not most jurisdictions now acknowledge that in applying strict liability in tort for design defects manufacturers cannot escape liability on grounds of *misuse* or *abnormal use* if the actual use proximate to the injury was objectively foreseeable."

This is clearly a duty analysis, with the defendant's responsibility coextensive with the ability of a reasonable manufacturer to foresee possible harm to the consumer. There is no reason to treat a plaintiff's risk-taking differently from his misuse of the product if such misbehavior is arguably foreseeable.[10] It is not a "leap of faith" to realize that a designer may also reasonably foresee that in a work environment an employee may make a decision which at the time of trial may appear to be *unreasonable.* Notwithstanding a plaintiff's error in judgement, the product may be dangerous in design as was the machine which injured Jose Cepeda. Under the assumption of risk view, the New Jersey Supreme Court was contradictory; on the one hand, it imposed a duty upon a manufacturer to protect consumers from anticipated misuse; on the other it absolved the defendant from the very obligation it assumed when it marketed a product which lent itself to the very misuse which, when denominated as an "unreasonable encounter with danger," is miraculously transformed into assumption of risk. *Cf. Micallef v. Miehle Co., Etc.,* 39 N.Y. 2d 376, 384, 348, N.E.2d 571, 577, 384 N.Y.S.2d 115, 120 (1976); *Palmer v. Massey-Fergusan,* 3 Wash. App. 508, 517, 476 P.2d 713, 719 (1970) ("The manufacturer of the obviously defective product ought not to escape because the product was obviously a bad one. The law, we think, ought to discourage misdesign rather than encouraging it in its obvious form."). These cases typify those which attend the decline of the patent danger rule[11] which has prevented recovery in the past because the plaintiff had been deemed to be sufficiently "warned" by the obviousness of the danger in the product. The irony of this view is that the visibility of the peril increases the *defendant's* foreseeability of its potential for danger in the contexts it could conceivably be used. S. Darling, *The Patent Danger Rule: An Analysis and a Survey of its Vitality,* 29 MERCER L. REV. 583 (1978).

CONCLUSION

In instructing the jury in a strict liability design defect case, the court should apply that instruction formulated by Dean Wade:

> A product is not duly safe (or is 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 not duly safe (unreasonably dangerous).[12]

In other words, did the manufacturer make a prudent marketing decision?

In considering a defense that the plaintiff was contributorily negligent, a court should first examine the nature of the defendant's duty toward the plaintiff; this duty should be defined by what the defendant could reasonably foresee as consequences of the use of its product. In *Cepeda,* because the court imputed knowledge of use without the guard to the manufacturer, the defendant's duty logically extended to those who would use the machine in this foreseeable state. *See, Micallef v. Miehle Co., Etc., supra,* at 380, 348 N.E.2d 573-574, 384 N.Y.S.2d 117, where the court noted that the action of the injured plaintiff in exposing himself to the danger presented by the machine was within the "custom and usage" of the industry, and that the defendant was aware of the practice which led to the plaintiff's injury. A pure assumption of risk application might have ignored particular circumstances of that case and barred recovery as a matter of law.

In light of public policy considerations which have marked some products liability analyses, assumption of risk should bar recovery only in those situations not foreseen by the seller or manufacturer of the product. Given that the seller's duty should be coextensive with its foreseeability, possible risks to the consumer, it should be encouraged to *design* a product both to take those risks into account and to minimize them where such precautions are necessary to ensure safety without sacrifice of the product's social utility.

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10. That is, there should be no difference in result between a case where the manufacturer will be liable if he could foresee how the plaintiff would misuse the product and one where the defendant could reasonably foresee how the injured would "misbehave" by some form of contributory negligence.

11. The assumption of risk doctrine and the patent danger rule are first cousins. In the former, the inquiry focuses on the state of mind of the injured and turns on the voluntary, unreasonable exposure to the danger presented by the product. As to the latter, the case-law supporting the patent danger rule (the so called *Campo* doctrine) states that the seller will not be liable where the danger presented by its product is patent, obvious, to the injured. Actually, while the patent danger rule is a sufficient, and not necessary, condition for assumption of risk, the latter is necessary for an application of the *Campo* rule. It is assumed that the encounter with an obvious danger entails *unreasonable, voluntary* risk-taking. At the very least, this is how the courts treat obvious dangers when they utilize the patent danger rule to bar recovery. *See* Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950).

Under a duty analysis, the patent danger rule could work against the defendant manufacturer as well, because it would also be obvious to the defendant that his product was dangerous. This extends foreseeability, and thus expands the manufacturer's duty to protect the consumer from dangers obvious to all parties.

The patent danger rule is in the decline, because courts may see a duty to protect the forgetful or hurried plaintiff in the employment situation. *See,* Comstock v. General Motors Corp., 358 Mich. 163, 99 N.W.2d 629 (1958) and Micallef v. Miehe Co., Etc., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

12. Wade, *On the Nature of Strict Tort Liability for Products,* 44 MISS. L. J. 825, 839-840 (1973). *See also, Cepeda, supra,* at 174, 386 A.2d at 827; Phipps v. General Motors Corp., 278 Md. 337, 345 n.4, 363 A.2d 955, 959 n.4 (1976). *See generally,* Barker v. Lull Engineering Co., Inc., 20 Cal. 3d 413, 431, 573 P.2d 443, 455, 143 Cal. Rptr. 255, 257 (1978) (California Supreme Court refused to retreat from *Cronin's* rejection of "unreasonable danger" standard, but reacted to criticism that earlier case law in that state had left the concept of defect without any substantiation. As a result, that court articulates none other than the risk/utility analysis, but refuses to allow any negligence description of its inquiry.).