

tent. The “without impairing the usefulness” element was a factor of the risk/utility analysis under common law. Just as section 3a(2) elevates some of those factors to an absolute defense that the defendant may raise, this exception to 3a(2) elevates a different factor to an exception that the plaintiff may raise. That the plaintiff will in most cases have to prove that the danger could be eliminated without impairing usefulness makes the plaintiff’s task more difficult, and that was the intent of the Act. Hence, if a plaintiff proves by a preponderance of the evidence that the defendant could have eliminated the danger without impairing the usefulness of the product, then the product might be defectively designed even though the defendant has proved the 3a(2) defense.

#### IV

The final question before us is, under section 3a(2), how severely must the elimination of danger impair the usefulness of the product? That is an issue of first impression. Moreover, even though the fourth factor of the common-law risk/utility analysis includes the “ability to eliminate the unsafe character of the product without impairing its usefulness,”\*[380Cepeda, supra, 76 N.J. at 174, 386 A.2d 816](#), no reported opinions have interpreted the phrase in that context.

Cadec asserts that removal of the danger posed by an allegedly defective product may impair its usefulness without rendering the product totally useless. Hence, Cadec seeks a standard under which the plaintiff has to prove that the danger can be eliminated without significantly diminishing the usefulness of the product. Under that standard, a plaintiff could not prevail by showing that the defendant could have designed a product that was safer, but significantly less useful.

[\[10\]\[11\]](#) The Act’s legislative history suggests that “without impairing the usefulness” implicates the product’s inherent characteristics and intended use. The Senate Judiciary Committee Statement refers to

dangers “that can feasibly be eliminated without impairing the usefulness of the product, *because such dangers are not ‘inherent.’*” (Emphasis added.) Hence, dangers that are not inherent can be eliminated without impairing usefulness.\*[1373](#) Conversely, dangers that are inherent cannot be eliminated without impairing usefulness. For example, the danger that a carving knife will cut the user cannot be eliminated because an exposed, sharp blade is an inherent characteristic of a carving knife, and essential to its intended use. A plaintiff could not establish the second exception to 3a(2) by proving that a dull knife would be safer. However, in the case of a lawn mower, the danger of being cut by sharp, exposed blades during use is not inherent: the manufacturer can include a cover that extends to the ground, so that the machine still cuts grass (its intended use) but does not pose nearly so great a threat of injury during operation. Thus, an inherent danger arises from an aspect of the product that is indispensable to its intended use. The danger of exposed, sharp blades is indispensable to knives, but not to lawn mowers.

Although no New Jersey cases have addressed the meaning of the phrase “without impairing the usefulness,” a federal district court has predicted how this Court would eventually interpret the [\\*381](#) phrase. In *McWilliams v. Yamaha Motor Corp., USA*, [780 F.Supp. 251 \(D.N.J.1991\)](#), *modified*,[987 F.2d 200 \(3d Cir.1993\)](#), the plaintiff, whose legs had been injured in a motorcycle accident, claimed that the section 3a(2) defense was not available to the defendant motorcycle manufacturer because the defendant could feasibly have eliminated the danger of leg injury by adding crash bars. *Id.* [at 253-54](#). Applying the Act, the district court held leg injuries to be an open and obvious danger of motorcycle riding that is inherent in the intended use of motorcycles and that, therefore, cannot feasibly be eliminated:

In all likelihood, the New Jersey Supreme Court will rule that a motorcycle, a vehicle specifically designed as an open-air, easily man-