



ST. MARY'S
UNIVERSITY

Digital Commons at St. Mary's University

Faculty Articles

School of Law Faculty Scholarship

2003

Distinguishing The Concept Of Strict Liability In Tort From Strict Products Liability: Medusa Unveiled

Charles E. Cantú

St. Mary's University School of Law, ccantu@stmarytx.edu

Follow this and additional works at: <https://commons.stmarytx.edu/facarticles>



Part of the [Law Commons](#)

Recommended Citation

Charles E. Cantú, *Distinguishing The Concept Of Strict Liability In Tort From Strict Products Liability: Medusa Unveiled*, 33 *U. Mem. L. Rev.* 823 (2003).

This Article is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons at St. Mary's University. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Digital Commons at St. Mary's University. For more information, please contact sfowler@stmarytx.edu, egoode@stmarytx.edu.

Distinguishing the Concept of Strict Liability in Tort from Strict Products Liability: Medusa Unveiled

CHARLES E. CANTU*

I.	INTRODUCTION	824
II.	ANIMALS	828
	A. <i>Trespassing Animals</i>	829
	B. <i>Domesticated Animals with Vicious Tendencies</i>	834
	C. <i>Animals Whose Habitat is Usually in the Wild</i>	837
III.	ULTRA-HAZARDOUS ACTIVITIES	839
IV.	NUISANCE	848
V.	MISREPRESENTATION	851
VI.	VICARIOUS LIABILITY	856
VII.	DEFAMATION	860
VIII.	WORKMEN'S COMPENSATION	862
IX.	STRICT PRODUCTS LIABILITY UNDER SECTION 402A OF THE <i>RESTATEMENT (SECOND) OF TORTS</i>	865
	A. <i>Mis-manufactured Products</i>	869
	B. <i>Mis-designed Products</i>	872
	C. <i>Mis-marketed Products</i>	876
	D. <i>Unreasonably Dangerous Products</i>	879
	E. <i>A Different Form of Strict Liability</i>	880
X.	CONCLUSION	880

* Fellow, American Law Institute; Distinguished South Texas Professor of Law, St. Mary's University School of Law; Fulbright Scholar, *Universidad de Rene Gabriel Moreno*, Santa Cruz, Bolivia; LL.M., University of Michigan; M.C.L., Southern Methodist University; J.D., St. Mary's University School of Law; B.B.A., University of Texas at Austin. The author would like to acknowledge his research assistant, Bryan W. Jones, for his tireless efforts in helping with the footnotes to this article. His work was truly exemplary and is responsible in large part for our success in being published.

I. INTRODUCTION

It is generally conceded that our Anglo-American system of tort law is based upon two fictions¹ and one well accepted principle.² The first fiction is the line of reasoning that allows us to award an individual damages after their injury.³ Theoretically, by so doing, we make them whole and place them in the position they were in before enduring the damaging event in question.⁴ This concept has its origins in the early development of our jurisprudence⁵ and is well established today.⁶ The second is the fictional

1. See *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1418 (9th Cir. 1986) (stating that determining whether a person acted as the fictional reasonably prudent person is a principle of negligence); *Geressy v. Digital Equip. Corp.*, 980 F. Supp. 640, 655 (E.D.N.Y. 1997) (noting that courts are willing to indulge in the fiction of awarding damages in tort to make the plaintiff whole).

2. See *Brown v. Kendall*, 60 Mass. 292, 298 (1850) (stating that a plaintiff may be entitled to recover if the jury is satisfied that the defendant is chargeable with some fault).

3. See *Geressy v. Digital Equip. Corp.*, 980 F. Supp. 640, 655 (E.D.N.Y. 1997) (noting that courts are willing to indulge in the fiction of awarding damages in tort to make the plaintiff whole); see also *Budgetel Inns, Inc. v. Micro Syst., Inc.*, 8 F. Supp. 2d 1137, 1141 (E.D. Wis. 1998) (stating that tort law reduces injuries of a physical nature into monetary damages); *McDougald v. Garber*, 536 N.E.2d 372, 374 (N.Y. 1989) (suggesting that courts accept the fiction that money damages will make a plaintiff whole with the knowledge that although money neither eases suffering nor restores the victim to his pre-injury position, this fiction comes as close as is legally possible to right the wrong); see also *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex. 1994) (stating that when the defendant has interfered with the plaintiff's rights and thereby caused the defendant's injuries, compensatory damages are awarded with the intention of making the plaintiff "whole").

4. See *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 754 (Tex. App. 1998) (stating that the object of the law after an individual's negligent or willful acts have been the proximate cause of the plaintiff's damage is to make the plaintiff whole); see also *Lee v. Lee*, 47 S.W.3d 767, 780 (Tex. App. 2001) (stating that compensatory damages in tort are awarded with the objective of restoring the injured party to the party's pre-injury position).

5. See Timothy D. Howell, *So Long "Sweetheart"*—*State Farm Fire & Casualty Co. v. Grandy Swings the Pendulum Further to the Right as the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 ST. MARY'S L.J. 47, 90 n.185 (citing *Buller v. Pritchard*, 8 P.2d 705, 706 (Colo. 1932)); ABA SPECIAL COMMITTEE ON THE TORT LIABILITY SYSTEM, *TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN*

concept of the reasonable prudent person,⁷ a yardstick against whom we compare the behavior of all defendants when attempting to determine whether or not they were negligent under the circumstances in question.⁸ Much has been written of this phenomenon and it need not be explored here. The third basis, which is the focal point of this article, is that liability is imposed and the corresponding right to recovery is given, not because the plaintiff is injured, but instead because the plaintiff's injury was the result of the defendant's fault.⁹

AMERICAN TORT LAW 4-29 (1984)) ("Courts and commentators have traced the underlying compensation theory of tort law far back into history.").

6. See *Weinberg v. Whatcom County*, 241 F.3d 746, 751 (9th Cir. 2001) (quoting the RESTATEMENT (SECOND) OF TORTS § 549(2) cmt. g (1977): "[T]he purpose of a tort action is to compensate for a loss sustained and to restore the plaintiff to his former position."); see also *Hutton v. Essex Group, Inc.*, 885 F. Supp. 331, 333 (D.N.H. 1994) (citing to the RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1977): "[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort."); Elliot Klayman & Seth Klayman, *Punitive Damages: Toward Torah-Based Tort Reform*, 23 CARDOZO L. REV. 221, 225 (2001) (stating that awards for damages exceeding compensation are listed in the earliest known codes of law).

7. See *Beck by Chain v. Thompson*, 818 F.2d 1204, 1218 (5th Cir. 1987) (holding that it was a critical error of law to allow testimony on what an individual pilot would have done rather than to require testimony on the "mythical man of legal fiction," the reasonable prudent person); see also *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1418 (9th Cir. 1986) (stating that determining whether a person acted as a reasonably prudent person is a principle of negligence); *Atl. Coast Line R. Co. v. Dixon*, 189 F.2d 525, 527 (5th Cir. 1951) (stating that common law principles define negligence as not acting as a reasonably prudent person would have acted under the circumstances); *Robinson v. Lindsay*, 598 P.2d 392, 393 (Wash. 1979) (noting that the law's fictitious reasonable prudent person was first used in the old English case *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837)).

8. See *Wash. Hosp. Ctr. v. Butler*, 384 F.2d 331, 335 (D.C. Cir. 1967) (stating that the yardstick in negligence cases is the reasonably prudent person standard); *City of Amarillo v. Martin*, 971 S.W.2d 426, 434 (Tex. 1998) (Spector, J., dissenting) (noting that the law imposes reasonably prudent person yardsticks in negligence cases).

9. See *Weaver v. Ward*, 80 Eng. Rep. 284 (King's Bench 1616) (standing for the proposition that a trespass without fault may serve as an excuse); see also *Brown v. Kendall*, 60 Mass. 292, 298 (1850) (stating that a plaintiff may be entitled to recover if the jury is satisfied that the defendant is chargeable with some fault).

Fault, as we all know, is based upon the idea that the defendant either intended the injury (juries will be asked to determine whether the resulting harm was a substantial certainty),¹⁰ or that the defendant was negligent in failing to act in a reasonable manner once he was confronted with a foreseeable risk.¹¹ One or the other of these two scenarios must be in place before the plaintiff will be entitled to recover.¹² The majority of litigation is involved with one or both of these issues.¹³ A very small number, however, involve cases wherein the fault of the defendant is not an issue.¹⁴ Instead, the defendant's liability is said to be based upon liability without fault, or as it is more commonly referred, strict liability.¹⁵

10. *See Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406 (Tex. 1985) (stating that to establish intentional conduct, the known danger must be more than a risk and must become a substantial certainty); *see also Spivey v. Battaglia*, 258 So. 2d 815, 817 (Fla. 1972) (noting that any conduct short of substantial certainty cannot be intentional).

11. *See Vega by Muniz v. Piedilato*, 713 A.2d 442, 445 (N.J. 1998) (stating that in tort law there is a general obligation to avoid foreseeable risk of harm to others); *see also Udy v. Custer County*, 34 P.3d 1069, 1072 (Idaho 2001) (stating that each person has a duty of care to prevent unreasonable foreseeable harm to others).

12. *See Farmers & Merch. State Bank v. Ferguson*, 617 S.W.2d 918, 921 (Tex. 1981) (implying that under the common law, a plaintiff can recover for certain types of damages if he can show the defendant engaged in intentional or negligent conduct); *see also Wallace v. Rosen*, 765 N.E.2d 192, 196 (Ind. Ct. App. 2002) (noting the key distinction between the two divisions of tort liability: negligence and intent).

13. *See Field v. Boyer Co., L.C.*, 952 P.2d 1078, 1084 (Utah 1998) (stating that a majority of states have noted the difference between intentional and unintentional (negligence) cases); *see also Serina v. Albertston's, Inc.*, 744 F. Supp. 1113, 1117 (M.D. Fla. 1990) (noting that there is a "solid precedent" comprised of a majority of states that do not treat negligence and intentional torts equally).

14. *See McLaughlin v. Watts*, 1995 WL 809501, *2 (Mass. Jan. 18, 1995) (stating that one use of land where the law will impose strict liability is the storage of water, which the court characterizes as relatively rare); *see also Acushnet Co. v. Coaters, Inc.*, 937 F. Supp. 988, 1000 (D. Mass. 1996) (stating that strict liability in the twentieth century is applied only in limited circumstances); *Saiz v. Belen School Dist.*, 827 P.2d 102, 112 (N.M. 1992) (noting that in only a small number of cases regarding independent contractors, courts have had to impose strict liability where inherently dangerous activities are involved).

15. *See Chavez v. S. Pac. Transp. Co.*, 413 F. Supp. 1203, 1214 (E.D. Cal. 1976) (stating the rationale behind the imposition of strict liability for hauling explosives in railroad cars); *see also* RESTATEMENT (SECOND) OF TORTS §

Strict liability in tort law is very limited.¹⁶ Our judiciary has been extremely jealous in confining this idea to seven distinct scenarios.¹⁷ These scenarios include animals that are trespassing, are domesticated but vicious, or are wild by nature,¹⁸ or fact situations involving ultra-hazardous activities,¹⁹ nuisance,²⁰ misrepresentation,²¹ vicarious liability,²² defamation,²³ or a workman's compen-

519 (1977) (setting forth activities that are abnormally dangerous).

16. See *Prather v. Brandt*, 981 S.W.2d 801, 804 (Tex. App. 1998) (stating that the imposition of strict liability occurs in only very limited situations); see also *Foster v. Preston Mill Co.*, 268 P.2d 645, 648 (Wash. 1954) (stating that strict liability is not imposed in order to protect against harms incident to an individual's unusual land use).

17. See *Goodwin v. Reilley*, 221 Cal. Rptr. 374, 376 (Cal. App. 1985) (stating that familiar examples of activities that give rise to strict liability include the keeping of animals with vicious tendencies and dangerous and uncommon usages of land such as blasting); see also *Koos v. Roth*, 652 P.2d 1255, 1259 (Or. 1982) (stating that modern strict liability cases include keeping explosives and crop dusting with destructive chemicals).

18. See *Spring Co. v. Edgar*, 99 U.S. 645, 651 (1878) (stating the rule of law that those who allow into the public wild animals that are known to be "mischievous" and where those animals do harm are strictly liable); see also *Zarek v. Fredericks*, 138 F.2d 689, 690 (3d Cir. 1943) (stating the rule that when an animal is known to have vicious propensities, the owner is liable for any harm it causes regardless of the care taken to guard against such harm); *Marshall v. Ranne*, 511 S.W.2d 255, 259 (Tex. 1974) (stating that although owners of vicious animals are subject to strict liability, not all animals are vicious and the careless owners of non vicious animals may only be subject to suits based on negligence for their handling of their animals).

19. See *Chisholm v. UHP Projects, Inc.*, 205 F.3d 731, 743 (4th Cir. 2000) (stating that strict liability is imposed for several reasons including ultra-hazardous activities); see also *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868) (holding that strict liability could be imposed for containing water).

20. See *Cox v. City of Dallas*, 256 F.3d 281, 290 (5th Cir. 2001) (stating that the rules of strict liability are imposed in nuisance situations); see also RESTATEMENT (SECOND) OF TORTS § 519 (1977).

21. See *Am. Safety Equip. Corp. v. Winkler*, 640 P.2d 216, 221 (Colo. 1982) (holding that tort claims based on theories of strict liability for misrepresentations are not precluded by statutory provisions requiring express contractual remedies); see also RESTATEMENT (SECOND) OF TORTS § 402B (1965).

22. See *Blanchard v. Ogima*, 215 So. 2d 902, 906 (La. 1968) (setting forth the requirements for vicarious liability when issues of the right of control are present); see also *United States v. Jon-T Chem., Inc.*, 768 F.2d 686, 696 (5th Cir. 1985) (stating that a corporation can be vicariously liable for the actions of a corporation found to be an alter ego of the parent corporation even in the absence of any fault of the parent).

sation statute.²⁴ There may be isolated instances involving other fact patterns, but these are the primary examples of situations wherein fault is not of primary concern when determining the plaintiff's right to recover.²⁵ As each is discussed and compared to the others, we shall see that the underlying reasons for the rule differ in each case and that each in turn is quite different from the rationale of strict products liability under section 402A of the *Restatement (Second) of Torts*.²⁶

II. ANIMALS

When concerned with the issue of animals, strict liability has been applied in any one of three different and distinct fact patterns.²⁷ The first involves trespassing animals,²⁸ and this is fol-

23. See *Garziano v. E.I. Du Pont de Nemours & Co.*, 818 F.2d 380, 394 (5th Cir. 1987) (noting that a possible consequence of unreasonable publications about employees in the workplace is to hold employers strictly liable); see also *Ryder v. Time, Inc.*, 557 F.2d 824, 825 (D.C. Cir. 1976) (stating that, historically, defamation suit defendants who had mistakenly identified individuals in their statements were nonetheless strictly liable).

24. See *Employers Cas. Co. v. Am. Employers Ins. Co.*, 397 S.W.2d 292, 296 (Tex. App. 1965) (acknowledging strict liability under Workman's Compensation Law); see also *Estate of Richard v. Am. Wrecking Corp.*, 134 F. Supp. 2d 252, 257 (D. Conn. 2001) (noting that the Workmen's Compensation statute imposed a form of strict liability on employers).

25. See, e.g., Gregory C. Keating, *The Trouble with Negligence*, 54 VAND. L. REV. 1187, 1222 (2001) (noting that no-fault insurance is a form of strict liability); see also Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1333 (2001) (stating that enterprise liability is a modern theory of strict liability).

26. See Charles E. Cantu, *Distinguishing the Concept of Strict Liability for Ultra-Hazardous Activities from Strict Products Liability Under Section 402A of the Restatement (Second) of Torts: Two Parallel Lines of Reasoning that Should Never Meet*, 35 AKRON L. REV. 31, 40 (2001) (noting that the reasons behind the imposition of strict liability for ultra-hazardous activities are different from the reasons underlying strict products liability under 402A); see also Mark F. Grady, *Proximate Cause and the Law of Negligence*, 69 IOWA L. REV. 363, 423 n.110 (1984) (noting that strict products liability and traditional strict liability are different doctrines).

27. See *McPherson v. James*, 69 Ill. App. 337 (1896) (holding owner of trespassing barnyard animals strictly liable for damages caused by the animals); *Marshall v. Ranne*, 511 S.W.2d 255, 258 (Tex. 1974) (stating that animals with known dangerous propensities will impose strict liability on their owners); *Nicholson v. Smith*, 986 S.W.2d 54, 60-61 (Tex. App. 1999) (stating the well-

lowed by domesticated animals with vicious tendencies as well as animals which are described as being *ferae naturae*, or those whose natural habitat is in the wild.²⁹ This reasoning has been part of our jurisprudence for so long that it is today accepted without question.³⁰

A. Trespassing Animals

From the earliest period, English common law has applied strict liability to cases involving trespassing animals.³¹ Typically, the scenario in question involved what today is thought of as farm yard animals—horses, cattle, sheep and hogs.³² These animals are

settled strict liability law regarding animals *ferae naturae* that landowners are held liable for a wild animal's acts upon the landowner's property only if the animal has been in the possession and control of the landowner or has been introduced as a non-indigenous species to the area).

28. See *Adams Bros. v. Clark*, 224 S.W. 1046, 1050 (Ky. App. Ct. 1920) (holding animal's owner strictly liable when his trespassing chickens ate grain and garden produce from a neighbor's land).

29. See *Belger v. Sweeney*, 836 S.W.2d 752, 754 (Tex. App. 1992) (stating that dog owners are strictly liable for damages caused by their dogs if the owners know the dogs are vicious); see also *Villarreal v. Elizondo*, 831 S.W.2d 474, 477 (Tex. App. 1992) (showing that strict liability may be imposed on an owner of a vicious animal if the animal has known vicious or dangerous propensities and the injuries the animal caused resulted from the animal's dangerous characteristics).

30. See *DeHart v. Austin, Ind.*, 39 F.3d 718, 720 n.1 (7th Cir. 1994) (setting forth a definition of "wild" animal to include any animal that has "historically" been found in the wild); Wigmore, *Responsibility for Tortious Acts*, 7 HARV. L. REV. 441, 450–51 (1894) (stating that strict liability for trespassing cattle dates back to the thirteenth century).

31. See *Rylands*, 35 L.J. Exe. at 156 (stating that one who keeps a thing of danger on his property is strictly liable for damages if the thing escapes); see also J.W. Looney, *Rylands v. Fletcher Revisited: A Comparison of English, Australian and American Approaches to Common Law Liability for Dangerous Agricultural Activities*, 1 DRAKE J. AGRIC. L. 149, 171 n.174 (1996) (noting that the imposition of strict liability on an animal's keeper for the harm caused by the escaped and dangerous animal is a well-established common law concept).

32. See, e.g., *Bischoff v. Cheney*, 92 A. 660, 661 (Conn. 1914) (distinguishing cats from other types of species of domestic animals that are "inclined to mischief," such as roving cattle that eat and trample crops); see also *McDonald v. Castle*, 243 P. 215, 216 (Okla. 1925) (distinguishing dogs from other types of domestic animals and noting that the common law presumption is that the dog is docile, tame and harmless to property and persons, unless the dog's owner has

capable of inflicting extensive harm when forcing their way onto the property of another.³³ It is for this reason that strict liability was imposed when animals of this sort made an unauthorized entry upon a neighbor's land.³⁴ The trespass was equated to that of the animal's owner themselves, and little was made as to whether or not negligence had been involved.³⁵ Instead, emphasis was placed on the control, or lack thereof, as a cause of the injury.³⁶ Interestingly, other animals with definite household characteristics, such as dogs and cats, which are known to wander and yet inflict little or no damage when so doing, were allowed total freedom.³⁷ Own-

actual knowledge to the contrary).

33. See Katherine L. Butler, *Coastal Protection of Sea Turtles in Florida*, 13 J. LAND USE & ENVTL. L. 399, 406 (1998) (describing the destructiveness of feral hogs on the natural habitat of indigenous species such as the sea turtle); see also John W. Ragsdale, Jr., *Alternative Communities for the High Plains: An Exploratory Essay on Holistic Responses to Issues of Environment, Economy, and Society*, 34 URB. LAW. 73, 77 (2002) (stating that the American Plains were never really well suited to the environmental destruction of overgrazing that large herds of cattle are capable of wreaking).

34. See RESTATEMENT (SECOND) OF TORTS § 504 cmt. b (1977).

35. See Douglas H. Cook, *Negligence or Strict Liability? A Study in Biblical Tort Law*, 13 WHITTIER L. REV. 1, 3-4 (1992) (noting that strict liability disregards fault and that strict liability survives today in the area of trespassing animals); see also Joseph H. King, Jr., *The Standard of Care for Veterinarians in Medical Malpractice Claims*, 58 TENN. L. REV. 1, 69 n.298 (1990) (noting that statutes provide for varying degrees of strict liability for injuries caused by trespassing animals).

36. See Harry R. Bader & Greg Finstad, *Conflicts Between Livestock and Wildlife: An Analysis of Legal Liabilities Arising from Reindeer and Caribou Competition on the Seward Peninsula of Western Alaska*, 31 ENVTL. L. 549, 558 (2001) (noting that strict liability may be imposed on owners of animals *ferae domesticae* if the owner fails to exercise proper control over the animal); see also James R. MacAyeal, *The Comprehensive Environmental Response, Compensation, and the Liability Act: The Correct Paradigm of Strict Liability and the Problem of Individual Causation*, 18 UCLA J. ENVTL. L. & POL'Y 217, 230 (2001) (stating that wild animals are often inherently difficult to control and strict liability has been imposed on individuals who harbor them).

37. See Cindy Andrist, *Is There (And Should There Be) Any "Bite" Left in Georgia's "First Bite" Rule?*, 34 GA. L. REV. 1343, 1348 (2000) (stating that historically, dog and cat ownership has been treated differently under strict liability principles than ownership of animals such as bears and lions); see also Keith A. Cutler, *When Man's Best Friend Bites*, 54 J. MO. B. 24, 24 (1998) (noting the special place the dog has in society and the importance of the owner's knowledge of the dog's propensities in assessing the owner's liability

ers were never held responsible for the trespass of such household pets.³⁸ In retrospect it is clear that the reasoning for imposing strict liability in the case of trespassing animals and not with others was based upon the seriousness or foreseeability of injury to the local residents.³⁹ If the entry was likely to be harmless, strict liability was not an issue.⁴⁰

Historically, it should be noted that in the United States the idea of strict liability for trespassing animals was not well received.⁴¹ Perhaps because of our vast areas and the ever present movement westward, owners of trespassing animals were held to more traditional concepts of liability based upon negligence.⁴²

for the dog's actions).

38. See *Olson v. Pederson*, 288 N.W. 856, 857 (Minn. 1939) (stating that the cattle trespass rule does not apply to dogs); see also *Lewis v. Great Southwest Corp.*, 473 S.W.2d 228, 231 (Tex. App. 1971) (noting that an owner of domesticated animal cannot be held liable for damages the animal causes in a place where the animal has a right to be, unless the owner knows, or should know, the animal has vicious propensities).

39. See *Williams v. River Lakes Ranch Dev. Corp.*, 116 Cal. Rptr. 200, 206 (Cal. Ct. App. 1974) (stating that a trespassing animal's owner has been found strictly liable for the actions of the animal that were reasonably to be expected from the animal's trespass such as crop damage, spreading of disease, or the breeding of a pedigreed heifer with a scrub bull); see also *Molton v. Young*, 204 S.W.2d 636, 638 (Tex. App. 1947) (stating that at common law, a domesticated animal's owner was precluded from allowing his animals to run at large, but was required to enclose them and upon the owner's failure to do so, the owner was unconditionally liable for any damages caused by the animal's trespass).

40. See *Baker v. Howard County Hunt*, 188 A. 223, 228 (Md. 1936) (stating that a dog owner who had no knowledge of any dangerous propensities of the dog which had trespassed was not liable for the dog's trespasses); see also *Metro. Cas. Ins. Co. v. Clark*, 129 N.W. 1065, 1066 (Wis. 1911) (stating that an owner of trespassing cattle may be negligent, but not strictly liable, if the cattle were being lawfully driven along the highway).

41. See *Thomas C. Grey, Accidental Torts*, 54 VAND. L. REV. 1225, 1277 (2001) (stating that traditional strict liability laws were relaxed in the American West due to the economics of agriculture such as the cost of putting up fences); see also *Colby Dolan, Examining the Viability of Another Lord of Yesterday: Open Range Laws and Livestock Dominance in the Modern West*, 5 ANIMAL L. 147, 148 (1999) (stating that while in the American East, some jurisdictions followed the English common law's rules for strict liability for damages caused by errant cattle, Western states developed statutory exceptions to strict liability).

42. See *Dunbar v. Emigh*, 158 P.2d 311, 314 (Mont. 1945) (stating the rule that unless the defendant willfully or negligently drives cattle onto another's

Once, however, competition for space arose between cattlemen and those engaged in agriculture, the law began to change.⁴³ Since cattle traditionally grazed on the open plains and were allowed to roam at will, some states, especially in the west, began to impose the requirement that land owners “fence out” any unwanted intrusions.⁴⁴ If cattle forced their way through the fence of a farmer, strict liability was imposed, but in all other cases liability was based upon the concept of negligence.⁴⁵ In other states, however, where agriculture was more important, “fence in” statutes required the owners of cattle to control their animals.⁴⁶ In these instances, strict liability was imposed if the cattle escaped from the owner’s land, trespassed and caused injury.⁴⁷ All other liability, however,

unfenced land where the animals cause damage, the defendant is not liable for the animals’ trespass); *see also* *Beinhorn v. Griswold*, 69 P. 557, 558 (Mont. 1902) (stating that the English common law regarding trespassing cattle has been modified in Montana).

43. *See* *Buford v. Houtz*, 133 U.S. 320 (1890) (noting that the common law of England regarding trespassing cattle was not applicable in American states with fencing laws); *see also* *Garcia v. Sumrall*, 121 P.2d 640, 644 (Ariz. 1942) (stating that the purpose of fencing laws was to force a landowner to fence to keep animals off of the landowner’s property).

44. *See* *Hart v. Meredith*, 553 N.E.2d 782, 784 (Ill. App. Ct. 1990) (showing that strict liability may be imposed through a fencing statute); *see also* *Ramey v. Richardson*, 397 S.W.2d 288, 290 (Tex. App. 1965) (stating that animals that have escaped through no fault of the owner are not engaged in the statutorily prohibited act of running at large).

45. *See* *McDonnold v. Weinacht*, 465 S.W.2d 136, 141 (Tex. 1971) (stating that an owner who does not properly fence his property has no cause of action for damages done by cattle that enter the land); *see also* *Parker v. Reter*, 383 P.2d 93, 94 (Or. 1963) (noting that the statutory prohibition against allowing livestock to enter another person’s land in a livestock district that prohibits cattle from running at large also prohibits a person from negligently permitting livestock to walk on a highway).

46. *See* *Fisel v. Wynns*, 667 So. 2d 761, 762 (Fla. 1996) (discussing the common law “fence in” doctrine before upholding a summary judgment decision in favor of landowner who did not know how the gate that allowed a cow out onto the highway where it was struck by a vehicle had been opened); *see also* *Selby v. Bullock*, 287 So. 2d 18, 22 (Fla. 1973) (holding that a statute that required individuals who suffered damages resulting from livestock moving along a public highway to prove negligence on the part of the owners was not unconstitutional).

47. *See* *Toole v. Dupuis*, 735 So. 2d 582, 582–83 (Fla. Dist. Ct. App. 1999) (stating that statutes governing livestock owner’s duty concerning situation where his cattle are on public roads do not give rise to strict liability, but

was based upon the more traditional concept of negligence.⁴⁸ Which type of statute was enacted was determined by the importance of cattle or farming to the local economy.⁴⁹ As in other situations, the common law evolved pursuant to the needs of special interests.⁵⁰ This has happened with other pressure groups, and cattlemen and farmers were no exception.⁵¹

Finally, some states have made a total return to the English position of strict liability.⁵² This is particularly true in areas that

rather, the plaintiff must show that owner negligently or intentionally allowed his livestock to stray upon public road); see also *Fisel*, 667 So. 2d at 764 (stating that the rule in *Selby v. Bullock* remains the law in Florida).

48. See *Shively v. Dry Creek Cattle Co.*, 35 Cal. Rptr. 2d 238, 243 (Cal. Ct. App. 1994) (stating that livestock owners in a county operating under open range law are not required to fence in the owners' cattle but the owners have the duty to exercise ordinary care); see also *Carver v. Ford*, 591 P.2d 305, 308 (Okla. 1979) (stating that a statute mandating that domestic animals be prevented from running at large was not meant to impose strict liability on the owner of a heifer that had merely escaped from its stall and the plaintiff would need to prove negligence or intentional trespass).

49. See David S. Steward, *Agricultural Fence Law: Good Fences Make Good Neighbors*, 43 DRAKE L. REV. 709, 725 (1995) (stating that Iowa's fence out law was reasonably necessary for the public purposes when large acres of grazing land were critical for Iowa's economy); see also HARVEY KATZ, *SHADOW ON THE ALAMO* (1972) (describing the cattle industry's influence over the Texas state lawmaking process months after the new state constitution of 1876 was passed).

50. See ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER* 80 (Vintage Book ed., Random House 1990) (1981) (claiming that even in the early part of the 20th Century, special interest groups virtually controlled the Texas Legislature); James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. COLO. L. REV. 241, 274 (1994) (listing the influence on the law that agriculture, timber, mining and other special interests have had during the last century).

51. See *Jeff Brax, Am. Trucking Ass'ns, Inc. v. EPA*, 27 ECOLOGY L.Q. 549, 572 n.131 (2000) (describing how some judges view the influence of environmental interest groups on developing laws); Fred H. Miller, *The Future of Uniform State Legislation in the Private Law Area*, 79 MINN. L. REV. 861, 868-69 (1995) (countering criticisms about the influence of interest groups during the process of revising the Uniform Commercial Code).

52. See *King v. Blue Mountain Forest Ass'n*, 123 A.2d 151, 154 (N.H. 1956) (stating that a livestock owner is strictly liable for damage caused by his trespassing livestock, irrespective of negligence); *Noyes v. Colby*, 30 N.H. 143, 147 (1855) (holding that an owner of a cow was liable in trespass when the cow, after being turned out to pasture by another individual, trespassed on another's

are closely settled, such as our northeastern seaboard.⁵³ Technological advancements brought industrialization into direct competition with mankind for the land that was once so plentiful, and as a result the law was changed to best serve the needs of those involved.⁵⁴

B. Domesticated Animals with Vicious Tendencies

There are certain animals which for eons have been domesticated.⁵⁵ Originally in the wild, they have long since lost their feral characteristics.⁵⁶ The classic example would be dogs and cats.⁵⁷

land).

53. See Christine LaRocca, *New Jersey's Solid Waste Flow Control Regulations Have Been Trashed: Are Environmental Investment Charges the Answer?*, 17 PACE ENVTL. L. REV. 123, 124 (1999) (stating that the northeastern states are densely populated); Geoffrey L. Wilcox, *New England and the Challenge of Interstate Ozone Pollution Under the Clean Air Act of 1990*, 24 B.C. ENVTL. AFF. L. REV. 1, 99–100 (1996) (stating that the northeastern corridor of the United States is densely populated).

54. See Terence J. Centner, *Reforming Outdated Fence Law Provisions: Good Fences Make Good Neighbors Only If They Are Fair*, 12 J. ENVTL. L. & LITIG. 267, 275 (1997) (asserting that population changes, technology, and the economy alter the welfare ramifications of available fence-out rules); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 660–61 (1986) (stating that increasing populations in California led to the eradication of fence out rules in that state).

55. See Paul Blunt, *Selective Breeding and the Patenting of Living Organisms*, 48 SYRACUSE L. REV. 1365, 1380–81 (1998) (stating that the modern domesticated dog has been bred from wolves); see also Geordie Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, 8 ANIMAL L. 199, 204 (2002) (stating that humans began domesticating dogs in approximately 15,000 B.C.E.).

56. See Duckler, *supra* note 55, at 208 n.36 (arguing that domestication is more than “taming” and dogs and cats are largely the product of the human manipulation of hereditary characteristics). *But see* Barbara J. Kramek, *The Hybrids Howl: Legislators Listen—These Animals Aren't Crying Wolf*, 23 RUTGERS L.J. 633, 643–44 (1992) (describing cross breeding Alaskan Malamutes with wolves to create a troublesome hybrid).

57. See Duckler, *supra* note 55, at 200 (arguing that modern trends in the law are trying to elevate domesticated dogs and cats beyond the realm of property altogether); Andrea Hart Herbst, *More than Pigs in a Parlor: An Exploration of the Relationship Between the Law and Keeping Pigs as Pets*, 86 IOWA L. REV. 339, 358 (2000) (claiming the law discriminates between traditional domesticated animals such as dogs and cats and pet pigs which are stereotyped as

Even when mankind followed a nomadic existence, dogs were known to be part of the family.⁵⁸ Cats enjoyed a similar relationship.⁵⁹ As a general rule, any liability imposed for injury inflicted by an animal of this kind is based upon actionable negligence.⁶⁰ However, the law is clear that when such an animal is known to have a vicious trait, the basis of liability is different.⁶¹ Once the owner knows, or should know, his pet is likely to attack, strict liability will follow.⁶² The reasoning in these cases is that an individual has undertaken to keep such an animal when he is aware of its tendency.⁶³ Responsibility is therefore based, not on control, as

dirty).

58. See *State ex rel Kroger Co. v. Craig*, 329 S.W.2d 804, 808 (Mo. Ct. App. 1959) (describing how dogs were more than just pets to the Egyptians, Greeks and Ethiopian tribesmen); see also Lynn A. Epstein, *Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets' Anthropomorphic Qualities Under a Property Classification*, 26 S. ILL. U. L.J. 31, 32 (2001) (stating that pets have been treasured by people since ancient times).

59. See Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1064 (1995) (noting that the ancient Egyptian Pharaohs kept cats for companionship); Sonia S. Waisman and Barbara R. Newell, *Recovery of 'Non Economic' Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45, 57 (2001) (stating that cats were household pets in Egypt almost 5000 years ago).

60. See *Duren v. Kunkel*, 814 S.W.2d 935, 938 (Mo. 1991) (stating that where the defendant failed to protect the plaintiff from a bull, plaintiff was entitled to a jury question on negligence); *Pearson v. Jones Co.*, 898 S.W.2d 329, 332 (Tex. App. 1994) (stating that an owner of a nonvicious animal could be held liable on a negligence theory for mishandling the creature).

61. See *Moore v. Moore*, No. 04-00-00831-CV, 2001 WL 1360014, at *1 (Tex. App. Nov. 7, 2001) (stating that when an owner knows his animal's vicious tendencies, the owner is subject to strict liability); *Lindsey v. Fuentes*, No. 01-99-00982-CV, 2000 WL 1867984, at *3 (Tex. App. Dec. 21, 2000) (stating that in suits for damages caused by a vicious animal, strict liability applies).

62. See Ted Fair, Comment, *Personal Injuries by Animals in Texas*, 4 BAYLOR L. REV. 183 (1952) (stating the reasons behind the imposition of strict liability for keeping a vicious animal); see also *Van Houten v. Pritchard*, 870 S.W.2d 377, 380 (Ark. 1994) (stating that strict liability did not apply to cat-bite case because owner did not have knowledge of the cat's viciousness); *Wells v. Burns*, 480 S.W.2d 31, 35 (Tex. App. 1972) (applying strict liability for the keeping of a vicious animal).

63. See *Garza v. Thomason*, No. 04-95-00149-CV, 1995 WL 679681, at *1 (Tex. App. Nov. 15, 1995) (reasoning that defendant landlord of animal's owner could not be held strictly liable for animal attack because landlord did not

with trespassing animals, but instead upon the knowledge of the likelihood that harm is to be expected.⁶⁴

The question of knowledge is an interesting one.⁶⁵ The fact that the animal has never attacked is not controlling.⁶⁶ Instead, the issue is whether the animal had a propensity to do so.⁶⁷ Evidence that the animal was usually restrained, snarled, bared its teeth or did not socialize well with individuals will impute knowledge of its vicious tendency.⁶⁸ This is enough to invoke strict liability.⁶⁹

have a duty to control the animal).

64. See David A. Elder, 2001: *An End of Millennium Odyssey Through Tort Liability of Occupiers and Owners of Land*, 28 N. KY. L. REV. 352, 356 n.54 (2001) (noting that some courts refuse to impose strict liability absent a showing of actual knowledge of an animal's vicious character).

65. See generally, DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING (Hackett Publishing Co. 1977) (1748) (explaining the philosopher's interest in a theory of knowledge); RONALD SUTER, INTERPRETING WITTGENSTEIN: A CLOUD OF PHILOSOPHY, A DROP OF GRAMMAR 124 (1989) (explaining the philosopher Wittgenstein's contention that the verb "to know" expresses in its ordinary usage a complete absence of doubt and Cartesian philosophers and skeptics such as David Hume violate this ordinary usage by misusing the word "know" in their philosophical writings).

66. See Andrist, *supra* note 37, at 1345 (stating that the Georgia Court of Appeals decisions have recognized that knowledge of a dog's threatening behavior does not, by itself, put an owner on notice of the dog's propensity towards aggression); Julie A. Thorne, *If Spot Bites the Neighbor, Should Dick and Jane go to Jail?: An Analysis of Existing Pet Control Legislation, Tort Liability, and the Trend Towards Imposing Criminal Liability on the Owners of Dangerous and Vicious Animals*, 39 SYRACUSE L. REV. 1445, 1471 (1988) (noting that although 'first bite' rules have been on the wane, "some jurisdictions still require that the owner have actual knowledge of the animal's dangerous propensities").

67. See *Hamilton v. Walker*, 510 S.E.2d 120, 121 (Ga. Ct. App. 1998) (showing that in order to be held strictly liable, the owner must have knowledge of the dog's propensity to engage in a particular act that causes injury); *Lagoda v. Dorr*, 28 A.D.2d 208, 209-10 (N.Y. App. Div. 1967) (stating that the action's gravamen is the owner's knowledge that the dog had vicious or mischievous propensities).

68. See *Carter v. Ide*, 188 S.E.2d 275, 276 (Ga. Ct. App. 1972) (showing that without more evidence, such as growling at humans, the owners could not be said to have sufficient knowledge of the dog's vicious propensities); *Searcy v. Brown*, 607 S.W.2d 937, 941 (Tex. App. 1980) (stating that plaintiffs must show by the evidence that the dog owner knew or should have known the dog was disposed to injuring humans).

69. See *supra* note 62 and accompanying text.

C. *Animals Whose Habitat is Usually in the Wild*

Unlike dogs and cats, some animals are, as a general rule, found in the wild.⁷⁰ In reference to these animals, the law is quite clear.⁷¹ If one undertakes to capture and retain such an animal as a pet, strict liability will be imposed for any subsequent injury.⁷² The reasoning seems to be that individuals have no need for these exotic animals.⁷³ Bobcats, lions, and tigers, for example, are best left in their natural habitat.⁷⁴ Additionally, we know that injury of some sort is likely when we undertake to keep this type of an animal.⁷⁵ As a result, one keeps such animals at his own peril.⁷⁶

70. See *DeHart v. Town of Austin*, 39 F.3d 718, 720 n.1 (7th Cir. 1994) (quoting 9 C.F.R. § 1.1) (defining wild animal as “any animal which is now or historically has been found in the wild, or in the wild state”); see also Richard A. Posner, *Savigny, Holmes, and the Law and Economics of Possession*, 86 VA. L. REV. 535, 544 (2000) (stating that English Common Law distinguished certain types of wild animals from those having *animus revertendi*, or a habit of returning, which makes those wild animals more similar to domestic animals).

71. See *Nicholson v. Smith*, 986 S.W.2d 54, 60–61 (Tex. App. 1999) (stating that the *ferae naturae* rule creating a cause of action in strict liability is well-settled); *Overstreet v. Gibson Product Co.*, 558 S.W.2d 58, 61 (Tex. App. 1977) (dismissing the plaintiff’s strict liability cause of action because there was no evidence the defendant harbored a wild rattlesnake).

72. See *Nicholson*, 986 S.W.2d at 60 (stating that a landowner is not liable for any injuries caused by animals *ferae naturae* unless the landowner actually possesses or controls the animals); *Gowen v. Willenborg*, 366 S.W.2d 695, 697 (Tex. App. 1963) (stating that an owner of land is not required to anticipate animals *ferae naturae* entering his property unless such owner undertakes to possess or harbor the animals).

73. See *Collins v. Otto*, 369 P.2d 564, 566 (Colo. 1962) (stating that strict liability for keeping a wild and vicious animal is predicated upon the fact that the keeper’s conduct is unjustified); see also *Briley v. Mitchell*, 115 So. 2d 851, 855 (La. 1951) (stating that though a person has a judicially recognized right to exhibit a wild animal, the right is privileged, and the person assumes the role of an insurer to the public).

74. See *Spring Co. v. Edgar*, 99 U.S. 645, 656–57 (1878) (noting that wild deer in their natural habitat are dangerous during certain seasons, and stating that the gist of a strict liability cause of action against the keeper of a wild animal is the keeping of the animal); see also *Hudson v. Janesville Conservation Club*, 484 N.W.2d 132, 136 (Wis. 1992) (stating the court’s opinion that an animal is “probably wild” if the “animal normally survives without human assistance” in nature, or has not been domesticated and usually lives outdoors, or is incapable of being tamed).

75. See *Crunk v. Glover*, 95 N.W.2d 135, 137–38 (Neb. 1959) (detailing

In summary, we can see that strict liability in the case of animals is applied to three situations.⁷⁷ In each case the reasoning for doing so is different.⁷⁸ Some trespassing animals are capable of inflicting great harm when forcing themselves onto a neighbor's land.⁷⁹ For this reason strict liability is imposed when their owner fails to exercise proper control.⁸⁰ On the other hand, domesticated animals with vicious tendencies as well as animals normally found in the wild are likely to cause harm to others, even absent a tres-

the severe injuries a farmer sustained to his hand after being savaged by a caged bear); *see also* *Franken v. City of Sioux Ctr.*, 272 N.W.2d 422, 424 (Iowa 1978) (describing the severe lacerations a man who had put his hand into the cage of a tiger sustained and how the tiger's jaws had to be pried apart with a steel bar to release the man's hand). *Cf.* *Ollhoff v. Peck*, 503 N.W.2d 323, 325 (Wis. Ct. App. 1993) (stating that a park patron who was bitten while trying to "pet" a large-toothed fish basking on the surface of a park pond could not utilize a strict liability cause of action against the park owner for keeping a dangerous animal).

76. *See* *Smith v. La. Farm Bureau Cas. Ins. Co.*, 603 So. 2d 199, 202 (La. Ct. App. 1992) (quoting the jury charge that instructed the jury that he who keeps a dangerous animal does so at his own peril); *Nelson v. Hansen*, 102 N.W.2d 251, 256 (Wis. 1960) (noting there is a line of a cases that hold that if an individual keeps a dangerous animal, he does so at his own peril).

77. *See* Joseph H. King, Jr., *The Standard of Care for Veterinarians in Medical Malpractice Claims*, 58 TENN. L. REV. 1, 67 n.287 (1990) (noting strict liability principles are applicable to owners of wild, domesticated but vicious, and trespassing animals); *see also* Gregory C. Keating, *The Idea of Fairness in Enterprise Liability*, 95 MICH. L. REV. 1266, 1285-86 (1997) (discussing trespassing animals, wild animals, and domestic animals with vicious tendencies).

78. *See* Looney, *supra* note 31, at 149 n.174 (setting out three situations where strict liability is imposed for animals); *see also* JOHN H. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS CASES AND MATERIALS 683-86 (10th ed. 2000) (explaining the three types of situations involving animals where strict liability may be imposed and the reasons therefore).

79. *See* Centner, *supra* note 54, at 285 (commenting that trespassing livestock may affect use and enjoyment of property as well as the overall landscape and many of the costs are hard to quantify); JIM HIGHTOWER, THERE'S NOTHING IN THE MIDDLE OF THE ROAD BUT YELLOW STRIPES AND DEAD ARMADILLOS 186 (1997) (noting that pound-for-pound, hogs generate nearly twice as much natural excretions as cattle do, thereby polluting the environment).

80. *Molton v. Young*, 204 S.W.2d 636, 638 (Tex. App. 1947) (stating that, under common law, if a domestic animal owner failed to control his animal, and it trespassed upon another's property, the animal owner was unconditionally liable); *see also* *Baker v. Howard County Hunt*, 188 A. 223, 229 (Md. 1936) (holding that owner's failure to control hunting dogs imposed liability on him for their trespass).

pass.⁸¹ The gist in these instances is that an individual has knowingly elected to keep a dangerous animal, and as a consequence, must do so at his own risk.⁸²

III. ULTRA-HAZARDOUS ACTIVITIES

Strict liability for ultra-hazardous activities is a relatively new concept in Anglo-American jurisprudence and can be traced to the venerable English case of *Rylands v. Fletcher*.⁸³ In this case, the defendant undertook to erect reservoirs on his land so as to supply his mills with a source of energy.⁸⁴ After proper and careful consultation with an engineer and contractor, the pools were built and filled.⁸⁵ The weight of the water, however, proved to be too much, and the tanks collapsed, flooding an underground coal mine belonging to the plaintiff.⁸⁶ Suit was brought and on an appeal to the House of Lords it was decided that the defendant would be held responsible even though there was a total absence of fault.⁸⁷ Going to great lengths in making a distinction between natural and unnatural uses of land, the court held that by bringing water onto his

81. See *Harvey v. Buchannan*, 49 S.E. 281, 282 (Ga. 1904) (quoting from the Georgia statutes for the proposition that an owner of a known vicious animal of any kind shall be liable for any damages the animal causes regardless of fault); RESTATEMENT (SECOND) OF TORTS § 518 (1977) (mandating strict liability for the owner of domestic animal with known vicious propensities).

82. See *Woods-Leber v. Hyatt Hotels of P.R., Inc.*, 124 F.3d 47, 51 (1st Cir. 1997) (finding that the hotel was not liable to injured guest who was bitten by a mongoose, because the hotel did not "control" the animal although it normally fed on the hotel grounds); *Williams v. Johnson*, 781 P.2d 922, 925 (Wyo. 1989) (holding that plaintiff would have to prove the owners had actual knowledge of the animal's dangerous proclivities if they were going to recover).

83. 3 L.R.-E & I App. 330 (H.L. 1868); see also David Howarth, *Muddying the Waters: Tort Law and the Environment from an English Perspective*, 41 WASHBURN L.J. 469, 494 (2002) (summarizing the famous English case).

84. *Rylands*, 3 L.R.-E & I App. at 331; see generally Sarah C. Richardson, *The Changing Political Landscape of Hydropower Project Relicensing*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 499, 501 (2000) (describing the historical importance of watermills as a source of energy that helped power the Industrial Revolution).

85. *Rylands*, 3 L.R.-E & I App. at 331-32.

86. *Id.* at 332.

87. *Id.* at 339-40.

land the defendant would be held strictly liable if it escaped and caused injury.⁸⁸

Subsequent English cases continue to follow this “natural” versus “unnatural” line of reasoning.⁸⁹ In so doing, the courts have emphasized two facts.⁹⁰ They have looked not only at the character of the activity in question, but also to the appropriateness of this conduct to the surroundings.⁹¹ If it is determined that the defendant’s actions are not suitable or apropos to the locale, strict liability will be imposed upon the defendant for any resulting injury.⁹²

A majority of the jurisdictions in the United States that have considered the issue have adopted the rule of *Rylands*, but remain reluctant to impose strict liability as a blanket concept.⁹³ Instead, the United States jurisdictions seem much more inclined to hold the defendant responsible only when we can establish fault.⁹⁴

88. *Id.*

89. *See Cambridge Water Co. v. E. Counties Leather Plc.*, [1994] 2 App. Cas. 264, 302–03 (appeal taken from H.L.(E.)) (stating that it is the knowledge that a thing placed on one’s property is likely to escape that establishes liability); *Read v. J. Lyons & Co. Ltd.*, [1947] App. Cas. 156, 170 (appeal taken from H.L.(E.)) (relying in a munitions case on the rule set down in *Rylands v. Fletcher*).

90. *See Cambridge Water Co.*, 2 App. Cas. at 308–09 (applying *Rylands* to categorize an action as ultra hazardous); *Read*, App. Cas. at 181–82 (explaining the history of *Rylands* rule and the reasons for finding the defendant strictly liable for his use of the property).

91. *See Read*, App. Cas. at 181–82 (showing the reasoning behind the *Ryland* rule); *see also* Andrew Allen Lemmon, *The Developing Doctrine of Rylands v. Fletcher: Hazardous Waste Remediation Contractors Beware*, 42 LOY. L. REV. 287, 293–94 (1996) (describing the development of the English doctrine and how some American courts also look to the appropriateness of activity to the location when determining whether to apply strict liability).

92. *See Smith v. Kendrick*, 7 C.B. 515, 564–66 (1849) (describing normal mining operations for the area); *see also Read*, App. Cas. at 182 (reasoning that appropriate production of explosives did not automatically implicate strict liability).

93. *See Robert E. Keeton, Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 432–33 n.62 (1959) (noting that many courts have been reluctant to approve *Rylands* by name but have employed some its reasoning).

94. *See Victor B. Flatt, “He Should At His Peril Keep it There . . .” : How the Common Law Tells Us That Risk Based Corrective Action is Wrong*, 76 NOTRE DAME L. REV. 341, 367 (2001) (stating that some states have not adopted the *Rylands* strict liability doctrine, but many courts often reach similar results by applying nuisance law); R. Thomas Lay, *Dam Failures: Common and*

When the principle of strict liability has been applied to these so-called ultra-hazardous activities, it has been in very limited circumstances.⁹⁵ In essence, it has been applied only where the defendant has, for his own purpose, created an abnormal risk of harm to those surrounding him.⁹⁶ Examples of such cases involve the transportation of toxic chemicals and flammable liquids,⁹⁷ pile driving that creates excessive vibrations,⁹⁸ crop dusting that contaminates adjoining crops,⁹⁹ use of poisonous gases,¹⁰⁰ deployment

Emerging Theories of Liability and Recovery, 43 OKLA. L. REV. 103, 111 (1990) (stating that strict liability has been rejected in a majority of jurisdictions when the activity in question is damming water).

95. See *Colton v. Onderdonk*, 10 P. 395, 397–98 (Cal. 1886) (citing *Rylands* and holding a gunpowder blasting defendant liable for damages to neighboring property). But see Jed Handelsman Shugerman, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110 YALE L.J. 333, 334 n.9 (2000) (taking issue with how jurisdictions that were said to have rejected the rule in *Rylands* have been counted).

96. See Gerald W. Boston, *Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier*, 36 SAN DIEGO L. REV. 597, 629–30 (1999) (arguing the plaintiff who attempts to recover under a strict liability theory must show evidence that the activity is “abnormally” or “unusually” or “atypically” dangerous and this requirement is not a prerequisite under a negligence theory); Robert E. Keeton, *Restating Strict Liability and Nuisance*, 48 VAND. L. REV. 595, 599 (1995) (explaining how the draft language of the *Restatement of Torts* developed factors to be considered when determining if an activity is ultra-hazardous).

97. See *Zero Wholesale Gas Co. v. Stroud*, 571 S.W.2d 74, 79 (Ark. 1978) (holding that transporting propane gas is an abnormally dangerous activity). But see *Nielsen v. Sioux Tools, Inc.*, 870 F. Supp. 435, 442 (D. Conn. 1994) (declining to extend strict liability to cases involving underground gasoline tanks).

98. See *Roberts v. Cardinal Servs., Inc.*, 266 F.3d 368, 379 (5th Cir. 2001) (listing pile driving as an activity to which strict liability has been applied); *Vern J. Oja & Assocs. v. Wash. Park Towers, Inc.*, 569 P.2d 1141, 1143 (Wash. 1977) (applying strict liability for pile driving).

99. See *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1262 (5th Cir. 1985) (noting that crop dusting is an activity that poses such great risks that Louisiana courts will impose strict liability for the activity); *Langan v. Valicopters, Inc.*, 567 P.2d 218, 220–23 (Wash. 1977) (finding that when injuries result from the abnormally dangerous activity of crop dusting, strict liability will apply).

100. See *Luthringer v. Moore*, 190 P.2d 1, 7 (Cal. 1948) (enabling plaintiff who sued after inhaling hydrocyanic acid gas (a poison) to recover under a theory of strict liability); see also Richard A. Repp, *Biotech Pollution: Assessing Liability for Genetically Modified Crop Production and Genetic Drift*, 36 IDAHO

of rockets,¹⁰¹ fireworks displays,¹⁰² hazardous waste disposals,¹⁰³ drilling for oil,¹⁰⁴ and, coming back to the starting point of *Rylands v. Fletcher*, cases involving injury caused by escaping water.¹⁰⁵ In all of these cases, the appropriateness of the dangerous activity to the surroundings is the controlling issue.¹⁰⁶ Once the court determines that the act was not in keeping with the surroundings, strict liability is imposed.¹⁰⁷

L. REV. 585, 616 (2000) (noting that courts have applied strict liability to instances involving poisonous gases).

101. See *Smith v. Lockheed Propulsion Co.*, 56 Cal. Rptr. 128, 137 (Cal. Ct. App. 1967) (applying strict liability for rocket motor testing).

102. See *Miller v. Westcor Ltd. P'ship*, 831 P.2d 386, 393 (Ariz. Ct. App. 1991) (finding that launching fireworks was an abnormally dangerous activity); *Klein v. Pyrodyne Corp.*, 810 P.2d 917, 920 (Wash. 1991) (finding the factors to determine an abnormally dangerous activity were present in the context of igniting fireworks). But see *Cadena v. Chi. Fireworks Mfg. Co.*, 697 N.E.2d 802, 813 (Ill. App. Ct. 1998) (applying the same factors, the court determined that fireworks ignition was not an abnormally dangerous activity).

103. See *United States v. Domenic Lombardi Realty, Inc.*, 204 F. Supp. 2d 318, 320 (D.R.I. 2002) (stating that the Comprehensive Environmental Response, Compensation and Liability Act is a strict liability statute); see also *Kurzyna v. City of New Britain*, No. CV0005043885, 2002 WL 1008450, at *8 (Conn. Apr. 11, 2002) (noting that the disposal of hazardous waste is an abnormally dangerous activity).

104. See *Green v. Gen. Petroleum Corp.*, 270 P. 952, 955 (Cal. 1928) (holding drillers of oil well strictly liable); see also James R. MacAyeal, *The Comprehensive Environmental Response, Compensation, and Liability Act: The Correct Paradigm of Strict Liability and the Problem of Individual Causation*, 18 UCLA J. ENVTL. L. & POL'Y 217, 274–75 n.300 (2001) (quoting the rationale behind the federal Superfund legislation that referred to the fact that strict liability is imposed in some states for the practice of oil well drilling).

105. See *Beckord v. Dist. Court of Larimer County in Eighth Judicial Dist.*, 698 P.2d 1323, 1326 n.3 (Colo. 1985) (noting statutory imposition of strict liability for escaping water); *Bridgeman-Russell Co. v. City of Duluth*, 197 N.W. 971, 972–73 (Minn. 1924) (stating that the rule in *Rylands* was applicable and the city was liable for its water main break).

106. See *Harper v. Regency Dev. Co.*, 399 So. 2d 248, 259 (Ala. 1981) (Torbert, J., concurring) (noting that appropriateness of the activity to the community was key to the determination of strict liability, and the storage of water on a hillside may be an abnormally dangerous activity); *Miller v. Civil Constructors*, 651 N.E.2d 239, 244 (Ill. App. Ct. 1995) (relying on the fact that, according to section 520 of the *Restatement (Second) of Torts*, an activity may be abnormally dangerous because of the circumstances surrounding it).

107. See *Mathews v. Ashland Chem. Inc.*, 770 F.2d 1303, 1307 (5th Cir. 1985) (stating that under Louisiana law, one of the determinants of an ultra-

This position has been adopted by the American Law Institute.¹⁰⁸ In section 520 of the *Restatement (Second) of Torts*, six factors are considered when determining whether or not strict liability is the proper basis of liability.¹⁰⁹ From the accompanying comments, it is clear that not all elements are required, and that, depending upon the facts in question, some may be more important than others.¹¹⁰ This means that section 520 should be considered in its entirety; each segment is a variable unto itself and should be given importance according to the facts of each individual case.¹¹¹

For example, pursuant to the first element, it must be established that the activity a high degree of risk to the person, property or chattels of others.¹¹² The first issue, therefore, is whether we

hazardous activity involves a relation to the land); James R. Zazzali & Frank P. Grad, *Hazardous Wastes: New Rights and Remedies?*, 13 SETON HALL L. REV. 446, 462 (1983) (stating that among the factors to be balanced in determining strict liability for abnormally dangerous activities are the utility of the activity and how appropriate the activity is to the locale).

108. See James A. Henderson, Jr., *Echoes of Enterprise Liability in Product Design and Marketing Litigation*, 87 CORNELL L. REV. 958, 967 (2002) (stating that the American Law Institute included the strict liability rule for abnormally dangerous activities in its 1965 publication of the *Restatement (Second) of Torts*); Kenneth P. Dobson, *Methods and Motives for Imposing Strict Liability on Parties Hiring Independent Contractors to Transport Hazardous Materials in the State of Florida*, 24 VT. L. REV. 1297, 1299 (2000) (stating that the American Law Institute added to its draft *Restatement* in 1964 a provision concerning strict liability for abnormally dangerous activities).

109. See RESTATEMENT (SECOND) OF TORTS § 520 (1977).

110. *Id.* cmt. f (asserting that no one factor is “necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability”).

111. See Gerald W. Boston, *Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier*, 36 SAN DIEGO L. REV. 597, 621 (1999) (describing each of the factors used to determine an abnormally dangerous activity as important to the analysis); Matthew Pontillo, *Suing Gun Manufacturers: A Shot in the Dark*, 74 ST. JOHN'S L. REV. 1167, 1177 (2000) (listing the six factors to determine an ultra-hazardous activity and describing them all as relevant to the determination).

112. See RESTATEMENT (SECOND) OF TORTS § 520(a) (setting forth as the first element: “existence of a high degree of risk of some harm to the person, land or chattels of others”). *But see* William W. Watts, *Common Law Remedies in Alabama for Contamination of Land*, 29 CUMBERLAND L. REV. 37, 54 (1998–99) (stating that all the factors listed in section 520 are somewhat open ended in nature).

have conduct wherein injury is likely.¹¹³ By definition, this question would eliminate any undertaking that the court would consider as not being ultra hazardous, and, by virtue of the remaining sections, this would depend in large part upon the location involved.¹¹⁴ Next, section 520 attempts to determine whether the gravity of the potential harm is likely to be great.¹¹⁵ Apparently, at this juncture, we bring into play the risk-benefit analysis that has been the hallmark of actionable negligence: $PL (G) > B = N$.¹¹⁶ According to this formula, we take the probability of loss (PL), and multiply it by the gravity of the foreseeable harm (G).¹¹⁷ This sum

113. See Mark Gistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611, 648 (1998) (suggesting that the *Restatement* factors really mean that the injury costs of an activity exceed their utility); Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH L. REV. 1266, 1308 (1997) (asserting that in order to spread losses "at an optimal level, under any form of strict liability, damages should be awarded at the deterrence level for negligently inflicted harms").

114. See *Sprinkle v. Bower Ammonia & Chem. Co.*, 824 F.2d 409, 414 (5th Cir. 1987) (stating that the appropriateness of the activity to the location is generally a requirement for most courts in the determination of the applicability of strict liability); RESTATEMENT (SECOND) OF TORTS § 520 cmt. g (1977) (setting forth the following: "In determining whether there is such a major risk, it may therefore be necessary to take into account the place where the activity is conducted . . .").

115. See RESTATEMENT (SECOND) OF TORTS § 520(b) (1977) (inquiring whether the "likelihood that the harm that results from it will be great"); Mary Margaret McEachern, *Inherently Dangerous or Inherently Difficult? Interpretations and Criticisms of Imposing Vicarious Liability on General Contractors for Injuries Suffered as a Result of Independent Contractors: Hooper v. Pizzagalli Construction Company*, 17 CAMPBELL L. REV. 483, 490 n.51 (1995) (stating that an abnormally dangerous activity is one in which great harm is likely).

116. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (setting forth the famous formula penned by Judge Learned Hand for determining negligence); see also A. Bryan Endres, *GMO: Genetically Modified Organism or Gigantic Monetary Obligation? The Liability Schemes for GMO Damage in the United States and the European Union*, 22 LOY. L.A. INT'L & COMP. L. REV. 453, 488 (2000) (asserting that the evaluation of *Restatement* section 520, factors (a), (b), (c) and (f), parallels a negligence analysis).

117. See *Grimes v. Norfolk S. Ry. Co.*, 116 F. Supp. 2d 995, 1005 (N.D. Ind. 2000) (summarizing Hand's algebraic negligence formula); *Cross v. Berg Lumber Co.*, 7 P.3d 922, 936 n.3 (Wyo. 2000) (restating the negli-

is weighed against the burden of eliminating or at least reducing the risk (B).¹¹⁸ Ultimately, the end result is a negligent defendant when the burden is less than the total of the first two variables, and conversely, a non-negligent defendant in cases wherein B is greater than the total of the other two.¹¹⁹ It is interesting to note at this point that while we are concerned with the issue of strict liability, the first part of section 520 is expressed in terms that sound in negligence.¹²⁰ This is made clearer by the third element which asks whether the risk can be eliminated by exercising reasonable care.¹²¹

To this point, the provisions of section 520 do not appear indicative of strict liability.¹²² It is, however, at this juncture that the

gence formula as follows: "tortfeasor is liable if the cost of reasonable precautions (B) is less than the product of the probability of injury (P) and the magnitude of potential loss (L). (B < PL)"; Gina M. DeDominicis, Note, *No Duty at Any Speed?: Determining the Responsibility of the Automobile Manufacturer in Speed-Related Accidents*, 14 HOFSTRA L. REV. 403, 405-06 n.11 (1986) (summarizing that a negligence finding begins with multiplying the probability of a loss times the gravity of the injury).

118. See *Reardon v. Peoria & Pekin Union Ry. Co.*, 26 F.3d 52, 53 (7th Cir. 1994) (showing that the negligence formula holds that the burden of precautions and the loss if there is an accident must be measured against an accident's probability if the precautions are not taken).

119. See *U.S. Fidelity & Guar. Co. v. Jadranska Slobodna Plovidba*, 683 F.2d 1022, 1026 (7th Cir. 1982) (showing that a tortfeasor is negligent if the burden of reducing the risk is less than the probability of the loss); see also *Schneider Nat'l, Inc. v. Holland Hitch Co.*, 843 P.2d 561, 572 n.10 (Wyo. 1992) (summarizing the negligence mathematical formula).

120. See RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1977) (showing that there is an allowance for both a negligence analysis and a strict liability analysis to ultra-hazardous activities); see also *Fletcher v. Conoco Pipe Line Co.*, 129 F. Supp. 2d 1255, 1261 (W.D. Mont. 2001) (stating that for many courts, the analysis for a strict liability situation revolves around whether or not the safety of an activity can be increased through the exercise of ordinary care).

121. See *Ind. Harbor Belt R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1181 (7th Cir. 1990) (stating that any analysis of an activity for imposing strict liability might start with the exercise of due care); *Chaveriat v. Williams Pipe Line Co.*, 1994 WL 583598, at *5 (N.D. Ill. Oct. 18, 1994) (stating that the third factor of section 520—reasonable care to reduce the risk of harm—deserves primary attention).

122. See *Yukon Equip. Inc. v. Fireman's Fund Ins. Co.*, 585 P.2d 1206, 1209-11 (Ala. 1978) (declining to accept the *Restatement's* section 520 approach because it was too similar to the negligence analysis).

Restatement brings to life the principles of *Rylands v. Fletcher*.¹²³ The Lord Chancellor's reasoning is echoed by the fourth factor which asks whether the activity is a common one, and *Ryland's* resurrection is further amplified by the fifth factor, which seeks to determine whether the activity is in fact appropriate to its location.¹²⁴ Section 520, therefore, makes it clear that judgment will be rendered in light of two principle issues: activities which are or are not appropriate to the area, and which may or may not be a matter of common acceptance.¹²⁵ These questions will be considered on a case by case basis.¹²⁶ If both elements are present, strict liability is likely to result.¹²⁷

Finally, the last section weighs the value of the activity to the community.¹²⁸ If the locale does not benefit economically, or if

123. See Boston, *supra* note 96, at 599 (arguing that some "tinkering" is necessary with the *Restatement* in order to recapture the *Rylands* origins of strict liability theory).

124. See RESTATEMENT (SECOND) OF TORTS § 520 cmt. i (1977); see also C. Conrad Claus, *Oregon's Development of Absolute Liability under the Rylands Doctrine: A Case Study*, 53 WASH. U. J. URB & CONTEMP. L. 171, 183 n.79 (1998) (explaining the development of the *Rylands* development and noting both the fourth and fifth elements in the *Restatement*). The drafters of the *Restatement* seem to have considered Lord Chancellor's statements because they discussed water collection in reservoirs in coal mining territory. See RESTATEMENT (SECOND) OF TORTS § 520 cmt. i.

125. See RESTATEMENT (SECOND) OF TORTS § 520(e) (listing as a consideration the "inappropriateness of the activity to the place where it is carried on"); Michael J. Maher & Sheila Horan, *Lessons in L.U.S.T.: The Complete Story of Liability for Leaking Underground Storage Tanks*, 16 N. ILL. U. L. REV. 581, 605 (1996) (summarizing the importance of location to the strict liability analysis).

126. See *Bowen Eng'g v. Estate of Reeve*, 799 F. Supp. 467, 481 (D.N.J. 1992) (stating that the six factors should be applied on a case by case basis); *T & E Indus., Inc. v. Safety Light Corp.*, 587 A.2d 1249, 1259 (N.J. 1991) (determining that activities may be classified as abnormally dangerous on a case-by-case basis).

127. See William E. Westerbeke & Reginald L. Robinson, *Survey of Kansas Tort Law*, 37 U. KAN. L. REV. 1005, 1057 n.258, 260 (1989) (stating that strict liability is appropriate when factors (d) and (e) are present); see also *State Dept. of Envtl. Prot. v. Ventron Corp.*, 468 A.2d 150, 159 (N.J. 1983) (applying the six factors to toxic waste and finding it abnormally dangerous and subject to strict liability).

128. See RESTATEMENT (SECOND) OF TORTS § 520(f) (1977) (setting forth the final factor as the "extent to which its value to the community is outweighed by its dangerous attributes"); see also *Cadena v. Chi. Fireworks*

the activity is against public policy, chances are good that strict liability will be applied.¹²⁹

In summary we can say that if section 520 is representative of the American position in matters involving ultra-hazardous activities, it becomes clear, regardless of some latent ambiguities resulting from the language used, that strict liability will result from injuries caused by such activities.¹³⁰ This is true when it appears that the activity is inappropriate to the area, poses great risk of harm to others, and has no particular redeeming economic value to the community.¹³¹ Ultimately, we weigh the risk of harm resulting from the behavior against its appropriateness to the surrounding area.¹³²

Mfg. Co., 697 N.E.2d 802, 814 (Ill. App. Ct. 1998) (stating that the court determined, due to the fact of the general public enjoyment of fireworks displays on July 4, that fireworks are of some social utility and, therefore, subparagraph (f) is not met).

129. See Stephen Kelly Lewis, Comment, "Attack of the Killer Tomatoes?" *Corporate Liability for the International Propagation of Genetically Altered Agricultural Products*, 10 TRANSNAT'L LAW. 153, 187-88 (1997) (positing that a strict liability finding for an ultra-hazardous activity is rooted in economics as well as public policy).

130. See *Correa v. Curbey*, 605 P.2d 458, 460 (Ariz. Ct. App. 1979) (relying upon the majority view which follows the *Restatement* section 520 factors to determine that use of explosives is an abnormally dangerous activity); *Miller v. Civil Constructors, Inc.*, 651 N.E.2d 239, 245 (Ill. App. Ct. 1995) (standing for the proposition that strict liability, in most cases, will be imposed for abnormally dangerous activities where no amount of care can make the activity more safe).

131. See *Mahowald v. Minn. Gas Co.*, 344 N.W.2d 856, 868 (Minn. 1984) (reasoning that dangerous activities may be of such value to a community that holding an actor strictly liable for damages flowing from the activity without regard to fault would not be appropriate because the community would lose the benefit of the activity); *Diffenderfer v. Staner*, 722 A.2d 1103, 1107 (Pa. 1998) (finding that the location of underground storage tanks was appropriate to the community and therefore, there was no strict liability).

132. See *Arlington Forest Assocs. v. Exxon Corp.*, 774 F. Supp. 387, 391 (E.D. Va. 1991) (stating the more appropriate an activity is to its setting, the less likely it is to be considered abnormally dangerous); *Clark-Aiken Co. v. Cromwell-Wright Co.*, 323 N.E.2d 876, 887 (Mass. 1975) (stating that the essential question is whether the risk's magnitude or the circumstances surrounding the risk justify the imposition of strict liability).

IV. NUISANCE

The law with regard to strict liability in nuisance is closely aligned to that of ultra-hazardous activities.¹³³ Before making the comparison, however, there are four features concerning nuisance that should be emphasized.¹³⁴ The first is that when we speak of nuisance, we are not referring to a specific tort.¹³⁵ Instead, we are referring to an entire field of law.¹³⁶ At one end of the spectrum we have what is generally referred to as a private nuisance which would involve any activity that unreasonably interferes with the use and enjoyment of one's land,¹³⁷ whether noise, vibration, light, or any other interference with rightful use of the land would qualify.¹³⁸ At the other end, we have what is referred to as a public nuisance.¹³⁹ Generally, this would include minor criminal offenses

133. See Keith N. Hilton, *The Theory of Tort Doctrine and the Restatement (Third) of Torts*, 54 VAND. L. REV. 1413, 1417 (2001) (stating that strict liability for ultrahazardous activities and nuisance are closely related); see also *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 219 (Mich. Ct. App. 1999) (stating that nuisance and strict liability are common law derivatives of trespass doctrine).

134. See *Filisko v. Bridgeport Hydraulic Co.*, 404 A.2d 889, 891 (Conn. 1978) (setting forth the elements of a nuisance cause of action); *Murphy v. Bradlees, Inc.*, 1994 WL 684683, at *1 (Conn. Super. Ct. Nov. 30, 1994) (mem.) (providing a summary of a typical nuisance case).

135. See *Brown v. Scioto Cty. Bd. of Commrs.*, 622 N.E.2d 1153, 1158 (Ohio Ct. App. 1993) (describing either a public or a private nuisance as an entire field of liability); see also WADE ET AL., *supra* note 78, at 802 (explaining that nuisance is an entire field of liability).

136. See *City of Tyler v. Likes*, 962 S.W.2d 489, 504 (Tex. 1997) (quoting Prosser and declaring nuisance a field of liability and a kind of damage done); *Loyd v. ECO Resources, Inc.*, 956 S.W.2d 110, 125 (Tex. App. 1997) (stating that a nuisance is a condition that interferes with another's rights).

137. See *Pestey v. Cushman*, 788 A.2d 496, 502 (Conn. 2002) (stating that private nuisance involves the interference with an individual's right to use and enjoy her land); *Taygeta Corp. v. Varian Assocs., Inc.*, 763 N.E.2d 1053, 1064-65 (Mass. 2002) (comparing and contrasting the difference between a private and public nuisance).

138. See *Gainsville, H. & W. R. Co. v. Hall*, 14 S.W. 259, 260 (Tex. 1890) (stating that a nuisance can arise from a business's "noise, smoke and vibration"); *City of Temple v. Mitchell*, 180 S.W.2d 959, 962 (Tex. App. 1944) (stating that had the enterprise been a private one, the offensive smells produced would have constituted a nuisance).

139. See RESTATEMENT (SECOND) OF TORTS § 821B (1979) (providing

that would interfere with the public's comfort, convenience, health, safety, morals or peace.¹⁴⁰ The only similarity between the two is that both incorporate the word nuisance; in reality they have no connection to one another.¹⁴¹ One is a tort with principles based upon the common law, and the other is, as noted, generally based upon some sort of penal provision.¹⁴²

Second, both may be classified as either temporary or permanent.¹⁴³ What distinguishes one from the other is the cost of abatement.¹⁴⁴ If the cost of abolishing the activity is relatively little, it will be designated as a temporary nuisance whereas if the cost is relatively prohibitive, it will be referred to as permanent.¹⁴⁵

a definition of public nuisance); *see also* *Fevold v. Board of Sup'rs*, 210 N.W. 139, 144 (Iowa 1926) (finding a public nuisance for the keeping of diseased cattle).

140. *See* *Wallace v. Horn*, 506 S.W.2d 325, 329 (Tex. App. 1974) (stating that a public nuisance is an act or condition that subverts the public order or that constitutes an interference with public rights); *see also* *Treadgill v. State*, 275 S.W.2d 658, 664 (Tex. App. 1954) (stating that fireworks are a public nuisance).

141. *See* Thomas P. Redick & Christina G. Bernstein, *Nuisance Law and the Prevention of Genetic Pollution: Declining a Dinner Date with Damocles*, 30 ENVTL. L. REP. 10328 (2000) (noting that although there may be some overlap, public nuisance and private nuisance are two distinct tort remedies). *But see* Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years after Boomer*, 54 ALB. L. REV. 359, 361 (1990) (standing for the proposition that although "the differences between the[se] two bodies of law" continue to be important in contemporary jurisprudence, and particularly in such areas as environmental law, the division between the two is disappearing).

142. *See* WADE ET AL., *supra* note 78, at 802 (explaining that in order to entitle one to relief in tort for a public nuisance, the complained of act has traditionally been required to also be a crime); Abrams & Washington, *supra* note 141, at 362 (noting that public nuisance was originally criminal in nature).

143. *See* *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 488 S.E.2d 901, 923 n.26 (W. Va. 1997) (noting there are several tests for determining permanent and temporary nuisances); *see also* *Taygeta Corp. v. Varian Assocs., Inc.*, 763 N.E.2d 1053, 1065 (Mass. 2002) (stating that a continuing trespass may cause permanent harm, temporary harm or both).

144. *See* *State ex rel. Smith*, 488 S.E.2d at 923 n.26 (citing 58 AM. JUR. 2D *Nuisances* § 30 (1989) for the "ability to abate" test).

145. *See* *Goldstein v. Potomac Elec. Power Co.*, 404 A.2d 1064, 1066 (Md. 1979) (permanent damages are only available if the nuisance is permanent); *see also* *Huffman v. United States*, 82 F.3d 703, 705 (6th Cir. 1996)

Third, in both instances, an injured plaintiff may be entitled to remedies in law or in equity depending upon the type of injury involved.¹⁴⁶ The only requirement for an individual bringing suit in the area of public nuisance, however, is that the plaintiff must suffer an injury different in kind rather than degree from the rest of the public.¹⁴⁷

The fourth feature concerning nuisance is that the basis of liability in both instances may be either the defendant's fault (i.e., intent or negligence), or strict liability.¹⁴⁸ In this instance, strict liability would be invoked where the defendant undertook an ultra-hazardous activity as described in the preceding section.¹⁴⁹ If the court determines that a nuisance—either public or private—exists

(stating that the test for temporary or permanent nuisances is whether the action can be remedied at a reasonable expense); *Hall v. Lovell Regency Homes Ltd. P'ship*, 708 A.2d 344, 355 (Md. 1998) (describing the elements for damages in a temporary nuisance claim).

146. See Peter Cane, *Using Tort Law to Enforce Environmental Regulations?*, 41 WASHBURN L.J. 427, 442 (2002) (stating that public nuisance remedies include injunction and damages); Jerome M. Organ & Kristin M. Perry, *Controlling Externalities Associated with Concentrated Animal Feeding Operations: Evaluating the Impact of H.B. 1207 and the Continuing Viability of Zoning and the Common Law of Nuisance*, 3 MO. ENVTL. L. & POL'Y REV. 183, 194 (1996) (stating that courts can grant damages and/or injunctions as remedies for private nuisances).

147. See Osborne M. Reynolds, Jr., *Of Time and Feedlots: The Effect of Spur Industries on Nuisance Law*, 41 WASH. U. J. URB. & CONTEMP. L. 75, 77 (1992) (stating that in order for the plaintiff to recover special damages, the injured party must show his damages were not the same as those suffered by the general public); see also *Adams v. Comm'rs of Trappe*, 102 A.2d 830, 834 (Md. 1954) (distinguishing between private nuisance and public nuisance).

148. See *Cox v. City of Dallas*, 256 F.3d 281, 290 (5th Cir. 2001) (stating that strict liability is one basis of liability in a nuisance action); Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89, 100 n.60 (1998) (noting the strict liability history of nuisance).

149. See Peter B. Kutner, *The End of Rylands v. Fletcher?* 31 Cambridge Water Co. v. Eastern Counties Leather PLC, 31 TORT & INS. L.J. 73, 95 (1995) (noting that Prosser and other authorities required an underlying basis of liability for recovery under a private nuisance action and one basis was strict liability predicated upon an ultra-hazardous activity); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 17, 24 (1998) (noting that for many torts as well, such as nuisance and defamation, the common law has permitted a range of liability without fault).

and that it also qualifies as an ultra-hazardous activity, strict liability will follow.¹⁵⁰ The reasoning is the same. All elements of section 520 as previously discussed would come into play.¹⁵¹

V. MISREPRESENTATION

Misrepresentation, like nuisance, does not represent a particular tort, but instead an entire field of law.¹⁵² In this instance, a cause of action would arise whenever one makes a statement as to a material fact that is untrue upon which another reasonably relies to her detriment.¹⁵³ An injured plaintiff in these cases may elect to bring suit in a variety of ways.¹⁵⁴ First, she may elect a remedy at

150. See *Highview N. Apartments v. Ramsey County*, 323 N.W.2d 65, 71 (Minn. 1982) (stating that nuisance requires some type of wrongful conduct which may be either intentional conduct, ultra-hazardous activity, negligence, violation of a statute or some other tort).

151. See *State Dept. of Env'tl. Prot. v. Ventron Corp.*, 468 A.2d 150, 159 (N.J. 1983) (holding that mercury dumping is an activity that is abnormally dangerous and carries strict liability for any damages that result and following the *Restatement's* section 520 guidelines in making the determination of what is abnormally dangerous activity); *Copart Indus., Inc. v. Consolidated Edison Co. of N.Y., Inc.*, 394 N.Y.S.2d 169, 172 (N.Y. 1977) (declaring that courts recognize that an individual is liable under a private nuisance theory if her conduct is a legal cause of the invasion of another's interest in the private use and enjoyment of land and the invasion is (1) unreasonable and intentional, (2) reckless or negligent, or (3) actionable under the rules for abnormally dangerous activities or conditions).

152. See *Riley Hill Gen. Contractor, Inc. v. Tandy Corp.*, 737 P.2d 595, 604 (Or. 1987) (quoting Prosser to describe misrepresentation as considerably broader than the action for deceit and noting that several theories of liability in this area of tort law overlap). Cf. *Babb v. Bolyard*, 72 A.2d 13, 16 (Md. 1950) (noting that some courts have expanded the action for deceit to encompass more than fraud and negligent misrepresentation).

153. See *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998) (stating that an actionable claim for fraud requires the plaintiff to establish that "(1) a material misrepresentation was made, (2) the speaker knew it was false when made or made it recklessly without any knowledge of its truth, (3) the representation was made with the intent that it should be acted upon by the party, and (4) the party acted in reliance upon the representation to its damage"); see also *Jackson v. W. Telemarketing Corp. Outbound*, 245 F.3d 518, 525 (5th Cir. 2001) (restating the elements for fraud).

154. See *WADE ET AL.*, *supra* note 78, at 1010 (setting forth "numerous alternative remedies" for misrepresentation).

law.¹⁵⁵ This would offer three vehicles of recovery.¹⁵⁶ The plaintiff may elect to bring suit on the basis of breach of contract, arguing that she had not received that for which she bargained.¹⁵⁷ In the alternative, the plaintiff could seek restitution electing to bring suit on the basis of quasi-contract so as to avoid any unjust enrichment on the part of the defendant.¹⁵⁸ Finally, the plaintiff may allege a cause of action in tort, which would require an additional choice.¹⁵⁹ The basis of liability could be that the defendant acted intentionally, in which case the proper cause of action would be deceit requiring the plaintiff to establish fraud.¹⁶⁰ This would re-

155. See *Kahin v. Lewis*, 259 P.2d 420, 423 (Wash. 1953) (showing that with an election, plaintiff may have a remedy at law with a misrepresentation); see also *Fina Supply, Inc. v. Abilene Nat. Bank*, 726 S.W.2d 537, 541 (Tex. 1987) (holding that the plaintiff ultimately had no cause of action for fraudulent misrepresentation as a matter of law).

156. See *WADE ET AL.*, *supra* note 78, at 1010 (relating the three vehicles of recovery where the plaintiff has elected a remedy at law: breach of contract, restitution, and the tort action of deceit).

157. See *Derry v. Peek*, 13 App. Cas. House of Lords 337 (1889) (distinguishing between actions for rescission of a contract based on misrepresentations of material fact and actions for deceit); see also *Sibley v. Southland Life Ins. Co.*, 36 S.W.2d 145, 146 (Tex. 1931) (stating that a defendant's liability in an action for deceit is held not to be affected by the fact that a false promise was made orally, the action being in tort and not in contract).

158. *Ross v. Harding*, 391 P.2d 526, 532 (Wash. 1964) (stating that absent fraud, a misrepresentation that is admitted would at the very least necessarily be characterized as a mutual mistake and a clear bona fide mutual mistake concerning material facts allows a court in equity to grant a rescission); see also *Seneca Wire & Mfg. Co. v. A.B. Leach & Co.*, 159 N.E. 700, 702 (N.Y. 1928) (stating that rescission may be had on a contract for misrepresentation).

159. See *RESTATEMENT (SECOND) OF TORTS* § 526 (1977) (delineating conditions that would cause a misrepresentation to be fraudulent); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 222 (Tex. 1992) (setting forth the elements to recover for fraud).

160. *Formosa Plastics Corp. USA v. Presidio Eng'rs and Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998) (stating that a showing of fraud requires a material misrepresentation that was false, the defendant's knowledge of its falsity when it was made or uncertainty of its truth, intent that the statement be acted upon, and reliance by the plaintiff, which caused the plaintiff's injury); see also *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 526-27 (Tex. 1998) (setting forth common law fraud elements).

quire the plaintiff to show that the defendant made the statement knowing it was false or with careless disregard as to whether it was true or not.¹⁶¹ In the alternative, the plaintiff could allege negligent misrepresentation and, in this instance, the elements of actionable negligence would come into play: duty, breach of duty, proximate cause and injury.¹⁶² If any of these three causes of action at law—contract, quasi contract or tort—do not offer the plaintiff an adequate remedy, in that money fails to make the plaintiff whole, the injured party would be able to invoke the equitable jurisdiction of the court and recover accordingly.¹⁶³

Tort is an interesting cause of action. As mentioned above, the basis of liability would be that the defendant acted intentionally, or failed to act as a reasonable and prudent person under like or similar circumstances. There are, however, some scenarios wherein strict liability would be proper.¹⁶⁴ If it is established that

161. *Hamad v. Tex. State Teacher's Ass'n*, No. 03-01-00360-CV, 2001 WL 1627937, at *3 (Tex. App. Dec. 20, 2001) (stating that in order to establish fraud, the plaintiff must show in part that the defendant made the statement, knowing it was false or made it recklessly); see also *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983) (stating that fraud may be constituted by an opinion if the maker of the statement has knowledge of its falsity).

162. See *Fed. Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991) (describing how a claim for negligent misrepresentation requires a duty to exercise reasonable care, a breach of that duty, causation and damages); *Key v. Pierce*, 8 S.W.3d 704, 709 (Tex. App. 1999) (stating that because there was no evidence to show that the maker of the statement failed to exercise ordinary care, the negligent misrepresentation claim must fail).

163. *Castano v. Wells Fargo Bank, N.A.*, 82 S.W.3d 40, 43 (Tex. App. 2002) (noting that in some cases where there has been a misrepresentation, a court in equity can impose a constructive trust over property); see also *In re Marriage of Loftis*, 40 S.W.3d 160, 164 (Tex. App. 2001) (noting that where property has been obtained through a misrepresentation, the court can use the equitable remedy of a constructive trust).

164. *Cincinnati Gas & Elec. Co. v. Gen. Elec. Co.*, 656 F. Supp. 49, 58 (S.D. Ohio 1986) (standing for the proposition that while the Ohio courts have considered the tort of innocent misrepresentation and situations wherein strict liability will be imposed, the court rejected its application in this case involving misrepresentations concerning whether a nuclear reactor would meet federal standards); see also *Monroe v. Hughes*, 31 F.3d 772, 774 (9th Cir. 1994) (noting statutory provisions that impose strict liability for misrepresentations made by accountants).

the defendant did not act intentionally or negligently, then by definition, we would have an innocent misrepresentation. There is ample authority for the proposition that an injured plaintiff in this type of scenario should still be offered relief.¹⁶⁵ This, by necessity, results in the application of strict liability.¹⁶⁶ In these cases, there appears to be a deliberate policy on the part of the courts to place the resulting loss upon the innocent defendant rather than upon the innocent plaintiff.¹⁶⁷ This is especially true in cases wherein the defendant purports to have knowledge concerning the matter in question.¹⁶⁸ The classic example would be a cause of action wherein the defendant, when inducing a sale, makes representations concerning the quality of goods.¹⁶⁹ This doctrine of fairness

165. *Gibson v. Capano*, 699 A.2d 68, 71 (Conn. 1997) (stating that Connecticut recognizes a cause of action for innocent misrepresentation); *see also Grube v. Daun*, 496 N.W.2d 106, 113 (Wis. Ct. App. 1992) (stating that a broker can be strictly liable for assertions about a home).

166. *See Gauerke v. Rozga*, 332 N.W.2d 804, 807 n.3 (Wis. 1983) (stating that under Wisconsin law, misrepresentations that impose strict liability occur when the defendant has personal knowledge or the situation is such that he necessarily ought to have known what was true or false concerning the statement and, furthermore, the defendant must have an interest of an economic nature in the transaction); RESTATEMENT (SECOND) OF TORTS § 552C (1977).

167. *Kirkpatrick v. Reeves*, 22 N.E. 139, 140 (Ind. 1889) (stating that if a speaker makes an untrue statement that is relied upon, the fact that the speaker subjectively believed the statement to be true does not relieve him of liability); *see also Essenburg v. Russell*, 78 N.W.2d 136, 138 (Mich. 1956) (stating that even if the maker of a statement does not know it is false when he makes it, if the person to whom it is made relies upon it to his detriment, the plaintiff could exercise a cause of action for damages either at law or in equity).

168. *See* RESTATEMENT (SECOND) OF TORTS § 552C cmt. a (1977) (discussing how courts have used the language of scienter, but have imposed strict liability for innocent misrepresentations nonetheless); *see also Horton v. Tyree*, 139 S.E. 737, 738 (W. Va. 1927) (stating that some sellers are under a duty to know, and if they give erroneous information without knowledge on the subject, they are liable in law just as if their falsehood had been intentional).

169. *Johnson v. Healy*, 405 A.2d 54, 56 (Conn. 1978) (relating that imposition of strict liability on sellers who make innocent misrepresentations in the sale of goods is a well established principle in Connecticut law); *see also Graves v. Haynes*, 231 S.W. 383, 385 (Tex. Comm'n App. 1921) (stating that even if the seller had the belief that his cows were safe, sound, and free from tick-induced fevers, that fact was not important if the buyer took

upon which the basis of liability is justified is the same as that adopted by the American Law Institute in section 552C of the *Restatement (Second) of Torts*.¹⁷⁰ The only difference is that the section does not limit its application to the sale of goods, but is extended to the rental or exchange of goods as well.¹⁷¹

Before leaving this topic, it should be noted that currently, the law of sales is codified in the Uniform Commercial Code which has been in force since the mid 1960s.¹⁷² Its predecessor, the Uniform Sales Act, which was enacted around the turn of the last century, fulfilled the same purpose.¹⁷³ Much has been written of these statutes and they need not be explored here. What is important however, is that both authorities, in codifying the law, apparently took note of the fact that warranties, expressed as well as implied, could be traced to the common law action of deceit.¹⁷⁴ Strict liability as expressed by the law of warranty, therefore, is yet an-

the representations as fact and relied upon those statements in purchasing the cattle).

170. *Compare* RESTATEMENT (SECOND) OF TORTS § 552C (a) (1977) (stating that section 552C is a strict liability rule pertaining to innocent misrepresentations of material facts made during the course of a sale, rental or exchange transaction), *with* Norman v. Brown, Todd & Heyburn, 693 F. Supp. 1259, 1264 (D. Mass. 1988) (stating the theory of innocent misrepresentation in Massachusetts has only been applicable in the context of disagreements between buyers and sellers of commodities).

171. Gibson v. Capano, 699 A.2d 68, 71 (Conn. 1997) (quoting the *Restatement* and stating that claims of innocent misrepresentations in Connecticut are not confined to the sale of goods); *see also* Richard v. A. Waldman & Sons, Inc., 232 A.2d 307, 310 (Conn. 1967) (stating that the home purchaser had relied upon misrepresentations that were in the nature of a warranty and the purchaser could recover under contract law for a breach of warranty).

172. *See generally* ROBERT J. NORDSTROM, HANDBOOK ON THE LAW OF SALES (1970); *see also* E. ALLEN FARNSWORTH & WILLIAM F. YOUNG, SELECTIONS FOR CONTRACTS: UNIFORM COMMERCIAL CODE, RESTATEMENT SECOND, UN SALES CONVENTION, UNIDROIT FORMS, FORMS (1998).

173. *See* NORDSTROM, *supra* note 172, at 4 (stating that many of the ideas contained in the Uniform Sales Act were reproduced in Article 2 of the Uniform Commercial Code).

174. *See* Ellen Taylor, *Applicability of Strict Liability Warranty Theories to Service Transactions*, 47 S.C. L. REV. 231, 233 (quoting 1 ORA F. HARRIS, JR. & ALPHONSE M. SQUILLANTE, WARRANTY LAW IN TORT AND CONTRACT ACTIONS § 2.5 (1989)) ("Professors Harris and Squillante state that '[b]reach of warranty is derived from the tort of deceit.'").

other example of how strict liability is applied, although in a derivative manner, in the area of misrepresentation.¹⁷⁵

VI. VICARIOUS LIABILITY

Whether referred to as *respondeat superior* or vicarious liability, in this area of the law we are speaking in terms of imputed negligence.¹⁷⁶ One is going to be held responsible for the wrongdoing of another.¹⁷⁷ This is the purest example of strict liability in that one who is totally innocent of any fault whatsoever will be held liable.¹⁷⁸ The scenario usually arises in employment situations where, assuming the employee is engaged in a task that is furthering the business of his employer, the latter will be forced to compensate any injured party for any tort sustained.¹⁷⁹ This rea-

175. See John J. Kropp et al., *Horse Sense and the UCC: The Purchase of Racehorses*, 1 MARQ. SPORTS L.J. 171, 186 n.92 (1991) (stating that strict liability in one form is found in the implied warranty of fitness for a particular purpose); John W. Wade, *Strict Product Liability: A Look at Its Evolution*, 19 THE BRIEF 8, 8-11 (1989) (explaining that while negligence liability in the context of dangerous products underwent an evolution, at the same time, implied warranties of fitness and merchantability were a form of strict liability).

176. *Marange v. Marshall*, 402 S.W.2d 236, 239 (Tex. App. 1966.) (stating that the doctrine of *respondeat superior* is a recognized legal fiction that a master should answer for the acts of his servant); see also *Lundberg v. State*, 255 N.E.2d 177, 179 (N.Y. 1969) (explaining the doctrine of *respondeat superior* where an employer will be liable for his employee's negligence).

177. *Leadon v. Kimbrough Bros. Lumber Co.*, 484 S.W.2d 567, 569 (Tex. 1972) (stating that an employer will be held liable for his employee's negligent actions if those actions are within the scope of the employee's general authority); see also *Fruit v. Schreiner*, 502 P.2d 133, 138 (Alaska 1972) (stating that *respondeat superior* means "let the employer answer").

178. *Med. Slenderizing, Inc. v. State*, 579 S.W.2d 569, 574 (Tex. App. 1979) (stating that although employer did not have knowledge thereof or had not forbidden the employee's conduct, the employer would be held liable for his employee's wrongs if those wrongs were done while the employee was acting in the business of his employer and were within the scope of his employment).

179. *Mosqueda v. Albright Transfer & Storage Co.*, 320 S.W.2d 867, 870 (Tex. App. 1958) (stating that actions of servants acting outside the scope of their employment will not impose liability on their employers under the doctrine of *respondeat superior* until the employee is on the job and within limits encompassing his employment and that the employee's state of

soning, as in the case of animals discussed above, has its origins in the earliest forms of our Anglo-American jurisprudence, and has been consistently applied.¹⁸⁰

The justification for this form of liability has many variations. First is the element of control.¹⁸¹ If a master controls or at least has the right of controlling his servant, the prevailing thought is that he should be held accountable for any resulting injury.¹⁸² In addition to the element of control, there is the thought that an employer, especially in the case of a going enterprise, has the deepest pocket.¹⁸³ Therefore, it would be most equitable to compensate the

mind does not determine entry into his scope of employment); *see also* Murrell v. Goertz, 597 P.2d 1223, 1225 (Okla. Ct. App. 1979) (noting that the line between what makes one a "servant" for the purposes of vicarious liability and what makes one an "independent contractor" is not clearly drawn).

180. Douglas McGhee, Comment, *Once Bitten, Twice Bitten: The Minnesota Court of Appeals Limits the Recovery of Sex Abuse Victims in Oelschlager v. Magnuson*, 15 LAW & INEQ. 191, 200 (1997) (noting that legal historians do not agree on the origins of *respondeat superior* but it is plausible that it could date from the era of the Roman Empire); *see also* John Dwight Ingram, *Vicarious Liability of an Employer-Master: Must There Be a Right of Control?*, 16 N. ILL. U. L. REV. 93, 94 (1995) (stating that Holmes traced the theory of vicarious liability back to Roman Law and Wigmore thought its origins were probably Germanic).

181. Rochelle Rubin Weber, Note, *"Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by their Employees*, 76 MINN. L. REV. 1513, 1518 n.24 (1992) (noting the historical justifications for the doctrine of *respondeat superior* are numerous and one example of a justification concerns the notion of an employer's "control" over his employee's conduct); *see also* Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945, 947 (Tex. 1998) (stating that the "right of control" is a justification for imposing vicarious liability on an employer because the employer controls the means of work).

182. RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a (1958) (noting that since the master has control over the servant's activities, the idea follows that responsibility for the damage done by the servant's activities should lie with the master); *see also* Newspapers, Inc. v. Love, 380 S.W.2d 582, 589 (Tex. 1964) (stating that essentially, vicarious liability is a policy doctrine based in contract, either expressed or implied, vesting the employer with the right to control the work details).

183. John L. Hanks, *Franchisor Liability for the Torts of its Franchisees: The Case for Substituting Liability as a Guarantor for the Current Vicarious Liability*, 24 OKLA. CITY U. L. REV. 1, 17 n.24 (1999) (noting that the most convincing of the explanations for vicarious liability is probably

innocent injured plaintiff first, and then leave the employer to attempt to recoup any loss from the wrongdoing employee.¹⁸⁴ Another reason for this form of liability is based upon public policy, or economically speaking, allocation of risk.¹⁸⁵ A business enterprise should pay.¹⁸⁶ Such a concern is better able to absorb the cost, and in turn obtain insurance against such loss and shift the burden to their customers.¹⁸⁷ As an added bonus, strict liability in these cases will encourage an employer to exercise more care when selecting his employees.¹⁸⁸ These reasons have been given in a

satisfaction, wherein the employee usually cannot compensate the injured party but the master or employer usually does have the ability to pay damages); see also Richard Fossey & Todd A. DeMitchell, "Let the Master Answer": Holding Schools Vicariously Liable when Employees Sexually Abuse Children, 25 J.L. & EDUC. 575, 578 (1996) (noting that a justification for vicarious liability is that enterprises that benefit from their people acting properly most of the time should be forced to pay when an employee acts improperly and causes injuries).

184. For a related justification, see Fossey & Demitchell, *supra* note 183, at 579 (stating that another reason for imposing vicarious liability on employers is that they have the ability to procure insurance); see also WARREN A. SEAVEY, HANDBOOK ON THE LAW OF AGENCY § 83 (1964) (providing a history and the justifications for *respondeat superior*).

185. *Abramson v. Reiss*, 638 A.2d 743, 750 (Md. 1994) (stating that "*respondeat superior* is essentially a public policy doctrine"); see also *Edwards v. Silva*, 32 S.W.3d 713, 715 (Tex. App. 2000) (stating that an employer is under a duty to prevent those who work for him from causing risks that are unreasonable to others).

186. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 124, at 915-16 (5th ed. 1984); Susan Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences—The Traps of Limited Liability Law Firms*, 54 WASH. & LEE L. REV. 717, 746 (1997) (stating that "vicarious liability deliberately allocates risk to the principal as a cost of doing business through agents as a policy rule").

187. See Rhett B. Franklin, Comment, *Pouring New Wine into an Old Bottle: A Recommendation for Determining Liability of an Employer under Respondeat Superior*, 39 S.D. L. REV. 570, 575 n.40 (1994) (noting several authorities who have written on the issue of the economic underpinnings of imposing vicarious liability in the business context).

188. See Fossey & Demitchell, *supra* note 183, at 579 (stating that the rule of vicarious liability fosters safety); Scott J. Hyman, *Far West Financial Corp. v. D&S Co. and the Abolition of Total Equitable Indemnity: What a Long, Strange Trip It's Been*, 21 PACIFIC L.J. 147, 183 n.242 (1989) (noting that greater safety is a policy reason behind strict products liability and that there is a close parallel in policy behind vicarious liability).

variety of combinations, but the result is the same—vicarious liability imposes the risk of loss upon one who did not act, was not present, and in many cases did not know of the injury until after the fact.¹⁸⁹ This is an excellent example of strict liability.

There are exceptions to this general rule. Vicarious liability will not apply when speaking in terms of independent contractors who the employer have no right of control,¹⁹⁰ or scenarios where the employee is on “a frolic of his own” and he is not in the act of furthering his employer’s business,¹⁹¹ or instances where the servant has inflicted an intentional tort for no reason other than to vent his own anger;¹⁹² but these need not be discussed at this point. Of interest to this discussion is the application of strict liability in a situation involving one who is acting on behalf of another.¹⁹³ In

189. See WILLIAM PROSSER, HANDBOOK ON THE LAW OF TORTS § 62 (1941) (stating that since vicarious liability imposes liability without any negligence or fault on the part of the employer, it is a form of strict liability); see also J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 341 (1995) (noting that strict vicarious liability has aspects in common with other strict liability forms).

190. *Espalin v. Children’s Med. Ctr. of Dallas*, 27 S.W.3d 675, 683 (Tex. App. 2000) (stating that independent contractors’ actions will not generally impose vicarious liability on the individuals who contracted with them).

191. *In re Centennial Techs. Litig.*, 52 F. Supp. 2d 178, 184 (D. Mass. 1999) (noting that in a situation where an employee who is on a frolic of his own and commits an act that injures another, vicarious liability will not attach on the employer); see also RESTATEMENT (SECOND) OF AGENCY § 235 (1958).

192. *Davis v. U.S. Steel Corp.*, 779 F.2d 209, 211 (4th Cir. 1985) (stating that under traditional vicarious liability doctrine as applied in South Carolina, an employer cannot be held vicariously liable for the intentional torts of its employees); see also *Luttrell v. O’Connor Chevrolet, Inc.*, No. 01 C 979, 2001 WL 1105125, at *4 (N.D. Ill. Sept. 19, 2001) (stating that sexual assault had not been shown to be in any way connected to the employee’s scope of employment and therefore the employer could not be vicariously liable).

193. See *Ex parte Certain Underwriters at Lloyd’s of London*, 815 So. 2d 558, 561 (Ala. 2001) (stating that if an employee is not acting on behalf of his employer, vicarious liability will not attach); see also *Alexander v. Fujitsu Bus. Communication Syst., Inc.*, 818 F. Supp. 462, 468 (D.N.H. 1993) (ruling that where the plaintiff has alleged that certain individuals were acting on behalf of their employer, the plaintiff had successfully stated a claim to hold the employer vicariously liable).

this instance the justifications for liability differ from those discussed previously and are mentioned for that specific purpose.

VII. DEFAMATION

Defamation consists of two torts: libel and slander.¹⁹⁴ The distinction between the two can at times be difficult to make, but for all practical purposes libel is concerned with the printed word and slander with that which is spoken.¹⁹⁵ Both causes of action are intended to protect an individual's good name, reputation or standing in her community (the tort is usually defined as a communication which holds the plaintiff up to hatred, contempt or ridicule, or causes her to be shunned or avoided), and both can be traced to the very earliest stages of development in our Anglo-American system of jurisprudence.¹⁹⁶ In fact, their lineage goes back to the time when ecclesiastical courts were in full power and defamation at the time was treated as a sin punishable with proper penance.¹⁹⁷ As

194. *West v. Thomson Newspapers*, 872 P.2d 999, 1007 n.12 (Utah 1994) (noting that the term "defamation" can mean either libel or slander and the main distinction between the two is the form of the publication); *see also* RESTATEMENT (SECOND) OF TORTS § 568 (1977) (distinguishing between libel and slander).

195. *Riss v. Anderson*, 304 F.2d 188, 193-94 (8th Cir. 1962) (noting the traditional common law definition of slander and the statutory definition of libel which includes printing of the defamatory statement); *see also* *Charles Parker Co. v. Silver City Crystal Co.*, 116 A.2d 440, 443 (Conn. 1955) (noting that the root of the distinction between slander and libel is the form of publication such as "the written or printed word or passage").

196. *Graves v. Iowa Lakes Cmty. Coll.*, 639 N.W.2d 22, 26 (Iowa 2002) (stating that words that are spoken are actionable as slander if they cause injury to a person's good name); *see also* *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 852 (10th Cir. 1999) (stating that slander protects the interest an individual has in his or her good name, offering a cause of action for an injury to the person's reputation caused by false statements).

197. Bonnie Docherty, *Defamation Law: Positive Jurisprudence*, 13 HARV. HUM. RTS. J. 263, 265 (2000) (noting the history of defamation and how a cause of action for publication of the insult developed out of the English ecclesiastical courts' inability to deal with defamation satisfactorily); *see also* Anita Bernstein, *Restatement (Third) of Torts: General Principles and the Prescription of Masculine Order*, 54 VAND. L. REV. 1367, 1377 (2001) (noting that the law of defamation has taken many forms and has been adjudicated in several different fora, including ecclesiastical courts).

the common law courts came into their own, the cause of action was shifted to their jurisdiction and current rules were formulated at that time.¹⁹⁸

Today, there are special constitutional questions regarding free speech that bring into play issues with regard to public officials, public figures and matters of public concern;¹⁹⁹ but if we set these aside and discuss the tort of defamation it becomes clear that we have yet another example of strict liability, in the sense that once again we are not concerned with the issue of fault. Regardless of why an individual undertook to say something about another or whether there is an issue of mistake, if what was published defames another, liability will follow.²⁰⁰ It is safe to say that in these cases one communicates at her own peril. The only defense, other than truth, would appear to be the narrow one of privilege.²⁰¹

198. Mike Steenson, *Defamation Per Se: Defamation by Mistake?*, 27 WM. MITCHELL L. REV. 779, 782–83 (2000) (noting that ancient conflict between the royal and the ecclesiastical courts over the harm caused by defamatory statements); see also Patrick J. McNulty, *The Law of Defamation: A Primer for the Iowa Practitioner*, 44 DRAKE L. REV. 639, 650 (1996) (stating that the common law courts of the 16th century developed categories for certain types of defamatory statements).

199. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 301–04 (1964) (creating First Amendment protections for the news media in cases where public officials are alleging defamation); see also HAROLD L. NELSON & DWIGHT L. TEETER, JR., *LAW OF MASS COMMUNICATIONS* 62–63 (5th ed. 1986) (describing the tension between the right to privacy and freedom of speech).

200. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (deciding in an opinion with two justices joining Chief Justice Powell and another justice concurring, not to extend the First Amendment protections to matters that are not of a public concern); *Peshak v. Greer*, 13 S.W.3d 421, 425–26 (Tex. App. 2000) (stating that absent any showing of a particular mental state, a false injurious statement's publication is sufficient to establish liability, for the presumption is that one intended to make the statement if it is published); William E. Westerbeke, *Survey of Kansas Tort Law: Part II*, 50 U. KAN. L. REV. 225, 266 (2002) (noting that at common law, defamation was a strict liability tort, but the U.S. Supreme Court's *Times v. Sullivan* decision modified the rule concerning statements about public officials).

201. See Nat Stern, *Private Concerns of Private Plaintiffs: Revisiting a Problematic Defamation Category*, 10 MO. L. REV. 597, 599 (2000) (noting that at common law, absent a defense such as truth, the person making the defamatory statement could be held strictly liable); see also J. Bradley

The justification for this rule, wherein hardship is almost certain to follow, is not clearly enunciated, but seems to rest upon the belief that one's good name should be protected at all costs, and, as a result, when we weigh the interests of the plaintiff's reputation against the interests of the defendant in expressing herself, the plaintiff will almost always win.²⁰² Perhaps the easiest way to explain this line of reasoning is with a blanket statement of public policy. It is better to confine an individual's freedom of expression than to see an innocent injured plaintiff suffer.²⁰³

VIII. WORKMEN'S COMPENSATION

Of all the examples and justifications discussed, the area of workmen's compensation offers the easiest explanation for the application of strict liability.²⁰⁴ Basically, this is a scenario where the legislature has stepped in and decreed that liability, regardless

Buckhalter, *Speak No Evil: Negligent Employment Referral and the Employer's Duty to Warn (or, How Employers Can Have Their Cake and Eat it Too)*, 22 SEATTLE U. L. REV. 265, 308 (1998) (noting that truth is an absolute defense that will defeat liability in a defamation case).

202. *Snead v. Redland Aggregates, Ltd.*, 998 F.2d 1325, 1334 (5th Cir. 1993) (stating that neither the law of Texas nor the Constitution places a fault requirement for a plaintiff to recover his presumed damages between private individuals in cases of libel *per se*); *see also* Hornby v. Hunter, 385 S.W.2d 473, 476 (Tex. App. 1964) (stating that even an innocently published statement that results in defamation will subject the statement's publisher to liability).

203. *See Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987) (comparing and contrasting the torts of defamation and business disparagement and noting that a defamation action protects the injured party's personal reputation, whereas the business disparagement action protects the injured party's economic interests); *see also* Matt Jackson, *One Step Forward, Two Steps Back: A Historical Analysis of Copyright Liability*, 20 CARDOZO ARTS & ENT. L.J. 367, 368 (2002) (noting the limitations courts have placed on strict liability in the context of defamation).

204. *See Bridgeman-Russell Co. v. City of Duluth*, 197 N.W. 971, 972 (Minn. 1924) (stating that workmen's compensation statutes are part of the trend in legislation that even in the absence of any negligence, the individual should be relieved of any "misfortune" of a business); *Meech v. Hillhaven West, Inc.*, 776 P.2d 488, 499 (Mont. 1989) (quoting legislative history behind the workmen's compensation statute where it was noted that it would allow an injured employee to recover without a showing of negligence on the employer's part).

of fault, should fall upon an employer.²⁰⁵ Since all jurisdictions have their own version of this type of legislation, we have elected to use the Texas workman's compensation statute, which is similar to that of other jurisdictions, as our focal point for discussion.²⁰⁶ In essence, it provides that whenever one employs more than three individuals he is eligible for workman's compensation insurance.²⁰⁷ So as to encourage this form of coverage, the legislature has further stated that, should an employer in this type of scenario fail to secure this insurance, all of the employer's common law defenses are rendered inoperable.²⁰⁸ In any subsequent law suit, he will not be allowed to allege any common law defense on his behalf.²⁰⁹ If, however, the employer selects such coverage, he will again be deprived of his common law defenses, but in this instance

205. See *Liberty Mut. Ins. Co. v. Thompson*, 171 F.2d 723, 725 (5th Cir. 1949) (stating that questions of employer negligence are entirely foreign to the Workmen's Compensation Act, which has as its purpose the provision of compensation to injured employees); *Travelers' Ins. Co. v. Lancaster*, 71 S.W.2d 318, 321 (Tex. App. 1934) (stating that the Workmen's Compensation Act was created as a type of life and accident insurance where, should certain contingencies happen, the employee would receive payment as long as the employee had not intentionally induced or provoked the occurrence of the contingency).

206. See TEX. LAB. CODE ANN. §§ 401.001–506.002 (Vernon 2002); *Parker v. Employers Mut. Liab. Ins. Co.*, 440 S.W.2d 43, 45 (Tex. 1969) (stating that the basis of liability in a Texas Workman's Compensation context is different than the basis of liability in a negligence action).

207. See *S. Underwriters v. Gallagher*, 136 S.W.2d 590, 592 (Tex. 1940) (stating that if an individual holds the status of a Texas employee, that individual is entitled to the protections of the Workmen's Compensation statute); *Tex. Employers' Ins. Ass'n v. Price*, 300 S.W. 667, 669 (Tex. App. 1927) (holding that employee covered by Workmen's Compensation statute in one state can also recover under statute of another state if that is where the injury occurred).

208. *Tex. Mexican Ry. Co. v. Bouchet*, 963 S.W.2d 52, 58 n.3 (Tex. 1998) (noting the limitations on the defenses available to non-subscribing employers); see also David W. Robertson, *The Texas Employer's Liability in Tort for Injuries to an Employee Occurring in the Course of the Employment*, 24 ST. MARY'S L.J. 1195, 1197 (1993) (stating that the employer who elects not to subscribe cannot invoke affirmative defenses such as the fellow servant rule, assumption of the risk, and contributory negligence).

209. TEX. LAB. CODE ANN. § 406.033 (Vernon Supp. 2003); *Britt v. Suckle*, 453 F. Supp. 987, 993 (E.D. Tex. 1978) (noting that non-subscribing employer could not avail itself of common law defenses).

the cost of compensation will be shifted to the insurance carrier.²¹⁰ In essence, this is strict liability.²¹¹ The employer, regardless of fault, will be held responsible; the big difference is that in these cases the financial responsibility is placed upon an insurance carrier, and the cost of the insurance is passed to the consumer as part of the price paid for the goods or services introduced into the stream of commerce.²¹²

The upside to this form of coverage is that an employee, once having established an injury, will be compensated almost immediately.²¹³ The downside, however, is that seldom does this coverage equal or come close to what would have been obtained in any subsequent personal injury litigation.²¹⁴ There is no argument, however, that this is strict liability. The reason or justification is sim-

210. See TEX. LAB. CODE ANN. § 406.031; *Payne v. Galen Hosp. Corp.*, 4 S.W.3d 312, 315 (Tex. App. 1999) (stating that an employee's exclusive remedy for covered accidents is to be found under the statute in both its former and current version).

211. James R. Chelius, *Liability for Industrial Accidents: A Comparison of Negligence and Strict Liability Systems*, 5 J. LEGAL STUD. 293, 298-301 (1976) (noting the emergence of worker's compensation laws as signaling a departure from negligence and a move toward a regime akin to "shared strict liability"); Jeffrey M. Jakubiak, *Maintaining Air Safety At Less Cost: A Plan for Replacing FAA Safety Regulations with Strict Liability*, 6 CORNELL J.L. & PUB. POL'Y 421, 429 (1997) (noting that Supreme Court decisions have made Worker's Compensation statutes "similar to being a true strict liability scheme").

212. *Prescott v. CSPH, Inc.*, 878 S.W.2d 692, 694 (Tex. App. 1994) (stating that under the Worker's Compensation Act, liability attaches to an insurance carrier for an employee who was injured regardless of the employer's fault or negligence); see also *Paradissis v. Royal Indem. Co.*, 507 S.W.2d 526, 529 (Tex. 1974) (noting the "statutory scheme is in lieu of common law liability based on negligence").

213. *Davis v. Sinclair Ref. Co.*, 704 S.W.2d 413, 415 (Tex. App. 1985) (stating that the object of the Texas Worker's Compensation Act is to do away with common-law negligence and attendant issues and to fix the amount of recovery); see also *Woolsey v. Panhandle Refining Co.*, 116 S.W.2d 675, 676 (Tex. 1938) (noting that the Texas Legislature enacted the present Workmen's Compensation Law due to the demand for an alteration in the way employment-related injury disputes were settled).

214. Kenneth M. Koprowicz, Note, *Corporate Criminal Liability for Workplace Hazards: A Viable Option for Enforcing Workplace Safety?*, 52 BROOK. L. REV. 183, 192 (1986) (noting that while jury awards for personal injuries can amount to millions of dollars, worker's compensation awards are set by schedules).

ple; the legislature in this type of case has decreed that whenever an employee is injured on the job, the employer will be responsible.²¹⁵

IX. STRICT PRODUCTS LIABILITY UNDER SECTION 402A OF THE RESTATEMENT (SECOND) OF TORTS

The idea of strict liability in the area of defective products is of much more recent vintage than in the area of other torts.²¹⁶ It did not, however, appear unexpectedly. Before the concept was published in the 1960s as part of the *Restatement*, it had, as is the tradition with the American Law Institute, been espoused for decades.²¹⁷ As early as the 1940s, concurring opinions had reasoned that strict liability should apply whenever a manufacturer undertook to introduce a defective product into the stream of commerce, and legal scholars were quick to support this new and novel idea.²¹⁸ It was not, however, until 1962, when Justice Roger Traynor of the Supreme Court of California rendered his decision in *Greenman v. Yuba Power Products*²¹⁹ that the idea was given its most important momentum.

In *Greenman*, the defendant designed, manufactured and marketed a power tool that could be used as a saw, drill press, and

215. *Parker v. Employers Mut. Liab. Ins. Co. of Wis.*, 440 S.W.2d 43, 45 (Tex. 1969) (stating that if employment caused a disease or injury, even if employer was not at fault, the employer is responsible); *Gen. Accident, Fire & Life Assurance Corp. v. Evans*, 201 S.W. 705, 708 (Tex. App. 1918) (stating that compensation may be awarded even if employer's negligence was not the proximate cause of the employee's injury).

216. See DAVID G. OWEN, *PRODUCTS LIABILITY AND SAFETY, CASES AND MATERIALS* 16 (3d ed. 1996) (noting that there are more products liability cases in the latter part of the twentieth century than in any other time); Charles E. Cantu, *Twenty-five Years of Strict Product Liability Law: The Transformation and Present Meaning of Section 402A*, 25 ST. MARY'S L.J. 327, 329 (1993).

217. See OWEN, *supra* note 216, at 16 (noting that strict manufacturer liability in warranty and tort exploded into adolescence in the 1950s).

218. See Charles E. Cantu, *Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Crack'd*, 25 GONZ. L. REV. 205, 207-08 (1989-90) (noting that as far back as the 1940s, dissenting and concurring opinions argued for strict liability application in manufacturing cases).

219. 377 P.2d 897 (Cal. 1963).

wood lathe.²²⁰ As a result of a defect in the design, the plaintiff was injured when, while using the tool as a lathe, a large piece of wood flew out and struck him in the head, inflicting serious injury.²²¹ Justice Traynor's decision was straightforward. First, he reasoned that strict liability in the area of defective products had already been applied in the case of unwholesome food, and had most recently been extended to such other products as a grinding wheel, bottles, a vaccine, an insect spray, a surgical pin, a skirt, a tire, a home permanent, a hair dye, and automobiles.²²² Secondly, Traynor reasoned that in these cases liability had been imposed on the basis of a warranty which ran from the manufacturer, but that the abandonment of privity and the inability of a manufacturer to disclaim warranties actually meant that the cases were in fact decided on the basis of strict liability; he elected to apply this principle to the case before him.²²³ From a historical point of view, it is important to note that this was the first time a court in this type of case had held for the plaintiff on the basis of strict liability. Two years later, this decision served as the basis of section 402A of the *Restatement (Second) of Torts*,²²⁴ which states:

(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

220. *Id.* at 898.

221. *Id.*

222. *Id.* at 900-01.

223. *Id.* at 901.

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

from or entered into any contractual relation with the seller.

Section 402A swept the country in a firestorm fashion,²²⁵ and it soon became clear that it was going to be interpreted by the courts to mean more than had originally been expressed.²²⁶ Much has already been said of this explosive reaction and it need not be discussed here. What is important to our discussion, however, is the principle of strict liability and how it is applied against one who has introduced a defective product into the stream of commerce.

From its very inception, the courts were clear that section 402A did not call for absolute liability.²²⁷ The idea espoused by the *Restatement* was not to make insurers out of manufacturers who placed a product that caused injury into the market place.²²⁸ Instead, the goal was to impose strict liability upon one who introduced a *defective* product into the stream of commerce.²²⁹ The phrase "in a defective condition unreasonably dangerous to the

225. *Jones v. Allercare, Inc.*, 203 F.R.D. 290, 307 n.8 (N.D. Ohio 2001) (stating that the plaintiffs in this case claimed that at the turn of the century, forty-three states had adopted the *Restatement's* strict liability in tort for product defects).

226. See William E. Westerbeke, *The Source of Controversy in the New Restatement of Products Liability: Strict Liability Versus Products Liability*, 8 KAN. J.L. & PUB. POL'Y 1, 6 (1998) (asserting that section 402A at its inception was intended to address the traditional barriers to recovery, but it expanded through interpretations to the entire field of products liability); see also *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 212 A.2d 769, 779-80 (N.J. 1965) (illustrating the court's willingness to expand section 402A by showing that a strict liability cause of action might apply to lease situations).

227. See, e.g., *Helene Curtis Indus., Inc. v. Pruitt*, 385 F.2d 841, 849-50 (5th Cir. 1967); see also *Elk Corp. of Ark. v. Jackson*, 725 S.W.2d 829, 833 (Ark. 1987).

228. See *Hittle v. Scripto-Tokai Corp.*, 166 F. Supp. 2d 159, 165 (M.D. Pa. 2001) (stating that to hold that a manufacturer is an insurer of his product would be to undermine the policies behind section 402A); see also *Korando v. Uniroyal Goodrich Tire Co.*, 637 N.E.2d 1020, 1024 (Ill. 1994) (stating that a manufacturer is not an insurer).

229. *Voelkel v. Gen. Motors Corp.*, 846 F. Supp. 1468, 1475 (D. Kan. 1994) (stating that in order to impose strict liability in tort, proof of defect is required); *Vincer v. Esther Williams All-Aluminum Swimming Pools Co.*, 230 N.W.2d 794, 798 (Wis. 1975) (stating that a requirement of strict products liability is an unreasonably dangerous defect).

user or consumer” became one of the most important of section 402A, and it proved to be the most difficult for the courts to interpret.²³⁰ Initially, we were unable to distinguish between a product that was defective and one which simply fell short of our expectations.²³¹ The issue was further complicated when we considered that any product is capable of inflicting harm, and no product is technologically perfect.²³² The courts added to this quandary when they acknowledged that a product could be legally defective because it had been mis-designed, mis-manufactured, or mis-marketed, and this confusion was compounded because there was no accepted test for determining each of these conditions.²³³ It is for these reasons that early decisions interpreting section 402A were often confusing.²³⁴ However, once the concept of defect became established, definite standards began to emerge and a true image of section 402A became obvious.

230. See RESTATEMENT (SECOND) OF TORTS § 402A (1965) (stipulating that a product must be in a defective condition in order for a plaintiff to have a cause of action); see generally *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 740 (N.Y. 1995) (Simons, J., dissenting) (noting that the term “defect” has no clear legal meaning).

231. *Gappelberg v. Landrum*, 666 S.W.2d 88, 90 (Tex. 1984) (stating that the issue of when a product is merely a lemon, rather than defective, may entitle the buyer to revoke his acceptance of the item). This case illustrates a different meaning of “defect” than what is applied in strict products liability cases. When the buyer obtains his product without knowing of the defects and then later discovers the product’s problems by using it, the buyer’s remedy through the Uniform Commercial Code may be to revoke his acceptance within a reasonable amount of time. *Id.*

232. See OWEN, *supra* note 216, at 262 n.3 (stating “all products are flawed at some technological level”); Cantu, *supra* note 216, at 334 n.12 (noting that even seemingly harmless products such as ball-point pens and neckties can cause injuries).

233. J. David Tate, Comment, *The American Law Institute Study on Enterprise Liability for Personal Injury: How Does Texas Tort Law Compare?*, 45 BAYLOR L. REV. 103, 110–11 (1993) (stating that there are three theories to determine when a product is defective).

234. *Ross v. Up-Right, Inc.*, 402 F.2d 943, 947 (5th Cir. 1968) (commenting that “to speak in terms of ‘defect’ only causes confusion”).

A. Mis-manufactured Products

The first idea to take hold was that a product could be defective because it had been mis-assembled.²³⁵ This condition is usually attributable to the fact that substandard raw materials have been used in the construction of the goods or that they were assembled in a manner not intended by the manufacturer.²³⁶ Their present state may be a result of some latent deficiency or, in turn, due to something as simple as a missing screw or a bolt that has not been adequately tightened.²³⁷ In any case, however, it is clear that the product stands alone; it is different from the rest of the defendant's production.²³⁸ For this reason, the best standard, which ultimately emerged for determining defect, is what is referred to as the reasonable expectations test.²³⁹ This test uses an objective

235. See Ellen Wertheimer, *The Third Restatement of Torts: An Unreasonably Dangerous Doctrine*, 28 SUFFOLK U. L. REV. 1235, 1242 (1994) (stating that not long after the inception of section 402A, scholarly commentary argued for the position that only mis-manufacture cases fell within the ambit of the section 402A); see also *Yamaha Motor Co. v. Thornton*, 579 So. 2d 619, 622–23 (Ala. 1991) (showing that where a motorcycle speed reduction plate had been left off through the mis-manufacture of the item, strict products liability applied).

236. *Pouncey v. Ford Motor Co.*, 464 F.2d 957, 961 (5th Cir. 1972) (finding evidence that the raw material supplied for the defective fan blades that caused the plaintiff's injuries was a type of "dirty" steel); *Curtiss v. Young Men's Christian Ass'n*, 511 P.2d 991, 1000 (Wash. 1973) (Hamilton, J., concurring in part, dissenting in part) (stating that it was clear that the injuries of the plaintiff were caused by improper assembly).

237. *Keeler v. Richards Mfg. Co., Inc.*, 817 F.2d 1197, 1199 (5th Cir. 1987) (affirming a jury verdict for the plaintiff in a case where a surgeon had inserted a hip screw during an operation and, months later, the screw broke); *O'Donnell v. Geneva Metal Wheel Co.*, 183 F.2d 733, 737 (6th Cir. 1950) (showing that a wheel barrow tire exploded after its metal rivets, which had been weakened during the assembly process, came apart).

238. *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 844 (Tex. 2000) (stating that to recover in strict liability for a manufacturing defect, it must be shown that the product's "construction or quality deviates from the specifications or planned output in a way that is unreasonably dangerous"); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 434 (Tex. 1997) (stating that a manufacturing "defect is a deviation from the planned output").

239. David A. Fischer, *Product Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 348 (1974) (conveying the information that the test measuring the reasonable expectations of the consumer is a natural fit for analyzing whether a product is defective); see also *Sperry-New Holland v.*

standard, usually employed by the jury as a question of fact, and is reminiscent of the implied warranty of merchantability that is found in the Uniform Commercial Code.²⁴⁰ The question becomes: did the product meet the reasonable expectations of the user consumer?

Generally, this issue is determined by looking to three criteria.²⁴¹ There may be others, but the principle ones are: product usage, product characteristics and the manufacturer's advertisements.²⁴² Under the first, we are concerned with the purpose for which the product is ordinarily used.²⁴³ Consumers have become

Prestage, 617 So. 2d 248, 254 (Miss. 1993) (explaining that under the reasonable expectations test, a defective product must be one that the ordinary consumer would not know to be unreasonably dangerous).

240. See Rebecca Tustin Rutherford, Comment, *Changes in the Landscape of Products Liability Law: An Analysis of the Restatement (Third) of Torts*, 63 J. AIR L. & COM. 209, 224 (1997) (stating the consumer expectations test is easy to administer and is determined from the ordinary consumer's standpoint); see also *Barker v. Lull Engineering Co.*, 573 P.2d 443, 454 (Cal. 1978) (stating that the consumer expectation test is somewhat analogous to the warranty of fitness and merchantability found in the *Uniform Commercial Code*).

241. See Theodore S. Jankowski, *Focusing on Quality and Risk: The Central Role of Reasonable Alternatives in Evaluating Design and Warning Decisions*, 36 S. TEX. L. REV. 283, 315 n.105 (1995) (explaining that the consumer expectation test examines a product for defectiveness through the lens of the product's characteristics or common usage); Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1370 (1974) (theorizing that a characteristic to be examined for a product's defectiveness is its advertising).

242. See Jankowski, *supra* note 241, at 315 n.105; Shapo, *supra* note 241, at 1370; see also *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 230 N.W.2d 794, 798 (Wis. 1975) (stating that the consumer expectation test is based on the characteristics of the type of product). *But see* *Seattle-First Nat. Bank v. Talbert*, 542 P.2d 774, 779 (Wash. 1975) (considering a number of factors under a version of the reasonable expectations test that takes into account potential harm from the defective product as well as the more traditional characteristics).

243. *Syrie v. Knoll Int'l*, 748 F.2d 304, 306 (5th Cir. 1984) (stating that for a products liability action based on strict liability, the defective manufacture of a product must be one that the ordinary consumer would not contemplate); *Cook v. Downing*, 891 P.2d 611, 613 n.1 (Okla. Ct. App. 1994) (pointing out that a good's ordinary purposes are contained within the idea of the product's merchantability and reinforce the idea of the good's cus-

accustomed to relying upon and, in fact, demand that the goods they have purchased are suitable for their intended purpose. The second involves the appearance of the product.²⁴⁴ It goes without saying that consumers expect more from rugged heavy machinery than they do from delicate fine precision tools.²⁴⁵ Finally, the third criterion relies upon the statements and claims made by the manufacturer in its advertisements; the projected image of the goods.²⁴⁶ If the defendant has gone to great lengths in creating an expectation concerning its product, the consuming public should hold it to its word.

Since reasonable minds may differ on the outcome of these questions, the issue is best left to the jury.²⁴⁷ Did the product in question meet the reasonable expectations of the user consumer? If the answer is in the affirmative, then the product is not defective. However, if the jury comes back with a negative answer, then clearly we have a defect attributable to the mis-assembling of the goods in question.²⁴⁸

tomary uses).

244. Shapo, *supra* note 241, at 1370 (stating that a consumer's expectations are built upon a product's appearance as well as the consensus of the product's function).

245. *Heaton v. Ford Motor Co.*, 435 P.2d 806, 810 (Or. 1967) (stating that a "rugged" Ford truck could be expected by an ordinary consumer to negotiate rough terrain).

246. *Id.* at 809–10 (showing that the plaintiff in a defective manufacturing case referred to advertising data to support his consumer expectations theory); *see also* Note, *Harnessing Madison Avenue: Advertising and Products Liability Theory*, 107 HARV. L. REV. 895, 904–06 (1994) (conveying the information that courts have considered a product's advertising as a means of establishing that product's defectiveness since advertising influences a consumer's expectations).

247. *Simien v. S.S. Kresge Co.*, 566 F.2d 551, 555–56 (5th Cir. 1978) (finding reversible error in the jury charge on the issue of defectiveness); *Rourke v. Garza*, 530 S.W.2d 794, 799 (Tex. 1975) (noting how the jury found some scaffolding to be defective and unreasonably dangerous).

248. *See Helene Curtis Indus., Inc. v. Pruitt*, 385 F.2d 841, 850 (5th Cir. 1967) (implying that where there is evidence of a miscarriage in the production of a product, a manufacturing defect may lie); *see also* Bailey H. Kuklin, *The Justification for Protecting Reasonable Expectations*, 29 HOFSTRA L. REV. 863, 896 n.143 (2001) (identifying "the 'representational' theory of consumer expectations whereby" the manufacturer's "image-making", advertising, and appearance are analyzed).

B. *Mis-designed Products*

From a historical perspective, it is clear that the issue of mis-designed products is the one which gave us the most difficulty.²⁴⁹ At the outset, it must be noted that a finding of mis-design, unlike that of mis-manufacture, will condemn the defendant's entire line of production.²⁵⁰ This type of product does not stand alone but in fact is identical to the manufacturer's entire output. It is for this reason that the courts exerted themselves more when attempting to determine an adequate standard for defect.²⁵¹ As a result, different tests were advanced. With differing combinations and with varying degrees of enthusiasm, the various tests set forth for determining whether a product has been mis-designed have been: (1) whether the product met the reasonable expectations of the user consumer (the exact same standard for determining mis-manufacture which added to the confusion mentioned above); (2) whether a reasonably prudent manufacturer would have placed this product into the stream of commerce had it been aware of the risk posed by the present design; (3) whether the product was in a con-

249. *Acord v. Gen. Motors Corp.*, 669 S.W.2d 111, 115-16 (Tex. 1984) (showing how the development of rules dealing with the jury charge in mis-design cases created a complicated history of case law in Texas); *see also* *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1142 (5th Cir. 1985) (quoting *Turner v. Gen. Motors Corp.*, 584 S.W.2d 844 (Tex. 1979)) (recapitulating the history of how the jury instruction for mis-design was changed through case law and setting forth the jury instruction for mis-design cases as follows: "By the term 'defectively designed' as used in this issue is meant a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use" 250. John B. Attanasio, *The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability*, 74 VA. L. REV. 677, 704 n.122 (1988) (stating that to find a design defective is to find the entire production line defective); *see* Michelle Capezza, Comment, *Controlling Guns: A Call for Consistency in Judicial Review of Challenges to Gun Control Legislation*, 25 SETON HALL L. REV. 1467, 1486 n.65 (1995) (stating that each unit of the production line that produced a misdesigned product represents a potential lawsuit).

251. *See* *Turner v. Gen. Motors Corp.*, 584 S.W.2d 844, 849 (Tex. 1979) (showing the careful analysis of the Texas Courts of Civil Appeals in determining which factors should be balanced in mis-design cases); *see also* *Miller v. Bock Laundry Mach. Co.*, 568 S.W.2d 648, 653 (Tex. 1977) (stating the broad form submission of the definition of defective design did not cause the rendition of an improper judgment).

dition considered to be unreasonably dangerous; and finally, (4) whether the risk created by the product as presently designed outweighed its utility to the consuming public or its benefit to society.²⁵²

After a period of time, the last test, designated as the risk-benefit analysis, emerged as the predominant standard for determining design defect.²⁵³ It is expressed as $PL (G) > B = D$, and is almost identical to the formula set forth early on for determining negligence.²⁵⁴ In this instance we again multiply the probability of loss, PL, times the gravity of the foreseeable harm, G, and compare this total against the burden of eliminating or at least reducing the injury, B.²⁵⁵ The result is a defective product where B is less than the product of the first two variables.²⁵⁶ In this case, however, B, the burden, is not concerned with the behavior of the defendant, but instead with a feasible alternative to the product under consideration.²⁵⁷

252. David A. Curran, Note, *Funds v. Big Tobacco and the Proximate Cause Issue: A Framework for Derivative Injuries*, 80 TEX. L. REV. 393, 396 n.16 (2001) (stating that in design defect cases, generally courts adopt one of two tests); Michael J. Toke, Note, *Restatement (Third) of Torts and Design Defectiveness in American Products Liability Law*, 5 CORNELL J.L. & PUB. POL'Y 239, 257 (1996) (taking issue with courts using the reasonable expectation test in misdesign cases).

253. See, e.g., *Brown v. Link Belt Div. of FMC Corp.*, 666 F.2d 110, 115 (5th Cir. 1982) (stating the balancing test is mandated when determining whether a product is unreasonably dangerous).

254. *Compare Knitz v. Minster Mach. Co.*, 1987 WL 6486, at *16-17 (Ohio Ct. App. Feb. 9, 1987) (setting out the formula for the risk utility test), with *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (establishing Judge Hand's famous formula for negligence).

255. See *Baker v. Lull Eng'g Co.*, 573 P.2d 443, 455 (Cal. 1978) (showing the factors that are used in applying what would become known as the risk benefit test); see also *Todd v. BIC*, 9 F.3d 1216, 1219-20 (7th Cir. 1993) (considering issues of both mis-design and mis-marketing and utilizing the risk benefit test).

256. See *Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 257 (Tex. 1999) (showing the risk utility test being used for a design defect case); see also *Foster v. Ford Motor Co.*, 616 F.2d 1304, 1311 (5th Cir. 1980) (concluding that the jury could find by using the risk utility test that the risk of harm outweighed the benefits of the product).

257. *Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584, 588 (Tex. 1999) (stating that the plaintiff must show an alternative design is technologically feasible); see also *Gen. Motors Corp. v. Harper*, 61 S.W.3d 118, 124 (Tex.

When investigating this issue of a feasible alternative, the jury will, as a rule, consider the following factors: cost, marketability, state of the art, utility and safety.²⁵⁸ Cost is an important issue because in a capitalistic economy we will not expect the manufacturers to spend themselves into oblivion. The cost of this alternative design must, therefore, be reasonable.²⁵⁹ Marketability is also a factor.²⁶⁰ Manufacturers are in the business of selling; as a result, it would be unthinkable to require a design that will not be accepted by consumers. State of the art must be considered.²⁶¹ We will require only that which is technologically feasible.²⁶² If the

App. 2001) (stating that an alternative design that is safer must be shown to exist, that the risk of injury must be reduced by the alternative design, and it must be economically and technologically feasible).

258. See *Guzman v. Synthes (USA)*, 20 S.W.3d 717, 721 (Tex. App. 1999) (noting that implicit in any safer alternative design is the technological and economic possibility of that design); *Magic Chef, Inc. v. Sibley*, 546 S.W.2d 851, 854 (Tex. App. 1977) (holding that a stove that was defective could have been made safer at a cost of only an additional \$1.50 per unit).

259. See *Hannah v. Greg, Bland, & Berry, Inc.*, 840 So. 2d 839, 860 (Ala. 2002) (discussing alternative design and showing that under the examination of an expert, the cost of the alternative design was part of the testimony); see also *Smith v. Louisville Ladder Co.*, 237 F.3d 515, 532 (5th Cir. 2001) (noting that with the inherent limitations of the availability of relevant data, a plaintiff cannot be expected to prove with particularity the economic costs a manufacturer would incur if the manufacturer were to employ the suggested alternative design).

260. *Scarangella v. Thomas Built Buses, Inc.*, 695 N.Y.S.2d 520, 522-23 (N.Y. 1999) (stating that function and monetary cost is a factor to any alternative design); see also John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 750 (1983) (contending that price of an alternative design determines whether a product will remain in the marketplace).

261. See *Connally v. Sears, Roebuck & Co.*, 86 F. Supp. 2d 1133, 1139 (S.D. Ala. 1999) (noting that an alternative design must be able to be adapted to the current market and the state of the art is a factor); *Fibreboard Corp. v. Fenton*, 845 P.2d 1168, 1172 (Colo. 1993) (noting that although the issue had to do with defective marketing, state of the art evidence is admissible with respect to design defect cases as well). But see *Besheda v. Johns Manville Prods. Corp.*, 447 A.2d 539, 547 (N.J. 1982) (declining to factor in state of the art in the determination of defectiveness).

262. *Rexrode v. Am. Laundry Press Co.*, 674 F.2d 826, 832 (10th Cir. 1982) (concluding that if the technology was not available at the time of the product's making, manufacturers should not be held strictly liable); Gary C. Robb, *A Practical Approach to Use of State of the Art Evidence in Strict*

alternative design is impossible to achieve, we will not consider it. Utility is important.²⁶³ If the proposed design does not fulfill the needs of the consuming public, it is by definition not feasible. Finally, the issue of safety is of the utmost importance.²⁶⁴ The ultimate concern before the court is a safer product, and whether or not the alternative design meets this goal must be considered by the jury.²⁶⁵

While this test appears similar to the one for determining negligence,²⁶⁶ there are some very important distinctions. First, in this instance our focus is different. We are not concerned with a negligent defendant, but instead with whether we have a defective product.²⁶⁷ A second difference is that under 402A the defendant manufacturer is charged with knowledge of a defect, whereas in

Products Liability Cases, 77 NW. U. L. REV. 1, 28–29 (1982) (arguing that as part of the ultimate issue of defectiveness, the jury answers questions of a feasible alternative design).

263. See *Hagens v. Oliver Mach. Co.*, 576 F.2d 97, 100 (5th Cir. 1978) (showing that the blade guard on a saw could not be non removable without impairing the saw's utility).

264. See *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 335 (Tex. 1998) (stating that alternative designs must be safer and reasonable); see also *McCormack v. Hanksraft Co.*, 154 N.W.2d 488, 499 (Minn. 1967) (attaching strict liability on manufacturer for the unreasonable risk the product posed to the public).

265. *Martinez*, 977 S.W.2d at 335 n.4 (making clear that a reasonably safer alternative design is a prerequisite to a finding of defectiveness that is to be determined by the jury); see also *Ford Motor Co. v. Nowak*, 638 S.W.2d 582, 585 (Tex. App. 1982) (stating that a finding of defectiveness by the jury may be influenced by evidence of a safer alternative design).

266. Michael D. Green, *Negligence = Economic Efficiency: Doubts*, 75 TEX. L. REV. 1605, 1636 (1997) (noting that the defective design test uses a formula similar to the one used for a negligence determination); see also *Lenhardt v. Ford Motor Co.*, 683 P.2d 1097, 1102 (Wash. 1984) (Dimmick, J., dissenting) (noting a proposal in the state's legislative tort reform history to introduce a balancing test based on risk and utility that was closely related to the negligence test).

267. See *Wallace v. Ford Motor Co.*, 723 A.2d 1226, 1229 (N.J. Super. Ct. App. Div. 1999) (stating that a design defect analysis focuses on the condition of the product); see also David A. Urban, Comment, *Custom's Proper Role in Strict Products Liability Actions Based on Design Defect*, 38 UCLA L. REV. 439, 471–72 (1990) (acknowledging the close relationship between Judge Learned Hand's negligence formula and the risk benefit test used for defective design).

negligence the defendant manufacturer is held to the standard of the reasonable and prudent expert.²⁶⁸ Finally, in this area the burden is involved, not with the defendant's conduct, but instead with whether we have a feasible alternative to the design under consideration.²⁶⁹

After some trial and error, this test emerged as the prevailing one for determining whether the defendant's product was misdesigned.²⁷⁰ It is easy for the jury to apply and is best suited for situations where an addition, modification or deletion to the existing product will result in a safer, more efficient and marketable product.²⁷¹

C. Mis-marketed Products

The final perspective of defectiveness involves marketing.²⁷² In this instance, we are involved with the safe and effective use of

268. *Eaves v. Hyster Co.*, 614 N.E.2d 214, 216 (Ill. App. Ct. 1993) (stating that under Illinois law, a jury may presume in negligence actions that a manufacturer has expert knowledge and skill); *see also Foster v. Ford Motor Co.*, 616 F.2d 1304, 1311 n.17 (5th Cir. 1980) (stating that a manufacturer is required to foresee risks that would not be contemplated by the ordinary consumer).

269. *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 384 (Tex. 1995) (stating that courts evaluate defective design in terms of safer alternative designs); *Nowak*, 638 S.W.2d at 585 (emphasizing a safer alternative design as a factor to be considered by the jury).

270. *See Cantu*, *supra* note 216, at 335 (stating that the risk benefit analysis has been the most frequently used standard in the misdesign area); *see also Brown v. Link Belt Div. of FMC Corp.*, 666 F.2d 110, 115 (5th Cir. 1982) ("In defining unreasonably dangerous, a balancing test is mandated: if the likelihood and gravity of harm outweigh the benefits and utility of the product, the product is unreasonably dangerous.").

271. Michael J. Toke, Note, *Restatement (Third) of Torts and Design Defectiveness in American Products Liability Law*, 5 CORNELL J.L. & PUB. POL'Y 239, 249 (1996) (noting that in the draft *Restatement*, the risk utility test was the preferred one in design defect cases); *see also Knitz v. Minster Mach. Co.*, 432 N.E.2d 814, 818 (Ohio 1982) (stating that in a defective design case, if there are no safer alternatives, the risk benefit test should be applied).

272. *Chandler v. Gene Messer Ford, Inc.*, 81 S.W.3d 493, 503-04 (Tex. App. 2002) (setting forth what elements a plaintiff must prove in a marketing defect case); *see also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965) (noting that a "seller may be required to give directions or warning,

the goods, which has a direct correlation to the warnings as well as the instructions that accompany the product.²⁷³ Oddly, and this was probably a minor cause of the confusion referred to above, we encounter two similarities with mis-design that arose in the preceding section.²⁷⁴ The first is that the manufacturer once again intended to place its product into the stream of commerce in its present condition.²⁷⁵ As a result, this means that a finding of defectiveness will once again condemn the defendant's entire line of product.²⁷⁶ Secondly, the test which finally emerged for determining whether the information accompanying the product was sufficient or lacking is the risk-benefit analysis.²⁷⁷

When applying this test, we once again measure the probability of loss, PL, times the gravity of the foreseeable harm, G, and weigh the sum of these two variables against B, the burden of eliminating or at least reducing the risk in question.²⁷⁸ In this in-

on the container [of a product] as to its use").

273. OWEN, *supra* note 216, at 329–31 (explaining that a marketing defect can occur when the manufacturer has failed to give “adequate warnings and instructions”); *see also* Griggs v. Firestone Tire & Rubber Co., 513 F.2d 851, 858–59 (8th Cir. 1975) (theorizing that the marketing could have been made safer if the label that included warnings against mismatching parts of tire rims had been stamped on the actual components of the rim).

274. *See* James A. Henderson, Jr., Restatement Third, Torts: Products Liability: *What Hath the ALI Wrought?*, 64 DEF. COUNS. J. 501, 506 (1997) (stating that the similarities in determining whether a product is defective due to mis-design or defective marketing both result in condemning the manufacturer's entire production line).

275. Mazzi v. Greenlee Tool Co., 320 F.2d 821, 823 (2d Cir. 1963) (stating in this pre-402A case that failure to warn of dangers of a product that is going into the stream of commerce as intended is the hallmark of negligent marketing); *see also* Hageney v. Jackson Furniture of Danville, Inc., 746 So. 2d 912, 925 (Miss. Ct. App. 1999) (providing jury instruction that states a product may be defective if it lacks adequate warnings and has gone out into the stream of commerce as intended by the manufacturer).

276. Henderson, *supra* note 274, at 506.

277. Fibreboard Corp. v. Fenton, 845 P.2d 1168, 1173 (Colo. 1993) (noting how the risk benefit test for design defect cases is similar to the test used for marketing defect cases); *see also* Ruiz-Guzman v. Amvac Chem. Corp., 7 P.3d 795, 807 (Wash. 2000) (stating that most courts concur that a balancing of risks and benefits must be performed in both marketing and design cases).

278. USX Corp. v. Salinas, 818 S.W.2d 473, 485 (Tex. App. 1991) (stating that prior decisions of the Texas Supreme Court utilize a test for

stance, however, we are not concerned with the idea of a feasible alternative to the design of the product, but instead, with the issue of whether the warnings and instructions accompanying the product are sufficient.²⁷⁹ This is a very delicate issue. Manufacturers cannot be expected to warn and issue instructions as to all foreseeable risks.²⁸⁰ The consequence of such a process would result in a voluminous amount of information being conveyed to the user consumer which in all probability would be ignored.²⁸¹ At first blush, this problem is further exaggerated by the risk-benefit analysis employed. It would appear that the burden of an additional warning or instruction would always be less than the foreseeable risk of harm, which would by necessity always result in a jury finding of defectiveness. The solution, and the reasoning is admittedly circuitous, is to require only that amount of information which is considered to be adequate.²⁸² Adequate information is defined as those warnings and instructions that would satisfy the

marketing defects that is "indistinguishable" from the negligence test); *see also* *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 469 (5th Cir. 1985) (stating that a product may be defective if the magnitude of the risk outweighs its utility and even where the balance tips in favor of its utility, adequate warnings must be given).

279. *Sims v. Washex Mach. Corp.*, 932 S.W.2d 559, 562 (Tex. App. 1995) (noting that a marketing defect occurs when the manufacturer can foresee the risk but fails to provide adequate warnings of that risk or fails to instruct on the safe use of the product); *Lujan v. Tampo Mfg. Co.*, 825 S.W.2d 505, 510 (Tex. App. 1992) (stating that a marketing defect involves the failure to adequately warn of the dangers or instruct on the safe use).

280. *See Hall v. Ashland Oil Co.*, 625 F. Supp. 1515, 1520 (D. Conn. 1986) (stating a manufacturer cannot be expected to warn individuals of facts already known to the individuals); OWEN, *supra* note 216, at 330 (stating that too much information may result in warnings pollution).

281. *See* OWEN, *supra* note 216, at 330 (stating that too much information may result in warnings pollution); *see also* *Maize v. Atlantic Ref. Co.*, 41 A.2d 850, 852 (Pa. 1945) (showing a different type of warnings pollution when the manufacturer called his product "Safety Clean" and emblazoned this name in large letters several times around the outside of the can, thus rendering the warnings of danger less conspicuous).

282. *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 804 (Tex. 1978) (stating that where a manufacturer knows or should know of risks with a product, adequate warnings must be provided); *see also* *Copeland v. Ashland Oil, Inc.*, 373 S.E.2d 629, 630 (Ga. Ct. App. 1988) (stating that while sufficiency of a warning is normally a jury question, in the present case, the warnings were adequate as a matter of law).

reasonable prudent person.²⁸³ Since reasonable minds will differ on this issue, it is a question of fact for the jury.²⁸⁴ As a result, a jury finding that the information in question is adequate will result in a finding of non-defectiveness, and vice versa.

D. Unreasonably Dangerous Products

Section 402A begins: "One who sells any product in a defective condition unreasonably dangerous"²⁸⁵ This phrase has been interpreted to mean that in addition to proving defectiveness, the plaintiff also has the burden of establishing that such condition renders the product unreasonably dangerous.²⁸⁶ The requirement on the plaintiff is therefore twofold. This element was inserted, no doubt, to distinguish between those products that can cause harm even though nothing is wrong with them (any product regardless of its nature is capable of inflicting injury), those products that are flawed but cause no injury (no product is technologically perfect), and ultimately those that are defective and as a result produce a foreseeable risk.²⁸⁷ The intention of the *Restatement* is to impose liability only in the last instance.

283. *Bituminous Cas. Co.*, 518 S.W.2d at 873 (stating that an adequate warning is one that would catch the attention of a reasonably prudent man in the circumstances of the product's use); see also M. Stuart Madden, *Selected Federal Tort Reform and Restatement Proposals Through the Lenses of Corrective Justice and Efficiency*, 32 GA. L. REV. 1017, 1056 (1998) (explaining that an adequate warning will impress upon a reasonably prudent user of the product the characteristics of its hazards).

284. *Hamilton v. Motor Coach Indus., Inc.*, 569 S.W.2d 571, 577 (Tex. App. 1978) (stating that adequacy of warnings is a question that the jury normally decides).

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

286. Richard C. Ausness, *Product Category Liability: A Critical Analysis*, 24 N. KY. L. REV. 423, 440 (1997) (explaining that a plaintiff must prove that a product is defective in order to recover from a manufacturer); Robert F. Thompson, *The Arkansas Products Liability Statute: What Does "Unreasonably Dangerous" Mean in Arkansas?*, 50 ARK. L. REV. 663, 666–67 (1998) (stating that Arkansas law requires that the plaintiff prove the unreasonably unsafe condition of the product as well as the fact that the product caused the injuries of the plaintiff).

287. See *Barker v. Lull Eng'g Co., Inc.*, 573 P.2d 443, 455–56 (Cal. 1978) (setting forth the requirement that a plaintiff prove the product was both unreasonably dangerous as well as the cause of the injury to the plaintiff); see also *Phipps v. Gen. Motors Corp.*, 363 A.2d 955, 958 (1976) (ex-

E. A Different Form of Strict Liability

In light of this discussion, it becomes clear that in this area of the law we are not applying strict liability in its usual form. Instead, we have what should be referred to as *strict products liability*.²⁸⁸ The requirement of a design, manufacturing, or marketing defect that results in goods that are unreasonably dangerous distinguishes this concept from those previously discussed.²⁸⁹ As a result, we have a different and distinct basis for imposing liability which is in no way related to the other areas of tort.

X. CONCLUSION

As a general rule, liability in our Anglo-American system of jurisprudence is imposed, not because the plaintiff is injured, but because the plaintiff's injury is a result of the defendant's fault. Fault is based upon the idea that the defendant either intended the injury or was negligent in failing to act in a reasonable manner once confronted with a foreseeable risk. We have seen, however, that in a very small number of cases fault is not an issue. In these instances, the courts will impose liability regardless of fault or, as it is sometimes referred to, strict liability.

plaining that the plaintiff must establish that the product was both unreasonably dangerous when it left the manufacturer and the cause of the plaintiff's injuries).

288. William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, U. ILL. L. REV. 639, 651 (1991) (stating that strict products liability is not true strict liability); see also Thomas A. Matthews, *Products Liability in Alaska—A Practitioner's Overview*, 10 ALASKA L. REV. 1, 2-3 (1993) (stating that from the distinct theories of strict liability and breach of warranty, strict products liability evolved).

289. See Jeffrey O'Connell & Geoffrey Paul Eaton, *Binding Early Offers as a Simple, if Second-Best, Alternative to Tort Law*, 78 NEB. L. REV. 858, 868 n.52 (1999) (noting that strict products liability, which requires proof of defect, should be differentiated from strict liability); Mark Geistfeld, *Manufacturer Moral Hazard and the Tort-Contract Issue in Products Liability*, 15 INT'L REV. L. & ECON. 241, 248 n.23 (1995) (noting that strict products liability, which requires proof of product defect, is not the same as strict liability).

Strict liability is confined to a very few and limited number of scenarios, and in each case the justification for doing so is different. For example, strict liability is imposed for harm caused by a trespassing animal due to the owner's lack of control over the animal, which is likely to cause harm once it enters into the close of another. On the other hand, strict liability is imposed for injury inflicted by a wild animal or a domesticated one with vicious tendencies because injury is foreseeable and the individual who undertakes to keep such an animal does so at his own risk. In the area of ultra-hazardous activities, strict liability is justified on the basis that an individual has undertaken an activity that is inappropriate to the locale and poses great risk of harm to others. Nuisance, either private or public, will justify strict liability if the activity in question is one which also qualifies as an ultra-hazardous activity.

In cases involving a misrepresentation, there is a deliberate policy to place any resulting loss upon the defendant, even if innocent, rather than upon the innocent plaintiff. This is especially true in a sales transaction wherein the defendant purports to have knowledge concerning the matter in question. On the other hand, in the area of vicarious liability, there are a variety of justifications for strict liability. The element of control, the theory of the business enterprise having the deepest pocket which would make it easier to compensate an injured plaintiff, and the allocation of risk have each been expressed as a reason for holding an employer strictly liable for the torts of her employees. Meanwhile, the law of defamation holds the publisher strictly liable on the basis that it is better to confine an individual's freedom of expression than to see an innocent injured plaintiff suffer from a loss of standing in the community. Finally, strict liability is justified in the area of workmen's compensation only because the legislature has stepped in and decreed that liability, regardless of fault, should fall upon an employer when her employee is injured on the job.

All of the above are distinguished from the concept of strict products liability, which derives its justification from one having introduced an unreasonably dangerous defective product into the market place. As illustrated, we speak in terms of strict liability, but each theory of recovery's justification is different and distinct from the rest.

Product Recalls & the Third Restatement: Consumers Lose Twice from Defects in Products and in the Restatement Itself

JAMES T. O'REILLY*

I.	INTRODUCTION	884
	A. <i>Definitions</i>	884
	B. <i>Rarity of Recalls</i>	885
	C. <i>Why Recalls Occur</i>	885
	D. <i>Manufacturing Defect Recalls</i>	886
	E. <i>Design Defect Recalls</i>	886
	F. <i>Warning Defect Recalls</i>	887
	G. <i>How Recalls Function</i>	887
II.	<i>THE RESTATEMENT THIRD OF PRODUCTS LIABILITY</i>	890
	A. <i>The Terms of Section 11</i>	890
	1. <i>The Meaning of Section 11(a)(1)</i>	891
	2. <i>The Meaning of Section 11(a)(2)</i>	891
	B. <i>What's Missing From Section 11</i>	893
	C. <i>The Reporters' Comments</i>	894
	D. <i>Why Restate Before Case Law Exists?</i>	896
III.	<i>THE STATUTORY BASIS FOR RECALLS</i>	897
	A. <i>The Handful of Mandatory Recalls</i>	898
	B. <i>Inability to Compel Agency Action</i>	899
	C. <i>The Case Law of Recalls</i>	900
IV.	<i>SUGGESTIONS TO STATE COURTS FOR ADOPTING A REVISED VIEW OF SECTION 11</i>	902
V.	<i>RATIONALES FOR AMENDMENT</i>	902
	A. <i>The Arguments for Altering Section 11</i>	902
	B. <i>The Arguments for Keeping the Present Version of Section 11</i>	903
VI.	<i>THE FUTURE OF POST-RECALL LIABILITY CLAIMS</i>	904

* Visiting Professor of Law, University of Cincinnati; B.A., Boston College; J.D., University of Virginia.