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Strict Liability and the Scientifically Unknowable Risk

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the cost of a product rises, a consumer must decide if he really needs the product. If he doesn't, sales will decline and the manufacturer might be forced to stop producing the product. If the product is essential, then the consumer will pay irrespective of costs.

On first glance, this "natural selection" approach might seem to be an appropriate means of ridding the market of unsafe products. If the consumer will bear the cost of liability for the unsafe product, then the product should remain available. The problem, however, is that the type of product which is likely to fall under the title of "unavoidably unsafe" is not a product which is used by a large percentage of the population. Drugs and other medical and pharmaceutical products may be used by a relatively small segment of the consuming public and therefore when the cost of liability is passed on, it will be especially hard to bear. Yet if the product is really necessary, as many drugs are, the individual may have no choice but to pay. Thus the exception to strict liability provided in comment k[50] is well justified. State of the art evidence is indispensible in bringing this important exception into play because without it, the product cannot be shown to be "unavoidably unsafe."

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STRICT LIABILITY AND THE SCIENTIFICALLY UNKNOWABLE RISK

I. INTRODUCTION

This comment deals with the question of whether or not a manufacturer should be excused from liability in a "strict liability" case because the injury resulted from a danger that was a scientifically unknowable risk prior to the injury. Basically, this question is concerned with defining the outer limits of the concept of "defective" products and, thereby, the scope of the strict liability theory in products liability cases.[1] The black letter rule of section 402A of the Restatement (Second) of Torts imposes liability on sellers or manufacturers if their product is in a "defective condition un-

50. RESTATEMENT (SECOND) OF TORTS § 402A, comment k at 353-54 (1965).

1. 2 L. FRUMER AND M. FRIEDMAN, PRODUCTS LIABILITY § 16A(4)(3), p. 3-332.

reasonably dangerous to the user."[2] In defining the terms which make up this phrase, it is necessary that the underlying policy considerations of the strict liability theory be taken into account.

Before discussing the question, it is necessary to define exactly what the danger involved in a case like this is. The danger is one which is a scientifically unknowable risk prior to the injury. Up until the time that such an injury occurs, not only was there no indication of the particular risk, there was no way of discovering it even with the use of all of the scientific tests available.

It must be remembered that it is the risk which is unknowable rather than the method of protecting against that risk. Therefore, this situation differs from the blood transfusion cases where the patient develops serum hepatitis infection.[3] The risk in the blood transfusion situation is known to the supplier. However, although he knows the risk is present, there has been, at least until recently, nothing he could do to protect against it. In the case with which this paper is concerned, there is nothing the manufacturer or seller can do to discover the risk itself. Although the two situations are quite similar for some purposes, they differ in certain respects so that some of the policy considerations applicable to the one situation are not applicable to the other. One of the most important differences is that in the blood case it is possible to warn the patient of the risk, whereas, if the risk is unknown, it is obviously impossible to give any warning.[4]

The problem of the scientifically unknowable risk arises most frequently with products which interact with living organisms. An example of such a product is the cigarette.[5] Although cigarettes have been around for many years, it has not always been known that their use could cause lung cancer.[6] Other products which are frequently involved in cases dealing with this issue are drugs and insecticides. The reason for this is that it is not always possible to say how a living organism is going to react to a foreign substance. Although this problem exists with regard to plants and animals,[7]

2. RESTATEMENT (SECOND) OF TORTS § 402A (1965) (Hereinafter referred to as RESTATEMENT § 402A).

3. *See* Brody v. Overlook Hospital, 121 N.J. Super. 299, 296 A.2d 668 (1972), and Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (Fla. App. 1966).

4. As to warnings, see RESTATEMENT § 402A, comment j.

5. *See* Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962), and Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963).

6. Ross v. Philip Morris & Co., Ltd., 328 F.2d 3 (8th Cir. 1964).

7. Oakes v. Geigy Agricultural Chemicals, 272 Cal. App. 2d 645, 77 Cal. Rptr. 709 (1969), and Alman Bros, Farm and Feed Mill, Inc. v. Diamond Laboratories, Inc., 437 F.2d 1295 (5th Cir. 1971).

as well as humans, it is particularly evident in the case of humans because of the difficulties in testing the product. It is much more difficult to carry out a thorough testing of the product when the tests must eventually include tests on individuals.[8]

II. THE STRICT LIABILITY THEORY

A. Some Basic Rules

As has been noted in the introduction to this symposium, the concept of strict liability as it applies to products liability cases was first used in *Greenman v. Yuba Power Products, Inc.*[9] This case became the foundation of section 402A of the Restatement (Second) of Torts.[10] One of the reasons for the adoption of this rule is to ease the burden of proof on the plaintiff in that it removes his burden of proving specific acts of negligence. It also protects the plaintiff from some of the technical defenses available to defendants under the warranty theory.[11]

While the strict liability theory does ease some of the burdens on the plaintiff, it is not intended to impose absolute liability on sellers or make them insurers of their products.[12] A manufacturer or seller is not subjected to liability solely because he put a product into circulation and it was involved in an injury producing event.[13] Therefore, it is necessary for the plaintiff to prove that the product was in a "defective" condition when it left the control of the manu-

8. Winthrop Laboratories Division of Sterling Drug, Inc. v. Crocker, CCH Prod. Liab. R. ¶ 7089 (Tex. Civ. App. Nov. 21, 1973).

9. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

10. RESTATEMENT § 402A. This section provides:

(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

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

11. *See, e.g.*, Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

12. Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967); Netzel v. State Sand and Gravel Co., 51 Wis. 2d 1, 186 N.W.2d 258 (1971); Cudmore v. Richardson-Merrell, Inc., 398 S.W.2d 640 (Tex. Civ. App. 1966); and 63 AM. JUR. 2d *Products Liability* § 123 (1972).

13. P. Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559 (1969).

facturer or seller.[14] This also involves the concept of the product being "unreasonably dangerous" to the user or consumer.[15] Obviously, the plaintiff must also prove that the defect in the product was the cause of the injury.

The crucial issue involved in applying the strict liability rules to cases involving an injury caused by a product where the danger was a scientifically unknowable risk is to determine whether or not such a product is, in fact, "defective" because it is "unreasonably dangerous" to the consumer. Therefore, the definitions which have been applied to these terms will be discussed below as they apply to this specific situation.

B. The Underlying Policy Considerations

The two traditional theories upon which products liability cases were based, negligence and warranty, imposed rather heavy burdens upon the plaintiff. The courts found these burdens to be unsatisfactory and therefore developed the rules of strict liability. Strict liability developed as a vehicle of social policy and is geared toward the protection of the public safety.[16]

In *Greenman v. Yuba Power Products, Inc.*, the California court stated that:

> (t)he purpose of such 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. . . .[17]

The court was obviously concerned with protecting the injured individual who is in no position to protect himself and who is probably in no position to carry the financial burden caused by his injury.

Therefore, two basic reasons are given for the imposition of strict liability in tort: (1)the manufacturer is in a better position to spread the loss; and (2) the manufacturer is in a better position to protect against the risk.[18] Although many policy considerations have been expressed by the multitude of authors who have written

14. *Id.* at 563; *see also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 99 (4th ed. 1971).

15. RESTATEMENT § 402A; J. Wade, *Strict Liability of Manufacturers*, 19 S.W.L.J. 5, 15 (1965); and 2 FRUMER AND FRIEDMAN, PRODUCTS LIABILITY § 16A(4)(e).

16. 63 AM. JUR. 2d *Products Liability* § 123 (1972).

17. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, ____, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

18. Brody v. Overlook Hospital, 121 N.J. Super, 299, 296 A.2d 668 (1972).

on the subject of strict liability, these are the two principle ones upon which the imposition of liability has been based.

Although the courts are interested in protecting the user or consumer of the product, they have repeatedly stated that the manufacturer is not the insurer of his product.[19] If this is so, clearly there are limits on the strict liability theory.[20] In determining what these limits are, the policy considerations upon which the imposition of liability is based must be looked at. If these considerations do not fit the situation of the particular case, it would appear that there should be no liability upon the manufacturer.[21]

III. Defining The Terms

A. "Defective"

In order for a plaintiff to recover under the strict liability theory, it is necessary for him to prove that the product was "defective."[22] The courts, however, have had difficulty in giving this term a definition. There is no truly satisfactory definition of the term which can be generally applied and, therefore, the courts have dealt with it on a case-by-case basis.[23]

The typical definition of "defective" includes the concepts of what the user expects from the product and what the normal use of the product is. The comments to section 402A state that a product is defective if it is in a "condition not contemplated by the ultimate consumer" and that a product is not defective if it is "safe for normal handling and consumption."[24] Prosser has said that:

> The prevailing interpretation of 'defective' is that the product does not meet the reasonable expectations of the ordinary consumer as to its safety. . . .[25]

The nature of the product and who the foreseeable user is would seem to become important factors in determining the existence of a defect under this definition of the term.

The existence of a condition which renders the product "inadequate,"[26] then, makes the product "defective." This is somewhat

19. *See* note 12.

20. Ross v. Philip Morris & Co., Ltd., 328 F.2d 3, 13 (8th Cir. 1964).

21. Oakes v. Geigy Agricultural Chemicals, 272 Cal. App. 2d 645, 77 Cal. Rptr. 709 (1969).

22. *See* note 14.

23. 63 Am. Jur. 2d *Products Liability* § 133 (1972).

24. RESTATEMENT § 402A, comments g and h; *see also* WIS. J.I.-CIVIL § 3200 (1971).

25. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 99, p. 659 (4th ed. 1971).

26. 2 FRUMER AND FRIEDMAN, PRODUCTS LIABILITY § 16A(4)(e), pp. 3-305, 3-306.

simplistic, however, because, under the Restatement view, the product must be "unreasonably dangerous" to the user or consumer. Also, the existence of a warning may act to cure the defect.

B. "Unreasonably Dangerous"

To impose liability upon a manufacturer or seller under section 402A of the Restatement, the defective condition of the product must make it "unreasonably dangerous" to the user. This term, as a qualification of "defective," has involved problems in defining it similar to the problems courts have had with defining "defect."

The definitions which have been given to this term have sometimes been quite similar to those which have been given to "defective." One such definition is:

> A product is unreasonably dangerous when it is dangerous beyond that contemplated by the ordinary user who purchases it with the ordinary knowledge common to the community as to its characteristics.[27]

This definition is substantially the same as that given to the term by the authors of section 402A.[28]

The concept of "unreasonably dangerous" has been limited somewhat by the recognition that there are some products which cannot possibly be made entirely safe. In *Borel v. Fibreboard Paper Prod. Corp.*,[29] the court found that:

> The requirement that the defect render the product 'unreasonably dangerous' reflects a realization that many products have both utility and danger. The determination that a product is unreasonably dangerous, or not reasonably safe, means that, on balance, the utility of the product does not outweigh the magnitude of the danger.[30]

By recognizing that the utility of the product is a factor in determining whether or not a product is unreasonably dangerous, the court severely limits the importance of whether or not the product was in fact dangerous beyond that contemplated by the ordinary user. Instead of this being the sole criteria for finding the product to be unreasonably dangerous, it becomes only one factor in this determination.

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27. WIS. J.I.-CIVIL § 3200 (1971).

28. RESTATEMENT § 402A, comment i.

29. Borel v. Fibreboard Paper Products Corp., CCH Prod. Liab. R. ¶ 7017 (5th Cir. Sept. 10, 1973).

30. *Id.*

C. *The Effect of a Warning*

In certain situations, a manufacturer may be required to give a warning of a particular danger which may arise through the use of his product. The existence of a condition which would otherwise render a product defective and unreasonably dangerous to the user or consumer may be offset by the manufacturer giving an adequate warning of the danger.[31] The reason for this is that:

> 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 a defective condition, nor is it unreasonably dangerous.[32]

When an adequate warning is given, the product is not defective because the manufacturer has informed the consumer what he should expect from the product in terms of its safety. Similarly, it is not unreasonably dangerous because the consumer has been made aware of how dangerous the product is.

IV. APPLICATION OF THE DEFINITIONS TO SCIENTIFICALLY UNKNOWABLE RISKS

A. *Authorities Holding Unknowability of the Risk to be Irrelevant*

The question of whether a manufacturer should be held liable under strict liability where the injury was caused by a danger which was scientifically unknowable until the injury has occurred has lead to different results from the various courts. The authors of articles on this subject are also split on the issue.

The courts and authors who take the view that knowledge by the manufacturer of the risk is not a factor in determining liability under strict liability, base their view primarily on the concept that strict liability imposes liability without consideration of the manufacturer's or seller's fault. They key factor is whether or not the product was defective and the "fact that the . . . manufacturer was unaware of the existence of the defect does not alter the fact that it was defective."[33]

The authorities following this reasoning look at the problem

31. Cochran v. Brooke, 409 P.2d 904 (Ore. 1965); RESTATEMENT § 402A, comments j and k; R. Patterson, *Products Liability: The Manufacturer's Continuing Duty to Improve His Product or Warn of Defects After Sale*, 62 ILL. BAR J. 92 (Oct. 1973).

32. RESTATEMENT § 402A, comment j.

33. P. Keeton, *Products Liability-Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 861 (1963).

from the time of trial rather than the time of sale or the time of injury. This approach is exemplified in Keeton's definition of the term "unreasonably dangerous":

> A drug or any other product is unreasonably dangerous, I suggest, if and only if, a reasonable man, with knowledge of the condition of the product and an appreciation of all the risks as found to exist at the time of the trial, would not now market the product at all or would do so pursuant to a different set of warnings and instructions as to use.[34]

By making the time of trial the critical time for knowledge of the risk, no distinction is made between risks that are scientifically knowable and those that are not.

In *Green v. American Tobacco Co.*,[35] the Florida Supreme Court was asked by the United States Court of Appeals for the Fifth Circuit, pursuant to a Florida statutory certification procedure, to answer the question whether that state imposes "absolute liability" for breach of implied warranty upon the manufacturer of cigarettes for death caused by use of its product when the manufacturer could not have known that cigarette smoking carried with it the risk of causing lung cancer. The court held:

> Upon the critical point, our decisions conclusively establish the principal that a manufacturer's or seller's actual knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty. . . .[36]

Although this case dealt with the implied warranty theory, the reasoning for the decision indicates that the same ruling would be appropriate under the strict liability theory. The only reason for even considering the seller's knowledge, according to the court, was to determine policy considerations.[37] The contention that the product's wholesomeness should be determined on any standard other than its "actual safety for human consumption, when supplied for that purpose," was expressly rejected.[38]

The Florida court has continued to apply this reasoning in light of section 402A and its comments. In two cases dealing with the

34. P. Keeton, *Some Observations About the Strict Liability of the Maker of Prescription Drugs: The Aftermath of MER/29*, 56 CAL. L. REV. 149, 158 (1968); *see also* P. Keeton, *supra* note 13, 20 SYRACUSE L. REV. at 56.

35. 154 So. 2d 169 (Fla. 1969).

36. *Id.* at 170.

37. *Id.* at 171.

38. *Id.* at 173.

blood transfusion problem,[39] the court reaffirmed its position that the knowledge of the manufacturer or seller is irrelevant. Although the risk was known in these cases, the court's decisions don't distinguish this situation from the one where risk is unknowable. The only question in Florida is whether the product was in a condition not contemplated by the user or consumer.

In another blood transfusion case, *Brody v. Overlook Hospital*,[40] a New Jersey court also adopted the view that the fact the defendant exercised "due care" is not relevant. In a strict liability case, the court said, liability is based upon the fact of the injury's occurrence as a result of the use of a defective product.

> The imposition of strict liability is predicated, not upon fault, but upon physical control over the defective product at the time when the product is in fact defective. (This does not, however, mean a degree of control to such an extent that the defect could theoretically be eliminated by the controller.)[41]

Again, the fact that the manufacturer was not at fault or could do nothing about the risk, whether he knew of or could have known of its existence or not, makes no difference. The manufacturer, under this approach, must produce a safe product or adequately warn against any risk. If it doesn't, it will be subject to liability.

When the position is taken that the question of whether a product is "defective" or "unreasonably dangerous" is to be determined from the consumer's point of view and with the knowledge of the facts after an injury has occurred, the fact that the risk was scientifically unknowable makes no difference. By adopting this position, the manufacturer is made an insurer of his product when it is used as intended.[42]

B. Authorities holding that there is no liability where the risk is unknowable

Although there is a general recognition that "defective" and "unreasonably dangerous" do, in fact, involve what is contemplated by the ordinary consumer, there are a number of decisions holding that there is no liability imposed upon the manufacturer when the danger which caused the injury was a scientifically un-

39. Rostocki v. Southwest Florida Blood Bank, Inc., 276 So. 2d 475 (Fla. 1973), and Community Blood Bank, Inc. v. Russell, 196 So. 2d 115 (Fla. 1967).

40. 121 N.J. Super, 299, 296 A.2d 668 (1972).

41. *Id.* at ___, 296 A.2d at 675.

42. *See* P. Rheingold, *Products Liability—The Ethical Drug Manufacturer's Liability*, 18 RUTGERS L. REV. 947 (1964).

knowable risk. As was stated by Dean Prosser:

> Thus far the courts have tended to hold the manufacturer to a high standard of care in preparing and testing drugs of unknown potentiality and in giving warning; but in the absence of evidence that this standard has not been met, they have refused to hold the maker liable for the unforeseeable harm. . . .[43]

One of the key theories used in finding that there is no liability has been that since there is no knowledge of the risk, it is impossible for the manufacturer to give any warning.

This theory was mentioned in one of the most recent cases in this area, *Borel v. Fibreboard Paper Products, Corp.*[44] The plaintiff developed asbestosis after working with asbestos insulation for a number of years. It was found that it was known that such work could lead to the worker developing asbestosis, but the court discussed the problem of the unknowable risk in its decision. After noting that the seller is not the insurer of his product, the court, in applying comment j[45] to section 402A, said:

> [A] seller has a responsibility to inform users and consumers of dangers which the seller knows or should know at the time the product is sold. The requirement that the danger be reasonably foreseeable, or scientifically discoverable, is an important limitation of the seller's liability.[46]

The strict liability theory, then, involves negligence concepts when the question of warning is involved.

Similar reasoning was used in *Basko v. Sterling Drug, Inc.*[47] The plaintiff was given the drug Aralen which was manufactured by the defendant for a skin disease. The plaintiff suffered a reaction to the drug and lost most of her vision. After deciding that there was a jury question as to whether or not the risk was knowable,

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43. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 99, p. 661 (4th ed. 1971).

44. CCH Prod. Liab. R. ¶ 7010 (5th Cir. Sept. 10, 1973).

45. RESTATEMENT § 402A, comment j, provides in part:

Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient in 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 foresignt should have knowledge, of the presence of the ingredient and the danger. . . .

46. Borel v. Fibreboard Paper Products Corp., CCH Prod. Liab. R. ¶ 7010 at p. 12, 213; *see also* Winthrop Laboratories Div. of Sterling Drug, Inc. v. Crocker, CCH Prod. Liab. R ¶ 7089 (Tex. Civ. App. Nov. 21, 1973).

47. 416 F.2d 417 (2nd Cir. 1969).

the court applied the rule of comment k of section 402A which says that if there is an adequate warning given, the product is not defective nor is it unreasonably dangerous.[48] This rule adopts the ordinary negligence concepts as to the duty to warn. If it is impossible to know that the risk exists, there is, therefore, no duty to warn the user or consumer.[49] This reasoning results in the finding that a product is not defective even if there is no warning if there was no duty to warn in the first instance.[50]

Two California cases apply the same reasoning. *Christofferson v. Kaiser Foundation Hospital*[51] involved Aralen, the same drug involved in the *Basko* case. *Oakes v. Geigy Agricultural Chemicals*[52] involved a plaintiff who suffered a severe skin condition as a result of contact with a weed killing chemical manufactured and distributed by the defendants. Both of these cases held that there is no defect if there is an adequate warning and whether or not the warning is adequate is to be determined on a basis of ordinary negligence.

The rulings in these and similar cases,[53] as well as the comments to section 402A, limit the definitions of the terms "defective" and "unreasonably dangerous" by allowing the seller to give warnings of dangers. Negligence concepts, rather than those of strict liability, apply to the determination of whether the warnings were adequate. Under the negligence theory, there is no duty to warn if the risk is scientifically unknowable.[54] This view of the terms "defective" and "unreasonably dangerous" under strict liability seeks to protect the consumer, but not at the expense of a seller or manufacturer who could not possibly know of the risk involved in the use of the product.

V. POLICY CONSIDERATIONS

As has been noted, strict liability in tort has been applied to products liability cases on a public policy determination that the consumer should be protected from the dangers involved in the use

48. RESTATEMENT § 402A, comment k.

49. Basko v. Sterling Drug, Inc., 416 F.2d 417, 426 (2nd Cir. 1969).

50. Winthrop Laboratories Div. of Sterling Drug, Inc. v. Crocker, CCH Prod. Liab. R ¶ 7089 at p. 12,501 (Tex. Civ. App. Nov. 21, 1973).

51. 15 Cal. App. 3d 80, 92 Cal. Rptr. 825 (1972).

52. 272 Cal. App. 2d 645, 77 Cal. Rptr. 709 (1969).

53. *See* Eisbach v. Jo-Carroll Electric Coop., Inc., 440 F.2d 1171 (7th Cir. 1971); Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963); and Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962).

54. *See* RESTATEMENT (SECOND) OF TORTS § 388 (1965).

of defective products. Since the doctrine of strict liability is based on public policy, courts must define the terms used in applying the doctrine by examining those public policy considerations. The importance of the various factors making up the policy considerations are given different weight by the courts and the writers and, therefore, the conclusions reached are in conflict.

A. Support for the imposition of liability even where the risk is scientifically unknowable

There are many who feel that liability should be imposed on the manufacturers of defective products regardless of the fact that the risk was scientifically unknowable. They feel that the protection of the consumer is of the utmost importance and, since the manufacturer made the product and usually has a deeper pocket, they feel the loss should be shifted to the manufacturer.

Paul D. Rheingold, in one of the earlier articles concerning this problem, takes the position that the policy considerations lead to the conclusion that even where the risk is unknowable, liability should be imposed.[55] By imposing liability, he believes: (1) it is possible that the manufacturer will proceed with even more care and use more tests for an earlier detection of the risk; and (2) the desirable effect of inducing the manufacturer to spread the loss by either obtaining insurance or otherwise providing for the contingency of harm will result. At the same time, he argues that: (1) firms will not be driven into bankruptcy; (2) competition within the particular industry will keep companies researching, developing and marketing new products; (3) the cost of products will not rise appreciably because of mass marketing; and (4) it is not undesirable that products be kept off the market for further testing if it means safer products.[56] If these arguments are accepted as true, it would seem that there would not only be benefits for the injured party, but also, major benefits for the general public through safer products. The only burden would be a minimal increase in prices.

In a series of articles, Page Keeton advocates that strict liability be imposed unless the benefits of the product outweigh the harm to which users of it are exposed. If the product is a very useful or necessary one, the injured party doesn't recover because the public good is better served by having the product on the market.[57] In an

55. P. Rheingold, *Products Liability—The Ethical Drug Manufacturer's Liability,* 18 RUTGERS L. REV. 947 (1964).

56. *Id.* at 1015-1017.

57. P. Keeton, *supra* note 13, 20 SYRACUSE L. REV. at 571.

article dealing solely with the problems involved with birth control pills, another author applies similar reasoning and suggests that since birth control pills are not designed to treat illnesses and are only one method of birth control, their usefulness is not that great in comparison to the possible harm which may be caused by them. Therefore, birth control pills, it is argued, should be distinguished from medicinal drugs and strict liability should be applied to the manufacturers of "the pill."[58]

In *Brody v. Overlook Hospital*,[59] the court felt that the imposition of strict liability will have the effect of encouraging research and more careful use of products. Also, the loss will cause no undue burden on anyone since it will be spread out over all users and consumers.

The various policy considerations noted, all put the greatest weight on the protection of the consumer. If strict liability is imposed on this reasoning, the manufacturer, for all practical purposes, becomes the insurer of his product for harm caused by its normal use. The arguments find this acceptable because the manufacturer can pass on his losses in this regard to the general public by increasing the cost of the product.

B. Opposition to the imposition of strict liability where the risk is scientifically unknowable.

The policy considerations listed in the preceding section do have the protection of the consumer in mind. However, those who feel strict liability should not be imposed in situations where the risk is scientifically unknowable feel that the reasons given by those who favor it break down when the risk is unknowable.

One of the most critical attacks on the proponents' reasoning is made by Paul Connolly.[60] First of all, Connolly points out that where the risk itself is unknown, the seller is in no position to spread the loss. The manufacturer has no way of estimating the amount of the loss, if any, or how often it will happen, if ever. Therefore, it could not pass the cost on by increasing the sales price because there is no way to determine how much the increase should be.

Where the manufacturer cannot spread the risk, he should not,

58. Comment, *Liability of Birth Control Pill Manufacturers*, 23 HASTINGS L. REV. 1526 (1972).

59. 121 N.J. Super, 299, 296 A.2d 688 (1972).

60. P. Connolly, *The Liability of a Manufacturer for Unknowable Hazards Inherent in His Product*, 32 INS. COUNSEL J. 303 (1965).

> it would seem, be liable for the defect, because there would be no justification for making him liable. The only difference between him and the consumer in this case is that he has the deeper pocket.[61]

Connolly also objects to the utility of the product versus the potential harm approach. His objection is on two grounds: (1) it would be difficult to place values on the utility and the risk and the court is probably not the best agency to make this judgment; and (2) if a manufacturer is to be encouraged to market new products for the benefit of society, it is not proper for the court to make a determination of whether the product was worth the risk on an after-the-fact basis.[62]

In *Lartique v. R.J. Reynolds Tobacco Co.*,[63] which dealt with the problems of the cigarette cases, the court recognized the fact that unknowable risks can't be considered a cost of production:

> Public policy demands that the burden of any accidental injuries caused by such products be placed upon those who produce and market the products and know the risks. The injuries from knowable risks are a cost of production for the industry to bear . . . . [The manufacturer] is an insurer against foreseeable risks—but not against unknowable risks.[64]

The reasoning of this case is that where the risk is knowable, the manufacturer can protect against it both by spreading the loss and by taking steps to prevent the harm, but where the risk is unknowable, it can do neither.

Courts have also stated that the manufacturer is not the insurer of its product.[65] To give any meaning to this statement, it would be necessary to excuse from liability manufacturers when the risk of their products are unknowable. If liability was extended this far, all grounds would be covered where the user or consumer uses the product as intended by the manufacturer.

Another reason put forth for limiting liability where the risk is unknowable is that to do so might effectively reduce the sufficient user experience indispensable to research.[66] This is particularly

61. *Id.* at 307.

62. *Id.* at 306.

63. 317 F.2d 19 (5th Cir. 1963).

64. *Id.* at 36-37.

65. Borel v. Fibreboard Paper Products Corp., CCH Prod. Liab. R. ¶ 7010 (5th Cir. Sept. 10, 1973); *see also* note 12.

66. Basko v. Sterling Drug, Inc., 416 F.2d 417 (2nd Cir. 1969) and Christofferson v. Kaiser Foundation Hospital, 15 Cal. App. 3d 80, 92 Cal. Rptr. 825 (1972).

important in drug and chemical cases. For some products, use by individuals is the only way tests can be thoroughly conducted. When this is true, the imposition of strict liability is seen as a true deterrent.

One further policy consideration should be pointed out. One of the justifications for imposing strict liability is that the manufacturer is in a better position to remove the risks in its products or to take precautions so that the risk will not cause injury.[67] This does not fit the situation where the risk is scientifically unknowable. When this is the case, there is nothing the manufacturer can do because it wouldn't know there is a problem.

VI. CONCLUSION

The situation with which this comment deals has resulted in different conclusions by different courts and writers. The terms "defect" and "unreasonably dangerous" are subject to definitions which could go either way on the question. Therefore, it is necessary to look primarily to the policy considerations underlying strict liability in tort to determine whether or not liability should be imposed.

The prime policy arguments made by those who feel strict liability should be applied in all cases are that, in order to protect the consumer, the loss should be shifted to the manufacturer and/or seller because he is in a better position to spread the loss and because he is in a superior position to protect against the risk. It appears, however, that neither of these arguments are applicable where the risk is scientifically unknowable. It would seem that it is impossible to consider such a risk a cost of production to be passed on to the public. This is so because there is absolutely no way to anticipate the unknowable and give it a monetary value to be added to the sales price. Also, the manufacturer or seller is in no better position to protect against the risk since they don't know there is one and, no matter what they do, they can't detect it. Imposing liability will not have a great impact on improving research and testing procedures because the manufacturer has done all he could already.

The "utility of the product versus the risk of harm" test also seems improper because the determination is being made after the risk is known, while the decision to market the product was made

67. *See* Tucson Industries, Inc. v. Schwartz, 108 Ariz. 464, 504 P.2d 936 (1973).

without any such knowledge. To impose liability where the utility is less than the risk of harm and to excuse the manufacturer when the risk is less than the utility of the product is an artificial distinction. Also, under this approach, the injured person is denied recovery where the product is more useful to the public, but he is allowed recovery, and, therefore, the loss supposedly spread to all consumers, where it is found that the risk of harm is greater than the utility of the product to those same consumers.

Although the injured user or consumer of a product should be protected, the mere fact that the manufacturer has the deeper pocket should not be the controlling factor. The injured party need not prove negligence on the part of the defendant, but he should be required to prove that either the defendant could have found and corrected the defect had he utilized all scientific knowledge available to him or he could have given a warning so that the consumer could have taken precautionary measures. The manufacturer of a product which has a scientifically unknowable risk inherent in it should be excused from liability under strict liability in tort.

RICHARD E. BYRNE

INDUSTRY-WIDE JOINT LIABILITY

INTRODUCTION

The issue presented in this article is whether or not an entire industry may be held jointly and severally liable under a theory of strict liability for injuries caused by its products. In its broadest form, this concept of industry-wide joint liability could impose liability upon an entire industry if the plaintiff could show that: 1) there was an injury caused to him by a product of that industry; 2) the product was defective, unreasonably dangerous and it reached the plaintiff without substantial change in its condition;[1] 3) the manufacturers adhered to an industry-wide custom in producing the product.[2] Whether or not the actual manufacturer could be identified would be irrelevant since all of the manufacturers would be liable for the action of one of them.

Industry-wide joint liability should be differentiated from two

1. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as RESTATEMENT § 402A].

2. *See* notes 27-28 and accompanying text *infra*.