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The Moment of Inadvertence Concept in Strict Products Liability: The Seed of Destruction for the Assumption of the Risk Defense?

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Notes

The Moment of Inadvertence Concept in Strict Products Liability: The Seed of Destruction for the Assumption of the Risk Defense?

The concept of assumption of the risk in the context of strict products liability has never been well-defined and has always given writers considerable difficulty when they have attempted to articulate its purpose or limit the bounds of its applicability.[1] Now some relatively recent cases[2] in the field of strict products liability dealing with the concept of assumption of the risk in various situations[3] have cast new doubt on the meaning and efficacy of the assumption of the risk defense. These cases tend to produce more questions than they produce answers, but do serve to illuminate continuing problems in meshing traditional fault notions about tort liability[4] with the consumer protection and loss distribution goals of strict products liability.[5]

The problem common to these cases is that of the plaintiff who is at one time cognizant of the danger of the product but who is later momentarily in-

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[1]*See e.g.,* Green v. Sanitary Scale Co., 431 F.2d 371, 377 (3d Cir. 1970) (Staley, J., dissenting); Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 424-26, 261 N.E.2d 305, 309 (1970). *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 670 (4th ed. 1971) [hereinafter cited as W. PROSSER].

[2]*E.g.,* Elder v. Crawley Book Mach. Co., 441 F.2d 771 (3d Cir. 1971); Taylor v. Paul O. Abbe, Inc., 380 F. Supp. 601 (E.D. Pa. 1974), *rev'd on other grounds,* 516 F.2d 145 (3d Cir. 1975); Scott v. Dreiss & Krump Mfg. Co., 26 Ill. App. 3d 971, 326 N.E.2d 74 (1975).

[3]*See* Elder v. Crawley Book Mach. Co., 441 F.2d 771 (3d Cir. 1971) (on-the-job accident with a folding machine); Taylor v. Paul O. Abbe, Inc., 380 F. Supp. 601 (E.D. Pa. 1974) (on-the-job accident with gears of an unguarded nip point in a continuous pebble mill); Scott v. Dreiss & Krump Mfg. Co., 26 Ill. App. 3d 971, 326 N.E.2d 74 (1975) (on-the-job accident involving the foot treadle of a press brake).

[4]*See, e.g.,* Cornette v. Searjeant Metal Prods., Inc., 147 Ind. App. 46, 52, 258 N.E.2d 652, 656 (1970); J. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS, 1-26 (1967); O. HOLMES, THE COMMON LAW, 76-78 (Howe ed. 1963); Ames, *Law and Morals,* 22 HARV. L. REV. 97, 99 (1908) ("The law of today, except in certain cases based upon public policy, asks the further question, 'Was the act blameworthy?' The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril."); Smith, *Tort and Absolute Liability,* 30 HARV. L. REV. 241, 254, 257 (1917). *See also* W. PROSSER, *supra* note 1, at 16-19 (discussing the general moral undertone which pervades the law of torts); Isaacs, *Fault and Liability,* 31 HARV. L. REV. 954, 966 (1918) (indicating that the author feels Holmes' position is that a legal system eventually develops the refined concept of fault while leaving certain areas of tort law with the concept of absolute liability; and that the true view of the law is that it vacillates in the grounds required for recovery in tort depending upon the times).

[5]*See, e.g.,* Greenman v. Yuba Power Prod. Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963); RESTATEMENT (SECOND) OF TORTS § 402A, comment c (1965).

advertent. Because the assumption of the risk defense in a strict products liability action requires that the plaintiff have actual knowledge of the defect,[6] the issue then becomes when the plaintiff must have that actual knowledge. It appears that the above-mentioned cases analytically divide plaintiffs into at least two classes—those who had the required awareness of the danger at any time before the accident and those who were aware of the danger at the exact moment when they encountered the defect in the product. These courts would deny recovery to the latter but would not deny recovery to a plaintiff who was unaware of the danger at the exact moment of encounter with the product. Although most courts would probably not distinguish between these two classes of plaintiffs and would disallow recovery upon a showing of actual knowledge at any time prior to the accident, it is conceivable that this distinction may gain more support in the case law of strict products liability.

The purpose of this note is to briefly review the history of the assumption of the risk defense in strict products liability actions; to analyze whether the above distinction can be of practical significance in a products liability case; to explore the theoretical consistency of the moment of inadvertence analysis with respect to products liability; to look at the practicality of recognizing a moment of inadvertence approach to assumption of the risk problems; and finally to comment upon the future of assumption of the risk vis-à-vis a moment of inadvertence analysis.

A BRIEF HISTORY OF ASSUMPTION OF THE RISK DEFENSE IN STRICT PRODUCTS LIABILITY ACTIONS

After *Greenman v. Yuba Power Products, Inc.*[7] launched a wave of strict products liability cases[8] and § 402A of the Restatement of Torts, Second

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[6]*See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 402A, comment n (1965).

[7]Greenman v. Yuba Power Prods. Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[8]*E.g.*, Clary v. Fifth Ave. Chrysler Center, Inc., 454 P.2d 244 (Alas. 1969); O.S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968); Greenman v. Yuba Power Prods. Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Hiigel v. General Motors Corp., 544 P.2d 983 (Colo. 1976); Wachtel v. Rosol, 159 Conn. 496, 271 A.2d 84 (1970); Martin v. Ryder Truck Rental, Inc., 353 A.2d 581 (Del. 1976); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Stewart v. Budget Rent-A-Car Corp., 52 Hawaii 71, 470 P.2d 240 (1970); Shields v. Morton Chem. Co., 95 Idaho 674, 518 P.2d 857 (1974); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 335 (1965); Ayr-Way Stores, Inc. v. Chitwood, 261 Ind. 86, 300 N.E.2d 335 (1973); Hawkeye Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970); Brooks v. Dietz, 218 Kan. 698, 545 P.2d 1104 (1976); Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1966); Weber v. Fidelity & Cas. Ins. Co., 259 La. 599, 250 So. 2d 754 (1971); Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976); McCormack v. Hankscraft Co., Inc., 278 Minn. 322, 154 N.W.2d 488 (1967); State Stove Mfg. Co., v. Hodges, 189 So. 2d 113 (Miss. 1966); Giberson v. Ford Motor Co., 504 S.W.2d 8 (Mo. 1974); Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 513 P.2d 268 (1973); Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601 (1971); Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 470 P.2d 135 (1970);

became the model for strict products liability actions in many states,[9] courts were faced with the dual problems of whether or not contributory negligence or its sister, assumption of the risk, or both, were to be considered defenses to an action based on a strict products liability theory.[10] As acceptance of the doctrine of strict liability grew, more and more courts grappled with the question as to what degree of participation by the plaintiff in his own injury was acceptable before such participation would bar his recovery.

One of the first steps found necessary to an understanding of the problem was to obtain standard definitions for contributory negligence and assumption of the risk.[11] After that obstacle was substantially surmounted, there gradually came to be a standard position adopted by the courts of this country[12]

Buttrick v. Arthur Lessard & Sons, Inc., 110 N.H. 36, 260 A.2d 111 (1969); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972); Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973); Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1975); Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966); Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974); Heaton v. Ford Motor Co., 248 Ore. 467, 435 P.2d 806 (1967); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966); Ritter v. Narrangansett Elec. Co., 109 R.I. 176, 283 A.2d 255 (1971); Engberg v. Ford Motor Co., 87 S.D. 196, 205 N.W.2d 104 (1973); Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); Zaleskie v. Joyce, 133 Vt. 150, 333 A.2d 110 (1975); Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P.2d 729 (1969); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). *See also* W. PROSSER, *supra* note 1, at 657.

[9]*See* O.S. Stapley v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968); Hiigel v. General Motors Corp., 544 P.2d 983 (Colo. 1976); Wachtel v. Rosol, 159 Conn. 496, 271 A.2d 84 (1970); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Stewart v. Budget Rent-A-Car Corp., 52 Hawaii 71, 470 P.2d 240 (1970); Shields v. Morton Chem. Co., 95 Idaho 674, 518 P.2d 857 (1974); Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970); Hawkeye Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970); Brooks v. Dietz, 218 Kan. 698, 545 P.2d 1104 (1976); Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1965); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966); Giberson v. Ford Motor Co., 504 S.W.2d 8 (Mo. 1974); Brandenburger v. Toyota Motor Sales, U.S.A, Inc., 162 Mont. 506, 513 P.2d 268 (1973); Buttrick v. Arthur Lessard & Sons, Inc., 110 N.H. 36, 260 A.2d 111 (1969); Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974); Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974); Heaton v. Ford Motor Co., 248 Ore. 467, 435 P.2d 806 (1967); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966); Ritter v. Narrangansett Elec. Co., 109 R.I. 176, 283 A.2d 255 (1971); Engberg v. Ford Motor Co., 87 S.D. 196, 205 N.W.2d 104 (1973); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); Zaleskie v. Joyce, 133 Vt. 150, 333 A.2d 110 (1975); Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P.2d 729 (1969).

[10]*See, e.g.*, Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 424-25, 261 N.E.2d 305, 309-10 (1970); Garret v. Nissen Corp., 84 N.M. 16, 21, 498 P.2d 1359, 1364 (1972); W. PROSSER, *supra* note 1, at 670.

[11]*See* Green v. Sanitary Scale Co., 431 F.2d 371, 377 (3d Cir. 1970) (Staley, J., dissenting); Kirkland v. General Motors Corp., 521 P.2d 1353, 1366-67 (Okla. 1974) (complicated semantic difficulties lie in the use of the term "assumption of the risk"); Ellithorpe v. Ford Motor Co., 503 S.W.2d 516, 521 (Tenn. 1973) (the terms can be used interchangeably); Lyons v. Redding Constr. Co., 83 Wash. 2d 86, 89-96, 515 P.2d 821, 822-26 (1973); Keeton, *Assumption of Products Risks*, 19 S.L.J. 61, 68-69 (1966); W. PROSSER, *supra* note 1, at 670; Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1, 3 (1974) (language concerning assumption of the risk is vague, inexact, and somewhat delphic); Wade, *Strict Tort Liability of Manufacturers*, 19 S.L.J. 5, 21-22 (1966).

[12]*See* Bachner v. Pearson, 479 P.2d 319, 329-30 (Alas. 1970); O.S. Stapley Co. v. Miller, 103 Ariz. 556, 561, 447 P.2d 248, 253 (1968); Luque v. McLean, 8 Cal. 3d 135, 145-46, 501

which was consistent in theory, if not always in terminology, with comment n of the Restatement.[13] Such a position held that while contributory negligence was not a defense to an action sounding in strict products liability, a defense of assumption of the risk would effectively preclude recovery.[14]

This discussion will adopt definitions for contributory negligence and assumption of the risk as its starting point as well. Contributory negligence will be defined as the "failure to discover the defect in the product, or to guard against the possibility of its existence."[15] Assumption of the risk will be defined as recognition and understanding of the dangerous condition of a product and yet voluntarily and unreasonably proceeding to encounter the known danger in disregard of that danger. These definitions are patterned after those found in §402A of the Restatement[16] and are in fairly general use in many jurisdications.[17] One of the main distinctions to be drawn between the two concepts lies in the actual subjective knowledge required of assumption of the risk as opposed to the objective "reasonable man" type of standard

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P.2d 1163, 1170-71, 104 Cal. Rptr. 443, 450 (1972); Hiigel v. General Motors Corp., 544 P.2d 983, 988 (Colo. 1975); Shields v. Morton Chem. Co., 95 Idaho 674, 677, 518 P.2d 857, 860 (1974); Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 426, 261 N.E.2d 305, 309-10 (1970); Gregory v. White Truck & Equip. Co., ____ Ind. ____, ____, 323 N.E.2d 280, 290 (1975); Hawkeye Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 380 (Iowa 1972); Brooks v. Dietz, 218 Kan. 698, 705, 545 P.2d 1104, 1110 (1976); Ford Motor Co. v. Matthews, 291 So. 2d 169, 175 (Miss. 1974); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362, 365 (Mo. 1969); Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 567, 209 N.W.2d 643, 655 (1973); Devaney v. Sarno, 125 N.J. Super. 414, 417-18, 311 A.2d 208, 209-10 (1973), *aff'd*, 65 N.J. 235, 323 A.2d 449 (1973); Bendorf v. Volkswagenwerk Aktiengeselischaft, 88 N.M. 355, 358, 540 P.2d 835, 838 (1975); Kirkland v. General Motors Corp., 521 P.2d 1353, 1366-67 (Okla. 1974); Findlay v. Copeland Lumber Co., 265 Ore. 300, 303-04, 509 P.2d 28, 30 (1973); Ferraro v. Ford Motor Co., 423 Pa. 324, 327, 223 A.2d 746, 748 (1966); Ellithorpe v. Ford Motor Co., 503 S.W.2d 516, 521 (Tenn. 1973); Shamrock Fuel & Oil Sales Co., Inc. v. Tunks, 416 S.W.2d 779, 783 (1967); Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 155, 542 P.2d 774, 779 (1975); 1977 Conn. Pub. Acts 77-335. *But see* Stephan v. Sears, Roebuck & Co., 110 N.H. 248, 249, 266 A.2d 855, 857 (1970); Codling v. Paglia, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628, 345 N.Y.S.2d 461, 470 (1973); Dippel v. Sciano, 37 Wis. 2d 443, 460-62, 155 N.W.2d 55, 63-65 (1967) (all three cases holding that contributory negligence in the sense of failure to discover a defect or guard against the possibility of its existence is a defense or, in the case of Wisconsin, to be considered with regard to the doctrine of comparative negligence).

[13]RESTATEMENT (SECOND) OF TORTS § 402A, comment n (1965).

[14]More specifically, comment n of the RESTATEMENT (SECOND) OF TORTS § 402A states:

> n. Contributory negligence. . . . Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liabilty. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Id.

[15]*See* note 14 *supra*.

[16]*Id.*

[17]*See* note 9 *supra*.

which applies to all considerations with regard to the plaintiff's knowledge under the heading of contributory negligence.[18] This distinction lies at the root of the reasoning in the decisions in the cases mentioned earlier and is used to add new dimensions to the defense of assumption of the risk.

Contributory negligence is generally rejected as a defense to a strict products liability action since the basic strict liability theory itself does not rely upon the concept of negligence.[19] The "fault" associated with this form of tort action, if, in fact, there is any, lies solely in placing an unreasonably dangerous product in the stream of commerce.[20] Most courts agree that the various policy considerations which led to the adoption of strict products liability—that the manufacturer, due to his knowledge and control, is in a relatively superior position to avoid the loss;[21] that there is justice in imposing the loss on the one who reaps the profit;[22] and that the manufacturer is in a better position to insure against loss and spread that loss over the consuming populace[23]—support the conclusion that barring recovery absent knowledge of the defect is inconsistent with the policy reasons which gave birth to the modern strict products liability doctrine and thus require that actual knowledge be an element of the assumption of the risk defense.[24]

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[18]*See* Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 815 (9th Cir. 1974); Moran v. Raymond Corp., 484 F.2d 1008, 1015 (7th Cir. 1973); Green v. Sanitary Scale Co., 431 F.2d 371, 377 (1970) (Staley, J., dissenting); Hastings v. Dis Tran Prods., Inc., 389 F. Supp. 1352, 1357 (W.D. La. 1975); Taylor v. Paul O. Abbe, Inc., 380 F. Supp. 601, 604 (E.D. Pa. 1974); Clarke v. Brockway Motor Trucks, 372 F. Supp. 1342, 1347-48 (E.D. Pa. 1974); Dorsey v. Yoder, 331 F. Supp. 753, 765 (E.D. Pa. 1971); Butaud v. Suburban Marine & Sporting Goods, 543 P.2d 209, 211 (Alas. 1975); Sperling v. Hatch, 10 Cal. App. 3d 54, 61, 88 Cal. Rptr. 704, 709 (1970); Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 430, 261 N.E.2d 305, 312 (1970); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 100, 337 A.2d 893, 901 (1975).

[19]*See* Hiigel v. General Motors Corp., 544 P.2d 983 (Colo. 1976); Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1976); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); RESTATEMENT (SECOND) OF TORTS § 402A, comment n (1965).

[20]Bachner v. Pearson, 479 P.2d 319, 329 (Alas. 1970); Hiigel v. General Motors Corp., 544 P.2d 983, 988 (Colo. 1976); Phipps v. General Motors Corp., 278 Md. 337, ____, 363 A.2d 955, 958 (1976).

[21]*See* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring); Peterson v. Lou Backrodt Chevrolet Co., 17 Ill. App. 3d 690, 694, 307 N.E.2d 729, 732 (1974), *rev'd on other grounds*, 61 Ill. 2d 17, 329 N.E.2d 785 (1975); Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 513 P.2d 268, 273 (Mont. 1973); Cintrone v. Hertz Truck Leasing & Rental Service, 45 N.J. 434, 446, 212 A.2d 769, 775 (1965).

[22]*See* Suvada v. White Motor Co., 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186 (1965); Hawkeye Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 382 (1972); Farr v. Armstrong Rubber Co., 288 Minn. 83, 94, 179 N.W.2d 64, 71 (1970).

[23]*See* Brown v. General Motors Corp., 355 F.2d 814, 821 (4th Cir. 1966), *cert. denied*, 386 U.S. 1036 (1967); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring); Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 513 P.2d 268, 273 (Mont. 1973); Ellithorpe v. Ford Motor Co., 503 S.W.2d 516, 521 (Tenn. 1973), Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1120 (1960); RESTATEMENT (SECOND) OF TORTS § 402A, comment c (1965).

[24]*See* Bachner v. Pearson, 479 P.2d 319, 329 (Alas. 1970); Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 426-27, 261 N.E.2d 305, 309-10 (1970); Ellithorpe v. Ford Motor Co., 503 S.W.2d 516, 521 (1973). *But see* Findlay v. Copeland Lumber Co., 265 Ore. 300, 303-04, 509 P.2d 28-30

APPLICATION OF THE MOMENT OF INADVERTENCE FORMULATION OF ASSUMPTION OF THE RISK IN SPECIFIC FACT SITUATIONS

Even once assumption of the risk is defined and accepted as a valid defense to a strict products liability action, there is little doubt that the major problems associated with assumption of the risk lie in its application to any given set of facts. In *Scott v. Dreiss & Krump Manufacturing Co.*,[25] the nineteen year old plaintiff had been operating, for three to four weeks, a press brake manufactured by the defendant.[26] The ram and bed of the press brake were fitted with dies for shaping the metal placed in the six inch aperature between the dies. A foot pedal which could be moved to accomodate the worker activated the ram and the ram descended until the foot pedal was released, at which point the ram ascended to its starting position.[27] There was no safety device which guarded the activating pedal and no guard to keep the operator's hands out of the operating area despite the fact such a guard was feasible.[28] The ram would continue to operate for several minutes after the current had been switched off,[29] but the plaintiff testified that he did not know this to be true[30] despite the fact that he had seen other employees activate their machines by "mashing the foot pedal"[31] after the power had been turned off. The plaintiff, who had just finished his work and had turned off the current to his machine, was removing a sheet of metal that had been shaped when the ram of the machine descended due to what was believed to be his inadvertent contact with the foot pedal.[32]

Before the case went to the jury, the trial court struck the affirmative defense of assumption of the risk.[33] The defendant had argued that as the plaintiff had admitted he had seen other machines operate in a manner such as his had operated, a jury could conclude that the plaintiff knew that it was dangerous to place his hands in the press as his press would operate in the same manner if activated.[34] The appellate court recognized that although a jury was "not compelled to accept a user's testimony that he was unaware of the danger",[35] there must be at least "some evidence"[36] which would permit a finding of assumption of the risk:

(1973) (stating they adopt the § 402A definition of assumption of the risk despite the fact they are not sure of the theory underlying strict products liability).

[25]Scott v. Dreiss & Krump Mfg. Co., 26 Ill. App. 3d 971, 326 N.E.2d 74 (1975).

[26]A press brake's function is to bend and shape metal. The ram, which is the movable part, will descend and shape the metal. Scott v. Dreiss & Krump Mfg. Co., 26 Ill. App. 3d 971, 976, 326 N.E.2d 74, 77 (1975).

[27]26 Ill. App. 3d 971, 977, 326 N.E.2d 74, 77-78 (1975).

[28]*Id.* at 977-79, 326 N.E.2d at 78-79.

[29]*Id.* at 977-78, 326 N.E.2d at 78.

[30]*Id.* at 980, 326 N.E.2d at 80.

[31]*Id.*

[32]*Id.*

[33]*Id.* at 989, 326 N.E.2d at 87.

[34]*Id.* at 990, 326 N.E.2d at 87.

[35]*Id.*

[36]*Id.*

> Assumption of the risk, as used in comment n to Restatement of Torts 2d, § 402A, is referred to as voluntarily and unreasonably proceeding to encounter a known danger. Whether the character of plaintiff's conduct is such that he may be deemed to have voluntarily and unreasonably encountered a known risk must necessarily depend upon the particular circumstances of each case. In situations where the nature of plaintiff's employment requires exposure to certain hazards, it would be a *non sequitur* of the policy considerations of strict tort liability to say that plaintiff has voluntarily and unreasonably assumed such hazards by the mere acceptance of his employment. *There must, we think, be an element of conscious conduct resulting in the injury which is not satisfied by mere inadvertence or momentary inattention.*[37]

What the court appears to be saying in its language striking the assumption of the risk defense is that even if the plaintiff knew of the danger of placing one's hands in a machine that could be activated by depressing a foot pedal which the plaintiff had to know was very nearby,[38] that knowledge was immaterial due to the plaintiff's momentary inadvertence. The opinion of the court indicates that the injury must result from *conscious* conduct with full knowledge of the dangerous situation at the *very moment*[39] when the plaintiff places himself in jeopardy.

Similar language appears in at least two other cases. As stated in *Taylor v. Paul O. Abbe, Inc.*,[40]

> The plaintiff's actions immediately prior to the accident, as described by the testimony, did not rise to the level of conscious appreciation and confrontation of a known danger so as to warrant a finding of assumption of risk as a matter of law. It was the proper function of the jury to determine whether the plaintiff's hand became enmeshed by reason of inadvertence, or momentary inattention, or through a conscious decision to challenge the dangers inherent in the exposed and unguarded gear mechanism.[41]

Parallel to that line of reasoning and expression is a statement contained in *Elder v. Crawley Book Machinery Co.*,[42] "We conclude, therefore, that if the plaintiff's fingers became placed in a dangerous position in the machine by reason of inadvertence, momentary inattention or diversion of attention, that this would not amount to assumption of the risk."[43] It is important to

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[37]*Id.* at 990-91, 326 N.E.2d at 87 (emphasis added).

[38]It appears that the pedal could be moved to accommodate the worker and that the plaintiff had just finished using the machine, and hence the pedal, just before the accident. Such use would surely give the plaintiff knowledge of the pedal's whereabouts.

[39]This is the kind of statement which appears to be expressed in Johnson v. Clark Equip. Co., 274 Ore. 403, ____ n.8, 547 P.2d 132, 139 n.8 (1976) when, in referring to the fact that subjective knowledge versus objective knowledge is a difficult distinction to impress upon a jury, the court says, "The question is one of fact: whether, at the time he encountered the risk, this particular plaintiff understood and appreciated both the danger itself and the nature, character, and magnitude which made it unreasonable."

[40]380 F. Supp. 601 (E.D. Pa. 1974), *rev'd on other grounds*, 516 F.2d 145 (3d Cir. 1975).

[41]*Id.* at 605.

[42]441 F.2d 771 (3d Cir. 1971).

[43]*Id.* at 774.

note, however, that in neither of these last two cases was any evidence mentioned in the courts' opinions that indicated that plaintiffs in these actions actually knew of the dangers confronting them at any point in time, much less at the time of the accident.[44]

In any event, it would appear that more than mere casual recognition of the elements making up a dangerous condition is required in order for these courts to find an assumption of the risk. The recognition of a dangerous condition and the plaintiff's challenge to that dangerous condition would appear to have to be foremost on the plaintiff's mind at the very moment at which he voluntarily chooses to encounter the risk; otherwise, the act cannot be said to be voluntary.

Whether one ascribes the prerequisite of the consciousness required by these courts to the "knowledge" element of assumption of the risk or the "voluntary" element of the defense would really appear to make little difference. Under the moment of inadvertence formulation of assumption of the risk, the plaintiff's action cannot be voluntary unless he is conscious of what he is doing because voluntariness implies a conscious, knowledgeable choice of actions. However, one could also argue that if the plaintiff is not conscious of the defective product's danger at that very moment, he effectively has no knowledge of the defect at the appropriate moment. It would seem that two of the three courts see the problem as primarily one of the degree of voluntariness in the action despite the fact that knowledge, or more accurately awareness, is a necessary element of voluntariness and could really be called the relevant heading under which the moment of inadvertence concept doctrinally belongs.[45]

These courts' formulation of the requirements of assumption of the risk can only be described as novel since review of a large number of cases would indicate that very often the distinctions as to voluntariness or knowledge are not so finely drawn. It is not unusual for a more general recognition and appreciation of the danger (so long as it does, in fact, provide actual knowledge) to be held sufficient as a basis for allowing the defense to be used; there does not appear to be any further "on-the-spot" type of consciousness requirement which is required by most states' courts.[46] In fact, courts will

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[44]In Taylor v. Paul O. Abbe, Inc., 380 F. Supp. 601, 605 (E.D. Pa. 1974), the court specifically mentions that there was no evidence produced that went to the question of whether the plaintiff knew of the danger.

[45]While the *Scott* court appears to see the question as one of the voluntariness of the action, the *Taylor* court would seem to be emphasizing knowledge in the sense of being aware of the danger. The *Elder* court relies heavily on the belief that this question is a part of the development of a workable definition for voluntariness.

[46]It is not too often that a court will take the issue away from the jury on a subject such as whether or not the plaintiff had acutal knowledge by either directing a verdict or by granting a summary judgment for the defendant. *See* note 65 *infra*. It is generally a safer practice to allow the jury to discover the facts in such an area. In cases where the court allows the issue to go to the jury, the only evidence left of the court's opinion on the moment of inadvertence concept is to look to the jury instructions to see if they clearly impart the idea that the factfinder needs to

very typically hold that once the plaintiff gains an awareness of the risk involved, he is charged with that awareness even though it is possible he had forgotten the danger,[47] or the exposure to that danger had become so commonplace that, for all intents and purposes, he "ignored" the danger. The questions that must then be confronted are whether the immediate consciousness requirement is compatible with strict products liability as a tort doctrine and whether such a requirement is practical.

THEORETICAL COMPATIBILITY OF STRICT PRODUCTS LIABILITY AND THE MOMENT OF INADVERTENCE CONCEPT

Although the problem with the assumption of the risk defense may arise because of the lack of opportunities to address the inadvertence issue in a strict products liability action, it seems more likely that the number of accidents which occur daily would be replete with instances where the plaintiff had been inadvertent despite his awareness of the risk involved than with instances where he actively and purposely challenged the product at the very moment he was injured. It is more believable to posit that for some reason the court and counsel ignored the possibility of a moment of inadvertence ap-

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find that the plaintiff was fully aware of the danger at the very moment of the injury. Unfortunately, there are not too many instances where the court has occasion to set out the instructions used in the trial. For examples of cases where the jury never got the issue, *see* Morrow v. Trailmobile, Inc., 12 Ariz. App. 578, 579, 583, 473 P.2d 780, 781, 785 (1970) (stating that the plaintiff's deceased's companion's statements that he would not want anybody to get hurt in the process of hitching trailers and the plaintiff's deceased's response that he had done it that way for a year without injury, plus the companion's observation that there was a first time for everything and the companion's urging that he would prefer the deceased not use the method he eventually employed, was sufficient evidence to support a directed verdict for the defendant as the deceased had to know of the danger); Denton v. Bachtold Bros., Inc., 8 Ill. App. 3d 1038, 1040-41, 291 N.E.2d 229, 230-31 (1972) (A case where the plaintiff was using a rotary mower with blades that projected beyond the front so as to cut tall weeds and as the plaintiff approached the blades after halting to move a barrel in his way, he slipped and fell into the blades. The plaintiff had failed to disengage the blade drive mechanism though he knew the blades were dangerous, but was not paying any attention to them at that moment in time, so the defendant received a directed verdict.); Jones v. Toledo Scale Corp., [1976] PROD. LIAB. REP. (CCH) ¶ 7822 (plaintiff, whose hand was caught in a meat grinder because he did not use the "stomper" provided to push the meat down, "hadn't really thought about" the danger though he knew his hand would be hurt if it went all the way in, and suffered an adverse directed verdict). For examples of jury instructions containing no specific "moment of inadvertence" language which would alert a jury to the distinction, *see* Sherrill v. Royal Indus., Inc., 526 F.2d 507, 510 n.4 (8th Cir. 1975); Gilbertson v. Tryco Mfg. Co., Inc., 492 F.2d 958, 960 (8th Cir. 1974); Messick v. General Motors Corp., 460 F.2d 485, 493 (5th Cir. 1972). For a particularly unusual case of jury instructions with regard to assumption of the risk, *see* Bronson v. Club Commanche, Inc., 286 F. Supp. 21, 23 (D. V.I. 1968) (An implied warranty action under U.C.C. § 2-314 in which the jury was charged that if they found that the plaintiff had assumed the risk of eating a piece of fish which had ciguatera poison in it because of knowing that this was a possibility when she ordered the fish (she had admitted she had heard of occasional cases of such poisonings in the Virgin Islands), then the jury's verdict should be for the defendant.).

[47] *But cf.* Byrnes v. Economic Mach. Co., 41 Mich. App. 192, 202, 200 N.W.2d 104, 109 (1972) (recognized that it is possible for the plaintiff to have forgotten the danger).

proach to the case given that it is not common to be especially specific about what degree of awareness is a constituent part of a voluntary act.[48] Yet it would seem to be highly important in a field such as strict products liability to enunciate precisely what is meant by the terms that give the doctrine its life. This is not only because of the large amount of litigation in this field and the correspondingly large amounts of money involved, but primarily because of the policy considerations that led to the doctrine's adoption[49] and their relatively important social and economic impact.

It has already been noted that contributory negligence as a defense to a strict products liability action is inappropriate in the eyes of most courts given the policy considerations from which that tort action arose.[50] It is not hard to construct an argument following that line of reasoning which would advocate that anything less than actual knowledge and consciousness of the danger in his action at the very moment when the plaintiff voluntarily chooses to encounter the risk is also an inappropriate basis upon which to deny recovery. In both instances one encounters the same objection to non-recovery—the most that can be said against the plaintiff is that he should have been aware of the danger and utilized that knowledge at the time of the accident. The only difference is that in the one case the plaintiff was aware of the risk at one time and thus, in terms of traditional thought, was more at fault. If, however, there were fault, the only fault exhibited was the undeniable human trait of being momentarily inadvertent instead of living up to the ideals of the law's reasonable and prudent man who remains consistently aware of observed danger and careful in his actions. But such fault, as was noted earlier,[51] does not form the foundation of the concept of strict products liability and was specifically rejected on the basis of the policy considerations giving rise to this form of liability. To hark back to that kind of fault severely undermines the expanded duty placed on manufacturers to protect the public. Actually, absent a finding of on-the-spot knowledge and conscious challenge, all that has been shown is another phase of contributory negligence.[52]

It could be argued that the moment of inadvertence analysis should be

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[48]This would seem to be the case despite the fact that the problem as to what degree of awareness or voluntariness is required by the law arises in many different circumstances and fields of law. The most obvious example is in the area of criminal law and its distinctions between the various states of mind. *See, e.g.,* MODEL PENAL CODE, § 2.02 (1962).

[49]*See* notes 21, 22 & 23, *supra.*

[50]*See* note 24 *supra.*

[51]*See* notes 19 & 20 *supra.*

[52]As contributory negligence has been defined as the failure to discover the defect in the product or to guard against the possibility of its existence, it can be said that there was a failure to guard against the defect's existence at the moment of injury. Because the actor was not cognizant of the defect at the moment of the accident, he is no more aware of the possible danger than is someone who has yet to discover the defect. Of course, he has exhibited more moral fault than the person who never discovered the defect, but as far as his ability to do anything constructive about the knowledge at the relevant moment, he is no better off than his less aware counterpart.

rejected because of the large plaintiffs' deterrence effect[53] which presently inheres in the concept of assumption of the risk. While use of tort liability as a means of conduct control is a concept which has often been questioned,[54] it is obvious that the deterrence argument has no place in a discussion concerning inadvertence as, by its nature, deterrence assumes that the anticipatable consequences of the act work upon the mental processes of the potential actor before the act. Inadvertence and forgetfulness are characterized by the very fact that there is a lack of mental process before the act upon which the potential deterrent can act.[55] Thus the penalty of non-recovery which the plaintiff suffers is a result of the very common human failing of momentary inadvertence—he simply was unable to meet any higher standard under the circumstances of the moment and thus cannot recover.[56]

The immediate rejoinder that one might expect to encounter in a discussion concerning what is to be expected of the plaintiff is that the plaintiff should have ceased his use of the product upon the discovery of the defect in the first place. But this argument is based on the position that the plaintiff did not act as a reasonably prudent man would have acted—he did not stop his use of the defective product upon becoming aware of the risk involved. That is, it is based on the same notions of fault which have been rejected in the area of contributory negligence in strict products liability since the emphasis in strict products liability is not on any form of moral fault.

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[53]For a short discussion of the concept of deterrence as one of the goals of tort law, *see* G. WILLIAMS & B. HEPPLE, FOUNDATIONS OF THE LAW OF TORT 25 (1976).

[54]For a discussion of the law of tort and its function (or dysfunction, as the case may be), *see* Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBS. 137, 144-51 (1951).

[55]*See* G. WILLIAMS & B. HEPPLE, FOUNDATIONS OF THE LAW OF TORT 25, 118-19 (1976) ("[T]here is apparently a logical difficulty in asserting that the threat implicit in the law is capable of deterring men from inadvertent conduct. If a man does not think of the possibility of causing harm by his acts, he is not capable of being influenced by the threat. A threat can influence only those who realise that it is directed against them.").

[56]It is not within the purview of this discussion to attempt to determine if there would be any plaintiff's deterrence aspect to the law of assumption of the risk if the plaintiff encountered the risk with full awareness at the critical moment. That is to say, no view as to the compatibility of the assumption of the risk doctrine and strict products liability is meant to be expressed. It is true that a line of reasoning similar to the reasoning expressed herein could serve as a starting point of analysis to such a question and could conceivably lead to the conclusion that assumption of the risk has no viability in a strict products liability action. A person's conclusion in that regard would, of course, depend upon his view of the mental processes of the plaintiff placed in an on-the-spot awareness type of situation. However, while one might or might not feel the assumption of the risk defense is warranted in order to deter aware and alert conduct, there can be no doubt there is no hope of deterring conduct which is inadvertent. The main problem in trying to work out an answer as to whether or not there is any deterrence factor with respect to a person who is aware of the defect at the very moment he challenges the machine is that the person always has an opportunity to change his mind at any time before the actual disaster. This is not true, of course, with respect to the inadvertent plaintiff who, in effect, cannot change a decision he has not made.

In addition to the foregoing problems, one must then confront the question as to precisely what was the motivating factor in the event of a change of mind. If it was the fear of injury and not the fear of lack of recovery in the event of injury, then one could reasonably conclude that it was better to meet at least one policy objective (loss distribution) than to fail in two (loss distribution and deterrence).

In analyzing the contention that the plaintiff should have ceased his use upon discovery of the defect, one must keep in mind both the policy, which has already been discussed, and the spirit of strict products liability.[57] There can be little doubt that strict products liability attempts to confront an industrial age problem in a forthright and realistic manner which at least makes an effort to recognize how the consuming public acts and reacts to modern manufacturers and the goods they produce. In light of such a goal, it seems unreasonable to erect legal barriers to recovery that do no reflect how the consuming public acts or can be made to act. Such barriers would be inapposite given the effort made by strict products liability to recognize the modern day consumer's inability to cope with the plethora of new products and their attendant dangers.

Although a vast majority of people do discontinue use of a product they find to be unreasonably dangerous, they do not cease use because they are afraid they could not recover if they were injured. If anything would keep people from using an unreasonably dangerous product, one would expect it to be fear of injury itself. It is highly unrealistic to contend that people will be deterred from using unreasonably dangerous products by threatening them with financial loss when the threat of bodily injury does so very little. Whether the motive for continued use is economic coercion by the employer, that the employer cannot afford a safer model, that the plaintiff is in a hurry or even that he erroneously assumed that he will always be careful enough when using the product and subsequently forgets the danger, is really of very little consequence if one is focusing on the deterrent aspect of tort law.

Thus many people do not cease to use the product upon discovery of its dangerous propensities.[58] When asked whether they realized the dangers involved with their unreasonably dangerous product, their answer is, of course, that they were aware of the risk. In fact, it would be hard in many cases for a plaintiff who had been around the product for any length of time to make a believable denial of knowledge of the defect. The admission, however, that he had become aware of the risk at some point during his use is sufficient in most cases to end the controversy and deny him compensation. The fact is that it is not at all uncommon for people to use what would be considered by a jury to be an unreasonably dangerous product and attempt to be careful when using it. Yet it is undeniable that some of those people will be momentarily inadvertent and will be injured no matter how careful and dexterous

[57]The spirit is perhaps best typified by those cases which recognize that one of the reasons for strict liability is that it is hard for the plaintiff to prove the negligence of the wrongdoer. *See, e.g.*, Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 515, 513 P.2d 268, 273 (1973); Prosser, *Assault Upon the Citadel*, 69 YALE L.J. 1096, 1116 (1960).

[58]One need not look very far to find the kind of plaintiff to whom such a description applies. Looking behind the doors of most manufacturing firms will reveal many people who have less than exciting jobs which tend to lull them into inadvertent and thoughtless action. However, the description can be equally applicable to those outside of an industrial setting.

they deem themselves. The question then to be faced is who shall bear the loss?

While in terms of moral fault the inadvertent plaintiff is in a weak position to ask for recovery, in terms of the policies of strict products liability he would seem to have at least an arguable case. If one argues that the policies of strict products liability are to protect the consumer first and foremost, and to distribute the losses through the cost of the product, then penalizing a momentarily inadvertent plaintiff violates these policies. Imposing the loss on the inadvertent plaintiff will not spread the cost of the injury; neither will it provide incentive to improve the quality of the product so that people will not be injured in the future. On the other hand, imposing the loss on the manufacturer would further these policies of strict liability. If one argues that the law should place the loss on the one best situated to control the loss,[59] it is at least arguable that the manufacturer has the best chance to avoid the injury by insuring that unreasonably dangerous products will not be placed in the stream of commerce in the first place. As one cannot hope to deter the plaintiff's conduct, it is just as well that such conduct be recognized and dealt with in a manner consistent with the purposes and spirit of strict liability.

Consistency with the purposes and spirit of strict products liability requires that the idea that a person should have discontinued his use of the product once he discovered the defect be rejected as unrealistic. If there were some good reason to withhold recovery, such as effecting a behavior modification in the plaintiff, the argument could be readily justified and harmonized with the doctrine of strict products liability. But as the question is how to deal with an accident that *will* occur, an argument that fails to grant the premise of the accident's occurrence lends little to a constructive discussion as to how public policy dictates the loss should be allocated.

Failure to recognize the moment of inadvertence doctrine in an industrial setting produces unusually harsh consequences due to the way in which courts have treated the issue of the worker who recognizes his machine as dangerous and has so indicated to his employer. Many courts which have considered the question hold that the plaintiff's continued use of the product because of the fear of loss of employment is sufficiently voluntary to fall under the heading of assumption of the risk and deny recovery.[60] Apart from the wisdom of the

[59]For a discussion of those who are best situated to control a loss and who is the cheapest cost avoider, see Calabresi & Hirschoff, *Toward a Test for Strict Liabity in Torts*, 81 YALE L.J. 1055 (1972). In that article it is noted that one test for the limits of strict liability lies in the dual questions of who was in a better position to judge the avoidance costs of the accident *and* who has the ability to act on that judgment. *Id.* at 1060. The article also notes that the level of generality in determining who could more easily avoid the loss has a tendency to confuse the issues at times because a case-by-case analysis would be more appropriate (and thus, in that respect, the authors' opinion is contra to the beliefs expressed in this writing). *Id.* at 1067-68. However, that article also recognizes that assumption of the risk has had a particularly bad record for preempting recovery on the part of plaintiffs who could not have really been said to have assumed the risk. *Id.* at 1073.

[60]*See, e.g.*, Orfield v. International Harvester Co., 535 F.2d 959, 960 (6th Cir. 1976) (recognizing that the plaintiff had expressed fear of losing his job, but directing a verdict against

holdings in such cases,[61] it is important to realize that these holdings and the denial of recovery to momentarily inadvertent plaintiffs effectively make the worker a slave to two unrelentingly contradictory masters. While the orthodox answer to this dilemma is to tell the employee to quit the job, such a solution hardly seems acceptable as an adjunct to strict products liability given its supposedly realistic approach to the problem of consumer protection. As was noted in one recent case, it is the plaintiff's poverty and not his will which consents to the use of the unreasonably dangerous product.[62]

Few, if any, people are able or choose to quit their jobs and inevitably some workers will inadvertently injure themselves despite the fact that they felt they could be careful enough to avoid injury. Once again the legal question becomes whether this is the kind of position in which one wishes to place the consuming public given the announced public policy and the increased duty placed upon the manufacturer. There exists no valid reason to place the loss upon the plaintiff given that the law has declared that there is no excuse for producing unreasonably dangerous products and that it is better to distribute such a loss over the consuming public. Any other conclusion allows the law to arbitrarily bestow its blessings on those fortunate enough to have not discovered the defect when the people who were aware of the defect at one time and those who were never aware of the defect both are unable to do anything about the situation at what proves to be the relevant moment in time.

SOME PRACTICAL CONSIDERATIONS AND THE FUTURE USE OF THE MOMENT INADVERTENCE DOCTRINE.

Departing from considerations of the compatibility of strict products liability and the moment of inadvertence doctrine and looking at the problem of the practicality of the on-the-spot awareness view of assumption of the risk, one is immediately confronted with the problem of applying the standard to the plaintiff's conduct. There can be no doubt that the applicability of the

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him on the basis of assumption of the risk with no discussion of his fear of job loss); Johnson v. Benjamin Moore & Co., 396 F. Supp. 362, 364 (W.D. La. 1975) (stating that the fact that the employer made the plaintiff use the product has no effect as against a third-party defendant who did not force the plaintiff to use the product); Fore v. Vermeer Mfg. Co., 7 Ill. App. 3d 346, 349, 287 N.E.2d 526, 528 (1972) ("The mere fact that an employee exposed himself to an abnormal risk because he feared that if he did not do this he would lose his position is not considered evidence of legal constraint and does not make his exposure to the risk involuntary); Ralston v. Illinois Power Co., 13 Ill. App. 3d 95, 98, 299 N.E.2d 497, 499 (1973) ("An employee cannot exculpate himself from the legal consequences of his acts on the grounds that he is fearful of losing his job if he does not comply with his superior's orders. The fact remains that the plaintiff knew and appreciated the risk and still voluntarily assumed it.").

[61]Of course, it would be fairly easy to come up with at least one other argument which, on its face, would appear to negate any possibility of finding an assumption of the risk. That method would be to find that the use of the product was *reasonable* due to economic coercion. Thus far, however, many courts do not appear to accept that argument as a basis by which the assumption of the risk defense can be defeated. *See* note 60 *supra*.

[62]Rhoads v. Service Mach. Co., 329 F. Supp. 367, 381 (E.D. Ark. 1971).

assumption of the risk defense is still a jury question just as it always has been.[63] However, the relevent inquiry becomes not whether the jury feels that the plaintiff was aware of the defect at some time before the accident but whether he was aware of the risk at the very second when the accident occurred, *i.e.*, whether the act was done with an awareness of the danger at the very second the risk was encountered. While some courts would no doubt feel that this is trying to shade a distinction too finely,[64] with counsel who is aware of the distinction and with proper jury instructions, the job does not seem to be that much more difficult than the kinds of factfinding duties presently imposed on juries. Though it does require a jury to engage in a more discriminating search of the testimony in order to ferret out what was actually occupying the plaintiff's mind at the time of the accident, at least the standard of awareness required is pinpointed with a degree of accuracy which would lead to less confusion once the jury retires.

Of course it is true that actual knowledge of the risk involved prior to the injury would still be relevant as to the credibility of the plaintiff's denial of the awareness of the risk at the moment of injury.[65] In fact, it would be essential in order to avoid the situation where the plaintiff, in essence, determines his own chances of recovery. If the plaintiff merely had to assert his lack of awareness as a precondition to recovery, consideration of assumption of the risk would soon become an empty exercise for defendent's counsel as any plaintiff could make such an assertion if advised of its importance by his counsel.[66] Objective evidence would be required in order to avoid making the defense of assumption of the risk any more impotent than the moment of inadvertence doctrine would leave it.

There is little doubt that the moment of inadvertence concept can only make serious inroads on the use of a very popular defense to strict products liabilty actions. The only time when the doctrine of assumption of the risk would be applicable would be when, in effect, the plaintiff has dared the defect in the machine. In relation to the present number of cases which are

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[63]*See, e.g.*, Sperling v. Hatch, 10 Cal. App. 3d 54, 62, 88 Cal. Rptr. 704, 709 (1970); Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 430, 261 N.E.2d 305, 312 (1970); Johnson v. Clark Equip. Co., 274 Ore. 403, ____ , 547 P.2d 132, 139 (1976) (*see, e.g.*, language in this opinion reproduced at note 39 *supra*); Heil Co. v. Grant, 534 S.W.2d 916, 921 (Tex. 1976) (whether he knew of the risk is peculiarly within the province of the jury).

[64]*See, e.g.*, Green v. Sanitary Scale Co., 431 F.2d 371, 374 (3d Cir. 1970).

[65]*See, e.g.*, the recognition of this fact in Johnson v. Clark Equip. Co., 274 Ore. 403, ____ n.8, 547 P.2d 132, 139 n.8 (1976) ("No juror is compelled by the subjective nature of this test to accept the plaintiff's testimony that he was unaware of the defect and the danger if, in light of all the evidence, he could not have been unaware of the particular hazard presented."); W. PROSSER, *supra* note 1, at 448. In a different context, see the discussion of a like problem in H. SHULMAN, F. JAMES, & O. GRAY, CASES AND MATERIALS ON THE LAW OF TORTS 580 n.4 (1976).

[66]If one wishes to maintain any vitality in the assumption of the risk defense, then it must not be the case that the plaintiff's assertion is taken as being true simply because the question concerns his state of mind at the time of the accident. A jury should be allowed to play its traditional truth-testing role in regard to such statements in order to prevent a mere recitation of the necessary state of mind from defeating an assumption of the risk defense.

decided under the rubric of "assumption of the risk," the number of cases where the plaintiff has actual awareness and knowledge of the risk at the very second he encounters the risk is probably relatively small. The momentary inadvertence concept would greatly extend the reach of a strict products liability action and thus run counter to what has been the general limiting trend since strict products liability became of increasing significance in the mid 1960's.[67] As a result, the lawyer who chooses to emphasize the moment of inadvertence concept to a court is likely to encounter stiff opposition to any attempt to include moment of inadvertence language in a jury instruction given the law's tendency to gravitate toward moral fault in a tort liability action.[68]

If one rejects the philosophy that forms the roots of strict products liability, then any diminution of moral fault bases of defense can only be displeasurable. Most courts now accept strict products liability as it is currently formulated but one must seriously consider that any move away from a fault basis of liability will meet with at least some resistance on the part of courts generally. In fact, it might be the case that a moment of inadvertence approach would so radically move tort liability away from the fault concept that it would be socially unacceptable to attempt to implement the idea on any large scale. In that case, the moment of inadvertence approach might only be used in certain cases where the court feels it would be unjust to bar the plaintiff from recovery and let considerations of doctrinal consistency be a theoretical nicety ignored in practice.[69] It would not be surprising to see courts adopt this approach given their natural hesitancy toward change and the strong influence of the concept of fault on the field of tort law.

Yet it should not be overlooked that requiring the use of the moment of inadvertence concept would seem to be the only consistent way to mesh the goals of strict products liability and the defense of assumption of the risk and that its adoption could be justified. Those who have never favored the assumption of the risk defense[70] could only be cheered by the adoption of the

[67]Products liability has, of course, extended its reach in the past decade and a half in terms of the number of jurisdictions willing to recognize the doctrine and the extent to which they are willing to recognize the doctrine. However, the major doctrinal change in strict products liability that has occurred since the 1960's has been the way in which courts have stressed its delimiting aspects, *e.g.*, whether there is a "defect" and whether that defect is "unreasonably dangerous," assumption of the risk and contributory negligence, misuse, etc. Thus, while the direction of growth with respect to recognition of the doctrine has been expansion, the direction of growth with respect to application of the recognized doctrine has been contraction of its otherwise unlimited bounds.

[68]*See* note 4 *supra.*

[69]As was noted by a distinguished jurist,

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. O. HOLMES, THE COMMON LAW 1 (Howe ed. 1963).

[70]*See, e.g.*, McGrath v. American Cyanamid Co., 41 N.J. 272, 276, 196 A.2d 238, 240-41 (1963); James, *Assumption of the Risk: Unhappy Reincarnation,* 78 YALE L.J. 185 (1968): W. PROSSER, *supra* note 1, at 454.

momentary inadvertence concept and so some pressure may develop along those lines for its application. It is possible, as well, that the legislature[71] might step into the picture at the behest of consumer protection groups despite the fact that the courts have fathered the strict products liability action from the beginning. Thus it would be impractical to totally discount the possibility of the adoption of a moment of inadvertence approach to assumption of the risk given its doctrinal consistency with strict products liability.

However, no matter which view is taken of the relative merits of the tort consumer protection/loss distribution system under which the United States now struggles, some answer will eventually have to be given to the question of the momentarily inadvertent plaintiff which can satisfy the demands of the policies lying behind strict products liability. Having an inconsistent doctrine which lies within a general scheme for compensating injuries which is not based on moral fault, thereby making recovery arbitrary and irrational, can only be counterproductive in the long run and create serious credibility problems between the public and the legal community.

RICHARD E. STITES

[71]For instance, in 1977 the Connecticut Legislature entered the field of strict products liability by statute. 1977 Conn. Pub. Act 77-335 indicates that contributory negligence is not to be considered a defense to a strict products liability action while assumption of the risk can be a defense. It is thus possible that legislatures elsewhere could follow such a lead and get involved in strict products liability doctrine formulation.