



1-1-1992

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Recommended Citation

Dana K. Astrachan, *Anderson v. Owens-Corning Fiberglass Corp.: Asbestos Manufacturers and Strict Liability: Just How Strict Is It*, 23 PAC. L.J. 1807 (1992).

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Anderson v. Owens-Corning Fiberglass Corp.: Asbestos Manufacturers and Strict Liability: Just How Strict Is It?

“Asbestos,¹ a miraculous mineral that fireproofed and insulated American homes and buildings for generations, became the cause of a national calamity as hundreds of thousands of people exposed to its dusts and fibers became ill and died.”² Victims, as well as their families, flocked to the courts to seek compensation. Cases began pouring into the courts twice as fast as their claims could be settled.³ Today, approximately 30,000 asbestos claims are pending in the judicial system, and it has been predicted that asbestos litigation will increase by fifty percent in the next three years.⁴

1. See Polin, *Asbestosis*, 45 AM. J. PROOF OF FACTS 2d, 1, 8 (1986) (providing that asbestos consists of several varieties of silicate minerals, all of which have certain characteristics in common). All forms of asbestos have a high degree of thermal, electrical, and chemical resistance, and therefore make excellent insulators. *Id.* Due to these qualities, asbestos-bearing products were used extensively in shipbuilding and repair, and in the construction industry. Vermeulen v. Superior Court, 204 Cal. App. 3d 1192, 1198, 251 Cal. Rptr. 805, 808 n.6 (1st Dist. 1988) (*disagreed with* by Anderson v. Owens-Corning Fiberglass Corp., 217 Cal. App. 3d 772, 266 Cal. Rptr. 204 (2nd Dist. 1990), *review gr.*, in part Anderson v. Owens-Corning Fiberglass Corp., 790 P.2d 238, 269 Cal. Rptr. 74, (1990), and reprinted for tracking pending review Anderson v. Owens-Corning Fiberglass Corp., 227 Cal. App. 3d 1035 (2nd Dist. 1990) *superseded* Anderson v. Owens-Corning Fiberglass Corp., 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991)). Asbestos was used in the following products: Textiles, paper, ropes, wicks, stoves, filters, floor tiles, roofing shingles, clutch facings, water pipe, cement, fillers, felt, fireproof clothing, gaskets, battery boxes, clapboard, wallboard, fire doors, fire curtains, and brake lining. *Id.* Additionally, it was used for fire resistant partitions in schools, office buildings, hospitals and ships; as thermal insulation on structural steelwork; as acoustical insulation for walls and ceilings; as undersealing for automobiles; as insulation for air conditioning ducts, shafts, steam lines, oil lines, and chemical lines; and used in ironing board covers, theater scenery, hot air pipe wrapping, stove lining, table pads, handles and coatings of all sorts. *Id.*

2. On the Civil Courts . . . the Asbestos Calamity, L.A. Daily J., April 4, 1991, at 6, col. 1. It has been estimated that 200,000 to 450,000 deaths have resulted from asbestos exposure. Hensler, Felstiner, Selvin & Ebener, *Asbestos in the Courts—The Challenge of Mass Toxic Torts*, p. 1 (Rand 1985).

3. On the Civil Courts . . . the Asbestos Calamity, *supra* note 2, at 6, col. 1.

4. Labaton, *The Tangled Crisis of Asbestos Litigation is Still Growing, with no Solution in Sight*, L.A. Daily J., March 15, 1991, at B1, col. 1; Hensler, ET. AL., *supra* note 2, at 1. According to a special committee of judges, appointed by Chief Justice Rehnquist for the sole purpose of seeking Congress' aid in rescuing the courts from this "impending disaster," asbestos claims will

Asbestos related claims are unique.⁵ Many of the individuals affected by asbestosis and other asbestos related diseases⁶ were exposed to asbestos as early as the 1930's.⁷ By the 1940's it was known that exposure to asbestos fibers could cause asbestosis and other diseases.⁸ However, the use of asbestos was not sharply curtailed until the 1970's, which was when most of its harmful health effects were discovered.⁹ Nonetheless, the asbestos litigation

continue to emerge in the near future at a more rapid rate than ever. Labaton, *supra* at B1, col. 1. This committee has urged Congress to establish a national solution to the asbestos problem. *Id.* Thousands of injured people are dying before their asbestos cases are decided. *Id.* Eventually, the costs of such litigation will deplete available resources well before the thousands of remaining claims can be heard. *Id. See id.* (suggesting that whether or not an injured plaintiff will ultimately recover damages will not depend on the extent of injury or need, but instead on which lawyer files the claim first).

5. See HENSLER, ET. AL. *supra* note 2, at 1-2 (suggesting that asbestos litigation is a new type of cause of action that differs from traditional personal injury suits because: (1) The injuries are medically complex, difficult to detect, associated with multiple causes, and have an uncertain prognosis; (2) the injuries are attributed to exposure to products that occurred several years ago; (3) there exists a large group of plaintiffs; and (4) only a small number of producers and suppliers have been accused of the behavior that led to the plaintiffs' injuries, and most of these defendants have been named in nearly all suits).

6. Asbestosis is the development of hardened fibrous areas in the lung tissue between the air spaces (alveoli) in the lung. Polin, *supra* note 1, at 9; Hensler, ET. AL., *supra* note 2 at 13-14. It generally takes at least 10, and usually 20 or more years to develop, and is first evidenced by shortness of breath. Polin, *supra* note 1, at 9. By the time asbestosis is detectable, the disease is progressive and its effects are irreversible, even if the victim is no longer exposed to asbestos dust. *Id.* Asbestosis itself is not a cancerous disease; nevertheless, exposure to asbestos is associated with lung cancer, and mesothelioma, which is a tumor on the membrane that lines the lungs and thoracic cavity. *Id.* Asbestos has also been associated with the recent increases in the rate of cancer of the esophagus, stomach, colon, larynx, and kidneys. *Id.* Like asbestosis, the symptoms of these diseases do not manifest themselves for at least 20 years after the first exposure to asbestos dust. *Id.*

The disease of asbestosis has been recognized since 1924. *Id.* at 10. In the 1940's it started to become obvious that exposure to asbestos fibers could cause asbestosis and several other cancers. *Id.* However, asbestos use was not sharply curtailed until the 1970's, when most of its harmful health effects were discovered. The Wall Street Journal, Oct. 22, 1991, at A3, col. 1. *See generally*, Hensler, ET. AL., *supra* note 2, at 1-5 (detailing the history and effects of asbestos). *See id.* at 13 (stating that although inhalation of asbestos fibers can cause asbestosis and other diseases, every person who is exposed to asbestos does not necessarily develop one of the diseases associated with it).

7. *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 196, 447 A.2d 539, 542 (1982). *But see* *Feldman v. Lederle Lab.*, 97 N.J. 429, 455, 479 A.2d 374, 387-88 (1984) (directly limiting *Beshada* to its facts). Some commentators admit that as far back as 1924 it has been known that exposure to asbestos caused asbestosis and other diseases. Polin, *supra* note 1, at 10; Hensler, ET. AL., *supra* note 2, at 1.

8. Polin, *supra* note 1, at 10-11.

9. *Rosewicz, Appeals Panel Overturns Ban on Asbestos: Court Reverses EPA Rules Ending Remaining Uses of Carcinogen by 1987*, Wall St. J., Oct. 22, 1991, at A3, col. 1.

has arisen only recently because of the nature of the diseases.¹⁰ There usually is a long latency period, approximately 20 years, between the time of exposure to asbestos and the manifestation of the symptoms of asbestosis and other asbestos related diseases.¹¹

Recently, courts have struggled with determining whether a manufacturer of asbestos and asbestos products should be liable in tort to an injured person or worker for failure to warn of the product's health-related risks.¹² One of the central issues which arises in asbestos litigation is whether manufacturers should be permitted to offer at trial state-of-the-art evidence, which is evidence indicating that, based on the scientific knowledge available at the time the product was manufactured or distributed, the defendant manufacturer had no way of knowing of the harm the product could cause.¹³ This evidence is relevant since it proves that the defendant could not warn of a defect that was unknowable at the time of production of the product.¹⁴

Plaintiffs in asbestos cases argue that under the traditional doctrine of strict products liability,¹⁵ which ignores the culpability of the defendant and only looks to the safe or unsafe character of the product, the knowledge of the manufacturer is irrelevant.¹⁶ Further, the plaintiffs claim that the manufacturers are in a much

10. *Beshada*, 90 N.J. at 196, 447 A.2d at 542 (limited by *Feldman*, 97 N.J. at 455, 479 A.2d at 387-88).

11. *Id.*

12. *See*, Labaton, *supra* note 4, at B1 col. 1 (noting that federal judges across the nation have been competing with each other to be the first to resolve the asbestos litigation crisis); O'Reilly, *Risks of Assumptions: Impacts of Regulatory Label Warnings Upon Industrial Products Liability*, 37 CATH. U. L. REV. 85, 85 (1987) (addressing the question of liability of an industrial chemical product manufacturer for failure to warn of the chemical's health related risks).

13. *Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 990, 810 P.2d 549, 550, 281 Cal. Rptr. 528, 529 (1991); Hensler, ET. AL., *supra* note 2, at 46.

14. *Anderson*, 53 Cal. 3d at 1002, 810 P.2d at 558, 281 Cal. Rptr. at 537.

15. *See infra*, notes 51-70 and accompanying text (explaining in detail the doctrine of strict liability).

16. Only a minority of jurisdictions have agreed that the defendant's knowledge is irrelevant in strict liability failure to warn cases. *See, eg., In re Asbestos Cases* 829 F.2d 907, 909 (9th Cir. 1987); *Johnson v. Raybestos-Manhattan Inc.*, 69 Haw. 287, 740 P.2d 548, 549 (Haw. 1987); *In re Hawaii Federal Asbestos Cases*, 665 F. Supp. 1454, 1458 (D.C. Haw. 1986); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 114 (La. 1986); *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434, 438 (Mo. 1984); *Beshada*, 90 N.J. at 204, 447 A.2d at 546 (reasoning later rejected in *Feldman v. Lederle Lab.*, 97 N.J. 429, 455, 479 A.2d 374, 386-88 (1984)).

better position to compensate for injuries resulting from the use of their products than are the victims.¹⁷

On the other hand, manufacturers contend that since there was no knowledge as to the harmful effects of asbestos at the time the product was developed, the manufacturers were incapable of warning the plaintiffs of the product's dangers.¹⁸ Additionally, manufacturers insist that by excluding evidence of "unknowability," the courts will cause the manufacturers to be placed in the role of insurers of their products, thereby holding them absolutely liable for all damages resulting from the products.¹⁹ The manufacturers maintain that this result was not the objective of the strict products liability doctrine.²⁰

California appellate courts disagree on the issue of whether evidence of the manufacturer's knowledge regarding the harmful effects of asbestos is admissible in products liability actions based on an alleged failure to warn of a product's risks.²¹ The Supreme

17. *Beshada*, 90 N.J. at 205, 447 A.2d at 547; *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

18. *Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 992, 810 P.2d 549, 551, 281 Cal. Rptr. 528, 530 (1991); *Vermeulen v. Superior Court*, 204 Cal. App. 3d 1192, 1206, 251 Cal. Rptr. 805, 813-14 (1988) (disagreed with by *Anderson v. Owens-Corning Fiberglass Corp.*, 217 Cal. App. 3d 772, 266 Cal. Rptr. 204 (2nd Dist. 1990), *review gr.*, in part *Anderson v. Owens-Corning Fiberglass Corp.*, 790 P.2d 238, 269 Cal. Rptr. 74, (1990), and reprinted for tracking pending review *Anderson v. Owens-Corning Fiberglass Corp.*, 227 Cal. App. 3d 1035 (2nd Dist. 1990) *superseded* *Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991)); Klein, 'Old Products': *The Admissibility of State of the Art Evidence in Product Liability Cases*, 9 J. OF PROD. LIAB. 233, 236 (1986) (citing the RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965)).

19. *Anderson*, 53 Cal. 3d at 993, 810 P.2d at 552, 281 Cal. Rptr. at 531; Klein, *supra* note 18, at 236; Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 13 (1965). See *Anderson*, 53 Cal. 3d at 1002, 810 P.2d at 558, 281 Cal. Rptr. at 537 (explaining absolute liability as where manufacturers are held automatically liable for injuries caused by their product merely because of the fact that the product was not labelled). In *Anderson*, the court declared that this is not the purpose or goal of the failure to warn strict liability theory. *Id.*

20. *Anderson*, 53 Cal. 3d at 993, 810 P.2d at 552, 281 Cal. Rptr. at 531. Many recent cases agree that strict liability was not intended to make manufacturers and distributors insurers of the safety of the use of their products. *Id.*; *Brown v. Superior Court*, 44 Cal. 3d 1049, 1066, 751 P.2d 470, 480-81, 245 Cal. Rptr. 412, 422 (1988); *Woodill v. Parke Davis & Co.*, 402 N.E.2d 194, 199 (Ill. 1980); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 733, 575 P.2d 1162, 1166, 144 Cal. Rptr. 380, 384 (1978).

21. *Anderson*, 53 Cal. 3d at 991, 810 P.2d at 550, 281 Cal. Rptr. at 529.

Court of California attempted to resolve this conflict in *Anderson v. Owens-Corning Fiberglass Corp.*²²

In *Anderson*, the court permitted the manufacturer of asbestos and asbestos products to introduce state-of-the-art evidence, or, in other words, evidence demonstrating that the defendant neither knew nor could have known of the potential harm its product could cause based on the scientific knowledge available at the time of manufacture or distribution.²³ In effect, the court held that Owens-Corning could not be held strictly liable for Anderson's injuries unless the manufacturer knew at the time of manufacture or distribution that its products could cause asbestosis and other asbestos related diseases, and that Owens-Corning failed to warn of these dangers.²⁴ Hence, the use of state-of-the-art evidence would enable Owens-Corning to demonstrate that it did not have, nor could have had, such knowledge at the time of manufacture or distribution.²⁵

While most courts agree that a manufacturer must warn of hazards inherent in its product that are reasonably foreseeable or discoverable,²⁶ the courts disagree in respect to hazards that are

22. 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991).

23. *Anderson*, 53 Cal. 3d at 1004, 810 P.2d at 559, 281 Cal. Rptr. at 538. See *Vermeulen v. Superior Court*, 204 Cal. App. 3d 1192, 1199, 251 Cal. Rptr. 805, 809 (1st Dist. 1988) (*disagreed with by Anderson v. Owens-Corning Fiberglass Corp.*, 217 Cal. App. 3d 772, 266 Cal. Rptr. 204 (2nd Dist. 1990), *review gr.*, in part *Anderson v. Owens-Corning Fiberglass Corp.*, 790 P.2d 238, 269 Cal. Rptr. 74, (1990), and reprinted for tracking pending review *Anderson v. Owens-Corning Fiberglass Corp.*, 227 Cal. App. 3d 1035 (2nd Dist. 1990) *superseded Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991)) (indicating that the term "state-of-the-art" is chameleon-like, since it refers to everything from ordinary customs of the trade to the objective existence of technological information to economic feasibility). In *Vermeulen*, the parties could not agree on a definition of state-of-the-art, however the appellate court relied on the trial court's definition: facts which were either known or discoverable in light of the scientific and technological knowledge available to the manufacturer at the time of manufacture and distribution. *Id.* at 1199, 1202, 251 Cal. Rptr. at 809, 811. It has been suggested that the meanings of state-of-the-art evidence are so diverse and so easily confused that it would be best to eschew its use completely. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. Rev. 734, 750-51 (1983).

24. *Anderson*, 53 Cal. 3d at 1004, 810 P.2d at 559, 281 Cal. Rptr. at 538.

25. *Id.*

26. See Polin, *supra* note 1, at 11 (defining reasonably foreseeable or discoverable hazards as those that a manufacturer knows of or should know of in the course of business). The state of the law on "knowable" hazards remains settled: the failure to furnish an adequate warning may subject manufacturers and distributors to strict liability when they knew or should have known of the hazard.

“unknowable”²⁷ at the time of manufacture or distribution.²⁸ Prior to the *Anderson* decision, the California Supreme Court had not ruled on the issue of whether state-of-the-art evidence should be admissible as a defense to manufacturers who did not warn of unknowable hazards.²⁹ When dealing with knowable, or

Vermeulen, 204 Cal. App. 3d at 1203, 251 Cal. Rptr. at 811.

27. See Polin, *supra* note 1, at 11-12 (explaining that “unknowable” hazards are those which are not reasonably foreseeable or discoverable); *Anderson*, 53 Cal. 3d at 990, 810 P.2d at 550, 281 Cal. Rptr. at 529 (indicating that “unknowable” refers to risks that were neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution).

28. The majority view permits the state-of-the-art defense. See, e.g., RESTATEMENT (SECOND) OF TORTS § 402A (1965); *Vermeulen*, 204 Cal. App. 3d at 1204, 251 Cal. Rptr. at 812 (stating that most courts agree that liability should be imposed only if the manufacturer knew, or should have known, of the presence of the danger); *Oakes v. E. I. Du Pont de Nemours & Co.*, 272 Cal. App. 2d 645, 650-51, 77 Cal. Rptr. 709, 713 (1969) (holding that liability must not be imposed when the manufacturer had no way of knowing of the danger). However, in a minority of jurisdictions, courts have not permitted state-of-the-art evidence to establish a defense. *But see Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 115-16 (La. 1986) (holding inadmissible evidence of the state-of-the-art defense that was offered to establish whether the manufacturer and seller of asbestos products knew or should have known of the hazards of asbestos); *In re Hawaii Federal Asbestos Cases*, 699 F. Supp. 233, 235-36 (D.C. Haw. 1988) (finding that state-of-the-art evidence is not relevant in failure to warn cases brought in strict liability because the imposition of liability for failure to warn of unknowable defects will promote risk-spreading, encourage accident avoidance, and eliminate the difficult task of proving the manufacturer’s negligence); *Johnson v. Raybestos-Manhattan, Inc.*, 69 Haw. 287, 740 P.2d 548, 549 (Hawaii 1987) (holding state-of-the-art evidence inadmissible for the purpose of determining whether the defendants knew or should have known of the dangers of asbestos); *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434, 438 (Mo. 1984) (denying defendant’s proffered state-of-the-art defense because the plaintiff brought his case on a defective design theory, hence issues of the defendant’s knowledge of the product’s danger were irrelevant); *Jowers v. Commercial Union Ins. Co.*, 435 So. 2d 575, 578 (La. App. 3d Cir. 1983) (stating that the inability of a defendant manufacturer to know or prevent a risk is not a defense in strict liability cases); *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 209, 447 A.2d 539, 549 (1982) (stating that the defense of state-of-the-art evidence may not be raised in products liability cases based on strict liability for failure to warn) (limited by *Feldman v. Lederle Lab.*, 97 N.J. 429, 455, 479 A.2d 374, 386-88 (1984)). See also Klein, *supra*, note 18, at 239, 243-44, 248 (stating that, as of 1984, a number of jurisdictions, including California, had not addressed the issue of whether state-of-the-art evidence is admissible in failure to warn cases). Specifically, California, Delaware, Iowa, Kentucky, Maine, Mississippi, Montana, Nevada, South Carolina, Vermont, and Wisconsin had not addressed this issue. *Id.* However, Alabama, Arizona, Arkansas, Colorado, Connecticut, Indiana, Kansas, Maryland, Michigan, Minnesota, New Mexico, Ohio, Tennessee, and West Virginia do admit state-of-the-art evidence in failure to warn cases. *Id.* Only Massachusetts and North Dakota clearly do not allow the evidence. *Id.* The remainder of the states are either uncertain on the issue, or permit state-of-the-art evidence in failure to warn cases only under certain circumstances. *Id.* See generally Polin, *supra* note 1, at 11-12 (detailing the dispute in the law of strict liability in regards to unknowable hazards).

29. See Klein, *supra* note 18, at 243, 248; *Anderson*, 53 Cal. 3d at 991, 810 P.2d at 550, 281 Cal. Rptr. at 529 (asserting that California had not yet decided whether to permit the state-of-the-art defense in failure to warn cases).

reasonably foreseeable hazards, the doctrine of negligence provides that a manufacturer will be held liable if the manufacturer knew, or should have known of a danger inherent in its product and this danger was of such character that a reasonable manufacturer would have warned consumers and users of its existence.³⁰ Hence, the *Anderson* court, by incorporating the knowledge or knowability component of negligence into the strict liability for failure to warn claims, arguably has exempted manufacturers of all varieties of products from strict liability in failure to warn claims.³¹ Consequently, the *Anderson* decision may be interpreted as implying that all claims brought on the failure to warn theory of strict products liability may be analyzed under the negligence standard.³²

This Note examines the approach used by the California Supreme Court, in *Anderson*, in deciding whether state-of-the-art evidence is admissible in failure to warn strict products liability actions. Part I discusses the evolution of strict liability and its underlying policies.³³ Part II summarizes the facts of *Anderson v. Owens-Corning Fiberglass Corp.* and reviews the majority, concurring, and dissenting opinions in that decision.³⁴ Finally, Part III discusses the legal ramifications that the court's decision in *Anderson* will have on future strict products liability claims.³⁵

I. LEGAL BACKGROUND

Under the doctrine of strict liability, a manufacturer will be held liable for all damage caused by its products if the plaintiff can prove that these products were defective at the time of manufacture

30. *Anderson*, 53 Cal. 3d at 1003, 810 P.2d at 559, 281 Cal. Rptr. at 538.

31. *Id.*

32. *Id.*

33. *See infra* notes 36-245 and accompanying text.

34. *See infra* notes 246-334 and accompanying text.

35. *See infra* notes 335-401 and accompanying text.

or distribution.³⁶ Originally, strict products liability was pioneered in order to relieve an injured plaintiff from the burdens of proof inherent in alternate remedies.³⁷ Particularly, strict liability was implemented to eliminate the requirement that the injured plaintiff prove that the manufacturer failed to act as would other manufacturers of similar products in similar circumstances.³⁸

Consequently, individuals who oppose the admission of state-of-the-art evidence assert that by permitting manufacturers to introduce evidence of the unknowability of the product's risks, the courts would be improperly infusing negligence concepts back into strict liability cases because, in strict liability, the knowledge of the manufacturer should be irrelevant.³⁹ These opponents contend that the use of state-of-the-art evidence defeats the central reason for implementing strict liability in the first place.⁴⁰ Nevertheless, the court in *Anderson* rejected this contention.⁴¹ Instead, the *Anderson* court professed that the founders of strict liability did not intend to

36. Restatement (Second) of Torts § 402A (1965). This section provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

37. *Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 1000, 810 P.2d 549, 557, 281 Cal. Rptr. 528, 536 (1991); *Brown v. Superior Court*, 44 Cal. 3d 1049, 1056, 751 P.2d 470, 474, 245 Cal. Rptr. 412, 415 (1988); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963). See *infra*, note 52 and accompanying text (detailing three reasons for establishing and implementing strict liability, other than to relieve a plaintiff from the burdens of proving that the manufacturer acted negligently); notes 54-57, 60-61 and accompanying text (detailing the two alternate remedies of negligence and breach of warranty).

38. *Brown*, 44 Cal. 3d at 1057, 751 P.2d at 474, 245 Cal. Rptr. at 415.

39. *Anderson*, 53 Cal. 3d at 1000, 810 P.2d at 557, 281 Cal. Rptr. at 536; *Barker v. Lull Eng'g. Co.*, 20 Cal. 3d 413, 433, 573 P.2d 443, 456, 143 Cal. Rptr. 225, 238 (1978); *Cronin*, 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

40. *Anderson*, 53 Cal. 3d at 1000, 810 P.2d at 557, 281 Cal. Rptr. at 536.

41. *Id.* at 1002, 810 P.2d at 558, 281 Cal. Rptr. at 537.

make the manufacturer or distributor the insurer of the safety of their products, which, in essence, would impose absolute liability.⁴²

To better understand the California Supreme Court's decision in *Anderson*, and the implications this decision will have on the future of strict products liability, relevant case law and pertinent Restatement sections relied on by the *Anderson* court will be reviewed. First, it will be necessary to analyze the development of strict liability, emphasizing the public policy concerns which led to both the establishment of, and exceptions to, the doctrine which holds manufacturers strictly liable for the injuries resulting from the products they place on the market.⁴³ Second, several cases which established and refined the doctrine of strict liability in California will be discussed.⁴⁴ Third, the special treatment that has been accorded to asbestos cases in some jurisdictions will be examined.⁴⁵ Finally, the disagreement among the California Courts of Appeal concerning the admissibility of state-of-the-art evidence will be discussed.⁴⁶

A. *The Development of Strict Products Liability*

Prior to the evolution of strict products liability, tort recovery was dependant upon a showing that the manufacturer either acted negligently, or breached an express or implied warranty.⁴⁷ Particularly, a plaintiff had to prove that the manufacturer did not act in a manner as would have been expected of a reasonably prudent manufacturer in similar circumstances.⁴⁸ However, the

42. *Id.* at 1004-05, 810 P.2d at 558, 281 Cal. Rptr. at 538.

43. *See infra* notes 47-91 and accompanying text.

44. *See infra* notes 92-202 and accompanying text.

45. *See infra* notes 203-224 and accompanying text.

46. *See infra* notes 225-245 and accompanying text.

47. *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442; *O'Reilly*, *supra* note 12, at 89. *See infra* notes 55-56, 60-61 and accompanying text (defining both the negligence and warranty theories).

48. *Klein*, *supra* note 18, at 235; *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, 1052 (N.Y. 1916). This negligence theory was later propounded in the Second Restatement of Torts, section 395. *See* RESTATEMENT (SECOND) OF TORTS § 395 (1965).

negligence theory offered limited relief to people who, for instance, develop chronic illnesses after long latency periods, such as asbestosis.⁴⁹ The complex relationship between exposure and contracting such illnesses makes it difficult for the plaintiff to prove that the manufacturer's conduct is what actually caused the plaintiff's injuries.⁵⁰

Ultimately, strict products liability was developed.⁵¹ The rationale of strict liability, in holding a manufacturer liable for injuries caused by its products, is that the manufacturer is in the best position to guard against the recurrence of hazards, insure against the risk of such hazards, and distribute the cost of insurance among the consumers.⁵² Strict products liability thereby discourages manufacturers from producing defective and hazardous products.⁵³ Before discussing further the development of strict liability, it is helpful to acquire an understanding of the alternate theories a plaintiff has available for a products liability action.

1. General Rules and Definitions Regarding Negligence, Breach of Warranty, and Strict Liability

Generally, workers who claim that a chemical product manufacturer caused them harm by exposing them to dangerous chemicals in the workplace have three primary causes of action

49. O'Reilly, *supra* note 12, at 89.

50. *Id.* See Hensler, ET. AL., *supra* note 2, at Executive Summary xi (stating that it is extremely difficult for workers, who were exposed to a variety of products over a long period of time, and for whom the identity of the manufacturers of those products was then not important, to prove that the defendant's specific product is what caused the plaintiff's injury).

51. See *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring); RESTATEMENT (SECOND) OF TORTS § 402A (1965) (providing the evolution of strict products liability). See also *infra* notes 103-118 and accompanying text (explaining the adoption of strict liability in California).

52. *Brown*, 44 Cal. 3d at 1057, 751 P.2d at 474, 245 Cal. Rptr. at 415.

53. *Id.* But see *id.* at 1063, 751 P.2d at 479, 245 Cal. Rptr. at 420 (providing that imposing strict liability on manufacturers might cause them to be reluctant to conduct research to develop pharmaceuticals that would prove beneficial because they will fear the imposition of large adverse monetary judgments).

available: negligence, breach of warranty, and strict liability.⁵⁴ Negligence has been defined as conduct that involves an unreasonably high risk of causing harm, or as conduct that falls below the legal standard for the protection of others against unreasonable risks of harm.⁵⁵ In negligence actions, the conduct of the defendant manufacturer is measured against the conduct that would be expected from a reasonably prudent manufacturer in similar circumstances.⁵⁶ Thus, in negligence suits, emphasis is placed on the manufacturer's conduct.⁵⁷

On the other hand, strict liability concentrates on the condition of the product itself.⁵⁸ Particularly, in strict liability suits, if a product is in a defective condition, unreasonably dangerous at the time the product leaves the manufacturer's hands, the manufacturer will be held liable for any resulting harm, even though the manufacturer used extreme care and precaution in the preparation and sale of his product.⁵⁹

The final type of cause of action available to an injured plaintiff who claims that the manufacturer's product caused the harm is breach of warranty. Under the theory of breach of warranty, if a seller or manufacturer expressly represents that the product has certain qualities, which the product later turns out not to have, the injured consumer may sue for breach of this warranty.⁶⁰ Additionally, the manufacturer or seller may be held

54. O'Reilly, *supra* note 12, at 88. See generally, Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) (discussing the three alternatives; strict liability, warranty, and negligence, as they coexist today).

55. RESTATEMENT (SECOND) OF TORTS § 282 (1965). According to Prosser and Keeton, a seller will be liable for negligence in the manufacture or sale of any product if, as a result of this negligence, the product was defective and would likely inflict substantial harm. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 96, at 683 (5th ed. 1984).

56. Klein, *supra* note 18, at 235.

57. *Id.*

58. *Id.*

59. RESTATEMENT (SECOND) OF TORTS § 402A (1965). See *supra* note 36 (providing the full text of Section 402A).

60. *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409, 412 (Wash. 1932), adhered to *Baxter v. Ford Motor Co.*, 168 Wash. 465, 15 P.2d 1118 (1932) and appeal after remanded *Baxter v. Ford Motor Co.*, 179 Wash. 123, 35 P.2d 1090 (1934). The Uniform Commercial Code (UCC) Section 2-313 provides that an "affirmation of fact or promise" by the seller about the product, by

liable if a plaintiff is harmed due to defects in the product where a warranty as to the quality of goods could be implied merely from the fact that the product is offered for sale.⁶¹

Although strict liability is the most recently developed of the three theories used in product liability litigation, it dominates the field of products liability as a whole.⁶² The strict liability theory permits plaintiffs to allege three different types of defects in products: design defects, manufacturing defects, and warning defects.⁶³ Although the court in *Anderson* only addressed the duty to warn,⁶⁴ it is important to briefly explain all three types of defects in order to fully understand the implications of the *Anderson* decision and its effect on strict liability as a whole.

Manufacturing defects exist where the particular item that injures the plaintiff is different from the other items manufactured by the defendant, due to a defect or an error in the manufacturing process.⁶⁵ In manufacturing defects the finished product is different from the manufacturer's intended result.⁶⁶ Design defects, on the other hand, exist if, at the time the product leaves the seller's hands, the product is in a condition not contemplated by the consumer,⁶⁷ thereby causing the product to be unreasonably

a description of the goods, or by displaying a sample or model, amounts to an express warranty. UCC § 2-313 (1987). See *Greenman v. Yuba Power Prod.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 n.2 (1963) (providing that an express warranty exists where the defendant seller makes a promise to a purchaser with the intention of inducing the purchaser to buy the product, and the purchaser does buy the product relying upon the promise).

61. See UCC § 2-314(1) (1987) (providing that a warranty of merchantability is implied in a contract for the sale of the product so long as the seller is a merchant with respect to goods of that kind). The UCC states that for the goods to be merchantable they must be "fit for the ordinary purposes for which such goods are used." *Id.* § 2-314(2). However, this implied warranty of merchantability only arises if the seller ordinarily deals in goods of that kind. *Id.*

62. O'Reilly, *supra* note 12, at 89 (citing Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 805 (1966)).

63. O'Reilly, *supra* note 12, at 90.

64. *Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 991, 810 P.2d 549, 550, 281 Cal. Rptr. 528, 529 (1991).

65. *Brown v. Superior Court*, 44 Cal. 3d 1049, 1057, 751 P.2d 470, 474, 245 Cal. Rptr. 412, 416 (1988); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 388-95, 111 N.E. 1050, 1052-55 (1916).

66. *Id.* A good example of a manufacturing defect is that of the exploding coca cola bottle in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944).

67. A product may be in a condition not expected by the consumer or user if, for instance, the product lacks a safety device. *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 420, 573 P.2d 443, 448, 143 Cal. Rptr. 225, 230 (1978).

dangerous.⁶⁸ Even products that are considered to be perfectly manufactured may be defective because of a flaw in the design of the product.⁶⁹ Finally, warning defects exist where the manufacturer knew, or should have known, that the product had a propensity to be dangerous when used in a certain way, yet failed to warn the consumer or user as to the correct method of use.⁷⁰

68. RESTATEMENT (SECOND) OF TORTS § 402A, comment g (1965); *Brown*, 44 Cal. 3d at 1057, 751 P.2d at 474, 245 Cal. Rptr. at 416; *Barker*, 20 Cal. 3d at 418, 573 P.2d at 446, 143 Cal. Rptr. at 228. Comment g provides:

The rule stated in [Section 402A] applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate user, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

Safe condition at the time of delivery by the seller will, however, include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner.

Id.

69. *Brown*, 44 Cal. 3d at 1057, 751 P.2d at 474, 245 Cal. Rptr. at 416; Keeton et al., *supra* note 55, § 96, at 688.

70. RESTATEMENT (SECOND) OF TORTS § 402A, comment j (1965). *See id.* (stating that in order to prevent a product from being unreasonably dangerous, and thus giving rise to strict liability, the seller may need to give directions or a warning on the container of the item as to its use); *Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 996, 810 P.2d 549, 553, 281 Cal. Rptr. 528, 533 (1991) (defining warning defects as either inadequate warnings, or failure to warn); *Finn v. G.D. Searle & Co.*, 35 Cal. 3d 691, 699, 677 P.2d 1147, 1152, 200 Cal. Rptr. 870, 875 (1984) (providing that to determine whether a defect exists the jury must decide whether a product, designed and produced flawlessly, may nevertheless be hazardous to a user solely because the lack of a warning itself causes the product to be dangerous).

Actually, warning defect allegations may be brought under any of the strict liability, warranty, or negligence theories. Polin, *Failure to Warn as Proximate Cause of Injury*, 8 AM. JUR. PROOF OF FACTS 3d, 547, 557-58 (1990). Under the negligence doctrine, a plaintiff may allege that a manufacturer was negligent for failing to warn of risks associated with the manufacturer's product. Klein, *supra* note 18, at 239-40. In such cases, actual or constructive knowledge of the product's dangers is imputed to the manufacturer. *Id.* However, knowledge is imputed only to the extent of that known by other similarly situated manufacturers. *Id.*

On the other hand, when a plaintiff alleges that a manufacturer is strictly liable for failing to warn of risks inherent in the product, expert knowledge is essentially imputed to the defendant. *Id.* at 239. Thus, a much higher degree of knowledge is imputed to the defendant in strict liability than in negligence, thereby making the plaintiff's burden of proof slightly lighter in strict liability than in negligence. Polin, *supra* at 558. For instance, if experts in the field knew of a particular risk inherent in a product, a manufacturer who made the product without furnishing a warning of this danger could be held strictly liable for harm resulting from this danger, even though the manufacturer was not an expert and therefore had no reason to know of the danger, and other manufacturers in similar

In *Anderson*, the plaintiff alleged that the defendant should be held strictly liable for failing to warn of the potential danger that could result from working closely and extensively with asbestos products.⁷¹ The court in *Anderson* was forced to grapple with determining whether the truly strict notion of strict liability should apply to manufacturers of asbestos products, or whether the seemingly modern trend of a fault standard, exemplified by the prescription drug cases,⁷² should apply.⁷³ Under the truly strict definition of strict liability⁷⁴ the manufacturer's knowledge regarding any potential risks inherent in its product was irrelevant, and thus not looked to.⁷⁵ This was so because strict liability was pioneered in order to relieve injured plaintiffs from the burden of proving negligence components, such as the manufacturer's knowledge at the time of manufacture or distribution.⁷⁶

2. The Purpose of Strict Products Liability

As our industrial society progressed, handicrafts came to be replaced by mass production and the close relationship between the manufacturer and consumer came to a halt.⁷⁷ Manufacturing

circumstances had no reason to know of the danger. Klein, *supra* note 18, at 239. Yet, this would not be true in negligence. *Id. But see*, KEETON ET AL., *supra* note 55, § 96, at 684 (providing that in negligence, a defendant who fails to inspect or test a product to discover possible defects, or the existence of dangerous propensities, may be held to the standard of an expert in the field). *See also*, Beshada v. Johns-Manville Prod. Corp., 90 N.J. 191, 200, 447 A.2d 539, 544 (stating that for design defect cases, strict liability is identical to negligence, except that in strict liability the foreseeability of the manufacturer as to the dangerous propensity of the alleged defective product is imputed to the manufacturer).

71. *Anderson*, 53 Cal. 3d at 992, 810 P.2d at 550-51, 281 Cal. Rptr. at 529-30.

72. *See infra* notes 177-202 and accompanying text (discussing the prescription drug exception to strict liability).

73. *Anderson*, 53 Cal. 3d at 990, 810 P.2d at 550, 281 Cal. Rptr. at 529.

74. California, followed by the Restatement of Torts, established the truly strict doctrine of strict liability. *See Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J. concurring); *Greenman v. Yuba Power Prod.*, 59 Cal. 2d 57, 64, 27 Cal. Rptr. 697, 701 (1963); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

75. *See Escola*, 24 Cal. 2d at 462, 150 P.2d at 441 (Traynor, J. concurring); *Greenman*, 59 Cal. 2d at 64, 27 Cal. Rptr. at 701; RESTATEMENT (SECOND) OF TORTS § 402A (1965).

76. *See Escola*, 24 Cal. 2d at 462, 150 P.2d at 441 (1944) (Traynor, J. concurring); *Greenman*, 59 Cal. 2d at 64, 27 Cal. Rptr. at 701; RESTATEMENT (SECOND) OF TORTS § 402A (1965).

77. *Escola*, 24 Cal. 2d at 467, 150 P.2d at 443 (Traynor, J. concurring).

processes became inaccessible to the general public, thereby depriving consumers of the means to investigate the soundness of the product.⁷⁸ Consumers began to rely on the reputation of the manufacturer, or the trade mark, in choosing which product was of the best quality, or safest to purchase.⁷⁹ In turn, manufacturers sought the faith of the consumers by increasing their standards of inspection, and by offering to replace defective products or furnish refunds for such products.⁸⁰ As a result, public policy demanded that manufacturers be responsible for the quality of their products regardless of the reasonableness of their conduct.⁸¹

Scholars typically cite four justifications for strict products liability: (1) to relieve an injured plaintiff from the difficulty of proving that a manufacturer has acted negligently; (2) to encourage manufacturers to develop safer products; (3) to protect the expectations of consumers in regard to the product's safety; and (4) to promote risk-spreading among the manufacturers.⁸² As to the

78. *Id.*

79. *Id.*

80. *Id.*

81. *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963); *Escola*, 24 Cal. 2d at 463, 150 P.2d at 443 (Traynor, J. concurring); Priest, *supra* note 54, at 494-96. In *Escola*, Justice Traynor insisted that the manufacturer's obligation to the consumer be conformed to meet the needs resulting from the changing relationship between the manufacturer and the consumers. *Escola*, 24 Cal. 2d at 463, 150 P.2d at 443 (Traynor, J., concurring). According to Justice Traynor, the imposition of absolute liability was the means to the ends. *Id.* See Dalrymple, *Brief Opposing Strict Liability in Tort, Restatement of Law, Second, Torts, Section 402A*, at 16, The Defense Research Institute, Inc. (1966) (stating that as industrialization, mechanization, and communication grew, the concerns for safety grew as well).

82. *Kelso, Brown v. Abbot Laboratories and Strict Products Liability*, 20 PAC. L.J. 1, 6 (1988) (citing Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)* 50 MINN. L. REV. 791, 799-800 (1966)). See Barham, *The Viability of Comparative Negligence as a Defense to Strict Liability in Louisiana*, 44 LA. L. REV. 1171, 1180 (1984) (suggesting that the economic theory underlying strict products liability is based on the notion that defendants, who are manufacturers or sellers, are in the best position to distribute the loss among the consuming public because they can obtain insurance or increase the price of the product to cover the cost of the damage, and they are in a position to reduce losses by developing and marketing a better, safer product); O'Reilly, *supra* note 12, at 112 (asserting that the economic justification for strict products liability is that manufacturers are able to spread the losses caused by defective products across many customers); Note, *The Essence of the Agent Orange Litigation: The Government Contract Defense*, 12 HOFSTRA L. REV. 983, 1011 (1983) (purporting that the theory of strict products liability is based on the following: An economic principle which suggests that the loss should be distributed to those who are best able to afford it; a deterrence principle which attempts to prevent the occurrence of future harm; and a moral principle which examines the moral aspect of the defendant's conduct). *But see*, *Kelso, supra*, at 6-9

first and third justifications, Dean Prosser explained in 1965 that, by placing their goods in the marketplace, manufacturers represent to the public that the products are suitable and safe for use.⁸³ Consumers, relying on these representations, purchase these products expecting them to be safe.⁸⁴ Therefore, Prosser asserted, the manufacturer who invited and solicited the use of the product should not be permitted to avoid liability by claiming that all reasonable care was used in manufacturing the product.⁸⁵ Instead, strict liability would impose liability regardless of the manufacturer's conduct, so long as the product was defective when it left the manufacturer's hands.⁸⁶

The second and fourth justifications, to encourage the manufacture of safer products and to promote risk-spreading, can be combined to encompass what is known as the enterprise liability theory.⁸⁷ This theory stands for the principle that the manufacturer is in the best position to bear and distribute the losses by securing market insurance, self-insuring, or by spreading costs to the consumers in the form of higher prices.⁸⁸ Further, the enterprise liability theory states that the manufacturer who introduces a product into the stream of commerce should be liable for harm

(suggesting that none of these four rationales supports the notion of making products liability strict liability instead of fault-based liability or even absolute liability).

83. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 799-800 (1966).

84. *Id.*

85. *Id.*

86. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

87. See Priest, *supra* note 54, at 463 (definition of enterprise liability).

88. *Id.* See *Ray v. Alad Corp.*, 19 Cal. 3d 22, 31, 560 P.2d 3, 8-9, 136 Cal. Rptr. 574, 579 (1977) (providing that the policy underlying strict liability is the protection of otherwise defenseless victims of defective products, and the spreading of the cost of compensating these victims throughout society); *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963) (holding that the producers of defective products should bear the burden of compensating injured plaintiffs because they are in a better position to spread the economic losses by increasing consumer prices and obtaining compensation through insurance). See generally Comment, *The Government Contract Defense: An Overview*, HOWARD L.J. 275, 292-95 (1984) (suggesting four policy considerations for imposing strict liability: Enterprise liability; market deterrence; compensation; and implied representation of safety); Note, *The Essence of the Agent Orange Litigation: The Government Contract Defense*, *supra* note 82, at 1011-16 (1983) (discussing the policies underlying the emergence of strict products liability); Prosser, *supra* note 83, at 799-800 (providing that under the risk-distributing theory the supplier, who is in the best position to insure against liability and add the cost to the price of the product, is the one who should be held liable).

resulting from the product because the manufacturer is the one who is in the best position to guarantee the safety of its products.⁸⁹ For instance, the manufacturer can either improve the quality of the product or furnish an adequate warning of known conditions on the product.⁹⁰ Consequently, the promulgators of strict products liability believed that its imposition would create an incentive for manufacturers to design and produce safer products.⁹¹

B. Case Law Adopting the Theory of Strict Liability

Prior to the California Supreme Court's decision in *Greenman v. Yuba Power Products*,⁹² the only options injured plaintiffs had at their disposal were to sue the manufacturer in negligence or breach of warranty.⁹³ The warranty theory, which is based on a contractual relationship between the consumer and the manufacturer,⁹⁴ traditionally required the plaintiff to act in reliance upon either an express or implied promise by the defendant.⁹⁵ However, it was sometimes impossible to determine whether the plaintiff actually relied on any such promise by the defendant, especially where the plaintiff did not even know the name of the manufacturer.⁹⁶ Therefore, it has been suggested that

89. Speidel, *Warranty Theory, Economic Loss, and the Privity Requirement: Once More into the Void*, 67 B.U.L. REV. 9, 21-22 (1987).

90. *Id.*

91. *Id.* at 22. See Prosser, *supra* note 83, at 799-800 (setting forth the most widely accepted explanations for strict products liability); Henderson, *Coping With the Time Dimension in Products Liability* 69 CALIF. L. REV. 919, 933 (1981) (professing that strict liability is predicted to increase general or "market" deterrence). *But see* Moore & Hengesbach, *Comment k: A Prescription For Over-The-Counter Drug Industry*, 22 PAC. L.J. 43, 45-6 n.12 (1990) (noting that the market deterrence argument has been rejected by many scholars and has not been explicitly approved by the California Supreme Court); Kelso, *supra* note 82, at 8 (advocating that the public policy interest in encouraging manufacturers to make safer products is not furthered by strict liability).

92. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

93. See Priest, *supra* note 54, at 461 (indicating that through the early 1960's breach of warranty and, to a lesser extent, negligence theories controlled defective product cases).

94. Priest, *supra* note 54 at 449; KEETON ET AL., *supra* note 55, ch. 17, § 96 at 684.

95. KEETON ET AL., *supra* note 55, § 97, at 691.

96. *Id.* See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099, 1130-31 (stating that the contract rules governing breach of warranty are a "booby-trap for the unwary").

the difficulties inherent in proving breach of warranty caused the use of this theory to decline sharply.⁹⁷

Furthermore, under the theory of negligence, plaintiffs are faced with three difficult tasks.⁹⁸ First, the plaintiff must prove that a defect in the defendant's product is what caused the injury.⁹⁹ Second, the plaintiff must prove that the defect existed at the time the product left the defendant's hands.¹⁰⁰ Third, the plaintiff is required to establish that the defect in the product was due to the fact that the defendant's conduct was unreasonable under the circumstances.¹⁰¹ Since it may be impossible for a plaintiff to prove all three of these elements, the California Supreme Court ultimately decided that it was time to provide plaintiffs with another avenue for recovery, particularly by disposing of the third requirement.¹⁰²

1. California Introduces the Doctrine of Strict Liability

The strict products liability theory was first introduced by Justice Traynor in his concurring opinion in *Escola v. Coca Cola Bottling Co.*¹⁰³ That opinion served as the basis for the California

97. KEETON ET AL., *supra* note 55, § 98, at 692. It has also been suggested that the rise of the strict liability doctrine, which is much more suitable for personal injury cases than the contract-based warranty theory, have caused warranty suits to be used less frequently than in the past. *Id.* § 98, at 693. See *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 61, 377 P.2d 897, 899-900, 27 Cal. Rptr. 697, 699-700 (1963) (asserting that the rules governing the warranty theory, which were developed to meet the needs of commercial transactions, cannot be invoked to also control the manufacturer's liability to plaintiffs who are injured by the manufacturer's defective products). As the rules governing warranty law were revised over the years, it became clear that the warranty case was virtually identical to a strict liability claim. *Id.* See Prosser, *supra* note 83, at 804 (indicating that some courts still refer to the "language of 'warranty'; but the forty-year reign of the word is ending, and it is passing quietly down the drain").

98. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, *supra* note 96, at 1114.

99. *Id.*

100. *Id.*

101. *Id.*; RESTATEMENT (SECOND) OF TORTS § 402A (1965).

102. *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 62-63, 377 P.2d 897, 900-01, 27 Cal. Rptr. 697, 700-01 (1963).

103. 24 Cal. 2d 453, 461, 150 P.2d 436, 440, (1944) (Traynor, J., concurring). In *Escola*, a bottle of Coca Cola exploded in a waitress' hand. *Id.* (Traynor, J., concurring). The broken pieces of the bottle inflicted a deep five-inch cut, severing blood vessels, nerves and muscles of the thumb and palm of the plaintiff's hand. *Id.* (Traynor, J., concurring). The plaintiff alleged in her complaint

Supreme Court's decision in *Greenman v. Yuba Power Products*,¹⁰⁴ where Justice Traynor wrote the opinion for the majority.¹⁰⁵ In *Greenman*, the plaintiff was using a power tool on a piece of wood when, unexpectedly, the piece of wood flew out of the tool and struck him in the head, inflicting serious injuries.¹⁰⁶ At trial, the jury returned a verdict in favor of the retailer for breach of implied warranties, and against the manufacturer for negligence and breach of express warranties.¹⁰⁷ Both the manufacturer and the plaintiff appealed.¹⁰⁸

The California Supreme Court affirmed the judgment and articulated the rule that a manufacturer, who places a product on the market knowing that it will be used without inspection for defects, is strictly liable in tort if the product actually proves to be defective and causes injury.¹⁰⁹ The court declared that the plaintiff had the burden of proving that a defect in the design or manufacture of the product caused the product to injure the plaintiff while the product was being used in a way in which it was

that the Coca Cola Bottling Company was negligent for selling bottles which, because of some defect in the bottle, were dangerous and likely to explode. *Id.* (Traynor, J., concurring). Although the plaintiff was unable to prove any specific acts of negligence on the part of the defendant, she prevailed under the doctrine of *res ipsa loquitur*. *Id.* at 457, 150 P.2d at 440 (Traynor, J., concurring).

In *Escola*, Justice Traynor urged in a concurring opinion that the court implement and apply a theory of absolute liability. *Id.* at 461, 150 P.2d at 440 (Traynor, J., concurring). Justice Traynor noted that persons injured from defective products are not prepared to meet the consequences associated with such injuries. *Id.* at 462, 150 P.2d at 441 (Traynor, J., concurring). Justice Traynor stated that even if the manufacturer is not negligent, it is essential that responsibility be fixed wherever it will most effectively reduce the hazards that are inherent in defective products that reach the market. *Id.* at 462, 150 P.2d 436, 440 (Traynor, J., concurring). Justice Traynor asserted that this policy would discourage the marketing of products that have defects. *Id.* (Traynor, J., concurring). Additionally, Justice Traynor indicated that the manufacturer can insure against the risk of injury and distribute the extra cost of insurance among the public as a cost of doing business by increasing the price of its products. *Id.* (Traynor, J. concurring). However, if any defective products ultimately reach the market, Justice Traynor reasoned that public policy requires that liability for any resulting injury be placed upon the manufacturer who is responsible for the product reaching the market, and who is best situated to afford such protection. *Id.* (Traynor, J., concurring).

104. 59 Cal. 2d 57; 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

105. *Greenman*, 59 Cal. 2d at 59, 63-64, 377 P.2d at 899, 901, 27 Cal. Rptr. at 699, 701.

106. *Id.*

107. *Id.* at 59, 377 P.2d at 899, 27 Cal. Rptr. at 699.

108. *Id.* at 60, 377 P.2d at 899, 27 Cal. Rptr. at 699. On appeal plaintiff sought reversal of the judgment in favor of the retailer only if the judgment against the manufacturer was overturned. *Id.*

109. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

intended to be used.¹¹⁰ Once the plaintiff fulfilled this burden, the product would be deemed unsafe for its intended use and the manufacturer would be held liable.¹¹¹

Shortly after the *Greenman* decision, the American Law Institute embodied the doctrine of strict liability in the Second Restatement of Torts.¹¹² Section 402A of the Restatement provides that liability will be imposed on "one who sells any product in a defective condition unreasonably dangerous" even though all possible care in the preparation and sale of the product has been exercised.¹¹³ The comments to section 402A provide definitions for the terms "defective condition" and "unreasonably dangerous."¹¹⁴ According to comment g, a product is in a "defective condition" when it is in a condition that has not been contemplated by the ultimate consumer.¹¹⁵ Comment i, on the other hand, defines "unreasonably dangerous" as the condition of the product when it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it."¹¹⁶ Further, comment j provides that sometimes the product

110. *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

111. *Id.*

112. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Opponents of the notion of permitting state-of-the-art evidence contend that such evidence is irrelevant and inconsistent with section 402A(2)(a) because that section provides that strict liability applies even if the seller has taken all possible precautions in the preparation and sale of his product. Klein, *supra* note 18, at 236. However, the proponents argue that the disallowance of the evidence would render the manufacturer an insurer, thereby subjecting it to absolute liability, which is not the intended policy of strict liability. *Id.*

113. RESTATEMENT (SECOND) OF TORTS § 402A (1965). *But see* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972) (expressing concern that section 402A in practice usually leads to the same result that would have been reached under negligence).

114. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comments g & i (1965). *See supra* note 68 (setting forth the full text of comment g). Comment i provides that for a product to be unreasonably dangerous, the product sold "must be dangerous to an extent that which would be ordinary knowledge common to the community as to its characteristics." RESTATEMENT (SECOND) OF TORTS § 402A, comment i (1965).

115. RESTATEMENT (SECOND) OF TORTS § 402A, comment g (1965). *See supra* note 68 (setting forth the text of comment g).

116. RESTATEMENT (SECOND) OF TORTS § 402A, comment i (1965). *See supra* note 114 (describing the text of comment i). Although "unreasonably dangerous" appears to be very similar to negligence, Dean Prosser suggests that the unreasonably dangerous requirement was included in the Restatement definition to prevent products liability from becoming absolute liability, not to make

will be in a defective condition unreasonably dangerous if the manufacturer fails to give directions, or a warning on the container of the product, as to the product's proper use.¹¹⁷ While the California courts initially followed section 402A and its accompanying comments, they eventually began to look for ways to escape its rigid confines.¹¹⁸

C. *The California Courts Refine The Doctrine of Strict Liability, and Then Move Away From its Application Toward a Fault-Based Standard*

Today strict products liability appears to be in the midst of a revolution.¹¹⁹ In the first decades of its existence, beginning with *Escola* and *Greenman*, the courts extended the boundaries of strict liability, giving full advantage to plaintiffs.¹²⁰ However, by the

products liability negligence-based. Kelso, *supra* note 82, at 17 (citing Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23 (1966)).

117. RESTATEMENT (SECOND) OF TORTS § 402A, comment j (1965). Comment j states:

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

Id. Compare *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring) (laying the foundation for strict liability), and *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963) (implementing the strict products liability theory) with RESTATEMENT (SECOND) TORTS § 402A (1965) (setting forth the modern strict products liability doctrine).

118. See generally Henderson & Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 U.C.L.A. L. REV. 479 (1990) (indicating that there has been a great shift in the law; by the mid-to late 1960's, through the expansion of the doctrine of strict liability, it became increasingly easy for plaintiffs to reach the juries with product defect claims, however by the early 1980's the courts became reluctant to expand the doctrine to further benefit plaintiffs).

119. Henderson & Eisenberg, *supra* note 118, at 539; Priest, *supra* note 54, at 523.

120. Henderson & Eisenberg, *supra* note 118, at 480, 483, 539.

mid-1980's the courts began placing significant limitations on plaintiffs' rights, and shifting towards a pro-defendant stance.¹²¹ The following discussion illustrates how the California courts first modified section 402A of the Restatement in order to fulfill its goal of easing the plaintiff's burden of proof at trial.¹²² Then, this Note explains how the courts began its shift away from the application of strict liability, and moved back toward a fault-based, or negligence, standard.¹²³

Just seven years after the implementation of section 402A, the California Supreme Court was reluctant to follow the American Law Institute's formulation of strict liability.¹²⁴ Gradually, the California courts began refining, and then nibbling away at, the doctrine of strict liability altogether.¹²⁵ First, the California Supreme Court deleted the requirement that plaintiffs prove that the product was unreasonably dangerous in claims alleging design defects.¹²⁶ To recover under strict liability for design defects a plaintiff still had to prove that the product was defective in design, but there was confusion among the courts as to the meaning of the term "defect."¹²⁷ In alleviating this confusion, the California Supreme Court took its second step away from the strict liability doctrine.¹²⁸ Particularly, the court established a "risk-benefit"

121. *Id.* During the 1980's plaintiffs success rates substantially declined. *Id.* at 517. *See id.* at 525 (suggesting that the courts believe that products liability has gone far enough, and that it is time to turn things around). Henderson and Eisenberg indicate that failure to warn cases are an exception to the anti-plaintiff trend. *Id.* at 496. However, they note that the courts may also be becoming more pro-defendant in this area as well. *Id.* The *Anderson* decision appears to support this notion. *See infra* notes 273-314 and accompanying text (detailing the majority's analysis in *Anderson*).

122. *See infra* notes 131-167 and accompanying text.

123. *See infra* notes 168-202 and accompanying text.

124. *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); Henderson & Eisenberg, *supra* note 118, at 489.

125. Henderson & Eisenberg, *supra* note 118, at 480.

126. *See Cronin*, 8 Cal. 3d at 134-35, 501 P.2d at 1163, 104 Cal. Rptr. at 443 (deleting the unreasonably dangerous requirement for design defect cases based on strict liability) *See also infra* notes 131-148 and accompanying text (discussing the "unreasonably dangerous" component of the Restatement formulation for strict liability).

127. Kelso, *supra* note 82, at 18.

128. *See Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 431-32, 573 P.2d 443, 455-56, 143 Cal. Rptr. 225, 237-38 (1978) (formulating a risk-benefit test for design defect cases). *See also infra* notes 149-167 and accompanying text (indicating the manner in which the California Supreme Court began to incorporate negligence principles into the doctrine of strict liability).

test which, in effect, incorporated negligence concepts into the definition of “defect” as it relates to the design of the product.¹²⁹ Yet, the court’s most notable bite into the doctrine of strict liability, causing strict liability to slant towards a negligence standard, was when it articulated a clear exception to strict liability for unavoidably unsafe products--an exception which generally applies to prescription drugs.¹³⁰

1. *California Rejects the “Unreasonably Dangerous” Requirement in Design Defect Cases*

In *Cronin v. J.E.B. Olson Corp.*,¹³¹ the California Supreme Court faced the question of whether an injured plaintiff seeking recovery based on the doctrine of strict liability must establish both that the product was in a defective condition, and that this defective condition in effect caused the product to be unreasonably dangerous.¹³² According to Section 402A of the Restatement, an injured plaintiff must show both.¹³³ However, in *Cronin*, the California Supreme Court rejected the unreasonably dangerous requirement in design defect cases.¹³⁴

In *Cronin*, the plaintiff was driving a bread delivery truck when he was involved in a collision.¹³⁵ The impact of the collision broke an aluminum safety clasp which was designed to hold the bread trays in place.¹³⁶ As a result of the abrupt stop and the impact of the accident, the loaded trays flew forward and struck the plaintiff in the back, thrusting him through the windshield of the truck.¹³⁷

129. *Barker*, 20 Cal. 3d at 431-32, 573 P.2d at 455-56, 143 Cal. Rptr. at 237-38.

130. *See* *Brown v. Superior Court (Abbot Laboratories)*, 44 Cal. 3d 1049, 1069, 751 P.2d 470, 482-83, 245 Cal. Rptr. 412, 424 (1988) (exempting prescription drug manufacturers from strict products liability). *See infra* notes 177-202 and accompanying text (discussing the *Brown* decision).

131. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

132. *Cronin*, 8 Cal. 3d at 123, 501 P.2d at 1155, 104 Cal. Rptr. at 435.

133. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

134. *Cronin*, 8 Cal. 3d at 134-35, 501 P.2d at 1162-63, 104 Cal. Rptr. at 442-43.

135. *Id.* at 124, 501 P.2d at 1155, 104 Cal. Rptr. at 435.

136. *Id.*

137. *Id.*

The defendant, J.E.B. Olson Corp., alleged that the trial court erred when it submitted a definition of strict liability to the jury which failed to include the element that the defective condition of the product caused it to be unreasonably dangerous.¹³⁸ The defendant urged that without this element included in the definition of strict liability, absolute liability would be imposed.¹³⁹

In reaching its decision that the trial court did not err, the California Supreme Court focused on the American Law Institute's rationale for including the unreasonably dangerous component in the Restatement definition.¹⁴⁰ Apparently, this component was added to prevent the seller from becoming an insurer of his products.¹⁴¹ However, the court noted that requiring the plaintiff to satisfy the unreasonably dangerous limitation would burden the plaintiff with proof of an element which "rings of negligence."¹⁴² In fact, the court asserted that reliance on the section 402A provision on strict liability in practice usually leads to the same result that would have been reached under the laws of negligence.¹⁴³ The *Cronin* court explained that this result, in essence, would contradict the very purpose of implementing strict liability in the first place.¹⁴⁴

Therefore, the *Cronin* court held that to require a plaintiff to prove that the defect in the product also made the product unreasonably dangerous would impose a significantly increased burden on the plaintiff and would represent "a step backward in the area pioneered by this court."¹⁴⁵ The court noted that to require a plaintiff to prove the product was unreasonably dangerous would be placing upon the plaintiff a much greater burden than

138. *Id.* at 127-28, 501 P.2d at 1158, 104 Cal. Rptr. at 438. At the trial the jury returned a verdict for the plaintiff. *Id.* at 124-25, 501 P.2d at 1156, 104 Cal. Rptr. at 436.

139. *Id.* at 128, 501 P.2d at 1158, 104 Cal. Rptr. at 438.

140. *Id.* at 132, 501 P.2d at 1161, 104 Cal. Rptr. at 441.

141. *Id.*

142. *Id.*

143. *Id.* at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

144. *See id.* *See supra* notes 47-91 and accompanying text (detailing the justifications of establishing strict liability).

145. *Cronin*, 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

was articulated in *Greenman*.¹⁴⁶ Nevertheless, the decision in *Cronin* created confusion among trial court judges regarding how to define a defective product.¹⁴⁷ The California Supreme Court tried to resolve this confusion in *Barker v. Lull Engineering Co.*¹⁴⁸

2. *The California Supreme Court Advances the “Consumer Expectation” Test and “Risk-Benefit” Test as the Standard for Determining Whether a Product is Defective*

In *Barker*, the plaintiff was operating a high-lift loader when the load he was lifting began to fall.¹⁴⁹ In the process of jumping out of the loader to avoid the falling material, the plaintiff was struck by a piece of falling wood and was seriously injured.¹⁵⁰ The trial court instructed the jury that, in order to find the defendant liable for a defect in design, the jury must find that the product was unreasonably dangerous for its intended use.¹⁵¹ Based on this instruction, the jury found in favor of the defendant.¹⁵² However, the California Supreme Court reversed since the “unreasonably dangerous” element of the plaintiff’s burden of proof had been eliminated by *Cronin*.¹⁵³

The main issue left for the California Supreme Court to determine in *Barker* was whether the loader used by the plaintiff was defective.¹⁵⁴ The *Barker* decision attempted to resolve some

146. *Id.* at 134-35, 501 P.2d at 1163, 104 Cal. Rptr. at 443. *See supra* notes 103-118 and accompanying text (discussing *Greenman*).

147. *Barker v. Lull Eng’g Co.*, 20 Cal. 3d 413, 418, 573 P.2d 443, 446, 143 Cal. Rptr. 225, 228 (1978).

148. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

149. *Barker*, 20 Cal. 3d at 419, 573 P.2d 447, 143 Cal. Rptr. at 229. In *Barker*, the plaintiff had only received minimal instruction on how to operate a high-lift loader prior to the day on which he was assigned to operate the loader. *Id.* While he was lifting a load to the second story of a building, the load began to tip. *Id.* The workers shouted to plaintiff to jump out of the loader to avoid the falling lumber. *Id.* The plaintiff did so, however, in the process, he was struck by a piece of the falling wood. *Id.*

150. *Id.*

151. *Id.* at 417, 573 P.2d at 446, 143 Cal. Rptr. at 228.

152. *Id.*

153. *Id.*

154. *Id.*

of the confusion fostered by the *Cronin* decision regarding the definition of "defect."¹⁵⁵ In so doing, the *Barker* court established a two-prong test.¹⁵⁶ The first prong stated that a product is defective in design "if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner."¹⁵⁷ This is what the court termed the "consumer expectation" test.¹⁵⁸

However, the *Barker* court reasoned that the expectations of the consumer cannot be the sole basis for evaluating design defectiveness.¹⁵⁹ The court recognized that in many instances the ordinary consumer would not know what to expect.¹⁶⁰ This is especially so because consumers have no idea as to how safe the product could be made.¹⁶¹ Therefore, the court in *Barker* adopted a second standard.¹⁶² The second prong of the two-prong test provided that a product may also be defective in design if the plaintiff proves that the product's design proximately caused the injury, and the defendant fails to show that the benefits of the design outweigh the risk of danger inherent in the design.¹⁶³ The court then termed this second prong the "risk-benefit" standard.¹⁶⁴

The *Barker* court explained that, in order to comply with the principal purpose underlying the strict liability doctrine, that is, to relieve an injured plaintiff of many of the burdens inherent in the laws of negligence and warranty, the burden of proof must shift to the defendant after the plaintiff shows that the defendant's product

155. *Id.*

156. *Id.* at 432, 573 P.2d at 455-56, 143 Cal. Rptr. at 237-38.

157. *Id.* at 429-30, 573 P.2d at 454, 143 Cal. Rptr. at 236 (citing CAL. COM. CODE § 2314 (West 1964)). *See id.* (indicating that this standard is analogous to the Uniform Commercial Code's warranty of fitness and merchantability).

158. *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238.

164. *Id.* at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

proximately caused the plaintiff's injury.¹⁶⁵ The defendant would thus be required to prove that the product is not defective.¹⁶⁶ The court in *Barker* asserted that this two-prong standard should lighten the plaintiff's burden, and therefore comply with the rationale of the *Greenman* and *Cronin* decisions.¹⁶⁷ Hence, *Barker* was another example of a case in which the courts expanded strict products liability to favor plaintiffs.

3. Is the "Risk-Benefit" Test a Negligence Test?

Is *Barker* really a pro-plaintiff holding? Or, does *Barker* evidence a shift towards a pro-defendant attitude? It has been suggested that the risk-benefit test is nothing more than a negligence test, and nothing more than Section 402A's unreasonably dangerous test.¹⁶⁸ According to the *Barker* court, this balancing of risks against benefits necessarily incorporates principles of negligence into strict liability cases, once again making the plaintiff's case difficult to prove.¹⁶⁹ However, the *Barker* court purports that this standard is different from negligence because the defective design test focuses the trier of fact's attention on the adequacy of the product itself, and not on the manufacturer's conduct, as in negligence.¹⁷⁰ Furthermore, the court stated that this defective design standard places the burden on the defendant, whereas in negligence causes of action the burden remains on the plaintiff.¹⁷¹

165. *Id.*

166. *Id.*

167. *Id.* at 433, 573 P.2d at 456, 143 Cal. Rptr. at 238. See *supra* notes 103-148 (discussing *Greenman* and *Cronin*).

168. Kelso, *supra*, note 82, at 19. See *id.* n.72 (suggesting that the consumer expectation test may conceptually be merely a different formulation of the same risk-benefit test).

169. *Barker*, 20 Cal. 3d at 434, 573 P.2d at 457, 143 Cal. Rptr. at 239.

170. *Id.*, at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238. *But see*, Kelso, *supra* note 82, at 19-20 (purporting that in *Barker* the focus on the adequacy of the product itself is nominal at best, because the product exists only because of the manufacturer's conduct). According to Professor Kelso, if the product does not pass the *Barker* balancing test, then the manufacturer has negligently placed a defective product into the marketplace. *Id.* at 20.

171. *Barker*, 20 Cal. 3d at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238.

Nevertheless, the *Barker* court acknowledged that a showing that a product is defective in design may also often prove that the manufacturer was negligent in choosing such a design.¹⁷² For instance, in *Barker*, the court instructed the jury to consider certain factors in balancing the risks against the benefits: (1) the gravity of danger the challenged design posed; (2) the likelihood of that danger occurring; (3) the possibility of a safer alternative design; (4) the economic burden of improving the design; and (5) the chance that any alternative design would cause adverse consequences to the product and the consumer.¹⁷³

These factors appear to be very similar to the factors Judge Learned Hand articulated in his risk-benefit test for negligence.¹⁷⁴ Even though the court maintained that design defect cases are analyzed under strict liability,¹⁷⁵ the court's analysis may be interpreted as indicating that products liability is not truly strict.¹⁷⁶

4. Forging an Exception to the Doctrine of Strict Liability: Unavoidably Unsafe Products

The California Supreme Court moved further away from the doctrine of strict liability, as it was first adopted in *Greenman*, when it forged an exception to the doctrine in cases involving prescription drugs. In articulating this exception, the California Supreme Court, in *Brown v. Superior Court*, adopted comment k of the Restatement of Torts, which exempted manufacturers of prescription drugs from strict liability.¹⁷⁷ In *Brown*, the court

172. *Id.* at 434, 573 P.2d at 457, 143 Cal. Rptr. at 239.

173. *Id.* 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

174. Kelso, *supra* note 82, at 19 (quoting *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947)). Judge Learned Hand stated that three factors must be examined in determining negligence: (1) the likelihood that the damage will occur; (2) the gravity of the resulting injury; and (3) the burden of taking sufficient precautions. *Id.*; *Carroll Towing Co.*, 159 F.2d at 173.

175. *Barker*, 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

176. Kelso, *supra* note 82, at 22.

177. *Brown v. Superior Court*, 44 Cal. 3d 1049, 1069, 751 P.2d 470, 482-83, 245 Cal. Rptr. 412, 424 (1988); RESTATEMENT (SECOND) OF TORTS § 402A, comment k (1965). Comment k reads as follows:

refused to apply the consumer expectation and risk-benefit standards *Barker* formulated for design defect cases.¹⁷⁸ Instead, *Brown* exemplifies the California court's trend of moving away from a pro-plaintiff stance, towards the current orientation of restricting the ability of plaintiffs to recover in tort for product related injuries.¹⁷⁹

In *Brown*, Justice Mosk explained that the social value to be gained from prescription drugs outweighed the risk of harm caused by the side effects of those drugs.¹⁸⁰ The *Brown* court relied extensively on comment k of the Restatement.¹⁸¹ Comment k recognizes that some drugs provide such tremendous benefits to

k. *Unavoidably unsafe products.* There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known, but apparently reasonable risk.

RESTATEMENT (SECOND) OF TORTS § 402A, comment k (1965).

178. See *Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 999, 810 P.2d 549, 556, 281 Cal. Rptr. 528, 535.

179. Henderson & Eisenberg, *supra* note 118, at 490-91. According to Henderson & Eisenberg, the *Brown* decision was a surprise in that the California Supreme Court broke away from the existing trend in products liability of imposing liability on drug manufacturers for dangerous designs regardless of whether adequate warnings of the risks had been furnished. *Id.* at 490. The *Brown* court refused to adopt either a "more generous-to-plaintiffs approach" for prescription drug liability, or to adopt a "half-way position" which was embraced in other jurisdictions. *Id.* at 490-491.

180. *Brown*, 44 Cal. 3d at 1058-59, 751 P.2d at 475, 245 Cal. Rptr. at 416-17.

181. *Id.* at 1069, 751 P.2d at 482-83, 245 Cal. Rptr. at 424.

society¹⁸² that their use is justified, regardless of any unavoidably high risks that may be involved.¹⁸³ Comment k particularly stresses the importance of marketing and using new or experimental drugs because of their potential value to society, even though there can be no assurance of the safety of these drugs since they have not been in existence long enough to determine whether they are potentially dangerous.¹⁸⁴

In order not to stifle the development of new "wonder drugs," comment k provides that the seller of such unavoidably unsafe products will not be held strictly liable for unfortunate injuries resulting from their use, so long as the drugs are properly prepared and accompanied by sufficient directions and warnings.¹⁸⁵ According to comment k, the manufacturer has undertaken to furnish to the public a useful and desirable product, therefore the manufacturer should not be held liable for attempting to contribute to, and improve, society.¹⁸⁶

In *Brown*, several plaintiffs filed actions against a number of drug manufacturers who produced diethylstilbestrol (DES).¹⁸⁷ The plaintiffs claimed that their mothers used DES to prevent miscarriages, and that this drug was defective.¹⁸⁸ As a result of their mothers ingesting DES while the plaintiffs were *in utero*, the

182. An example of one drug which affords great benefits to society is the vaccine for rabies. RESTATEMENT (SECOND) OF TORTS § 402A comment k. (1965) See *supra* note 177 (setting forth the full text of comment k).

183. RESTATEMENT (SECOND) OF TORTS § 402A, comment k (1965).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Brown v. Superior Court*, 44 Cal. 3d 1049, 1054, 751 P.2d 470, 473, 245 Cal. Rptr. 412, 414 (1988). See, Henderson & Eisenberg, *supra* note 118, at 490-91 (asserting that the California Supreme Court's decision in *Brown* to exclude prescription drugs from strict liability was a surprise since the California courts had been at the forefront in extending the boundaries of products liability for defective designs); Kelso, *supra* note 82, at 2 (suggesting that, as a result of the *Brown* holding, the time has come to reevaluate the place of products liability in modern tort law); Moore & Hengesbach, *supra* note 91, at 54-86 (indicating that the applicability of *Brown* may be very far-reaching, and Moore and Hengesbach specifically discuss the application of *Brown* to over-the-counter drugs); *California Supreme Court Survey, February 1988-April 1988, Torts*, 16 PEPPERDINE L. REV. 221, 221-28 (analyzing the California Supreme Court's opinion in *Brown*). See generally, Comment, *Brown v. Superior Court: Drug Manufacturers Get Immunized From Strict Liability For Design Defects*, 19 GOLDEN GATE U.L. REV. 435 (criticizing the *Brown* decision).

188. *Brown*, 44 Cal. 3d at 1054-55, 751 P.2d at 473, 245 Cal. Rptr. at 414.

plaintiffs alleged that they sustained injuries.¹⁸⁹ The plaintiffs sued under the theories of strict liability, breach of express and implied warranty, fraud, and negligence.¹⁹⁰ The trial court ruled in favor of defendants after determining that the defendants could not be held liable for unknown and unknowable side effects of the drug.¹⁹¹ The Court of Appeal affirmed.¹⁹² The California Supreme Court granted review to examine the issue of strict liability for manufacturers of prescription drugs which turn out to be defective.¹⁹³

In *Brown*, the California Supreme Court held that a manufacturer of prescription drugs is not strictly liable for design defects, or for injuries caused by dangerous propensities in prescription drugs, that are scientifically unknowable at the time they are manufactured.¹⁹⁴ The *Brown* court reasoned that the imposition of strict liability for unknowable risks at the time of manufacture or distribution would discourage manufacturers from developing new and improved products, for fear that future significant advances in scientific knowledge would increase their liability.¹⁹⁵ According to the *Brown* court, it was essential that prescription drug manufacturers be exempted from strict liability because such drugs are necessary to relieve pain and suffering and to sustain life.¹⁹⁶ Unfortunately, it is unavoidable that some users may be harmed from the use of prescription drugs.¹⁹⁷ Thus, the *Brown* court interpreted comment k to grant the defendants an exemption from strict liability, and thereby required the plaintiffs to prove negligence on the manufacturers' part in order for the court to hold the defendant liable.¹⁹⁸

189. *Id.* The plaintiffs allege that DES was unsafe for use in preventing miscarriages because the defendants knew that the drug contained a cancer-causing substance, yet they failed to warn users of this dangerous characteristic. *Id.*

190. *Id.* at 1055, 751 P.2d at 473, 245 Cal. Rptr. at 414-15.

191. *Id.*

192. *Id.*

193. *Id.* at 1055-56, 751 P.2d at 473, 245 Cal. Rptr. at 415.

194. *Id.* at 1069, 751 P.2d at 482-83, 245 Cal. Rptr. at 424.

195. *Id.* at 1066, 751 P.2d at 481, 245 Cal. Rptr. at 422.

196. *Id.* at 1063, 751 P.2d at 478, 245 Cal. Rptr. at 420.

197. *Id.*

198. *Id.* at 1059, 751 P.2d at 476, 245 Cal. Rptr. at 417.

Nonetheless, scholars, both before and after the *Brown* decision, have argued that the potential for harm exists in all products.¹⁹⁹ These scholars asserted that all products should be treated alike, rather than distinguishing between those that are acceptably dangerous, such as prescription drugs, and all other products.²⁰⁰ In fact, one California Court of Appeal interpreted the *Brown* holding to apply equally to prescription drugs and other products in failure to warn cases.²⁰¹ However, up until the California Supreme Court's decision in *Anderson v. Owens-Corning*

199. Moore & Hengesbach, *supra* note 91, at 81 n. 154; Kelso, *supra* note 82, at 26-27 and accompanying text (referring to Dean Prosser's statements made at the American Law Institute's meeting convened to first consider the topic of prescription drugs and Section 402A in 1961).

200. Moore & Hengesbach, *supra* note 91, at 81 n. 154; Kelso, *supra* note 82, at 26-27 and accompanying text (referring to Dean Prosser's statements made at the American Law Institute's meeting convened to first consider the topic of prescription drugs and Section 402A in 1961).

201. *Vermeulen v. Superior Court*, 204 Cal. App. 3d 1192, 1206, 251 Cal. Rptr. 805, 813 (1st Dist. 1988) (disagreed with by *Anderson v. Owens-Corning Fiberglass Corp.*, 217 Cal. App. 3d 772, 266 Cal. Rptr. 204 (2nd Dist. 1990), *review gr.*, in part *Anderson v. Owens-Corning Fiberglass Corp.*, 790 P.2d 238, 269 Cal. Rptr. 74, (1990), and reprinted for tracking pending review *Anderson v. Owens-Corning Fiberglass Corp.*, 227 Cal. App. 3d 1035 (2nd Dist. 1990) *superseded Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991)). In coming to this conclusion, the court in *Vermeulen* stated that *Brown*: (1) referred to comment j of Restatement (Second) Torts § 402A; and (2) asserted that most jurisdictions only impose strict liability for failure to warn on the manufacturer if it had actual or constructive knowledge at the time the product was distributed. *Id.* *Brown* cited several cases which did not involve prescription drugs. *Id.* See, *eg.*, *Diamond v. Caterpillar Tractor Co.*, 65 Cal. App. 3d 173, 134 Cal. Rptr. 895 (1976) (discussing strict liability against the manufacturer of a towmotor); *Bojorquez v. House of Toys, Inc.* 62 Cal. App. 3d 930, 133 Cal. Rptr. 483 (1976) (addressing the applicability of strict liability against a retailer and distributor of slingshots); *Dosier v. Wilcox-Crittendon Co.*, 45 Cal. App. 3d 74, 119 Cal. Rptr. 135 (1975) (examining the admissibility of evidence regarding the purchase of a "snap" or "hook" device, manufactured to be used as a bull tie, stallion chain or cattle tie in a personal injury action based on strict liability in tort); *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968) (analyzing strict liability against manufacturer of a defective tire, and against the supplier and installer of the tire); *Oakes v. E.I. Du Pont de Nemours & Co.*, 272 Cal. App. 2d 645, 77 Cal. Rptr. 709 (1969) (discussing strict liability against the manufacturer of weed-killing chemicals that caused a severe systematic skin condition to the plaintiff who was allergic to an ingredient in the weed-killing spray); *Canifax v. Hercules Powder Co.*, 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965) (addressing strict liability against manufacturer and supplier of a fuse and other supplies used in blasting, and analyzing whether the defendant was negligent for failing to adequately warn as to the timing of the fuse). Hence, the court in *Vermeulen* declared that it did not interpret *Brown*'s holding to be limited to prescription drug cases. *Vermeulen*, 204 Cal. App. 3d at 1206, 251 Cal. Rptr. at 813. Additionally, the California Supreme Court, in *Anderson*, stated that although the holding in *Brown* only applies to prescription drugs, its logic and common sense are not limited to drugs. *Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 1000, 810 P.2d 549, 556, 281 Cal. Rptr. 528, 535. According to *Anderson*, *Brown* clearly implied that knowledge is an element of strict liability for failure to warn cases in cases other than prescription drugs. *Id.*

Fiberglass Corp., the California Supreme Court had not extended *Brown* into non-drug cases. Indeed, some courts expressly refused to take this step in failure to warn causes of action concerning asbestos and asbestos products.²⁰²

D. *The Asbestos Cases*

In the past decade the failure to warn doctrine has frequently been addressed by the courts, particularly because of its use in asbestos as well as other chemical litigation.²⁰³ In most of these industrial liability cases, the plaintiffs allege that manufacturers were aware of the fact that fibers emitted from structural insulation installed in ships, buildings, or other structures caused asbestosis and other asbestos related diseases.²⁰⁴ Hence, much of the asbestos litigation frequently concerns the point in time at which asbestos manufacturers and distributors learned, or should have learned, about the hazards associated with asbestos, thereby triggering a duty to warn of those hazards.²⁰⁵

Generally, a manufacturer must warn of hazards that are reasonably foreseeable or discoverable.²⁰⁶ Yet, a few courts, particularly in asbestos litigation, have taken this notion one step further, and have held that a manufacturer is strictly liable when the manufacturer sells an unsafe product, whether or not the manufacturer knew or could have known of the risk of injury inherent in the product at the time of manufacture.²⁰⁷ In effect,

202. See *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 196, 447 A.2d 539, 542 (1982) (limited by *Feldman v. Lederle Lab.*, 97 N.J. 429, 455, 479 A.2d at 386-88).

203. O'Reilly, *supra* note 12, at 86 n.5; Henderson & Eisenberg, *supra* note 118, at 484 (noting that by the mid-1980's failure to warn cases "blossomed"). See *supra* notes 1-4 (discussing the tremendous increase of asbestos litigation during the past decade).

204. See Hensler, ET. AL., *supra* note 2 (stating that asbestos was used in industrial settings, in ships, in schools, and in homes across the country, even though there was evidence that manufacturers knew of the dangers associated with asbestos exposure as far back as the 1930's).

205. Polin, *supra* note 1, at 11; O'Reilly, *supra* note 12, at 86 n.5.

206. Polin, *supra* note 1, at 11. See *id.* (defining reasonably foreseeable or discoverable hazards as those that a manufacturer knows of or should know of in the course of business).

207. *Beshada v. Johns-Manville Prod. Co.*, 90 N.J. 191, 204, 447 A.2d 539, 546 (1982) (limited to its facts by *Feldman v. Lederle Lab.*, 97 N.J. 429, 455, 479 A.2d 374, 386-88 (1984)). Apparently, Hawaii, Louisiana, and Missouri also follow the line of cases holding that state-of-the-art evidence is inadmissible to prove whether manufacturers and distributors of asbestos products knew or should

this small minority of jurisdictions have prohibited the use of state-of-the-art evidence.²⁰⁸ It is also this minority view that strongly adheres to the pro-plaintiff ideal of strict liability, whereas the majority of jurisdictions have returned to the negligence, pro-defendant, standard.

1. *The Use of State-of-the-Art Evidence in Other Jurisdictions*

One case prohibiting use of state-of-the-art evidence is *Beshada v. Johns-Manville Products Corp.*²⁰⁹ *Beshada* was a consolidation of six cases in which all of the plaintiffs were workers, or survivors of deceased workers, who alleged that they were exposed to asbestos for varying lengths of time, and as a result of such exposure they had contracted asbestosis and other asbestos-related disorders.²¹⁰ The defendant manufacturers' products did not contain any warning of their dangerous nature prior to the 1960's.²¹¹ At trial, there was a dispute over the defendants' knowledge of the dangerous condition of their products and over when they acquired this knowledge.²¹² The defendants argued that it was not until the 1960's that the hazards associated with asbestos and products containing asbestos became known.²¹³ The plaintiffs moved to strike the defendants' state-of-the-art defense.²¹⁴ The trial judge then denied plaintiffs' motion, stating that the presumption imputing knowledge to the defendants of the dangers of their products could be overcome by proof that the knowledge

have known of the dangers of asbestos. See *supra* note 28 (discussing cases which prohibit the use of state-of-the-art evidence).

208. *Id.*

209. 90 N.J. 191, 447 A.2d 539 (1982). Several Hawaii cases involving asbestos have held that state-of-the-art evidence is irrelevant in actions brought in strict liability. *In re Asbestos Cases* 829 F.2d 907, 909 (9th Cir. 1987); *Johnson v. Raybestos-Manhattan, Inc.*, 69 Haw. 287, 740 P.2d 548, 549 (1987); *In re Hawaii Federal Asbestos Cases*, 665 F.Supp. 1454, 1457 (D. Haw. 1986). The trial court, before trial, granted plaintiff's motion to prevent the defendant from introducing state-of-the-art evidence based on these Hawaii cases. *Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 992, 810 P.2d 549, 551, 281 Cal. Rptr. 528, 530.

210. *Beshada*, 90 N.J. at 196, 447 A.2d at 542.

211. *Id.* at 197, 447 A.2d at 542.

212. *Id.*

213. *Id.*

214. *Id.* at 198, 447 A.2d at 543.

at issue was unknowable at the time the product was manufactured.²¹⁵

However, the New Jersey Supreme Court reversed the trial court's holding, and granted the plaintiffs' motion.²¹⁶ In *Beshada*, the court reasoned that knowledge is imputed to the defendant, and thus it is not necessary for the plaintiff to prove its existence as a matter of fact.²¹⁷ According to the court in *Beshada*, culpability of the manufacturer is irrelevant in strict liability cases, and to recognize the state-of-the-art defense would amount to imposition of negligence, rather than strict liability.²¹⁸ The *Beshada* court insisted that in strict liability the only thing that matters is that the product was unsafe, not that the manufacturer acted negligently.²¹⁹ Further, the court declared that even though the product was unsafe because of the state of technology at the time of manufacture, it does not change the fact that the product was unsafe.²²⁰ Therefore, the *Beshada* court concluded that the manufacturers must be held strictly liable.²²¹

Hawaii, Louisiana, Missouri, Pennsylvania, and Washington all agree with *Beshada*.²²² However, a number of jurisdictions still

215. *Id.* at 199, 447 A.2d at 543.

216. *Id.*

217. *Id.* at 202, 447 A.2d at 545. *Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229, 239 (1981) was cited in *Beshada* as the leading case in New Jersey law regarding strict liability for failure to warn. *Beshada*, 90 N.J. at 202, 447 A.2d at 545.

218. *Id.*, at 204, 447 A.2d at 546. According to *Beshada*, state-of-the-art is essentially a negligence defense. *Id.*

219. *Id.*

220. *Id.* However, as a result of a great deal of criticism regarding its decision in *Beshada*, the Supreme Court of New Jersey later explicitly limited *Beshada* to its particular facts. See *Feldman v. Lederle Lab.*, 97 N.J. 429, 455, 479 A.2d 374, 388 (1984). See *id.* at 451-52, 479 A.2d at 386-88 (holding that the duty to warn depends upon the degree of the manufacturer's knowledge, and that the requirements of strict liability failure to warn cases, as provided in Restatement § 402A, comment j, are substantially similar to that of negligence). However the *Feldman* court expressly refused to overrule *Beshada*. *Id.* at 455, 479 A.2d at 388.

221. *Beshada*, 90 N.J. at 209, 447 A.2d at 549.

222. See, Hawaii Federal Asbestosis Cases, 699 F. Supp. 233 (Haw. 1988); *Johnson v. Raybestos-Manhattan, Inc.*, 69 Haw. 287, 740 P.2d 548, 549 (Haw. 1987); *In re Hawaii Federal Asbestos Cases*, 665 F. Supp. 1454, 1457 (Haw. 1986) (Hawaiian cases); *Halphen v. Johns-Manville Sales Corp.*, 788 F. 2d 274, 275 (5th Cir. 1986) (Louisiana case); *Elmore v. Owens-Illinois, Inc.*, 673 S.W. 2d 434, 438 (Mo. 1984) (Montana case); *Carreter v. Colson Equipment Co.* 346 Pa. Super. 95, 499 A.2d 326, 330-31 (Pa. 1985) (Pennsylvania case); *Little v. PPG Indus.*, 579 P.2d 940, 946 (Wash. 1978); *Haugen v. Minnesota Mining and Manufacturing Co.*, 15 Wash. App. 379, 550 P.2d

have not addressed the issue of whether state-of-the-art evidence is admissible in failure to warn cases.²²³ Prior to *Anderson*, the California Supreme Court was included among the jurisdictions which had not addressed the issue.²²⁴ Therefore, before examining the *Anderson* opinion, it will be helpful to briefly discuss the views among the California appellate courts preceding *Anderson*.

2. *State-of-the-Art Evidence in California*

Prior to the *Anderson* decision, the California Courts of Appeal disagreed on the law in respect to hazards that are unknowable.²²⁵ The Court of Appeal for the Second District, in *Anderson*,²²⁶ held that the state-of-the-art defense, permitting the defendant to show that the specific risk was not known nor knowable at the time of manufacture, was not admissible in failure to warn strict liability cases.²²⁷ However, the Courts of Appeal for the Third District and the First District held the opposite; that state-of-the-art evidence is admissible in failure to warn cases.²²⁸

71, 76-77 (Wash. 1976) (Washington cases).

223. Klein, *supra* note 18, at 239, 243-44, 248.

224. *Id.*

225. *Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 991, 810 P.2d 549, 550, 281 Cal. Rptr. 528, 529. *See id.* at 987, 810 P.2d at 550, 281 Cal. Rptr. at 529 (indicating that "unknowable" refers to risks that were neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution); Polin, *supra* note 1, at 11-12 (defining "unknowable" as hazards that are not reasonably foreseeable or discoverable).

226. 217 Cal. App. 3d 772, 266 Cal. Rptr. 204 (1990).

227. *Anderson*, 217 Cal. App. 3d 772, 266 Cal. Rptr. 204, 211 (2nd Dist. 1990), *review gr.*, in part *Anderson v. Owens-Corning Fiberglass Corp.*, 790 P.2d 238, 269 Cal. Rptr. 74, (1990), and reprinted for tracking pending review *Anderson v. Owens-Corning Fiberglass Corp.*, 227 Cal. App. 3d 1035 (2nd Dist. 1990) *superseded Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991)).

228. *Vermeulen v. Superior Court*, 204 Cal. App. 3d 1192, 1206, 251 Cal. Rptr. 805, 813 (1st Dist. 1988) (disagreed with by *Anderson v. Owens-Corning Fiberglass Corp.*, 217 Cal. App. 3d 772, 266 Cal. Rptr. 204 (2nd Dist. 1990), *REVIEW GR.*, in part *Anderson v. Owens-Corning Fiberglass Corp.*, 790 P.2d 238, 269 Cal. Rptr. 74, (1990), and reprinted for tracking pending review *Anderson v. Owens-Corning Fiberglass Corp.*, 227 Cal. App. 3d 1035 (2nd Dist. 1990) *superseded Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991)); *Oakes v. E.I. Du Pont de Nemours & Co., Inc.*, 272 Cal. App. 2d 645, 646, 77 Cal. Rptr. 709, 713 (1969). Most jurisdictions agree with the view that state-of-the-art evidence is admissible in failure to warn cases. *See supra* note 28 and accompanying text (listing some of the cases and jurisdictions that

*Oakes v. E.I. Du Pont de Nemours & Co., Inc.*²²⁹ was the first California case that discussed the state-of-the-art defense in strict liability actions.²³⁰ In *Oakes*, the defendant manufactured and distributed weed-killing chemical products.²³¹ Apparently, plaintiff *Oakes* was allergic to an ingredient in the weed killer, and he acquired a severe systemic skin condition after using the defendant's products.²³² *Oakes* proceeded on the theory of strict liability, however, he failed to allege that defendant knew or should have known that the weed killer could have an adverse effect on individuals allergic to the ingredients in the weed killer.²³³ According to the court, the plaintiff was required to establish that the defendant had knowledge of the danger before the defendant could be held liable.²³⁴ In *Oakes*, the court stated that imposing liability on a manufacturer for failing to warn of unknown and unknowable defects would cause the manufacturer to be placed in the role of an insurer, which is beyond any reasonable application of the rationale for strict liability.²³⁵ Therefore, the appellate court affirmed the trial court's judgment in favor of the defendant.²³⁶

Moreover, in *Vermeulen v. Superior Court*,²³⁷ the court of appeal for the first district was asked to review pretrial evidentiary rulings consisting of three general orders which were applicable to approximately two thousand pending complex asbestos litigation cases brought under the doctrine of strict liability.²³⁸ At issue in the challenge to all three of these orders was whether the court

follow the majority view).

229. 272 Cal. App. 2d 645, 77 Cal. Rptr. 709 (1969).

230. *Anderson*, 53 Cal. 3d at 997, 810 P.2d at 555, 281 Cal. Rptr. at 534.

231. *Oakes*, 272 Cal. App. 2d at 646, 77 Cal. Rptr. at 710.

232. *Id.*

233. *Id.* at 646-47, 77 Cal. Rptr. at 710-11.

234. *Id.* at 647, 77 Cal. Rptr. at 710.

235. *Id.* at 650-51, 77 Cal. Rptr. at 713. Many recent cases agree that strict liability was not intended to make manufacturers and distributors insurers of the safety of the use of their products. *Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 1004, 810 P.2d 549, 559, 281 Cal. Rptr. 528, 538; *Woodill v. Parke Davis & Co.*, 492 N.E.2d 194, 199 (Ill. 1980); *Daly v. General Motors Corp.*, 20 Cal.3d 725, 733, 575 P. 2d 1162, 1166, 144 Cal. Rptr. 380, 384 (1978). *See supra* notes 77-91 and accompanying text (discussing the rationale for strict products liability).

236. *Oakes*, 272 Cal. App. 2d at 652, 77 Cal. Rptr. at 714.

237. 204 Cal. App. 3d 1192, 251 Cal. Rptr. 805 (1988).

238. *Id.* at 1195, 251 Cal. Rptr. at 806.

should permit the use of state-of-the-art evidence.²³⁹ The *Vermeulen* court relied on section 402A, comment j, of the Restatement (Second) of Torts.²⁴⁰ Comment j provides that manufacturers will be held strictly liable for failure to warn only if they have “knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge,” of the possibility of harm.²⁴¹ The court recognized that even though consideration of state-of-the-art evidence infuses negligence principles into a cause of action based on strict liability, the theory of failure to warn “is itself a doctrine borrowed from negligence.”²⁴²

In *Vermeulen* the court noted that the California Supreme Court had not settled the issue of whether state-of-the-art evidence is admissible in other than prescription drug contexts.²⁴³ Nonetheless, the *Vermeulen* court stated that the *Brown* holding, which conditioned liability for failure to warn actions on the manufacturer’s knowledge at the time of manufacture or distribution of the product, was not limited to prescription drug cases because the *Brown* court cited several non-prescription drug cases when reaching its decision.²⁴⁴ Therefore, the *Vermeulen* court concluded that state-of-the-art evidence is admissible in strict liability cases based on failure to warn.²⁴⁵

As evidenced by these appellate court decisions, prior to *Anderson* there existed a conflict among the California Courts of Appeal as to whether state-of-the-art evidence is admissible in strict

239. *Id.* at 1198-1203, 251 Cal. Rptr. at 808-811.

240. RESTATEMENT (SECOND) OF TORTS § 402A, comment j (1965). *See supra* note 117 (listing the full text of comment j).

241. *Vermeulen v. Superior Court*, 204 Cal. App. 3d 1192, 1204, 251 Cal. Rptr. 805, 812 (1st Dist. 1988) (disagreed with by *Anderson v. Owens-Corning Fiberglass Corp.*, 217 Cal. App. 3d 772, 266 Cal. Rptr. 204 (2nd Dist. 1990), REVIEW GR., in part *Anderson v. Owens-Corning Fiberglass Corp.*, 790 P.2d 238, 269 Cal. Rptr. 74, (1990), and reprinted for tracking pending review *Anderson v. Owens-Corning Fiberglass Corp.*, 227 Cal. App. 3d 1035 (2nd Dist. 1990) *superseded Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991)).

242. *Id.* at 1204, 251 Cal. Rptr. at 812.

243. *Id.* at 1205, 251 Cal. Rptr. at 813.

244. *Id.* at 1206, 251 Cal. Rptr. at 813. *See supra* note 201 (listing several cases cited by *Brown* which dealt with products other than prescription drugs).

245. *Vermeulen*, 204 Cal. App. 3d at 1206, 251 Cal. Rptr. at 813.

liability for failure to warn claims. Until the *Anderson* decision, the California Supreme Court had not addressed this issue.

II. THE CASE

In *Anderson v. Owens Corning Fiberglass Corp.*,²⁴⁶ the California Supreme Court granted review to determine whether a manufacturer may offer as a defense, in a strict liability failure to warn cause of action, state-of-the-art evidence to show that the manufacturer did not know, nor could have known, that the product was unsafe based on the scientific knowledge available at the time of manufacture.²⁴⁷ The *Anderson* court concluded that state-of-the-art evidence is admissible, thereby permitting negligence principles to be incorporated into the doctrine of strict liability.²⁴⁸ In reaching this conclusion the court first illustrated that use of negligence principles in strict liability claims has survived judicial challenges in the past which asserted that such incorporation violates the fundamental principles of strict liability.²⁴⁹ Then, the *Anderson* court explained that, regardless of its roots in negligence, claims alleging failure to warn in strict liability differ significantly from actions alleging failure to warn in the negligence context.²⁵⁰ Particularly, in negligence failure to warn causes of action, the plaintiff must prove that the defendant's failure to warn was unreasonable, whereas in strict liability failure to warn the reasonableness of the defendant's conduct is immaterial.²⁵¹ As a result, the *Anderson* court held that a defendant in a strict products

246. 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991).

247. *Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 990, 810 P.2d 549, 550, 281 Cal. Rptr. 528, 529 (1991).

248. *Id.*

249. *Id.* at 1002, 810 P.2d at 558, 281 Cal. Rptr. at 537.

250. *Id.* at 1000-03, 810 P.2d at 557-59, 281 Cal. Rptr. at 536-38. *See infra*, notes 292-314 and accompanying text (justifying the use of negligence principles in strict liability, and comparing the use of such negligence principles in negligence versus their use in strict liability for failure to warn causes of action).

251. *Anderson*, 53 Cal. 3d at 1000-03, 810 P.2d at 557-59, 281 Cal. Rptr. at 536-38. *See supra* note 70 (discussing the various types of failure to warn causes of action).

liability action for failure to warn may introduce state-of-the-art evidence.²⁵²

A. The Facts

Carl Anderson worked as an electrician at the Long Beach Naval Shipyard from 1941 to 1976.²⁵³ The nature of Anderson's job at the shipyard required him to work in close proximity to others who were removing and installing insulation products containing asbestos aboard ships.²⁵⁴ Anderson alleged that working in such close proximity to those who were installing and removing insulation products caused him to be exposed to asbestos and asbestos products,²⁵⁵ and ultimately caused him to contract asbestosis and other lung ailments.²⁵⁶

Owens-Corning Fiberglass Corporation (hereinafter Owens-Corning) manufactured products containing asbestos, and these products were used in the naval shipyard in which Anderson worked.²⁵⁷ Anderson claimed that Owens-Corning's products contained design and manufacturing defects.²⁵⁸ These products, Anderson asserted, caused injury to users and consumers, including himself, while being used in a reasonably foreseeable manner.²⁵⁹ Anderson also claimed that Owens-Corning marketed its products with knowledge that exposure to asbestos and asbestos products was highly likely to cause injury and death.²⁶⁰ Anderson alleged that this knowledge derived from scientific studies and medical data.²⁶¹ Anderson further asserted that while Owens-Corning knew that consumers and members of the general public did not

252. *Anderson*, 53 Cal. 3d at 1000-03, 810 P.2d at 557-59, 281 Cal. Rptr. at 536-38.

253. *Id.* at 991, 810 P.2d at 550, 281 Cal. Rptr. at 529.

254. *Id.* See *supra* note 1 (describing the use of asbestos as an insulator).

255. A few of the asbestos products Anderson was exposed to while working at the naval shipyard were performed blocks, cloth and cloth tape, cement, and floor tiles. *Anderson*, 53 Cal. 3d at 991, 810 P.2d at 550, 281 Cal. Rptr. at 529.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 992, 810 P.2d at 550, 281 Cal. Rptr. at 529.

260. *Id.* at 992, 810 P.2d at 551, 281 Cal. Rptr. at 530.

261. *Id.*

have knowledge of the potential harm asbestos could cause, it nevertheless failed to warn users of the risk of danger.²⁶²

In response, Owens-Corning asserted the state-of-the-art defense.²⁶³ Specifically, Owens-Corning insisted that, based on the state of technology at the time Owens-Corning's products were distributed, it was not possible for scientific experts to know that asbestos was hazardous to users in the concentrations associated with its products.²⁶⁴

The trial court granted the plaintiff's motion to preclude the defendants from presenting state-of-the-art evidence.²⁶⁵ Then, without stating a reason, the trial court granted the defendant's motion to prevent the plaintiff from proceeding on the failure to warn allegations.²⁶⁶ Thereafter, the case went to trial on the design defect theory.²⁶⁷ The jury entered judgment in favor of the defendant upon finding that the defendant's product contained no design defects.²⁶⁸ Anderson then moved for a new trial.²⁶⁹

The court granted Anderson's motion for a new trial.²⁷⁰ The court of appeal for the second district upheld the order, based on the fact that the trial court erred in precluding Anderson from proceeding on the failure to warn theory and erred in finding that the product had no design defect.²⁷¹ Additionally, the appellate court stated that in strict liability asbestos cases, state-of-the-art evidence is inadmissible because it focuses on the reasonableness of the defendant's conduct, which is the crux of negligence, and is therefore irrelevant in strict liability actions.²⁷²

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* The trial court relied on the "Hawaii cases" in granting the motion. *Id.* The "Hawaii cases" held that in all types of strict liability causes of action state-of-the-art evidence is irrelevant. *Id.* (citing *Johnson v. Raybestos-Manhattan Inc.*, 740 P.2d 548, 549 (Haw. 1987); *In re Hawaii Federal Asbestos Cases*, 665 F.Supp. 1454 (Haw. 1986)).

266. *Anderson*, at 992-93, 810 P.2d at 551, 281 Cal. Rptr. at 530.

267. *Id.*

268. *Id.* at 993, 810 P.2d at 551, 281 Cal. Rptr. at 530.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

B. *The Majority Opinion*

The California Supreme Court, in an opinion written by Justice Panelli,²⁷³ affirmed the trial and appellate court's grant of a new trial, and directed that the case be remanded to the trial court for proceedings consistent with the supreme court's decision in *Anderson*.²⁷⁴ In determining whether the negligence elements of knowledge and knowability should be incorporated into the realm of strict liability for failure to warn causes of action, the California Supreme Court had to decide whether to adopt the *Vermeulen* decision, which is the majority view, or the appellate court's decision in *Anderson*.²⁷⁵ In *Vermeulen*, the court had held that state-of-the-art evidence is admissible, whereas the appellate court in *Anderson* had decided that the element of the manufacturer's knowledge, and thus state-of-the-art evidence, is irrelevant in such cases.²⁷⁶

The *Vermeulen* court relied on comment j of the Restatement in reaching its decision.²⁷⁷ Comment j suggests that evidence that a manufacturer knew or should have known of a particular defect is admissible in strict liability failure to warn cases.²⁷⁸ However, before the *Anderson* court decided to embrace the requirements of comment j, the court first analogized to its decision in *Brown v. Superior Court*,²⁷⁹ which held that manufacturers are not to be found strictly liable for failing to warn of unknown hazards with

273. In *Anderson*, Justice Broussard filed a concurring opinion, and Justice Mosk filed an opinion concurring in part and dissenting in part. *Id.* at 1004-09, 810 P.2d at 560-63, 281 Cal. Rptr. at 539-42 (Broussard, J., concurring, Mosk, J., concurring and dissenting).

274. *Id.* at 1004, 810 P.2d at 559-60, 281 Cal. Rptr. at 538-39.

275. *Id.* at 991, 810 P.2d at 550, 281 Cal. Rptr. at 529.

276. *Id.*

277. *Vermeulen v. Superior Court*, 204 Cal. App. 3d 1192, 1206, 251 Cal. Rptr. 805, 813 (1st Dist. 1988) (disagreed with by *Anderson v. Owens-Corning Fiberglass Corp.*, 217 Cal. App. 3d 772, 266 Cal. Rptr. 204 (2nd Dist. 1990), *review gr.*, in part *Anderson v. Owens-Corning Fiberglass Corp.*, 790 P.2d 238, 269 Cal. Rptr. 74, (1990), and reprinted for tracking pending review *Anderson v. Owens-Corning Fiberglass Corp.*, 227 Cal. App. 3d 1035 (2nd Dist. 1990) *superseded Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991)).

278. *Anderson*, 53 Cal. 3d at 1000, 810 P.2d at 557, 281 Cal. Rptr. at 536.

279. 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988).

respect to prescription drugs.²⁸⁰ Second, the *Anderson* court examined the underlying rationale for the strict liability doctrine.²⁸¹ Then, the court analyzed the difference between the use of negligence components in strict liability failure to warn cases and their use in failure to warn actions grounded in negligence.²⁸²

1. *The Brown Decision is Extended to All Products Under the Failure to Warn Cause of Action*

In *Brown*, the California Supreme Court refused to impose strict liability on manufacturers of prescription drugs where the manufacturers failed to warn consumers of risks that were unknowable at the time of distribution.²⁸³ The *Brown* court reasoned that to impose such liability would discourage manufacturers from developing new and improved products out of the fear that later advances in scientific knowledge and technology would increase their liability.²⁸⁴ In *Anderson*, the California Supreme Court had to determine whether the *Brown* holding was applicable beyond the limitations of its narrow factual setting, i.e., prescription drugs.²⁸⁵

The majority in *Anderson* admitted that *Brown* only applied to prescription drugs, however the majority decided that “*Brown’s* logic and common sense are not limited to drugs.”²⁸⁶ The *Anderson* court interpreted *Brown* to imply that the element of the

280. *Anderson*, 53 Cal. 3d at 999, 810 P.2d at 556, 281 Cal. Rptr. at 535; *Brown*, 44 Cal. 3d at 1066, 751 P.2d at 481, 245 Cal. Rptr. at 422. See *infra* notes 283-291 and accompanying text (discussing the manner in which the *Anderson* court extends *Brown* to apply to failure to warn strict liability cases).

281. *Anderson*, 53 Cal. 3d at 1000, 810 P.2d at 557, 281 Cal. Rptr. at 536. See *infra* notes 292-314 and accompanying text (discussing the justifications for infusing negligence concepts in a strict liability cause of action).

282. *Anderson* 53 Cal. 3d at 1002-04, 810 P.2d at 558-59, 281 Cal. Rptr. at 537-38. See *infra* notes 292-314 and accompanying text (comparing the differences of the use of the failure to warn theory in negligence causes of action with its use in strict liability litigation).

283. *Brown*, 44 Cal. 3d at 1066, 751 P.2d at 481, 245 Cal. Rptr. at 422.

284. *Id.* at 1066, 751 P.2d at 470, 245 Cal. Rptr. at 422.

285. *Anderson*, 53 Cal. 3d at 1000, 810 P.2d at 556, 281 Cal. Rptr. at 535.

286. *Id.*

defendant's knowledge is a necessary component of strict liability for failure to warn in litigation involving other than prescription drugs.²⁸⁷ Hence, the court in *Anderson* was persuaded to accept the view that knowledge is required in failure to warn strict liability cases.²⁸⁸ Alternatively, the court maintained that even if it was implying too much from the *Brown* decision, the court was now squarely faced with the issue of knowability in strict liability failure to warn causes of action outside the domain of prescription drugs.²⁸⁹ The *Anderson* majority decided to adopt the knowledge requirement, regardless of the fact that doing so would incorporate negligence principles into strict liability.²⁹⁰ The majority justified this decision by comparing the doctrine of negligence with that of strict liability for failure to warn, and noting the similarities in the doctrines.²⁹¹

2. *Justifying the Application of Negligence Principles*

The opponents of the Restatement view, including *Anderson*, declared that by requiring the element of knowledge, and thus allowing the admission of state-of-the-art evidence, the majority would improperly infuse negligence concepts into strict liability by focusing on the conduct of the manufacturer or distributor, rather than on the condition of the product.²⁹² The *Anderson* majority rejected this argument, despite recognizing that one of the guiding principles of strict liability was to relieve a plaintiff of the burdens of proving negligence.²⁹³ In so doing, the majority asserted that merely because a component of strict liability “rings of” or

287. *Id.*

288. *Id.*

289. *Id.* at 1000, 810 P.2d at 558, 281 Cal. Rptr. at 536.

290. *Id.* at 1000, 810 P.2d at 557, 281 Cal. Rptr. at 535.

291. *Id.* at 1000-03, 810 P.2d at 557-59, 281 Cal. Rptr. at 536-38. *See infra* notes 292-314 and accompanying text (comparing the negligence and strict liability theories in failure to warn cases).

292. *Anderson*, 53 Cal. 3d at 1000-03, 810 P.2d at 557-59, 281 Cal. Rptr. at 536-38.

293. *Id.*

“sounds in” negligence does not necessarily mean that it is precluded from use in the context of strict liability.²⁹⁴

The majority in *Anderson* then distinguished the condition of knowledge in strict products liability actions from the knowledge requirement in negligence cases.²⁹⁵ The majority stated that in a strict liability suit the jury’s focus is directed to the condition of the product itself, whereas in a negligence case the jury’s attention is focused on the manufacturer’s conduct.²⁹⁶

Further, the majority pointed out that the “warning defect” theory of strict products liability has stronger roots in negligence than the manufacturing or design defect theories, because warning defects involve a failure that is extraneous to the product itself.²⁹⁷ Hence, according to the majority, the adequacy of a warning given by a manufacturer cannot be evaluated without reference to the manufacturer’s conduct.²⁹⁸ The majority stated that one cannot warn of something that is unknowable.²⁹⁹ If such a requirement were mandated, the manufacturers and distributors would be held absolutely liable, which is not the purpose of the failure to warn

294. *Id.* (quoting *Barker v. Lull Eng’g Co.* 20 Cal. 3d 413, 433, 573 P.2d 443, 456, 143 Cal. Rptr. 225, 238 (1978)). *See also* *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 734, 575 P.2d 1162, 1167, 144 Cal. Rptr. 380, 385 (1978) (concluding that principles of comparative negligence also apply to actions based on strict products liability). In *Daly*, the court indicated that strict products liability and traditional negligence are twin principles. *Anderson*, 53 Cal. 3d 1001, 810 P.2d at 557, 281 Cal. Rptr. at 536 (quoting *Daly*, 20 Cal. 3d at 734, 575 P. 2d at 1162, 144 Cal. Rptr. at 380). *But see* *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 132, 501 P.2d 1153, 1161-62, 104 Cal. Rptr. 433, 441-42 (1972) (providing that the result of the limitation of section 402A of the Second Restatement of Torts has both prevented a seller from becoming an insurer of his product, and has burdened the injured plaintiff with proof of an element which rings of negligence, yet the very purpose of developing the theory of strict products liability, which was to relieve the plaintiff from difficulties of proof inherent in pursuing negligence and warranty remedies, is defeated).

295. *Anderson*, 53 Cal. 3d at 1002, 810 P.2d at 558, 281 Cal. Rptr. at 537. *See* Klein, *supra* note 18, at 235-240 (distinguishing between the admissibility of state-of-the-art evidence in negligence, strict liability, and breach of warranty theories).

296. *Anderson*, 53 Cal. 3d at 1001, 810 P.2d at 558, 281 Cal. Rptr. at 537 (quoting *Barker*, 20 Cal. 3d at 434, 573 P.2d at 455, 143 Cal. Rptr. at 239).

297. *Id.* at 1002, 810 P.2d at 558, 281 Cal. Rptr. at 537.

298. *Id.*

299. *Id.*

theory of strict liability.³⁰⁰ Therefore, the *Anderson* majority rejected the argument that permitting the defendant manufacturer to present evidence of knowledge, as is permitted in negligence causes of action, would serve to defeat the purpose of strict liability.³⁰¹

3. *Reasonableness of Manufacturer's Failure to Warn is Immaterial in Strict Products Liability*

The majority in *Anderson* distinguished between failure to warn in negligence, and failure to warn in strict liability, in another respect.³⁰² According to the majority, in negligence, a plaintiff is required to prove that a manufacturer or distributor failed to warn of a particular risk for reasons which fell below the acceptable standard of care, that is, what a reasonably prudent manufacturer should have known and warned about.³⁰³

On the other hand, the majority explained that strict liability requires a plaintiff to prove only that the defendant failed to adequately warn of a risk that it either knew or should have known existed, based on the generally recognized and best prevailing scientific and medical knowledge available at the time of manufacture and distribution.³⁰⁴ The *Anderson* majority then explained that while the negligence standard looks to the reasonableness of the manufacturer's conduct in relation to other manufacturers, the strict liability standard judges the manufacturer's conduct in light of the knowledge of the scientific community at the time of manufacture.³⁰⁵ Therefore, the majority asserted that

300. *Id. See id.*; *Finn v. G.D. Searle & Co.*, 35 Cal. 3d 691, 701, 677 P.2d 1147, 1153, 200 Cal. Rptr. 870, 876 (1984) (noting that if a warning automatically precluded liability in every case, a manufacturer or distributor could easily avoid liability by providing overly broad warnings, which would in effect be practically useless). This defeats the purpose of requiring a warning. *Id.*; *Finn*, 35 Cal. 3d at 701, 677 P.2d at 1153, 200 Cal. Rptr. at 876.

301. *Anderson*, 53 Cal. 3d at 987, 810 P.2d at 558, 281 Cal. Rptr. at 537.

302. *Id.* at 1002-03, 810 P.2d at 558-59, 281 Cal. Rptr. at 537-38.

303. *Id.* at 1002, 810 P.2d at 558, 281 Cal. Rptr. at 537.

304. *Id.*

305. *Id.* at 1002, 810 P.2d at 558, 281 Cal. Rptr. at 537.

the reasonableness of the defendant's failure to warn is immaterial.³⁰⁶

To more clearly demonstrate the difference between negligence and strict liability for failure to warn, the *Anderson* majority supplied an example.³⁰⁷ If a manufacturer tests a product, and the results of the test are contrary to that of others in the scientific community and the manufacturer does not warn users and consumers of the result, the manufacturer may escape liability under negligence if a reasonably prudent manufacturer would have decided that the risk of harm was such as not to require a warning.³⁰⁸ However, according to the *Anderson* majority, such a manufacturer would not escape liability under the doctrine of strict liability.³⁰⁹ Strict liability imposes liability upon the manufacturer if the manufacturer failed to furnish a warning of dangers that were known to the scientific community at the time the product was manufactured or distributed, regardless of how a reasonably prudent manufacturer would have acted.³¹⁰ Under this analysis, the manufacturer will be held strictly liable if the trier of fact determines that, based on the scientific information available at the time, the manufacturer's failure to warn caused the product to become unsafe to its intended users.³¹¹ Hence, the element of knowledge is relevant to the imposition of liability under the failure to warn strict liability theory.³¹²

Accordingly, the *Anderson* majority declared that a defendant in a strict products liability action for failure to warn of a risk of injury may assert the state-of-the-art defense.³¹³ The majority

306. *Id.* at 1003, 810 P.2d at 559, 281 Cal. Rptr. at 538.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* The majority stated that no matter what actions the manufacturer may consider reasonable, the user of the product must be provided the opportunity to either refrain from using the product at all, or to use it in a manner that would minimize the degree of danger. *Id.*

311. *Id.* The majority also indicated that when the risk calls for a true choice judgment, medical or personal, a warning must be furnished. *Id.* (quoting *Davis v. Wyeth Lab.*, 399 F.2d 121, 129-30 (9th Cir. 1968)). See generally *Finn v. G.D. Searle & Co.*, 35 Cal. 3d 691, 699-700, 677 P.2d 1147, 1152, 200 Cal. Rptr. 870, 874-75 (1984) (listing specific kinds of warnings and their implications).

312. *Anderson*, 53 Cal. 3d at 1004, 810 P.2d at 559, 281 Cal. Rptr. at 538.

313. *Id.*

held that the manufacturer may present evidence that a particular risk was neither known, nor could possibly have been known, by application of the scientific knowledge available at the time of manufacture and/or distribution.³¹⁴

C. Concurring Opinion by Justice Broussard

Justice Broussard agreed with the *Anderson* majority's conclusion that state-of-the-art evidence is admissible as a defense to a suit based on the failure to warn theory of strict products liability, but wrote separately in order to emphasize that the majority's opinion was narrow in scope.³¹⁵ Justice Broussard professed that under the majority's holding, state-of-the-art evidence may not be admissible in all types of strict liability cases.³¹⁶ For instance, Justice Broussard indicated that such evidence would not be admissible if a plaintiff proceeded solely on the "consumer expectation" prong of the design defect principle propounded in *Barker*.³¹⁷ With respect to the consumer expectation standard in design defect cases, Justice Broussard asserted that if a product proves to be unsafe, an injured plaintiff may recover for the resulting injuries based on a warranty theory, without introducing evidence as to whether the manufacturer knew or should have known at the time of manufacture or distribution that the product was defective.³¹⁸ Since, in this case, *Anderson* relied only upon the failure to warn theory, Justice Broussard

314. *Id.*

315. *Id.* at 1005, 810 P.2d at 560, 281 Cal. Rptr. at 539 (Broussard, J. concurring).

316. *Id.* (Broussard, J. concurring).

317. *Id.* (Broussard, J. concurring). See *supra*, note 157-158 and accompanying text (detailing the consumer expectation test set forth in *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 429-30, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978)).

318. *Anderson*, 53 Cal. 3d at 1005, 810 P.2d at 560, 281 Cal. Rptr. at 539 (Broussard, J. concurring). This consumer expectation notion, permitting recovery without regard to knowledge on the part of the manufacturer at the time of manufacture or distribution, has been stated in several cases. *West v. Johnson & Johnson Prod., Inc.*, 174 Cal. App. 3d 831, 852-58, 863-67, 220 Cal. Rptr. 437, 448-52, 456-58 (1987); *Johnson v. Raybestos-Manhattan, Inc.*, 740 P.2d 548, 549 (Haw. 1987); *Ontai v. Straub Clinic and Hosp. Inc.*, 66 Haw. 237, 659 P.2d 734, 744-45 (1983).

concluded that the state-of-the-art evidence was properly admitted.³¹⁹

D. Concurring and Dissenting Opinion by Justice Mosk

Justice Mosk agreed with the *Anderson* majority insofar as the majority affirmed the granting of a new trial ordered by the appellate court.³²⁰ However, Justice Mosk, the author of the opinion in *Brown*,³²¹ argued that the majority in *Anderson*, which relied extensively on *Brown*, failed to recognize that *Brown* was based on a narrow exception to strict products liability applicable only to prescription drugs.³²²

Justice Mosk asserted that in *Brown* the court recognized a significant distinction between prescription drugs and other products.³²³ Justice Mosk stated that since prescription drugs are manufactured in order to save lives and reduce pain, public policy encourages the development and marketing of new drugs, even if some risks might result.³²⁴ Therefore, Justice Mosk asserted that the majority stretched the holding in *Brown* beyond all recognition by relying on it in cases involving products other than prescription drugs.³²⁵ Justice Mosk asserted that use of *Brown* in this manner makes its narrow exception swallow up fundamental law.³²⁶

Moreover, Justice Mosk suggested that the court should consider the idea of either determining failure to warn actions solely on a negligence theory, or drawing a bright-line rule that could be applied to all failure to warn strict liability actions.³²⁷ Justice Mosk stated that this bright-line rule should provide for a

319. *Anderson*, 53 Cal. 3d at 1005, 810 P.2d at 560-61, 281 Cal. Rptr. at 539-40 (Broussard, J., concurring).

320. *Id.* at 1005, 810 P.2d at 561, 281 Cal. Rptr. at 540 (Mosk, J., concurring and dissenting).

321. See *supra* notes 177-202 and accompanying text (describing the *Brown* holding).

322. *Anderson*, 53 Cal. 3d at 1008, 810 P.2d at 562, 281 Cal. Rptr. at 541 (Mosk, J. concurring and dissenting).

323. *Id.* (Mosk, J., concurring and dissenting).

324. *Id.* (Mosk, J., concurring and dissenting) (quoting *Brown v. Superior Court*, 44 Cal. 3d 1049, 1063, 751 P.2d 470, 479, 245 Cal. Rptr. 412, 420 (1988)).

325. *Id.* (Mosk, J., concurring and dissenting).

326. *Id.* (Mosk, J., concurring and dissenting).

327. *Id.* at 1008, 810 P.2d at 563, 281 Cal. Rptr. at 542 (Mosk, J., concurring and dissenting).

clear distinction between situations where the defendants actually knew of the dangers, and situations where the defendants should have known of the dangers.³²⁸ In the first instance, Justice Mosk asserted that state-of-the-art evidence should not be admissible, whereas in the latter it should be admissible.³²⁹ Particularly, Justice Mosk suggested that, at trial, if plaintiffs can prove that the defendant manufacturers had actual knowledge of the high risks of injury from the use of their products, then state-of-the-art evidence would be excludable by the trial court as irrelevant.³³⁰ However, Justice Mosk explained that if the plaintiffs are only capable of establishing that, based on the scientific knowledge available at the time of manufacture and distribution, the defendant manufacturers should have known of the dangerous characteristic of their products, then state-of-the-art evidence would be admissible if presented by the defendant manufacturers.³³¹

Thus, Justice Mosk stated that he would affirm the order of a new trial granted by the trial court and upheld by the court of appeal.³³² Additionally, Justice Mosk suggested that at the new trial, the court should either apply the doctrine of negligence alone, or the bright-line rule set forth above.³³³ Accordingly, Justice Mosk concluded that upon application of the bright-line rule, the court should find, as did the appellate court in *Anderson*, that state-of-the-art evidence is inadmissible in *Anderson* since Anderson, the plaintiff, had shown that Owens-Corning knew, at the time of manufacture and distribution, that its products could cause asbestosis.³³⁴

328. *Id.* at 1008-09, 810 P.2d at 563, 281 Cal. Rptr. at 542 (Mosk, J., concurring and dissenting). See Carrizosa, *Justices Allow 'State-of-Art' Product Defense; Distinction Blurred Between Negligence and Strict Liability; Asbestos Case Ruling*, L.A. Daily J., May 31, 1991, at 5, col. 2-3 (summarizing both the majority and Justice Mosk's dissenting opinions in *Anderson*).

329. *Anderson*, 53 Cal. 3d at 1008-09, 810 P.2d at 563, 281 Cal. Rptr. at 542 (Mosk, J. concurring and dissenting).

330. *Id.* (Mosk, J., concurring and dissenting). Justice Mosk indicated that defendant manufacturers would still be able to produce evidence to show that they did not have any prior knowledge, as the plaintiffs claim. *Id.* (Mosk, J., concurring and dissenting).

331. *Id.* (Mosk, J., concurring and dissenting).

332. *Id.* (Mosk, J., concurring and dissenting).

333. *Id.* (Mosk, J., concurring and dissenting).

334. *Id.* (Mosk, J., concurring and dissenting).

III. LEGAL RAMIFICATIONS

The decision in *Anderson* settled a dispute among the California appellate courts by concluding that state-of-the-art evidence is admissible in failure to warn strict liability cases.³³⁵ By allowing the defendant to present evidence showing that the alleged hazards of the product were unknowable at the time of manufacture and distribution, the court, in effect, funneled failure to warn actions back into the realm of negligence.³³⁶ Therefore, the *Anderson* decision impacts both the traditional distinction drawn between strict liability and negligence, and the application of the strict liability doctrine outside the realm of failure to warn.

A. *Anderson Blurs the Distinction Between Negligence and Strict Liability*

Apparently, most of the courts which prohibit the use of state-of-the-art evidence do so in order to maintain a conceptual distinction between the negligence and strict liability theories in failure to warn cases.³³⁷ By permitting state-of-the-art evidence to be presented by the defendant in a strict liability failure to warn cause of action, the majority in *Anderson* blurred this distinction.³³⁸ Particularly, the majority relied on a fault-based standard for a no-fault cause of action, thereby abrogating the original purpose of the strict liability doctrine.³³⁹

335. *Anderson*, 53 Cal. 3d at 1004, 810 P.2d at 559, 281 Cal. Rptr. at 538.

336. See Carrizosa, *supra* note 328, at 1, col. 6 (providing that the court in *Anderson* now has made a strict liability trial into a negligence trial).

337. Klein, *supra* note 18, at 239. These courts hold that state-of-the-art evidence is irrelevant to any theory of strict liability. See *supra* note 28 (listing several cases which prohibited the use of state-of-the-art evidence).

338. Carrizosa, *supra* note 328, at 1, col. 6. See *infra* notes 340-378 and accompanying text (explaining how the majority's reliance on a fault-based standard abrogated the original purpose of strict liability).

339. *Id.*

1. *The Majority Relied on a Fault-Based Standard for a No-Fault Cause of Action*

Originally, true strict liability was a no-fault doctrine.³⁴⁰ Simply, if the product was defective when it was manufactured or distributed, and the product was thereafter placed on the market, the manufacturer was held strictly liable for any injury caused by the product. Liability arose regardless of whether the manufacturer had knowledge of the defect, so long as the product was being used according to the instructions (or--for its intended purpose).³⁴¹ Typically, a court would only consider a defendant's knowledge in negligence causes of action.³⁴² Nevertheless, the California Supreme Court in *Anderson* clearly stated that evidence as to the defendant's knowledge, or knowability, of risks inherent in its product is admissible in both negligence and strict liability cases.³⁴³ Hence, the majority resorted to a fault-based standard for a no-fault cause of action.³⁴⁴ The *Anderson* court reached this decision upon finding that the failure to warn theory itself is grounded in negligence.³⁴⁵

340. True strict liability was expounded in *Greenman v. Yuba Power Prod., Inc.*, and adhered to by the appellate court in *Anderson*. See *Anderson*, 53 Cal. 3d 987, 991, 810 P.2d 549, 550, 281 Cal. Rptr. 528, 529; *Greenman v. Yuba Power Prod.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

341. See *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

342. *Escola*, 24 Cal. 2d at 462, 150 P.2d at 440 (Traynor, J., concurring).

343. *Anderson*, 53 Cal. 3d at 1004, 810 P.2d at 559, 281 Cal. Rptr. at 538. See *supra* notes 273-314 and accompanying text (discussing the majority's analysis of the applicability of the state-of-the-art defense).

344. *Anderson*, 53 Cal. 3d at 1004, 810 P.2d at 559, 281 Cal. Rptr. at 538.

345. See *supra* notes 297-301 and accompanying text (explaining the *Anderson* majority's idea that the failure to warn theory is rooted in negligence).

2. *The Majority's Use of this No-Fault Standard Contradicts the Original Rationale for Implementing the Theory of Strict Liability*

Since the majority justified its decision by stating that the failure to warn theory of strict liability is grounded in negligence, it has been argued that the court's opinion flatly contradicts the rationale for implementing strict products liability.³⁴⁶ Again, strict liability was primarily adopted to relieve an injured plaintiff from the burdens inherent in proving the fact that the manufacturer's conduct amounted to negligence.³⁴⁷ Additionally, since manufacturers are in a better position to bear the costs of the injury than the innocent plaintiff, public policy mandated that manufacturers should be strictly liable for such injuries.³⁴⁸ Thus, by incorporating the negligence component of knowability into the realm of strict liability, the *Anderson* decision makes it more difficult to recover than under the traditional strict liability rule.

Since defendant manufacturer's will now have an extra element to prove (the fact that they did not know, nor could have known, of the products dangerous propensity at the time of manufacture and distribution), the *Anderson* decision will also tend to cause trials to last longer, thereby discouraging plaintiff's from bringing suit because the increased length of the trial will cause the cost of such litigation to increase.³⁴⁹ Moreover, prior to *Anderson*, the imposition on the manufacturers of the costs of failing to discover potential hazards, created an incentive for them to conduct extensive safety research. Now, by allowing the defendant manufacturers to introduce state-of-the-art evidence, the *Anderson*

346. See Rosen, *Unknowable Hazards—Loophole for Asbestos Makers is a Threat to Workers*, L.A. Daily J., June 28, 1991, at 6, col. 3. See *supra* notes 47-52 and accompanying text (detailing the four main justifications for imposing strict liability on manufacturers).

347. See *supra* notes 47-50 and accompanying text (stating that the doctrine of negligence imposed great burdens on plaintiffs).

348. See *supra* notes 52-53 and accompanying text; Rosen *supra* note 346, at 6, col. 5 (explaining that the manufacturer is in the best position to be held liable for injuries proximately caused by its products).

349. Rosen, *Supra* note 346, at 6, col. 3.

decision may have the effect of discouraging manufacturers from researching and developing new and more safe products.³⁵⁰

a. *The Anderson Decision Imposes the Difficulties Inherent in Negligence into Strict Liability*

Under *Anderson*, an injured plaintiff is no longer relieved of the difficulties inherent in proving that a manufacturer acted negligently.³⁵¹ Particularly, *Anderson* requires the plaintiff to prove that the defendant knew, or should have known, that the product was unsafe, yet the defendant failed to warn of its hazards.³⁵² This requirement forces the plaintiff to focus on the manufacturer's conduct, regardless of the fact that strict liability was intended to remove this burden from the plaintiff.³⁵³ Traditionally, in true strict liability, the court needed only focus on the condition of the product, whereas in negligence, the court was directed to the conduct of the manufacturer or distributor.³⁵⁴

Nonetheless, the *Anderson* court attempted to justify requiring the plaintiff to focus on the manufacturer's conduct by declaring that warning labels are not actually a part of the product.³⁵⁵ Therefore, the *Anderson* court stated that the adequacy of the warning, or the reasons for failing to furnish a warning, cannot be determined without examining the manufacturer's conduct.³⁵⁶ However, is it not possible that the warning label may actually be a part of the product?

Comment j of the Restatement (Second) of Torts, section 402A, which governs defective warning actions, provides that sometimes

350. *Id.* at p.6, col. 4.

351. *Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 1004, 810 P.2d 549, 559, 281 Cal. Rptr. 528, 538 (1991).

352. *Id.*

353. *See supra* notes 340-342 and accompanying text (indicating that under true strict liability, the manufacturer's knowledge, or knowability, as to the product's risks is irrelevant).

354. *Anderson*, 53 Cal. 3d at 1001-02, 810 P.2d at 558, 281 Cal. Rptr. at 537 (quoting *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 434, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 239 (1978)).

355. *Id.* at 1002, 810 P.2d at 558, 281 Cal. Rptr. at 537.

356. *Id.* at 1002, 810 P.2d at 558, 281 Cal. Rptr. at 537 (quoting *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 434, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 239 (1978)).

a seller is required to place a warning, or furnish directions, on the container itself in order to ensure the safety of the product.³⁵⁷ Can this be interpreted as suggesting that some products are incomplete without a warning, or directions as to their use, and therefore suggesting that the warning is a necessary part of the product? If so, then the *Anderson* court might not have been able to properly justify the admissibility of evidence as to the defendant's knowledge at the time of manufacture. For instance, if the warning was deemed part of the product, then the majority in *Anderson* was actually looking to the character of the product. Thus, the court would not have had any justification for focusing on the manufacturer's conduct. However, if the warning was deemed part of the product, yet the court still looked to the manufacturer's conduct, then the *Anderson* court was actually using negligence principles instead of strict liability standards. The court in *Anderson* apparently did not contemplate this possibility.

b. Is the Majority's Distinction Between Strict Liability and Negligence Well Founded?

Another question that must be asked is whether there is a real distinction, as the court in *Anderson* contended, between the focus on the manufacturer's conduct in negligence, versus the focus on the condition of the product in strict liability. The court explained that, in negligence actions, a manufacturer may escape liability for failure to warn if other manufacturers of similar intelligence would also not have warned of the hazard.³⁵⁸ However, the court asserted that in strict liability litigation, if the dangers were known to the scientific community at the time of production or distribution, the manufacturer may be held strictly liable for failing to warn of such risks.³⁵⁹ Thus, in strict liability whether or not other manufacturers of similar intelligence would have warned of

357. RESTATEMENT (SECOND) OF TORTS, § 402A, comment j (1965). See *supra* note 117 (setting forth the full text of comment j).

358. *Anderson*, 53 Cal. 3d at 1003, 810 P.2d at 559, 281 Cal. Rptr. at 538.

359. *Id.*

the hazard is irrelevant.³⁶⁰ As long as the scientific community knew that the manufacturer's product was inherently dangerous, the manufacturer will be held strictly liable for the resulting harm.³⁶¹

However, the *Anderson* court did not clarify what was meant by dangers "known to the scientific community" at the time of manufacture or distribution.³⁶² For instance, will the hazard be deemed to be known to the scientific community if one manufacturer conducts a single test and determines that the product is defective, yet the other manufacturers of the same type of product conduct their own tests and the results of these tests indicate that the product is safe? Can the result of one test be sufficient to impute knowledge of the risk to the scientific community, thereby subjecting all manufacturers who failed to warn of that risk to liability? Or, can manufacturers ignore the one test result since all other tests found the product to be risk free? This scenario was not addressed by the court in *Anderson*. The *Anderson* decision, therefore, provides no workable definition of "scientific community," nor does it specify the responsibilities placed on manufacturers once their product's dangers are scientifically knowable.

Further, the *Anderson* court did not clarify what was meant by an "inherently dangerous," or "unsafe" product.³⁶³ For instance, will a product be deemed unsafe only if it causes an injury? Will it be considered unsafe and inherently dangerous if it merely has the potential of causing harm? Or, is the product unsafe only when it is "unreasonably unsafe?" Again, the *Anderson* court did not define these terms.

360. *Id.*

361. *Id.*

362. *Id.* The court in *Anderson* did not define the term "known to the scientific community."

Id.

363. *Id.*

c. *The Holding in Anderson Will Cause Trials to Last Longer and Will Therefore Increase the Cost of Recovery*

The third manner in which *Anderson* undermines the traditional doctrine of strict liability is that the *Anderson* decision will cause longer trials and increase the cost of recovery, thereby (or, once again) restricting the plaintiff's ability to recover.³⁶⁴ After *Anderson*, manufacturers may try to "muddy the waters" at trial by trying to prove that not even the scientific community could possibly have known of their products' dangers at the time the products were made.³⁶⁵ By adding this extra element of proof, each party will be forced to bring into court experts to testify whether or not such hazards were scientifically knowable at the time of manufacture.³⁶⁶ As a result of hearing this expert testimony, the duration of the trial will increase, as well as the cost of the trial, since the parties will most likely have to pay the experts to testify. Further, the increase in the length of the trial will cause the attorney fees to rise proportionally, and add to the existing backlogs in most court systems.

d. *Anderson Will Discourage Manufacturers from Designing and Manufacturing Safer Products*

Finally, opinions differ as to the result of the abrogation of true strict liability for failure to warn cases. Some believe that the abolishment of true strict liability in failure to warn causes of action will result in the decrease of research related to improving the quality and safety of products.³⁶⁷ Others believe the opposite, that holding manufacturers exempt from strictly liable will actually

364. See Rosen, *supra* note 346, at 6, col. 3 (suggesting that the *Anderson* decision will cause the length of an asbestos trial to increase, and thereby cause the cost of litigation to increase as well).

365. Rosen, *supra* note 346, at 6, col. 5.

366. *Id.* at 6, col. 3.

367. Rosen, *supra* note 346, at 6, col. 3-4.

encourage manufacturers to conduct more thorough research, and therefore increase product safety.³⁶⁸

For example, at least one commentator, David Rosen,³⁶⁹ asserts that the *Anderson* decision will discourage manufacturers from manufacturing safer products.³⁷⁰ Particularly, he contends that, prior to *Anderson*, traditional strict liability standards held the manufacturers liable for the costs of their failure to discover dangers inherent in their products.³⁷¹ Therefore, according to Mr. Rosen, the fear of liability acted as a great incentive for manufacturers to invest significant amounts of money and time in conducting safety research.³⁷² However, Mr. Rosen states that, since *Anderson* only imposes liability on manufacturers for hazards that were scientifically knowable at the time of manufacture and distribution, manufacturers will tend to trim back on basic safety research expenditures.³⁷³

Accordingly, Mr. Rosen alleges that, under *Anderson*, manufacturers will merely need to determine whether their product contains risks which are known in the scientific community to cause harm, and then warn the consumers of these risks.³⁷⁴ Thus, manufacturers will no longer need to worry about protecting themselves from liability for dangers in their product which may manifest at some future date.³⁷⁵ Consequently, Mr. Rosen

368. *Brown v. Superior Court*, 44 Cal. 3d 1049, 1063, 751 P.2d 470, 478-79, 245 Cal. Rptr. 412, 420 (1988). See Moore & Hengesbach, *supra* note 91, at 74 (suggesting that *Brown* should be extended to all products with respect to its policy of encouraging research and development by exempting prescription drugs from strict liability, thus asserting that all products should be treated alike); Carrizosa, *supra* note 328, at 1, col. 6, at 5, col. 1 (suggesting that the *Anderson* ruling will enable manufacturers to take risks, by conducting research to improve their products, which they could not have taken prior to *Anderson* without having to constantly worry about being penalized, years later, for knowledge they might acquire after placing the product on the market).

369. David Rosen, who represented the California Trial Lawyers Association as an amicus in *Anderson*, is a partner with Rose, Klein & Marias, a Los Angeles law firm. See Carrizosa, *supra* note 328, at 1, col.6 (indicating that Mr. Rosen took part as an amicus in *Anderson*). Mr. Rosen also writes occasionally for the Los Angeles Daily Journal. See Rosen, *supra* note 346 at 6, col. 3.

370. Rosen, *supra* note 346 at 6, col. 3-4.

371. *Id.* at 6, col. 4.

372. *Id.* at 6, col. 3.

373. *Id.*

374. *Id.* at 6, col. 3-4.

375. *Id.* at 6, col. 4.

maintains that the potential decrease in research may cause a proportional reduction in product safety.³⁷⁶

On the other hand, in *Brown v. Superior Court*, which concerned defectively designed prescription drugs, the court implied the exact opposite, that the imposition of strict liability would discourage manufacturers from conducting research, and developing new and safer products, for fear that later developments in scientific knowledge would increase their liability.³⁷⁷ As a result, it has been argued that all new products should be exempted from strict liability, as are prescription drugs.³⁷⁸ Nonetheless, *Anderson* did not do away with the doctrine of strict liability altogether.³⁷⁹ Two questions remain: (1) is strict liability applicable beyond the realm of failure to warn allegations?, and (2) should *Brown* be extended to exempt all defectively designed products from strict liability?

B. *What's in Store for Strict Liability?*

One of the biggest puzzles remaining after *Anderson* is whether any form of strict liability remains for either failure to warn, as in *Anderson*, or defective design, as in *Brown*.³⁸⁰ Justice Broussard, in a concurring opinion in *Anderson*, said that the majority opinion in *Anderson* should be limited to failure to warn cases, and thus not be applicable to manufacture or design defects.³⁸¹ However, Justice Panelli, who authored the majority opinion, made no such

376. *Id.*

377. *Brown v. Superior Court*, 44 Cal. 3d 1049, 1063, 751 P.2d 470, 479, 245 Cal. Rptr. 412, 420 (1988).

378. See Moore & Hengesbach, *supra* note 91, at 74.

379. Traditional strict liability is still used in design defect cases (excluding prescription drug, and unavoidably unsafe product cases), as well as in manufacturing defect cases. See *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 426-27, 573 P.2d 443, 452, 143 Cal. Rptr. 225, 234 (1978) (detailing the two-part test used in analyzing design defect cases).

380. Moore & Hengesbach, *supra* note 91, at 57-58 & n.68.

381. *Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 987, 1004-05, 810 P.2d 549, 560, 281 Cal. Rptr. at 539 (1991) (Broussard, J., concurring). See *supra* notes 315-319 and accompanying text (detailing Justice Broussard's concurring opinion in *Anderson*).

concession.³⁸² Therefore, *Anderson* might possibly be stretched to cover other strict liability cases as well.

1. Should the Brown Decision Be Extended to Apply Beyond the Realm of Prescription Drugs?

The question then arises that if *Anderson* is extended, should *Brown* also be extended to apply to all types of defectively designed products?³⁸³ Prior to *Anderson*, California courts consistently rejected arguments advocating the extension of *Brown* and comment k to non-drug products where such products are not “unavoidably unsafe,” because such products were not as socially important as prescription drugs.³⁸⁴ Although *Anderson* relied extensively on *Brown*, the opinion did not expressly hold that *Brown* should be extended beyond prescription drug cases.³⁸⁵ Rather, *Anderson* acknowledged the fact that *Brown* applies only to prescription drugs, yet stated that its rationale may be applicable in other contexts.³⁸⁶

Interestingly, Justice Mosk, who wrote the majority decision in *Brown*, asserted in his dissent in *Anderson*, that the *Anderson* majority stretched the holding and analysis of *Brown* beyond its scope when the majority relied on *Brown* in cases involving other than prescription drugs.³⁸⁷ In *Brown*, Justice Mosk emphasized that the court was creating a narrow public policy exception for prescription drugs because of their social utility and the public

382. Carrizosa, *supra* note 328, at 5, col. 3.

383. See Moore & Hengesbach, *supra* note 91, at 57 & n.65 (indicating that comment j, which governs failure to warn for strict liability cases, contains the same elements of foreseeability and reasonable conduct as does comment k, which governs strict liability for design defects, and which is, in fact, an articulation of a negligence standard).

384. Moore & Hengesbach, *supra* note 91, at 55-56 n.62, 81 n.154-56. *But see supra* note 368 and accompanying text (suggesting that all products should be treated alike).

385. *Anderson*, 53 Cal. 3d at 1000, 810 P.2d at 556, 281 Cal. 3d at 535.

386. *Id.*

387. *Id.* at 1008, 810 P.2d at 562, 281 Cal. Rptr. at 541 (Mosk, J., concurring and dissenting).

interest in their development.³⁸⁸ However, in *Anderson*, the majority downplayed this distinction.³⁸⁹ Therefore, Justice Mosk insisted that the *Anderson* majority allowed the exception to defeat the rule.³⁹⁰

Nevertheless, many scholars ignore Justice Mosk's contentions.³⁹¹ Instead, these scholars maintain that there really is not, and never has been, any difference between the negligence and the strict liability causes of action.³⁹² Particularly, these noted commentators suggest that none of the four main reasons for adopting strict liability actually support the conclusion that strict products liability is essential, and that it will cause a different result than under the theories of negligence or breach of warranty.³⁹³

First, these commentators insist that the difficulty in proving a manufacturer's negligence was not a substantial concern to a plaintiff.³⁹⁴ Instead, the scholars contend that the essential concern was whether the plaintiff should be able to recover when no one, not even the manufacturer was at fault.³⁹⁵ Second, these noted commentators state that the public policy of encouraging manufacturers to produce safer products is not furthered by imposing strict liability on the manufacturer since the manufacturer has already taken all reasonable steps in producing the product.³⁹⁶

388. *Brown v. Superior Court*, 44 Cal. 3d 1063, 751 P.2d 479, 245 Cal. Rptr. 420 (1988); Kelso, *supra* note 82, at 24-25; Carrizosa, *supra* note 328, at 1, col.6. *See, e.g.,* *yyyyIn re Hawaii Federal Asbestos Cases*, 665 F. Supp. 1454, 1459 (1986) (providing that the courts only apply comment k to prescription drugs, thus *Brown*, 182 Cal. App 3d 1125, 227 Cal. Rptr. 768, does not apply to asbestos products at all).

389. *Anderson*, 53 Cal. 3d at 1000, 810 P.2d at 557, 281 Cal. Rptr. at 536; Kelso, *supra* note 82, at 24-25; Carrizosa, *supra* note 328, at 1, col. 6.

390. *Anderson*, 53 Cal. 3d at 1008, 810 P.2d at 562, 281 Cal. Rptr. at 541 (Mosk, J., concurring); Kelso, *supra* note 82, at 24-25; Carrizosa, *supra* note 328, at 1, col. 6.

391. *See* Kelso, *supra* note 82, at 1; Polin, *supra* note 70, at 559; KEETON ET AL., *supra* note 55, at 697 (providing that there really is no difference between negligence and strict liability causes of action).

392. Kelso, *supra* note 82, at 1; Polin, *supra* note 70, at 559; KEETON ET AL., *supra* note 55, at 697.

393. Kelso, *supra* note 82, at 5-10; Prosser, *supra* note 83, at 799-800; Prosser, *supra* note 98, at 1116-19.

394. Kelso, *supra* note 82, at 8; Prosser, *supra* note 96, at 1116-17.

395. Kelso, *supra* note 82, at 8; Prosser, *supra* note 96, at 1116-17.

396. Kelso, *supra* note 82, at 8; Prosser, *supra* note 96, at 1119.

Third, these scholars contend that the expectations of consumers are sufficiently protected through the theories of breach of warranty, thus strict liability is not necessary for this purpose.³⁹⁷ Finally, these scholars disagree with the notion of holding manufacturers strictly liable merely because they are in the best position to insure against the cost of the injuries caused by their products.³⁹⁸ Instead, they argue that no court has ever fully accepted the policy favoring risk-spreading since no court has gone as far as imposing absolute liability on the manufacturer.³⁹⁹

Along the same lines, these scholars assert that there is no easy way to distinguish between prescription drugs, over-the-counter drugs, and all other products, as Justice Mosk did in *Brown*.⁴⁰⁰ Therefore, these scholars suggest that *Brown* should be extended to apply to all products liability cases.⁴⁰¹

CONCLUSION

The California Supreme Court, in *Anderson v. Owens-Corning Fiberglass Corp.*, restricted the applicability of the doctrine of strict products liability by permitting a defendant to offer evidence that the defendant had no way of knowing of the danger of its product, thereby incorporating negligence principles into the realm of strict products liability.⁴⁰² As a result, injured plaintiffs will no longer be relieved of the burdens inherent in proving that the manufacturer's conduct amounted to negligence, although relief

397. Kelso, *supra* note 82, at 8-9.

398. *Id.* at 9.

399. *Id.* Several cases have reiterated the statement that "manufacturers are not insurers of their products." *Anderson v. Owens-Corning*, 53 Cal. 3d 987, 994, 810 P.2d 549, 552, 281 Cal. Rptr. 528, 531 (1991); *Brown v. Superior Court*, 44 Cal. 3d 1049, 1066, 751 P.2d 470, 480-81, 245 Cal. Rptr. 412, 422 (1988); *Woodill v. Parke Davis & Co.*, 402 N.E. 2d 194, 199 (Ill. 1980); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 733, 575 P.2d 1162, 1166, 144 Cal. Rptr. 380, 384 (1978).

400. Kelso, *supra* note 82, at 28 (citing Prosser's observations during the American Law Institute's (A.L.I.) proceedings, when Section 402A of the Restatement Second was first being considered by the A.L.I., 38 A.L.I. PROC. 55 (1962)).

401. Kelso, *supra* note 82, at 28 (citing Prosser's observations during the A.L.I. proceedings, when Section 402A of the Restatement Second was first being considered by the A.L.I., 38 A.L.I. PROC. 55 (1962)).

402. *See supra* notes 273-314 and accompanying text (discussing the majorities decision in *Anderson*).

from this burden was one of the primary purposes for imposing strict liability. Whether or not all products will eventually be exempted from strict liability, the final result is that *Anderson* reinforces the current trend in product liability law in favor of extending protection to defendants. This so called "quiet revolution"⁴⁰³ in products liability appears to be bringing products liability, full circle, back to a fault-based negligence standard.

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403. See Henderson & Eisenberg, *supra* note 119, at 539 (defining the significant changes that have recently occurred in the law of products liability as a "quiet revolution").

