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

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NOTES AND COMMENTS

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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. Strict liability was gradually adopted as a tort, however, and reliance upon the language of warranty became less pronounced. 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.

Principal among the misapplied negligence concepts is that of foreseeability. 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 and that the manufacturer or supplier of a defective product is liable for resulting harm even if he has exercised due care.

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).
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, and the question remains one of determining the limits of liability short of requiring only that the product cause an injury. This article will discuss three possible limitations on liability: contributory negligence and its modern counterpart, comparative negligence; assumption of risk; and alteration and misuse. 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, knowable and unknowable risks, the state of the art defense, duty to warn, and proximate causation 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 is beyond the scope of

property by the condition of the chattel, without regard to the presence or absence of his negligence." Wade, Strict Torts Liability of Manufacturers, 19 Sw. L.J. 5 (1965).
7. See, e.g., Kissel, Defenses to Strict Liability, 60 Ill. B.J. 450 (1972).
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 contractual 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. 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. These narrow exceptions included the keeping of wild animals, the sale of food, and ultrahazardous activities. For these exceptions, liability was imposed without regard to fault or culpability on the part of the defendant. But applying strict liability to manufacturers and suppliers generally was long thought to be a concept “characteristic of medieval times” and “long-discarded.”

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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).


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. Id., supra note 18, at 939.

25. Id.
Strict liability for products came into its own in a case of "lathes on the loose." Justice Traynor wrote the opinion in this case, *Greenman v. Yuba Power Products, Inc.*, 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.*

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 occurrence 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.

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."

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.

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

29. *Id.* at 462, 150 P.2d at 441.
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.
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 encourage carelessness on the part of the consumer dismisses the consumer's natural tendency to prefer no injury at all to monetary compensation therefore.
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).

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., did so in a warranty action. The Supreme Court of Florida, upon certification of a question from the federal district court, held that Florida case law affirmatively established that implied warranty is not limited by the doctrine of foreseeability. 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. 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, 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." 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. 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); Lartigue 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.
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 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).
analogies is unnecessary and reminiscent of those cases which reasoned that foreseeability is merely another name for scienter. 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. 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. Brantly Helicopter Corp.

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.

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. Such an analysis follows

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.
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.* 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. 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, is infinitely closer to the policy considerations underlying strict liability than is Cardozo’s rule of the foreseeable plaintiff. 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.

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).


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-Palsgraved 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 extension 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.\(^6\)

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 (1953)] 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 \(res ipso loquitur\) theory of negligence and the court's test (133 Cal. App. at —, 284 P.2d at 532-33) was quoted from the \(Restatement (Second) \S 388\), 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 asbestosis 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 condemned, 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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\(^61\) See note 51 *infra*.


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.

\(^63\) Following the *Kimwood* test of imputed foreseeability, *infra* 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.

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\(^64\) 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. 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.

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 deservedly be eliminated through economic interactions.

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 unknowable; 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. Lartigue 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 inclusionary 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.

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) 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. 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."

Among the hepatitis cases, Cunningham v. MacNeal Hospital, though not without criticism, stands as a landmark case in recognizing 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. While 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 adjoining 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.


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

69. *Id.* at 171.

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

ing the proper policy purposes of strict liability. That case held that, where a product was unreasonably dangerous, 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. 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. The proper rule was well stated in the recent case of General Motors v. Hopkins. 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. "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." 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.

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


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 5, 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 "in negligence 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. Ld. 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).


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 judgment. 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 disastrous effects would have been both unknown and unforeseeable. 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. 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,

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

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.

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.\textsuperscript{85} To return to the drug industry, for example, further research demonstrated the horrible dangers of thalidomide. It is regrettable 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,\textsuperscript{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.\textsuperscript{87} Such a requirement would also place the risk and resulting

\textsuperscript{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.

\textsuperscript{86} A related issue is relative safety. "The purchaser of a Volkswagen 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.

\textsuperscript{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
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

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).


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 Torts92 and have concluded that, while
manufacturers are not insurers, they are liable for a product's unrea-
sonable danger. These courts have employed a balancing test to deter-
mine whether the danger is outweighed by the product's utility. One
court went so far as to proclaim: "The fulcrum for the balancing pro-
cess is the reasonable man as consumer or seller."93 This is clearly noth-
ing 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 anal-
ysis: once the dangers of the product becomes known through de-
veloped 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 negli-
gence as distinguished from a strict products liability action.

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

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,
94. 493 U.S. 869 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,
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 over-
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-

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cases has followed the rule articulated in *Campo v. Scofield* that there is no duty to warn of open and obvious dangers. This rule has been much criticized and was recently disavowed in the state which adopted it. 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. 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. The proper focus of strict liability should not be upon the defendant’s conduct but rather upon the nature

ability.”... 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).

[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 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), modified, 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-

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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.
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 cause116 or for a substantial factor in bringing about the injury117 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,
which has been held to be an ultrahazardous activity,\textsuperscript{120} overturned and discharged its contents which then seeped into the soil and were carried by subterranean waters to a trout farm pond less than three miles away killing fish therein, such a result might be deemed unforeseeable.\textsuperscript{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.\textsuperscript{122} This postulate is invalid, however, since limitations based on foreseeable consequences reintroduce negligence considerations counterproductive to public policy in strict liability.\textsuperscript{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.\textsuperscript{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.\textsuperscript{125} In negligence, one

\begin{itemize}
    \item 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.

\textit{Id.} at —, 337 A.2d at 900.


\textsuperscript{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).

\textsuperscript{122} W. Prosser, \textit{supra} note 110, § 79, at 517.

\textsuperscript{123} Polelle, \textit{supra} note 42, at 124-25, writes:

\begin{quote}
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.
\end{quote}

\textit{Id.}

\textsuperscript{124} 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.


\textsuperscript{125} See generally W. Prosser, \textit{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\footnote{126} with regard to the ultimate result.\footnote{127} 
Conversely there may be a foreseeable result arising out of an unfore-
seeable cause\footnote{128} for which the defendant may be found to be negligent
because that result was within the purview of a reasonable person.\footnote{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.\footnote{130}

Problems arise, however, when this intervening cause concept is
transplanted from its native soil of negligence to the field of strict liabil-
ity. 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, inter-
vening causation frequently finds its way into strict liability either
through the guise of the negligence of a third party or through an alter-
ation of the product or both.

In Ford Motor Co. v. Matthews,\footnote{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 re-
ceived one of the tractors in question after it had been damaged by fire.
The dealership repaired the fire damage but ignored the starter prob-
lem, 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 re-
lied by the foreseeable negligence of a retailer to remedy the problem
or by the purchaser’s failure to guard against the defect’s existence.\footnote{132}

\footnote{126} Id. at § 44, at 281-86.
\footnote{127} See Smith v. Lampe, 64 F.2d 201 (6th Cir. 1933) (sounding automobile horn which
cailed 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).
\footnote{128} W. Prosser, supra note 110, § 44, at 286-89.
\footnote{129} See Johnson v. Kosmos Portland Cement Co., 64 F.2d 193 (6th Cir. 1933) in which de-
endant 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 ex-
pectable results. W. Prosser, supra note 110, § 44, at 286 n.31.
\footnote{130} W. Prosser, supra note 110, § 79, at 517-22. Two exceptions noted therein involving
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.
\footnote{131} 291 So. 2d 169 (Miss. 1974).
\footnote{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-

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


135. "[T]he unreasonably dangerous defect" under Section 402A which is a proximate cause of a plaintiff's injury 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, § 63, 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 \textit{volenti non fit injuria}.

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 \textit{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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\(^{141}\) 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.


\(^{143}\) W. Prosser, supra note 110, § 68, at 440-41.


\(^{145}\) W. Prosser, supra note 110, § 68, at 441.

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

\(^{147}\) \textit{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).

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., 116 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).
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.\footnote{156} The second is a desire to reduce damages in the amount of the plaintif-

\footnote{156} 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.

\footnote{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
found upon negligence and therefore readily accepted traditional negligence defenses. There is
little deviation, then, between results in a negligence action, particularly of the res
posse lociuitur 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
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 occurred 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. \textit{Id}. at 681. The plaintiff's damages were reduced by 20%.

lamented the absence of a comparative negligence scheme in New York with regard to strict liability.
\textit{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 (Mc-
Kinney 1976).

\footnote{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 es-
cape 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 negli-
gence 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 danger-
ous course of conduct. In any event, the common-law rule gave too much weight to
detering 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.

\footnote{157} Hopkins v. General Motors Corp., 548 S.W.2d 344 (Tex. 1977). \textit{See generally Twerski,
From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts, 60
MARQ. L. REV. 297 (1977); Wade, \textit{Products Liability and Plaintiff's Fault—The Uniform Compara-
tive Fault Act, 29 MERCER L. REV. 373 (1978); Comment, Comparative Fault and Strict Products
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. 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. The court did, however, proclaim that foreseeability had no place in strict products liability.

To apply comparative negligence to strict liability, however, is again to subordinate strict liability's public policy aspects to the fault balancing of negligence. This approach has been judicially renounced. 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. 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,

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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. "We 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. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 46 (Alaska 1976).


Inc.\textsuperscript{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 liability.\textsuperscript{165} As the foregoing indicates, this approach has not found universal acceptance,\textsuperscript{166} but it is the rule which logic, the majority of jurisdictions,\textsuperscript{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 \textit{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.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{165} \textit{RESTATEMENT (SECOND), supra} note 2, § 402A, comment n. at 356. \textit{Compare} Posiljon, \textit{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, \textit{Contributory Negligence—An Integral Part of Products Liability Cases}, 56 ILL. B.J. 904 (1968), which Posiljon, citing the same cases, seeks to rebut.

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


\textsuperscript{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 \textit{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." \textit{Id.} at ---, 29 Am. Rep. at 126-27.

The defendant being held solely 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." \textit{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 de-
fective product.\textsuperscript{169} The vicious animal cases noted that, because negli-
gence was not the grounds of liability, contributory negligence was not
a defense.\textsuperscript{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 man-
ner, however slight, contributed to their own injuries.\textsuperscript{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 re-
strictions upon the liability the supplier or manufacturer would be
enormous and beyond what the law should allow.\textsuperscript{172} The courts need
no longer act as protectors of burgeoning industries which, if not nur-
tured 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 lia-
ability insurance, the cost of which is ultimately passed on to the con-
sumer 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 dam-
ages.\textsuperscript{173}

B. Assumption of Risk

Assumption of risk, though sometimes viewed as a part of contrib-
utory negligence, is a very different matter and should, unlike contribu-
tory negligence, properly serve as a limitation upon strict liability even
where a defective product is involved.\textsuperscript{174} While contributory negli-

\textsuperscript{169} See, e.g., Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1975).
\textsuperscript{172} Lascher, supra note 18, at 50-51. \textit{Contra}, Plant, supra note 18, at 950, who gets a "pecu-
liar sensation in the pit of his stomach at the thought of... liability being imposed" by a negli-
gent plaintiff upon a potentially nonnegligent defendant.
\textsuperscript{173} \textit{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 con-
tributory negligence should not constitute a defense in an action for personal injures
incurred through use of a defective product regardless of the theory under which the
plaintiff proceeds.
Epstein, supra note 140, at 284.
\textsuperscript{174} \textit{RESTATEMENT (SECOND), supra note 2, § 402 A, comment n: "T}he form of contribu-
tory 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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\(^{175}\) 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.


\(^{177}\) *Id.*. See also *Restatement (Second), supra* note 2, § 496D, comment c, at 575.

\(^{178}\) *Id.*. See also *Restatement (Second), supra* note 2, § 496A, comment d, at 562 and § 496C, comment e, at 571.

\(^{179}\) *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.

\(^{180}\) *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*.
of risk has not been accepted by all commentators as a viable defense to strict liability, of risk has not been accepted by all commentators as a viable defense to strict liability, 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, 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. 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.

purposely 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 market- ing 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

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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. 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. The question is what the plaintiff himself perceived and not what a reasonable person would have appreciated in those same circumstances. 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. Cases involving work-related

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.


186. See, e.g., Halepeska v. Callihian 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).


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. 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. The better rule is that job-related dangers can never be said as a matter of law to be voluntarily assumed. 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. This has generally been adopted by the courts, and it is naturally recognized that a consumer's reasonable assumption of risk is no defense for the manufacturer. The unanswered question is whether the standard to be applied is that of a reasonably prudent person. It is probably true that


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).


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 465 (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. 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., 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. 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. 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).
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. Bartkewich v. Billinger 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." 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

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.


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.\textsuperscript{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.\textsuperscript{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 \textit{Restatement (Second)} recognizes the defense of misuse but extends liability only to foreseeable misuse of a product,\textsuperscript{206} as does much of the negligence case law.\textsuperscript{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\textsuperscript{208} or for not anticipating that a highly flammable dress would be worn near a stove.\textsuperscript{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.\textsuperscript{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.\textsuperscript{211}

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\textsuperscript{204} is limited to dangers subjectively known to the plaintiff rather than those merely foreseeable. \textit{Cf. Restatement (Second), supra} note 2, § 496 D. \textit{Pollele, supra} note 42, at 133 n.116.
\textsuperscript{205} Misuse has been referred to as "contributory negligence under another name." \textit{Kissel, supra} note 7, at 459.
\textsuperscript{206} \textit{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. \textit{See also Miether 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.}
\textsuperscript{207} \textit{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." \textit{Id.} at —, 261 N.E.2d at 309.}
\textsuperscript{209} \textit{Ringstad v. I. Magnin & Co., 239 Wash. 2d 923, 239 P.2d 848 (1952).}
\textsuperscript{211} \textit{See, e.g.,} Noel, \textit{supra} note 153, at 105. \textit{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." \textit{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:}
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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.\textsuperscript{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, \textit{McDivitt v. Standard Oil Co.}\textsuperscript{213} There the plaintiff purchased "high-trend, deep traction type" tires\textsuperscript{214} for his station wagon (which was sometimes driven off the road while camping) in size 850\times14 rather than the recommended 800\times14. He believed that his car's rims were large enough to permit the tires' use.\textsuperscript{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

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.


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 \textit{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, \textit{The Strict Products Liability Case—Complaint, Defense, 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.


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

\textsuperscript{214} Id. at 366.

\textsuperscript{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-

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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 accommodating an 850x14 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.
ably foreseeable to the user before his misuse will limit his recovery.\textsuperscript{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,\textsuperscript{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

\textsuperscript{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.

\textsuperscript{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.

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.