Dalhousie Law Journal

Volume 16 | Issue 2 Article 1

10-1-1993

Negligence, Strict Liability, and Manufacturer Failure to Warn: On Fitting Round Pegs in a Square Hole

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Articles

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Introduction

In the common law provinces of Canada, it is generally recognized that a plaintiff in a products liability action in tort must prove four elements in order to succeed: first, that the product contains a defect traceable either to its manufacture, to its design, or to its warnings or instructions; second, that the defendant manufacturer[1] was somehow negligent in connection with this defect; third, that there is some causal connection between the manufacturer's negligence and the damages suffered by the plaintiff; and fourth, that these damages are such as to give rise to compensation in law.[2] In the United States, in the majority of states adhering to a theory of strict tort liability, the plaintiff in such an action is relieved of the obligation of proving the second element. However, the plaintiff must still establish the existence of a defect, recognized damages, and a causal connection between the two.[3]

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1. Unless the context suggests otherwise, references to the term "manufacturer" in this article should not be interpreted as necessarily excluding other suppliers of products such as distributors, retailers, liquidators, or service people, from the scope of the principles under analysis. In recent years, liability in tort for defective products has been imposed on individuals involved in the supply of products who are not strictly speaking manufacturers. I adopt "manufacturer" to lighten the text and put aside issues not particularly relevant to my thesis.
2. See generally S.M. Waddams, *Products Liability*, 2d ed. (Toronto: Carswell, 1980) and Ontario Law Commission, *Report on Products Liability* (Toronto: Ministry of the Attorney General, 1979).
3. See generally M.S. Shapo, *The Law of Products Liability*, 2d ed. (Salem, N.H.: Butterworth Legal Publishers, 1990) and D.W. Noel & J.J. Phillips, *Products Liability*, 2d ed. (St. Paul, Minn.: West Publishing Co., 1982).

This article focuses on the standard of liability used by courts in these neighbouring countries, in theory and in practice, when deciding tort actions predicated on a defect traceable to a product's warnings. Until recently, warning defects have received relatively little attention outside of the courtroom in the United States, especially when compared to manufacturing and design defects.[4] In Canada, despite the increasing reliance by plaintiffs on the failure to warn line of argument, there is a relative vacuum of accompanying academic commentary.[5] In an effort to break with this trend, this article deals with an issue that has become increasingly provocative in the last few years: the standard of liability used to decide failure to warn actions. My goal is to examine the actual role played by the concept of negligence when deciding whether to hold manufacturers liable for not warning of risks associated with the use of their products. Must a manufacturer conduct itself with reasonable care in all the circumstances in order to escape liability, or must it answer to some higher standard, irrespective of fault? Theory suggests that both countries use diametrically opposed approaches on this issue. An analysis of recent case law reveals otherwise.

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4. See M.S. Jacobs, "Toward a Process-Based Approach to Failure-to-Warn Law" (1992), 71 N.C. L. Rev. 121 at 122-23. In footnotes 11-13 and accompanying text, Professor Jacobs notes numerous articles and describes how "two decades of almost unbroken scholarly silence" on this subject slowly began to change. There are a number of recent articles addressing the problems associated with the standard of liability used to decide failure to warn actions. Other than those mentioned by Jacobs, see W. Wertheimer, "Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back" (1992), 60 Cin. L. Rev. 1183; R.N. Pearson, "Strict Liability and Failure to Warn" (1992), 3 Prod. Liab. L.J. 108; Note, "Reformulating the Strict Liability Failure to Warn" (1992), 49 Wash. & Lee L. Rev. 1509; Note, "The Move Toward a Negligence Standard in Strict Products Liability Failure to Warn Cases" (1989), 27 Duquesne L. Rev. 755; and A. Gershonowitz, "The Strict Liability Duty to Warn" (1987), 44 Wash. & Lee L. Rev. 71.

5. The growing relevance of failure to warn in the Canadian context is noted by Professor L.N. Klar in "Recent Developments in Tort Law" (1991), 23 Ottawa L. Rev. 177 at 224-25. To my knowledge, the only articles published in Canadian legal periodicals focusing primarily on manufacturers' duty to warn of risks associated with their products are: P. Peppin, "Drug/Vaccine Risks: Patient Decision-Making and Harm Reduction in the Pharmaceutical Company Duty to Warn Action" (1991), 70 Can. Bar Rev. 473 and P. Legrand jr., "Pour une théorie de l'obligation de renseignement du fabriquant en droit civil canadien" (1981), 26 McGill L.J. 207. Most commentators mention this subject only tangentially to a general discussion of products liability, which usually revolves around a discussion of the manufacturer's liability for manufacturing or design defects. Especially when analysing the standard of liability issue and arguing for the adoption of strict tort liability, Canadian commentators have a tendency of virtually ignoring failure to warn and of focusing on the judicial treatment of defects traceable to the manufacture and design of products: see, for example, Ontario Law Reform Commission, *supra*, note 2 at 17-19; Waddams, *supra*, note 2 at 61-65; and A.M. Linden, *Canadian Tort Law*, 4th ed. (Toronto: Butterworths, 1989) c. 16.

In Canada, as many commentators have noted, products liability cases are frequently decided in favour of the plaintiff even though little evidence of manufacturer negligence is before the court. For example, Professors Waddams and Linden (as the latter then was) suggest that the maxim *res ipsa loquitur* and other evidential devices are often used in ways that give rise to *de facto* strict liability, or something akin thereto.[6] It would, they submit, be an incremental step for Canadian courts to openly adopt strict tort liability. For this and various policy-type reasons, they urge such a move.[7] In particular, they note the general acceptance and apparent success of this principle in the United States and see no convincing reason why Canadian courts or legislatures should not adopt a similar rule.[8] Likewise, some years ago, the Ontario Law Reform Commission observed that "there is a large measure of strict liability already in the law"[9] and that a plaintiff who proves defect, injury, and causation "very rarely fails on the ground that negligence cannot be established".[10] This view greatly influenced the Commission's recommendation that the Ontario Legislature enact a principle of strict tort liability to serve as the legal basis of liability for damages caused by defective products.[11] Moreover, the Commission was undoubtedly inspired by its perception of the situation in the United States, which it discussed at length in its report.[12] Despite the alleged tacit acceptance of

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6. See, for example, Waddams, *supra*, note 2 at 61-65; S.M. Waddams, "Strict Products Liability" in F.E. McArdle, ed., *The Cambridge Lectures 1987* (Montréal: Yvon Blais, 1987) 111; Linden, *ibid.*; C.A. Wright, A.M. Linden, & L.N. Klar, *Canadian Tort Law: Cases, Notes & Materials*, 8th ed. (Toronto: Butterworths, 1985) c. 16 at 74-79; A.M. Linden, "Products Liability in Canada" in A.M. Linden, ed., *Studies in Canadian Tort Law* (Toronto: Butterworths, 1968) 216 at 234-47; and A.M. Linden, "A Century of Tort Law in Canada; Wither Unusual Dangers, Products Liability and Automobile Accident Compensation?" (1967), 45 Can. Bar Rev. 831 at 857-64. See also J.G. Fleming, *The Law of Torts*, 7th ed. (Sydney: The Law Book Company Ltd., 1987) at 469-71; G. Vukelich, "Strict Products Liability 'Just(ice) Out of Reach'—A Comparative Canadian Survey" (1975), 33 U.T. Fac. L. Rev. 46 at 59-62; and E.R. Alexander, "Recent Developments in the Law of Torts" in *Special Lectures of the Law Society of Upper Canada 1966* (Toronto: Richard De Boo Ltd., 1966) 1 at 46.

7. See, for example, Waddams, *supra*, note 2 at 258-59 and Linden, *supra*, note 5 at 563.

8. Professor (now Mr. Justice) Linden, in the works mentioned *supra*, notes 5 and 6, seems particularly inspired by the approach adopted in the United States. See also Waddams, *supra*, note 2 at 231-54.

9. *Supra*, note 2 at 33.

10. *Ibid.* at 17.

11. *Ibid.* at 135-38.

12. *Ibid.* at 51-57 and 64.

some form of strict products liability in Canada and the situation in the United States, such calls for reform have generally been ignored by Canadian courts and legislatures.[13]

In my view, there are at least two problems pertaining to the current debate in Canada with respect to products liability. First, those involved in the debate excessively generalize the necessity and possibility of applying strict tort liability to all types of defective products, thereby failing to appreciate the differences between the three generally recog-

13. Canadian courts have been somewhat adamant in their refusal to *openly* adopt strict tort liability. A recent example of a missed opportunity to move from a relaxed application of *res ipsa loquitur* to an open standard of strict liability for manufacturing defects is *Farro* v. *Nutone Electrical Ltd.* (1990), 72 O.R. (2d) 637, 68 D.L.R. (4th) 268 (C.A.). It is sometimes noted that a very high standard of care is imposed on manufacturers of certain products, like those supplying foods and beverages: see, for example, L.D. Rainaldi, ed., *Remedies in Tort*, vol. 3 (Toronto: Carswell, 1987) c. 20, at 29-30. Even in such cases, however, the analysis is portrayed as one of negligence. As for Canadian legislatures, the only pieces of legislation addressing the standard of liability in tort are New Brunswick's *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C-18.1, s. 27 (adopting strict liability under certain circumstances) and Québec's *Civil Code of Québec*, S.Q. 1991, c. 64, Arts. 1468 and 1469 (arguably adopting strict liability).

nized categories of defects: defects in manufacture, design, and warning.[14] Second, while drawing to a large extent on the experience in the United States, the proponents of strict liability fail to examine how courts

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14. See generally W.P. Keeton, "The Meaning of Defect in Products Liability Law—A Review of Basic Principles" (1980), 45 Missouri L. Rev. 579 at 585-88 and J.J. Philips, "A Synopsis of the Developing Law of Products Liability" (1978), 28 Drake L. Rev. 317 at 342-52. The same classification is found in Canadian case law. Generally speaking, a *manufacturing defect* occurs during the production stage of a product. It is usually the result of an omission of a component part, of an introduction of a foreign element in the product, or of an omission or inappropriate execution of some required procedure for the making of a safe product. Whatever its exact source, the defect occurring during the production stage is usually not discovered prior to the product entering the market. It is relatively simple for a court to ascertain whether such a defect is present simply by comparing the product causing the plaintiff's injuries with other products manufactured according to specifications. A classic example of a product defective because of a manufacturing defect is *Donoghue* v. *Stevenson*, [1932] A.C. 562, 37 Com. Cas. 850 (H.L.) [cited to A.C.] where a consumer is alleged to have found a snail in an opaque bottle of ginger beer. It is harder, however, to assess the manufacturer's negligence *vis-à-vis* this defect and courts often resort to devices such as *res ipsa loquitur*. A *design defect*, on the other hand, occurs during the initial stage of a product's creation, where it is conceived, sketched, and planned. It is during this stage that manufacturers decide, for example, which kind of material, components, and safety devices will be incorporated into their product. A design defect results from a consciously made choice to manufacture a product with a certain component or feature and from the eventual discovery—usually following a number of accidents—that the choice of another component or feature might have resulted in a safer product. The hallmark distinction between manufacturing and design defects is that an inquiry into the latter requires the second-guessing of a consciously made choice, whereas an inquiry into the former involves an assessment of the condition of the injury-causing product in comparison to other products of its kind. Understandably, compared to defects in manufacture, it is usually more difficult to assess whether a design is defective since *choices* are in issue as opposed to *results*. To this end, courts usually resort to a cost/benefit type of analysis and consider whether safer alternatives existed at the time of production. An example of a product defective because of a design defect is the riding lawn mower at issue in *Nicholson* v. *John Deere Ltd.* (1986), 58 O.R. (2d) 53, 34 D.L.R. (4th) 542, *affirmed* (1989) 68 O.R. (2d) 191, 57 D.L.R. (4th) 639 (C.A.) which contained a battery with uncovered terminals in close proximity to its gas reservoir. Also, the line separating the defect issue from the negligence issue is thinner with respect to design defects, as commentators in the United States have often noted (see *infra* note 16). Lastly, products with *defective warnings* are those which, although designed and manufactured with care, are nonetheless defective because they contain no warnings or inadequate ones with respect to known or knowable dangers associated with the use of the product. Some have noted, quite correctly, that warning defects are actually a specific instance of design defects. Nevertheless, both lines of argument raise different issues and courts in Canada and the United States have treated them as giving a plaintiff two distinct theories of recovery. As with design defects, the demarcation between the defect inquiry and the negligence inquiry is not as clear as it is for cases involving manufacturing defect cases. Moreover, the danger of which manufacturers must warn may either be inherent in the use of the product, or may result from a manufacturing or design defect discovered after the product's supply. An example of the former is *Lambert* v. *Lastoplex Chemicals Co.*, [1972] S.C.R. 569, 25 D.L.R. (3d) 121 [hereinafter *Lambert* v. *Lastoplex* cited to D.L.R.] where the defendant failed to warn of the danger of using a highly flammable sealer near a furnace pilot light. An example of the latter is *Rivtow Marine Ltd.* v. *Washington Iron Works*, [1974] S.C.R. 1189, 40 D.L.R. (3d) 530 [hereinafter *Rivtow* v. *Washington Iron Works* cited to D.L.R.] where the defendants failed to warn of a design defect in the mounting of a crane.

south of the Canadian border actually decide cases. They forget that the gap observed in Canadian judgments between theory and practice might also exist in the United States. In my opinion, such a gap does indeed exist. True, there are elements of strict liability currently infiltrating Canadian judgments even though fault is supposed to be the standard. But it is also true that elements of negligence increasingly infiltrate the regime of strict tort liability in the United States. This interplay between negligence and strict liability is particularly noticeable with respect to actions based on a manufacturer's failure to warn of risks associated with the use of its product,[15] my subject of analysis, although it also occurs when a design defect is involved.[16]

I contend that many courts in Canada and the United States actually apply a similar standard of liability when deciding failure to warn actions, even though their rhetoric may suggest otherwise. This common standard cannot adequately be described solely in terms of negligence or strict liability, as it represents a combination of both traditions. A court deciding a failure to warn action, whether in Canada or the United States, generally addresses two questions: first, did the manufacturer have a duty to warn of the risk which materialized and allegedly caused damage to the plaintiff, and second, if so, was this duty breached in the circumstances of the case. Although adopting different standards of liability, courts in both countries approach these questions in a very similar fashion, using notions of negligence to answer the first question (*i.e.* the manufacturer's foreseeability of the risk) while reverting to strict liability to answer the second (*i.e.* the adequacy of the product's warning).

This argument is introduced and developed in Parts I and II respectively. In the former, I explain the use made of the two terms most central

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15. See, for example, G.T. Schwartz, "Foreword: Understanding Products Liability" (1979), 67 Cal. L. Rev. 435 at 462-63 and G.T. Schwartz, "The Vitality of Negligence and the Ethics of Strict Liability" (1981), 15 Ga. L. Rev. 963 at 972-73. Professor Schwartz is one of the first to argue that strict liability for design defects and failure to warn is really a form of negligence. Although there is some truth to such arguments, it is equally misleading to suggest that liability for failure to warn in the United States is a pure form of negligence. Rather, as in Canada, it is an amalgam of both strict liability and negligence concepts.

16. Cost-benefit balancing lies at the heart of an inquiry into whether a product design is defective. Since balancing is also central to the law of negligence, it is often difficult to distinguish a standard of strict liability with respect to design defects from one of negligence. See, for example, F.J. Vandall, " 'Design Defect' in Products Liability: Rethinking Negligence and Strict Liability" (1982), 43 Ohio St. L.J. 61; B. Lemer, "Strict Products Liability: the Problem of Improperly Designed Products" (1982), 20 Osgoode Hall L.J. 250; S.L. Birnbaum, "Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence" (1980), 33 Vand. L. Rev. 593; and W.P. Keeton, "Products Liability—Design Hazards and the Meaning of Defect" (1979), 10 Cumb. L. Rev. 293.

to my thesis, "negligence" and "strict liability", both generally and in the specific context of failure to warn actions involving products. In Part II, the focus shifts to the manner in which these prevailing standards of liability are actually applied by courts in Canada and the United States. The objective is not to conduct an exhaustive survey of the law, but to discern general trends in recent case law. As noted, my principal argument is that many courts in Canada and the United States use a combination of both negligence and strict liability concepts when deciding failure to warn actions involving products. Stated differently, I believe a gap exists in *both* countries between the standard of liability adopted in theory and the one used in practice. References to *either* of these concepts in isolation are insufficient to fill this gap. For the most part, Canadian courts do not treat the manufacturer's negligence in such cases as pivotal. Nevertheless, their decisions cannot be described solely in terms of strict liability. Conversely, a growing number of courts in the United States are distancing themselves from strict liability, but not in order to adopt a pure negligence theory. In my view, the experience in both countries with failure to warn actions reveals the emergence of a common *compound* standard of liability. In the third and final part, I conduct a brief analysis and assess the merits of this surfacing standard of liability. Many commentators have reviewed the appropriateness of general systems of fault-based and strict liability, as these concepts are currently understood *i.e.* with one standard necessarily negating the other.[17] Part III, however, assesses the appropriateness of a mixed standard of liability, containing elements of both negligence and strict liability.

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17. Recent articles in the United States include: A. Schwartz, "The Case Against Strict Liability" (1992), 60 Fordham L. Rev. 819; R.A. Prentice & M.E. Roszkowski, " 'Tort Reform' and the Liability 'Revolution': Defending Strict Liability in Tort for Defective Products" (1992), 27 Gonz. L. Rev. 251; N.E. Simmonds, "Epstein's Theory of Strict Tort Liability" (1992), 51 Cambridge L.J. 113; J. Cirace, "A Theory of Negligence and Products Liability" (1992), 66 St. John's L. Rev. 1; G.L. Priest, "Can Absolute Manufacturer Liability be Defended?" (1992), 9 Yale J. on Reg. 237; D. Beyleveld, "Impossibility, Irrationality and Strict Product Liability" (1991), 20 Anglo-American L. Rev. 257; and W.C. Powers, "A Modest Proposal to Abandon Strict Products Liability", [1991] U.Ill. L. Rev. 639. In Canada, see, for example, D. Dewees & M.J. Trebilcock, "The Efficacy of the Tort System and its Alternatives: A Review of Empirical Evidence" (1992), 30 Osgoode Hall L.J. 57; M.J. Trebilcock, "Incentive Issues in the Design of 'No-Fault' Compensation Systems" (1989), 39 U. Toronto L.J. 19; M.J. Trebilcock, "The Future of Tort law: Mapping the Contours of the Debate" (1989), 15 Can. Bus. L.J. 471; S.R. Perry, "The Impossibility of General Strict Liability" (1988), 1 Can. J. of Jurisprudence 147; Waddams, "Strict Products Liability", *supra*, note 6; and M.J. Trebilcock, "Products Liability and the Allergic Consumer: Problems of Framing an Efficient Liability Regime" (1986), 36 U. Toronto L.J. 52.

I. *The Prevailing Theories of Liability for Failure to Warn: Negligence and Strict Liability*

Negligence and strict liability are concepts difficult to define with precision. Confusion and divergence of opinion are common in both academic and judicial circles. The object of this first part is not to critically review all the material on this matter and to suggest *the* correct answers, but to advance sufficient elements to explain the use made of these concepts in this article. The tone is mostly descriptive; I describe a relatively uncontroversial core associated with these prevailing standards of liability and suggest the theoretical foundation required for advancing to a more tangible case law analysis. Abstract concepts are the focus here, *not* the application of these concepts in practical cases. True, there is some divergence between theory and practice. In fact, this is the thrust of the article. However, only the theory is addressed in this part.[18]

Part of the difficulty with defining negligence and strict liability arises because many scholars and judges use these terms gratuitously, without articulating their meaning and merely distinguishing them by saying the one rejects the other. An example is provided by the 1979 *Report on Products Liability* published by the Ontario Law Reform Commission.[19] As mentioned, the Commission recommended the enactment of a principle of strict tort liability to serve as the legal basis of liability for damages caused by defective products. This recommendation was warmly embraced by those in the legal community who argued for the adoption of strict liability in Canada.[20] However, there is a noticeable lack of

18. My thesis depends on the meaning given to the concepts of negligence and strict liability. A very narrow definition of negligence, for example, would likely lead to a conclusion that courts are doing something else than deciding cases on the basis of the reasonableness of the defendant's conduct. Conversely, a broad definition would lead to the conclusion that courts uniformly adopt this standard, both in theory *and* in practice. The same is true with respect to strict liability. As one of my law professors used to say, it is easy to pull a rabbit out of a hat when you placed it there in the first place. I am aware of this concern and have chosen to only identify elements of negligence and strict liability which are relatively uncontroversial, that is, elements situating themselves at the very core of these theories of liability.

19. *Supra*, note 2.

20. See, for example, A.M. Linden, "Commentary: OLRC Report on Products Liability" (1980), 5 Can. Bus. L.J. 92. Professor Waddams contributed to the Commission's study and his efforts and insights were strongly acknowledged at the beginning of the report.

elaboration on the exact meaning of such a standard.[21] The analysis in the *Report on Products Liability* is limited to equating the concept of strict liability with the removal of negligence as the basis for liability. Strict liability is defined solely by contrasting it with a regime where the plaintiff must prove negligence on the part of the manufacturer in order to succeed.[22] In addition, the Commission fails to discuss the standard of negligence.

A. *Negligence-Based Liability*

The term "negligence" commonly denotes two concepts in the law of torts: first, a *cause of action* comprised of many elements,[23] and second, *conduct* falling below a certain standard imposed by law. These two meanings are easily confused. The latter usage is always material in the context of the former as it constitutes the pivotal element to a cause of action for negligence. Indeed, once it is shown that the defendant owed a duty of care to the plaintiff, a breach is established by showing the defendant acted negligently in the circumstances of the case. However, the use of negligence to denote conduct falling below a prescribed norm is neither logically nor legally limited to a cause of action for negligence. It is sometimes used in other causes of action, comprised of different

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21. To be sure, chapter seven of the *Report on Products Liability*, *supra*, note 2, discusses at length the "Scope of Strict Liability". But this chapter deals with aspects of products liability having no necessary legal or logical connection with strict liability such as damages, monetary limits on recovery, limitation periods, types of products, classes of plaintiffs, classes of defendants, defences, contribution, indemnity, jury trials, and class actions. These topics can be addressed regardless of the standard of liability issue. The omission I attribute to the Commission concerns the lack of any meaningful discussion on the essence of the legal basis of liability put forward in their recommendations.

22. Of course, I am not suggesting it is incorrect to view strict liability as liability without proof of negligence. Such a definition is necessarily accurate. This does not mean, however, that the sole function of these two concepts is to denote a regime in which proof of unreasonable behaviour is, or is not, required. Just as it is insufficient to explain negligence by stating what it is not, or what elements do not have to be established to sustain a claim, defining strict liability as liability without negligence, while true, does not tell us the whole story.

23. Courts and commentators have described the elements of the cause of action for negligence on numerous occasions and in various ways. Briefly, these elements are: a duty of care owed by the defendant to the plaintiff; a breach by the defendant; some injury to the plaintiff recognized in law; causation between the defendant's breach and the injury; and the absence of any conduct on the part of the plaintiff prejudicial to his or her recovering in full for the loss suffered.

requirements. For example, Canadian courts still recognize a tort of negligent trespass with the historical shift in the burden of proof.[24] In a trespass action, once the plaintiff establishes that he or she suffered an injury by force applied directly by the defendant, the burden of proof shifts to the defendant to demonstrate the absence of intention *and negligence*. Similarly, negligence is sometimes used in the context of criminal law to denote the standard by which to judge the criminality of the defendant's conduct.[25]

In Canada, suits involving defective products are mostly brought under negligence theories where the plaintiff must establish all required elements, including the existence of a duty of care and its breach.[26] Since *Donoghue* v. *Stevenson*,[27] few decisions ponder the notion of the duty of care owed by a manufacturer. Using the speech of Lord Atkin, courts appear to conclude that a *prima facie* duty of care exists whenever a consumer[28] suffers damages as the result of a product manufactured by the defendant, and concentrate instead on other elements of the tort such as defect, negligence, causation, and damages. Defendants rarely challenge this presumption, except in cases where the plaintiffs are not consumers or where the defendants are not manufacturers, in the strict sense of these words, or where the risks which materialized are arguably unforeseeable.

For my purposes, it is important to note that issues of duty of care and negligence, although closely interrelated, are conceptually distinct. Of

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24. See, for example, *Cook* v. *Lewis*, [1951] S.C.R. 830, [1952] 1 D.L.R. 1; *Walmsley* v. *Humenick*, [1954] 2 D.L.R. 232 (B.C.S.C.); *Ellison* v. *Rogers*, [1968] 1 O.R. 501, 67 D.L.R. (2d) 21 (H.C.); *Goshen* v. *Larin* (1975), 10 N.S.R. (2d) 66, 56 D.L.R. (3d) 719 (C.A.); and *Doyle* v. *Garden of the Gulf Security & Investigations Inc.* (1979), 24 Nfld. & P.E.I.R. 123, 65 A.P.R. 123 (P.E.I.S.C.). See generally R. Sullivan, "Trespass to the Person in Canada: A Defence of the Traditional Approach" (1988), 19 Ottawa L. Rev. 533.

25. See, for example, *Criminal Code of Canada*, R.S.C. 1985, c. C-46, ss. 79 [reasonable care in the handling of dangerous substances] and 86 [careless use of a firearm].

26. Numerous actions are also brought—separately or in conjunction with a negligence claim—under a breach of warranty theory. For an in-depth review of this alternate theory, see Waddams, *supra*, note 2. On the similarities between the negligence and breach of warranty theories, in terms of strict products liability, see W.L. Prosser, "The Assault on the Citadel (Strict Liability to the Consumer)" (1960), 69 Yale L.J. 1099 and S.M. Waddams, "Strict Liability, Warranties and the Sale of Goods" (1969), 19 U.T.L.J. 157.

27. *Supra*, note 14.

28. Unless the context suggests otherwise, references to the term "consumer" in this article should not be interpreted as necessarily excluding other individuals who are injured by defective products, such as non-paying users and bystanders, from the scope of the principles under analysis. In recent years, redress in tort for damages caused by defective products has been extended to individuals involved in the consumption and use of products who are not strictly speaking consumers. I adopt "consumer" to lighten the text and put aside issues not particularly relevant to my thesis.

course, the former is a question of law mainly for the court to determine whereas the latter is a question predominantly within the realm of the trier of fact—in Canada, usually the same body as the trier of law. Beyond this, both requirements logically and legally involve different inquiries. When asking whether a defendant *owes a duty* of care to the plaintiff, and in determining the duty's nature and scope, courts concentrate on a number of factors including: the proximity relationship between the parties; the foreseeability of the plaintiff and of the risk which materialized; reliance on the part of the plaintiff *vis-à-vis* the defendant's conduct; and the reasonableness or otherwise of imposing a duty on the defendant.[29] On the other hand, when courts ask whether a defendant has *breached said duty* of care (*i.e.* whether the defendant acted negligently), they focus solely on the reasonableness of the defendant's conduct, comparing it to that of a reasonable person of ordinary prudence faced with similar circumstances.

When courts are concerned about opening the floodgates of litigation, about embarking on a slippery slope, or about exposing defendants to "liability in an indeterminate amount for an indeterminate time to an indeterminate class",[30] they often channel their concerns in the direction of the duty of care issue. There, they can deny the existence of a duty altogether (as shown by the infamous case of *Winterbottom* v. *Wright*[31] and its now-obsolete progeny), recognize the possibility of a general duty

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29. There is debate in the United Kingdom and Canada about the factors and methods used to determine the circumstances in which a duty of care is owed to another: see, for example, *Donoghue* v. *Stevenson*, *supra*, note 14; *Hedley Byrne Co.* v. *Heller & Partners*, [1963] 2 All E.R. 575, [1964] A.C. 465 (H.L.); *Anns* v. *Merton London Borough Council*, [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.); *Junior Books Ltd.* v. *Veitchi Co.*, [1982] 3 All E.R. 201, [1983] A.C. 520 (H.L.); *Caparo Industries plc* c. *Dickman*, [1990] 1 All E.R. 568, [1990] 2 A.C. 605 (H.L.); *Murphy* v. *Brentwood District Council*, [1990] 2 All E.R. 908, [1990] 3 W.L.R. 414 (H.L.); *Kamloops (City)* v. *Nielsen*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 631; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 14, 31 D.L.R. (4th) 482; *B.D.C. Ltd.* v. *Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228, [1986] 3 W.W.R. 216; *Rothfield* v. *Manolakos*, [1989] 2 S.C.R. 1259; *Canadian National Railway Co.* v. *Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, 11 C.C.L.T. (2d) 1; and *London Drugs* v. *Brassart and Vanwinkel*, [1992] 3 S.C.R. 299, 97 D.L.R. (4th) 261.

30. *Ultramares Corp.* v. *Touch*, 255 N.Y. 170, 174 N.E. 441 at 444 *per* Cardozo J. (1931).

31. (1842), 152 E.R. 402, 11 L.J. 415. This case was interpreted as standing for the proposition that conduct of A constituting a breach of a contractual obligation to B could not concurrently give C, a third party, a cause of action in tort. From this, developed the now-rejected rule that manufacturers of products owed a duty of care only to those with whom they shared privity of contract. See, for example, F. Bohlen, *Studies in the Law of Torts* (Indianapolis: The Bobbs-Merrill Company, 1926) at 76-80; Fleming, *supra*, note 6 at 465-66; Wright, Linden & Klar, *supra*, note 6, c. 16 at 10; and *Huset* v. *J.I. Case Threshing Co.*, 120 F.865 (8th Cir. 1903).

of care as in *MacPherson* v. *Buick Motor Co.*[32] and *Donoghue* v. *Stevenson,*[33] but deny its existence in the particular facts before it, or recognize a duty but limit its nature and scope. The concept of negligence, on the other hand, is immune from such considerations, at least in theory. It is more concerned with the *case before the court* than with *other potential actions*, and its focus is the conduct of the specific defendant at bar. No doubt, a trier is aware that a judgment of negligence will affect future decisions involving similar conduct. Hence, even the question of whether the standard of liability has been met may be affected by considerations going beyond the specific facts of a case. Overall, however, there is a conceptual difference between the duty of care and negligence requirements, both with respect to the predominant focus of the inquiries and the factors considered in making these determinations.

The importance of distinguishing the duty of care issue from the negligence standard of liability is highlighted by the action for failure to warn. As will be shown in Part II, courts in Canada and in a majority of the United States require the manufacturer's knowledge—actual or constructive—of the danger which materialized before finding that a duty to warn with respect to said danger was *owed.* In principle, this inquiry is no different from the one adopted in most negligence causes of action. That is, it concentrates less on the conduct of a particular manufacturer than on broader considerations such as proximity, foreseeability, reliance, and reasonability. Unlike the typical cause of action for negligence, however, these courts do not endorse a fault based standard of liability during the second inquiry to determine whether said duty was *breached.* In a typical negligence case, this question is determined by focusing on the reasonableness of the defendant's conduct. Yet, when a duty to warn is triggered, courts ignore to a large extent the conduct of the manufacturer in considering the breach issue. Rather, they focus on factors common to other strict products liability actions such as the condition of

32. 217 N.Y. 382, 11 N.E. 1050 (1916) [hereinafter *MacPherson* v. *Buick*]. This decision is most famous in the United States for its rejection of the privity requirement derived from *Winterbottom* v. *Wright, ibid.*, and its adoption of a general rule, engulfing a patchwork of earlier exceptions, allowing consumers to sue manufacturers directly for breach of a duty of care, irrespective of contract.

33. *Supra*, note 14. In essence, this decision played the same role in Canada as *MacPherson* v. *Buick, ibid.*, did in the United States. In addition, the speech of Lord Atkin is famous generally for the "neighbour" principle concerning the existence of a duty of care (at 580-81) and its specific articulation in the field of products liability (at 599).

the product.[34] To state the matter somewhat differently, courts in both countries determine first whether a duty to warn was owed by using, *inter alia*, a foreseeability factor (*i.e.* by using a factor commonly used in a negligence *cause of action* with respect to the duty of care element), but then depart from the usual negligence inquiry by focusing almost exclusively on the nature of the product and largely ignoring the conduct of the manufacturer (*i.e.* by adopting a *standard of liability* which is not concerned with the reasonableness of the manufacturer's conduct).

If a failure to warn action were decided on the basis of a negligence standard of liability, one would expect a typical case to ask, *inter alia*,[35] two fundamental questions: (1) whether or not the manufacturer owed a duty to warn the plaintiff with respect to the risk which materialized and caused harm to said plaintiff and (2) if the first answer is affirmative, whether the manufacturer acted negligently in all the circumstances thereby breaching its duty. As in a typical negligence case, the first inquiry would consider the proximity of relation between the parties, the manufacturer's foreseeability of the danger, any reliance coming from the plaintiff, and the reasonableness or otherwise of imposing a duty on the manufacturer. These factors would determine not only whether a duty to warn was owed to the plaintiff, but its nature and scope. If the analysis leads to the conclusion that no duty was owed to the plaintiff, the inquiry is over and the manufacturer is not liable. There would be no need to address the reasonableness of the manufacturer's conduct, the defective nature of the product, the damage caused to the plaintiff, or the causation between the defect and damage.

If, however, the answer to the first question is "yes", the trier must ask whether this duty was breached and the focus then becomes the conduct of the defendant manufacturer. Part of the answer requires determining

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34. Many courts and commentators in the United States use these elements to distinguish a fault based test of liability from strict products liability. It is said that the focus in the latter case is not the reasonableness of the manufacturer's *conduct* but the condition of the *product* supplied. See, for example, *Barker* v. *Lull Engineering Co.*, 20 Cal.3d 413, 573 P.2d 443 at 447 (1979) [cited to P.2d]; *Jackson* v. *Coast Paint and Lacquer Co.*, 499 F.2d 809 at 812 (9th Cir. 1974); Keeton, *supra*, note 16 at 315; Wade, "On Product 'Design Defects' and Their Actionability" (1980) 33 Vand. L. Rev. 551 at 553; and Weinstein *et al.*, "Product Liability: An Interaction of Law and Technology" (1974), 12 Duquesne L. Rev. 425 at 429. Although this distinction has come under recent attack by some academics, notably in J.A. Henderson & A.D. Twerski, "Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn" (1990), 65 N.Y.U.L. Rev. 265, it continues to receive the endorsement of many courts including the Supreme Court of California in *Anderson* v. *Owens-Corning Fiberglas Corp.*, 53 Cal.3d 987, 810 P.2d 549 (1991) [hereinafter *Anderson* v. *Owens-Corning* cited to P.2d].

35. As noted in the introduction, regardless of the standard of liability adopted, it is clear that a plaintiff must establish the existence of a defect in the product, some damage resulting from said defect, and a causal connection between the defect and the damage suffered.

whether the manufacturer gave a warning and, if so, whether it was adequate in all the circumstances. But this only addresses the defective nature of the product and tells us nothing about the behaviour of the manufacturer. Under a negligence theory, one should not only *ask* whether the manufacturer's behaviour was negligent; one should actually *answer* this question. It would not be sufficient under this second inquiry to focus solely on the condition of the product and to answer that it was defective. As noted, although the existence of a defect is indeed crucial in a negligence cause of action, it is not the chief concern at this stage of the inquiry. Rather, a trier ought to concentrate on the *actions* of the manufacturer in putting a product on the market with a warning of the sort in question. Thus, one expects the balancing of a number of factors such as the costs of avoiding the accident, the costs of harm, and the likelihood that the risk will materialize, in order to determine whether the manufacturer created, by its conduct, an unreasonable risk of harm to others.

B. *Strict Liability*

As previously noted, few courts and commentators attribute to the concept of strict liability a meaning beyond that of implying a rejection of a fault based standard of liability.[36] The example previously given about the *Report on Products Liability* remains apposite. Most understand the proposition that a defendant is held strictly liable for harm caused as simply meaning that the defendant is responsible regardless of any care—or lack thereof—exercised in avoiding said harm. In other words, the common definition is purely negative: it tells us that strict liability is *not* concerned with fault when deciding whether the defendant is responsible, but adds little to indicate what it *is* concerned with. This is true not only when the concept is used with respect to defective products, but also when used to describe the judicial treatment of hazards such as dangerous animals, dangerous substances brought onto one's land, and ultrahazardous activities, as well as when dealing with liability of sellers for breach of implied warranties. When those involved in the products liability debate turn to these latter examples for reassurance that strict liability in torts is not a new development—or, conversely, that negligence is not as fundamental and established as some might believe—they only refer to the rejection of fault implicit in those realms of decision-making.

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36. For an effort to advance some substantive content to the concept of strict liability, see G. Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (New Haven, CN: Yale University press, 1970) and G. Calabresi & J.T. Hirschoff, "Toward a Test for Strict Liability in Torts" (1972), 81 Yale L.J. 1055.

In this sense, strict liability has the appearance of being a versatile concept, capable of describing liability for, *inter alia*, defective products (in contract *and* in tort), dangerous animals, dangerous substances, and ultrahazardous activities, without requiring specific adaptations as when a negligence standard is used. Indeed, while it is also possible to describe superficially the standard of liability governing medical malpractice, professional responsibility, and automobile accidents with the universal "reasonable care in all the circumstances" principle, one needs little imagination to understand that important differences exist in the way this standard is applied in each context. The reason for this is simple: the negligence standard has a positive meaning, telling us what is considered relevant for deciding against the defendant—fault. This, naturally, varies with the circumstances. Strict liability, on the other hand, tells us nothing in its common usage about what it considers relevant for making a decision, other than that negligence is *not* relevant. Nevertheless, the concept of strict liability tailors itself to each specific area in which it is used. A decision to adopt the strict liability standard is not merely a decision to reject an inquiry into fault. It is a conscious decision to change both the questions asked and the focus of the inquiry.

It is generally recognized, in matters of products liability, that a standard of strict liability eliminates the requirement of fault on the part of the manufacturer. The reasonableness of the manufacturer's conduct becomes immaterial and the focus is exclusively on the defective nature of the product. Unlike negligence liability, which emphasizes the conduct of the manufacturer, strict liability is concerned solely with whether the product allegedly causing damage to the plaintiff was in a defective condition at the time of the accident.[37] As when negligence is the norm, the inquiry into the defectiveness of a product usually takes one of three forms: (1) an inquiry into the manufacturing of the product; (2) an inquiry into the design of the product; and/or (3) an inquiry into the warnings accompanying the product. It is relatively easy to determine whether a product contains a manufacturing defect, simply by comparing the product causing the plaintiff's injuries with a similar product manufactured according to specifications.[38] But when it comes to design defects and especially defects in warnings, it is harder to make this determination as courts are faced with *choices*, and not simply *results*.[39]

37. *Supra*, note 34 and accompanying text.
38. *Supra*, note 14.
39. *Ibid.*

In the United States, the vast majority of states have adopted, either judicially or legislatively, a principle of strict products liability in tort modeled on § 402A of the *Restatement (Second) in Torts*.[40] Under this section, someone who sells a product "in a defective condition unreasonably dangerous to the user or consumer" will be liable for physical and property damages thereby caused.[41] This rule is said to apply "although the seller has exercised all possible care in the preparation and sale" of its product.[42] This gives the rule its distinctive strict liability flavour. It directs a court to focus not on the conduct of the manufacturer and whether it was reasonable in all the circumstances, but on the defective nature of the product. Section 402A does add a modifier to this analysis, however, with the statement that the defective product must be "unreasonably dangerous". Obviously, this is not directed to the reasonableness of the manufacturer's conduct as there would be serious inconsistencies within the rule. Rather, it means that the product sold "must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics".[43] This consumer expectations qualification, if desired, could easily be incorporated into the very definition of what is a "defect", instead of being attached as a separate element. Indeed, some state courts and legislatures have rejected this modifier only to re-channel the consumer expectations component into the definition of defect itself.[44]

Any discussion of strict liability would not be complete without some reference to the policy considerations giving rise to this alternative form

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40. W.L. Prosser, "The Fall of the Citadel (Strict Liability to the Consumer)" (1966), 50 Minn. L. Rev. 791 at 793-98 describes the rapid pace at which states recognized strict liability following the publication in 1965 of § 402A of the *Restatement (Second) of Torts*. By 1966, it had been adopted by legislation or judicial decision in 24 states. For the current situation, see "State Chart—Acceptance of Strict Liability", 1 Products Liability Reporter (C.C.H.) ¶ 4016 (November 1988—April 1989), summarizing recognition of strict products liability in all the states, the District of Columbia, and Puerto Rico as follows: (1) 37 states and the District of Columbia adopt the Restatement's version of strict tort liability; (2) 8 states and Puerto Rico recognize variations of § 402A; (3) Delaware, Massachussetts, Michigan, North Carolina, and Virginia have not yet adopted strict tort liability; and (4) in all, the "unreasonably dangerous" condition in § 402A has been rejected by 9 states, including California and New York, and Puerto Rico.

41. This applies, provided the seller is engaged in the business of selling such a product, and it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold: *Restatement (Second) of Torts* § 402A(1)(a) & (b) (1965).

42. *Restatement (Second) of Torts* § 402A(2)(a) (1965). Moreover, subsection 2(b) provides that the rule applies regardless of privity of contract.

43. *Restatement (Second) of Torts* § 402A (1965), Comment i.

44. See, for example, *Barker* v. *Lull Engineering Co.*, *supra*, note 34. On this point, see also "State Chart—Acceptance of Strict Liability", *supra*, note 40.

of liability. The principal rationales are found in the concurring reasons of Mr. Justice Traynor in *Escola* v. *Coca Cola Bottling Co.*[45] and in his opinion for the Court in *Greenman* v. *Yuba Power Products Inc.*,[46] two landmark decisions in this area which incorporate by reference the works of numerous commentators such as Prosser and Calabresi. These rationales include: the manufacturer is in the best position to avoid the risks of injury by taking preventive measures; the loss may be overwhelming for the plaintiff, but the manufacturer can procure insurance and distribute the loss to society as a cost of doing business; regardless of negligence, the manufacturer is *responsible* for products placed on the market and should bear the loss; it is often difficult for the injured person to establish negligence; the trier of fact often applies, in effect, strict liability via the use of evidential shortcuts such as *res ipsa loquitur*; many statutes already endorse a strict liability rule in the case of food products; the current principle allowing the plaintiff to sue the retailer for breach of warranty (*i.e.* in strict liability[47]) but not the manufacturer—who can nevertheless be sued for breach of warranty by the seller—is needlessly circuitous and engenders wasteful litigation; in food products cases, many courts have created exceptions to the privity of contract rule and have extended the warranty from the manufacturer to the consumer, thus allowing the latter to sue the former directly for breach of warranty (*i.e.* in strict liability); sales warranties serve the purposes of deterrence and compensation "fitfully at best"; and, there is greater reliance today as consumers lack the means and skills to fully investigate every product and their vigilance is lulled by advertising and market devices.[48] Recently, it has been observed that these rationales only go so far, and that strict liability "was never intended to make the manufacturer or distributor of a product its insurer".[49] Concerns about fairness to the defendant manufacturer have also been raised to counterbalance these policy goals.[50]

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45. 24 Cal.2d 453, 150 P.2d 436 (1944) [hereinafter *Escola* cited to P.2d].
46. 59 Cal.2d 57, 377 P.2d 897 (1963) [hereinafter *Greenman* cited to P.2d].
47. See Prosser and Waddams, *supra*, note 26.
48. For more on the justifications for strict liability in tort, see generally Prosser, *ibid.* See also Wertheimer, *supra*, note 4 at 1184-91 (insuring adequate compensation and fairness for those injured by defective products) and Calabresi, *The Cost of Accidents*, *supra*, note 41 and G. Calabresi, "Optimal Deterrence and Accidents" (1975), 84 Yale L.J. 656 (placing the burden for defective products on the party who is in the best position to insure itself against the loss, to take preventive measures and to spread the loss amongst all those who benefit from products in society).
49. *Anderson* v. *Owens-Corning*, *supra*, note 34 at 552.
50. See, for example, J.A. Henderson & A.D. Twerski, "A Proposed Revision of Section 402A of the *Restatement (Second) of Torts*" (1992), 77 Cornell L. Rev. 1512.

In a failure to warn action, the adoption of a strict liability theory should mean that the conduct, knowledge, and actions of the defendant manufacturer in putting its product on the market ought to be immaterial. The focus of the inquiry should be solely on the defective nature of the product. Factors such as foreseeability of the risk, used at the stage of determining whether a duty to warn arises, would be irrelevant. Similarly, the reasonable care exercised by the manufacturer would not be considered with respect to the breach issue. It is often said that the goal of providing warnings on products is twofold: first, reducing the risk of accidents, and second, offering sufficient information to consumers to allow them to make informed decisions as to whether to use a product.[51] With respect to defects traceable to a product's warnings, one would expect the analysis to be centred exclusively on the defective nature of the product in relation to these underlying goals. That is, once it is clear that the risk in question was non-obvious,[52] the question would be whether the product contained a warning sufficient to transmit to consumers the nature of the danger involved, the ways to prevent or avoid a materialization of the risk, and the emergency measures to take in case of an accident, thereby reducing the risk of accidents and enabling consumers to make informed decisions. If the warning is "adequate" in all the circumstances, the manufacturer would not be liable for failing to warn even if signs of negligence are otherwise present. Conversely, if the warning is "inadequate", the manufacturer would be liable for losses caused by this defect even if it exercised all reasonable care in the circumstances to warn consumers of risks associated with its product.[53]

II. *The Prevailing Standards of Liability as Applied in Practice*

A. *The Situation in Canada*

As noted, negligence is the standard of tort liability adopted by Canadian courts when dealing with defective products. When the alleged defect is based upon a manufacturer's failure to warn, this standard implies that two questions will be addressed in judging a manufacturer's responsibility: first, whether the manufacturer owed a duty to warn the plaintiff of the risk which materialized and allegedly caused harm to the plaintiff, and

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51. See, for example, Henderson & Twerski, *supra*, note 34 at 285-86 and Note, "Reformulating the Strict Liability Failure to Warn", *supra*, note 4.

52. I say "non-obvious" because neither the risk-reduction nor the informed-decision objectives are promoted by requiring a manufacturer to warn against obvious dangers, such as the sharpness of a knife.

53. See generally Gershonowitz, *supra*, note 4 and M.S. Madden, "The Duty to Warn in Products Liability: Contours and Criticism" (1987), 89 W.Va. L. Rev. 221.

second, if so, whether the manufacturer breached this duty in the circumstances of the case.[54] In an attempt to scrutinize the rhetoric of negligence, I shall examine how each of these inquiries are conducted in practice.[55]

Among the factors traditionally considered when determining whether a duty of care arises in a particular situation, one receives particular attention when a duty to warn is at issue: foreseeability of the risk. In every Canadian decision involving a manufacturer's alleged failure to warn of a danger associated with its product, whether or not said risk is inherent in the use of the product or the result of a defect in manufacture or design, there is mention of the manufacturer's knowledge (or lack thereof) of the danger posed by its product. Excluding cases where the plaintiff is not a consumer and those where the defendant is not a manufacturer, in the strictest sense of these terms, there is little discussion about the proximity of relationship between the parties, the reliance placed on the defendant, or the reasonableness or otherwise of imposing a duty to warn on the manufacturer. After *Donoghue* v. *Stevenson* and its progeny, these elements are largely taken for granted. If the defect is traceable to the manufacturer's failure to warn, the first inquiry usually concentrates entirely on foreseeability of the risk which materialized and caused damage to the plaintiff.

Originally, courts focused on the manufacturer's *actual* knowledge of the risk. An example is the 1971 decision of the Supreme Court of Canada in *Lambert* v. *Lastoplex*.[56] This case involved the manufacturer of a fast drying lacquer sealer called Supremo W-200. The product was known by the manufacturer to be highly inflammable and its container bore three separate cautions to this effect, notably warning against using the product

54. Again, there are other issues—not directly considered herein—which must be addressed before finding the manufacturer liable, such as the causal connection between a failure to warn and the damages suffered by the plaintiff, the assessment of these damages, and conduct on the part of the plaintiff which may evidence an assumption of risk or contributory negligence.

55. The relevance of the first question will become apparent when considering the situation in the United States and during the analysis in Part III. At this stage, one may doubt that Canadian courts actually depart from fault-based liability when inquiring whether or not a manufacturer owed a duty to warn of a particular risk. The short answer is that, indeed, they do *not* greatly differ during this inquiry from a theory of negligence. Rather, it is during the second inquiry that courts commonly leave the principles of negligence behind. Examples of the manner in which the standard of liability differs in practice from theory will therefore appear mostly when the second question is addressed.

56. *Supra*, note 14. See also *Stewart* v. *Lepage's Inc.*, [1955] O.R. 937 (H.C.) (manufacturer knew at least five years before an accident that its glue had propensity to blow caps off containers) and *Schmitz* v. *Stoveld* (1974), 11 O.R. (2d) 17, 64 D.L.R. (3d) 615 (Co. Ct.) (manufacturer of floor sealer and varnish knew of the risk of fire and explosion associated with its product).

near open flames. The plaintiff planned to use the product to seal the floor of a recreation room located in the basement of his house. A furnace and water heater equipped with pilot lights were located in the basement in an adjoining room. Although the plaintiff turned down the thermostat of the furnace and took other precautionary measures, he did not extinguish the pilot lights. He began to apply the sealer and approximately one hour later, the fumes from the product came into contact with one or both of the pilot lights causing a fire and leading to an explosion which injured the plaintiff and caused property damage. The plaintiff sued in negligence arguing, *inter alia*, that the manufacturer had failed to give an adequate warning about the volatility and inflammability of its product.

Mr. Justice Laskin, writing for a unanimous court, began his analysis of the duty to warn by emphasizing that the hazard of fire attributable to Supremo W-200 was clearly known to the manufacturer. From this, Laskin J. noted there was "hence no need here to consider whether any other basis of liability would be justified if the manufacturer was unaware or could not reasonably be expected to know (if that be conceivable) of particular dangers which its product in fact had for the public at large or for a particular class of users".[57] Arguably, he was alluding to strict liability in this excerpt. In this respect, he was juxtaposing negligence—with the foreseeability factor central to a duty to warn—with strict liability, and dismissing the possibility that "another basis of liability" might be available and preferable even when the manufacturer is aware of the risk involved. Implicit in Laskin J.'s comment are assumptions commonly held that foreseeability of the risk is relevant solely in an action based on negligence and that it is unnecessary to look for an alternative basis of liability when such an element is present.

In my view, suppositions like these are largely responsible for the continuing myth that Canadian courts apply a pure theory of negligence in failure to warn cases. Many courts appear to think that in order to sustain a finding of negligence it is sufficient to find that the manufacturer knew, or should have known, of the risk, regardless of the defendant's otherwise reasonable behaviour. I am not suggesting that these courts are wrongly applying the concept of foreseeability. Rather, I submit that contrary to common assumption, a finding that the manufacturer knew or should have known of a danger does not (nor should it) preclude a standard of liability other than negligence from being applied in deciding whether a manufacturer ought to bear the loss for damages caused by its products, and that another standard is indeed applied.

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57. *Lambert* v. *Lastoplex*, *supra*, note 14 at 124.

Laskin J. then described the nature of the duty owed by manufacturers with respect to their products. He distinguished the duty to manufacture products safely from the duty to warn by noting that respecting the former does not necessarily discharge the latter. If a product put on the market for ultimate purchase and use by the general public is properly manufactured but nonetheless dangerous to use, and the manufacturer is aware of its dangerous character, it cannot "without more, pass the risk of injury to the consumer".[58] In such a situation, a duty to warn is triggered: the manufacturer "knowing of their hazardous nature, has a duty to specify the attendant dangers".[59] The scope of the duty to warn is said to vary with the circumstances of the case, requiring a degree of explicitness appropriate to the danger likely to be encountered in the ordinary use of the product. I will return to the question of whether the manufacturer of Supremo W-200 breached this duty. For now, it is sufficient to note the crucial role played by the manufacturer's knowledge of the danger in determining whether a duty to warn arose.

Despite the language chosen by Laskin J., courts did not hesitate to extend the duty to warn to situations where, although there was little evidence supporting a finding of actual knowledge, the circumstances justified an inference that the manufacturer knew of the risk associated with its product or "should have known" about it. For example, in *Meilleur* v. *U.N.I.-Crete Can. Ltd.*,[60] an employee using a liquid concrete additive ("Uni-Crete XL") to seal the interior of a tunnel under construction became permanently blind when accidentally sprayed in the face with the substance. The employee was not wearing protective eye-wear at the time of the accident. The labels on the drums of Uni-Crete XL warned generally of its irritant propensities, but not of possible blindness. The manufacturer and distributor were sued in negligence and they replied, *inter alia*, that they did not know that their product could cause blindness. Mr. Justice Steele disregarded this argument, stating that the real question was whether the risk of blindness was so foreseeable that they *should have known* of the danger. Relying on trade standards concerning corrosive products such as Uni-Crete XL, and the fact that the defendants knew that their product was highly corrosive, Steele J. found that the defendants should have been aware of the dangerous nature of their product and should have given better warnings.

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58. *Ibid.* at 125.
59. *Ibid.*
60. (1985), 32 C.C.L.T. 126, 15 C.L.R. 191 (Ont. H.C.) [hereinafter *Meilleur* v. *U.N.I.-Crete* cited to C.C.L.T.].

A similar analysis is found in *Smithson and Smithson* v. *Saskem Chemicals Ltd.*[61] In this case, one of the plaintiffs used a chemical drain cleaner ("Drainex") to unblock a floor drain in the dry cleaning plant owned and operated by herself and her husband. Four days later, the problem was persisting and she applied a second chemical ("Gillette's lye") manufactured by another company. A violent reaction occurred during the second application. The plaintiff was splattered with the chemical substance, suffered severe burns, and became permanently blind. She and her husband sued the manufacturers and retailers of both products. Both products were labelled as appropriate for cleaning drains and were marked corrosive in conformity with federal requirements. The labels also indicated that the products contained sulphuric acid (Drainex) and sodium hydroxide (lye) respectively, but did not specify the percentage of these chemicals. Drainex cautioned to "not use where other drain chemicals are present", whereas the second product was silent on this issue. In defence, the manufacturer of lye argued that it did not owe a duty to warn because it was unaware that its product could contribute to such a violent reaction when mixed with sulphuric acid. Noble J. rejected this argument because of the following: there are many decisions in the United States where a similar product did cause these damages; both manufacturers should know that all drain cleaners contain some form of acid or sodium hydroxide; and, both manufacturers should have realised that the mixing of these products created a "very real and in that sense a foreseeable risk".[62] In other words, regardless of the manufacturer's actual knowledge, the circumstances indicated that it should have been aware of the risk.

61. (1985), 43 Sask. R. 1, [1986] 1 W.W.R. 145 (Q.B.) [hereinafter *Smithson* v. *Saskem Chemicals* cited to W.W.R.].
62. *Ibid.* at 153-54.

Buchan v. *Ortho Pharmaceutical (Canada) Ltd.*,[63] *Rothwell* v. *Raes and Connaught Laboratories*,[64] and many other decisions[65] may also be cited for the proposition that a manufacturer has a duty to warn of risks not only known, but reasonably knowable. The decisions mentioned thus far deal with risks inherent in the use of certain products—the volatility and inflammability of a sealer, the danger to eyesight of a concrete additive, the danger of mixing drain cleaners, the serious side effects of certain pharmaceutical products, and so on. In these cases, the product was manufactured according to specifications and arguments about design defects were either rejected or ignored. The only claim in tort sustained was that the manufacturer failed to warn of a risk inherent to the use of the product.

Other decisions apply the manufacturer's duty to warn to risks which are, in some respects, "external" to the product and result instead from a defect in its manufacture or design. These decisions are particularly noticeable because courts continue to focus on the manufacturer's *actual* knowledge of the risk and seem reluctant to adopt a reasonably *knowable* standard. A telling example is the 1973 Supreme Court of Canada decision in *Rivtow* v. *Washington Iron Works*,[66] where the Court held that the manufacturer and the supplier of cranes were under a duty to warn those to whom the cranes had been supplied of a defect in design of which they became aware and which made the cranes dangerous for their intended purpose.

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63. (1986), 52 O.R. (2d) 92, 25 D.L.R. (4th) 658 at 666 [hereinafter *Buchan* v. *Ortho* cited to D.L.R.].

64. (1988), 66 O.R. (2d) 449, 54 D.L.R. (4th) 193 at 336 (H.C.) [hereinafter *Rothwell* v. *Raes* cited to D.L.R.].

65. See, for example, *Labrecque* v. *Saskatchewan Wheat Pool*, [1980] 3 W.W.R. 558, 110 D.L.R. (3d) 686 at 691 (Sask. C.A.) *reversing in part*, [1977] 6 W.W.R. 122, 78 D.L.R. (3d) 289 (Q.B.) [cited to D.L.R.] (a manufacturer of herbicide "ought to have known" the characteristics of the product which made it suitable for use on flax crops only under certain specific conditions); *Cominco Ltd.* v. *Westinghouse Can. Ltd.* (1981), 45 B.C.L.R. 26, 127 D.L.R. (3d) 544 *reversed on other grounds* (1983), 45 B.C.L.R. 35, 147 D.L.R. (3d) 279 [hereinafter *Cominco* v. *Westinghouse* cited to D.L.R.] (evidence sufficient to support a conclusion that the defendant knew or ought to have known of a cable's propensity to catch fire); *Pirie* v. *Merck Frosst Canada Inc.* (1989), 243 A.P.R. 337, 96 N.B.R. (2d) 337 (Q.B.) [hereinafter *Pirie* v. *Merck Frosst* cited to A.P.R.] (the expert evidence supports an inference that a manufacturer of herbicide used for potatoes knew that increased loss of potatoes from bacterial soft rot was an inherent risk associated with the use of the product on potatoes that were coming wet from the field, after a wet season, to be placed in storage without forced ventilation); and *Chase* v. *Goodyear Tire & Rubber Co.* (1991), 291 A.P.R. 181, 115 N.B.R. (2d) 181 (Q.B.) [hereinafter *Chase* v. *Goodyear* cited to A.P.R.] (because of a number of complaints made each year, a manufacturer of tires "should have anticipated" that the radial cords of its tires may have gradually weakened through over-deflection while the tire has been in use, that the sidewalls may explode while being inflated, and that anybody inflating the tire should use the "clip-on" air valve and stand well away when the tire is being inflated).

66. *Supra*, note 14.

The plaintiff in *Rivtow* v. *Washington Iron Works* used special cranes in its logging business. The cranes were designed and manufactured by one defendant and supplied by the other. To both defendants' knowledge, a defective design made the continuous use of the cranes dangerous—cracks in the mountings would develop under operation leading to potential collapse. Extensive repairs and alterations were required to render the cranes safe for their intended purpose. Despite having actual knowledge of the defect and of the use the plaintiff intended to make of the cranes, neither of the defendants took any steps to warn of the potential danger and necessity for repairs. Indeed, the plaintiff was first made aware of the seriousness of the situation during the busiest season of the year when, following a fatal accident involving another crane designed and manufactured by the same manufacturer, the plaintiff took the precaution of inspecting its cranes for structural defects. During inspection, it discovered what the defendants knew of the defect many months earlier. The plaintiff sued the manufacturer and supplier for the costs of repairing the cranes and for the loss of profits suffered while the cranes were idle.

The decision of the Supreme Court is mostly noted for its discussion of the plaintiff's attempt to recover in tort for purely economic losses.[67] The aspect on which I concentrate here is the Court's treatment of the duty to warn. Writing for a 7-2 majority, Ritchie J. observed on several occasions that the plaintiff's suit was based on a failure to warn and not on a negligent manufacture and design of the product supplied. According to Ritchie J., "[t]he difference between the two types of liability and consequent damage is that one may arise without the manufacturer having any knowledge of the defect, *whereas the other stems from his awareness of the danger to which the defect gives rise*."[68] In other words, the defendant's actual knowledge of the risk is not only an aggravating circumstance in determining the existence of a duty to warn, it is a *sine qua non*.[69] The reasons of Ritchie J. are replete with references to the defendants' actual knowledge of the risk posed by the defective cranes,

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67. On this aspect, a more recent discussion may be found in *Canadian National Railway Co.* v. *Norsk Pacific Steamship Co.*, *supra*, note 29.

68. *Supra*, note 14 at 542 [emphasis added].

69. Ritchie J. characterized the basis of liability in this way in order to deal with the problem of recovery for purely economic loss presented by the plaintiff's claim. Apparently, it was acceptable to the majority to allow a claim for economic loss in circumstances where a manufacturer could have prevented the losses at very little cost had it disclosed the information to which it was privy. However, the majority seemed uneasy about allowing such recovery where only a defect in manufacture or design was present and this on the assumption that such defects do not necessarily carry with them the defendant's knowledge of the risk involved.

of the person who would be using the cranes, and of the purpose for which this person would use the cranes.[70] This knowledge carried with it a duty to warn those to whom the cranes had been supplied of the danger, a duty which "arose at the moment when the [defendants] or either of them became seized with the knowledge".[71] Even if the defect was discovered after the product's supply, the defendants had a duty to warn those to whom the product had already been supplied.[72]

Another illustration is offered by the decision of the Saskatchewan Court of Appeal in *Setrakov Construction Ltd.* v. *Winder's Storage & Distributors Ltd.*[73] There, the owner of a 1969 Caterpillar tractor hired a common carrier to move the tractor a short distance. The carrier loaded the tractor onto a trailer purchased as a used unit from its manufacturer, the Fruehauf Trailer Company of Canada. Apparently because of the trailer's defective suspension, the tractor was thrown off and damaged shortly after beginning its voyage. The owner of the tractor recovered in full from the common carrier since the latter was legislatively subject to absolute liability. The Court held, however, that the carrier could recover against the manufacturer of the trailer in tort for the amount of damages awarded to the owner. The manufacturer had been informed by the manufacturer of the trailer's suspension of a design defect and of the need for remedial measures. The former nonetheless supplied the trailer to the carrier without warning. Relying on *Rivtow* v. *Washington Iron Works*, Hall J.A. held that the manufacturer of the trailer "had the duty either to make the trailer safe before it was sold or to warn [the carrier]. It's failure to do either was the cause of the accident and it is liable."[74] Again, the manufacturer knew of the risk and of the person who would suffer should such a risk materialize.

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70. In this respect, the emphasis was placed not only on the defendants' foreseeability of the risk, but also on their foreseeability of the ultimate plaintiff.

71. *Supra*, note 14 at 536.

72. On the post-supply duty to warn, see also *Cominco* v. *Westinghouse*, *supra*, note 65; *Nicholson* v. *John Deere Ltd.*, *supra*, note 14 (manufacturer of a lawn mower has a duty to warn users upon becoming aware of a design defect creating an unreasonable risk of fire); and *N.S. (Ministry of Government Services)* v. *Picker Canada Ltd.* (1989), 92 N.S.R. (2d) 385, 237 A.P.R. 385 (T.D.) (manufacturer of a component part used in an X-ray machine has a duty to warn the manufacturer of the ultimate product about a defect in the component part after becoming aware of it, even though the component has already been incorporated into the product).

73. (1981), 11 Sask. R. 286, 128 D.L.R. (3d) 301 (C.A.) [hereinafter *Setrakov* v. *Winder's* cited to D.L.R.]. No mention is made of Saskatchewan's *Consumer Products Warranties Act*, R.S.S. 1978, c. C-30. The part of this decision relevant to this article addresses the manufacturer's liability in tort.

74. *Ibid.* at 304.

McCain Foods Ltd. v. *Grand Falls Industries Ltd.*[75] provides a recent example of failure to warn in conjunction with manufacture and design defects. In late 1986, the plaintiff hired a crane mounted on a truck and an operator to lift a heavy juice packaging machine and load it on a trailer for delivery. The lessor of the crane (Grand Falls) had purchased it second hand in 1980, when it was already twelve years old. The life expectancy of the crane was twenty years. Due to a defect in the mounting of the crane which occurred during manufacturing in 1967-68, the crane collapsed during the procedure causing substantial damage to the juice packaging machine. The manufacturer had issued service bulletins in 1977 and 1981 with respect to the fatigue of the welded structures of the crane, but Grand Falls had not received them. The plaintiff sued Grand Falls for breach of an implied warranty of fitness as well as the manufacturer for negligence. The trial judge found Grand Falls liable to the plaintiff for its damages, but found that the former was entitled to be fully indemnified by the manufacturer for negligence in manufacturing the crane. The manufacturer appealed arguing that there was insufficient evidence of negligence and that the trial judge imposed a standard of care close to that expected of an insurer.

Angers J.A., writing for the majority, essentially equated the finding of a *defect* in the court below with a finding of *negligence* in the manufacture of the crane. But, in an attempt to de-emphasize the lack of evidence of negligence, he held that this defect only "contributed to the loss".[76] The real cause of the accident, according to him, was the manufacturer's failure to warn a "known consumer" (Grand Falls) of the defect. Although the manufacturer was aware of "the possibility of a problem developing with the welding" of its cranes and was aware that Grand Falls had purchased one of the cranes "with a potential welding problem", there was no evidence that it had taken any steps to specifically warn Grand Falls. Knowledge of a potential defect in the manufacture of the crane imposed a duty upon the manufacturer to ensure that a "known

75. (1991), 116 N.B.R. (2d) 22, 80 D.L.R. (4th) 252 (C.A.), *varying* (1990), 106 N.B.R. (2d) 296, 67 D.L.R. (4th) 29 (Q.B.), *leave to appeal to S.C.C. denied* 85 D.L.R. (4th) viii [hereinafter *McCain* v. *Grand Falls* cited to D.L.R.].
76. *Ibid.* at 261.

consumer" was made aware of the potential danger posed thereby.[77] Service bulletins issued on two occasions were not sufficient to bring the matter home to Grand Falls.[78]

Assuming a duty to warn was owed to the plaintiff, the next question is whether this duty was breached. I now turn to this question. As mentioned in Part I, when the standard of liability is negligence, this question is answered by focusing on the manufacturer's conduct in all the circumstances and asking whether a reasonable person placed in like circumstances would have behaved similarly. If so, the manufacturer's conduct is adjudged reasonable and there is no liability for any harm caused. In an action for failure to warn, however, it is apparent that many Canadian courts are not primarily concerned with the conduct of the manufacturers. They focus instead on the product which caused harm to the plaintiff and only ask whether it is defective. In this respect, the inquiry is similar in form to the question of whether a product contains a defect in manufacture or design. It is a technical analysis, detached from the manufacturer's conduct, and focusing solely on the nature of the product before the court. The ultimate question is not whether the behaviour at issue creates an unreasonable risk of harm to others, but whether the product, detached from its manufacturer's behaviour, falls below the standards which, at this time and place, courts declare as minimal for consumer products. Often, a manufacturer who supplies a product which is defective by reason of inadequate warnings will be held liable no matter how reasonable its conduct might be by traditional standards.

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77. Once again, this case highlights the other component of foreseeability that courts emphasize when dealing with a manufacturer's failure to warn of known defects: foreseeability of the user of the product. Further illustrations of a manufacturer's duty to warn of known defects in the manufacture or design of its product include *Lavoie* v. *Poitras Gas & Oil Ltd.* (1979), 28 N.B.R. (2d) 541, 63 A.P.R. 541 (C.A.) (manufacturer having knowledge of defective seems in a gasoline tank); *Nicholson* v. *John Deere, supra,* note 14 (manufacturer of lawn mower must warn of a design defect creating a risk of fire once it becomes aware of said defect); *Strata Plan N38* v. *Charmglow Prod.*, [1988] B.C.W.L.D. (manufacturer defectively designed its barbecue so as to permit placement of propane tanks directly under barbecue and failed to warn consumers against such use); and *McEvoy* v. *Ford Motor Co.* (1989), 17 A.C.W.S. (3d) 355, *supplementary reasons at* 41 B.C.L.R. (2d) 224, 18 A.C.W.S. (3d) 650, *and* 45 B.C.L.R. (2d) 363, 20 A.C.W.S. (3d) 760, *affirmed by* (1992), 63 B.C.L.R. (2d) 362, 88 D.L.R. (4th) 358 (*sub nom. McEvoy* v. *Capital Motors (Pouce Coupe B.C.) Ltd.*) (Canadian distributor of a pick-up truck manufactured in the United States was aware of a defect in the design of the park gear prior to purchase by the deceased, but took no steps to remedy the defect or to warn consumers).

78. However, Grand Falls was held 25% responsible for not having conducted a reasonable inspection of the crane upon its delivery.

For the purpose of analysis, case law addressing the breach issue may be divided into four broad categories. First, cases where the manufacturer offers no warning whatever about a known defect in the manufacture or design of a product which creates a risk of danger to its users. Second, cases where the manufacturer does give some warning of a known defect. Third, cases where the manufacturer gives no warning whatever about a known or knowable risk inherent to the use of an otherwise properly made and designed product—a product containing no apparent defects traceable to its manufacture or design. And fourth, cases where the manufacturer gives some warning of such a risk. The common denominator for the first two categories is the object of the duty. In these situations, the danger posed to consumers stems from a *defect* in the product traceable either to its manufacture or to its design, and the inquiry considers whether consumers were properly warned of this defect and its attendant danger. The duty to warn in the other two categories has a different object. In these contexts, the danger to consumers stems from a *risk* inherent in the use of an otherwise properly made and designed product.

I begin with categories one and three, that is, where the manufacturer has given no warning whatever of the danger stemming either from a known defect traceable to the manufacture or design of its product, or from some known or knowable characteristic inherent to its use. Examples of the former include *Rivtow* v. *Washington Iron Works* (no warning of known design defect in cranes),[79] *Setrakov* v. *Winder's* (no warning of known design defect in suspension of trailer),[80] and *McCain* v. *Grand Falls* (no warning of known defect in the manufacturing of crane).[81] Examples of the latter kind include *Smithson* v. *Saskem Chemicals* (no warning on drain cleaner of knowable danger of mixing with another drain cleaner),[82] *Pirie* v. *Merck Frosst* (no warning on fertilizer of knowable risk of bacterial soft rot to potatoes),[83] and *Skelhorn* v. *Remington Arms Company Inc.* (no warning on package of cartridges about how to avoid injury from misfires).[84]

Understandably, the question of breach is relatively straightforward when no warning whatsoever is provided. The focus is entirely on whether the manufacturer owed a duty to warn the plaintiff of the risk which materialized. If such a duty arose, this conclusion is essentially

79. *Supra*, note 14.
80. *Supra*, note 73.
81. *Supra*, note 75.
82. *Supra*, note 61.
83. *Supra*, note 65.
84. (1989), 69 Alta L.R. (2d) 298 (C.A.) [hereinafter *Skelhorn* v. *Remington*].

sufficient to find the manufacturer liable for damages caused by its failure to warn. The rationale appears to be that it is negligent behaviour for a manufacturer to fail to warn of defects in its products once it becomes seized with this knowledge, and that it is also negligent to supply products without warning of known or knowable dangers inherent to their use. Such behaviour creates an unreasonable risk of harm. In short, a reasonable manufacturer foreseeing such dangers would have behaved differently than the defendant; it would have provided at least *some* warning. To this extent, courts faced with cases of the first and third categories are relatively faithful to a negligence standard of liability. Arguably, the reason is less that they are particularly dedicated to fault-based liability, than that they have the fortune of dealing with facts where the respective manufacturers have done nothing to apprise consumers of very real and foreseeable dangers. In such situations, few would dispute that reasonable behaviour requires at the very least *some* form of warning.

Having said this, the standard of liability applied in these decisions may still be very demanding. Like negligence itself, the foreseeability requirement at the heart of the duty to warn can be manipulated depending on the desired result. Especially in cases involving dangers inherent in the use of a product,[85] many courts appear to give considerable weight to circumstantial evidence and impute to the manufacturer a sometimes

85. As mentioned above, courts dealing with a failure to warn of a defect in manufacture or design tend to limit foreseeability to the defendant's actual knowledge of the defect.

very refined knowledge of the risk.[86] These decisions are perhaps easier to reconcile with a standard of negligence, but they nonetheless reflect a trend towards imposing greater responsibilities on manufacturers. The inquiry into foreseeability is naturally characterized by retrospection. In an action for failure to warn, a risk somehow associated with a product *has* materialized, and the question is whether it is of such nature and magnitude that the defendant *ought to* have foreseen and specified it. But in answering this question it is worth keeping in mind the insightful words of Lord Simonds: "After the event even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility."[87] Although these decisions do not adopt a standard of strict liability in the sense defined here, they nonetheless sanction "stricter" liability for negligence. They demand greater foresight on the part of the reasonable manufacturer than was required in the past.

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86. For two recent examples, see *Pirie* v. *Merck Frosst*, *supra*, note 65 and *Skelhorn* v. *Remington*, *supra*, note 84. In the former, the trial judge observed that the expert witness of a potato supplement ("Mertect") manufacturer had written an article in July of 1979, shortly before the product was supplied to the plaintiff farmers, hinting at the risk of soft rot and recommending ventilation in storage bins as a precautionary measure. This expert worked "in conjunction with" the manufacturer, and thus McLellan J. found it was a "reasonable inference" that the latter knew of the article before supplying the product to the plaintiffs. The brochure accompanying the product never mentioned the risk of soft rot nor any other inherent risk associated with the use of Mertect. From this evidence, the trial judge concluded that the manufacturer "knew that increased loss from bacterial soft rot was an inherent risk associated with the use of Mertect on potatoes that were coming wet from the field after a wet season to be placed in storage without forced draft ventilation through the bins" (at 345). He held that the manufacturer was under a duty to warn consumers of this danger and that it was negligent for failing to do so. In *Skelhorn* v. *Remington*, the plaintiff was injured when attempting to remove a .22 calibre cartridge manufactured by the defendant from his rifle following a misfire. The cartridge exploded approximately 10 seconds after misfiring, possibly because it struck the ejector while the plaintiff was attempting to remove it using what was described as an unsafe method, not usually adopted by the plaintiff. The jury found no negligence in the manufacture or design of the cartridges, but found that the manufacturer owed—and had breached—a duty to warn about procedures to be used to avoid injury from misfires. On appeal, Irving J.A. reviewed the evidence on the issue of warning. The only evidence was one answer given by the manufacturer's expert witness. During cross-examination of this witness, plaintiff's counsel read an excerpt from "The American Rifleman" magazine to the effect that one ought to ensure that no protuberance might hit the cartridge's rim when attempting to dislodge a misfired cartridge, and asked (at 302): "Would you agree that that is good advice?" The expert witness replied "That's good advice." Based on this answer, Irving J.A. concluded "[t]here was evidence permitting the jury to find that the [manufacturer] was negligent by failing to give an appropriate general warning about extraction and ejection of unfired cartridges" (at 302). In both cases, the plaintiffs were held contributorily negligent and were assigned with 50% and 80% of the blame, respectively.

87. *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co. (The Wagon Mound)*, [1961] A.C. 388 at 424, [1961] 1 All E.R. 404 (P.C.).

I now address cases of the second category. Here, unlike the first category of cases, the manufacturer makes some attempt to warn consumers of the defect discovered in its product, either before supplying the product or afterwards. Manufacturers commonly issue service bulletins to distributors and sometimes directly to consumers, warning of various defects and requesting that remedial measures be taken. A warning can also appear on the product's packaging or in an accompanying manual. The ultimate warning in this category occurs when the product is recalled by the manufacturer for repairs or replacement. Here, the inquiry into whether the manufacturer has breached its duty to warn becomes more involved. It is no longer sufficient to concentrate on foreseeability of the risk and answer that the manufacturer failed to warn of a risk which was foreseen. Indeed, the manufacturer *has* made an attempt to fulfil its duty and the court must now evaluate this effort. Theory dictates that the focus be on the manufacturer's behaviour viewed through the spectacles of a reasonable person. But Canadian courts are gradually departing from this standard in such cases. Instead, they judge the manufacturer's efforts by focusing solely on the product at issue and asking whether the warning was adequate. In my view, the question of adequacy along with the inquiry which it necessarily entails has led Canadian courts closer to adopting a *de facto* standard of strict liability.

I did not find any reported decision in which the manufacturer gave a warning of a known defect where the warning was judged adequate to discharge its duty. Many defendants have made this argument. Indeed, the question of warning is raised not only by the plaintiff as a basis of liability, but increasingly by the manufacturer in order to excuse its conduct. To date, courts have dismissed such claims and have adopted a very strict approach on the adequacy issue. Some courts have ventured further, suggesting that even if a warning about a defect is adequate in the circumstances, it does not automatically dissolve liability for supplying a defective product. According to them, just because a manufacturer warns of known defects, it does not necessarily follow that it should escape liability for the underlying failure to manufacture or design the product carefully.

Nicholson v. *John Deere Ltd.*[88] provides a good illustration of these directions. The plaintiffs lost their home following a fire in May of 1981. On the day of the accident, one plaintiff was in the garage refilling the fuel tank of their garden and lawn riding mower purchased second hand in 1975, and manufactured by one of the defendants in 1967. The tractor's

88. *Supra*, note 14.

gas tank was located within close proximity of its battery. This particular model (model 112) came from the assembly line equipped with covered battery terminals, unlike its predecessor (model 110), but consumers and service people usually removed these covers. The plaintiff placed the tank's metal cap on the flat surface of the tank during the refuelling. The cap was instable partly because of a 15 cm. metal stick attached thereto which belonged at the time of manufacture to a fuel-gauge system no longer in working condition. The cap began to roll in the direction of the battery and some part of it came into contact with the uncovered positive battery terminal, causing a spark that ignited gasoline vapours which had gathered in the area. A fire ensued and the plaintiffs' home was destroyed. They sued the manufacturer of the tractor for negligent design and for failing to warn about the risk of fire caused by the close proximity of the exposed battery and the fuel tank. They also sued the person who had repaired their tractor on several occasions for negligent servicing and failure to warn.

The trial judge found that the plaintiff in question had behaved reasonably both before and after the accident. The sole cause of the fire was the close proximity of the exposed positive battery terminal to the fuel reservoir. In this respect, Smith J. found the manufacturer negligent on two alternative grounds. First, the placement of the battery and the tank in relation to each other represented a design defect creating an unreasonable risk of fire.[89] Alternatively, the manufacturer had failed to meet its duty to warn of this defect, once it became known. This was based on the assumption that it might be "casting too heavy a burden on the manufacturer given the state of art"[90] to hold that it ought to have known of the defect at the time of manufacture—a pre-condition to recovery under both grounds. However, once the manufacturer acquired this knowledge, it had a duty to warn consumers. There was evidence showing that the manufacturer had knowledge of the defect after the product's manufacture. Besides equipping the model 112 with a battery cover, the manufacturer issued the following warnings: the operator's manual "warned unequivocally and in several places against allowing sparks or flames near a charged battery", warned of not touching the battery with any metal objects during refuelling, and spoke of making sure that the positive battery terminal was covered with a rubber boot; a green label placed on

89. This defect was sufficient to allow the plaintiffs to recover in full for their losses, regardless of any warnings given by the manufacturer. Indeed, according to Smith J., that the manufacturer may have eventually warned of the problem ought not to discharge it from liability for the underlying defect. *Supra*, note 14 at 549.
90. *Ibid.* at 547.

the fuel tank was marked "danger" and repeated the warnings included in the manual; in early 1980 the manufacturer issued a battery cover safety kit and implemented a programme to advise users of models 110 and 112 of the hazard—it placed newspaper advertisements and sent unregistered letters to known original users and to territory managers and service managers informing them of the programme and urging users to have the safety kit installed; and, a "tagging parts" programme was implemented in conjunction with its dealers in the spring of 1981 whereby parts indigenous to the tractors at issue would be affixed with a card describing the potential problem.

In reviewing the manufacturer's efforts to warn consumers, Smith J. makes it clear that the duty to warn is extremely stringent.[91] With respect to the warnings given, he found the following: the plaintiffs' second hand tractor did not come with an owner's manual; the decal might not have been in place on the plaintiffs' tractor and, in any event, it "should have been of a red and white combination" instead of green;[92] both the manual and the warning "lack the specificity required of the warning which the ever-evolving law of products liability demands of manufacturers of dangerous products";[93] only a small fraction (15%) of owners targeted by the letters and advertisements were being reached and a sense of urgency was not transmitted to dealers; and, the tagging programme was "ambitious although largely unsuccessful" because it did not begin early enough in the year and did not follow up with dealers more aggressively. Thus, he held that the manufacturer had breached its duty to warn.[94]

Smith J.'s reasons focus exclusively on the nature of the warnings given, and place the extremely stringent standard of "ensuring" that users, even second hand purchasers like the plaintiffs, are made aware of a design defect.[95] One is left to wonder what other *reasonable actions* a reasonably prudent manufacturer ought to have taken in the circum-

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91. *Supra*, note 14 at 547 ("the burden upon the manufacturer is a heavy one of *ensuring* that the danger is brought home to the consumer") and at 549 ("duty to devise a programme that left nothing to chance") [emphasis in original].

92. *Ibid.* at 548.

93. *Ibid.* at 549.

94. Smith J. also found the repairer liable in negligence for not bringing the danger to the attention of the plaintiffs when the tractor was serviced in May of 1981: *ibid.* at 550-51. In other words, the manufacturer's efforts were sufficient to shift some responsibility for the loss to the repairer (who became aware of the safety kit programme), but not to the plaintiffs (who apparently did not). On this point, see also *Olshaski Farms Ltd.* v. *Skene Farm Equipment Ltd.* (1987), 49 Alta L.R. (2d) 249, [1987] 2 W.W.R. 691 (Q.B.).

95. It is noteworthy that the manufacturer's foreseeability of the plaintiff in *Nicholson* v. *John Deere Ltd.* was not as manifest as in the cases discussed earlier with respect to the duty issue.

stances? Clearly, the manufacturer's conduct in attempting to warn consumers of the danger was reasonable, but such was not the focus of the inquiry. *Nicholson* v. *John Deere Ltd.* demonstrates the extent to which Canadian products liability law is indeed "ever-evolving". However, contrary to what Smith J. appears willing to admit, at least with respect to failure to warn it is evolving in the direction of strict liability.

Another example from the second category is *Can-Arc Helicopters Ltd.* v. *Textron Inc.*[96] In October of 1987, a helicopter owned by one plaintiff and leased by the other was severely damaged when it made an emergency landing following a sudden loss of power due to the failure of a gear. The helicopter was manufactured by one defendant and serviced by the other. The gear failure was linked to the chromium plating used, which weakened the gear and which was contrary to the manufacturer's design specifications. The design was improved and, in April of 1987, the manufacturer issued a service bulletin recommending inspection of all engines and installation of the new gear. The bulletin "recommended" that the replacement be done on all installed gearboxes "at next return to an authorized service centre" and on all spare gearboxes prior to installation. It warned that "[n]on-compliance with this Service Bulletin can result in gearbox failure causing complete loss of power". In July of 1987, the helicopter in question was taken to the second defendant for another purpose where it was inspected and released as serviceable without any alterations to the gearbox.

The trial judge found that the gear's failure was principally due to its negligent manufacture. Unlike in *Nicholson* v. *John Deere Ltd.*, there were no doubts about the manufacturer's knowledge at the time of manufacture. Paris J. then suggested that the manufacturer would "not be liable to a user if it gives clear warning [...] and the user suffers damage by carelessly disregarding that warning".[97] He found that the service bulletin did not constitute an adequate warning to people such as the plaintiffs, "particularly users who brought their engines into a servicing agent's facilities to be tested but not necessarily to be repaired or

96. (1991), 63 B.C.L.R. (2d) 207, 86 D.L.R. (4th) 404 (S.C.) [hereinafter *Can-Arc* v. *Textron* cited to D.L.R.].

97. *Ibid.* at 414. This is less drastic than Smith J.'s view in *Nicholson* v. *John Deere Ltd.*, *supra*, note 14 at 549, that no amount of specificity could excuse a manufacturer who places a known defective product into the market. Despite their difference in tone, Paris J. ultimately took a similarly strict approach with respect to the warnings given by the manufacturer.

overhauled".[98] Paris J. also believed that the phrase "it is recommended" did not sufficiently convey the urgency of the situation. A phrase such as "to be accomplished" ought to have been used. In the end, the warning was "confusing" because it did not require the customer to take immediate action, but warned of the serious consequences of not doing so. Interestingly, the trial judge then turned to the conduct of the plaintiff lessee and held that it was contributorily negligent in not doing anything about the service bulletin. Although the warning was confusing, "the bulletin did contain a specific requirement, namely, that the bevel gear be replaced, and it warned that the failure to do so could result in a complete loss of power".[99] Thus, a warning inadequate to fulfil the manufacturer's duty to warn was nonetheless able to convey enough knowledge of the risk to the consumer to make the latter contributorily negligent.[100]

Lastly, I discuss cases falling within the fourth category outlined earlier, that is, those where the manufacturer makes some effort to warn about a known or knowable risk inherent to the use of an otherwise properly made and designed product. By far, most reported cases fall in this category and the vast majority of these decisions hold the relevant warning was inadequate in the circumstances. True, "courts appear to be demanding more explicit warnings than in the past".[101] But, in my view, the reason for this is that a noticeable trend towards the adoption of *de facto* strict liability is under way. The propensity to decide the question of breach regardless of fault was influenced by the decision of the Supreme Court of Canada in *Lambert* v. *Lastoplex*, a case discussed earlier with respect to the duty issue.[102] There, Laskin J. focused almost

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98. *Can-Arc* v. *Textron*, *ibid.* This distinction between types of users is puzzling. Are users who have their engines tested an *identifiably different* group from those who have them repaired or overhauled, so that the manufacturer could have taken specific actions *vis-à-vis* the former? Paris J. made this distinction because of evidence showing that the practice in the helicopter industry was to not comply with service bulletins when an engine is returned for testing (as it was in this case) unless the engine is repaired or overhauled afterwards. How does such a practice affect the reasonableness of the *manufacturer*'s conduct? More importantly, what measures could the manufacturer have taken to "bring the danger home" to users such as the plaintiffs who would return the engine only for testing? The service bulletin recommended to make the changes on the "next return to an authorized service centre". Was this not sufficiently clear to apply to *all* users, regardless of individual motives for having an engine serviced? The trial judge believed this language was less precise and imperative than other bulletins issued by the manufacturer using words such as "returned for any reason" and "returned for repair or overall": *ibid.* at 415. In terms of the behaviour expected of a reasonable person, is there a meaningful difference between "next return" and "return for any reason"?

99. *Ibid.* at 415.

100. The trial judge apportioned the responsibility between the lessee of the helicopter and the manufacturer at 40% and 60% respectively.

101. Waddams, *supra*, note 2 at 54.

102. *Supra*, notes 56-59 and accompanying text.

exclusively on the quality of the product supplied in order to decide whether the manufacturer had breached its duty to warn. The Court did not seem particularly concerned with the reasonableness of the manufacturer's conduct in all the circumstances, but rather with a technical analysis of whether the product met certain minimal standards of safety. To be sure, the manufacturer's labels did not specifically warn against leaving pilot lights on, in or near the working area, unlike the warning attached to a similar product sold by a competitor. In this respect, there was some evidence on which to judge the manufacturer negligent since it knew of a hazard associated with the use of its product and its behaviour was below that of another manufacturer faced with similar circumstances. The reasons of the Court, however, focus solely on the explicitness of the labels attached to the product. After announcing guiding principles,[103] Laskin J. held that the cautions on the labels "lacked the explicitness which the degree of danger in its use in a gas-serviced residence demanded".[104] That is, the labels did not warn against sparks or specifically against leaving pilot lights on, in or near the working area. Of course, I am not suggesting that this case was wrongly decided since, as mentioned, there was evidence of negligence. But the preoccupation in the Court's reasons with the specific language of the labels announced a shift in emphasis from the reasonableness of the manufacturer's conduct to the defective nature of the product.

Using a similar analysis, the second manufacturer involved in *Smithson* v. *Saskem Chemicals* was held liable for breaching its duty to warn of the knowable danger of using its product in conjunction with another chemical drain cleaner:[105] This conclusion was reached despite the fact that its product was marked corrosive pursuant to federal regulations, indicated that it contained sulphuric acid, and cautioned to "not use [the product] where other drain chemicals are present". Noble J. was troubled by the size of the print used for the label, by the fact that no percentage for the content of sulphuric acid was given, and by the absence of a specific warning about the type of risk which could materialize should the product be used in the presence of another drain cleaner. Interestingly, in rejecting an argument of contributory negligence based on this warning,

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103. *Supra*, note 14 at 125. First, a general warning will not suffice where the likelihood of the danger may be increased according to the surroundings in which it is expected that the product will be used. Second, the required explicitness of a warning will vary with the danger likely to be encountered in the ordinary use of the product.

104. *Ibid.*

105. *Supra*, notes 61-62 and accompanying text. As noted, the first manufacturer was held liable for not giving any warning whatever. Both defendants were held jointly and severally liable for the plaintiffs' losses.

no mention is made of the label's failure to fully apprise the consumer of the situation. Instead, Noble J. held it was not reasonable to suggest that the plaintiff should have known that some of the first product would still be present when the second product was applied four days later.

The Ontario Court of Appeal decision in *Buchan* v. *Ortho*[106] also played an instrumental role in pointing the law of failure to warn in the direction of a *de facto* standard of strict liability. There, the plaintiff suffered a stroke which left her partially paralysed. The evidence at trial established that the stroke was caused by the use of oral contraceptives manufactured and distributed by the defendant company and prescribed by her doctor. The defendant manufacturer knew of this risk, but did not warn doctors or patients and the plaintiff sued for negligence. The often-quoted principle on the issue of breach is couched in language of reasonableness.[107] Nonetheless, it calls for a technical analysis of the product and its defective nature, rather than an inquiry into the reasonableness of the choices made by the manufacturer. This principle requires a comparison *not* between the conduct of the manufacturer and that of the reasonable person placed in similar circumstances, but between the product in question and what courts consider to be minimal standards of safety.

In *Buchan* v. *Ortho*, Robins J.A. discussed at some length the "learned intermediary" rule. Ordinarily, the manufacturer's warning must be addressed directly to the person likely to be injured. However, in cases involving prescription drugs, an exception provides that the duty to warn is discharged if the manufacturer gives prescribing physicians adequate warnings. In *obiter*, Robins J.A. said the general rule should be applied to the specific case of oral contraceptives as the rationales for the exception were not supported in this context.[108] In this respect, although the manufacturer had complied with federal regulations requiring the inclusion of explanatory statements with their products, the warning given to consumers was not adequate to fully apprise them of the risk of stroke associated with oral contraceptives. The warning was general in tone and told patients to turn to their prescribing physicians for details. In

106. *Supra*, note 63.
107. *Ibid.* at 667: "Once a duty to warn is recognized, it is manifest that the warning must be adequate. It should be communicated clearly and understandably in a manner calculated to inform the user of the nature of the risk and the extent of the danger; it should be in terms commensurate with the gravity of the potential hazard, and it should not be neutralized or negated by collateral efforts on the part of the manufacturer. The nature and extent of any given warning will depend on what is reasonable having regard to all the facts and circumstances relevant to the product in question."
108. *Ibid.* at 688-89.

any event, on the assumption that the learned intermediary rule applied, Robins J.A. found that the warnings given to physicians at the material time did not satisfy the standard.

Reviewing the information intended for doctors given by the manufacturer,[109] Robins J.A. held that none contained any warning or made any mention of the risk of stroke associated with the use of oral contraceptives. In this respect, the Court emphasized that the manufacturer's sister company in the United States offered much more detailed information about thromboembolic complications in oral contraceptive users. Robins J.A. also discussed certain "factors" relevant to a drug manufacturer's duty to warn such as its expert status in the field and attendant duty to keep abreast of scientific developments pertaining to its product through research, adverse reaction reports, and scientific literature. This manufacturer must "be forthright" and "tell the whole story"; it must provide doctors with "current, accurate and complete information about a drug's risks".[110] The adequacy of a warning must be judged by what is reasonable in the circumstances, including the likelihood of injury, the seriousness of the danger, the number of people potentially affected, the nature of the drug, and the necessity for taking it. According to Robins J.A., the circumstances in this case indicated that the manufacturer had failed to give the medical profession warnings commensurate with its knowledge. The manufacturer argued that its actions were "reasonable in the circumstances" since it knew that a 44 page report providing, in essence, the same information as that given in the United States was circulated to each practising physician in Canada before the accident, pursuant to the Minister of Health and Welfare's direction, and that the physician in question had received and reviewed said report. This argument was rejected on the ground that the manufacturer had to warn physicians itself and could not delegate this duty to others in the field. Moreover, a more stringent duty to warn was neither inconsistent with the report in question nor precluded by it[111]; apparently, neither is it one of the circumstances to be taken into account in judging the reasonableness of the manufacturer's conduct.

Rothwell v. *Raes*[112] also provides a good illustration of the current tendency. The infant plaintiff was one of two twins, the other of whom

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109. This information was contained in the following: the *Compendium of Pharmaceuticals and Specialties* published annually by the Canadian Pharmaceutical Association; file cards describing the defendant's products; sales bulletins issued by the defendant's sales representatives; and, general literature intended for distribution to patients through doctors.

110. *Supra*, note 63 at 678.

111. *Ibid.* at 681.

112. *Supra*, note 64.

was stillborn. At three, four, and five months, the plaintiff received immunization doses against a number of common diseases. Shortly after his third shot, the plaintiff began suffering from a developmental abnormality and ultimately became blind, almost deaf, and severely mentally disabled. He sued, among others, the manufacturer of the vaccine for failing to warn of the adverse reactions associated with the administration of the vaccine. The action was dismissed on the ground that the plaintiff failed to prove a causal connection between the vaccine and the damage suffered by the plaintiff.[113] For my purposes, the interesting part of the reasons deals with the discussion, *in arguendo*, of the manufacturer's negligence. Osler J. found that the manufacturer was aware of a "possible link" between the administration of its product and the danger in question. According to him, the warning given stating that "it has been reported on rare occasions that uncontrolled screaming and/or convulsions, sometimes followed by neurological complication, have resulted from the injection of pertussis vaccine" was inadequate in the light of *Buchan* v. *Ortho* to warn against this "possible link". It should have been more detailed and should have outlined the medical and scientific information relied on in assessing the risks. Thus, while the mere possibility of a causal connection between the product and the materialization of the risk was insufficient to satisfy the plaintiff's burden of proving causation, it was sufficient to require the manufacturer to give warnings outlining this "possible" risk with greater detail than currently provided.

Lastly, I mention *Chase* v. *Goodyear*.[114] There, the plaintiff service station worker brought an action in negligence against the defendant tire manufacturer after being severely injured when a tire exploded during inflation. The tire was approximately three years old and was advertised as suitable for retreading. The trial judge admitted there were "too many unknowns in this case" with respect to the use made of the tire during its various lives. It was known that the tire had been inspected and retreaded once by the manufacturer, that it had been transferred on several occasions before reaching the garage where the plaintiff worked, and that it was at the end of its retreaded life on the day of the accident. General warnings and instructions regarding the inflation of tires were given, such as a warning to stand clear and to use a tire cage or chains so that the lock ring would not pop out during inflation. However, these were judged to

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113. The Court of Appeal affirmed this finding, holding that the mere "possibility" of a causal connection is not enough to meet the burden of proof with respect to causation: (1990), 2 O.R. (3d) 332, 76 D.L.R. (4th) 280 (C.A.).

114. *Supra*, note 65. No mention is made of New Brunswick's *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C-18.1, but the reasons of the trial judge suggest that proof of negligence was considered essential to recovery.

be insufficient to warn of the specific possibility of a latent weakness in the radial cords. In a revealing statement, the trial judge concluded: "If the claim were one solely for a breach of warranty I would dismiss it because I do not believe the plaintiff has proven such a case. Counsel for the plaintiff has properly stressed in my opinion the claim as one for failing to warn the plaintiff that the radial cords may have gradually weakened through overdeflection while the tire has been in use, that the sidewalls may explode while being inflated and that anybody inflating the tire should use the clip-on air chuck and stand well away when the tire is being inflated."[115]

B. *The Situation in the United States*

In the United States, negligence and strict liability have both, to varying degrees, received judicial recognition as viable theories of liability in actions based on a manufacturer's failure to warn. In virtually every state, negligently failing to warn of a known or knowable non-obvious danger is, like in Canada, a recognized ground for holding a manufacturer tortiously liable.[116] Section 388 of the *Restatement (Second) of Torts* states that the "supplier" of a product is subject to liability for negligently failing to warn foreseeable users, provided: that it knew or had reason to know that its product is or is likely to be dangerous for the use for which it is supplied; that it had no reason to believe that those for whose use the product is supplied will realize its dangerous condition; and, that it failed "to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous".[117] The first two conditions are directed to the manufacturer's foreseeability of the risk and to the obviousness of the danger, hence to the question of whether a duty to warn arose. The third condition is directed to whether this duty, if it arose, was breached in the circumstances of the case. In this respect, the analysis under § 388 is virtually identical to that suggested by the standard of liability adopted by courts in the Canadian common law provinces.

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115. *Ibid.* at 187.

116. See, for example, *Twombley* v. *Fuller-Brush*, 221 Md. 475, 158 A.2d 110 (1960); *Martin* v. *Bengue Inc.*, 25 N.J. 359, 136 A.2d 626 (1957); *Tomao* v. *A.P. De Sanno & Son*, 209 F.2d 544 (3d Cir. 1954); *Dempsey* v. *Virginia Dare Stores Inc.*, 186 S.W.2d 217 (Mo.App. 1945); *Moran* v. *Faberge Inc.*, 332 A.2d 11 (Md. 1975); *Temple* v. *Wean United Inc.*, 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977); and *Carter* v. *Yardley & Co.*, 319 Mass. 92, 64 N.E.2d 693 (1946). See generally Products Liability Reporter, vol. 1, ¶ 1750; W.L. Prosser, *Handbook on the Law of Torts*, 4th ed. (St. Paul, Minn.: West, 1971) at 646-47; Dillard & Hart, "Products Liability: Directions for use and the Duty to Warn" (1955) 41 Va. L. Rev. 145; and Madden, *supra*, note 63.

117. *Restatement (Second) of Torts*, § 388 (1965).

In addition, courts in many states have recognized that a plaintiff suffering damages allegedly because of a failure to warn may also plead his or her case in strict liability.[118] As noted, the vast majority of states have adopted, either judicially or legislatively, a principle of strict products liability in tort modeled on § 402A of the *Restatement (Second) of Torts*.[119] Inspired by the general trend towards strict products liability and by several of the official comments following § 402A, a number of courts have recognized a strict liability action for failure to warn. In this respect, Comment h provides that the defective condition of a product may arise, *inter alia*, "from the way in which the product is prepared or packed" and that, although a product is not in a defective condition when safe for normal handling and consumption, a manufacturer who:

> "*has reason to anticipate* that danger may result from a particular use ... may be required to give adequate warning of the danger (see Comment j), and a product sold without such warning is in a defective condition".[120]

Comment j to § 402A states that in order to prevent a product from being unreasonably dangerous, "the seller may be required to give directions or warning, on the container, as to its use." It specifies that no warnings are required with respect to common allergies as consumers will reasonably be aware of them, but adds that where the product:

> "contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, *if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger.*"[121]

Finally, Comment k deals with "unavoidably unsafe products", such as drugs and vaccines, and provides that these products are not defective nor unreasonably dangerous when "properly prepared, and accompanied by proper directions and warnings".[122] Somewhat ironically, two of the comments used to support the extension of strict liability to warning defects were later invoked in order to limit the manufacturer's duty to foreseeable risks,[123] a development believed by some to repudiate any meaningful distinction between strict liability and negligence.[124]

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118. See generally Products Liability Reporter, vol. 1, ¶ 4095 and the cases noted, *infra*.
119. *Supra*, note 40.
120. *Restatement (Second) of Torts* § 402A (1965), Comment h [emphasis added].
121. *Restatement (Second) of Torts* § 402A (1965), Comment j [emphasis added].
122. *Restatement (Second) of Torts* § 402A (1965), Comment k.
123. See the portions of Comment h and Comment j with added emphasis, *supra*, notes 125 and 126 respectively.
124. See, for example, Henderson & Twerski, *supra*, note 34 and Wertheimer, *supra*, note 4.

While adding to a plaintiff's arsenal of arguments, the existence of alternative theories of liability for failure to warn has created much confusion in the United States amongst litigants, judges, juries, and commentators.[125] This has led to criticisms and calls for either substantial reform of existing doctrine or an outright rejection of strict liability for warning defects.[126] The true value of a strict liability cause of action, beyond what is already provided by the law of negligence, has been seriously questioned. With respect to manufacturing defects, the questions facing courts and legislatures south of the Canadian border have been relatively straightforward since the 1960s: whether to follow the trend initiated by *Greenman*[127] and codified in the *Restatement (Second) of Torts* by adopting a standard of strict liability and, if so, whether the product supplied by the defendant at bar contained a defect in manufacture making it unreasonably dangerous to consumers. Both the doctrinal and practical implications of the choice were—and still are—evident. The concept of a defect in manufacture is simple and intuitively understood, especially in cases involving food and beverage products. By definition, it does not require reference to the conduct or mental process of the manufacturer.[128] Moreover, it is easy to see what is removed from the analysis when a move to strict liability is made. In negligence, the plaintiff must prove not only the existence of a manufacturing defect, but that the manufacturer behaved negligently in allowing this defect to develop, for example, by not taking adequate preventive measures such as quality control testing and continual monitoring of the production line.

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125. An example of this confusion is provided by two recent decisions. In *Oanes* v. *Westgo Inc.*, 476 N.W.2d 248 at 253 (N.D. 1991), the Supreme Court of North Dakota held that: "In a strict liability failure-to-warn case, the focus is on whether the warnings, if any, which accompany a product are adequate so that the product is not unreasonably dangerous to the ordinary user. The focus is not on the knowledge or reasonableness of the conduct of the manufacturer or seller." According to the Court, the trial judge who spoke of the manufacturer's foreseeability erroneously "injected negligence concepts about the manufacturer's knowledge into the strict liability failure-to-warn claim". Mr. Justice Meschke, in dissent on this point, suggested that: "The complications brought about by dual theory cases like this one demonstrate that we should merge strict liability and negligence ... Altogether, today's majority opinion vividly illustrates the need to combine and simplify strict liability and negligence doctrine for submission to a jury" (*ibid.* at 255-56). Conversely, the Supreme Court of California recognized in *Anderson* v. *Owens-Corning*, *supra*, note 34 that a manufacturer's knowledge (actual or constructive) *was* relevant to a strict liability failure to warn action at the stage of determining whether a duty to warn was owed. Mr. Justice Mosk dissented on this point and noted, among other things, that if this was indeed the state of the law, then: "We should consider the possibility of holding that failure-to-warn actions lie solely on a negligence theory"(*ibid.* at 563).

126. See, for example, Henderson & Twerski, *supra*, note 34 and Wertheimer, *supra*, note 4.

127. *Supra*, note 46.

128. *Supra*, note 14.

In this respect, there are many decisions involving the maxim of *res ipsa loquitur* serving as a reminder of what is at stake for the plaintiff.[129] For these reasons, courts in strict liability states have had few difficulties in applying their standard to manufacturing defect cases and in differentiating this standard from fault-based liability. Any debate about the appropriateness of strict liability in this context focuses almost exclusively on its policy rationales.

With respect to failures to warn, however, the situation is quite different. Here, the debate surrounding failure to warn ventures beyond policy analysis and is characterized—especially recently—by doctrinal complexity focusing on whether there are any meaningful distinctions between strict liability and negligence when applied to warning defects. Even assuming that the rationales advanced in *Escola*[130] and *Greenman* persuade a court that strict products liability should be adopted in theory, the question remains whether actual changes to a plaintiff's cause of action will be such as to warrant an alternate theory of liability. If not, recognizing strict liability failure to warn can only lead to confusion, to a waste of precious judicial resources, and to an eventual frustration of otherwise commendable goals. The answer may have been obvious in the context of manufacturing defects but, as recent case law demonstrates, courts may have been too presumptuous in assuming that the same simplicity extended to all types of defects.

Generally speaking, courts have taken three related positions with respect to this issue. A minority of courts directly asked the question and, failing to see any practical difference between both standards, refused to adopt strict liability with respect to defects in warning.[131] The other two approaches, encompassing a majority of states, recognize strict liability failure to warn but differ in the manner in which they differentiate it from negligence. Some courts recognized, mostly in earlier decisions and often in *obiter dicta*, that the distinction relates to the manufacturer's foreseeability of the risk associated with its product. In this respect, a view articulated by some courts is that while a plaintiff must prove that the manufacturer knew or should have known of the danger which materialized in order to trigger a duty to warn in negligence-based liability, its knowledge of the risk is either conclusively presumed or

129. This maxim, in effect, allows a plaintiff to succeed in negligence even though no direct proof of negligence is adduced: see generally Waddams, *supra*, note 2 at 61-65. Notice how it is usually invoked in cases dealing with manufacturing defects.

130. *Supra*, note 45.

131. See, for example, *Borel* v. *Fibreboard Paper Prods. Corp.*, 493 F.2d 1976 (5th Cir. 1973); *Higgins* v. *E.I. DuPont de Nemours & Co.*, 671 F.Supp. 1055 (D.Md. 1987); and *Overbee* v. *Van Waters & Rogers*, 706 F.2d 768 (6th Cir. 1983).

simply immaterial in the context of strict liability.[132] Beyond this, they make little effort in differentiating the theories and some concede that both are essentially the same on the issue of breach.[133] A third and increasingly popular view states the difference between these theories in the exact opposite manner. Here, foreseeability of risk *is* relevant in the context of strict liability in determining whether or not a duty to warn is owed, as it is in the context of negligence.[134] Rather, it is in considering whether or not this duty has been breached that both theories part, the former focusing solely on the adequacy of the warning and the latter

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132. See, for example, *Beshada* v. *Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982) [hereinafter *Beshada* v. *Johns-Manville* cited to A.2d] (conclusively presuming the manufacturer's knowledge of the risk—a reasoning later modified and limited to its facts in *Feldman* v. *Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374 (1984)); *Johnson* v. *Raybestos-Manhattan Inc.*, 69 Haw. 287, 740 P.2d 548 (1987) (manufacturer's foreseeability of risk irrelevant to any theory of strict liability); *Oanes* v. *Westgo Inc.*, *supra*, note 125 (manufacturer's knowledge of the danger is assumed in strict liability and hence foreseeability of the risk is irrelevant to strict liability failure to warn); *Ayers* v. *Johnson & Johnson*, 818 P.2d 1337 (Wash. 1991) (manufacturer's foreseeability of risk irrelevant to strict liability failure to warn); *Halphen* v. *Johns-Manville Sales Corp.*, 484 So.2d 110 (La. 1986) (same); and *Phillips* v. *Kimwood Machine Co.*, 269 Or. 485, 525 P.2d 1033 (1974) (same).

133. *Beshada* v. *Johns-Manville*, *ibid.*

134. See "Annotation, Strict Products Liability: Liability for Failure to Warn as Dependent on Defendant's Knowledge of Danger" (1984), 33 A.L.R. (4th) 368. This annotation reviews case law from 1970 to 1984 and concludes (at 371): "Often citing the above position [Comment j] of the Restatement, the courts for the most part, in jurisdictions generally espousing the doctrine of strict liability (when a negligence theory is applied, there is no question that actual or constructive knowledge is an essential element), hold that liability based upon a failure to warn users of a product's inherently dangerous quality or characteristic may be imposed only where the manufacturer, distributor, or seller, as the case may be, had actual or constructive knowledge of the dangerous quality or characteristic." Recent high court decisions adopting this "majority" view, not mentioned in this often-cited annotation, include *Anderson* v. *Owens-Corning*, *supra*, note 34; *Fibreboard Corporation* v. *Fenton*, 845 P.2d 1168 (Colo. 1993); *Shanks* v. *The Upjohn Company*, 835 P.2d 1189 (Alaska 1992); *Bernier* v. *Raymark Industries Inc.*, 516 A.2d 534 (Me. 1986); *Lohrmann* v. *Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986); *Owens Illinois Inc.* v. *Zenobia*, 325 Md. 420, 601 A.2d 633 (1992); *Anderson* v. *Owens-Illinois Inc.*, 799 F.2d 1 (1st Cir. 1986); *Thomas* v. *Amway Corporation*, 488 A.2d 716 (R.I. 1985); *Castrignano* v. *E.R. Squibb & Sons Inc.*, 546 A.2d 775 (R.I. 1988); and *Ellis* v. *Chicago Bridge & Iron Company*, 545 A.2d 906 (Pa. 1988). A number of states have passed statutes which, in effect, forbid liability under strict liability failure to warn unless the danger which materialized was known or knowable to the manufacturer and its industry at the time of supply. This is done usually by allowing a manufacturer to introduce evidence of the state of the art at the time of supply to establish, as an affirmative defence, that the danger in question was neither known nor knowable at the time of supply: see, for example, Ark. Code Ann. § 16-116-104(a)(1) (1987); Colo. Rev. Stat. § 13-21-403(1)(a) (1987); Conn. Den. Stat. Ann. § 52-572q(b)(3) (1991); Ind. Code Ann. § 33-1-1.5-4(b)(4) (1983); Iowa Code Ann. § 668.12 (1987); Ky. Rev. Stat. Ann. § 411.310(2) (1992); La. Rev. Stat. Ann. § 9:2800.59 (1991); Mo. Rev. Stat. § 537.764(2) (1988); Neb. Rev. Stat. § 25-21,182 (1989); N.H. Rev. Stat. Ann. § 507:8-g (1991); Ohio Rev. Code Ann. § 2307.76(A)(1)(a) (1991); and Tenn. Code Ann. § 29-28-105(b) (1980).

considering the reasonableness of the manufacturer's conduct.[135] Stated somewhat differently, the difference between the second and third approaches lies in the stage at which a distinction is perceived; the second argues the only real difference is encountered when inquiring whether a duty to warn was owed, whereas the third invokes the distinction when inquiring whether or not the duty was breached. To add to the confusion, some states like New Jersey appear to shift from one approach to another, never giving clear reasons for their departures.[136] Furthermore, among the growing number of states now recognizing the relevance of foreseeability in strict liability failure to warn, there is a renewed questioning about the appropriateness of maintaining any distinction between this action and the analogous one based on negligence.[137]

Having said this, I turn to a more detailed discussion of the inquiry into whether the manufacturer owed a duty to warn of risks associated with the use of its products. With respect to *negligent* failure to warn, courts in the United States engage in a similar analysis to that found in Canadian judgments on the threshold duty issue. The focus is almost entirely on the manufacturer's foreseeability of the risk which materialized and allegedly caused damage to the plaintiff, whether said risk is inherent in the use of the product or associated to a defect in its manufacture or design. A manufacturer has a duty to warn only of dangers which are known, or should have been known, at the time of supply.[138] Occasionally, a post-supply duty to warn will be triggered when the manufacturer acquires knowledge of an earlier unknown risk, as when it becomes apparent that its products contain a dangerous design or manufacturing defect.[139] In most cases, it seems to be assumed that the manufacturer could foresee the plaintiff as a possible user of its product, although some cases, especially those where the risk is traceable to a defect in manufacture or

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135. See, for example, *Anderson* v. *Owens-Corning*, *supra*, note 34 at 558-59; *Fibreboard Corp.* v. *Fenton*, *ibid.* at 1175; *Shanks* v. *Upjohn Company*, *ibid.* at 1199-1200; and *Ellis* v. *Chicago Bridge & Iron Company*, *ibid.* at 913-14.

136. Compare *Beshada* v. *Johns-Manville*, *supra*, note 132 with *Feldman* v. *Lederle Laboratories*, *supra*, note 132 and *Feldman* v. *Lederle Laboratories*, 125 N.J. 117, 529 A.2d 1176 (1991).

137. See, for example, the dissenting opinions noted *supra*, note 130; Henderson & Twerski, *supra*, note 34; and M.J. Bromberg, "The Mischief of the Strict Liability Label in the Law of Warnings" (1987), 17 Seton Hall L. Rev. 526.

138. See, for example, *Restatement (Second) of Torts* § 388(a) (1965); *Rivers* v. *Stihl Inc.*, 434 So.2d 766 (Ala. 1983); *Payne* v. *Soft Sheen Prods. Inc.*, 486 A.2d 712 (D.C. 1985); *Jarrel* v. *Monsantano Co.*, 528 N.E.2d 1158 (Ind.Ct.App. 1988); and *Mitchell* v. *Sky Climber Inc.*, 487 N.E.2d 1374 (Mass. 1986).

139. See, for example, *Comstock* v. *General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627 (1959); *Smith* v. *Selco Products Inc.*, 385 S.E.2d 173 (N.C.C.A. 1989); and the articles noted *infra*, note 146.

design of the product, spend more time discussing this issue.[140] Finally, as in Canada, the scope of the duty is limited to non-obvious dangers[141] and does not extend to all unintended uses or misuses of a product.[142]

With respect to *strict liability* failure to warn, courts in a majority of states have retained both the form and substance of the preliminary inquiry into whether or not the manufacturer owed a duty to warn. The manufacturer is not required to warn of dangers which are apparent or commonly known to all reasonable people[143] and may be relieved of warning against risks associated with unintended uses or misuses of its product.[144] More importantly, most courts now expressly recognize the relevance of the manufacturer's foreseeability during the inquiry.[145] They acknowledge that even under strict liability a manufacturer's duty to warn is limited to risks which were known or knowable at the time of supply. Under special circumstances, post-supply duties to warn, based on later-acquired knowledge, may also arise.[146]

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140. See, for example, *Rohrbaugh* v. *Owens-Corning Fibreglass Corporation*, 965 F.2d 844 (10th Cir. 1992).

141. See, for example, *Dudley Sports Co.* v. *Schmitt*, 279 N.E.2d 266 (Ind.Ct.App. 1972); *Griebler* v. *Doughboy Recreational Inc.*, 449 N.W.2d 61 (Wis.Ct.App. 1989); *Dempsey* v. *Virginia Dare Stores Inc.*, 186 S.W.2d 217 (Mo.App. 1945); *Owens* v. *Allis-Chalmers Corp.*, 414 Mich. 413, 326 N.W.2d 372 (1982); and *Minneapolis Society of Fine Arts* v. *Parker-Klein Associates Architects Inc.*, 354 N.W.2d 816 (Minn. 1984). In Canada, a manufacturer is also relieved of warning consumers of obvious dangers: see, for example, *Yachetti* v. *John Duff & Sons Ltd.*, [1942] O.R. 682, [1943] 1 D.L.R. 194 (H.C.); *Schulz* v. *Leeside Dev. Ltd.*, [1978] 5 W.W.R. 620, 90 D.L.R. (3d) 98 (B.C.C.A.); *Moffat* v. *Witelson* (1980), 29 O.R. (2d) 7, 111 D.L.R. (3d) 712 (H.C.) and *Kirby* v. *Canadian Tire Corp. Ltd.* (1989), 57 Man. R. (2d) 207 (Q.B.).

142. See, for example, *Higgens* v. *Paul Hardeman Inc.*, 457 S.W.2d 943 (Mo.Ct.App. 1970); *Darsan* v. *Guncalito Corp.*, 153 App.Div.2d 868 (N.Y. 1989); and *Watters* v. *TSR*, P.L.R. ¶ 12,474 (6th Cir. 1990). The general limit is expressed in terms of unforeseeable misuses of the product. A similar limit is placed by Canadian courts: see *Lem* v. *Barotto Sports Ltd.* (1976), 1 A.R. 556, 69 D.L.R. (3d) 276 (C.A.); *Ivan* v. *AOCO Ltd.* (1980), 5 Sask. R. 78 (C.A.) *reversing* (1979), 1 Sask. R. 198 (Q.B.) and *Rae* v. *T. Eaton Co. (Maritimes) Ltd.* (1961), 28 D.L.R. (2d) 522, 45 M.P.R. 261 (N.S.S.C.).

143. See, for example, Annotation, "Failure to Warn as Basis of Liability Under Doctrine of Strict Liability in Tort" 53 A.L.R. 3d 239 at 257 (1973 & Supp. 1989); *Plante* v. *Habart*, 771 F.2d 617 (1st Cir. 1985); *Lorfano* v. *Dura Store Stepps Inc.*, P.L.R. ¶ 12,381 (Me. 1990); *Hagans* v. *Oliver Machinery Co.*, 576 F.2d 97 (5th Cir. 1978); and *Kelley* v. *Rival Manufacturing Co.*, 704 F.Supp. 1039 (D.Ct. 1989).

144. See, for example, *Reilly* v. *Dynamic Explorations*, P.L.R. ¶ 12,725 (La. 1990); *Robinson* v. *GGC Inc.*, P.L.R. ¶ 12,789 (Nev. 1991); *Robinson* v. *Reed-Prentice Div*, 49 N.Y.2d 471; and *Sage* v. *Fairchild-Swearigen Corp.*, 70 N.Y.2d 579.

145. *Supra*, note 134.

146. See, for example, Allee, "Post-Sale Obligations of Product Manufacturers" (1984), 12 Fordham Urb. L.J. 625; Schwartz, "The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine" (1983), 53 N.Y.U. L.Rev. 902; *Kozlowski* v. *John E. Smith's Sons Company*, 87 Wis.2d 882, 275 N.W.2d 915 (1979); and *Walton* v. *Avco Corp.*, P.L.R. ¶ 12,144 (Pe. 1987).

The infiltration of foreseeability of risk into strict liability failure to warn has taken various forms.[147] As noted, some courts took the initial position that foreseeability was not an issue under strict liability because the manufacturer is conclusively presumed to have known about the dangers associated with the use of its products. Stated differently, some courts imputed knowledge of the danger to the manufacturer and precluded any evidence directed to foreseeability of the risk.[148] *Beshada* v. *Johns-Manville*, a case involving asbestos products, was instrumental in advancing this view.[149] However, in many instances, this position was later judicially modified or legislatively bypassed with a rebuttable presumption of knowledge[150] or with a rule that knowledge of the danger is a required element of the tort.[151] Some courts avoided the presumption/imputation debate altogether, holding that foreseeability is simply immaterial in strict liability failure to warn, because the focus is on the product

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147. Part of what is confusing about the negligence/strict liability debate with respect to failure to warn is the different language chosen by courts and commentators. As already evident, I have chosen to use the expressions "foreseeability" and "knowability" interchangeably as they essentially denote the same object: the relation between the manufacturer's state of mind, whether actual or reasonably implied, and the risk posed by its product to consumers. In this respect, saying that a manufacturer knew or should have known of a particular risk is the same thing as saying that the manufacturer foresaw or could have foreseen such risk. Similarly, the class of dangers for which a manufacturer is *not* required to warn may be labelled either "unknowable" dangers (*i.e.* dangers that were not known nor knowable at the time of supply) or "unforeseeable" dangers (*i.e.* dangers that were not foreseen nor foreseeable at the time of supply). Lastly, when the expression "state of the art evidence" is used by courts or commentators in this context, it merely refers to evidence that a particular risk was neither known nor knowable (*i.e.* was not reasonably foreseeable) by the application of scientific knowledge applicable at the time of supply.

148. See, for example, *Beshada* v. *Johns-Manville*, *supra*, note 132 and *Oanes* v. *Westgo Inc.*, *supra*, note 125.

149. *Ibid.* This decision was severely criticised in academic circles. See, for example, J. Berman, "The Function of State of the Art Evidence in Strict Products Liability" (1984) 10 Am.J.L. & Med. 93; A.T. Berry, "Revolution—or Aberration—in Products Liability Law" (1984), 52 Fordham L. Rev. 786; J.E. Keefe & R.C. Henke, "Presumed Knowledge of Danger: Legal Fiction Gone Awry?" (1989), 19 Seton Hall L. Rev. 174; W.J. Murrsay, "Requiring Omniscience: The Duty to Warn of Scientifically Undiscoverable Product Defects" (1983), 71 Geo. L.J. 1635; and Note, "Defeat for the State-of-the-Art Defense in New Jersey Products Liability" (1983), 14 Rutgers L.J. 953. But see Wertheimer, *supra*, note 4 and C.M. Placitella & A.M. Darnell, "Evolution or Revolution in Strict Products Liability?" (1983), 51 Fordham L. Rev. 801.

150. See, for example, *Feldman* v. *Lederle Laboratories*, *supra*, note 132 at 388, where the Supreme Court limited the ruling of *Beshada* v. *Johns-Manville* to the facts of its case (*i.e.* to asbestos decisions) and stated that the manufacturer now carries the burden "of proving that the information was not reasonably available or obtainable and that it therefore lacked actual or constructive knowledge of the defect". See also the statutes (except for Ohio's) noted *supra*, note 134.

151. See, for example, Ohio Rev. Code Ann. § 2307.76(A)(1)(a) (1991) (a product is defective due to inadequate warnings only if the "manufacturer knew or ... should have known about a risk").

at issue and not the manufacturer's conduct.[152] The fact that the risk was unknowable at the time of supply, it is said, does not detract from the policy rationales for strict liability suggesting that the loss ought to lie with the person who put a dangerous product into the market.[153]

The current trend is to acknowledge the relevance of foreseeability of risk to strict liability failure to warn at the stage of determining whether a duty to warn arose.[154] The Supreme Court of California, one of the earliest proponents of strict products liability, expressly adhered to this now widely accepted view in *Anderson* v. *Owens-Corning*.[155] Its reasoning is typical of courts adopting this approach and thus will be described in some detail. The plaintiff brought a strict liability action against manufacturers of products containing asbestos, arguing, *inter alia*, that the defendants had failed to warn of the dangers from exposure to asbestos or asbestos-containing products. At the first trial, the plaintiff was not allowed to proceed with this theory and the jury returned a verdict for the manufacturers on the other ground of recovery argued, finding that the product had no design defects. The trial judge ordered a new trial in which the plaintiff could argue strict liability failure to warn and simultaneously rejected the manufacturers' attempt to introduce state of the art evidence to the effect that those at the vanguard of scientific knowledge at the time the products were supplied, could not have known that asbestos was dangerous to users in the concentrations associated with the manufacturers' products. According to the trial judge, knowledge or knowability of the danger is irrelevant in strict liability failure to warn situation. The Court of Appeal affirmed the order for a new trial and confirmed the exclusion of evidence.

In a superseding opinion by Panelli J., the Supreme Court of California held that "a defendant in a strict products liability action based upon an alleged failure to warn of a risk of harm may present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time

152. See, for example, *Johnson* v. *Raybestos-Manhattan Inc.*, *supra*, note 137 at 550 and *Ayers* v. *Johnson & Johnson*, *supra*, note 132 at 1343-47.

153. Professor Wertheimer, *supra*, note 4, argues that losses for unknowable dangers should be borne by manufacturers since, between an innocent injured consumer and the manufacturer who placed the product in the market, fairness requires that the latter should be held responsible. She suggests that the "fairness" justification for strict liability has been overshadowed by a majority of courts and commentators who concentrate solely on the economic feasibility of making manufacturers pay for losses caused by the materialization of unknowable risks associated with their products.

154. *Supra*, note 134.

155. *Supra*, note 34.

of manufacture and/or distribution."[156] The Court gave a number of reasons for rejecting the reasoning of the courts below. The first two are specific to the Californian context, but the others have been advanced by most courts taking a similar view. First, California courts recognizing strict liability failure to warn had, from the beginning, always included a knowledge or knowability component as an implicit condition of strict liability.[157] Second, the "logic and common sense" of *Brown* v. *Superior Court*[158] "are not limited to drugs".[159] Third, the *Restatement (Second) of Torts*, Comment j, propounds that knowledge or knowability is a component of strict liability for failure to warn.[160] Fourth, a "majority of other states" have adopted the view that foreseeability of the risk is a condition of strict liability for failure to warn and "only a small minority of jurisdictions" have rejected this view.[161] Fifth, strict products liability is a judicial creation which, on more than one occasion, "has incorporated some well-settled rules from the law of negligence and has survived judicial challenges asserting that such incorporation violates the fundamental principles of the doctrine".[162] Sixth, perhaps to a greater extent than the manufacturing- or design-defect theories of liability, the warning-defect theory is by its very nature rooted in negligence.[163] Seventh, strict liability was never intended to make the manufacturer of a product its insurer, and liability for failing to warn of unforeseeable risks would have this result.[164] Finally, "despite its roots in negligence, failure to warn

156. *Ibid.* at 559.
157. *Ibid.* at 554.
158. 44 Cal.3d 1049, 751 P.2d 470 (1988), a decision involving prescription drugs where the Supreme Court of California refused on policy grounds to extend strict liability to failure to warn of risks that were unknowable at the time of distribution.
159. *Anderson* v. *Owens-Corning*, *supra*, note 34 at 555-56.
160. *Ibid.* at 553, 556 (n. 12), and 557.
161. *Ibid.* at 554-56 (nn. 10 and 12).
162. *Ibid.* at 557-58, observing that assumption of risk and comparative negligence apply to actions founded on strict products liability, and that a risk/benefit test was adopted with respect to the determination of design defects: see *Luque* v. *McLean*, 8 Cal.3d 136, 501 P.2d 1163 (1972); *Daly* v. *General Motors Corp.*, 20 Cal.3d 725, 575 P.2d 1162 (1978); and *Barker* v. *Lull Engineering Co.*, *supra*, note 34, respectively.
163. *Anderson* v. *Owens-Corning*, *ibid.* at 558.
164. *Ibid.* at 559.

in strict liability differs markedly from failure to warn in the negligence context".[165]

The specific holding of *Anderson* v. *Owens-Corning* is that a manufacturer in a strict products liability action based on an alleged failure to warn can present evidence that the risk was neither known nor knowable by the application of scientific knowledge available at the time of supply. In this respect, an argument could be made that the burden is on the manufacturer to establish the non-foreseeability of the risk, rather than on the plaintiff. On other occasions, the Supreme Court of California has shifted aspects of the burden of proof in products liability actions to the manufacturer, such as the requirement of meeting the risk/benefit test for defective designs.[166] Some courts who accept the relevance of foreseeability apparently take this view.[167] However, this does not appear to be the view of the "majority of states" referred to by the Supreme Court in *Anderson* v. *Owens-Corning*,[168] nor the view of that court. Although cautiously stating that knowability of the risk is "relevant"[169] to strict liability for failure to warn and is a "component"[170] of this theory, thereby shedding no particular light on the burden issue, Panelli J. also characterized this element as "an implicit condition of strict liability",[171] a "condition of strict liability",[172] a "requisite for strict liability for failure to warn",[173] and a "requirement".[174] Such descriptions are more suitable to placing the burden on the plaintiff to prove that the manufacturer foresaw the risk.

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165. *Ibid.* at 558. The difference perceived by the Supreme Court relates to the breach issue: in negligence, the question is whether the manufacturer has breached its duty to warn by somehow falling bellow the relevant *standard of care*, whereas in strict liability the question is whether or not the warning provided is *adequate* in all the circumstances. Mr. Justice Mosk dissented on this issue, observing that the distinction advanced by the majority, while "generally accurate", often amounts in practice to a "distinction without a substantial difference" (*ibid.* at 562). Citing Professors Henderson and Twerski, *supra*, note 34, Mosk J. suggests that: "We should consider the possibility of holding that failure-to-warn actions lie solely on a negligence theory" (*ibid.* at 563).

166. *Barker* v. *Lull Engineering Co.*, *supra*, note 34.

167. The New Jersey Supreme Court took this position in *Feldman* v. *Lederle Laboratories*, *supra*, note 132 at 388 when it relaxed the non rebuttable presumption or imputation of knowledge earlier announced in *Beshada* v. *Johns-Manville*, *supra*, note 132 by imposing a requirement of "actual or constructive knowledge" of the danger, but placing the burden on the defendant "of proving that the information was not reasonably available or obtainable and that it therefore lacked actual or constructive knowledge of the defect". See also *Shanks* v. *Upjohn Co.*, *supra*, note 134 at 1199-1200.

168. See the annotation noted *supra*, note 134.

169. *Anderson* v. *Owens-Corning*, *supra*, note 34 at 559.

170. *Ibid.* at 557.

171. *Ibid.* at 554.

172. *Ibid.* at 555, n. 10.

173. *Ibid.* at 557.

174. *Ibid.*

Moreover, in explaining how the two theories of liability "differ markedly" from each other, Panelli J. refrained from placing the burden with respect to unknowability on the manufacturer, a step taken in *Barker* v. *Lull Engineering Co.* in response to an argument that a risk/benefit analysis for design defects "rings of negligence".[175]

Accordingly, the question of whether the defendant manufacturer owed a duty to warn is essentially answered in the same way under both recognized theories of liability in the United States: by asking whether the manufacturer knew or reasonably could have known of the non-obvious danger associated with its product which materialized and allegedly caused damages to the plaintiff. This analysis is akin to the one undertaken by Canadian courts with respect to the same inquiry. A few courts have imposed the burden of proving unknowability on the manufacturer in a strict liability context, equating it with any other defence, but the generally accepted view appears to be that foreseeability is a required element for the plaintiff to establish. If the answer to this threshold question is "no", the inquiry ends and the manufacturer is not liable under either theory. There is no need to consider whether the duty to warn was breached. If the manufacturer did or could have foreseen the danger, however, a second inquiry is required. Neither theory of liability has ever held that the combination of a duty to warn, on the one hand, and damages caused by the materialization of the risk, on the other hand, is enough to hold the manufacturer liable. Some intermediary element is required, namely, a breach of the duty to warn.

With respect to *negligent* failure to warn, this element is measured by the manufacturer's failure to act as a reasonable manufacturer would have in similar circumstances. In other words, the inquiry is focused on the conduct of the manufacturer and on a comparison of this conduct with the standard of reasonable care applicable to the particular industry. Section 388 of the *Restatement (Second) of Torts* states the requirement as being a failure "to exercise reasonable care to inform [consumers] of [the product's] dangerous condition or of the facts which make it likely to be dangerous".[176] For example, if everyone in the industry is giving extensive warnings about the dangers associated with the use of a particular product, and the defendant only gives summary warnings, it may be held liable for creating an unreasonable risk by its conduct. The fact that the manufacturer does respect the prevailing standards in the community does not exempt it from liability, however, as these standards are usually

175. *Supra*, note 34 at 456. See also Panelli J.'s explanation of the distinction between both theories in *Anderson* v. *Owens-Corning*, *supra*, note 34 at 558.
176. *Restatement (Second) of Torts* § 388(c) (1965).

regarded as only evidence of negligence and not conclusive on the question.[177] With the extensive use of jury trials in the United States, it is somewhat difficult to appreciate the factors which lead a trier of fact to conclude that a manufacturer was negligent in failing to exercise reasonable care to inform consumers about the risks associated with the use of its products.[178] It is relatively clear, however, that they are asked to consider the conduct of the manufacturer and not to focus solely on the question of whether or not the warnings given by the manufacturer are "adequate" in the circumstances.[179]

With respect to *strict liability* failure to warn, this element of breach is measured by the defectiveness of the product supplied by the manufacturer, regardless of the level of care employed. Generally, the question of whether a product is defective because of a lack of warning and is thereby "unreasonably dangerous" is determined by considering the adequacy of the warning provided. The Supreme Court of California in *Anderson* v. *Owens-Corning* stated the issue as follows: "The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. Thus, in strict liability, as opposed to negligence, the reasonableness of the defendant's failure to warn is immaterial."[180] The Court gave a somewhat specific example of what it meant by the distinction: "[A] reasonably prudent manufacturer might reasonably decide that the risk of harm was such as not to require a warning as, for example, if the manufacturer's own testing showed a result contrary to that of others in the scientific community.

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177. See, for example, *Texas & P.R. Co.* v. *Behymer*, 189 U.S. 468 at 470, 23 S.Ct. 622 at 623 (1903) *per* Holmes J.; *The T.J. Hooper*, 60 F.2d 737 at 739-40 (2d Cir. 1932) *per* Hand J.; and *La Sell* v. *Tri-States Theatre Corporation*, 233 Iowa 929, 11 N.W.2d 36 (1943).

178. It is beyond the scope of this article to engage in a full review of the factors affecting the question of breach in the context of negligent failure to warn in the United States. I am particularly interested in the treatment of this issue under a strict liability theory. On the question of negligent breach of duty to warn, see generally Dillar & Hart, *supra*, note 121; H. Shulman, F. James, and O.S. Gray, *Cases and Materials on the Law of Torts*, 3d ed. (Mineola, N.Y.: The Foundation Press, 1976) at 167-68; and Shapo, *supra*, note 3, c. 19.

179. Of course, the adequacy of the warning in all the circumstances is a relevant inquiry even under a negligence theory as the product must contain some defect. The theory of negligence, however, requires some connection between the inadequate nature of the warning and the reasonableness of the manufacturer's conduct in attempting to inform consumers.

180. *Supra*, note 34 at 558-59. See also the cases noted *supra*, note 139 recognizing the relevance of the manufacturer's foreseeability of the risk during the duty inquiry, but then differentiating between both standards of liability during the breach inquiry, especially *Shanks* v. *The Upjohn Company*, *Ellis* v. *Chicago Bridge & Iron Company*, and *Fibreboard Corporation* v. *Fenton*.

Such a manufacturer might escape liability under negligence principles. In contrast, under strict liability principles the manufacturer has no such leeway; the manufacturer is liable if it failed to give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product. Whatever may be reasonable from the point of view of the manufacturer, the user of the product must be given the option either to refrain from using the product at all or to use it in such a way as to minimize the degree of danger."[181] What constitutes an "adequate" warning is beyond the scope of this article. Someone once noted that "there are almost as many interpretations of the specific elements constituting an adequate warning as there are warning cases".[182] The important point is that, under strict liability, the focus is entirely on the warning attached to the product and the sole question is whether it conveys sufficient information to consumers about the known or knowable dangers associated with the product as to promote the dual objectives of warnings: reducing unnecessary risks and allowing consumer informed-choices about products. If it does, the product is not defective and the manufacturer is not liable. If it does not, the manufacturer is liable for having supplied a defective product,[183] regardless of whether or not a standard of reasonable care would otherwise have exonerated the manufacturer.

III. *An Emerging Compound Standard of Liability for Failure to Warn*

This review suggests the emergence of a new standard, combining elements of both negligence and strict liability with respect to failure to warn. Regardless of the theory adopted, foreseeability of the risk is a crucial factor in determining whether a duty to warn is owed in a particular setting. As conceded by courts of a strict liability tradition in the United States, the incorporation of this element into the analysis adds a flavour of negligence to the inquiry of whether manufacturers should be held responsible for damages allegedly caused by their products. Indeed, a defendant's foreseeability plays a crucial role in the law of negligence; it is central to the determination of whether the defendant owed a duty of

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181. *Ibid.* at 559.

182. B. Wrubel, "Liability for Failure to Warn or Instruct" in *Product Liability: Warnings, Instructions, and Recalls 1984* (New York: Practising Law Institute, 1984) 9 at 38. The author offers a fairly extensive review of the question at 38-45. See also Shapo, *supra*, note 3, c. 19 at 62-66.

183. As noted, an added inquiry might be whether this defect makes the product "unreasonably dangerous" within the meaning of § 402A of the *Restatement (Second) of Torts* for those states adopting this modifier.

care *vis-à-vis* the particular plaintiff. In this respect, it is easy to understand why this element plays a central role in the Canadian context when the duty to warn issue is considered.

However, an analysis of the manufacturer's liability does not end after this preliminary inquiry. In both countries, foreseeability of risk combined with damages caused by the materialization of said risk are insufficient in themselves to give rise to liability. There must be a *breach* of the duty to warn and it is during this second inquiry that changes in the focus occur. While the analysis in both countries starts off sounding like negligence, it adopts a strong flavour of strict liability when considering whether or not the duty to warn has been breached. Courts focus almost exclusively on the nature of the product, asking themselves whether the warning was adequate in all the circumstances. In this inquiry, the reasonable care exercised by the manufacturer is often treated as immaterial, even though it forms the very heart of a cause of action for negligence. Courts in the United States adhering to strict liability often use the distinction in focus (the *product* and not the *conduct*) during this second stage in order to emphasize that they are still committed to liability without fault. Courts in Canada, however, do not have a similar excuse.

Thus, it is apparent that courts in both countries depart from their respective theories of liability at different stages of the analysis. Many courts in the United States depart from pure strict liability during the preliminary inquiry into the existence of a duty to warn, relying heavily, like their Canadian counterparts, on the notion of foreseeability of the risk. Many courts in Canada depart from pure negligence liability during the breach inquiry by adopting an approach similar to the one adopted by their counterparts in the United States. In the end, a common approach emerges combining elements taken from both standards of liability.

Commentators in the United States, noting the growing relevance played by foreseeability in strict liability failure to warn, have generally reacted in one of three ways. Some have criticized this as an impermissible infusion of negligence and have called for a return to pure strict liability.[184] At the other extreme, some have suggested that this result is inevitable and appropriate since defects in warnings are fundamentally different from manufacturing defects and must intrinsically be judged according to negligence factors.[185] In the middle, some have acknowl-

184. See, for example, Wetheimer, *supra*, note 4; Note, "Is There a Distinction Between Strict Liability and Negligence in Failure to Warn Actions" (1981), 15 Suffolk U.L. Rev. 983; and Martineau, "The Duty to Warn Under Strict Products Liability as Limited by the Knowledge Requirement: A Regretful Retention of Negligence Concepts" (1981), 26 St. Louis U.L.J. 125.
185. See, for example, Henderson & Twerski, *supra*, note 34 and Bromberg, *supra*, note 142.

edged that foreseeability is relevant but have called for the introduction of other features in order to underscore the distinction between both theories.[186] What these commentators have in common is their tendency to presumptively equate a consideration of foreseeability at the preliminary stage of the existence of a duty with a standard of fault liability.[187] They assume it is not possible for foreseeability and strict liability to coexist, and that courts should therefore (1) reject the infusion of forseeability in order to uphold strict liability, (2) openly recognize that they are in essence applying a pure negligence theory and that it is the correct standard for failure to warn, *or* (3) keep foreseeability while developing new distinguishing features for strict liability failure to warn.[188]

My reaction to the current situation in Canada and the United States is different. For my part, I believe forseeability of risk (during the duty inquiry) and strict liability (during the breach inquiry) can indeed coexist, that such a peaceful coexistence is not surprising considering the current legal framework, and that the emerging combined standard of liability should be openly acknowledged and adopted since it represents a just compromise between the competing interests of consumers and manufacturers.

The assumption that foreseeability of risk cannot coexist with strict liability ought to be rejected. When a court finds that a manufacturer did not know, or could not have reasonably known, about a risk at the time

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186. See, for example, Note, "Reformulating the Strict Liability Failure to Warn", *supra*, note 4.

187. The tendency in U.S. scholarship to equate forseeability during the duty inquiry with a standard of negligence governing the breach inquiry has some basis. If a risk is foreseeable and the manufacturer provides *no warning whatsoever*, the distinction between negligence and strict liability at the stage of the breach inquiry is indeed non-existent. In essence, under either theory a court can be taken as saying that the manufacturer did not act in a reasonably prudent manner in not warning of a known or knowable risk. A reasonable manufacturer placed in its shoes would have behaved differently and would have offered some warning. *When some warning is provided*, however, this basis disappears. Indeed, I submit that an important distinction between both theories does (or rather, should) emerge when a warning is provided. Under a pure negligence theory, courts ought to evaluate the efforts made by the manufacturer to warn consumers of foreseeable risks. They ought to weigh the costs of avoiding the danger along with the likelihood of its occurrence and the gravity of the danger. They ought to consider what a reasonable manufacturer would have done in the circumstances. Their focus would be on the conduct of the manufacturer and the care exercised in making consumers aware of foreseeable risks. Yet, many courts in both Canada and the United States focus exclusively on the nature of the product and conduct a technical analysis into whether or not the warning provided is "adequate". In making this determination, the care exercised by the manufacturer is not the determining factor.

188. Only a few commentators appear to accept the recent judgments in this respect at their face value; that is, as standing for a watered-down standard of strict liability in the context of failure to warn. See Pearson, *supra*, note 4 and Note, "The Move Toward a Negligence Standard in Strict Products Liability Failure to Warn Cases", *supra*, note 4.

of supply, it is *not* saying anything about the manufacturer's negligence in the circumstances. At the stage of determining the existence of a duty to warn, the reasonableness of the manufacturer's conduct is not the issue. Rather, courts are deciding, for reasons not dissimilar to those motivating the rule derived from *Winterbottom* v. *Wright*,[189] that the manufacturer did not owe a duty to avoid this particular occurrence. This old rule was not based on a presumed reasonableness of manufacturers' conduct, but on concerns with slippery slopes, floodgates of litigation, and unlimited defendant liability. The difference with the old rule of privity, however, is that courts have substituted a flexible principle taking into account each particular case for the old absolute prohibition against non-privy suits in tort. This newer rule, holding a manufacturer liable only if the risk in question could have been foreseen, is also based on sound principle and policy with respect to the fairness and social utility of turning manufacturers into virtual insurers for the products they supply. It is impossible for a manufacturer to predict unknowable risks and to insure itself accordingly. Many have noted the infeasibility of spreading losses which arise from unknowable risks and hazards among all users of the product.[190] Making a manufacturer liable for failing to warn of unknowable risks could lead to an increase in superfluous warnings, to consumer apathy, and to a decrease in innovation by fear of unlimited liability. Thus, while I suggest that the current approach is akin to the rule derived from *Winterbottom* v. *Wright* in that neither says anything about the reasonableness of the manufacturer's conduct, I am not suggesting that both rules have similar foundations. Like the old privity rule, the principle that a duty to warn is owed only with respect to foreseeable risks performs a gate-keeping function. It lets in only those actions which are considered worthy of judicial attention on broad policy grounds having little, if anything, to do with negligence.

In Canada, a combined standard conforms with a growing trend towards imposing stricter liability on manufacturers within the current framework of the law negligence. It is surely not unusual for Canadian courts to focus on foreseeability of risk at the preliminary stage of determining the existence of a duty to warn. But, the switch afterwards to strict liability in cases where they must evaluate the adequacy of a warning should not be surprising either. Canadian courts have slowly been moving in the direction of imposing greater responsibilities on

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189. *Supra*, note 31.

190. See, for example, J.A. Henderson, "Coping with Time Dimension in Products Liability" (1981), 69 Cal. L. Rev. 919 at 948-49 and Wade, "On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing" (1983), 58 N.Y.U.L. Rev. 734.

manufacturers for defective products, irrespective of fault. This is particularly noticeable in the area of manufacturing defects via the use of evidential devices such as *res ipsa loquitur*.[191] While reluctant to openly adopt strict tort liability, Canadian courts have shown a tendency to infuse elements of this theory within the current analytical framework. Perhaps motivated by recent criticism addressed to strict products liability in the United States,[192] Canadian courts have so far refused to take drastic steps in modifying the manner in which losses caused by defective products are shifted to manufacturers. A theoretical showing of negligence is still required. However, in a quintessentially Canadian fashion, they have adopted a *de facto* compromise between both traditions with respect to failure to warn: on the one hand, the manufacturer is not held responsible for failing to warn of risks which are neither known nor knowable at the time of supply (the duty to warn issue); on the other hand, the reasonable care exercised by the manufacturer in attempting to warn consumers is not determinative with respect to liability (the breach issue). The first aspect allows them to adhere to a theory of negligence and avoid virtually unlimited manufacturer liability, while the second alleviates the plaintiff's burden of proof and promotes the social policies which gave rise to strict tort liability in the United States.

The mixed standard of liability protects manufacturers from unlimited liability and from becoming insurers for their products. As noted by many courts in the United States, it was never the goal of strict liability to turn manufacturers into insurers for their products.[193] Making them liable for unforeseeable risks would have such an effect as it would not be possible for them to adopt measures to avoid such risks, nor would it be possible for them to adequately insure themselves. It is possible to deter conduct creating foreseeable risks, whether such conduct is labelled negligent or not. Strict liability can indeed deter some accidents by forcing manufacturers to adopt preventive measures which perhaps would not otherwise be required by a standard of reasonable care. But, short of forcing social actors into complete inaction, it is not possible to deter the creation of unforeseeable risks. At the heart of deterrence is some notion of

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191. For a recent example, see *Farro* v. *Nutone Electrical Ltd.*, *supra*, note 13.

192. See, for example, the recent articles listed *supra*, note 17 as well as P.W. Huber, *Liability: The Legal Revolution and its Consequences* (New York: Basic Books, 1988); R.J. Stayin, "The U.S. Product Liability System: A Competitive Advantage to Foreign Manufacturers" (1988), 14 Can.-U.S. L.J. 193; G.S. Frazza, "A U.S. View of the Products Liability Aspects of Innovation" (1989) 15 Can.-U.S. L.J. 85; and A. Schwartz, "Proposals for Product Liability Reform: A Theoret,ical Synthesis" (1988), 97 Yale L.J. 353.

193. See, for example, *Anderson* v. *Owens-Corning*, *supra*, note 34 at 559 and *Fibreboard Corporation* v. *Fenton*, *supra*, note 134 at 1175.

foreseeability of the risk which should be avoided. A rule requiring manufacturers to warn against risks which were neither known nor knowable at the time of supply would do nothing to achieve an optimal level of deterrence, and could ultimately have negative impacts on the innovation of new products and on the rationales for failure to warn law. Conceivably, manufacturers would swamp consumers with multiple standard-form warnings to protect themselves against potential liability, leading to increased consumer confusion and indifference. The rationales of preventing accidents and permitting informed choices would ultimately be impaired if manufacturers were forced to warn of every possible risk associated with their products, whether reasonably foreseeable or not.

For these reasons, I believe the emerging standard of liability is worth encouraging. Courts in Canada and the United States should be more open about the manner in which they are making decisions with respect to failure to warn. Instead of strongly adhering to one theory of liability or the other, believing that there is no compromise position to be taken, they should openly acknowledge that they are in fact using a compound approach superior to either taken in isolation. To be sure, I am not criticizing the judiciary of either country for making *bona fide* efforts to preserve the internal consistency of their respective traditions with respect to products liability. But when it becomes apparent that something else is going on, courts should either reject the interpretation advanced herein and return to a strict application of negligence or strict liability, or they should openly recognize that they are applying a mixed standard of liability. Such candour would diminish much of the confusion currently existing in this area, thereby increasing the predictability of the law and economising valuable judicial resources.

Conclusion

Currently, there is a gap in Canada and the United States between the standard of liability adopted in theory to decide failure to warn actions involving products and the standard used in practice. Regardless of the language chosen, courts in both countries often use a common approach which combines elements of negligence and strict liability. Under this approach, the manufacturer's foreseeability of the risk is initially focused on in order to determine whether a duty to warn arose. If such a duty is triggered, the focus switches to the defective nature of the product and to an inquiry into whether the warning on the product was adequate. When no warning whatsoever is given, the inquiry does not proceed any further and the manufacturer is held liable provided the other requirements of the

tort are met. In such a scenario, there is no practical difference between a theory of strict liability and one of negligence, unless perhaps one shifts the burden with respect to foreseeability to the manufacturer under the former. If some warning is provided, however, an important distinction emerges at the stage of the breach inquiry. In theory, a negligence standard would require an evaluation of the manufacturer's efforts in warning consumers, taking into consideration factors such as the costs of avoiding the accident, the likelihood of its occurrence, and the severity of the harm done. However, in both countries, the unreasonableness of the manufacturer's conduct is not given a determining role during this second inquiry. Courts focus chiefly on the defective nature of the product and conduct a technical analysis related to the adequacy of the warnings provided. In the end, a manufacturer can be held liable if its product is defective, in the sense of not carrying adequate warnings, even though it exercised reasonable care in attempting to warn consumers of the dangers associated with its products.

Accordingly, it is misleading to describe the situation in either country solely in terms of negligence or strict liability. With respect to many states in the United States, a "strict liability" label does not give adequate consideration to the fact that foreseeability of risk is used as a threshold requirement for the existence of a duty to warn. With respect to the common law provinces of Canada, a "negligence" label underscores the importance given to the manufacturer's knowledge—actual or constructive—of the danger, yet does not fully reflect the manner in which a growing number of courts are conducting the breach inquiry. Moreover, simply changing one label for the other would not resolve the confusion, as the opposite arguments could then be made. That is, references to either of these standards in isolation does not fill the current gap between theory and practice. Experience in both countries reveals the emergence of a compound standard of liability with respect to warning defects, which cannot be understood solely in terms of negligence or strict liability.

There is nothing inherently illogical with such a combinatory standard of liability. In the United States, it conforms to the letter and spirit of the *Restatement (Second) of Torts* which makes foreseeability relevant with respect to the existence of a duty to warn, while at the same time disregarding the reasonableness of the manufacturer's conduct as the focus of any breach inquiry. In Canada, it conforms with a growing trend towards imposing stricter liability on manufacturers within the current framework of the law negligence. Furthermore, such a standard promotes the traditional goals of strict tort liability while protecting manufacturers from unlimited liability and preventing them from becoming insurers for their products. In essence, it represents a compromise between both

traditions: in the context of the *duty to warn inquiry*, the manufacturer is not held responsible for failing to warn of risks which are neither known nor knowable at the time of supply while, in the context of the *breach inquiry*, the reasonable care exercised in attempting to warn consumers is not given determining weight. The problem, however, is the fidelity of courts in both countries to their respective theories of liability. Instead of strongly adhering to one traditional standard, an approach bound to create confusion and waste valuable judicial resources, they should openly acknowledge the use of a mixed approach.

The debate with respect to Canadian products liability can learn from the foregoing. The case for reforming this area and for adopting a standard of strict tort liability must be more discriminating than it currently is. I believe the current debate overly generalizes the necessity and practicality of adhering to a theory of strict liability, and fails to take into account the practical experience with this standard in the United States. Concentrating on manufacturing defects and the use of devices such as *res ipsa loquitur* to lighten the plaintiff's burden, and deducing that the open adoption of all-encompassing strict products liability would be an incremental step of great benefit does not tell the entire story. As evidenced by the experience in the United States, such a standard, while relatively easy to apply when manufacturing defects are involved, is not always suitable for defects in designs and warnings. Courts south of the Canadian border have been struggling ever since *Greenman*[194] and its progeny to establish tests and criteria faithful to liability without fault for dealing with these areas.

Undoubtedly, Canadian courts and legislatures would encounter similar problems if they adopt a general standard of strict tort liability. They have the hindsight and flexibility required to avoid reforms that would do little to actually improve the situation of a plaintiff injured by a product, but would create confusion for consumers, litigants, juries, judges, and commentators. They should deal with these problems before they arise by tailoring reforms to specific types of defects. For the reasons motivating a move to strict liability in the United States,[195] the open recognition of strict tort liability for manufacturing defects should be encouraged in the Canadian context. In my view, such a reform could be accomplished judicially as it represents an incremental change to the *status quo* and falls within the guidelines established by the Supreme Court of Canada for

194. *Supra*, note 46.
195. *Supra*, notes 45-50 and accompanying text.

court-made reforms to the Common Law.[196] With respect to design and especially warning defects, however, any reform should seriously consider whether this standard would actually alter the way cases are currently being decided.

On this point, the debate should also pay closer attention to the way courts of both countries are actually applying their theories of liability. In actions for failure to warn, Canadian courts have already adopted elements of strict liability in their analysis. The necessity of changing standards in such a context is therefore diminished. In addition, many courts in the United States that have made such a move in theory are in fact using an approach almost identical to the one currently used in Canada. In my opinion, a standard of strict liability in this context would impose an unnecessary detour in the current path of Canadian courts. Initially, they would struggle with the distinction between negligence and strict liability as applied to failure to warn. Eventually, however, they would return to their current position; that is, applying a standard which combines elements of both negligence and strict liability. Again, it would be better for courts to openly acknowledge the compromise approach they have adopted. In the meantime, those seeking reform in Canada should not conclude from the judiciary's silence that a move from a theory of negligence to one of strict liability would actually give rise to a meaningfully different approach in deciding who should bear the losses caused by products with defective warnings.

196. See the recent trilogy of *Watkins* v. *Olafson*, [1989] 2 S.C.R. 750, 61 D.L.R. (4th) 577; *Salituro* v. *The Queen*, [1991] 3 S.C.R. 654, 131 N.R. 161; and *London Drugs Ltd.* v. *Brassart and Vanwinkel*, *supra*, note 29.