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**STRICT PRODUCTS LIABILITY UNDER
RESTATEMENT (SECOND) OF TORTS § 402A:
“DON’T THROW THE BABY OUT WITH THE
BATHWATER”**

Honorable George C. Pratt:

Professor Henderson, I believe, has demonstrated the bewildering nature of the problems that surround products liability. Our next speaker is Professor Stuart Madden.

Professor M. Stuart Madden:*

I greatly appreciate the opportunity to speak at this symposium. My colleagues on this panel include lawyers, teachers and authors who have shaped, and who will continue to shape, modern products liability law.

I believe that the Restatement (Second) of Torts section 402A¹ and its erudite accompanying comments have performed yeo-

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1. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides in pertinent part:

- (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 user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and

man's work in leading modern products liability law through its first thirty years, and have permitted development of broad areas of consensus as to the types of product risks and injuries that should import seller liability.² As a result, I believe that the current initiative of the American Law Institute (A.L.I.)³ to prepare a Restatement of products liability should properly assign substantial deference to the language and structure of such interpretive comments to the current section 402A as have proved successful in promoting a rational, progressive, and moderately

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- (b) the user or consumer has not bought the product from or entered into any contractual relationship with the seller.

Id.

2. Case law interpretation has not been uniform, however. Compare *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 446-47 (Cal. 1978) (holding that a plaintiff with a strict product liability claim need not prove that the product was "unreasonably dangerous") with *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1036-38 (Or. 1976) (requiring that a product be unreasonably dangerous for a manufacturer to be strictly liable, stressing that such a test does not confuse the distinction between strict liability and negligence). See generally Joseph A. Page, *Generic Product Risks: The Case Against Comment k and For Strict Tort Liability*, 58 N.Y.U. L. REV. 853 (1983). The first decision to hold manufacturers strictly liable in tort for defective products was *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1962). Since this decision, scores of courts have followed the holding enumerated in *Greenman* and "codified" by Restatement (Second) of Torts § 402A. See, e.g., *Kaiser Aluminum and Chem. Corp. v. Westinghouse Elec. Corp.*, 981 F.2d 136, 143 (4th Cir. 1992) (noting *Greenman* as the "promulgation . . . of the modern doctrine of strict liability in tort . . ."); *Westric Battery Co. v. Standard Elec. Co.*, 482 F.2d 1307, 1315 (10th Cir. 1973) (stating that "[o]ut of the *Greenman v. Yuba* decision emerged § 402A of the Restatement of the Law of Torts 2d . . ."); *Passwaters v. General Motors Corp.*, 454 F.2d 1270, 1277 (8th Cir. 1972) (recognizing "Justice Traynor's opinion in the *Greenman* case" as the foremost authority explicating the doctrine of strict liability).

3. The American Law Institute (A.L.I.) began with the formation of a committee made up of legal scholars such as Benjamin Cardozo, Arthur Corbin, Learned Hand, Harlan Stone and John Wigmore. In 1923, this committee organized the A.L.I. for the purpose of establishing a "Restatement of the Law" to deal with the rising complexity of American Law. The A.L.I. adopted § 402A of the Restatement (Second) of Torts in 1965 and is now in the process of drafting the Restatement (Third) of Torts. See generally Herbert F. Goodrich, *The Story of the American Law Institute*, 1951 WASH. L. REV. 283 (1951).

uniform interpretation of seller liability for harm caused by defective products.⁴

In a practical vein, however, I must recognize that there exists a seeming majority of experts in the field who believe that strict tort liability is but a chimera that hides *de facto* negligence analysis.⁵ Thus, in the spirit of compromise and pragmatism, I gave some thought to whether true *strict* products liability serves a more socially beneficial role in some types of product claims than it does in others. If the answer to that question is yes, it follows that serious consideration should be given to creating a residual domain of strict products liability for such claims, while surrendering its applicability in others.

Regarding the first question: "Are there types of products or product claims in which strict products liability serves a role in the satisfaction of agreed upon tort principles?" My consideration leads me to conclude that the answer is yes, and that those claim categories can be described in this way: putting aside alcohol, tobacco products, prescription pharmaceuticals, medical devices,

4. Cf. James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1536 (1992) (proposing that "courts should not review the adequacy of prescription drug designs . . ."); Kim D. Larsen, Note, *Strict Products Liability and the Risk-Utility Test for Design Defect: An Economic Analysis*, 84 COLUM. L. REV. 2045, 2066-67 (1984) (stating that manufacturers should not be liable for accidents arising from the use of a product for which there is no alternative design). *But see* Keith Miller, *Design Defect Litigation in Iowa: The Myths of Strict Liability*, 40 DRAKE L. REV. 465, 469-70 (1991) (stating that due to the limited types of products discussed in the § 402A comments, "a court that has adopted § 402A can draw little support from the comments and must develop the meaning of strict liability on its own . . .").

5. See, e.g., W. Page Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 563 (1969) (stating that "while strict liability obviates the necessity for convincing the jury as to the existence of negligence, it does not alter in any substantial way the plaintiff's proof problems, and the satisfaction of plaintiff's proof requirements for strict liability will generally result also in a finding of negligence . . ."); John W. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 15 (1965) (arguing that since "the test for imposing strict liability is whether the product was unreasonably dangerous, to use the words of the *Restatement*, . . . is simply a test of negligence . . .").

and biological products, a manufacturer should be strictly liable for defective design or formulation in long latency claims that result in personal physical injury due to ingestion or inhalation of the product, other exposure to it, or to radiation emitting from it.⁶

Regarding this category of claims, if one agrees with the premise that strict products liability serves an irreplaceable role, a second question may be asked. The second question is whether there is a theoretical justification, and a practical means, of affording a strict liability standard to such claims, notwithstanding the probable negligence analysis applied to other claims. It is to these two questions that I now turn to.

I will try to sketch a preliminary case in which true strict tort liability can succeed and should not be abandoned to a negligence standard. This select group of harm categories are harms caused by nonmedical products that have defective formulations and

6. See *McCullock v. H.B. Fuller Co.*, 981 F.2d 656, 658 (2d Cir. 1992) (stating whether manufacturer failed to warn the user of an unventilated glue pot about the fumes is to be determined by the trier of fact "consistent with the general trend in tort law . . ."); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1087 (5th Cir. 1973) (stating that a manufacturer of a defective product may be held liable on either a tort or warranty theory); *Hammond v. North American Asbestos Corp.*, 454 N.E.2d 210, 216 (Ill. 1983) (stating that failure to warn could be a basis for holding manufacturer strictly liable); *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 867 (Mo. 1985) (sustaining plaintiff's claim that defendant corporation should be held strictly liable for radiation damage resulting from abnormally dangerous activity and remanding the case to trial court for determination on the question of liability in accordance with the Restatement (Second) of Torts §§ 519 and 520); *City of New York v. Lead Indus. Ass'n*, 190 A.D.2d 173, 177, 597 N.Y.S.2d 698, 700 (1st Dep't 1993) (lead based paint manufacturers amenable to trial and potential joint and several liability on claims arising from the production and promotion of product which young people could inhale and digest). Courts have, however, recognized the suggested exception for tobacco, prescription and alcoholic products. See, e.g., *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149, 1158-59 (E.D. Pa. 1987) (rejecting strict liability claims based on a defect theory against cigarette manufacturer); *Brown v. Superior Court*, 751 P.2d 470, 482-83 (Cal. 1988) (holding that drug manufacturers are not strictly liable for design defects). Other commentators have expressed similar suggestions with respect to long latency claims. See generally Barbara Green, *Toxic Torts and Strict Liability*, 30 AUG. HOUS. LAW. 14 (1992).

have been proven to cause injury through exposure, inhalation, radiation or infection.⁷

STRICT LIABILITY, AS APPLIED TO HARM ARISING FROM CERTAIN PRODUCTS, SERVES IMPORTANT SOCIETAL OBJECTIVES

The policy justifications for strict products liability have been stated as relating to: (1) compensation through loss spreading; (2) deterrence; (3) encouraging useful conduct; (4) amelioration of expensive and time consuming problems of proof; (5) protection of consumer expectations; and (6) cost internalization.⁸

Modern application of strict products liability has been criticized in many regards.⁹ A principal criticism is that due to the

7. There is authority concluding that the application of different liability rules to different product types violates neither the Equal Protection Clause nor the Due Process Clause of the United States Constitution. *See In re Asbestos Litigation*, 829 F.2d 1233, 1244 (3d Cir. 1987) (holding that the denial of "state-of-the-art" defense to asbestos manufacturers in a products liability claim does not violate either constitutional clause); *Gogol v. Johns-Manville Sales Corp.*, 595 F. Supp. 971, 975 (D.N.J. 1984) (stating that since asbestos cases are like no other products liability cases in terms of their volume, difficulty, and massive societal problems, denial of this defense does not violate equal protection).

8. *See* DAVID A. FISCHER & WILLIAM POWERS, JR., *PRODUCTS LIABILITY: CASES AND MATERIALS* 50, 51 (1988); Gary J. Highland, Note, *Sales of Defective Used Products: Should Strict Liability Apply?*, 52 S. CAL. L. REV. 805, 811-19 (1979) (stating that "[t]he reasons commonly given by the courts for applying strict liability may be grouped into five broad categories: enterprise liability, deterrence, risk distribution, practicality, and implied representation . . .").

9. *See, e.g.*, Teresa M. Schwartz, *Product Liability Reform by the Judiciary*, 27 GONZ. L. REV. 303, 306 (1992) (noting that critics of the products liability system contend that "the system is out of control because of dramatic increases in the amount of litigation and in the size of damage awards and because legal standards are too open-ended and unpredictable for business . . ."); Michael D. Green & Richard A. Matasar, *The Supreme Court and the Products Liability Crisis: Lessons From Boyle's Government*

spare phraseology of "unreasonably dangerous, defective condition,"¹⁰ courts or legislatures in most jurisdictions have expanded upon the evaluation, by the court or the jury, and thereby have developed the so called risk-utility criteria.¹¹ Employment of

Contractor Defense, 63 S. CAL. L. REV. 639, 640 n.5 (1990) ("Critics have argued that the expansion of products liability, along with its concomitant uncertainty, has driven useful products off the market, stunted incentives for technological innovation, and harmed the country's ability to compete in the international marketplace."); Margaret I. Lyle, Note, *Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common-Law Tort System*, 61 TEX. L. REV. 1297, 1298 (1983) (commenting that the large awards in products liability cases "might bankrupt a small corporation, for which the cost of products liability insurance might become prohibitive" and at the same time "lead to greater monopolization of manufacturing fields" by large corporations who can afford such insurance); see generally Frank J. Vandall, "Design Defect" in *Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST. L.J. 61 (1982).

10. According to comment g, a product is defective if it leaves the hands of the manufacturer in a condition not contemplated by the ultimate consumer. RESTATEMENT (SECOND) OF TORTS, cmt. g. This has come to be known as the consumer expectation test. See *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 411 F. Supp. 705, 706-08 (W.D. Okla. 1976) (holding that a product was not more dangerous than an ordinary consumer would expect), *rev'd on other grounds*, 561 F.2d 202 (10th Cir. 1977). Another test used by courts is the risk-utility test that imputes knowledge of all risks knowable at the time of manufacture or sale. See John W. Wade, *On the Nature of Strict Tort Liability For Products*, 44 MISS. L.J. 825, 834-35 (1973). A third approach uses the risk-benefit test but imputes knowledge at the time of trial. See Keeton, *supra* note 5, at 569-71. The hybrid approach uses a combination of the consumer expectation test and the risk-utility test. See *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 885 (Alaska 1979) (adopting a two prong test in determining whether product is defective consisting of a consumer expectation test and/or a risk-utility analysis). But see *Pyatt v. Engel Equip., Inc.*, 309 N.E.2d 225, 229 (Ill. App. 1974) (holding that unreasonably dangerous does not require a definition).

11. See, e.g., *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 183 (Mich. 1984) (applying the risk-utility balancing test and stating that "[t]he competing factors to be weighed under [such] a . . . test invite the trier of fact to consider the alternatives and risks faced by the manufacturer and to determine whether in light of these the manufacturer exercised reasonable care in making the design choices it made . . ."); *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 150-51 (N.J. 1979) (noting that it is the court's function to

risk-utility criteria, the argument goes, so pervades strict liability analysis as to render it indistinguishable from negligence analysis.¹² For this reason, the argument concludes that to continue describing the liability theory as strict is simply erroneous.¹³

On this basis, critics of strict products liability argue that, as compared to a negligence standard, strict liability adds only minimally to its stated tort objectives.¹⁴ They suggest, that if the same objectives of compensation, loss spreading, cost internalization and satisfaction of consumer expectations are achieved

determine whether the manufacturer had a duty to the consumer by "balancing . . . the nature of the risk, the public interest and the relationship of the parties . . ."), *superseded by statute* as stated in *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1252 (N.J. 1990); *Cepeda v. Cumberland Eng'g Co.*, 386 A.2d 816, 825 (N.J. 1978) (acknowledging that the risk-utility analysis is "most useful . . . for purposes of practical judicial implementation in design cases . . ."), *overruled by Suter*, 406 A.2d at 150-51, and *superseded by statute* as stated in *Dewey*, 577 A.2d at 1252; *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 682-83 (W. Va. 1979) (holding that the risk-utility analysis is useful in products liability cases "by setting the general contours of relevant expert testimony concerning the defectiveness of the product . . .").

12. See *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153 (Cal. 1972). In rejecting the unreasonably dangerous test of § 402A, the *Cronin* court stated that the imposition of the unreasonably dangerous test in § 402A "has burdened the injured plaintiff with proof of an element which rings of negligence . . . [and] places upon [the plaintiff] a significantly increased burden and represents a step backward in the area pioneered by this court." *Id.* at 1162.

13. *Id.* ("the Restatement formulation of strict liability rarely leads to a different conclusion than would have been reached under the laws of negligence . . .").

14. See Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183 (1992). The commentator states that "[m]any courts, when applying strict products liability, have imputed the knowledge of the product's danger available at the time of trial to the manufacturer as of the time of the product's manufacture. Once this knowledge has been imputed, the standard is the same as a negligence standard." *Id.* at 1206. She also argues that "[s]ome traces of strict products liability remain in the form of altered burdens of proof . . . [but] [t]hese traces . . . are insufficient to fulfill the goals that strict products liability was designed to serve." *Id.* at 1191.

through application of negligence liability,¹⁵ strict tort liability adds little but verbiage to the administration of civil justice for harms caused by unreasonably dangerous products.¹⁶

I will try to respond to these criticisms in turn.

Employment of Risk Utility Criteria Does Not Vitate Strict Liability

Employed appropriately, use of risk-utility evaluation does not trammel the concept of liability without regard to fault.¹⁷ By proper employment, I mean that risk-utility evaluation should retain a role in the court's threshold determination of whether or not the plaintiff has succeeded in presenting evidence that defendant marketed its product in an unreasonably dangerous and defective condition.¹⁸ Where plaintiff has done so, the court should permit jury evaluation of plaintiff's claim as to whether the prod-

15. See Wertheimer, *supra* note 14, at 1206.

16. Other writers would agree with this view. See, e.g., Irene W. Bruynes, *Strict Liability and the Admissibility of Evidence of Subsequent Remedial Measures Under Evidence Rule 407*, 5 ALASKA L. REV. 333, 347-50 (1988) (arguing that the theory of strict liability is a misnomer in products liability cases as unreasonably dangerous standard is closer to negligence); Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 663-69 (1990) (reviewing PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988)) (arguing that "strict liability" only applies to defective products where a negligence-type standard is used to determine if the product is unreasonably dangerous).

17. Commentators are generally not comfortable with the idea of liability without fault. See David P. Griffith, Note, *Products Liability - Negligence Presumed: An Evolution*, 67 TEX. L. REV. 851, 899 (1989) (arguing that a fault based standard should be used in every tort case).

18. See Thomas C. Galligan, Jr., *The Louisiana Products Liability Act: Making Sense of It All*, 49 LA. L. REV. 629, 668 (1989) ("First the judge must engage in a balancing process to determine if the plaintiff has established a prima facie case. If the plaintiff has, then the jury must determine whether, in its common-sense opinion, the product design in question is unreasonably dangerous.").

uct was dangerously defective, without reference to risk-utility balancing.¹⁹

The key distinction between strict tort liability and negligence analysis has always been that, in negligence analysis, the focus is on the care exercised by defendant, while in strict tort liability, the issue is the safety of the product.²⁰ An influential device for appreciating and preserving this distinction has been to imagine that in strict tort liability, knowledge of product risks is *imputed* to a defendant without regard to whether the defendant actually knew or should have known of the risks.²¹ The Oregon Supreme Court, in *Phillips v. Kimwood Machine Co.*,²² explained that the "imputation" of knowledge operates in this way:

A dangerously defective article would be one which a reasonable person would not put into the stream of commerce *if he had knowledge of its harmful character*. The test, therefore, is whether the seller would be negligent if he sold the article *knowing of the risk involved*. Strict liability imposes what amounts to constructive knowledge of the condition of the product.²³

In other words, "[t]he [product] can have a degree of dangerousness which the law of strict liability will not tolerate even though

19. See Galligan, *supra* note 18, at 669 ("Presuming knowledge of the plaintiff's proposed design focuses the jury's evaluation on whether the manufacturer's design was 'reasonably' safe.").

20. See, e.g., *Spieker v. Westgo, Inc.*, 479 N.W.2d 837, 841-42 (N.D. 1992) (explaining that negligence instruction properly informed the jury as to the difference between negligence and strict liability); *Mauch v. Manufacturers Sales & Serv., Inc.*, 345 N.W.2d 338, 346-47 (N.D. 1984) (noting that contributory negligence is not a defense in products liability action); *Brown v. Yamaha Motor Corp.*, 691 P.2d 577, 579-80 (Wash. Ct. App. 1984) (stating that rejection of strict liability theory does not foreclose a finding of negligence).

21. See, e.g., *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 544 (N.J. 1982) (stating that unknowable risks do not relieve defendants of liability of the failure to warn); *Freund v. Cellofilm Properties, Inc.*, 432 A.2d 925, 942-43 (N.J. 1981) (stating that a products liability charge in an inadequate warning case must make clear that knowledge of product risks are imputed to the manufacturer).

22. 525 P.2d 1033 (Or. 1974).

23. *Id.* at 1036 (citations omitted) (emphasis in original).

the actions of the designer were entirely reasonable, in view of what he knew at the time he planned and sold the manufactured article."²⁴

The critical question unresolved by these statements is *what* knowledge shall be imputed to the defendant? Should it be the knowledge of product risks known or knowable at the time of original marketing or, should knowledge of product risks known at the time of trial be imputed to defendant, without regard to whether such risks were within the spectrum of scientific knowledge at the time of marketing? The dispute is practically as old as section 402A itself.²⁵ Those taking the view that imputation applies only to risks knowable at the time of sale adopt a negligence standard, as advanced by Dean John Wade.²⁶ Those maintaining that true strict liability requires imputation of even later revealed knowledge find support in the argument of Page Keeton,²⁷ to wit, that as a consequence of assuming the defendant's knowledge of the dangers of the product, it is irrelevant whether the existence of such dangers was scientifically discoverable.²⁸

24. *Roach v. Kononen*, 525 P.2d 125, 129 (Or. 1974) (stating that this "requisite degree" of knowledge can be defined as a "greater degree of danger than a consumer has a right to expect . . .").

25. *Cepeda v. Cumberland Eng'g Co.*, 386 A.2d 816, 825-26 (N.J. 1978) (foreseeability of dangerousness is imputed to the manufacturer), *overruled by* *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 150-51 (N.J. 1979), *and superseded by statute* as stated in *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1252 (N.J. 1990); *Johnson v. Clark Equip. Co.*, 547 P.2d 132, 142 n.12 (Or. 1976) (stating that danger is assumed to be foreseeable by the manufacturer in the law of strict products liability), *superseded by statute* as stated in *Sandford v. Chevrolet Div. of Gen. Motors*, 642 P.2d 624, 627 (Or. 1982); *Phillips*, 525 P.2d at 1040 n.17 (stating that the law of strict products liability imputes the knowledge of risks to manufacturer regardless of whether manufacturer actually knows or not).

26. *See* Wade, *supra* note 10, at 834-35; *see also* *Beshada*, 447 A.2d at 544 (finding liability for failure to warn of risks which were unknowable).

27. *See* Keeton, *supra* note 5, at 569-71; *see, e.g.,* *Dart v. Wiebe Mfg., Inc.*, 709 P.2d 876, 881 (Ariz. 1985) (limiting liability to risks which are known amounts to a standard of negligence); *Byrns v. Riddell, Inc.*, 550 P.2d 1065, 1068 (Ariz. 1976) (test of unreasonable danger imputes knowledge of risks to the manufacturer).

28. As another court observed, "[t]he Wade and Keeton formulations of the standard appear to be identical except that Keeton would impute the

It is worth remembering that whether the doctrine is negligence, strict products liability or liability for abnormally dangerous activities, the task is always the same: the evaluation of the utility of a product or a process and the risks inherent in its use.²⁹ As the Oregon Supreme Court has stated, "The difference between the three theories of recovery is in the manner in which the decisional functions are distributed between the court and the jury."³⁰ Specifically, in strict products liability, it is the court, not the jury, that must conduct a risk-utility analysis to determine whether the product was marketed in an unreasonably dangerous and defective condition.³¹

What is proposed is *not absolute liability*.³² Absolute liability attaches where a defendant is liable in money damages for any

knowledge of dangers at time of trial to the manufacturer, while Wade would impute only the knowledge existing at the time the product was sold." *Phillips*, 525 P.2d at 1036 n.6. *See also* *Freund v. Cellofilm Properties, Inc.*, 432 A.2d 925 (N.J. 1981). In *Freund*, the New Jersey Supreme Court explained that the difference between negligence and strict liability in a failure to warn case is that in strict liability cases knowledge of the dangerousness of the product is imputed to defendants. *Id.* at 929-31. As the only issue was whether the product distributed by defendant was reasonably safe, plaintiff did not need to prove that defendant knew or should have known of its dangerousness. *Id.*

29. *See, e.g.*, *McWilliams v. Yamaha Motor Corp.*, 987 F.2d 200, 205 (3d Cir. 1993) (requiring the application of a risk-benefit analysis as provided by exception to New Jersey's "open and obvious" danger defense to design defect claims); *O'Brien v. Muskin Corp.*, 463 A.2d 298, 304-06 (N.J. 1983) (discussing the use of the risk utility test), *superseded by statute* as stated in *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1252 (N.J. 1990).

30. *Phillips*, 525 P.2d at 1039.

31. *See, e.g.*, *Motter v. Everest & Jennings, Inc.*, 883 F.2d 1223, 1227 (3d Cir. 1989) (stating that the trial judge must "evaluate the risks of the product" and its utility to determine if the case should be submitted to the jury on the issue of defect); *O'Brien*, 463 A.2d at 310 (Schreiber, J., concurring & dissenting) (stating that jury not cognizant of absolute liability elements causing decisions to reflect value judgments and lack precedential effect); *see also* Wade, *supra* note 10, at 838-41. *Cf.* Dominick Vetri, *Products Liability: The Developing Framework for Analysis*, 54 OR. L. REV. 293, 304 (1975) (taking the view that the jury should be instructed on the risk-utility factors).

32. *See* Richard W. Wright, *Causation In Tort Law*, 73 CAL. L. REV. 1735, 1750-51 (1985) (noting that "traditionally, absolute liability has meant prima facie liability based merely on causation of harm to another . . .").

harm proximately caused by a design or manufacturing defect in the product.³³ Strict products liability differs. It is not absolute. As summarized by the Oregon Supreme Court:

The manner of injury might be so fortuitous and the chances of injury occurring so remote that it is reasonable to sell the product despite the danger. In design cases the utility of the article may be so great, and the change of design necessary to alleviate the danger in question may so impair such utility, that it is reasonable to market the product as it is, even though the possibility of injury exists and was realized at the time of the sale Such an article is not dangerously defective despite its having inflicted injury.³⁴

The proof that risk-utility analysis, through imputation of knowledge to the defendant, is compatible with strict products liability is, as the expression goes, in the pudding. In the work of lawyers, the pudding is the decisional law. The courts in numerous jurisdictions, which are unequivocally committed to strict tort liability, nevertheless employ risk-utility analysis to permit meaningful evaluation of whether a product is safe.³⁵

33. See, e.g., *Galbreath v. Engineering Constr. Corp.*, 273 N.E.2d 121, 124 (Ind. Ct. App. 1971) (holding that absolute liability is imposed where damage or injury is proximately caused by the use of explosives whether or not such damage or injury is immediate or direct); *Ohler v. Davis*, 298 A.2d 895, 901 (Pa. Super. Ct. 1972) (Cercione, J., dissenting) (stating that absolute liability applies only if the defect was a proximate cause of the injury).

34. *Phillips*, 525 P.2d at 1038.

35. See, e.g., *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 454-55 (Cal. 1978) (holding that the design of a product may be determined to be defective if "the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design") (citation omitted); *Roach v. Kononen*, 525 P.2d 125 (Or. 1974). In *Roach*, the court used the following seven factors to make a utility/risk determination with respect to the product:

- (1) The usefulness and desirability of the product - its utility to the user and to the public as a whole.
- (2) The safety aspects of the product - the likelihood that it will cause injury, and the probable seriousness of the injury.
- (3) The availability of a substitute product which would meet the same need and not be unsafe.

The compatibility of risk-utility criteria with genuine strict products liability is most clear in jurisdictions where the court makes a threshold determination of whether or not the plaintiff has made a jury submissible case that a product is dangerously defective.³⁶ In these settings, the risk-utility factors, stated by Dean John Wade³⁷ and others, are not the basis for instructions to the jury, but are utilized by the court to determine whether the a sufficient case has been made out that may be submitted to the jury.³⁸ If such a case has been made out, then it is submitted to the jury for its determination as to what constitutes a "dangerously defective" product.³⁹

Strict Tort Liability Materially Serves Accepted Tort Policy Objectives

As mentioned, a central argument against retention of strict products liability is that, as compared to a negligence standard, it adds only minimally to the stated policy objectives of compensation, loss spreading, deterrence, cost internalization and satisfaction of consumer expectations.⁴⁰

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- (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
 - (5) The user's ability to avoid danger by the exercise of care in the use of the product.
 - (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of the general public knowledge of the obvious condition of the product, or the existence of suitable warnings or instructions.
 - (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. at 128-29 (quoting Wade, *supra* note 10, at 837-38).

36. *See supra* note 31 and accompanying text.

37. *See supra* note 10, at 837-38.

38. *See supra* note 31 and accompanying text.

39. *See Phillips*, 525 P.2d at 1040.

40. *See generally* Stephen D. Sugarman, *Alternative Compensation Schemes and Tort Theory: Doing Away With Tort Law*, 73 CAL. L. REV. 558, 591 (1985).

Distinguished commentators have suggested that strict tort liability does not induce safer conduct on the part of the actor.⁴¹ In response, I will invite attention to certain products cases, and to the decisions and commentary involving the related strict tort doctrine that apply strict products liability to abnormally dangerous activities.⁴² While the majority of decisions rejects the application of strict liability for abnormally dangerous activities,⁴³ many of the clearest statements describing the distinctive policy attributes of true strict liability have been made in such cases.⁴⁴

41. Sugarman, *supra* note 40, at 588 (citing G. Eads & P. Reuter, *Designing Safer Products: Corporate Responses to Product Liability*, LAW AND REGULATION 46 (1983)); *see also* Kurt M. Zitzer, *Illinois Rejects Market Share Liability: A Policy Based Analysis of Smith v. Eli Lilly & Co.*, 79 KY. L.J. 617, 649 (1991) (stating that market share liability theory does not promote safer conduct).

42. *See, e.g.*, Chavez v. Southern Pac. Transp. Co., 413 F. Supp. 1203, 1214 (E.D. Cal. 1976) (finding that transportation of explosives is an ultrahazardous activity, subjecting the carrier to strict liability for resulting damages); M. W. Worley Constr. Co., v. Hungerford, Inc., 210 S.E.2d 161, 164 (Va. 1974) (ruling that strict liability applies for direct damages caused by blasting due to its intrinsically dangerous nature provided that the injured party who had reason to know of the risk did not participate in injurious incident); Siegler v. Kuhlman, 502 P.2d 1181, 1184 (Wash. 1972) (holding that transportation of gasoline as freight along public highways to be an abnormally dangerous activity requiring imposition of strict liability for harm); *see also* RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1977). *See generally* Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257 (1987) (tracing the origins of the application of strict liability to abnormally dangerous activities and commenting on the current status of such liability).

43. *See generally* M. STUART MADDEN, PRODUCTS LIABILITY §§ 11.2 & 11.3 (2d ed. 1988 & Supp. 1993) (analyzing authority).

44. *See, e.g.*, Indiana Harbor Belt R.R. v. American Cyanamid Co., 916 F.2d 1174 (7th Cir. 1990). In *Indiana Harbor Belt R.R.*, the court held that strict liability imposed for ultrahazardous activity was inapplicable in the situation where leakage of a toxic and flammable chemical led to suit against chemical manufacturers, since the accident was due to carelessness and would be adequately deterred by the threat of liability for negligence. *Id.* at 1179. *See also* City of Bloomington v. Westinghouse Elec. Corp., 891 F.2d 611, 617 (7th Cir. 1989) (holding that corporation was not strictly liable under abnormally dangerous activity doctrine to Bloomington for damages due to ground water contamination, since the damage was due to the activity of third

Representative of the observations that strict products liability for abnormally dangerous activities does *not* clearly serve to improve conduct or to deter actors are the comments of Professors Henderson and Pearson⁴⁵ referring to *Atlas Chemical Co. v. Anderson*.⁴⁶ Therein, the Texas Court of Civil Appeals reviewed a judgment for the plaintiff in a case involving the deliberate dumping by the defendant of industrial waste on sixty acres of the plaintiff's land.⁴⁷ The court affirmed the judgment for the plaintiff, concluding that strict liability would attach, under Texas law, when pollutants are intentionally discharged.⁴⁸ The court explained that "[t]he costs of injuries resulting from pollution must be internalized by industry as a cost of production and borne by consumers or shareholders, or both, and not by the injured individual."⁴⁹

To the Texas Appellate Court's conclusion, Professors Henderson and Pearson replied:

[I]t should be clear that, in theory at least, moving from negligence to strict liability will not cause actors to act any more carefully. In theory, an actor such as Atlas Chemical Industries, Inc., will invest a socially optimal amount in pollution control under a regime of negligence-based liability. The losses that continue to occur even after such optimal investment—the "residual" pollution losses not deemed worth it to prevent through precautions because they amount to less than the costs of prevention—fall on the victims under a negligence rule. But even if the actor were held strictly liable for all pollution losses, including the residual losses that are cheaper to incur than to pre-

party); *Sprankle v. Bower Ammonia & Chem. Co.*, 824 F.2d 409, 415-16 (5th Cir. 1987) (applying factors from Restatement (Second) of Torts § 520 the court determined that storage of anhydrous ammonia was not an abnormally dangerous activity).

45. JAMES A. HENDERSON, JR. & RICHARD N. PEARSON, *THE TORTS PROCESS* 695-96 (Little, Brown & Co., 3d ed. 1988).

46. 514 S.W.2d 309 (Tex. Civ. App. 1974), *aff'd*, 524 S.W.2d 681 (Tex. 1975).

47. *Id.* at 311.

48. *Id.* at 313. The court determined that neither "malicious nor wanton conduct" were required in intentional discharge cases. *Id.*

49. *Id.* at 316.

vent, the actor would not invest more in care than he would if liable only when proven negligent because the residual losses are, by hypothesis, cheaper to incur than to prevent. . . . [E]ven under strict liability, the actor will find it cheaper to pay for the residual losses (through insurance, perhaps) than to pay to prevent them.⁵⁰

To this critique, I would only set forth what I believe to be the telling counter-argument, as it has been expressed by various writers.⁵¹ The authors of the A.L.I.'s 1991 study, entitled *Enterprise Responsibility for Personal Injury*⁵² suggested that, in the context of environmental harms, "strict liability may have deterrent effects superior to those produced by a negligence standard when the risk created by an activity is difficult to quantify but nonetheless substantial."⁵³ Other authors and judges seemingly concede that strict liability does affect conduct in ways not reached by conventional negligence analysis.⁵⁴ The point was

50. HENDERSON & PEARSON, *supra* note 45, at 695-96. See also Steven L. Humphreys, Comment, *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal*, 39 AM. U. L. REV. 311, 323-24 (1990).

51. See, e.g., Kathleen B. Benesh, *Restitution for the Nonsmoker: Holding the Tobacco Industry Liable for Injuries to Nonsmokers*, 7 IN PUB. INTEREST 12, 15 (1987) (suggesting that the application of strict liability under theory of product liability or abnormally dangerous activity will act as deterrent to the harm that the tobacco industry inflicts on the nonsmoker); John A. Chanin, Comment, *Lust on Your Corner: Strict Liability, Victim Compensation, and Leaking Underground Storage Tanks*, 62 U. COLO. L. REV. 365, 394 (1991) (recommending the imposition of strict liability upon manufacturers and users of leaking underground gasoline storage tanks in order to provide incentives for such manufacturers and users to remedy their activities and improve their products).

52. A.L.I., REPORTERS' STUDY, ENTERPRISE LIABILITY FOR PERSONAL INJURY, Vol. II, Approaches to Legal and Institutional Change (1991).

53. *Id.* at 366 (citations omitted).

54. See, e.g., *Indiana harbor belt R.R. v. American Cyanamid Co.*, 916 F.2d 1174, 1177 (7th Cir. 1990) (stating that imposition of strict liability would give manufacturers an incentive to experiment with different methods to prevent accidents); see also Guido Calabresi, *Optimal Deterrence and Accidents: To Fleming James, Jr.*, 84 YALE L.J. 656, 666-70 (1975).

made by Seventh Circuit Judge and influential law and economics scholar Judge Richard Posner.⁵⁵ In Judge Posner's words:

By making the actor strictly liable . . . we give him an incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident The greater the risk of an accident . . . and the costs of an accident if one occurs . . . the more we want the actor to consider the possibility of making accident-reducing activity changes; the stronger, therefore, is the case for strict liability⁵⁶

In my view, the corrective justice sentiments, permeating the logic of strict liability for abnormally dangerous activities, are equally applicable to my suggestion of defective design or formulation and strict products liability for long latency injuries, caused by toxic exposure by respiration, ingestion, dermal contact and radiation. It is in these particular injury categories that non-reciprocal risks, created by the manufacturer and endured by the plaintiff, are most stark. It is also in these categories that over a period of time and after the introduction of hundreds of potentially injurious toxic products and processes, that the episodic revelation of widespread personal physical injury is seemingly unavoidable. And it is there that failure to provide a true strict products liability remedy has, and will, operate most harshly.

A Proposal for a Residual Domain of Strict Liability for Personal Physical Injury Sustained by Radiation, Inhalation or Absorption .

Revealed risks at the time of initial research, development and first marketing, were not known and were truly not knowable,

55. Richard A. Posner, Judge, United States Court of Appeals for the Seventh Circuit.

56. *Indiana Harbor Belt R.R.*, 916 F.2d at 1177 (citation omitted).

are rare indeed.⁵⁷ Where they happen, and where they affect broad population segments, the injuries are most often related to toxic products or processes.⁵⁸ A noteworthy example of a toxic exposure products liability case, in which the plaintiff prevailed even though the court accepted the hypothesis that the risks of exposure were not known at the time of marketing, is the asbestos injury decision in *Beshada v. Johns-Manville Products Corp.*,⁵⁹ decided by the Supreme Court of New Jersey in 1982.⁶⁰

We all recognize that *Beshada* has gained its notoriety in equal parts from, both, the vision of its holding, and the flat rejection of that vision by most jurisdictions.⁶¹ Even in its state of origin, the New Jersey Supreme Court later limited *Beshada* to its asbestos antecedents.⁶² Please try to think of *Beshada* in the context of its logic. This is the finite subject areas, for which I propose, that retain true strict torts liability and include products that, after a period of latency, are toxic when touched, ingested, inhaled or by

57. Some of the instances where courts found that the risks were not known or knowable at the time of marketing have been in prescription drug cases. In such cases, some courts have refused to find strict liability on the part of the manufacturer. *See, e.g.,* *Basko v. Sterling Drug, Inc.*, 416 F.2d 417, 426 (2d Cir. 1969) (refusing to find the manufacturer of prescription drug Aralen strictly liable where risks were not apparent at time of manufacture); *Brown v. Superior Court*, 751 P.2d 470, 481 (Cal. 1988) (holding that manufacturers of prescription pharmaceuticals could only be liable for failure to warn of side effects that were known or knowable at the time of distribution).

58. *See* *Griffin v. Planter's Chem. Corp.*, 302 F. Supp. 937, 943-44 (D.S.C. 1969) (holding manufacturer liable for marketing a pesticide with unknown toxic capabilities); *Orr v. Shell Oil Co.*, 177 S.W.2d 608, 612 (Mo. 1943) (holding defendant liable for supplying chemical, with questionable toxic capability, which led laborer to develop severe rash).

59. 447 A.2d 539 (N.J. 1982).

60. The Opinion of the Court was delivered by Judge Pashman.

61. *See generally* Andrew T. Berry, *Beshada v. Johns-Manville Corp.: Revolution - Or Aberration - In Products Liability Law*, 52 *FORDHAM L. REV.* 786, 800 (1984) (noting that the first state supreme court to consider *Beshada* rejected the decision in *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288 (N.H. 1983)).

62. *See generally* *Landrigan v. Celotex Corp.*, 605 A.2d 1079, 1099 (N.J. 1992) (discussing the limitation of the *Beshada* doctrine in New Jersey).

radiation cause personal physical injury, excluding alcohol, tobacco and prescriptive products.⁶³

Beshada involved failure to warn claims brought by plaintiffs, some of whom were exposed to defendants' asbestos products as early as the 1930's.⁶⁴ Defendants claimed that any duty to warn attached only after the risks to the worker (as distinct from previously known risks associated with high concentration exposure in asbestos textile mills) became scientifically knowable.⁶⁵ The New Jersey Supreme Court rejected this "state-of-the-art" or "state of scientific knowability" limitation on a defendants' informational duty, and held that even accepting defendant's claims of justifiable ignorance, liability for failure to warn would attach without regard to when the risks became scientifically knowable.⁶⁶

The court proceeded to explain why only imposition of true strict tort liability could satisfy important goals of compensation, deterrence and judicial efficiency:⁶⁷

Risk Spreading. One of the most important arguments generally advanced for imposing strict liability is that the manufacturers and distributors of defective products can best allocate the costs of the injuries resulting from those products. The premise is that the price of a product should reflect all of its costs, including the cost of injuries caused by the product. This can best be accomplished by imposing liability on the manufacturer and distributors. Those persons can insure against liability and incorporate the cost of the insurance in the price of the product. In this way, the costs of the product will be borne by those who profit from it: the manufacturers and distributors who profit from its sale

63. Cf. James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 U.C.L.A. L. REV. 479 (1990) (stating that in the 1980's plaintiffs stormed barriers in areas such as handguns, cigarettes and alcoholic beverages attempting to recover on strict liability theory).

64. *Beshada*, 447 A.2d at 542.

65. *Id.* at 542-43.

66. *Id.* at 546.

67. *Id.* at 547-49. "The most important inquiry . . . is whether imposition of liability for failure to warn of dangers which were undiscoverable at the time of manufacture will advance the goals and policies sought to be achieved by our strict liability rules. We believe that it will." *Id.* at 547.

and the buyers who profit from its use. It should be a cost of doing business that in the course of doing that business an unreasonable risk was created.⁶⁸

The court conceded that there was "some truth" to the defendants' claim that the stated policies of risk spreading and cost internalization were not advanced by true strict liability.⁶⁹ Defendants had argued that since unknowable hazards "by definition are not predicted, the price of the hazardous product will not be adjusted to reflect the costs of the injuries it will produce."⁷⁰ Nonetheless, the court stated:

[T]he same argument can be made as to hazards which are deemed scientifically knowable but of which the manufacturers are unaware. Yet it is well established under our tort law that strict liability is imposed even for defects which were unknown to the manufacturer. It is precisely the imputation of knowledge to the defendant that distinguishes strict liability from negligence.⁷¹

A second policy justification for true strict liability, the New Jersey Supreme Court stated, is found in enhanced accident avoidance.⁷² In citing New Jersey precedent that strict liability

68. *Id.* at 547.

69. *Id.*

70. *Id.*

71. *Id.* (citation omitted) The court continued:

Defendants advance no argument as to why risk spreading works better for unknown risks than for unknowable risks. Second, spreading the costs of injuries among all those who produce, distribute and purchase manufactured products is far preferable to imposing it on the innocent victims who suffer illnesses and disability from defective products. This basic normative premise is at the center of our strict liability rules. It is unchanged by the state of scientific knowledge at the time of manufacture. Finally, contrary to defendants' assertion, this rule will not cause the price and production level of manufactured products to diverge from the so-called economically efficient level. Rather, the rule will force the price of any particular product to reflect the cost of insuring against the possibility that the product will turn out to be defective.

Id.

72. *Id.* at 547-48.

"is but an attempt to minimize the costs of accidents and to consider who should bear those costs[,]" the court noted the celebrated article by Calabresi & Hirschhoff.⁷³ The article suggests that "the strict liability issue is to decide which party is the 'cheapest cost avoider,' or who is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made."⁷⁴ Using this approach, the court noted that "it [was] obvious that the manufacturer rather than the factory employee is 'in the better position both to judge whether avoidance costs would exceed foreseeable accident costs and to act on that judgment.'"⁷⁵

To defendants' argument that the logic of "cheapest cost avoider . . . has no force as to hazards which by definition were undiscoverable[,]"⁷⁶ the court rejoined:

Defendants have treated the level of technological knowledge at a given time as an independent variable not affected by defendants' conduct. But this view ignores the important role of industry in product safety research. The "state-of-the-art" at a given time is partly determined by how much industry invests in safety research. By imposing on manufacturers the costs of failure to discover hazards, we create an incentive for them to invest more actively in safety research.⁷⁷

Continuing, the New Jersey Supreme Court, in *Beshada*, stated that true strict products liability would work economies in the fact-finding process by avoiding laborious mini-trials on the issues of what the manufacturer knew and when the manufacturer learned of it.⁷⁸ In the court's words:

Fact finding process. The analysis thus far has assumed that it is possible to define what constitutes "undiscoverable" knowledge and that it will be reasonably possible to determine what knowledge was technologically discoverable at a given time. In fact,

73. *Id.* at 548 (citing Guido Calabresi & John T. Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972)).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

both assumptions are highly questionable. The vast confusion that is virtually certain to arise from any attempt to deal in a trial setting with the concept of scientific knowability constitutes a strong reason for avoiding the concept altogether by striking the state-of-the-art defense.⁷⁹

Furthermore, the court elucidated:

Scientific knowability, as we understand it, refers not to what in fact was known at the time, but to what could have been known at the time. Proof of what could have been known will inevitably be complicated, costly, confusing and time-consuming. Each side will have to produce experts in the history of science and technology to speculate as to what knowledge was feasible in a given year. We doubt that juries will be capable of even understanding the concept of scientific knowability, much less be able to resolve such a complex issue The concept of knowability is complicated further by the fact, noted above, that the level of investment in safety research by manufacturers is one determinant of the state-of-the-art at any given time. Fairness suggests that manufacturers not be excused from liability because their prior inadequate investment in safety rendered the hazards of their product unknowable.⁸⁰

79. *Id.*

80. *Id.* Furthermore, the *Beshada* court continued:

[D]iscussion of state-of-the-art could easily confuse juries into believing that blameworthiness is at issue. Juries might mistakenly translate the confused concept of state-of-the-art into the simple question of whether it was defendants' fault that they did not know of the hazards of asbestos. But that would be negligence, not strict liability.

Id. at 548.

For precisely this reason, Professor Keeton has urged that negligence concepts be carefully avoided in strict liability cases:

My principal thesis is, and has been, that theories of negligence should be avoided altogether in the products liability area in order to simplify the law, and that if the sale of a product is made under circumstances that would subject someone to an unreasonable risk in fact, liability for harm resulting from those risks should follow.

W. Page Keeton, *Products Liability - Inadequacy of Information*, 48 TEX. L. REV. 398, 409 (1970) (footnote omitted).

As explained in § 402A, comment j, a seller has responsibility to inform users of dangers which the seller knows or should have known at the time of sale.

Apart from the New Jersey experience with *Beshada*, has any other state court interpreted its products liability law to effect a "hindsight" standard? If there is such a state, how has it operated? Washington has such a statute. The Revised Code of Washington section 7.72.030(1)⁸¹ provides that "[a] product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided."⁸²

Two additional provisions of the Washington statute illuminate what is meant by the phrase "not reasonably safe." Revised Code of Washington section 7.72.030(1)(b) ("subsection (b)") states:

A product is not reasonably safe because adequate warnings or instructions were not provided with the product, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.⁸³

This statute was applied by the Washington Supreme Court in *Ayers v. Johnson & Johnson Baby Products, Co.*,⁸⁴ a suit brought by the parents of a child who ingested the manufacturer's popular baby oil, leading ultimately to cardiac arrest and to brain

RESTATEMENT (SECOND) OF TORTS § 402A cmt. j. Other commentators are in seeming agreement with the court that such proof would be complicated. *See, e.g.,* Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845, 856 (1987) ("Such proof would be enormously complicated, expensive, and difficult."). With respect to state-of-the-art evidence, see *Anderson v. Owens-Corning Fiberglass Corp.*, 810 P.2d 549, 559 (Cal. 1991) (explaining that the state-of-the-art evidence is evidence that the risk was neither known nor knowable at the time of sale).

81. WASH. REV. CODE § 7.72.030(1) (1988).

82. *Id.*

83. WASH. REV. CODE § 7.72.030(1)(b) (1988).

84. 818 P.2d 1337 (Wash. App. 1991).

damage.⁸⁵ Before the court was the reversal of a trial judgment notwithstanding the verdict following a \$2.5 million jury award against Johnson & Johnson on the theory that it failed to provide adequate warnings that this product, intended for use around infants, could cause serious injury or death if ingested by a child.⁸⁶ In ruling against the trial court, the court of appeals held that foreseeability was *not* an element of a failure to warn claim under subsection (b).⁸⁷

Affirming the court of appeals' holding that foreseeability is not an element of a failure to warn claim, the Washington Supreme Court stated that the design defect provision, Washington precedent, and the legislative history of the Washington Products Liability Act, required it to apply strict liability to design claims.⁸⁸ Avoiding the risk identified earlier by our colleague, John Vargo,⁸⁹ that many states permit a negligence-like analysis for design claims to contaminate analysis of warnings liability,⁹⁰ the Washington Supreme Court held that the statute's warnings provision was also one of strict liability.⁹¹ This was true, the court continued, even though the statute provided a negligence-like balancing test for both warnings and design claims.⁹² The balancing of the warnings claim, indistinguishable from that for design claims, could be stated as:

[O]n one side of the balance . . . are the likelihood that the product would cause plaintiff's harms or similar harms and the seriousness of those harms. On the other side [of the balance] are the adequacy of the warnings that were provided, and the ability

85. *Id.* at 1339.

86. *Id.*

87. *Id.* at 1344.

88. *Id.* at 1345.

89. See John F. Vargo, *Caveat Emptor: Will The A.L.I. Erode Strict Liability In The Restatement (Third) For Products Liability?*, 10 TOURO L. REV. 21 (1993).

90. Vargo, *supra* note 89, at 29-37.

91. *Ayers*, 818 P.2d at 1345.

92. *Id.*

of the manufacturer to have provided an alternative warning that would have prevented the injury.⁹³

Consequently, the court stated, as foreseeability was not an element of a strict liability design claim, it was not an element of a failure to warn claim.⁹⁴ Applying the balancing test to the evidence before the jury, the court stated that "given the seriousness of that harm and the slight burden on the manufacturer of providing a warning, the jury was justified in concluding that baby oil is a dangerous product that should have been accompanied by an adequate warning."⁹⁵

Just as one swallow does not make a spring, scattered authority does not support a statement of doctrine. However, in this year of vigorous review of the *bona fides*, if any, of strict products liability, I would like the flame kept alive. Claims arising from potentially toxic products or processes, both established and novel alike, are in the ascent, and each year new, wide scale injuries are proven or hypothesized.⁹⁶ In the past year, for example, consider the concern over potential long latency harm arising from proximity to a venerable symbol of industrialization, the electrical power line.⁹⁷ Concern has been expressed that geneti-

93. *Id.*

94. *Id.* Professor Henderson cautions that *Ayers* on its facts involves the issue of foreseeability of the manner in which the injury came about, as distinct from foreseeability or scientific knowability of the type of harm the product may cause. He states correctly that the risk of a chemical pneumonia injury from baby oil within the lungs has long been known. *Id.*

95. *Id.* at 1346.

96. See Michael D. Green, *When Toxic Worlds Collide: Regulatory and Common Law Prescriptions for Risk Communication*, 13 HARV. ENVTL. L. REV. 209, 209-10 n.2 (1989) (stating that there was more than a 700% increase in products liability cases filed between 1974 and 1985). See generally Jack L. Slobodin, *Products Liability Litigation: Litigating the Toxic Tort Case*, C396 ALI-ABA 153, 170-173 (American Law Institute 1989) (discussing the Restatement (Second) of Torts § 402A strict liability theory in toxic product situations and warning of inert ingredients causing the injury).

97. See, e.g., Bill Richards, *Elusive Threat: Electric Utilities Brace For Cancer Lawsuits Though Risk is Unclear*, WALL ST. J., Feb. 5, 1993, at A1; *Suit Seeks to Hold Two Utilities Liable for Injuries to Family Living Near Substation*, TOXICS L. REP. (BNA) No. 31, at 927 (Jan. 8, 1992). However, only very few cases dealing with tort liability over electric transmission lines

cally altered plants or livestock, raised for human consumption, will eventually be shown to cause personal physical injury.⁹⁸ Requiring the plaintiffs in these and many other long latency toxic product personal injury claims to prove that the product risks were known or knowable at the time of initial marketing may strip the plaintiffs of a claim, even where the proof of proximate cause is clear.⁹⁹ Professor Twerski¹⁰⁰ correctly states that, in general, our tort law does not shift costs unless there is a good reason to do so.¹⁰¹ I submit that placing into commerce a product that causes long latency, toxic physical harm, through no fault of the plaintiff, provides the requisite "good reason" to shift the costs of injuries.

CONCLUSION

I have not meant to suggest that strategic replacement of strict liability by adoption of an explicit risk-utility evaluation in certain products liability areas is not indicated, and you have today

have been litigated. One of these cases was *Houston Lighting & Power Co. v. Klein Indep. Sch. Dist.*, 739 S.W.2d 508, 511 (Tex. 1987), in which the court of appeals affirmed the actual damage award by the trial court, but reversed the punitive damage award for the erection of electrical power lines over school property.

98. See Thomas O. McGarity, *International Regulation of Deliberate Release Biotechnologies*, 26 TEX. INT'L L.J. 423, 430 (1991) ("Even when used as designed, technologies can have unanticipated adverse health and environmental effects . . ."); Diane E. Hoffmann, *The Biotechnology Revolution and its Regulatory Evolution*, 38 DRAKE L. REV. 471, 472-73 (1989) ("Those who would like to see biotechnology processes and products more stringently regulated have argued that biotechnology is a new technology with dangers and risks never before confronted by our society.").

99. See, e.g., Dana K. Astrachan, *Anderson v. Owens-Corning Fiberglass Corp.: Asbestos Manufacturers and Strict Liability: Just How Strict is It?*, 23 PAC. L.J. 1807, 1859 (1992) (noting that proof of knowledge or knowability increases the cost of litigation and consequently discourages toxic injury suits).

100. See Aaron D. Twerski, *From A Reporter: A Prospective Agenda*, 10 TOURO L. REV. 5 (1993).

101. See Vargo, *supra* note 89, at 54.

heard many good reasons for such a reassessment. However, with regard to certain products, I believe that strict liability ought to mean what its name suggests, at least the discrete realm of product risks I have described. A manufacturer should be held liable for harm caused to users, consumers and foreseeable bystanders without regard to what that or other manufacturers knew, or should have known, about product risks. To repeat, in the finite categories, that I propose, such a rule retains a manifest fairness. For products that cause long latency personal physical injuries, by defective formulation and consequent toxicity by touch, ingestion, inhalation, infection or radiation, excluding alcohol, tobacco and prescriptive products, elimination of the state-of-the-art defense or the state of scientific knowledge defense, and imposition of true strict tort liability, would preserve the progress of section 402A where anything less would not adequately protect injured individuals.

The Reporters and the A.L.I need not endorse this potential preservation and rarefication of true strict products liability with regard to these toxic harms. Rather, to permit the common law to continue to take shape in this finite area, it would be optimal for the Reporters' notes to state explicitly that the A.L.I takes no position as to preserving or creating true strict liability for defective formulation, as to long latency product risks caused by inhalation, contact, ingestion, or radiation, excluding alcohol, tobacco and prescription products.

