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Strict Products Liability: The Irrelevance of Foreseeability and Related Negligence Concepts

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NOTES AND COMMENTS

STRICT PRODUCTS LIABILITY: THE IRRELEVANCE OF FORESEEABILITY AND RELATED NEGLIGENCE CONCEPTS

I. INTRODUCTION

Strict products liability was conceived and nurtured as a bastard stepchild among the legitimate fraternal twins of negligence and warranty. As a result, not only was the terminology of negligence and warranty imparted to the concept of strict liability but there was also an accompanying confusion of tort and contract principles.[1] Strict liability was gradually adopted as a tort, however, and reliance upon the language of warranty became less pronounced.[2] Unfortunately, the negligence terminology, and often—and more importantly—the negligence concept itself, has remained firmly attached to strict liability in a manner which is inconsistent with strict liability's policy of consumer protection and with the enterprise theory of risk allocation.[3]

Principal among the misapplied negligence concepts is that of foreseeability.[4] To say that a defect, a hazard, or an injured plaintiff is foreseeable to a supplier of a product is to say nothing more than that the supplier was negligent for injecting foreseeable harm into the marketplace. A fundamental premise of this paper is that strict liability is not dependent upon negligence[5] and that the manufacturer or supplier of a defective product is liable for resulting harm even if he has exercised due care.[6]

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1. *See generally* Donnelly, *After The Fall of the Citadel: Exploitation of the Victory or Consideration of All Interests?*, 19 SYRACUSE L. REV. 1 (1967).

2. RESTATEMENT (SECOND) OF TORTS, [hereinafter cited as RESTATEMENT (SECOND)] Explanatory Notes § 402A, comment m, at 355 (1965): "The basis of liability is purely one of tort." *See also* Greenman v. Yuba Power Prod. Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); Annot., 13 A.L.R.3d 1057 (1967).

3. *See, e.g.*, Calabresi & Hirschoff, *Toward a Test for Strict Liability in Tort*, 81 YALE L.J. 1055 (1972); Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J. LAW & ECON. 67 (1968); Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

4. "[T]he doctrine of foreseeability, although a recognized doctrine where ordinary negligence in tort is involved, has no part in the concept of strict liability in tort." Howes v. Hansen, 56 Wis. 2d 247, —, 201 N.W.2d 825, 831 (1972).

5. RESTATEMENT (SECOND), *supra* note 2, § 402 A, comment n, at 365: "[T]he liability with which this section deals is not based upon the negligence of the seller, but is strict liability. . . ."

6. *Id.*, § 402 A(2)(a). A concise and conclusive definition of strict liability may be said to be "liability imposed on a manufacturer of a chattel because of an injury caused to plaintiff or his

Nevertheless, strict liability does not mean absolute liability,[7] and the question remains one of determining the limits of liability short of requiring only that the product cause an injury.[8] This article will discuss three possible limitations on liability: contributory negligence and its modern counterpart, comparative negligence;[9] assumption of risk;[10] and alteration and misuse.[11] The focus of the article, however, will be on the inappropriate use of foreseeability as a limitation upon strict products liability. Of necessity, adnate negligence concepts such as duty and breach of duty,[12] knowable and unknowable risks,[13] the state of the art defense,[14] duty to warn,[15] and proximate causation[16] are also examined. Eliminating foreseeability as a test of liability affects them all.

II. THE HISTORICAL AND POLICY CONSIDERATIONS OF STRICT LIABILITY

A comprehensive account of the rise and development of strict liability and its eventual application to products[17] is beyond the scope of

property by the condition of the chattel, without regard to the presence or absence of his negligence." Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965).

7. *See, e.g.*, Kissel, *Defenses to Strict Liability*, 60 ILL. B.J. 450 (1972).
8. Phillips v. Kimwood Mach. Co., 269 Or. 485, —, 525 P.2d 1033, 1036 (1974).
9. See notes 148-73 *infra* and accompanying text.
10. See notes 174-202 *infra* and accompanying text.
11. See notes 203-22 *infra* and accompanying text.
12. See notes 40-63 *infra* and accompanying text.
13. See notes 64-78 *infra* and accompanying text.
14. See notes 79-89 *infra* and accompanying text.
15. See notes 90-109 *infra* and accompanying text.
16. See notes 110-38 *infra* and accompanying text.
17. The products liability concept is embodied in the RESTATEMENT (SECOND), *supra* note 2, § 402 A. 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 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

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the 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 his product, and

(b) the user or consumer has not bought the product from or entered into any contractural relation with the seller.

There has been much discussion of the language of the *Restatement (Second)* concerning "defective condition" (comments g and h) and "unreasonably dangerous" (comment i), and a resolution of the conflict is outside the parameters of this article. It should be noted, however, that some jurisdictions have eliminated the requirement that a plaintiff prove the product was defective. *See, e.g.*, Ross v. Up-Right, Inc., 402 F.2d 943 (5th Cir. 1968); Grinnell v. Charles Pfizer & Co., 274 Cal. App. 2d 424, 79 Cal. Rptr. 369 (1969). Other jurisdictions have eliminated the requirement that the product be "unreasonably dangerous." *See, e.g.*, Anderson v. Fairchild Miller Corp., 358

this article.[18] It should be noted, however, that in the most elemental sense, leaving aside medieval concepts that one who caused harm was liable regardless of negligence, the strict liability standard arose from a small category of exceptions to the rules of negligence.[19] These narrow exceptions included the keeping of wild animals,[20] the sale of food,[21] and ultrahazardous activities.[22] For these exceptions, liability was imposed without regard to fault or culpability on the part of the defendant.[23] But applying strict liability to manufacturers and suppliers generally was long thought to be a concept "characteristic of medieval times"[24] and "long-discarded."[25]

F. Supp. 976 (D. Alas. 1973); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Berkebile v. Brantley Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975). The courts in the latter instances have correctly perceived that "unreasonably dangerous" is based upon the reasonable person standard of negligence. The *Berkebile* case held that such a standard has no place in strict liability thereby obviating any requirement of reasonableness. However, this view has been criticised in the federal court as not being the law in Pennsylvania. *See, e.g.*, Beron v. Kramer-Trenton Co., 402 F. Supp. 1268, 1276-77 (E.D. Pa. 1975), *aff'd*, 538 F.2d 318 (3d Cir. 1976) (*per curiam*). *See also* Bunn v. Catepillar Tractor Co., 415 F. Supp. 286, 288-89 (W.D. Pa. 1976), *aff'd*, 556 F.2d 564 (*per curiam*), *cert. denied*, 434 U.S. 875 (1977). New Jersey is an example of the rapid flux. Having dispensed with the unreasonably dangerous requirement in Glass v. Ford Motor Co., 123 N.J. Super. 599, 304 A.2d 562 (1973), the state restored it in Cepeda v. Cumberland Eng'r Co., 76 N.J. 152, 386 A.2d 816 (1978).

18. *See generally* RESTATEMENT (SECOND), *supra* note 2, § 402A, comment c, at 348-49; Dickerson, *The ABC's of Products Liability—With A Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439 (1969); Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal*, 24 STAN. L. REV. 439 (1972); James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957); Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959); Lascher, *Strict Liability In Tort For Defective Products: The Road To and Past Vandermark*, 38 S. CAL. L. REV. 30 (1965); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Prosser, *The Assault Upon The Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960). For opinions generally opposing the ascendancy of strict liability, *see generally* the dissenting opinions in Chapman Chem. Co. v. Taylor, 215 Ark. 630, —, 222 S.W.2d 820, 828 (1949) and Webb v. Zern, 422 Pa. 424, —, 220 A.2d 853, 855 (1966); Green, *Should The Manufacturer of General Products Be Liable Without Negligence?*, 24 TENN. L. REV. 928 (1957); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1957).

19. J. HENDERSON & R. PETERSON, THE TORTS PROCESS 522 (1975). RESTATEMENT (SECOND), *supra* note 2, § 402A, comment b, at 348.

20. Filburn v. People's Palace & Aquarium Co., [1890] 25 Q.B.D. 258. *See also* Annot. 69 A.L.R. 500 (1930) and Annot. 21 A.L.R.3d 603 (1968).

21. "In the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome at his peril. This is a principle . . . necessary to the preservation of health and life." Van Bracklin v. Fonda, 12 Johns. Ch. 468, —, 7 Am. Dec. 339, 339 (N.Y. 1815).

22. Seigler v. Kuhlman, 81 Wash. 2d 448, 502 P.2d 1181 (1972); Rylands v. Fletcher, L.R. 1 Ex. 265 (1866), *aff'd*, 3 H.L. 330 (1868). *See also* Prosser, *The Principle of Rylands v. Fletcher*, in SELECTED TOPICS IN THE LAW OF TORTS, 135, 149-64 (1954).

23. Nevertheless, one court has held that "strict liability . . . is a tortious action based squarely on the concept of culpability or fault." Ford Motor Co. v. Carter, 141 Ga. App. 371, —, 233 S.E.2d 444, 447 (1977). Still, the same court determined that reasonable care was not a defense, and strict liability was found to be the equivalent of negligence *per se*. *Id.*

24. Plant, *supra* note 18, at 939.

25. *Id.*

Strict liability for products came into its own in a case of "lathes on the loose."[26] Justice Traynor wrote the opinion in this case, *Greenman v. Yuba Power Products, Inc.*,[27] for a unanimous California Supreme Court. The policy considerations underlying not only that decision but also the principle of strict liability itself can be found in his concurring opinion, written two decades before, in *Escola v. Coca-Cola Bottling Co.*:[28]

> Those who suffer injury from defective products are unprepared to meet its consequences. The cost of injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of the injury can be insured by the manufacturer and distributed among the public as a cost of doing business . . . . However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurence is a constant and general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.[29]

In addition, manufacturers are in the best position to research, to inspect, to supervise, and continually to replace their best practices with better ones. As Mr. Justice Holmes observed, "[I]t may be considered that the safest way to secure care is to throw the risk upon the person who decides what precautions shall be taken."[30]

Succinctly stated, the purposes of strict products liability have been recognized as one or more of the following: (1) economic distribution of injury costs throughout society, (2) risk distribution, (3) enhanced emphasis on safety through imposition of liability upon nonnegligent manufacturers and suppliers, (4) protection, or at least partial indemnification, of consumers vulnerable to technological hazards, and (5) elimination of the formalistic and highly technical confusion of the Uniform Sales Act and the Uniform Commercial Code as applied to breach of warranty.[31]

Not unexpectedly, strict liability was shunned during the Industrial Revolution because it was feared that responsibility for increasing

26. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 376 (1965).

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

28. 24 Cal. 2d 453, 150 P.2d 436 (1944).

29. *Id.* at 462, 150 P.2d at 441.

30. O. HOLMES, THE COMMON LAW 93 (1881).

31. *Cf.* Annot., 13 A.L.R.3d 1057, 1062-66 (1967). *See generally The Assault Upon the Citadel, supra* note 18.

injuries and death not directly related to negligence would unduly curtail fledgling industries and retard economic and technological progress. But that "assumption rested on the oft-disproved notion that wheels operate at peak efficiency when unattended by brakes."[32] Today it is generally recognized as a matter of policy that no current societal interest is forwarded by allowing a manufacturer who places a defective article into the stream of commerce to avoid responsibility for damages which it causes.[33] Strict liability is imposed primarily for social policy reasons to assure an allocation of risks[34] throughout society with the consequential distribution of the cost of damages which are inevitable in a highly technological existence. Such damages are seen as merely another cost of doing business.[35] Secondarily, the interests of enhanced safety for products are furthered.[36]

It cannot be overemphasized that a finding of negligence is not necessary to the imposition of strict products liability in tort. The most important distinction between negligence and strict liability is that, unlike negligence, strict liability has no requirement that the dangerous product reach the marketplace or consumer through any fault of the manufacturer or supplier. Even though a manufacturer has exercised every precaution in the production and distribution of a product, he must bear the costs if harm results[37] subject only to certain narrow limitations discussed hereinafter.[38] While it is often said that strict liability is a tort without fault in the traditional sense, it would perhaps be more

32. Traynor, *supra* note 26, at 364.

33. Salvador v. Atlantic Steel Boiler Co., 457 Pa. 24, 32, 319 A.2d 903, 907 (1974). But merely manufacturing a defective product which causes injury and which has not reached the marketplace has been held insufficient for strict liability. Winkler v. Hyster Co., 54 Ill. App. 3d 282, —, 369 N.E.2d 606, 610 (1977).

34. Dean Prosser noted that, while "risk distributing" is a favorite theory of the professors, it is not often found in the cases and appears generally as a makeweight. Prosser, *The Fall of the Citadel, supra* note 18, at 800.

35. The purpose of such [strict] liability is to insure that the cost of injuries or damage, either to the goods sold or to other property, resulting from defective products, is borne by the makers of the product who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves.

Santor v. A & M Karagheusian, Inc., 44 N.J. 52, —, 207 A.2d 305, 312 (1965).

36. Perhaps "consumers can be taught to be more careful if the law penalizes them for imprudence. Fostering careful manufacture is, however, more important than discovering incautious consumption. Pernicious products should be scrapped in the factory rather than dodged in the home." Morris, *Negligence in Tort Law*, 53 VA. L. REV. 899, 909 (1967). Any suggestion that enhanced recovery would encouarge carelessness on the part of the consumer dismisses the consumer's natural tendency to prefer no injury at all to monetary compensation therefor.

37. *Cf.* Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910), wherein a ship's owner was held liable for damages done to plaintiff's dock to which the ship was rightfully and lawfully docked during a storm. Although the owner sought only to protect his ship from the tempest, he was nevertheless required to pay for the damage to the plaintiff's dock which resulted.

38. See notes 139-224 *infra* and accompanying text.

accurate to deem it a tort without negligence. Even if one is not negligent in placing a potentially harmful commodity in the stream of commerce, and that commodity does in fact result in injury, that very act cannot necessarily be termed faultless and may be legally and ethically culpable.[39] The semantical distinctions among blame, culpability, fault, and the like may be avoided as long as it is manifest that negligence in whatever form is not a prerequisite to strict products liability in tort. Once this is established, the attendant trappings of negligence fall away from the corpus of strict liability, and the policy goals outlined above may truly be achieved.

III. THE IRRELEVANCE OF FORESEEABILITY

The application, or rather misapplication, of negligence concepts to strict products liability has been pervasive. Early advocates of the doctrine did not appear to question foreseeability as a natural limitation upon strict products liability, and the test was variously applied to foreseeable defects, foreseeable harm, and foreseeable plaintiffs.[40] The courts and commentators, apparently well-schooled in the practice of attaching liability only where the defendant's conduct fell below the standard of care expected of a reasonably prudent person, had difficulty finding liability where such reasonable care was found to have been taken.[41]

The misapplication of foreseeability as a limitation on strict products liability, however, goes even further. In addition to being the determinant for the limits of duty under a conventional risk analysis,[42] foreseeability has a major bearing upon proximate causation and the defenses of contributory and comparative negligence, abnormal use, alteration, the state of the art, and assumption of risk.

Foreseeability is a test for determining whether a defendant exer-

39. Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1089 (1965). There are also those who believe that strict liability has "accomplished little for the consumer and it has had little impact upon practice." Rheingold, *The Expanding Liability of the Product Supplier; A Primer*, 2 HOFSTRA L. REV. 521, 531 (1974). Rheingold maintains that negligence is "hot" and strict liability is "cold" and that a plaintiff is in a position to receive substantially larger awards by showing that the defendant is at fault. *Id.* For a more theistic approach, see Lucey, *Liability Without Fault and the Natural Law*, 24 TENN. L. REV. 952 (1957).

40. "This enterprise liability should not be unlimited, but it should extend to all casualties and hazards that are injected into society by the activity of the enterprise, *at least to the extent that they are . . . reasonably foreseeable.*" James, *supra* note 18, at 927 (emphasis added).

41. For an analysis of the foreseeability doctrine as applied to products liability cases in negligence, see Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962).

42. Polelle, *The Foreseeability Concept and Strict Products Liability: The Odd Couple of Tort Law*, 8 RUT.-CAM. L.J. 101, 101-02 (1976).

cised due care. It is illogical to apply foreseeability to strict products liability since a finding of lack of due care is not required to establish liability. One of the cases to recognize this inconsistency, *Green v. American Tobacco Co.*,[43] did so in a warranty action. The Supreme Court of Florida, upon certification of a question from the federal district court,[44] held that Florida case law affirmatively established that implied warranty is not limited by the doctrine of foreseeability.[45] This same reasoning logically carries over to strict liability, and it has long been so applied in cases involving foods in which the producer or retailer could not have foreseen a defective condition.[46] Nevertheless, the concept of the irrelevance of foreseeability has troubled courts when applied to products. One case which resolved the problem in favor of the inapplicability of foreseeability was *Howes v. Hansen*,[47] wherein the court held that "the doctrine of foreseeability, although a recognized doctrine where ordinary negligence in tort is involved, has no part in the concept of strict liability in tort."[48] The court in *Howes*, however, relied on still another negligence concept and found that strict products liability is imposed essentially on the basis of negligence *per se*, in which foreseeability plays no role of limitation.[49] Resorting to such an

43. 154 So. 2d 169 (Fla. 1963).

44. The certification was part of a lengthy journey in the courts as evidenced by the full citation of the case: Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962), *on rehearing*, 304 F.2d 85 (*per curiam*), *on certification*, 154 So. 2d 169 (Fla. 1963), *on receipt of answers to certification*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964). *See also* Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964) (applying Missouri law); Lartique v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963); Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961).

45. 154 So. 2d at 172-73.

46. *See, e.g.*, Griggs Canning Co. v. Josey, 139 Tex. 623, —, 164 S.W.2d 835, 839-40 (Civ. App.), *aff'd*, 165 S.W.2d 201 (1942). *Contra*, Bowman Biscuit Co. v. Hines, 151 Tex. 370, 251 S.W.2d 153 (1952) (involving a wholesaler based on foreseeability).

47. 56 Wis. 2d 247, 201 N.W.2d 825 (1972).

48. *Id.* at —, 201 N.W.2d at 831.

49. This has been explained as follows:

> Negligence per se was defined in Osborne v. Montgomery, (1931) 203 Wis. 223, 240, 234 N.W. 372, 378 . . . : "We come now to a consideration of that class of cases where foreseeability is not an element of negligence,—a more accurate statement would be to that class of cases where the defendant is foreclosed or concluded upon the question of foreseeability. In all those cases where it is said that the performance of the wrongful act being admitted the defendant is guilty of negligence as a matter of law or that the act is negligent per se, the case is one which admits of no question as to reasonable anticipation or foreseeability. These cases are those in the main where the act amounts to a violation of a standard of care fixed by statute (ordinance) or previous decision."

Id. at —, 201 N.W.2d at 831. *Contra*, Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 604 n.9 (D. Idaho 1976) (applying Idaho law), wherein the court said that "foreseeability is an important element of strict products liability law and has long been a part of tort jurisprudence in Idaho," and specifically rejected Howes v. Hansen, 56 Wis. 2d 247, 201 N.W.2d 825 (1972).

analogy is unnecessary and reminiscent of those cases which reasoned that foreseeability is merely another name for scienter.[50] The courts have clearly felt the pull of negligence law in the need to find culpability, negligence *per se*, scienter, or fault in some form in order to hold a manufacturer liable.[51] To do so, however, is to misread the policy requirements of strict liability.

The better reasoned rule in such cases—and an excellent statement of the thesis of this article—was articulated by the Pennsylvania Supreme Court in *Berkebile v. Brantley Helicopter Corp.*:[52]

> To require foreseeability is to require the manufacturer to use due care in preparing his product. In strict liability, the manufacturer is liable even if he has exercised all due care. Foreseeability is not a test of proximate cause; it is a test of negligence. Because the seller is liable in strict liability regardless of any negligence, whether he could have foreseen a particular injury is irrelevant in a strict liability case. In either negligence or strict liability, once the negligence or the defective product is shown, the actor is responsible for all of the unforeseen consequences thereof no matter how remote which follow in a natural sequence of events.[53]

The foreseeability limitation on strict products liability has been expressed not only in terms of due care but also in terms of duty, so that a manufacturer is liable only to those to whom he owes a duty and thus whose injury he might have foreseen.[54] Such an analysis follows

50. Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 640, 105 Cal. Rptr. 890, 895 (1973).

51. A series of Oregon cases typify this trend. In Anderson v. Klix Chem. Co., 256 Or. 199, 472 P.2d 806 (1970), the court held that the test under strict liability is whether a reasonably prudent manufacturer should have foreseen the hazards of his product if it were distributed without a warning. *Id.* at —, 472 P.2d at 808. Clearly such a standard is nothing more than a negligence test, giving credence to those who say strict liability has accomplished little in the way of benefits to the plaintiff. *See generally* Rheingold, *supra* note 39. The Oregon Supreme Court apparently recognized this and overruled *Klix Chem. Co.* in Phillips v. Kimwood Mach. Co., 269 Or. 485, —, 525 P.2d 1033, 1039 (1974), after having the decision foreshadowed by Roach v. Kononen, 269 Or. 457, 525 P.2d 125 (1974). Now the Oregon courts impute knowledge of the danger to the manufacturer. See notes 61-63 *infra* and accompanying text.

52. 462 Pa. 83, 337 A.2d 893 (1975).

53. *Id.* at —, 337 A.2d at 900 (citations omitted). See notes 111-38 *infra* and accompanying text.

54. In Winnett v. Winnett, 57 Ill. 2d 7, 310 N.E.2d 1 (1974), a four-year old girl's fingers were injured when they were caught in the slow-moving belts of a forage wagon. Such a "use" was held not foreseeable by the manufacturer. The court spoke in terms of duty and held that

> the liability of a manufacturer properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen and only those situations where the product is being used for the purpose for which it was intended or for which it is reasonably foreseeable that it may be used. Any other approach to the problem results in making the manufacturer and those in the chain of product distribution virtual insurers of the product . . . .

clearly and directly, albeit erroneously, from the Cardozoan theory of duty formulated in *Palsgraf v. Long Island Railroad*.[55] It is inappropriate to define strict liability in any terms whatsoever relating to duty. It is presupposed that often the injury from a dangerous product could not have been prevented by any known precautions; hence, one would be forced into the untenable position either of not engaging in the conduct at all or of performing the impossible. So stating the law in terms of duties impossible to perform is extremely unwise.[56] The dissenting opinion of Justice Andrews in the *Palsgraf* decision, in which he finds a duty owed to the whole world when an unreasonable risk of harm is created by the defendant,[57] is infinitely closer to the policy considerations underlying strict liability than is Cardozo's rule of the foreseeable plaintiff.[58] Under both the duty concept of Andrews in negligence and the public policy considerations of strict liability, a manufacturer would be liable not only for those persons or property he might have been expected to injure, but also for those that he does in fact injure.[59]

Id. at —, 310 N.E.2d at 4. *See also* Richelman v. Kewanee Mach. & Conveyor Co., 59 Ill. App. 3d 578, 375 N.E.2d 885 (1978), reaching the opposite result "upon a set of facts strikingly similar to the *Winnett* case." *Id.* at —, 375 N.E.2d at 889 (dissenting opinion).

55. 248 N.Y. 339, 162 N.E. 99 (1928). *See also*, Polelle, *supra* note 42, at 113-19.

56. Harper, *Liability Without Fault and Proximate Cause*, 30 MICH. L. REV. 1001, 1014 (1932).

57. 248 N.Y. at —, 162 N.E. at 103.

58. Polelle, *supra* note 42, characterized the problem:

> Emergence of the foreseeability factor in the duty aspect of strict products liability cases is symptomatic of the doctrinal distress that arises when a legal principle is extended into new areas that do not fall within its original rationale. To the extent that the foreseeability factor of negligence law has entered into the duty analysis of strict products liability cases, a basic reassessment of the relationship of both torts to the foreseeability concept is unavoidable.
>
> The danger is that the courts in strict liability cases are being led by the *Restatement (Second)* into requiring not only foreseeability, but an extremely high degree of foreseeability. While it does not explicitly use the terms "duty" or "foreseeability," the *Restatement (Second)* limits recovery in strict products liability to those persons who can be classified either as "consumers" or "users" of the defective product. The failure to protect persons other than consumers or users was justified on the ground that a consumer who buys a product has greater reason to rely on the product that non-consumers, and on the intriguing ground that it was the consumers who brought the social pressure for the recognition of strict products liability. The drafters of section 402A of the *Restatement (Second)* have effectively out-Palsgrafed the *Palsgraf* doctrine by creating an even more limited ambit of duty in strict products liability than exists under the flexible duty test of negligence.

Id. at 116-17 (footnotes omitted). Polelle points out that the circumscribed duty described above is the source of some dissatisfaction as evidenced by the extention of strict products liability to bystanders who cannot be classified as users or consumers. *Id.* at 117. *See, e.g.*, Passwaters v. General Motors Corp., 454 F.2d 1270 (8th. Cir. 1972); Caruth v. Mariani, 11 Ariz. App. 188, 463 P.2d 83 (1970); Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

59. This would apparently include the group of reasonably foreseeable users and consumers envisioned by the *Restatement (Second)*. In Winnett v. Winnett, 57 Ill. 2d 7, 310 N.E.2d 1 (1974), older farm workers might have recovered for injuries from the exposed wheels of the conveyor if

It should be apparent at this point that, in strict liability cases, the analysis should be of the condition of the product rather than of the conduct of the defendant, but such has not always been the case.[60]

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the wheels were found to be unreasonably dangerous. The mere fact that plaintiff was only four years old should not have provided the crucial pivotal point upon which liability turned. See Stanfield v. Medalist Indus., Inc., 34 Ill. App. 3d 635, 340 N.E.2d 276 (1975), in which the plaintiff sustained the loss of three fingers while operating a boring and cutting machine. The court found *Winnett* "clearly distinguishable" since injury to a four-year old child by a farm forage wagon was different from injury to an inexperienced or unsupervised adult operator of a dangerous machine! *Id.* at —, 340 N.E.2d at 280. *See also* Court v. Grzelinski, 48 Ill. App. 3d 716, 363 N.E.2d 12 (1977), and Morris, *Enterprise Liability and the Actuarial Process—the Insignificance of Foresight*, 70 YALE L.J. 554 (1961).

To compound the problem further, courts have often failed to state whether the foreseeability test they have applied refers to the defect, the injury, or the plaintiff. That commentators have exacerbated the confusion is demonstrated in an analysis of Borel v. Fiberboard Paper Prod. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) found in Elser, *Asbestosis: Its Impact Upon Products Liability and Workmen's Compensation*, 1975 INS. L.J. 459. Therein, Elser states:

> Referring to the element of foreseeability, the court in *Rodin v. American Can Company* [133 Cal. App. 2d 524, 284 P.2d 530 (1955)] set forth the *rules common to many other strict liability cases*. The supplier is held liable if he: (1) knew or should have known that the chattel was likely to be dangerous for the purpose intended, (2) had no real reason to expect the user would realize the danger, and (3) failed to warn the users of real or potential danger.

Id. at 464 (emphasis added). He added that the above test and rules for foreseeability are very similar to the ones used in *Borel*. However, *Rodin* was not an "other" strict liability case as the author indicates; it was tried on a *res ipsa loquitur* theory of negligence and the court's test (133 Cal. App. at —, 284 P.2d at 532-33) was quoted from the *Restatement (Second)* § 388, dealing purely with negligence. Elser is correct in observing that the test is the same as that used in the *Borel* strict liability case in which a worker had contracted asbestosis after working more than 30 years as an insulation worker in the defendant's employ. Despite the burden imposed by the court's use of a straight negligence test of liability, the plaintiff prevailed. The *Borel* court in effect held that the dangers of asbestosis were foreseeable to the defendants and that they had ignored them; hence, they were negligent.

This need to establish culpability is out of place. The issues should instead be whether the condition of the product rendered it dangerous and whether the condition caused the harm. *But see* Bassham v. Owens-Corning Fiber Glass Corp., 327 F. Supp. 1007 (D.N.M. 1971), where the court found that asbestos was either not defective or, if defective, was not unreasonably dangerous, thus absolving the defendant of liability.

60. This focus upon conduct, not condition, is well illustrated by Hagenbuck v. Snap-On Tools Corp., 339 F. Supp. 676 (D.N.H. 1972), wherein the plaintiff sued the manufacturer and distributor of a hammer in strict liability after it chipped while in use and blinded him in one eye. The court emphasized numerous acts and omissions by the defendant distributor surrounding the insuring of the safety of the hammers ordered and sold. The defendant had not only distributed hammers manufactured by others, but also manufactured hammers itself. This dual role gave the distributor expert knowledge of the flaws and hazards to which the product was susceptible. The opinion stated:

> I find the . . . defendant [seller] *negligent* in not inspecting and testing the hammers purchased from [defendant manufacturer], in not insisting that [defendant manufacturer] meet [defendant seller's] design and testing specifications in the manufacture of its hammers, and in failing to take adequate steps to warn of the danger of chipping.
>
> While [defendant manufacturer's] blind adherence to its time-worn manufacturing and testing procedures is not condoned, there is no evidence that [defendant manufacturer] did not meet *the standard of care of the average hammer manufacturer of reasonable prudence*. There was no testimony as to industry wide practice and custom, and the only evidence as to industry procedure was limited to what [defendant manufacturer] did and

Further, some courts have taken an approach similar to that of finding negligence *per se* and have imputed knowledge of the product's condition to the manufacturer.[61] Under this approach, which is to some degree a measure of the defendant's conduct, the court will assume that the danger was foreseeable by the manufacturer and will then ask whether a reasonably prudent manufacturer would have marketed the product anyway.[62] This does not do away with the negligence test; it merely injects strict liability with a legal dose of scienter in much the same fashion as is done in negligence *per se*. The approach is indeed closer to strict liability devoid of foreseeability, but it is arrived at through the use of an unnecessary legal fiction.[63]

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failed to do. I find, therefore, that, *under the standard negligence test*, [defendant manufacturer] is not liable.

Id. at 683 (emphasis added).

The court was candid in demonstrating that, although it was a strict liability case, liability was to be assessed along pure negligence lines. It would appear from the facts that, had a strict liability test focused upon the condition of the product rather than the conduct of the parties, the defendant manufacturer would have been liable for placing a defective hammer which was unusually dangerous into the marketplace.

The court also transplanted another negligence concept into the garden of strict liability—that of comparative negligence. Here, the court found the plaintiff 20% negligent in using the hammer after it had chipped previously. *Id.* at 680. When strict products liability cases are subjugated to pure negligence tests, it is not surprising that additional negligence concepts fail to stand out on the legal landscape as clearly inappropriate. Once evaluations of conduct are thrown into the equation, the examination again becomes one of negligence rather than of strict liability based on the product's condition. *See also* notes 154-64 *infra* and accompanying text.

61. See note 51 *supra*.

62. See Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974):

> The law imputes to a manufacturer [or supplier] knowledge of the harmful character of his product whether he actually knows of it or not. He is presumed to know of the harmful characteristics of that which he makes [or supplies]. Therefore, a product is dangerously defective if it is so harmful to persons [or property] that a reasonably prudent manufacturer [or supplier] with this knowledge would not have placed it on the market.

Id. at —, 525 P.2d at 1040 n.16 (quoting Professor Wade with alterations by the court). *See also* Cepeda v. Cumberland Eng'r Co., 76 N.J. 152, —, 386 A.2d 816, 821 (1978).

63. Following the *Kimwood* test of imputed foreseeability, *supra* note 51, the Oregon Supreme Court, in Johnson v. Clark Equip. Co., 274 Or. 403, 547 P.2d 132 (1976) observed that:

> Foreseeability is a negligence concept; a standard for assessing culpability. As such, it is not an appropriate consideration when determining whether a manufacturer should be held liable without fault. If, however, we *assume* foreseeability of the danger and ask only whether it would be reasonable to market the product in that condition with full knowledge of the risks involved, then that inquiry will reflect the proper focus of the law of products liability and center on the condition of the product, rather than on the culpability of the particular manufacturer.

Id. at —, 547 P.2d at 142 n.12. *See also* the special concurring opinion of Mr. Justice Holman in which he explains that foreseeability has no place in strict products liability. It is presumed and, therefore, removed from consideration by the jury. To allow any jury instruction as to foreseeability, he correctly noted, is to revert to a negligence test for liability. *Id.* at —, 547 P.2d at 144 (concurring opinion).

One important limitation on the imputed knowledge test is that it is limited to those risks which were in some measure knowable at the time of marketing rather than those known to be hazardous at the time of trial. Phillips v. Kimwood Mach. Co., 269 Or. 485, —, 525 P.2d 1033,

IV. KNOWABLE VERSUS UNKNOWABLE RISKS

Foreseeability has been the basis of limiting the liability of suppliers and manufacturers for dangers which were both unknown and unknowable at the time of marketing.[64] A finding of nonliability in such situations has also been based on the premise that holding a manufacturer strictly liable in the case of unknowable hazards might unnecessarily discourage the development and the marketing of new and useful products which might initially have unforetold detrimental consequences.[65] This, however, does not necessarily follow since the risk allocation doctrine merely shifts the burden of resulting injuries from the victim to the producer. If the product is indeed useful, it will pay its way in the marketplace as do many other useful but occasionally dangerous products. If the product's utility does not outweigh its hazard, it will quickly and deservingly be eliminated through economic interactions.[66]

1036-37 (1974). *See generally* Vetri, *Products Liability: The Developing Framework for Analysis*, 54 OR. L. REV. 293 (1975). Such a time limitation is arguably meaningless where imputed, and not actual, knowledge is the requirement. It should make no conceptual difference whether the time of marketing or the time of trial is chosen for the imputation of such knowledge. *See generally* Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 404 (1970); Wade, *supra* note 6, at 14; notes 64-79 *infra* and accompanying text.

64. Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964) (applying Missouri law), denied recovery because the state of scientific or medical knowledge was such that the harm was unforseeable; to impose liability "would have made the defendant an absolute insurer—without regard to 'reasonableness' and without regard to 'developed human skill and foresight.' " *Id.* at 12, quoting language similar to that found in the RESTATEMENT (SECOND), *supra* note 2, § 402A, comment j, at 353. Lartique v. R. J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963), held that a manufacturer "is an insurer against foreseeable risks—not unknowable risks." *Id.* at 37. For a similar result in pure negligence, as opposed to the foregoing warranty cases, see Livesley v. Continental Motor Works, 331 Mich. 434, 49 N.W.2d 365 (1951) where apparently no means were available to the defendant which would have allowed him to discover the presence of inclusion pits in a connecting rod. The rod had failed, causing the crash of a light plane. A similar analysis has been carried over erroneously into strict liability based upon the foreseeability doctrine.

65. Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962).

66. White, *Strict Liability of Cigarette Manufacturers and Assumption of Risk*, 29 LA. L. REV. 589 (1969). White discusses the cigarette industry, which arguably markets a product with no social utility whatsoever. The ultimate, unavoidable effect of the operations of the industry is "mass destruction of life" where the " 'norm is danger.' " White, not wishing to advocate the abolition of the industry, writes:

> We survived the passing of the buggy whip industry, a valid one in its day, and I am sure we can survive the passing of many more when they outlive their social usefulness. Prohibition of the manufacture of cigarettes, their sale or smoking is not proposed—it is proposed only that the cigarette manufacturing industry pay the inevitable, and thus intentional [one intends the consequences which are substantially certain to follow from his actions] cost of its present system of operations. If it cannot do that and survive, it has no basis on which to claim a right to stay.

Id. at 618-19. The commentator draws an interesting analogy from Commonwealth v. Feinberg, 211 Pa. Super. Ct. 100, 234 A.2d 913 (1967), *aff'd*, 433 Pa. 558, 253 A.2d 636 (1969), in which a skid-

There is a difference, conceptually at least, between an unknown danger which tests would have revealed (although the need for the tests was perhaps not recognized)[67] and hazards which science and technology are not able to detect even though their harmful potential is realized, such as serum hepatitis contamination in blood transfusions. Perhaps *Green v. American Tobacco Co.*[68] set the stage for finding defendants liable for unknowable defects. Although the case was tried under the narrower principles of implied warranty rather than strict liability, the court nevertheless reasoned that "[n]o reasonable distinction can . . . be made between the physical or practical impossibility of obtaining knowledge of a dangerous condition, and scientific inability resulting from a current lack of human knowledge and skill."[69]

Among the hepatitis cases, *Cunningham v. MacNeal Hospital*,[70] though not without criticism,[71] stands as a landmark case in recogniz-

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row store owner sold cans containing a high percentage of methyl alcohol, in a solidified state, marked: "Institutional Sterno. Danger. Poison; not for home use. For commercial and industrial use only." The store owner sold this product to residents of the area without calling attention to the label or warning of the danger. Its use resulted in deaths, and defendant store owner was convicted of involuntary manslaughter. White quotes the court in affirming the conviction:

> In light of the recognized weaknesses of the purchasers of the product, and appellants greater concern for profit than with the results of his action, he was grossly negligent and demonstrated a wanton and reckless disregard for the welfare of those whom he might reasonably have expected to use the product for drinking purposes.

Id. at 616-17.

67. In Chapman Chem. Co. v. Taylor, 215 Ark. 630, 222 S.W.2d 820 (1949), defendant had marketed a new chemical designed to be sprayed on crops from an airplane. When it was found that the chemical had a greater tendency to drift than similar sprays, defendant was imputed to have that knowledge which tests would have revealed and was held liable for damage done to foliage in fields ajoining the one being sprayed.

> We do not think the Chemical Company excused itself from liability by the mere showing that it was unaware of the peculiar carrying quality of the dust it was selling. Ordinary care required that it should have known in view of the dangerous nature of the product it was selling, and it was charged with the knowledge which tests would have revealed. The case is therefore one in which the rule of strict liability should be applied.

Id. at —, 222 S.W.2d at 827. But while the test appears to be similar to that applied by the Oregon Supreme Court, see notes 63-65 *supra*, in strict liability, actually the court here appeared to find liability because the chemical company was negligent in its testing. Mr. Justice Smith dissented from the opinion saying:

> I find no reason for bringing into our law the principle of absolute liability. Experience elsewhere has shown that this doctrine is hard to confine, once its existence has been recognized. We shall be asked to extend the scope of this case in the future, and I can hardly see the point at which its application may logically be said to end.

Chapman Chem. Co. v. Taylor, 215 Ark. 630, —, 222 S.W.2d 820, 828 (1949).

68. 154 So. 2d 169 (Fla. 1963).

69. *Id.* at 171.

70. 47 Ill. 2d 443, 266 N.E.2d 897 (1972).

71. *See, e.g.*, Heirs of Fruge v. Blood Serv., 365 F. Supp. 1344 (W.D. La. 1973), *modified*, 506 F.2d 841 (1975); Brody v. Overlook Hosp., 127 N.J. Super. 331, 317 A.2d 392 (Div. 1974), *aff'd*, 66 N.J. 448, 332 A.2d 596 (1975); Hines v. St. Joseph's Hosp., 86 N.M. 763, 527 P.2d 1075, *cert. denied*, 87 N.M. 111, 529 P.2d 1232 (1974); Note, *Strict Liability for Disease Contracted from*

ing the proper policy purposes of strict liability. That case held that, where a product was unreasonably dangerous,[72] the fact that its danger could not have been detected did not excuse the supplier from liability therefor. The court in *Cunningham* correctly reasoned that to allow a defendant to escape liability because the impurities of a product were unknown, either practically or theoretically, would emasculate strict liability in favor of a return to negligence theories.[73] Other courts have echoed this conclusion and have held that some products are so dangerous that the manufacturer, even though he did not know and could not have known of the danger at the time of marketing, should be held liable for the resulting harm.[74] The proper rule was well stated in the recent case of *General Motors v. Hopkins*.[75] There it was recognized that a manufacturer's liability is not rested upon what he knew or should have known when he manufactured and sold the product. Rather it rests upon the very fact that he placed a dangerous instrumentality into the stream of commerce.[76] "The damaging event may not have been reasonably foreseeable at the time of manufacture or sale because the dangerous factor of the product might not then have even been knowable."[77] Hence, even though the supplier or manufacturer is free of culpability, a price of doing business is the protection of the public from the menace of his products.[78]

V. THE STATE OF THE ART DEFENSE

A manufacturer has traditionally been protected from negligence liability by the state of the art defense for product defects which were ostensibly unknowable. This defense allowed a supplier to be absolved from all liability for harm which resulted if the means of making the

Blood Transfusion, 66 NW. U.L. REV. 80, 88-90 (1971); Note, *Liability for Serum Hepatitis in Blood Transfusions*, 32 OHIO S.L.J. 585, 597-98 (1971).

72. In 1970, it was estimated that 92,000 people contracted acute viral hepatitis via blood transfusions, with one-third of the cases termed severe. Further, 3,700 deaths in that year were attributable to this form of disease transfer. The resulting economic impact for this group of hepatitis victims alone in that year was estimated at $40,900,000 in medical costs and $210,200,000 in productivity loss. Tolsma & Bryan, *The Economic Impact of Viral Hepatitis in the United States*, 91 PUBLIC HEALTH REPORTS 349 (1976).

73. Cunningham v. MacNeal Hosp., 47 Ill. 2d 443, —, 266 N.E.2d 897, 902 (1972). *See also* Melnick, Dreesman & Hollinger, *Viral Hepatitis*, SCIENTIFIC AMERICAN July, 1977, at 44, indicating there may soon be a vaccine against hepatitis *B*, the major strain troublesome in blood transfusions.

74. *See, e.g.*, Crocker v. Winthrop Laborator s, 514 S.W.2d 429, 432 (Tex. 1974).

75. 548 S.W.2d 344 (Tex. 1977).

76. Id. at 351.

77. Id.

78. Id.

offending article safe—or safer—were beyond the state of the scientific or industrial art at the time the article was marketed. In other words, the manufacturer was protected if he had exercised due care.[79] Further, it has been held that a manufacturer is under no duty to adopt every new safety device or procedure available.[80] But this is to continue to approach strict liability on a plane of negligence in which duty and due care are very much a part. Moreover, strict liability does not require that industry adopt new safety practices; it only requires that industry pay for the damage its products cause rather than shift the burden of that risk to consumers. This, in fact, has been true even under the state of the art defense: industry-wide practices ("custom") were never conclusive where the exercise of due care was in question, and the test was often dealt with somewhat in the abstract.[81]

The elimination of the state of the art defense in strict products liability might at first blush seem almost heretical in that a manufacturer is thus constantly being held to a future standard. But to preserve the defense would be a return to a negligence standard, and this is being recognized increasingly by the courts.[82] The policy considerations

79. That this reasoning is carried over into the strict liability arena by some courts is seen in the case of Maxted v. Pacific Car & Foundry Co., 527 P.2d 832 (Wyo. 1974). Although discussing an action under the *Restatement (Second)* § 402A, the court repeatedly referred to the scope of negligence and the exercise of reasonable care as standards therein and held that there is "no duty upon the manufacturer to adopt every possible new device which has been conceived or invented" and further, that "[n]egligence cannot be proved because there is a better way later demonstrated." *Id.* at 835, *citing* Dean v. General Motors Corp., 301 F. Supp. 187, 192 (D.C. La. 1969). The latter authority, however, was purely a negligence action. *See also* Bruce v. Martin-Marietta Corp., 544 F.2d 442, 447 (10th Cir. 1976); Raleigh, *The "State of the Art" in Products Liability: A New Look at an Old Defense*, 4 OHIO N.L. REV. 249 (1977).

80. Maxted v. Pacific Car & Foundry Co., 527 P.2d 832, 835 (Wyo. 1974).

81. Bordorek v. General Motors Corp., 11 Cal. App. 3d 902, 935, 90 Cal. Rptr. 305, 327 (1970). *See also* The T.J. Hooper, 60 F.2d 737, *cert. denied, sub nom.* Eastern Transp. Co. v. Northern Barge Corp., 287 U.S. 662 (1932): "Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." 60 F.2d at 740.

82. In Gelsumino v. E.W. Bliss Co., 10 Ill. App. 3d 604, 295 N.E.2d 110 (1973), plaintiff's employer purchased a punch press from the defendant. The machine could be operated in either of two ways: by hand buttons on each side of the machine or by a partially guarded foot pedal. The plaintiff, while operating the machine, slipped on oil which was on the floor and fell against the machine. His foot struck the pedal on its unguarded side; this activated the machine which severely injured the plaintiff's hand which had entered the die portion of the machine as he fell. At trial, in an action based on strict liability, defendant was granted summary judgement. The court held that the punch press was not unreasonably dangerous and that it conformed to the state of the art for the industry at the time of sale.

The Illinois Court of Appeals reversed the decision and remanded the case for trial. That court chose to follow the lead of Cunningham v. MacNeal Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1972), see notes 71-80 *supra* and accompanying text, and held that whether the foot pedal was unreasonably dangerous was a material question for the jury since "the state of the art defense is not a defense to a claim involving an unreasonably dangerous product" in strict liability. 47 Ill. 2d at —, 295 N.E.2d at 113. But additionally, the court noted that the accident was foreseeable since

for eliminating the defense involve both risk allocation and safety incentives. Had the use of thalidomide, for instance, found its way to markets in the United States at the same time that it did in other parts of the world, its disasterous effects would have been both unknown and unforeseeable.[83] When such a product does, in fact, visit devastation upon its users, the policy considerations underlying strict liability require that the responsibility for injuries should fall upon those who placed the outrageously dangerous product into the stream of commerce. The drug industry, through its profits, is more able to cope with the tragic losses than are innocent victims of the substance.

Secondarily, there is the question of incentives for safety. It may well be asked what safety incentive could result from imposing liability on a manufacturer who could not possibly have known of the danger and the consequent need to guard against it. The answer, simply stated, is that limiting liability to foreseeable harm is stating the issue in the negative: no liability for unknown or unknowable danger. Conversely, requiring that the manufacturer know that his product is safe is an affirmative notion. Fulfilling that requirement would entail either more extensive research and testing, thereby conclusively proving the product's safety, or having the seller shoulder the risks involved and pay for his product's damage accordingly. It goes without saying that some dangers at any given point in time will be unknown or undetectable. But foreseeability as a limitation or liability arguably has the effect of retarding research and development of products.[84] If the hazard is unknowable due to the current state of industry research, liability is avoided. The incentive to *know* that a product is safe carries with it the possibility that research will produce evidence of heretofore unknown or unforeseeable harm which thereafter may make that industry liable,

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the foot pedal was partially guarded and that, therefore, the state of the art defense does not apply to foreseeable harm. *Id.*

83. N.Y. Times, Nov. 15, 1962, at 39, col. 8.

84. As has been pointed out:

> what is feasible often depends upon the industry's research efforts because it alone has the knowledge and experience peculiar to its field. The extent of industrial research and development eventually determines the state of the art, and this effort, motivated primarily by profit, may retard possible advancement in safety design. Extending liability in such circumstances, however, may make it more profitable to install safety devices rather than compensate for injuries. In contrast, the *Cunningham* court viewed the imposition of strict liability as a vehicle for economic risk distribution, recognizing that the manufacturer is in a superior position to purchase insurance and spread the cost. But producers will do more than merely insure; they will be forced to improve their products where improvement is economically and technologically feasible.

Recent Developments, *Products Liability—Strict Liability—Elimination of the "State of the Art" Defense*, 41 TENN. L. REV. 357, 363 (1974).

even under negligence standards, once the foreseeability of the harm is evidenced.

Thus the realm of the unknown provides a haven for unsafe products. Rather, the law should prescribe that, if a product is to enter the stream of commerce, the producer must affirmatively know of its safety or assume the risk if it is unsafe.[85] To return to the drug industry, for example, further research demonstrated the horrible dangers of thalidomide. It is regretable that such research was carried on in the marketplace with the resulting carnage which, in all likelihood, could have been avoided through the requirement of affirmative knowledge of the product's safety. In fact, it was a fortuitous call for further testing that prevented thalidomide from reaching the American market.

Absolute safety,[86] of course, is a myth and would not be required under this analysis. However, the affirmative knowledge requirement would inject a much stronger element of encouragement for safety research.[87] Such a requirement would also place the risk and resulting

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85. It is interesting to note that the *Restatement (Second)*

> would extend [immunity] even to manufacturers of many drugs of uniform quality, if their usefulness *appears* to outweigh the *known* dangers that attend their use. Thus, ill health offers an adventure; no one has a better chance to live dangerously than the ill who must take their medicine.
>
> . . . .
>
> If a product is so dangerous as to inflict widespread harm, it is ironic to exempt the manufacturer from liability on the ground that any other sample of the product would produce like harm. If we scrutinize deviations from a norm of safety as a basis for imposing liability, should we not scrutinize all the more the product whose norm is danger?

Traynor, *supra* note 26, at 368 (emphasis in original). Furthermore, it has been observed:

> That the *Restatement (Second)* [comment *k*] formulation of the unreasonably dangerous requirement is an implied invitation to return to negligence law by means of a foreseeability risk analysis is confirmed by its further dictate that products which are unavoidably unsafe because of inadequate technical knowledge do not subject the defendant to strict liability. . . . [T]he *Restatement (Second)* has relegated the unavoidably unsafe product to a negligence risk analysis and its concomitant concepts of foreseeability and fault. For how does one determine whether a product is "properly" marketed or a "proper" warning is attached except by determining what a reasonable person of ordinary prudence would do in the light of his foresight under the circumstances.

Polelle, *supra* note 42, at 111.

86. A related issue is relative safety. "The purchaser of a Volkswagon cannot expect the same degree of safety as would the buyer of the much more expensive Cadillac. It must be borne in mind that we are dealing with a relative, not absolute, concept." Seattle First Nat'l Bank v. Tabert, 86 Wash. 145, —, 542 P.2d 774, 779 (1975). But this is perhaps more properly reserved for discussion in assumption of risk. See notes 174-202 *infra* and accompanying text.

87. The question of the impact of products liability suits upon manufacturers is often more a matter of assumption than of demonstration. A provocative footnote in Vetri, *supra* note 63, is deemed important enough to be reproduced here in full.

> The National Commission on Product Safety commissioned law professor William Whitford to do an empirical study "to assess the impact of product liability litigation on the decisions of manufacturers regarding the design of their products and the content of

costs of injury on that entity which is most able to absorb and distribute

the warnings issued about dangers connected with their products' use." "The circumstancial evidence uncovered in this project," wrote Whitford, "together with what direct evidence there is, suggests that products liability litigation usually has little direct impact on product design or warning decisions." The evidence supporting this conclusion was of three types, said Whitford: "First, in many of the cases studied, the time period between the occurence of the injury and the final outcome of the litigation exceeds 5 years, and in almost every case the time period exceeds 2 years. The design of many products is changed periodically for reasons unconnected with safety, and when these products are involved in litigation, the court is usually asked to determine whether a design no longer in use was sufficiently safe." Second, although manufacturers probably interest themselves in product liability litigation more than, say, motorists, nonetheless "a number of . . . manufacturers . . . indicated that their insurers handle all products liability claims. In some instances, the manufacturers apparently do not even inform themselves of the final resolution of the claims, and for these manufacturers it is obvious that a court decision will have no direct effect on product design or warning decisions. A manufacturer who intended to take account of litigation results would be likely to exert more control over the claim settling process since the other interests that enter into design decisions could be undesirably affected by an adverse outcome."

Finally, a majority of the rotary mower manufacturers who replied responsively [to this survey] indicated that they did not routinely keep track of litigation involving other manufacturers. A manufacturer taking account of products liability litigation in its design decisions would logically inform himself of the outcome of litigation involving manufacturers of similar products, particularly in an industry in which there has been so much litigation.

Professor Whitford's report can be found in "Products Liability," in Supplemental Studies, 3 Products Safety Law and Administration: Federal, State, Local & Common Law 221 (1970).

Moreover, products liability insurers have not been actively involved in encouraging manufacturers to develop safer products:

"Until recently, the insurance industry has not been assiduous in encouraging manufacturers of consumer products to reduce unreasonable hazards. It studies the records of individual products or firms mainly to decide how much coverage to grant and what premium to charge. Product liability insurance and payments typically cost the manufacturer less than 0.05 percent of sales. They cover only a few percent of the medical cost of injuries.

"According to Professor Herbert S. Denenberg of the University of Pennsylvania's Wharton School, three 'blue chip' insurers concede that they have done little to analyze their files in order to synthesize principles of product safety to guide their decisions, to enlighten their clients, or to protect the consumer. Two, however, claimed such programs were under consideration. Few of the companies studied by Denenberg could cite examples of their success in preventing losses from unreasonably hazardous products.

"A leading expert on casualty insurance, Clarence A. Kulp, wrote: 'There is . . . no automatic connection between a scheme for loss payment and loss prevention. Insurance, even under public auspices, is still a device to distribute the costs of the Hazard.'

"Professor Denenberg calls it 'an act of gross social irresponsibility' to permit insurance companies to acquire this expertise in saving life and limb and then utilize this information only for the purpose of estimating the cost of, but not preventing, injury. Representatives of the insurance industry said their companies engage in substantial loss prevention efforts, but offered little data and few specific examples in rebuttal. Our survey of manufacturers found that few received counsel on product safety from insurers. A consultant suggested that few insurers are able to retain engineers as qualified as the manufacturer to evaluate the safety of his product.

"Even if insurance companies, through loss prevention efforts, do work aggressively to reduce product hazards, they cannot enforce safety standards upon manufacturers who do not wish to buy their insurance. At the same time, it is not clear that safety necessarily would be improved by a law which required manufacturers of consumer products to be insured." National Comm'n On Product Safety, Final Report 70-71 (1970). The Commission's Final Report is reproduced as an appendix to 4 Frumer & Friedman, Products Liability (1974).

those costs and which is responsible for that injury in the final analysis.[88]

In products liability cases based upon negligence, the state of the art defense was indeed relevant because it was regarded as proof that the defendant had exercised all possible care in the production and distribution of its product. In strict liability, however, all possible care does not excuse a defendant. Hence, as some courts have already recognized, the state of the art defense is of no import in strict products liability.[89]

VI. FORESEEABILITY—THE DUTY TO WARN

The application of the foreseeability doctrine is also clearly found in the frequently imposed requirement that a seller give adequate warning of any hazards of his product, in order to prevent the product's being found to be unreasonably dangerous.[90] The requirement applies

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To this very discouraging information must be added the economic reality that, if accident costs are a small percentage of the sales dollar, it is not likely that they will exercise much deterrent effect or provide a safety incentive.

Id. at 299-301 n.35 (some citations omitted).

88. It has been said that, since under negligence principles manufacturers who fail to use the latest safety techniques will be held negligent and liable, "one is forced to wonder what further could be accomplished under a system of strict liability." Comment, *Implied Warranties—The Privity Rule and Strict Liability—The Non-Food Cases*, 27 MO. L. REV. 194, 208 (1962). Obviously the answer is liability for nonnegligent danger resulting in injury not absolved through an appropriate defense. See notes 139-222 *infra* and accompanying text. *See also* Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963):

There exists we think, no valid objection to this distribution of the burden if the public health is to be protected in any practical sense from exploitation by those who, for a profit motive, undertake to supply the vast and ever increasing variety of products which the people by unprecedented powers of commercial persuasion are daily urged to use and consume.

Id. at 173. *See also* Karasik, *State of the Art or Science: Is It a Defense to Products Liability?*, 60 ILL. B.J. 348 (1972).

89. *See, e.g.*, Walker v. Trico Mfg. Co., 487 F.2d 595 (7th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974); Community Blood Bank, Inc. v. Russell, 196 So. 2d 115 (Fla. 1967); Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970); Stanfield v. Medalist Indus., Inc., 34 Ill. App. 3d 635, 340 N.E.2d 276 (1975).

90. RESTATEMENT (SECOND), *supra* note 2, § 402A comment j:

Directions or warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. [The foregoing appears essentially as a negligence standard]. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

But a seller is not required to warn with respect to products, or ingredients in them,

only to known or knowable harm, moreover, in contravention of the considerations outlined above.[91] Courts have applied section 402A of the *Restatement (Second) of Torts*[92] and have concluded that, while manufacturers are not insurers, they are liable for a product's unreasonable danger. These courts have employed a balancing test to determine whether the danger is outweighed by the product's utility. One court went so far as to proclaim: "The fulcrum for the balancing process is the reasonable man as consumer or seller."[93] This is clearly nothing more than a negligence standard of reasonable care based upon the mythical reasonable person, coupled with a duty to warn of foreseeable dangers. The same court applied comment k of section 402A and found that, even though the utility of the product outweighed the risk, failure to warn adequately would render the product unreasonably dangerous.[94] As has been pointed out, this is a simple negligence analysis: once the dangers of the product becomes known through developed skill or foresight,[95] the duty to warn attaches.[96] Resorting to the concepts of foreseeability, duty to warn, and breach of duty in a strict liability action has returned the court to the arena of negligence (albeit at the invitation of the *Restatement (Second)*). It is therefore difficult to imagine a court's reaching a different result under an action for negligence as distinguished from a strict products liability action.

For purposes of strict liability, the warning, or lack thereof, concerning the dangers of a given product should refer more properly to informed consent and assumption of risk.[97] Nevertheless, a long line of

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which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.

Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

91. *Id.*

92. See note 17 *supra*.

93. Borel v. Fiberboard Paper Prod. Corp., 493 F.2d 1076, 1088 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

94. 493 F.2d at 1088-89.

95. RESTATEMENT (SECOND), *supra* note 2, comment j. See note 93 *supra*.

96. Borel v. Fiberboard Paper Prod. Corp., 493 F.2d 1076, 1093 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

97. See notes 139-222 *infra* and accompanying text. In *Borel*, the court held that assumption of risk did not apply because the plaintiff lacked the knowledge to appreciate the degree of harm—plaintiff knew asbestos was unhealthy but did not know it could kill. Before it was overruled by Phillips v. Kimwood Mach. Co., 269 Or. 485,—, 525 P.2d 1033, 1039 (1974), Anderson v. Klix Chem. Co., 256 Or. 199, 472 P.2d 806 (1970), stood for the traditional approach to duty to warn in strict liability:

"Logically, failure to warn (effectively) conceptually resembles negligence, not strict lia-

cases has followed the rule articulated in *Campo v. Scofield*[98] that there is no duty to warn of open and obvious dangers. This rule has been much criticized[99] and was recently disavowed in the state which adopted it.[100] Those courts which have followed the rule reasoned that there is no duty to warn of a patently obvious danger since nothing of value is gained thereby.[101] But there are instances in which an open and obvious danger, even if it had been warned of, should not absolve the defendant from liability.[102] The proper focus of strict liability should not be upon the defendant's conduct but rather upon the nature

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bility." . . . This aspect of "strict liability," failure to warn of the dangers of an otherwise nondefective product, does revert to a negligence basis for liability. The basic questions are whether it was reasonably foreseeable to the manufacturer that the product would be unreasonably dangerous if distributed without a warning on the label and, if so, whether the manufacturer supplied the warning that a reasonably prudent manufacturer would have supplied.

Id. at —, 472 P.2d at 808. To apply the foregoing test in strict liability/duty to warn cases is to eviscerate the doctrine of strict liability.

98. 301 N.Y. 468, —, 95 N.E.2d 802, 804 (1950).

99. *See, e.g.*, Pike v. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

100. Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976). *See also* Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U.L. REV. 1065 (1973).

101. Jamieson v. Woodward & Lothrop, 247 F.2d 23, 26-29, 32 (D.C. Cir. 1957); Fanning v. LaMay, 38 Ill. 2d 209, —, 230 N.E.2d 182, 185 (1967).

102. Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

[T]he policy underlying the doctrine of strict liability compels the conclusion that recovery should not be limited to cases involving latent defects. . . . Requiring the defect to be latent would severely limit the cases in which the financial burden would be shifted to the manufacturer. It would indeed be anomalous to allow a plaintiff to prove that a manufacturer was negligent in marketing an obviously defective product, but to preclude him from establishing the manufacturer's strict liability for doing the same thing. The result would be immunize from strict liability manufacturers who callously ignore patent dangers in their products while subjecting to such liability those who innocently market products with latent defects.

Id. at 145, 501 P.2d at 1169, 104 Cal. Rptr. at 449. *See also* Buccery v. General Motors Corp., 60 Cal. App. 3d 533, 550, 132 Cal. Rptr. 605, 616 (1976). *But see* Patten v. Logemann Bros. Co., 263 Md. 364, 283 A.2d 567 (1971) (where plaintiff's hand entered a lubrication hole on a paper bailing machine when plaintiff slipped and fell, the defect was termed patent and plaintiff was denied recovery).

Allergies pose more difficult questions than the summary treatment of the *Restatement (Second)* comment j, see note 90 *supra*, indicates. The *Restatement* excuses liability for allergic reactions unless the victim is a member of a large, foreseeable class so afflicted. In Mountain v. Procter & Gamble Co., 312 F. Supp. 534 (E.D. Wis. 1970), a strict liability action against the makers of Head and Shoulders shampoo, plaintiff sued to recover damages from substantial injuries suffered following an allergic reaction to the defendant's product. The opinion, heavily laced with negligence analysis, finds, *inter alia*, that the company was not negligent in testing its product and was not under a duty to warn due to the small number of expected reactions. When the court found no breach of duty and therefore no negligence, it dismissed the plaintiff's action. A more recent case, however, held that the "failure to warn of a danger cannot always be excused by the mere fact that the potentially endangered users are few in number." Crocker v. Winthrop Laboratories, 514 S.W.2d 429, 432 (Tex. 1974), disapproving Cudmore v. Richard-Merrell, Inc., 398 S.W.2d 640 (Tex. Ct. App. 1965), *cert. denied*, 385 U.S. 1003 (1967) and Alberto-Culver Co. v. Morgan, 444 S.W.2d 770 (Tex. Ct. App. 1969). *See also* Whitmore, *Allergies and Other Reactions Due to Drugs and Cosmetics*, 19 SW. L.J. 76 (1965).

of the product. Failure to warn adequately is then correctly seen as a negligence concept relating to the sufficiency of the defendant's conduct and to his actions as a reasonably prudent manufacturer or supplier. A supplier in strict liability should not be viewed as fulfilling or breaching a duty to the plaintiff vis-à-vis the presence or absence of warnings. Rather a warning may serve to remove liability from the supplier by conveying such information as will make a user or consumer fully and subjectively cognizant of the danger involved. The question then becomes whether the plaintiff's conduct amounted to assumption of risk.[103]

Foreseeability has long been entwined with duty to warn in actions for negligence,[104] and the cases indicate the extreme malleability of the foreseeability doctrine in regard to the supplier's predictive skills. It has been held that manufacturers should have foreseen that directions would not be followed in using a tree spray;[105] that a user of a chest ointment would smoke and drop a match into his pajamas, igniting the trapped fumes of the ointment;[106] and that a child of six years would spray highly flammable hairspray on her dress and hair.[107] Yet is was not deemed foreseeable that a rubber exercising rope which was designed to be held under the feet while being stretched would slip off and snap into the plaintiff's eye[108] or that a housewife would splash cleaning fluid into her eye.[109] Continuation of this sort of analysis in strict liability is not only improper but counterproductive. Since the issue of negligence need not be decided, inquiry into foreseeability and breach of duty to warn is mere surplusage and should be disregarded.

VII. PROXIMATE CAUSE

Because perhaps no other area of the law is subject to as much disagreement and to as many attempts at clarification as is the issue of proximate causation,[110] it is with reluctance that the problem is raised here. However, addressing it is unavoidable in a discussion of foresee-

103. See notes 139-222 *infra* and accompanying text.

104. *See generally* Comment, *Foreseeability in Product Design and Duty to Warn Cases— Distinctions and Misconceptions*, 1968 WIS. L. REV. 228.

105. McClanahan v. California-Spray Chem. Corp., 194 Va. 842, 75 S.E.2d 712 (1953).

106. Martin v. Bengue, Inc., 25 N.J. 359, 136 A.2d 626 (1957).

107. Hardman v. Helene Curtis Indus. Inc., 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964).

108. Jaimeson v. Woodward & Lothrop, 247 F.2d 23 (D.C. Cir. 1957).

109. Sawyer v. Pine Oil Sales Co., 155 F.2d 855 (5th Cir. 1946), *contra*, Haberly v. Reardon Co., 319 S.W.2d 859 (Mo. 1958).

110. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41, at 236 n.1 (4th ed. 1971) [hereinafter cited as W. PROSSER], citing one book and 25 law review articles expounding upon the problem.

ability since the latter has long been employed as a test for proximate cause, although other approaches such as substantial factor or sequential causation have also found favor.

The *Restatement (Second)* is notable in that it requires only actual causation—not proximate causation—under section 402A.[111] A number of cases have nevertheless included it as a proper element of strict liability.[112] Others have reasoned that the same principles which apply to causation in negligence should apply in strict liability.[113] The attitude toward proximate cause is perhaps typified by the strict liability action of *Gelsumio v. E. W. Bliss Co.*[114] in which the court employed a heavy dose of negligence language to hold: "Proximate cause is essentially a question of foreseeability and, for plaintiff to recover, his injury must be the natural and probable result of a negligent act and be of such nature that an ordinarily prudent person should have foreseen as likely to result."[115]

Perhaps because of the confusion and dissatisfaction associated with the foreseeability test for proximate cause, courts have increasingly called for a producing cause[116] or for a substantial factor in bringing about the injury[117] as the proper test for proximate cause. Foreseeability is more suitably a test of negligence rather than of proximate cause.[118] The better rule, in order to eliminate the foresight test of negligence's reasonably prudent person, would be the adoption of sequential causation.[119] As an example, if a tank truck hauling gasoline,

111. *See generally* RESTATEMENT (SECOND), *supra* note 2, § 402A(1), at 348. Maleson, *Negligence is Dead but its Doctrines Rule Us from the Grave: A Proposal to Limit Defendant's Responsibility in Strict Products Liability Actions without Resort to Proximate Cause*, 51 TEMP. L.Q. 1 (1978).

112. *See, e.g.*, White Motor Co. v. Stewart, 465 F.2d 1085 (10th Cir.), *cert. denied*, 409 U.S. 1061 (1972); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965). The "mother mink" cases were early applications of this limitation despite the ultrahazardous activity of blasting. *See, e.g.*, Gronn v. Rogers Constr. Co., 221 Or. 226, 350 P.2d 1086 (1960); Madsen v. East Jordan Irr. Co., 101 Utah 552, 125 P.2d 794 (1942); Foster v. Preston Mill Co., 44 Wash. 2d 440, 268 P.2d 645 (1954). For the proximate cause limitation in an unusual or "far-fetched" situation, there is Paparelli v. General Motors Corp., 179 N.W.2d 263 (Mich. Ct. App. 1970).

113. *See, e.g.*, Oehler v. Davis, 223 Pa. Super. Ct. 333, —, 298 A.2d 895, 895-96 (1972).

114. 10 Ill. App. 3d 604, 295 N.E.2d 110 (1973).

115. *Id.* at —, 295 N.E.2d at 112 (citation omitted). *See also* Guarino v. Mine Safety Appliance Co., 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (Ct. App. 1969).

116. Ethicon, Inc. v. Parten, 520 S.W.2d 527, 532, 533 (Tex. Ct. App. 1975).

117. Codling v. Paglia, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628-29, 345 N.Y.S.2d 461, 469-70 (1973) (but with the limitations of intended use and reasonable care imposed on the plaintiff).

118. Hoover v. Sackett, 221 Pa. Super. Ct. 447, —, 292 A.2d 461, 463 (1972).

119. The court in Berkebile v. Brantly Helicopter Co., 462 Pa. 83, 337 A.2d 893 (1975) reasoned that:

> [b]ecause the seller is liable in strict liability regardless of any negligence, whether he could have foreseen a particular injury is irrelevant in a strict liability case. In either

which has been held to be an ultrahazardous activity,[120] overturned and discharged its contents which then seeped into the soil and were carried by subterranian waters to a trout farm pond less than three miles away killing fish therein, such a result might be deemed unforeseeable.[121] Under the sequential theory of causation, however, since the unbroken chain of events resulted in injury or damage, causation is established.

It has been postulated that where, as in strict liability, there has been neither intentional harm nor negligence, the limits of liability are—or should be—drawn at or within the foreseeable risk, purportedly basing such a limitation upon the policy which supports the liability.[122] This postulate is invalid, however, since limitations based on foreseeable consequences reintroduce negligence considerations counterproductive to public policy in strict liability.[123] Therefore, courts have begun to rule that a plaintiff must show only that the defect was a producing cause of his injuries, with no showing of proximate cause required.[124] The implementation of the test of sequential causation described above extends the ambit of strict products liability law to its proper dimensions.

Inherent in any discussion of proximate cause is the issue of intervening, superseding causation whereby, under a negligence theory at least, a wrong-doer is relieved of liability when the chain of causation is broken by an unforeseeable act or consequence.[125] In negligence, one

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negligence or strict liability, once the negligence or defective product is shown, the actor is responsible for all the unforeseen consequences thereof no matter how remote, which follow in a natural sequence of events.

Id. at —, 337 A.2d at 900.

120. Siegler v. Kuhlman, 81 Wash. 2d 448, 502 P.2d 1181 (1972), *cert. denied*, 411 U.S. 983 (1973).

121. Such was the result in a negligence cause of action. See Ozark Indus., Inc. v. Stubbs Transports, Inc., 351 F. Supp. 351 (W.D. Ark. 1972).

122. W. PROSSER, *supra* note 110, § 79, at 517.

123. Polelle, *supra* note 42, at 124-25, writes:

> A simpler and more coherent causation test for strict products liability would abandon the foreseeability fiction entirely in favor of a pure, sequential version of causation.
>
> . . . .
>
> The risk allocation theory of strict products liability will produce the same compensatory result of sequential causation that has been achieved in the doctrine of trespass law and will permit the evolution of causation doctrine in strict products liability cases along the theoretical lines that are internally consistent with the tort itself.

124. Helicoid Gage Div. of Am. Chain & Cable Co. v. Howell, 511 S.W.2d 573 (Tex. Ct. App. 1974). *See also* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[4][d] (1978): "A manufacturer of a defective product is responsible for all the unforeseen consequences thereof, no matter how remote, which follow in a natural sequence of events." Craig v. Burch, 228 So. 2d 723, *writ ref'd*, 255 La. App. 475, 231 So. 2d 393 (1970). *Contra*, Vinogradov v. Clicquot Club Co., 55 App. Div. 2d 489, 391 N.Y.S.2d 18 (1977).

125. *See generally* W. PROSSER, *supra* note 110, § 44, at 270-89.

who fails to anticipate an unforeseeable circumstantial addition to a given situation which results in injury is not necessarily liable for the injury. There may be an unforeseeable intervening cause which has an unforeseeable result for which the defendant will not be liable. This is because he is not negligent[126] with regard to the ultimate result.[127] Conversely there may be a foreseeable result arising out of an unforeseeable cause[128] for which the defendant may be found to be negligent because that result was within the purview of a reasonable person.[129] The test is basically a risk foreseeability analysis which may relieve an otherwise negligent actor if the injury is found to lie outside the risk which a reasonable person should have anticipated.[130]

Problems arise, however, when this intervening cause concept is transplanted from its native soil of negligence to the field of strict liability. Reverting to the negligence test of intervening causation in strict liability is inappropriate both logically and from the standpoint of the risk allocation policy underlying strict liability. As will be seen, intervening causation frequently finds its way into strict liability either through the guise of the negligence of a third party or through an alteration of the product or both.

In *Ford Motor Co. v. Matthews*,[131] Ford sent notices warning its dealers of a faulty starter mechanism on its tractors and instructed the dealers to make repairs on the affected machinery. A dealership received one of the tractors in question after it had been damaged by fire. The dealership repaired the fire damage but ignored the starter problem, leaving the defect uncorrected. It then resold the tractor to the plaintiff who was injured when the tractor started in gear. Ford was held liable, and the court ruled that Ford's liability could not be relieved by the foreseeable negligence of a retailer to remedy the problem or by the purchaser's failure to guard against the defect's existence.[132]

126. *Id.* at § 44, at 281-86.

127. *See* Smith v. Lampe, 64 F.2d 201 (6th Cir. 1933) (sounding automobile horn which caused steamboat collision in a fog); Morril v. Morril, 104 N.J.L. 557, 142 A. 337 (1928) (wind blew door latch against boy's eye).

128. W. PROSSER, *supra* note 110, § 44, at 286-89.

129. See Johnson v. Kosmos Portland Cement Co., 64 F.2d 193 (6th Cir. 1933) in which defendant negligently failed to clean an oil barge, leaving a potentially explosive residue. The fact that lightning ignited the barge, injuring nearby workmen, did not relieve the defendant of the expectable results. W. PROSSER, *supra* note 110, § 44, at 286 n.31.

130. W. PROSSER, *supra* note 110, § 79, at 517-22. Two exceptions noted therein involving animals, Vredenburg v. Behan, 33 La. Ann. 627 (1881) and Kinmouth v. McDougall, 19 N.Y.S. 771 (Sup. Ct. 1892), *aff'd*, 139 N.Y. 612, 35 N.E. 204 (1893), appear to find the results to be within the ambit of risk. *See also* Harper, *supra* note 56, at 1009.

131. 291 So. 2d 169 (Miss. 1974).

132. *Id.* at 177. A similar result was reached in Balido v. Improved Mach., Inc., 29 Cal. App.

A similar analysis was applied with a different result in *Ford Motor Co. v. Eads*.[133] There a tractor was defective because its starter plunger was too short to allow the tractor to be started, and the dealer had repeatedly failed to repair it. At the suggestion of the dealer, the plaintiff's brother "hot-wired" the engine, causing a by-pass of the safety mechanism designed to prevent the tractor from being started in gear. The brother's action was ruled an unforeseeable intervening cause which rendered Ford not strictly liable for the resulting damage.

These decisions, following similar findings in the area of negligence,[134] have, with few exceptions,[135] subordinated strict liability to a negligence-like determination of intervening cause based upon foreseeability. The better rule is to hold a defendant liable if his dangerous product is a factor contributing to the plaintiff's injury, without regard to whether an intervening circumstance was foreseeable to the defendant. As a matter of policy, strict liability was conceived as a device for spreading the cost of harm from hazardous products without regard to individualized fault. As such, to delve into an inquiry of foreseeability in cases of intervening negligence is counterproductive. It often results in a plaintiff's having to recover, if at all, from the intervening party, who is frequently less solvent than the manufacturer and less able to absorb and distribute the cost of the injury.

The second major area in which the concept of intervening causation is seen involves alteration of a product such that it is not in substantially the same condition as it was when it left the hands of the manufacturer.[136] Often a factual question is presented of whether the defect or the alteration caused the injury. In *General Motors Corp. v. Hopkins*,[137] for example, there was evidence that there may have been some alteration of a carburetor on the plaintiff's truck when he reinstal-

3d 633, 105 Cal. Rptr. 890 (1973). *See also* Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972) (the fact that a manufacturer may expect someone else to install safety devices will not immunize him); Finnegan v. Havir Mfg. Corp., 60 N.J. 413, 290 A.2d 286 (1972) (same); Recent Cases, *Torts—Products Liability—Manufacturer May Be Held Strictly Liable to Employee of Purchaser for Failure to Install Safety Devices Despite Expectation that They Would Be Installed by Purchaser.*—Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972), 86 HARV. L. REV. 923 (1973).

133. 224 Tenn. 473, 457 S.W.2d 28 (1970). The court inigmatically added that the issue of foreseeability was relatively insignificant. *Id.* at —, 457 S.W.2d at 32.

134. *See, e.g.*, Stultz v. Benson Lumber Co., 6 Cal. 2d 688, 59 P.2d 100 (1936).

135. " '[A]n unreasonably dangerous defect' under Section 402A which is *a* proximate cause of a plaintiff's injuries may result in the imposition of strict liability, even where an intervening cause might not have been 'foreseeable' by the defendant." Bradford v. Bendix-Westinghouse Auto. Air Brake Co., 517 P.2d 406, 413 (Colo. App. 1973).

136. RESTATEMENT (SECOND), *supra* note 2, § 402A, comment p, at 357.

137. 548 S.W.2d 344 (Tex. 1977).

led it after it had malfunctioned. But the evidence showed that a design defect made it possible for the carburetor to become locked, causing the engine to race out of control. The court found that the defect and not the alteration was the producing cause of the injury. Thus, it held that a manufacturer or supplier of a dangerously defective product, if it is to escape liability due to an alteration, must prove a cause-in-fact connection between the alteration and the injury.

Clearly, where an alteration and not a defect causes injury, no liability should attach. However, where it is not the alteration which causes the injury or where the alteration exacerbates a latent defect without the injured party's knowledge (removing any question of assumption of risk), the plaintiff should be allowed to recover.

The negligence standards of intervening causation (based upon the foreseeability test),[138] as often applied to strict liability, focus attention upon conduct rather than condition and lead to lengthy considerations of individualized fault inappropriate in a strict liability action. The problems raised by questions of intervening causation can be adequately dealt with through the sequential view of proximate cause. A manufacturer or supplier should not be liable for all acts of third parties nor for every manner in which its products can be (ab)used. Those intervening causes which are sufficiently substantial would serve to break the sequential chain of causation, and fairness would dictate that the manufacturer not be liable. Dwelling upon hair-splitting distinctions based on foreseeability, and the notions of negligence which underlie it, leads to results hardly distinguishable from those in actions based purely on negligence and on who is more at fault. To summarize, to the extent that proximate cause is an element of strict products liability law, it should be approached as a determination of both the sequential chain of events and whether those events resulted in the injury.

VIII. DEFENSES TO STRICT PRODUCTS LIABILITY WITHOUT THE LIMITATION OF FORESEEABILITY

The two most common defenses in actions for negligence are contributory negligence and assumption of risk. The majority of courts have held that these are affirmative defenses which must be pleaded and proved by the defendant.[139] Courts and commentators have dis-

138. Misuse is sometimes regarded as an intervening cause, but misuse is dealt with in a separate section of this article. See notes 203-222 *infra* and accompanying text.

139. W. PROSSER, *supra* note 110, § 65, at 416. For an analysis of the use of contributory

cussed at length the conceptual aspects of these defenses and the semantic distinctions between them, and there has been much confusion in their applications.[140] Traditionally, the two defenses have had considerable overlap,[141] and some courts either have used the terms interchangeably or have refused to delineate their distinctions.[142] The usual approach in distinguishing the two has been to say that assumption of risk entails both a subjective knowledge and appreciation of the risk involved as well as a voluntary acquiescence thereto, whether reasonable or unreasonable,[143] much like the common law principle of *volenti non fit injuria*.[144] Contributory negligence, on the other hand, refers to conduct of the plaintiff which may be inadvertent but which falls below the standard of care which would have been exercised by a reasonable person.[145] The two defenses may commingle in those instances in which the plaintiff unreasonably elected the risk[146] or in which he, having undertaken an ordinarily reasonable risk, thereafter neglected to exercise due care for his safety.[147]

A. Contributory Negligence

Contributory negligence had its origins in *Butterfield v. Forrester*.[148] In that case the plaintiff, while galloping his horse through the streets of Derby, collided with a pole which the defendant

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negligence in negligence and breach of warranty actions, see Bushnell, *Illusory Defense of Contributory Negligence in Product Liability*, 12 CLEV.-MAR. L. REV. 412 (1963); Weston, *Contributory Negligence in Products Liability*, 12 CLEV.-MAR. L. REV. 424 (1963). OKLA. CONST. art 13, § 6, provides that assumption of risk and contributory negligence shall at all times be questions of fact for the jury.

140. *See* Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970), and the authorities cited therein; Epstein, *Products Liability Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267; Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 50 (1966); Annot., 46 A.L.R.3d 240.

141. W. PROSSER, *supra* note 110, § 68, at 440-41. It is also pointed out that, in the area of overlap, a defendant could choose either (or both) and clear distinctions were not necessary since either prevented recovery.

142. Decker v. Fox River Tractor Co., 324 F. Supp. 1089 (E.D. Wis. 1971); Stukes v. Trowell, 119 Ga. App. 651, 168 S.E.2d 616 (1969). *But see* Independent Nail & Packing Co. v. Mitchell, 343 F.2d 819 (1st Cir. 1965). Indeed, one court described contributory negligence as a voluntary, unreasonable assumption by the plaintiff of a known hazard. Cepeda v. Cumberland Eng'r Co., 76 N.J. 152, —, 386 A.2d 816, 821 (1978).

143. W. PROSSER, *supra* note 110, § 68, at 440-41.

144. "He who consents cannot receive an injury." BLACK'S LAW DICTIONARY 1746 (rev. 4th ed. 1968). See W. PROSSER, *supra* note 110, § 68, at 440.

145. W. PROSSER, *supra* note 110, § 68, at 441.

146. *See, e.g.*, Adair v. Valley Flying Serv., 196 Or. 479, 250 P.2d 104 (1952) (flying with an intoxicated pilot).

147. *See, e.g.*, Oast v. Mopper, 58 Ga. App. 506, 199 S.E. 249 (1938) (riding in car with sleepy driver and making no effort to exit the car or keep the driver awake).

148. 103 Eng. Rep. 926 (K.B. 1809).

had put across part of the road. The court found that the plaintiff had been negligent and that "[i]f he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault."[149] As both a matter of policy and of proximate cause, the court held that there must be two elements present in such an action: negligence on the part of the defendant and absence of negligence on the plaintiff's part.[150] As it has been applied in some strict liability cases, the doctrine of contributory negligence acted as a bar to recovery for a plaintiff who had thoughtlessly or unintentionally used a defective product.[151] These cases adopted the policy argument that one is never relieved of the duty to exercise reasonable care for his own safety; he cannot thrust all responsibility for it upon others.[152] If a court adopts strict liability but holds to the idea that there must have been some negligence on the part of the manufacturer of a product later proved defective and dangerous, even though the negligence cannot be demonstrated, then it is likely that the court will allow contributory negligence as a defense.[153] This is much like the approach in *Dippel v. Sciano*.[154] The court in that case found that strict liability *is* based upon negligence and that selling a defective product is negligence *per se* against which the negligence of the plaintiff may readily be set.

The *Dippel* court, however, rather than viewing contributory negligence as a complete bar to recovery, applied a form of comparative negligence wherein the plaintiff's negligence was measured against the negligence *per se* of the defendant, and damages were apportioned accordingly.[155] Decisions such as that in *Dippel* have apparently been

149. *Id.* at 927.

150. *Id. See also* International & G.N.R. Co. v. Schubert, 130 S.W. 708 (Tex. Civ. App. 1910) and St. Louis, I.M. & S. Ry. v. Rice, 51 Ark. 467, 11 S.W. 699 (1889) where contributory negligence was approached as an element of proximate cause.

151. In those states which recognize contributory negligence as a defense to strict liability, the plaintiff's recovery will be barred by his failure to discover or foresee hazards which the ordinarily prudent person would have discovered or foreseen, or by his engaging in negligent conduct after such discovery. *See, e.g.*, Stephan v. Sears, Roebuck & Co., 110 N.H. 248, 266 A.2d 855 (1970); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). Contributory negligence often involves "misuse", moreover, as in Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965). Misuse is discussed herein as a subsection of assumption of risk. See notes 203-22 *infra* and accompanying text.

152. Chadwick v. Ek, 1 Wash. 2d 117, 129, 95 P.2d 398, 403 (1939). It has also been held that "lack of ordinary due care could constitute a defense to strict tort liability." West v. Caterpillar Tractor Co., 336 So. 2d 80, 90 (Fla. 1976) (road grader ran over plaintiff's decedent).

153. See Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 129 (1972).

154. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

155. Mr. Justice Hallows in a concurring opinion in *Dippel* writes:

motivated by two considerations in adopting comparative negligence in strict liability. The first is an abhorrence of complete bars to recovery by a negligent plaintiff who has fallen victim to a dangerous product.[156] The second is a desire to reduce damages in the amount of the plaintiff's negligence, or, put another way, to limit the plaintiff's recovery to that portion of his injury attributable to the defective product.[157] The

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> What we mean is that a seller who meets the conditions of sec. 402A, Restatement, Torts 2d, in Wisconsin is guilty of negligence as a matter of law and such negligence is subject to the ordinary rules of causation and the defense applicable to negligence. While the Restatement, Torts 2d, sec. 402A imposes a strict or absolute liability regardless of the negligence of the seller, we do not.

37 Wis. 2d at —, 155 N.W.2d at 66 (concurring opinion).

As was pointed out, the Wisconsin court in *Dippel* was convinced that strict liability is founded upon negligence and therefore readily accepted traditional negligence defenses. There is little deviation, then, between results in a negligence action, particularly of the *res ipsa loquitur* variety, and an action founded upon strict liability in which the classic negligence defenses are utilized and wherein harsh results can sometimes be expected. This was recognized in Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676 (D.N.H. 1972), as it too adopted a form of comparative negligence in strict liability. In that case a defective hammer chipped and seriously injured the plaintiff's eye. The plaintiff, a mechanic, had observed a chip in the hammer, a piece of which had apparently lodged in his finger. He had returned it to the supplier who refused to exchange it or otherwise make good the purchase on the basis that there was no warranty against chipping. The plaintiff continued to use it until it again chipped, striking him in the eye. Because of his continued use of the defective product, the plaintiff was deemed to have been negligent. "Had the accident occured just five weeks earlier, plaintiff's conduct would have been an absolute bar to recovery," the court said, taking note of the legislative replacement of contributory negligence with comparative negligence. *Id.* at 681. The plaintiff's damages were reduced by 20%.

The court in Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), lamented the absence of a comparative negligence scheme in New York with regard to strict liability. *Id.* at 345, 298 N.E.2d at 630, 345 N.Y.S.2d at 472. The legislature, heeding the invitation, adopted a pure comparative negligence statute. N.Y. CIV. PRAC. LAW §§ 1411, 1412, 1413 (McKinney 1976).

156. Discussing England's adoption of comparative negligence, the court in Frummer v. Hilton Hotels Int'l, Inc., 60 Misc. 2d 840, —, 304 N.Y.S.2d 335, 342 (1969), said:

> England's rejection of the all or nothing approach of the common law rule reflects a view that a person who is principally responsible for injuries to another should not escape liability completely because the injured party was also in part at fault. The argument that the common-law rule deters carelessness on the part of the plaintiff is rejected as being highly unrealistic. If fear for one's own life or health will not induce a decent regard for one's own safety, then the prospect of not recovering damages surely will not. If, indeed, the regulation of conduct is one of the functions of the contributory negligence rule—and this is extremely doubtful—then the common-law rule ran the wrong way. There is more psychological reality to the proposition that the threat of liability may influence persons to consider possible risks to others before embarking on a dangerous course of conduct. In any event, the common-law rule gave too much weight to deterring carelessness on the part of a plaintiff while removing all incentive to care on the part of a defendant. England's rule achieves a better balance. There is no doubt that the principal motive for change in the law in England is the harsh lack of proportion and the immorality in a rule which denies an injured person all compensation although his responsibility for the accident and the resulting injuries may be minor.

157. Hopkins v. General Motors Corp., 548 S.W.2d 344 (Tex. 1977). *See generally* Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297 (1977); Wade, *Products Liability and Plaintiff's Fault— The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373 (1978); Comment, *Comparative Fault and Strict Products Liability: Are They Compatible?*, 5 PEPPERDINE L. REV. 501 (1978).

Supreme Court of Alaska, in adopting comparative negligence in strict products liability actions, thought it anomalous to allow mitigated damages if a plaintiff sues in negligence but to allow full recovery if he sues in strict liability.[158] The court noted that the legal purist might find it theoretically difficult to balance apples and oranges—the plaintiff's negligence against no requirement of negligence on the part of the defendant manufacturer—but ultimately overlooked the incongruity.[159] The court did, however, proclaim that foreseeability had no place in strict products liability.[160]

To apply comparative negligence to strict liability, however, is again to subordinate strict liability's public policy aspects to the fault balancing of negligence.[161] This approach has been judicially renounced.[162] If risk is truly to be allocated to an industry without regard to fault when that enterprise unleashes a hazardous product upon the public, that end is not served by having producers benefit from the momentary lapses or inadvertent negligence of a plaintiff injured by such a product. The defense of contributory negligence should be limited to those instances in which the plaintiff had full knowledge of the product's defect or of its dangerous condition but proceeded unreasonably to fly in the face of the hazard, thereby incurring an assumption of risk sufficient to relieve the supplier or manufacturer of liability.[163] A user or consumer of a defective or hazardous product without knowledge of its condition, as well as one who experiences a momentary or inadvertent lapse in his instincts, is in that class of persons who are powerless to protect themselves and for whom *Greenman v. Yuba Power Products,*

158. Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 46 (Alaska 1976). *See also* Mr. Justice Rabinowitz's concurring opinion therein favoring the adoption of comparative causation rather than comparative negligence. *Id.* at 47 (concurring opinion).

159. *Id.* at 45. *See generally,* Adler, *Strict Products Liability: The Implied Warranty of Safety, and Negligence With Hindsight, As Tests of Defects,* 2 HOFSTRA L. REV. 581, 601 (1974); Schwartz, *Strict Liability and Comparative Negligence,* 42 TENN. L. REV. 171 (1974), supporting the application of comparative negligence to strict liability.

160. "[W]e are not convinced that the doctrine of foreseeability provides a viable conceptual basis upon which to predicate a defense in products liability cases. It appears to focus on negligence rather than upon proximate cause, which is the primary issue in products liability." Butaud v. Surburban Marine & Sporting Goods, Inc., 555 P.2d 42, 46 (Alaska 1976).

161. See Comment, *Tort Defenses to Strict Products Liability,* 20 SYRACUSE L. REV. 924, 943 (1969).

162. "To initially apply a theory of comparative negligence to an area of the law in which liability is not premised on negligence seems particularly inappropriate." McCown v. International Harvester Co. 463 Pa. 13, —, 342 A.2d 381, 382 n.3 (1975). Similarly, "comparative negligence has no application to products liability actions under § 402A." Kinard v. Coats Co., 553 P.2d 835, 837 (Colo. App. 1976).

163. See the dissenting opinion in Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 46 (Alaska 1976) (dissenting opinion).

Inc.[164] stands as a monument.

The more rational approach to this entire aspect of contributory negligence is embodied in the *Restatement (Second)* wherein contributory negligence, except that which constitutes assumption of risk, is not a defense to strict liablity.[165] As the foregoing indicates, this approach has not found universal acceptance,[166] but it is the rule which logic, the majority of jurisdictions,[167] and the evolution of strict liability support.

It may be helpful, in considering the *Restatement's* position, to look to the early cases dealing with animals which were *ferae naturae*. The courts recognized that only voluntary assumption of risk was a sufficient defense to the strict liability imposed in such cases. In short, one must be found to have visited the injury upon himself.[168] This approach has been utilized, appropriately enough, by courts in strict products liability. Harking back to the animal cases and finding in those decisions that no distinction was drawn between a failure to discover the nature of a vicious animal and a careless encounter with its viciousness thereafter, courts have applied the same rule to products liability. Contributory negligence, even following the discovery of a

164. "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." Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, —, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1967).

165. RESTATEMENT (SECOND), *supra* note 2, § 402A, comment n, at 356. *Compare* Postilion, *Strict Liability and Contributory Negligence: The Two Just Don't Mix*, 57 ILL. B.J. 26, 29 (1968) ("Negligence of the plaintiff is not relevant to strict tort liability.") *with* Groark, *Contributory Negligence—An Integral Part of Products Liability Cases*, 56 ILL. B.J. 904 (1968), which Postilion, citing the same cases, seeks to rebut.

166. That contributory negligence is not a bar has been criticized and called "a rule without a rationale." Schwartz, *supra* note 159, at 176, citing Noel, *supra* note 153, at 107-14. *See also* Ettin v. Ava Truck Leasing, Inc., 53 N.J. 463, 251 A.2d 278 (1969).

167. *See, e.g.* O.S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968); Barth v. B.F. Goodrich Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968); Brooks v. Dietz, 218 Kan. 698, 545 P.2d 1104, (1976); Sandy v. Bushey, 124 Me. 320, 128 A. 513 (1925); Fields v. Volkswagon of America, Inc., 555 P.2d 48 (Okla. 1976); Findlay v. Copeland Lumber Co., 265 Or. 300, 509 P.2d 28 (1973); Ellithorpe v. Ford Motor Co., 503 S.W.2d 516 (Tenn. 1973); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. 1967).

168. Muller v. McKesson, 73 N.Y. 195, 29 Am. Rep. 123 (1878), wherein the court held:

> If a person with full knowledge of the evil propensities of an animal wantonly excites him, or voluntarily and unnecessarily puts himself in the way of such an animal, he would be adjudged to have brought the injury upon himself, and ought not to be entitled to recover. In such a case it cannot be said, in a legal sense, that the keeping of the animal, which is the *gravamen* of the offense, produced the injury. (citations omitted). . . . To enable the owner of such an animal to interpose this defense [of contributory negligence], acts should be proved with notice of the character of the animal, which would establish that the person injured voluntarily brought the calamity upon himself."

Id. at —, 29 Am. Rep. at 126-27.

The defendant being held strictly liable cannot be absolved "by any act of the person injured, unless it be one from which it can be affirmed that he caused the injury himself, with a full knowledge of its probable consequences." *Id.* at —, 29 Am. Rep. at 129.

defect, has been held to be no defense under this rationale; the rule is the same whether the risk encountered is a dangerous animal or a defective product.[169] The vicious animal cases noted that, because negligence was not the grounds of liability, contributory negligence was not a defense.[170] The same should be true in products liability.

Contributory negligence has been characterized as a discredited doctrine which destroys the claims of persons who have in some manner, however slight, contributed to their own injuries.[171] By placing a product on the market, a manufacturer or supplier is deemed to have made an affirmation of its safety and fitness for use without defect. If this affirmation were held to be made only to careful persons, the restrictions upon the liability the supplier or manufacturer would be enormous and beyond what the law should allow.[172] The courts need no longer act as protectors of burgeoning industries which, if not nurtured in their infancy, could succumb to the technological hazards of their own creation. Producers today are generally in a position either to act as self-insurers and cost-spreaders, or they are able to obtain liability insurance, the cost of which is ultimately passed on to the consumer in tiny fractional increments of the pricing structure. As industry was once protected from the imposition of ruinous judgments, so now must the consumer be protected from otherwise ruinous damages.[173]

B. Assumption of Risk

Assumption of risk, though sometimes viewed as a part of contributory negligence, is a very different matter and should, unlike contributory negligence, properly serve as a limitation upon strict liability even where a defective product is involved.[174] While contributory negli-

169. *See, e.g.*, Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1975).

170. Muller v. McKesson, 73 N.Y. 195, —, 29 Am. Rep. 123, 128 (1878).

171. Pope & Talbott, Inc. v. Hawn, 346 U.S. 406, 409 (1953).

172. Lascher, *supra* note 18, at 50-51. *Contra*, Plant, *supra* note 18, at 950, who gets a "peculiar sensation in the pit of his stomach at the thought of . . . liability being imposed" by a negligent plaintiff upon a potentially nonnegligent defendant.

173. *Cf.* Frummer v. Hilton Hotels Int'l, Inc., 60 Misc. 2d 840, —, 304 N.Y.S.2d 335, 341-42 (1969). It has also been pointed out that

> [a] large portion of mass-produced items is manufactured with as poor quality as the market will support . . . . The de facto victimization of the consumer requires that contributory negligence should not constitute a defense in an action for personal injuries incurred through use of a defective product regardless of the theory under which the plaintiff proceeds.

Epstein, *supra* note 140, at 284.

174. RESTATEMENT (SECOND), *supra* note 2, § 402 A, comment n: "[T]he form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known dan-

gence is based on an objective standard of conduct, assumption of risk is highly subjective. It involves a conscious encounter with a known danger by consent or design, coupled with the willingness to take a chance.[175] Assumption of risk further involves what the particular plaintiff saw, knew, understood, and appreciated,[176] as well as his age, lack of information, experience, intelligence, and judgment.[177] In addition to the foregoing, the *Restatement (Second)* adds a requirement under strict products liability: the assumption of risk must be unreasonable.[178] To some extent this may be thought to be a reintroduction of the reasonable person standard. Great care must be taken to insure that the reasonableness of the standard is not based upon what an ordinary person of reasonable prudence would have done in the same or similar circumstances, but rather is based upon what was reasonable for a given plaintiff under the influence of all present subjective factors.[179] Assumption of risk should be an extremely difficult standard to meet, for it implies that the plaintiff engaged in conduct with the knowledge that, with substantial certainty, he would be injured. It is that knowledge which makes his conduct unreasonable.[180] Assumption

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ger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability." *Id.* at 356.

175. Sweeney v. Matthews, 94 Ill. App. 2d 6, —, 236 N.E.2d 439, 448, *aff'd*, 46 Ill. 2d 64, 264 N.E.2d 170 (1970). This was also well stated in Magnuson v. Rupp Mfg., Inc., 171 N.W.2d 201 (Minn. 1969):

> Assumption of risk in the classic sense does not involve failure to use reasonable care. Instead, it is based on a subjective analysis and may be found whenever the plaintiff (1) had knowledge of the risk, (2) appreciated the risk, and (3) had a choice to avoid the risk and voluntarily chose to chance it.

Id. at 211 n.6. *See also* Doran v. Pullman Standard Car Mfg. Co., 45 Ill. App. 3d 981, 360 N.E.2d 440 (1977); Brown v. North Am. Mfg. Co., 576 P.2d 711 (Mont. 1978); Maxey v. Freightliner Corp., 450 F. Supp. 955 (N.D. Tex. 1978).

176. RESTATEMENT (SECOND), *supra* note 2, § 496D, comment c, at 575.

177. *Id. See also* RESTATEMENT (SECOND), *supra* note 2, § 496A, comment d, at 562 and § 496C, comment e, at 571.

178. RESTATEMENT (SECOND), *supra* note 2 § 402A, comment n, at 356. *See also* Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972):

> Ordinary contributory negligence does not bar recovery in a strict liability action. "The only form of plaintiff's negligence that is a defense to strict liability is that which consists of *voluntarily and unreasonably proceeding to encounter a known danger*, more commonly referred to as assumption of risk. For such a defense to arise, the user or consumer must become aware of the defect and still proceed unreasonably to make use of the product."

Id. at 145, 501 P.2d at 1169-70, 104 Cal. Rptr. at 449-50 (emphasis by the court).

179. *See, e.g.*, Saeter v. Harley-Davidson Motor Co., 186 Cal. App. 2d 248, 8 Cal. Rptr. 747 (1960), in which age and experience is used to show that plaintiff knew or should have known of the risk. A different result was reached in Sweeney v. Matthews, 94 Ill. App. 2d 6, 236 N.E.2d 439 (1968), *aff'd*, 46 Ill. 2d 64, 264 N.E.2d 170 (1970), involving a broken nail and a young, briefly experienced carpenter. See note 175 *supra*.

180. It is risky, but not unreasonably so, to cross a street—even with the forethought that an approaching automobile might have a defective steering mechanism. It is quite another matter to

of risk has not been accepted by all commentators as a viable defense to strict liability,[181] but when viewed critically it would appear that a producer's liability should not extend to situations in which the plaintiff patently brought the damage upon himself.

There should be limits, however, to this defense. If it is accepted that, as premised above,[182] a corollary of the risk allocation policy justification for strict liability is to provide an incentive for safer products, the defense of assumption of risk may be seen as negating that incentive. Consider the cigarette industry, for example. If assumption of risk stands as a defense to liability for damages caused by its products, that industry would have little or no incentive to produce safer products.[183] In addition, when a cigarette manufacturer, or any other manufacturer for that matter, markets an inherently dangerous product and thereafter expends tremendous sums of money and effort advertising and encouraging consumers to disregard the risk, the manufacturer should be held liable when its perilous invitation is accepted. To profit from knowingly enticing another to injure himself and thereafter to escape the cost of that injury is untenable.[184]

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purposefully stand in front of an oncoming car known to be uncontrollable on the odd chance that it might somehow miss.

181. Policy justifications for recognizing defenses of contributory negligence and assumption of risk are plainly less cogent . . . in relation to claims based on strict liability. Though the issue is debatable, it appears that the better solution is to deny recognition of an independent defense of consent to risk in cases of strict liability for injuries resulting from defective products.

Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 166 (1961). Also advocating the proposition that assumption of risk has no place in strict liability is Lascher, *supra* note 18, at 54.

Further, it was observed in Hagenbuch v. Snap-On Tools, 339 F. Supp. 676 (D.N.H. 1972) that "despite the Restatement's position that strict liability is not based upon negligence, the allowance of contributory negligence, or as the Restatement prefers, the doctrine of assumption of the risk, as a defense injects at least a flavor of negligence into the strict liability doctrine." *Id.* at 682. *See also* W. PROSSER, *supra* note 110, § 68, at 454-57; James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968).

182. See notes 84-88 *supra* and accompanying text.

183. See Wegman, *Cigarettes and Health: A Legal Analysis*, 51 CORNELL L.Q. 678, 718 (1966).

184. While it may strike one as a harsh thing to say about industrial leaders who have enjoyed a mantle of respectability that their conduct in making and aggressively marketing cigarettes constitutes the intentional infliction of death, there seems to be no other permissible characterization of it. One intends the consequences which are known to follow with substantial certainty from his actions. Stated conservatively, there is now substantial certainty that the making and aggressive marketing of cigarettes will cause thousands of premature deaths annually. In known certainty of results, there is no difference between the actions of cigarette manufacturers who make, sell, and promote the use of their deadly product, and the angry man who fires his gun into a crowd. Neither knows who is to die, but both know with substantial certainty that someone will.

White, *Strict Liability of Cigarette Manufacturers and Assumption of Risk*, 29 LA. L. REV. 589, 616-17 (1969). Query: "Can a manufacturer after it has recommended that the [product] be used in a way fraught with peril, and after injury results from that use, obtain judgment as a matter of law

Assumption of risk involves a three-part test: (1) knowledge of the risk, (2) voluntary assumption thereof, and (3) the unreasonableness of the risk assumption. Obviously, as to the first element, one cannot assume a risk of which he is unaware.[185] Even in negligence actions, it is recognized that the plaintiff must have an actual, subjective appreciation of the danger and the attendant risks involved therein. In strict liability, moreover, it is not enough to say that the plaintiff *should* have realized the danger.[186] The question is what the plaintiff himself perceived and not what a reasonable person would have appreciated in those same circumstances.[187] This subjective requirement is extremely important and must not be lightly established, for it is doubtful that many consumers would knowingly play Russian roulette with a dangerous product where they fully appreciate the potential consequences.

Secondly, as with negligence, the assumption of risk must be in all respects a voluntary choice on the part of the plaintiff, made after he has determined the hazards involved.[188] Cases involving work-related

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by asserting that the danger should have been fully apparent to anyone who so used it?" Jamieson v. Woodward & Lothrop, 247 F.2d 23, 38 (1957) (dissenting opinion).

To allow a manufacturer to induce a consumer to ignore the hazards of his product and thereby "assume the risk" which the manufacturer knows to be present is against public policy. Rather, the manufacturer should assume the risk that the consumer will be so persuaded, and it should bear the costs which its inducements create.

> There exists . . . no real alternative and no valid objection to this distribution of the burden, if the public health is to be protected in any practical sense from exploitation by those who, for a profit motive, undertake to supply the vast and ever increasing variety of products which the people by unprecedented powers of commercial persuasion are daily urged to use and consume.

Green v. American Tobacco Co., 154 So. 2d 169, 173 (Fla. 1963).

185. RESTATEMENT (SECOND), *supra* note 2, § 402A, comment n, at 356. *See* Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. 1967).

186. *See, e.g.*, Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368 (Tex. 1963), *aff'd*, 376 S.W.2d 932 (Tex. Ct. Civ. App. 1964). *But see* Bereman v. Burdolski, 204 Kan. 162, —, 460 P.2d 567, 569 (1969), where the defendant was absolved of liability because the plaintiff should have known of defective brakes. It may be, however, that the language of the case indicates that he should have known and, in view of the totality of the fact situation, actually did know.

It does not constitute assumption of risk, for instance, for a worker to be aware that he is working around heavy machinery which poses some degree of danger and that if his body comes in contact with moving parts he is likely to be injured. Thus, it was held not to constitute encountering a known risk where a plaintiff had lost his footing and had fallen between the drum and stationary hopper of a concrete mixer alleged defective because of the absence of safeguards to prevent such accidents. In the court's words, "evidence must show that plaintiff had actual knowledge of the specific danger posed by the defect in manufacture or design, and not just a general knowledge that the machinery could be dangerous." Culp v. Rexnord & Booth-Rouse Equip. Co., 553 P.2d 844, 845 (Colo. Ct. App. 1976).

187. "[A] finding of assumption of risk must be based on the individual's own subjective knowledge, not upon the objective knowledge of a 'reasonable man.' " Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, —, 337 A.2d 893, 901-02 (Pa. 1975) (*citing* Dorsey v. Yoder Co., 331 F. Supp. 753, 765 (E.D. Pa. 1971)).

188. RESTATEMENT (SECOND), *supra* note 2, § 402A, comment n, at 356. *See also* Elder v.

accidents illustrate the problem surrounding this requirement. Some courts have held in such cases that work pressures and fear of losing one's job do not excuse an employee's assumption of risk.[189] Such decisions do not seem to evaluate realistically the subjective, voluntary nature of an employee's action. Nor do they take into account the enormous pressure upon workers to preserve their jobs and their future employment prospects, especially when faced with tight job markets and high unemployment. These problems have caused other courts to realize properly that the voluntary character of the worker's undertaking of assigned hazardous duties, or of his use of dangerous machinery, is illusory.[190] The better rule is that job-related dangers can never be said as a matter of law to be voluntarily assumed.[191] In every instance the matter of voluntary and unconstrained assumption of a subjectively known hazard must be a question of fact to be evaluated with great care. Numerous influences may exert themselves whenever a decision is made, and this is especially so where the decision involves a risk. Constraints outside the plaintiff and beyond his control may serve to influence unduly the willingness with which the danger is encountered.

The foregoing constitutes the basic common law doctrine of assumption of risk. Where strict liability is involved, a third element of an unreasonable assumption of risk has been added.[192] This has generally been adopted by the courts,[193] and it is naturally recognized that a consumer's reasonable assumption of risk is no defense for the manufacturer.[194] The unanswered question is whether the standard to be applied is that of a reasonably prudent person. It is probably true that

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Crawley Book Mach. Co., 441 F.2d 771 (3d Cir. 1971)(applying Pennsylvania law); Barkewich v. Billinger, 432 Pa. 351, 247 A.2d 603 (1968); W. PROSSER, *supra* note 110, § 68, at 450.

189. *See, e.g.*, Ralston v. Illinois Power Co., 13 Ill. App. 3d 95, 299 N.E.2d 497 (1973).

190. Rhoads v. Service Mach. Co., 329 F. Supp. 367 (E.D. Ark. 1971); Johnson v. Clark Equip. Co., 274 Or. 403, 547 P.2d 132 (1976). *Contra*, Prince v. Galis Mfg. Co., 58 Ill. App. 3d 1056, 374 N.E.2d 1318 (1978).

191. Brown v. Quick Mix Co., 75 Wash. 2d 833, 454 P.2d 205 (1969).

192. RESTATEMENT (SECOND) § 402A, *supra* note 2, comment n, at 356. Unreasonable assumption of risk was also recognized in the case of strict liability for dangerous animals. *See, e.g.*, Sandy v. Bushey, 124 Me. 320, 128 A. 513 (1925).

193. *See, e.g.*, Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974); Ferraro v. Ford Motor Co., 423 Pa. 324, 223 A.2d 746 (1966); McNichols, *The* Kirkland v. General Motors *Manufacturer's Products Liability Doctrine—What's In A Name?*, 27 OKLA. L. REV. 347 (1974).

194. "[A] plaintiff's choice to encounter the risk ought not to bar his recovery if the choice was reasonable, even though he fully understood the risk." Keeton, *Assumption of Products Risks*, 19 SW. L.J. 61, 75 (1965). *See also* Messik v. General Motors Corp., 460 F.2d 485 (5th Cir. 1972); Doran v. Pullman Standard Car Mfg. Co., 45 Ill. App. 3d 981, 360 N.E.2d 440 (1977). To the same effect in a negligence action is Dawson v. Payless For Drugs, 248 Or. 334, 433 P.2d 1019 (1967), reversing a ruling that the plaintiff unreasonably assumed the risk of traversing an icy parking lot.

a plaintiff rarely takes a chance which, in his estimation, is truly unreasonable. He obviously must have expectations of remaining uninjured or his conduct would amount to an intentional infliction of injury upon himself.[195] The question of judging the reasonableness of the risk assumption is difficult to resolve, and it carries with it the danger that a negligence standard will be reimposed upon strict liability. Perhaps it is enough that the matter be approached with caution and with the realization that there are circumstances under which the plaintiff's conduct may fall below the standard of the reasonable person and yet be reasonable for that particular plaintiff. There appear to be at least two approaches to the question: one based upon a subjective analysis of the plaintiff's conduct and the other involving a question of the duty of the manufacturer similar to a negligence analysis.

The first approach is illustrated by *Johnson v. Clark Equipment Co.*,[196] in which the plaintiff, apparently under considerable pressure and time contraints, was moving bundles bound with metal bands with the use of a fork lift. In a hurry and without his assistant, the plaintiff, rather than dismounting and moving in front of the fork lift to cut the metal bindings before discharging his load, reached through the lift mechanism to snip the bindings. While so doing, he accidentally activated the lift which severed his arms. Such conduct may be thought to fall below the care which would have been exercised by a reasonably prudent person. However, the conduct may also be seen as having been reasonable, given the totality of the circumstances coupled with the degree of danger or risk perceived by the plaintiff.

In *Johnson*, the court held that whether the plaintiff's decision to encounter a known danger was reasonable pertained only to the plaintiff's decision itself and not to the apparent reasonableness of the physical conduct by which he carried out his decision.[197] The court further determined that the decision must be evaluated as of the time it was made and that working conditions may be considered even though they were not related to the conduct of the manufacturer of the allegedly dangerous product.[198] Moreover, it should be noted that the condition of the product was related to the question of the reasonableness of the plaintiff's decision. Here, the lift's operating lever was open and ex-

195. A player of Russian roulette must have the belief that he will survive or it becomes a matter of suicide. But a reasonably prudent person would no doubt conclude that to take the chance of shooting oneself at all is unreasonable.

196. 274 Or. 403, 547 P.2d 132 (1976).

197. Johnson v. Clark Equip. Co., 274 Or. 403, —, 547 P.2d 132, 140 (1976).

198. *Id.* at —, 547 P.2d 140-41.

posed, and a fixed wire mesh would have prevented the plaintiff from inserting his arms through the hoisting columns of the machine.

To summarize, a plaintiff injured by a dangerous product may be expected to be careless or negligent in certain situations. This conduct should not bar his recovery unless it was so extreme and outrageous that it effectively broke the chain of causation. The plaintiff must be seen as having brought the injury upon himself, rather than as having suffered it as the result of the defective product.

A second approach, in the guise of duty, has also been suggested.[199] *Bartkewich v. Billinger*[200] involved a plaintiff who was operating a glass crushing machine. A piece of glass apparently became lodged in the machine which seemed in danger of being damaged. The plaintiff instinctively reached for the jammed piece, thinking he had time to dislodge it before the next cycle of operation, and was injured. The Pennsylvania Supreme Court reversed a verdict for the plaintiff in the strict liability action citing numerous negligence decisions. The court ruled that a manufacturer is not "obligated to build a machine that was designed not only to keep glass in, but people out."[201] Such an analysis, based upon the duty of care owed by the defendant to the plaintiff, reverts to a simple negligence test. It does not reach the important question of the nature of assumption of risk in strict liability.

What is unreasonable, then, as an assumption of risk remains a murky question. If it is based upon the objective reasonable person standard, then the defense of assumption of risk is likely to be unduly expanded. The better approach is to use reasonableness as a limitation upon the defense of assumption of risk. That is to say, rather than cutting off recovery for damages at the instant assumption of risk is demonstrated, the determination should go further and allow compensation for reasonable assumption of risk. Account should be taken of the character of the danger, the magnitude of the risk, and the myriad factors affecting the decision made by the plaintiff. Consideration should be given to pressures acting upon the plaintiff, his age, experience, intelligence and state of mind, the condition of the product, and the presence or absence of product safeguards. In short, the analysis must be as inclusive and subjective as possible. A highly technological society is, by its very nature, hazardous. If strict products liability is to

199. Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Area*, 60 IOWA L. REV. 1 (1974).
200. 432 Pa. 351, 247 A.2d 603 (1968).
201. *Id.* at —, 247 A.2d at 605.

mitigate the harm which suddenly and catastrophically descends upon an individual as a result of those hazards, strict liability must be sufficiently free of fetters to accomplish this function.

It should be noted that assumption of risk, as a limitation on manufacturers' and suppliers' liability, can also act as a more general benefit to society. A user or consumer has the option of obtaining cheaper but less safe products. Thus he accepts the higher risk potential in exchange for the benefit of lower prices and of the general availability of goods which might otherwise be absent from the market place.[202]

C. Misuse

One of the most important defenses in strict products liability has traditionally been misuse or abnormal use of the product. Properly viewed, misuse is a part of the assumption of risk analysis in which, at the outset, a distinction is drawn between (1) use for an abnormal purpose which would absolve the defendant of liability *if* the three-element test for assumption of risk is met and (2) careless use[203] for a

202. This concept of freedom of choice in assuming the risk or paying the price might be somewhat illusory in that it presupposes the ability to choose. Obviously, there are millions of consumers who, if they can afford a product at all, may only be able to purchase the least expensive and potentially most dangerous item of its type. However, this may be offset by the product's being available at all. As an example, rather than all automobiles conforming to the safety standards of a Mercedes-Benz, society (as represented by individual consumers) is willing to assume certain risks in order that four-wheeled individual transportation be available to all, albeit with less safety. It must also be remembered that the consumer must have sufficient information beyond the mere knowledge of a lower price to know of the risk he is assuming. In Seattle First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 542 P.2d 774 (1975), the court recognized that one cannot expect as much safety in a Volkswagen as in a more expensive Cadillac. But it also noted that it was "not the snub-nosed design [of the microbus] per se, but the lack of structural integrity in the front panel" which was the alleged defect of which the decedents may have been unaware. *Id.* at —, 542 P.2d at 779. As strict liability has been extended to include third parties as well as consumers, *see, e.g.*, Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972) and Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969), and since these people make up a defenseless class who had no opportunity to make a risk/cost choice, assumption of risk should not be applied to bystanders unless they meet the three elements of the subjective criteria, hereinabove reviewed, which would seem unlikely. See notes 185-98 *infra* and accompanying text.

203. Fields v. Volkswagen of America, Inc., 555 P.2d 48, 56 (Okla. 1976).

Although it may be argued that the intended or foreseeable use doctrine is a component entering into the determination of a defect, this classification rests uneasily within the *Restatement (Second)*, which views "defect" from the perspective of the plaintiff-consumer, rather than from that of the defendant-manufacturer. Moreover, to make this doctrine part of the plaintiff's prima facie case virtually guarantees the retention of the foreseeability fault factor in the determination of a product's defect, even after the elimination of the "unreasonably dangerous" requirement. The absorption of this concept of intended use by the assumption of risk defense would keep the burden of going forward with the evidence on the defendant, while guaranteeing that the defense of intended use

normal purpose which would constitute contributory negligence.[204]

There have been cases which restricted a manufacturer's liability to those instances in which the product was being used in the manner which was intended by the manufacturer.[205] This is clearly too narrow a requirement since, while a manufacturer may intend a screwdriver to drive screws, it is probable that it will be used for a variety of other purposes, such as prying the lid off of a paint can. The *Restatement (Second)* recognizes the defense of misuse but extends liability only to foreseeable misuse of a product,[206] as does much of the negligence case law.[207] The foreseeable use doctrine can be found in numerous negligence decisions such as cases which have held a defendant liable for failing to foresee that one would stand on a chair as well as sit in it[208] or for not anticipating that a highly flammable dress would be worn near a stove.[209]

Applying the foreseeability test to strict liability is incongruous in view of the fact that the manufacturer's negligence is irrelevant. A manufacturer is entitled to expect that normal use will be made of his product.[210] Nonetheless, the foreseeability test, when applied in the misuse defense, reintroduces negligence so that only negligent manufacturers are liable for defective products or products without adequate warnings.[211]

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is limited to dangers subjectively known to the plaintiff rather than those merely foreseeable. *Cf. Restatement (Second), supra* note 2, § 496 D.
Polelle, *supra* note 42, at 133 n.116.

204. Misuse has been referred to as "contributory negligence under another name." Kissel, *supra* note 7, at 459.

205. *See, e.g.*, Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968), a negligence action, in which crashing in an automobile was held not to be the intended use to which the product was to be put. *See also* Mieher v. Brown, 54 Ill. 2d 539, 301 N.E.2d 307 (1973), a negligent design action. In that case, an automobile hit the rear of a large truck and ran under it. The court applied a duty analysis and concluded that a manufacturer did not have a duty to design a vehicle with which it is safe to collide.

206. RESTATEMENT (SECOND), *supra* note 2, comment h, at 351.

207. *See, e.g.*, Williams v. Brown Mfg. Co., 45 Ill. 2d 418, —, 261 N.E.2d 305 (1970), in which the court defines misuse as "use for a purpose neither intended nor 'foreseeable' (objectively reasonable) by the defendant." *Id.* at —, 261 N.E.2d at 309.

208. Phillips v. Ogle Aluminum Furniture, Inc., 106 Cal. App. 2d 650, 235 P.2d 857 (1951).

209. Ringstad v. I. Magnin & Co., 239 Wash. 2d 923, 239 P.2d 848 (1952).

210. Maiorino v. Weco Prod. Co., 45 N.J. 570, —, 214 A.2d 18, 20 (1965) (warranty action). *Maiorino* was limited to its facts in Cepeda v. Cumberland Eng'r Co., 76 N.J. 152, —, 386 A.2d 816, 833 n.7 (1978). Prosser, *supra* note 18, at 1145. *See also* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A [5][f] (1978); Annot., 13 A.L.R. 3d 1057, 1100 (1967); Annot., 4 A.L.R. 3d 501 (1965).

211. See Noel, *supra* note 153, at 105. RESTATEMENT (SECOND), *supra* note 2, comment j, at 353. Further, "[i]t is clear from the better-reasoned cases that directions for use, which merely tell how to use the product, and which do not say anything about the danger of foreseeable misuse, do not necessarily satisfy the duty to warn." 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 8.05[1], at 162-63 (1978). Where a baby ingested detergent, the "use" was held unintended but foreseeable:

Strict products liability case law appears to have wholeheartedly adopted the limitation of a manufacturer's liability to those uses of its product which would have been foreseeable to a reasonably prudent manufacturer.[212] But clearly such reasoning focuses attention, not on the condition of the product, but on the conduct of the manufacturer or supplier. Such an approach is inconsistent with strict products liability, and it should be abandoned in favor of a subjective assumption of risk analysis of the plaintiff's appreciation of his alleged misuse of the product and of the attendant risks.

This can perhaps be illustrated by a case frequently cited for the doctrine of misuse in strict products liability, *McDivitt v. Standard Oil Co.*[213] There the plaintiff purchased "high-trend, deep traction type" tires[214] for his station wagon (which was sometimes driven off the road while camping) in size 850×14 rather than the recommended 800×14. He believed that his car's rims were large enough to permit the tires' use.[215] It was further shown that while the tires were on the vehicle the air pressure varied from fifteen to thirty-five pounds per square inch

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> A manufacturer may be liable . . . for damage caused by nonintended use of a product if the use is one which may be reasonably foreseen. . . . If a product is not reasonably safe for a use that may be expected to be made of it and no adequate warning is given of its dangerous propensities, the manufacturer or seller of such a product may be liable even though the product itself is faultlessly made.

Jonescue v. Jewel Home Shopping Serv., 16 Ill. App. 3d 339, —, 306 N.E.2d 312, 316 (1974) (citations omitted).

That negligence is still forcefully retained in strict liability actions may be illustrated by the following. In attempting to formulate a workable jury instruction on foreseeable use in strict liability, one commentator admittedly combines comments j and k of the *Restatement (Second)* § 395 which deal solely with negligence. Predictably, the result is a negligence instruction unreasonably dangerous to the plaintiff when used in strict liability:

> One who sells a product is not liable when harm results only because the product is handled in some way that he has no reason to expect, or is used in an unforeseeable manner. [The seller may, however, reasonably anticipate other uses than the one for which the product is primarily intended.]

Hilton, *The Strict Products Liability Case—Complaint, Defenses, and Instructions*, 48 OR. L. REV. 192, 208 (1969). The bracketed portion is optional for use where foreseeability of the use in question is an issue of fact. That instruction, however, is appropriate only for a negligence action for its lays liability solely on a negligent seller.

For an examination of the foreseeability doctrine, misuse, and the duty to warn in actions for negligence, see Dale and Hilton, *Use of the Product—When Is It Abnormal?*, 4 WILLAMETTE L.J. 350 (1967). *See also* Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961).

212. *See, e.g.*, Krammer v. Edward Hines Lumber Co., 16 Ill. App. 3d 763, —, 306 N.E.2d 686, 689 (1974); Higgins v. Paul Hardeman, Inc., 457 S.W.2d 943, 948 (Mo. 1970); Rogers v. Toro Mfg. Co., 522 S.W.2d 632, 638 (Mo. Ct. App. 1975). Manufacturers may also be held liable for foreseeable misuse of a product. *See, e.g.*, Wilson v. Crouse-Hinds Co., 556 F.2d 870, 874 (8th Cir. 1977) (electrical plug); Porter v. United Steel & Wire Co., 436 F. Supp. 1376, 1381-82 (N.D. Iowa 1977) (shopping cart).

213. 391 F.2d 364 (5th Cir. 1968) (applying Texas law).

214. *Id.* at 366.

215. *Id.* at 365.

(p.s.i.) although twenty-four to twenty-six p.s.i. was recommended. McDivitt's wife, accompanied by her six minor children, was driving the station wagon at approximately sixty miles per hour when the left rear tire blew out. She retained control of the vehicle, but, by the time she had slowed to thirty-five miles per hour, the left front tire came off causing the car to overturn, injuring its occupants.[216] Expert witnesses disagreed on whether defects in the tires or misuse had caused the accident. The tires had been in use for nine months and had traveled several thousand miles.[217] Given the facts of the case, it is difficult to believe that the plaintiff subjectively appreciated that the tire/rim combination was highly dangerous and potentially lethal nor that he thereby assumed the risk for himself and for his family. It does appear that the plaintiff was negligent in not using the tire size recommended for his rim, but this hardly rises to the level of knowing misuse and assumption of risk.[218]

Misuse as an affirmative defense would appear appropriate only in those cases in which the plaintiff, given all of the subjective factors of age, experience, intelligence, and the like, is found to have appreciated the risk of harm which his actions had created and thus to have voluntarily and unreasonably assumed the risk. The court in *McDivitt* noted that the purpose of strict liability is to provide judicial protection for the otherwise defenseless consumer.[219] A consumer who neither knew nor fully appreciated the risk of harm which his use—albeit negligent—of the defendant's product created is certainly defenseless. He knew neither of the potential for harm nor of the need to be wary. The need for tires and rims to vary in size is clear. But where a tire can be mounted on the wrong size of rim with facility, concealing a hazardous condition for many months and for thousands of miles, an unusually dangerous condition exists from which liability should follow.

The approach of the *McDivitt* court appears to have been modified for the better by the Texas Supreme Court in *General Motors Corp. v. Hopkins*.[220] In that case, the court held that the harm must be reason-

216. *Id.* at 366.

217. The record admitted a discrepancy in the actual number of miles, with 3,800 and 7,200 being the extremes. *Id.*

218. An expert witness testified that "such a rim was capable of accomodating an 850×14 tire" indicating that such a choice by the plaintiff was not a flagrant or outrageous disregard of the recommended size. *Id.*

219. *Id.* at 370.

220. 548 S.W.2d 344 (1977). *See also* Mitchell v. Fruehauf Corp., 568 F.2d 1139 (5th Cir. 1978); Note, General Motors Corp. v. Hopkins: *Products Liability: Abrogation of the Misuse Defense in Texas*, 18 S. TEX. L.J. 603 (1977).

ably foreseeable to the *user* before his misuse will limit his recovery.[221] The effect of this is that the foreseeability concept has been transposed to the plaintiff, and the question becomes what he, as a reasonable consumer, should have foreseen. But, once again, the standard of the reasonable person exercising due care has been introduced into strict liability unnecessarily. The uses of so simple an item as a hammer are as broad as imagination permits,[222] and the question of foreseeability about its use which arises when such a product is dangerously defective is mere surplusage. If misuse is confined to the doctrine of assumption of risk where it logically belongs, then the plaintiff's subjective recognition of the danger of the defect will relieve the defendant of liability therefor. Otherwise no interest is served by relieving a manufacturer or supplier of liability for having unleashed a defective product upon unsuspecting users who are thereby injured. Misuse is a viable defense only where it constitutes voluntary, knowing assumption of a subjectively unreasonable risk. Otherwise, it is a return to negligence.

IX. CONCLUSION

Conceived as an alternative to negligence and breach of warranty, strict products liability has nevertheless become infused with many of the fault concepts of negligence which run counter to the principles and policies of this rapidly developing tort. Foremost among these remnants of negligence is the doctrine of foreseeability which remains pervasive throughout the current strict liability analysis. Foreseeability serves an unfortunate role in that it refocuses attention on negligence and on the attendant questions of reasonableness; contributory negligence and its modern counterpart, comparative negligence; duty and breach of duty; alteration and misuse; and proximate cause. Clearly

221. It is essential that the supplier prove, as an element of this defense, that the consumer plaintiff should have reasonably anticipated as consequences of the misuse that the malfunction or injury, or some similar malfunction or injury, would occur. The harm must be reasonably foreseeable to the user if he is to be penalized . . . . If the malfunction and damaging event are not reasonably foreseeable to the user, his misuse should not limit his recovery.

548 S.W.2d at 351-52.

222. It may be noted that a hammer is an implement of beguiling simplicity, and there is probably no artifact with so many uses, real or fancied. No one is in awe of the art of using a hammer, and everyone deems himself competent to employ it, albeit, artfully or in frustration. It is to be found in many households, and children, from the time they are able to lift the artifact, can use it with enthusiasm, although the benefits may be dubious. A hammer is a hammer to most people and limitations in the implement, or its age, fitness and condition, are not apparent to the unsophisticated.

Dunham v. Vaughan & Bushnell Mfg. Co., 86 Ill. App. 2d 315, —, 229 N.E.2d 684, 691 (1967), *aff'd*, 42 Ill. 2d 339, 247 N.E.2d 401 (1969).

any application of foreseeability results only in a determination of the presence or absence of negligence.

The result is that liability without fault and the risk allocation theories of strict liability are subrogated by negligence tests and by an individualized case-by-case fault finding analysis which is detrimental to plaintiffs injured by dangerous products. Too often a strict products liability case resembles little more than a *res ipsa loquitur* negligence action with its traditional limitations grounded in negligence.

If compensation for both foreseeable and unforeseeable damages, for hazards both known and unknown, and if the distribution of risk throughout society as a cost of doing business is to proceed apace, moral culpability based upon foreseeability must not be regarded as elemental. The liability of a manufacturer or supplier is not rested upon what he knew or should have known when he manufactured and sold the product. Rather it is grounded upon his placing into the stream of commerce a product which is demonstrated at trial to have been dangerous.[223]

Eliminating the foreseeability factor would necessarily obviate the usual defenses common to negligence actions and would leave a manufacturer or supplier with three defenses or limitations to liability: (1) a pure form of assumption of risk on the part of the plaintiff, (2) the statute of limitations,[224] and (3) the production of safe products. Although removal of the foreseeability doctrine from strict products liability analysis would have far-reaching consequences, the propriety of such a revision is demonstrable. The erosion and eventual disappearance of foreseeability as a legal landmark on the new frontiers of strict products liability is to be anticipated and encouraged.

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223. General Motors Corp. v. Hopkins, 548 S.W.2d at 351. It would perhaps serve the best interest of fairness, however, to have the issue of danger resolved as of the time of the accident rather than the time of trial in order not to encourage delaying tactics by either side in the hope of obtaining the advantage of knowledge or data not yet developed but bearing upon the issue of dangerousness.

224. *See generally* Comment, *Statutes of Repose in Products Liability: The Assualt Upon the Citadel of Strict Liability*, 23 S.D.L. REV. 149 (1978).