

safe defense, *N.J.S.A. 2A:58C-3a(3)*.

[*Fabian v. Minster Mach. Co.*, 258 *N.J.Super.* 261, 271, 609 *A.2d* 487 (App.Div.), *certif. denied*, 130 *N.J.* 598, 617 *A.2d* 1220. (1992).]

By converting some factors of the risk/utility equation into absolute defenses, the Act “drastically changed the method of analyzing products-liability cases.” *Dewey, supra*, 121 *N.J.* at 96, 577 *A.2d* 1239. Indeed, because “under [the Act], the consumer-expectations test cannot be avoided,” *id.*, some commentators have referred to it as an element of the plaintiff’s case:

[S]ince the Act so clearly provides that the test under section 3a(2) constitutes an *absolute defense to liability*, the net effect upon a plaintiff (suing on a claim in which consumer-expectations may be a component) requires that the section 3a(2) standard be included *within the proof of defect presented in the affirmative case*.

[William A. Dreier et al., *Products Liability and Toxic Tort Law in New Jersey: A Practitioner’s Guide*, at 135.1 (6th ed. 1988 & Supp.1990) (emphasis added).]

Such an interpretation of 3a(2) accords with the fact that, under common law, the components of the 3a(2) defense were part of the ***378** risk/utility analysis, and it was the plaintiff’s burden to prove that risk outweighed utility. That burden remains on the plaintiff under section 2.

[6][7] The Act, however, provides the defendant with a defense that did not exist under common law. Because consumer expectations and open-and-obvious danger were merely factors of the risk/utility test under common law, a plaintiff could still make out a case of design defect even if those factors weighed in favor of the defendant. Under the Act, that is no longer the case: a product that satisfies the 3a(2) standard is, by statutory definition, not defectively designed. If the harm caused by a product “would be recognized by the ordinary person who uses ****1372** or consumes the product,”

and if the harm stems from an “inherent characteristic of the product,” *N.J.S.A. 2A:58C-3a(2)*, then the harm is not actionable. Because 3a(2) provides a new, absolute defense, the defendant should bear the burden of proving the 3a(2) defense by a preponderance of the evidence. “When an affirmative defense is raised [in a civil case], the defendant normally has the burden of proving it.” Biunno, *Current N.J. Rules of Evidence*, comment 2 on *Evid.R. 101(b)(1)* (1994-95). However, because 3a(2) is an absolute defense that product-liability defendants will invariably raise, a plaintiff will rarely be able to go forward without addressing it.

The Act effected the same “conversion”—from mere factor to absolute defense—for the “state-of-the-art” test. *N.J.S.A. 2A:58C-3a(1)*. For example, in reviewing a jury charge, the Appellate Division held that, “by including the state-of-the-art element only as an element of the risk/utility analysis, the court failed to give *defendant* the benefit of the absolute statutory affirmative defense available under *N.J.S.A. 2A:58C-3a(1)*.” *Fabian, supra*, 258 *N.J.Super.* at 274, 609 *A.2d* 487. The same analysis applies to the section 3a(2) defense: if the defendant has proved it, and the plaintiff has not disproved it, the plaintiff will not recover.

***379 [8]** The exceptions, however, provide two circumstances in which the 3a(2) absolute, affirmative defense is not available to the defendant: if the product is workplace equipment or if the danger can “feasibly be eliminated without impairing the usefulness of the product.” *N.J.S.A. 2A:58C-3a(2)*. Although case law and the legislative history are silent on whose ultimate burden it is to prove that the danger can or cannot feasibly be eliminated without impairing the usefulness of the product, we hold that the plaintiff bears that burden of proving that this exception precludes the defendant’s use of the 3a(2) defense.

[9] Placing on the plaintiff the burden of proving that the danger could feasibly be eliminated without impairing the product’s usefulness conforms to both the plain language of the statute and legislative in-