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Thomas C. Galligan Jr.

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Strict Liability in Action: The Truncated Learned Hand Formula

Thomas C. Galligan, Jr.*

I. INTRODUCTION

Things are not always what they seem. The five sons of the Irish king Eochaid were out hunting one day when they got lost in the forest; they could not find their way out and were overcome with thirst. Each in turn set out to search for water. The first, Fergus, found a well where an old woman was standing guard. Without going into it, suffice it to say that she was not a pretty sight. When Fergus asked for water the hag proposed a trade—water for a kiss on the cheek. Fergus refused, telling her he would rather die from thirst than kiss her. He went away thirsty. Three other brothers, Olioll, Brian, and Fiachra, followed, and, like Fergus, they refused the woman's terms of exchange.

Last came Niall, who, when presented with the hag's terms not only gave her a kiss but also a hug. When Niall looked at the woman again, the old lady had become the most beautiful woman in the world. She was, in fact, Royal Rule,¹ and what had originally appeared to be a foul, old witch was in actuality the equivalent of a goddess. As Niall and his brothers learned, appearances, or impressions, can be deceiving. Often we have to take a close look at something to see what it is we are really looking at. The same is true of strict liability.

Some hear the words strict liability and quiver. What is this thing? Does it hold everyone liable for everything? Will it shut down industry? Will it grind the wheels of commerce to a halt? Do we shy away from it as did the brothers from the hag? Like Niall's brothers do we draw our conclusions too quickly? Upon closer examination, strict liability, as courts apply it, is not what we may first assume. It may not be Royal Rule. In fact, it may not be a strange, new thing at all. Strict liability might remind us of that familiar old concept—negligence.

In many states, including Louisiana, manufacturers are supposedly "strictly" liable, at least in some cases, when their unreasonably dan-

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* Associate Professor of Law, Paul M. Hebert Law Center, Louisiana State University; L.L.M. Columbia University, 1986; J.D. (Summa Cum Laude) University of Puget Sound School of Law, 1981; A.B. Stanford University, 1977. The author thanks Lewellyn Kidder for her technical support and the Paul M. Hebert Law Center for a research grant to complete work on this article.

1. The fable is adapted from Joseph Campbell's version of the tale in J. Campbell, *The Hero With A Thousand Faces* 116-18 (2d ed. 1968).

gerous products cause injury.² Similarly, in Louisiana one is strictly liable if a thing in her "garde" presents an unreasonable risk of harm which causes injury to another.³ Far from being liability across the board for making a product or having a thing, however, strict liability, as courts use the phrase, is merely truncated negligence involving a comparable, but slightly simplified, analysis. Many courts have adopted the notion that strict liability is akin to negligence but with a presumption of knowledge of the risk.⁴ Thus, strict liability, like negligence, involves a risk utility balance but *without* the cost of knowledge added in. It involves a shortened version of the Learned Hand formula, subtracting

2. W. Keeton, D. Dobbs, R. Keeton, and D. Owen, *Prosser and Keeton on Torts* §§ 97 & 98 (5th ed. 1984) [hereinafter *Prosser & Keeton*].

3. La. Civ. Code art. 2317; *Entrevia v. Hood*, 427 So. 2d 1146 (La. 1983); *Kent v. Gulf States Utils. Co.*, 418 So. 2d 493 (La. 1982); *Loescher v. Parr*, 324 So. 2d 441 (La. 1975).

4. In the products liability context, see *Feldman v. Lederle Laboratories*, 97 N.J. 429, 451, 479 A.2d 374, 385 (1984); *Phillips v. Kimwood Machine Co.*, 269 Or. 485, 492, 525 P.2d 1033, 1036 (1974). As to strict liability under La. Civ. Code art. 2317 see *Kent*, 418 So. 2d at 497.

The California Supreme Court has recently held that state of the art evidence is admissible in a strict products liability failure to warn case. *Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991). The court indicated that the relevancy of the manufacturer's knowledge (compliance with state of the art) did not turn strict liability into negligence. This proposition is contrary to much of what I say herein. Perhaps in my own defense, I must point out that the California Supreme Court's position on this point is ambiguous. First, the court pointed out that negligent failure to warn depends upon the manufacturer's failure to conform to the appropriate standard of care, whereas strict liability, per the court, does not (supposedly) involve a breach of the standard of care. The plaintiff need only prove that the "defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution." *Id.* at 1002, 810 P.2d at 558, 281 Cal. Rptr. at 537. It seems to me the quoted portion gets right back into a standard of care and negligence. The court, continuing, said that a manufacturer could escape negligence liability for failing to warn if its own testing showed a result "contrary to that of others. . . ." *Id.* at 1003, 810 P.2d at 559, 281 Cal. Rptr. at 538. Such a manufacturer might not escape strict liability because it must provide a warning of what was known. But, if the manufacturer's research was correct, why would the product be unreasonably dangerous? If it were incorrect, might it not be negligent? If it were reasonably incorrect, how many cases are we really talking about? I feel the California court is drawing lines in the sand. Making state of the art admissible/determinative eviscerates the negligence/strict liability distinction.

I have a final nit to pick. The *Anderson* court cites Louisiana as a jurisdiction where state of the art evidence was not admissible in a warning case. *Id.* at 997 n.10, 810 P.2d at 554 n.10, 281 Cal. Rptr. at 533 n.10, and refers to *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986). While *Halphen* held state of the art was inadmissible in an unreasonably dangerous per se case, the Louisiana Supreme Court specifically allowed for the admissibility of state of the art evidence in a warning case. *Id.* at 114-15.

the burden of discovering the risk.⁵ One is negligent, per the Hand formula, when $B < P \times L$. B is the burden of avoiding the risk; P is the *ex ante* probability the risk will materialize in injury; and, L is the gravity of the risk if it materializes in injury. Adjusting the Hand formula, someone is strictly liable if $B - BK < P \times L$, where BK is the burden of knowing or discovering the relevant risk.⁶ As such, strict liability is a lot like negligence.

Identifying something as strict liability, the first step, is not the same, however, as explaining it, the second step. Why do we have strict liability, or what I call strict liability in action? Why did we get to where we are? What explains it? What is there to support such a truncated negligence formula? What is behind this concept of strict liability in action? This is a paper about both steps. What do we have, and, why do we have it? The pages that follow explore these questions.

In section II, I describe what I call strict liability in action, distinguishing it from some other uses of the phrase. In section III, I discuss what potential justifications there are for the presumption of knowledge in strict liability cases. Section IV reassesses strict liability in action in light of the possible justifications; and, section V sets forth some brief conclusionary remarks.

II. DEFINING TERMS

The phrase strict liability is susceptible of several meanings. As a result, it is essential at the outset to define the phrase as I use it in this article. Of course, in presenting my definition I exclude others. I do not mean to imply that these other definitions are unacceptable or somehow spurious. Rather, they are available alternatives which I merely distinguish for present purposes.

A. *Strict Liability In Action*

I use the phrase strict liability to refer to, if I might paraphrase the legal realists, strict liability in action, not strict liability in theory.⁷ Strict liability in action, like negligence, involves a balance at the case-specific level of risk and utility.⁸ To be strictly liable there must be an unreasonable risk of harm.⁹

5. See *infra* text accompanying notes 34-38.

6. *Id.*

7. For a definition of strict liability in theory, see *infra* text accompanying notes 45-50.

8. *Id.* See also Restatement (Second) of Torts §§ 291-293 (1965). The Restatement, in sections 291-293, expressly uses the terms risk and utility. Interestingly, the Restatement states that in a negligence case the risk/utility balance is conducted only "[w]here an act

Nationally, no doubt the most controversial, publicized, and widespread interest in strict liability is in the supposedly strict liability of a product manufacturer for defects in its products. Restatement (Second) of Torts Section 402A provides:

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

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.¹⁰

One notes immediately that the manufacturer or seller is only liable if the product is in an "unreasonably dangerous" condition. The phrase unreasonably dangerous often reminds lawyers and students of negligence. Recall that one is liable in negligence only if she *knew or should have known* of a risk and proceeded to act unreasonably in light of that risk.¹¹ Courts have wrestled with giving meaning to the phrase unreasonably dangerous in the products liability field. Some have adopted a consumer expectation test, citing the comments to the Restatement.¹² Under this test, a manufacturer is strictly liable for its product if the product is dangerous to an extent beyond that contemplated by the ordinary user.¹³ Others courts have leaned away from the consumer expectation test and towards a risk/utility test.¹⁴ Under such a test the decision maker balances the risks the product presents against its utility

is one which a reasonable man would recognize as involving a risk of harm to another." Thus, the risk/utility balance is done after it is determined that the defendant knew or should have known of the risk of harm presented. But, under both the Restatement and Judge Learned Hand's negligence formulae the process is basically the same. Courts and juries balance the benefits and risk of the conduct (or the way in which the conduct was engaged) of the defendant and others like him or her.

9. For a definition of strict liability in theory see *infra* text accompanying notes 45 through 50.

10. Restatement (Second) of Torts § 402A (1965).

11. See, e.g., *supra* note 8. See also Prosser and Keeton, *supra* note 2, § 31, at 170.

12. Restatement (Second) of Torts § 402A comment i (1965). For a discussion of the consumer expectation test see Prosser and Keeton, *supra* note 2, § 99, at 698-99.

13. See Prosser & Keeton, *supra* note 2, § 99, at 698.

14. Restatement (Second) of Torts §§ 291-293 (1965).

as manufactured, designed, or sold. The risk/utility test used in products liability litigation is akin to the balancing test courts use when determining whether or not a defendant is negligent.¹⁵ The similarity is in the risk/utility balance; the difference is found in the factor of the defendant's knowledge. Before discussing that difference, however, let us turn to Louisiana.

In Louisiana, under Civil Code article 2317, the custodian of a thing is strictly liable for the damages that the thing causes.¹⁶ In order to prevail in an Article 2317 case, the plaintiff must prove that the defendant had "garde" of the thing,¹⁷ that the thing was unreasonably dangerous,¹⁸ and that its unreasonably dangerous condition caused injury.¹⁹ In determining whether or not the thing was unreasonably dangerous, Louisiana courts frequently employ a risk/utility test.²⁰ Once again, the test is reminiscent of the risk/utility test employed in negligence cases, but lack of knowledge of the defect is not a defense.²¹

15. See, e.g., Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 834-38 (1973).

16. See *supra* note 3 and accompanying text.

17. The Louisiana Civil Code actually provides that one who has "custody" of a thing is liable for the damages it causes; however, courts have noted that the word custody does not adequately translate the French word "garde," the original word used in earlier editions of the Civil Code. See, e.g., *Ross v. La Coste de Monteville*, 502 So. 2d 1026 (La. 1987); *Loescher v. Parr*, 324 So. 2d 441, 447 (La. 1975). For a recent discussion of garde, see *Doughty v. Lloyds Ins. Co.*, 576 So. 2d 461 (La. 1991). See also *Socorro v. City of New Orleans*, 579 So. 2d 931 (La. 1991).

18. See, e.g., *Spivey v. Super Valu*, 575 So. 2d 876 (La. App. 2d Cir. 1991).

19. *Id.*

20. See, e.g., *Entrevia v. Hood*, 427 So. 2d 1146 (La. 1983) and *Kent v. Gulf States Utils. Co.*, 418 So. 2d 493 (La. 1982).

21. For purposes of this article I am focusing only on Louisiana Civil Code article 2317 and generally on products liability. Article 2317 is the introductory article to a series of articles which Louisiana courts have interpreted as imposing strict liability on various other persons who have a certain relationship with various persons or things. Almost everything that is said relating to Article 2317 also applies to Article 2322. Article 2322 imposes strict liability on a building owner for injuries arising out of the ruin of the building caused by a vice in the original construction or a neglect to repair. Courts basically state that building owners are strictly liable for unreasonably dangerous characteristics of their buildings which cause injury. Recently, when there has been doubt regarding whether or not there was a ruin or whether or not whatever it was that caused the plaintiff's injury was a part of defendant's building, courts have resorted to Article 2317 as a basis of liability rather than Article 2322. See *Fonseca v. Marlin Marine Corp.*, 410 So. 2d 674 (La. 1981). Arguably broader liability is imposed by Article 2322, as any owner is liable, even one who does not have garde of the building. Both Article 2317 and Article 2322 create the same type of strict liability. Knowledge of the risk is basically presumed (or lack of knowledge is not a defense) and the court proceeds from there. The knowledge issue is not as neatly presented in the other strict liability articles but it might still be said that knowledge is essentially irrelevant.

For instance, Louisiana Civil Code article 2318 imposes liability upon parents for certain

Consequently, one might say that in strict liability cases, courts presume that the defendant has knowledge of the dangerous characteristic of its product or thing and then ask whether or not a defendant with knowledge of the dangerous characteristic of the thing or product would use, keep, or sell it in that condition.²² If the person who had knowledge would be negligent (or unreasonable) for using, keeping or selling a thing or product in its injury-causing condition, then the product or thing presents an unreasonable risk of harm and the defendant is liable—strictly liable.²³

torts which their children commit while residing with them. If the child is over the age of discernment *and* commits a tort, then the parent is vicariously liable. If the child is below the age of discernment but engages in conduct which would be a tort under normal standards, the parents are strictly liable. See *Turner v. Bucher*, 308 So. 2d 270 (La. 1975). (Query what happens when the child is over the age of discernment and engages in conduct which would not be a tort for a child of his age, intelligence, and experience but would be a tort for an adult? Are the parents strictly liable?) Turning to the knowledge issue, one might conclude that what would prevent a child from having the ability to discern whether his actions were negligent is his "knowledge of the world." That is, the child lacks the capacity to know that what he is doing is wrong. In essence, capacity is related to knowledge. Thus, by denying the parents the defense that the child had no capacity, the court is essentially holding them strictly liable. Indeed, in his concurrence in *Kent*, Justice Dennis stated: "In negligence, allowance is made for the risk apparent to the actor, for his capacity to meet it, and for the circumstances under which he must act. In strict liability, however, knowledge of the condition of the product is imputed to the defendant before the balancing test or negligence test is applied." 418 So. 2d at 501 (Dennis, J., concurring).

Louisiana Civil Code article 2319 involves liability for custodians of interdicted persons. Once again, these persons arguably lack the capacity to know right from wrong, so what was said regarding children is equally applicable to them.

Louisiana Civil Code article 2320, amongst other things, imposes vicarious liability upon employers for torts which their employees commit in the course and scope of employment. Although the relationship between a presumption of knowledge and vicarious liability is interesting and raises several theoretical questions, these need not detain us now. Suffice it to say that the employer's lack of knowledge that the employee committed a tort is irrelevant to determining vicarious liability for that tort.

Finally, Louisiana Civil Code article 2321 imposes liability upon the owner of an animal for injury which it causes to others. In *Holland v. Buckley*, 305 So. 2d 113 (La. 1974), the supreme court held that Louisiana did not follow the "first bite rule" and that the defendant's failure to know that its dog might bite someone was not a defense. Thus, lack of knowledge was no defense. In *Boyer v. Seal*, 553 So. 2d 827 (La. 1989), the court held that owners of domestic animals are liable when their animals create an unreasonable risk of harm which causes injury to another. Further, it has been held that owners of wild animals are absolutely liable. See *Holland*, 305 So. 2d at 119 n.10.

Although I am focusing only on Article 2317 because of its prevalence and because of the clarity with which the presumption of knowledge issue is presented in the cases, one can see that knowledge is what separates strict liability in Louisiana from negligence.

22. See generally *Kent*, 418 So. 2d 493, and *Wade*, *supra* note 15.

23. See *Wade*, *supra* note 15.

Both Dean Page Keeton²⁴ and Dean John Wade²⁵ have articulated this presumed knowledge test as a way to determine whether a product manufacturer is strictly liable. In his majority opinion in *Kent v. Gulf States Utilities Co.*,²⁶ Justice Lemmon of the Louisiana Supreme Court posited this same formula for determining strict liability under Article 2317. Other Louisiana courts have adopted the same idea although they approach it a little differently. They note that the risk/utility test in a strict liability case is essentially the same as it is in a negligence case except that the defendant's knowledge or lack thereof is not a defense.²⁷ These courts do not refer to a presumption of knowledge and do not focus on whether a defendant who had knowledge would be negligent. Instead, they note that lack of knowledge is no defense and balance the risk and utility of the thing.

Although there seems to me to be no real difference between the two approaches, I prefer Justice Lemmon's articulation because it encourages the decision maker to look not only at the thing involved but also at what the guardian has done to render the thing less risky, whether she knew of the risk or not. For instance, imagine a rotten step of which the owner/custodian is not aware. A visitor falls through the step. If there had been a sign stating: DO NOT GO UP THESE STAIRS, the sign would reduce the risk side of the calculus even though the owner has no idea the stair is rotten. Lemmon's formulation clearly assures that the sign is figured into the balance. The other approach does not expressly exclude the sign; however, it is not as clearly a relevant concern. Lemmon's approach reminds us that strict liability is negligence *without* knowledge. The other approach is somewhat more vague for the trier of fact and the practicing attorney. Importantly, the effect of both formulations is the same—knowledge of the risk is not an issue.

Turning now from the two formulations of strict liability to a comparison of negligence and strict liability, despite the similarities between strict liability in action and negligence, they are not the same thing.²⁸ They are not because, as noted, knowledge of the risk is irrelevant in a strict liability case. However, the two are quite similar, because both negligence and strict liability involve a case specific risk/utility balance. Recently, the Louisiana Supreme Court noted this similarity in

24. See, e.g., Keeton, *Product Liability and the Meaning of Defect*, 5 St. Mary's L.J. 30 (1973).

25. See Wade, *supra* note 15.

26. 418 So. 2d 493 (La. 1982).

27. See, e.g., *Entrevia v. Hood*, 427 So. 2d 1146 (La. 1983) and *Spivey v. Super Valu*, 575 So. 2d 876 (La. App. 2d Cir. 1991).

28. See *Entrevia*, 427 So. 2d 1146; Keeton, *supra* note 24, at 33-35; and Wade, *supra* note 15, at 834-88.

an Article 2317 case. In *Oster v. Department of Transportation and Development, State of Louisiana*,²⁹ Justice Cole wrote:

In essence, the only difference between the negligence theory of recovery and the strict liability theory of recovery is that the plaintiff need not prove the defendant was aware of the existence of the "defect" under a strict liability theory. Under the negligence theory, it is the defendant's *awareness* of the dangerous condition of the property that gives rise to a duty to act. Under a strict liability theory, it is the defendant's *legal relationship* with the property containing a defect that gives rise to the duty. *Loescher v. Parr*, 324 So.2d 441, 446 (La. 1976). Under both theories, the absence of an unreasonably dangerous condition of the thing implies the absence of a duty on the part of the defendant.

Cole continued at footnote four in *Oster*:

4. La. R.S. 9:2800(B) provides that in an action against a "public entity" under La. C.C. article 2317, the plaintiff must prove the public entity had actual or constructive notice of the defect in the thing before liability will attach. This statute appears to eviscerate the distinction between negligence and strict liability when a public entity is a defendant.³⁰

All I can say in light of the *Oster* quote is "I agree."³¹

I. Negligence

It is now appropriate to compare strict liability, as described above, with liability for negligence from a theoretical approach. As noted, one might say that a person is negligent when she knew or should have known of a risk and failed to exercise reasonable care to avoid the risk.³² Thus, negligence can occur through action or failure to act, in light of some known or reasonably knowable risk.³³ Consequently, one could break negligence down into two elements: knowledge and risk

29. 582 So. 2d 1285 (La. 1991).

30. *Id.* at 1288 (part of footnote 4 is omitted).

31. In *Labit v. Tangipahoa Parish Council*, 581 So. 2d 732 (La. App. 1st Cir. 1991), the court considered another case against the state. The plaintiff had alleged both negligence under Louisiana Civil Code article 2315 and strict liability under Louisiana Civil Code article 2317. La. R.S. 9:2800 (1991) applied to the case. Noting that the state had actual knowledge of the alleged defect, the court stated: "Therefore, the liability analysis is the same under La. C.C. art. 2315 or La. C.C. art. 2317." 581 So. 2d at 734. The quoted sentence is consistent with my understanding of strict liability in action.

32. See *supra* note 11 and accompanying text.

33. See, e.g., *Prosser & Keeton*, *supra* note 2, at ch. 5.

prevention. Negligence fundamentally differs from strict liability in that knowledge is not an element of the plaintiff's strict liability case.

Judge Learned Hand provided an algebraic or economic definition of negligence in a series of cases decided in the 1940's.³⁴ His formulation merits consideration now. According to Judge Hand, an actor was negligent when the burden of avoiding an accident (B) was less than the *ex ante* (before hand) probability of an accident occurring times the anticipated severity of the accident if it occurred ($P \times L$). The product of P times L represents the *ex ante* cost of the accident. Thus, if B is less than $P \times L$ the defendant who fails to undertake that burden (B) is negligent.³⁵ As such, Hand's formula encourages actors to behave efficiently by spending up to but not over the *ex ante* "cost" of the accident. Phrased differently, society wants an actor to spend \$99 (B) to avoid a \$100 accident ($P \times L$); she is negligent if she fails to do so. Alternatively, society does not want her to spend \$101 to avoid that same accident. So if B is \$101 and $P \times L$ is still \$100, letting the accident happen and leaving the loss on the victim is good for society, at least if it is *societas economicus*.

For present purposes, it is important to focus on the B side of the formula. The burden of avoiding an accident is not simply the direct cost of accident avoidance. B should encompass all the costs involved in accident avoidance.³⁶ For instance, if a safety feature on a product would avoid an accident, the direct cost (labor and materials) of placing the guard on the product would be included in B. Likewise, if the product has a lower utility with the guard than it does without the guard, the reduced utility is also part of B.³⁷ Most importantly for present purposes, B also includes the "cost" of discovering the risk associated with the product, thing, or activity.³⁸ This would include all the costs of researching the risk. These costs are implicit in Hand's formula.

34. See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); *Conway v. O'Brien*, 111 F.2d 611 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 492, 61 S. Ct. 634 (1941).

35. See *Carroll Towing Co.*, 159 F.2d at 173.

36. If B does not encompass all the costs involved in avoiding an accident then the actor is not actually taking into account all of the costs which its conduct imposes upon society. As such, the actor will over-engage in the activity, exposing people to undue levels of risk.

37. See, e.g., *Prosser & Keeton*, *supra* note 2, § 99, at 700. Note also that the Louisiana Products Liability Act expressly provides that in a design case, the court, as part of the risk/utility balance, must consider the impaired utility on the defendant's products of an alternative design. La. R.S. 9:2800.56(2) (1991).

38. Including the cost of discovering a risk in B is essential to the smooth application of the Learned Hand test. If the Learned Hand test is only applied after knowledge is gained, then the test would ignore the cost of discovery. The cost of discovering a risk is an important part of the risk/utility balance.

Interestingly, several recent Louisiana Supreme Court cases have employed Hand's formula. In one, *Levi v. SLEMCO*,³⁹ the formula is extensively discussed; however, the court applies the test *after* deciding if the defendant electrical cooperative had knowledge of the risk.⁴⁰ Thus, the court separates the knowledge issue from the Hand balance. This is certainly acceptable but it is not necessary. Hand did not do so although he did not specifically focus on knowledge. Further, in *Dobson v. Louisiana Power and Light Co.*,⁴¹ Justice Dennis, writing for the majority, stated that Louisiana courts might employ Hand's formula to compare fault in comparative negligence cases. In so doing the court allocated less fault to an inexperienced tree trimmer electrocuted by an uninsulated electric utility's distribution line than to the utility because it would have cost the decedent more to discover the risk. Thus in *Dobson*, the court implicitly recognized that the knowledge issue in a negligence case can be subsumed into Hand's formula.

2. *Strict Liability and the Presumption of Knowledge*

As noted, the primary difference between strict liability in action and negligence is that in a strict liability case knowledge of the risk is presumed. Thus, lack of knowledge of the risk is not a defense. From an economic perspective one is negligent if $B < P \times L$. Employing the same variables to define strict liability, one is strictly liable if $B - BK < P \times L$ where BK is the burden of obtaining knowledge of the risk.

39. 542 So. 2d 1081 (La. 1989).

40. In the opinion the court has a section titled "Whether the power company was required to recognize the hazard" which precedes a section titled "Whether the hazard was an unreasonable risk of harm." It is in the second section that the court addresses the Learned Hand test. In essence, by using the test only to determine whether or not the defendant's conduct presented an unreasonable risk of harm, the court is using it to determine the breach issue in the negligence formula. That is, if negligence consists of four factors, duty, breach of a duty, cause, and damage, one might say that the court in *Levi* was using the Learned Hand formula to determine breach. Knowledge would relate to duty, and one could say that once one had, or should have had, knowledge of a risk then a duty was triggered to exercise reasonable care. Or, perhaps duty is broader. One always has a duty to exercise reasonable care to avoid risk, and part of that duty involves determining whether or not there is an unreasonable risk of harm under the circumstances to trigger a more particularized subduty. Furthermore, by using the Learned Hand formula only to determine breach *after* determining if the defendant knew or should have known of the risk, the court is essentially doing what it does in a strict liability case in which knowledge is not an issue. The only difference would be that in *Levi*, the court, because it was deciding a negligence case, first had to determine whether or not the defendant knew or should have known of the risk of harm. Obviously, the cost of knowledge is relevant. See *supra* note 36. As such, in most negligence cases we do not impose an absolute duty to discover a risk.

41. 567 So. 2d 569 (La. 1990).

BK is not included; it is subtracted from B. This strict liability formula is a truncated Learned Hand formula. An example or two may help to explain the truncated Hand formula.

Let us begin with an example from the products liability arena. Imagine that an auto manufacturer manufactures a car which leaves the assembly line with an important part missing. This missing part renders the car's brakes dangerous; because of the missing part, the brakes may not work. Imagine that the part and labor would cost one dollar. Furthermore, imagine that the probability of an accident occurring when the part is not in the car is 25% and that the anticipated losses that will be sustained if the part is not in the car are \$100,000. Thus, $P \times L$ is \$25,000. Finally, imagine that in order to determine whether or not the part is missing in any particular car that comes off the assembly line the car manufacturer would have to expend an additional \$500,000 in equipment and wages (to test for the missing part), resulting in lower overall output. As a result, the total burden of avoidance is \$500,001, \$1 for the part and \$500,000 for "discovery" costs. B, \$500,001, is greater than $P \times L$, \$25,000; therefore, under the Hand negligence formula the car manufacturer is not *negligent* for not discovering and fixing the car with the missing part. On the other hand, the burden of knowledge, the burden of discovering that the part is missing from the machine, is not figured into the formula in a strict liability case. Using the truncated Hand formula, $B - BK < P \times L$, the left side of the equation, B (\$500,001) - BK (\$500,000), yields \$1. \$1 is less than \$25,000, still the relevant figure on the right side. That is, where knowledge of the risk is presumed, the manufacturer of the automobile is strictly liable because $B - BK < P \times L$, even though the manufacturer is not negligent because $B > P \times L$.

Turning to Louisiana and Article 2317, imagine that Driver (the purchaser) of that unreasonably dangerous car has a wreck because the brakes fail, and a pedestrian, Walker, is injured. Granted, under Louisiana law⁴² and in most states⁴³ Walker can recover in a products liability suit from the manufacturer because the courts will find the manufacturer strictly liable because $B - BK < P \times L$. But, in Louisiana, is Driver strictly liable to Walker under Article 2317?

Suppose that repairing the brakes would cost purchaser \$500 in mechanic's fees and \$700 in "lost utility" from "down" time while the brakes are repaired. Further, assume the manufacturer now sells a brake

42. La. R.S. 9:2800.53(4) (1991). "Claimant" is basically defined as anyone asserting a claim. Thus, privity of contract is not required and Walker could recover.

43. See generally Prosser & Keeton, *supra* note 2, at § 100. The Restatement (Second) of Torts expressly takes no position on whether or not bystanders can recover. Restatement (Second) of Torts § 402A comments l and o (1965).

defect discovery system which is available to Drivers for \$24,000. Let us keep $P \times L$ as it was in the previous hypothetical at \$25,000. Note first that the cost of the brake discovery machine is the cost of obtaining knowledge. Like the repair cost and the "lost utility," it is part of the burden of avoiding the accident. Second, observe that under the Hand formula Driver is not negligent, for B ($\$500 + \$700 + \$24,000 = \$25,200$) is greater than $P \times L$ ($\$25,000$). However, Driver is strictly liable to Walker under the truncated Learned Hand strict liability test because B ($\$25,200$) - BK ($24,000$) equals $\$1,200$ which is less than $P \times L$ ($\$25,000$).

Returning once again to the linguistic statement of the negligence formula, one will recall that it had two components— knowledge and risk prevention.⁴⁴ In a strict liability case, the knowledge aspect of the linguistic negligence formula is irrelevant; however, risk prevention is still quite relevant. Thus, the care that a manufacturer, or the custodian of a thing, might exercise to prevent an accident is relevant in determining whether or not a product or thing presents an unreasonable risk of harm.

Now, what caused us to adopt this definition of strict liability; more simply, why do we have what we have? Before answering these questions I must first distinguish other definitions of strict liability.

B. Calabresi Strict Liability

There has been an ongoing debate in the law and economics literature over the efficiency of systems imposing strict liability for certain activities as opposed to systems imposing liability only for negligence.⁴⁵ The legal economists who use the phrase strict liability use it to mean liability without regard to the defendant's negligence or blameworthiness.⁴⁶ Under this definition a person may be liable despite the fact that the relevant utility of an action, product, or thing might outweigh the risk it presented.⁴⁷ Thus, a decision maker deciding whether to impose this type

44. See *supra* text accompanying note 32.

45. Compare G. Calabresi, *The Cost of Accidents* (1970) [hereinafter Calabresi] and Posner, *Strict Liability: A Comment*, 2 *J. Leg. Stud.* 205 (1973). I must note that in the summer of 1990 I had the opportunity to teach a comparative tort law class at LSU's summer program in Aix-En-Provence, France. After spending three of the six weeks comparing the various tort schemes of several nations, we then turned to a theoretical examination of the general principles of torts. For this purpose I used Robert Rabin's excellent book, *Perspectives on Tort Law*. R. Rabin, *Perspectives on Tort Law* (2d ed. 1983). Many of the insights I gained for this article came from reading the wonderful pieces which Professor Rabin has collected in the book and from his insightful questions and comments at the conclusion of the selections.

46. See generally Calabresi, *supra* note 45; Calabresi and Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 *Yale L.J.* 1055 (1972) [hereinafter Calabresi and Hirschoff]; Shavell, *Strict Liability Versus Negligence*, 9 *J. Leg. Stud.* 1 (1980).

47. See Calabresi and Hirschoff, *supra* note 46, at 1060.

of strict liability would not delve into traditional negligence inquiries. The word "unreasonable" would have no place in such schemes. At the very least, unreasonableness would not be determinative, as it now seems to be.

For instance, Dean Calabresi has articulated a theory that an actor ought to be strictly liable whenever she is the cheapest cost avoider of an accident.⁴⁸ Although certain traditional negligence defenses such as assumption of the risk might be relevant to determining who is the cheapest cost avoider,⁴⁹ decision makers under this theory would not undertake a risk/utility analysis to determine the "reasonability" of risks. In fact, avoiding that balancing process and the attendant administrative costs is one of the strengths of this type of strict liability.⁵⁰ In places throughout this paper I shall refer to the cheapest cost avoider theory as "Calabresi strict liability." It is different from strict liability in action because there is no case specific risk/utility balance involved. If Calabresi strict liability is akin to negligence, it is only a distant relation. Strict liability in action, on the other hand, is a first cousin, or closer.

C. Absolute Liability

Courts and commentators often use the phrase strict liability in reference to liability for engaging in ultrahazardous or abnormally dangerous activities.⁵¹ This form of liability is arguably derived from *Rylands v. Fletcher*.⁵² In *Rylands* the defendant, a lessee of land in a mining area in England, built a reservoir for a mill. At the bottom of the reservoir were unused mine shafts. When the lessee filled the reservoir with water the mine shafts gave way and flooded the neighboring plaintiff's mine. The wet plaintiff sued the defendant with the dry reservoir, and the courts that heard the case found the defendant liable even though he was not personally negligent.

Despite a stormy early history in the United States,⁵³ American courts have extended the *Rylands* rationale to such categories as blasting,⁵⁴

48. See Calabresi, *supra* note 45, at 135 and Calabresi and Hirschhoff, *supra* note 46.

49. Calabresi and Hirschhoff, *supra* note 46, at 1064-66.

50. Calabresi, *supra* note 45, at 252-65, 286-87.

51. See Prosser & Keeton, *supra* note 2, ch. 13, § 78; W. Prosser, J. Wade & V. Schwartz, *Cases and Materials on Torts*, ch. 14, 673-88 (8th ed. 1988) [hereinafter Prosser, Wade & Schwartz]; Calabresi and Hirschhoff, *supra* note 46.

52. L.R. 3 H.L. 330 (1868). The lower courts' opinions are also worth reading as they have been relevant to the development of the law. See, e.g., *In the Exchequer*, 3 H. & C. 774, 159 Eng. Rep. 737 (1865) and *In the Exchequer Chamber*, L.R. 1 Ex. 265 (1866).

53. See Prosser, Wade & Schwartz, *supra* note 51, at 679 nn.7 & 8.

54. See, e.g., *Spano v. Perini Corp.*, 25 N.Y.2d 11, 250 N.E.2d 31, 302 N.Y.S.2d 527 (1969).

crop dusting,⁵⁵ hazardous waste disposal,⁵⁶ pile driving,⁵⁷ chemical storage,⁵⁸ and various other uncommon,⁵⁹ but dangerous,⁶⁰ activities. Some call this type of liability strict liability; I prefer to call it absolute liability.⁶¹

In Louisiana we have a similar liability rule for the above enumerated activities. This rule apparently derives from Louisiana Civil Code articles 667 and 669, in conjunction with Article 2315.⁶² Whether Louisiana law is different from our common law neighbors, and if so, how, are interesting questions. For instance, there is a recent Louisiana Supreme Court case, *Butler v. Baber*,⁶³ which conspicuously omits the words "ultrahazardous (or abnormally dangerous) activity" while imposing "667/2315" liability. And, there is a court of appeal decision, *Street v. Equitable Petroleum Corp. and Energy Corp. of America*,⁶⁴ ostensibly applying *Butler*, which states that "667/2315" liability may be imposed without proof that an activity (storage/spillage of oil) is ultrahazardous.⁶⁵ Happily, for present purposes, these questions need not detain us. It suffices to say that some Louisiana courts, like many common law courts, refer to this type of liability as strict liability.⁶⁶ However, all Louisiana judges have not followed suit.

In *Kent*, a most important case for my purposes, Justice Lemmon referred to this category of tort liability as "absolute liability." In essence it is Louisiana's version of *Rylands*.⁶⁷ My colleague, Professor Frank Maraist, like Justice Lemmon, also calls this type of liability absolute liability.⁶⁸ I humbly adopt their useful nomenclature. Why use that phrase? Unlike a negligence case, or a strict liability in action case, in a *Rylands*-type case there is no risk/utility balance undertaken at the case-specific level. Generally, if the activity is one which exposes the defendant to *Rylands*-type liability, he or she is liable despite the fact

55. *Langan v. Valicopters, Inc.*, 88 Wash. 2d 855, 567 P.2d 218 (1977).

56. Baurer, *Love Canal: Common Law Approaches to a Modern Tragedy*, 11 *Envtl. L.N.W.U.* 133 (1980).

57. *Vern J. Oja & Assoc. v. Washington Park Towers Inc.*, 89 Wash. 2d 72, 569 P.2d 1141 (1977).

58. *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 1083-84, 249 So. 2d 133, 139-40 (1971).

59. See Restatement (Second) of Torts §§ 519-520, 520(d) (1977).

60. *Id.* at §§ 519-520(a) & (b).

61. See *infra* text accompanying notes 67-70.

62. See, e.g., *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 249 So. 2d 133 (1971).

63. 529 So. 2d 374 (La. 1988).

64. 532 So. 2d 887 (La. App. 5th Cir. 1988).

65. *Id.* at 889. *Contra, Welcker v. Fair Grounds Corp.*, 577 So. 2d 301 (La. App. 4th Cir.), writ denied, 580 So. 2d 670 (1991).

66. See, e.g., *Langlois*, 258 La. 1067, 249 So. 2d 133 (Interestingly, the court refers to the case involving *strict* liability.).

67. *Kent v. Gulf States Utils. Co.*, 418 So. 2d 493, 498-99 (La. 1982).

68. F. Maraist, *Louisiana Tort Law Cases and Materials*, ch. 16 (1990 ed.).

that the social utility of the activity may outweigh its risk.⁶⁹ The activity presents a reasonable risk of harm but the defendant is still liable.⁷⁰ The risk from blasting to build a new dam may be valued at \$900,000, the utility at \$2,000,000. Utility is greater than risk but the defendant would nevertheless be found liable under an absolute liability theory.

Of course, the astute reader will note that one of the factors that the Restatement (Second) of Torts (which Louisiana apparently does not follow) counsels courts to consider in determining whether or not an activity is abnormally dangerous is the extent to which the value of the activity outweighs its dangerous attributes.⁷¹ Some scholars have criticized the Restatement for including this "balance" among the relevant factors. Moreover, the Restatement (Second) balance is only a factor; it is not determinative of liability. In any absolute liability case, balancing is necessarily involved; however, that balancing usually takes place at the activity level. Should one who engages in this reasonable, but dangerous, activity pay the damages she causes even though she has acted reasonably? Courts decide whether or not, given the policies at stake, it is appropriate to impose *Rylands*-type liability upon the activity in question. Once a court determines an activity is within (or without) the scope of *Rylands* absolute liability, it, in effect, creates a categorical rule.⁷² Trial courts do not subsequently engage in a risk/utility balance at the case specific level. Consistently, the Restatement provides that whether an activity is abnormally dangerous is for the court to decide. It is, I suppose, a question of law.⁷³ To the contrary, strict liability requires a case-specific determination that risk outweighs utility, and,

69. *Kent*, 418 So. 2d at 498. Prosser, Wade & Schwartz state:

Strict liability is "founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur. The defendant's enterprise, in other words, is required to pay its way by compensating for the harm it causes because of its special, abnormal and dangerous character." Restatement (Second) of Torts § 519 comment d (1977). The liability "is applicable to an activity that is carried on with all reasonable care, and that is of such utility that the risk which is involved in it cannot be regarded as so great or so unreasonable as to make it negligence merely to carry on the activity at all." *Id.* at § 520, comment b. Observe also that the decision of whether an activity is subject to strict liability is for the court, not the jury. *Id.* Prosser, Wade & Schwartz, *supra* note 51, at 687 n.7.

70. Restatement (Second) of Torts § 520 comment b (1977).

71. *Id.* at § 520 (F).

72. There are cases that say this absolute liability (*Rylands*) inquiry is case by case. See *State v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150 (1983). However, much of the "analysis" goes on at the activity level. See, e.g., Prosser, Wade & Schwartz, *supra* note 51, at 685-86.

73. Restatement (Second) of Torts § 520 comment 1 (1977).

whether risk outweighs utility in a strict liability case,⁷⁴ as in a negligence case, is a question for the jury.⁷⁵

It is important to note there *are* defenses to absolute liability. For instance, determining whether or not the risk is within the scope of the defendant's absolute liability is always an issue.⁷⁶ Phrased differently, proximate cause or scope of duty is still an issue. No doubt, many readers will recall the series of cases involving mother minks who ate their babies because of the noise produced by blasting.⁷⁷ Many courts have held that such a risk was not within the scope of risks for which they imposed absolute liability on the blasting defendant,⁷⁸ therefore, the defendant was not liable. In Louisiana we have the case of *Holland v. Keaveney*.⁷⁹ The defendant demolished a building. Some bees had been living in one of the walls. The evicted and angry bees set out to even the score. They lit upon plaintiff's rare and valuable dog and stung it to death. The court stated that building demolition was an ultrahazardous activity; however, it did not hold the defendant liable. The reason was because the dog's death was an "unanticipated" event. The facts, though sad, certainly present the no proximate or no legal cause defense in a more cultured setting than the baby mink cases.

Furthermore, in *Kent*, Justice Lemmon pointed out that in Louisiana cases imposing liability for engaging in an ultrahazardous activity, the defendant is "almost invariably the sole cause of the damage and the victim seldom has the ability to protect himself. No decisions have placed in this category any activities in which the victim or a third person can reasonably be expected to be a contributing factor in the causation of damages with any degree of frequency."⁸⁰ Whether the

74. See *Spivey v. Super Valu*, 575 So. 2d 876 (La. App. 2d Cir. 1991).

75. L. Green, *Judge and Jury* (1930).

76. The Restatement provides: "This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous." Restatement (Second) of Torts § 519 (2) (1977).

77. See, e.g., *Foster v. Preston Mill Co.*, 44 Wash. 2d 440, 268 P.2d 645 (1954) (risk of minks eating their babies as a result of nervousness caused by blasting not within the risk for which the defendant is absolutely liable). Accord, *Gronn v. Rogers Constr., Inc.*, 221 Or. 226, 350 P.2d 1086 (1960); *Madsen v. East Jordan Irrigation Co.*, 101 Utah 552, 125 P.2d 794 (1942).

78. See, e.g., *Foster*, 44 Wash. 2d 440, 268 P.2d 645.

79. 306 So. 2d 838 (La. App. 4th Cir.), writ denied, 310 So. 2d 843 (1975).

80. *Kent v. Gulf States Utils. Co.*, 418 So. 2d 493, 499 n.8 (La. 1982). The law in other states has not been so limited. For instance, there is a famous case involving a military installation in Alaska where dynamite was stored. Some vandals broke in, stole dynamite, then blew up the storage area causing damage to nearby residences. The court imposed absolute liability. *Yukon Equip. Inc. v. Fireman's Fund Ins.*, 585 P.2d 1206 (Alaska 1978). Compare *Bridges v. The Kentucky Stone Co.*, 425 N.E.2d 125 (Ind. 1981) (*Webb* stole dynamite from defendant and three weeks later, over 100 miles away, blew up plaintiff's home killing one son and injuring *Bridges* and another son).

Louisiana Supreme Court has asked too little of the defendant is an open question; however, the point is clear—scope of duty and/or legal cause is a defense in an absolute liability case.

Additionally, one recent Louisiana court has found that comparative negligence is a defense to an absolute liability claim.⁸¹ Whatever the merits of that conclusion, it at least shows that there are defenses to absolute liability. In conclusion, let me reiterate my basic point. *Rylands*, its progeny, its Louisiana kin, and the Restatement provisions dealing with this type of liability are *not* what I call strict liability. Strict liability entails a case specific risk/utility balance at the individual case level; absolute liability does not.⁸²

D. Summary

Strict liability in action involves a negligence-type risk/utility balance. Knowledge, however, is irrelevant; thus lack of knowledge is not a defense. As such, strict liability in action may be expressed by a truncated Learned Hand formula under which one is strictly liable if $B - BK < P \times L$ where BK is the burden of discovering the risk. Strict liability in action is different from Calabresi strict liability and absolute liability because of the case specific risk/utility balance involved. It remains to be seen in the following sections if we can explain why courts have adopted this strict liability in action concept and what it does for us.

III. WHAT JUSTIFICATION?

What possible policy justifications are there for a doctrine under which the decision maker is allowed to presume knowledge of the risk before engaging in a risk/utility balance? Like any other torts writer, I turn to the purposes of tort law whenever I hear the word "policy." I also confess publicly that I do not relate this fact to my first year Torts students until after they have tortured themselves with all those proximate cause and duty/risk cases. With this confession noted, I continue.

A. Compensation

Strict liability might be justified by the desire to compensate accident victims. Legal economists have noted that assuring compensation to the

81. *Pelt v. City of DeRidder*, 553 So. 2d 1097, 1099 (La. App. 3d Cir. 1989). One will note that the court referred to the case as a strict liability case, *id.* at 1098, but it fits under my taxonomy as an absolute liability case. It arose under La. Civ. Code art. 667.

82. *Cf. State v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150 (1983) (court said *Rylands*-type liability is decided on a case-by-case basis).

injured victim is a distributional, rather than an efficiency-oriented, concern.⁸³ Thus, a society might care so much about compensation that it would be willing to compensate even if doing so was inefficient. One way to assure compensation to accident victims would be to create an adequate state-run, no-fault scheme. Another would be to subsidize the purchase of first party insurance. Another way to compensate would be to make actors liable for all damages they cause, whether negligent or not. Compensation also provides some rationale for absolute liability (yet why is absolute liability so limited if compensation drives it?).

However, compensation does *not* explain strict liability in action. How does compensation relate to the truncated Learned Hand test? It doesn't—at least not to me.⁸⁴ We could compensate very well without looking at risk or utility. If anything, the balance gets in the way in certain situations because it denies compensation in many cases. Certainly one may suspect that the desire to compensate influenced courts to impose strict liability; but why have the courts adopted the truncated Learned Hand formula? Compensation, standing alone, does not explain strict liability in action; it does not explain the unreasonable risk of harm requirement; nor, does it explain the presumption of knowledge.

B. Risk Spreading

Like compensation, risk spreading is, in part, a distributional concern.⁸⁵ Professor Fleming James highlighted the risk spreading function of torts.⁸⁶ Liability ought to be imposed on the person in the best position to spread the loss across the broadest segment of society. A \$100 risk should not rest upon an uninsured accident victim if another participant in the accident has insurance that can spread the risk, or if the other can spread risk by charging her customers a little more for her goods and services. Risk spreading may provide a reason to shift a loss from the victim to another. Recall Oliver Wendell Holmes told his readers there had to be a good reason to shift a loss away from where it originally fell.⁸⁷

83. See, e.g., Calabresi, *supra* note 45, at 28 n.6.

84. Of course, the truncated Learned Hand test may relate to compensation if it makes recovery easier. See *supra* text accompanying notes 47-50.

85. See *supra* note 83. See also Calabresi, *supra* note 45, ch. 4, at 39-67.

86. James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 *Yale L.J.* 549 (1948). For a fascinating study of James' work and his reliance on risk distribution as a justification for rules in torts, see Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 *J. Leg. Stud.* 461 (1985).

87. See O.W. Holmes, *The Common Law*, 94 (1881). Cf. Calabresi, *supra* note 45, at 261-62.

Turning from one great judge to another, Justice Traynor emphasized risk spreading as a justification for strict products liability.⁸⁸ But now, with improved first party health and disability insurance and increased medical assistance for the indigent, is risk spreading as persuasive a reason for imposing liability as it once was? I hazard to speculate that even though first party insurance and government programs (such as Medicare and Medicaid) are better and more widespread than they were when James and Traynor wrote, they are still *not* comprehensive, and they are subject to legislative adjustment. The originally growing, later contracting, now growing again pool that is the Medicaid program is evidence of this.⁸⁹ Perhaps absent a pervasive, comprehensive, consistently available scheme of first party medical and disability insurance, courts will continue to indulge in the presumption that those with third party insurance and access to markets are better risk spreaders than their victims. Courts may indulge in this presumption even though first party insurance is more efficient and, by definition, cheaper than third party insurance. Whatever one concludes about these issues, risk spreading, like compensation, does not explain strict liability in action. First, strict liability, like negligence, requires a causal relation between the defendant's product or thing and the plaintiff's injuries. Risk spreading, pushed to its extreme, would require no such relationship. Theoretically, the best risk spreaders should pay whether they were involved in the injury-producing event or not. Torts has never gone that far.

Refocusing on the current subject, risk spreading considerations alone would place liability on the better risk spreader—plaintiff or defendant. There would be no reason to get into unreasonable risks of harm. There would be no reason to presume knowledge. One might note that manufacturers intuitively are good risk spreaders because of insurance, albeit third party, and access to markets but, why stop at manufacturers? Why retain the unreasonably dangerous requirement?

As to those with the "garde" of unreasonably dangerous things, they are frequently business people who, we can assume, have insurance, albeit third party, and access to markets. They are plant owners, railroad operators, and other business people. These guardians are in a position similar to manufacturers. Another type of custodian subject to Article 2317 liability is the homeowner who has homeowner's insurance. Risk spreading is a persuasive justification for homeowner liability, even if less persuasive here than it is with the business custodian. But, again

88. See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring).

89. See, National Health Policy Forum, *Through the Looking Glass: An Overview of Medicaid Today*, Issue Brief #457 (George Washington University 1987), reprinted in C. Havighurst, *Health Care Law and Policy* 112 (1988).

why the unreasonable risk of harm element? France has not so limited its "strict liability" article.⁹⁰ And, why no inquiry into the plaintiff's ability to spread risk, i.e. through first party insurance? As with compensation, risk spreading alone does not explain strict liability in action.

C. *Morality*

Morality considerations certainly may justify liability rules. Concern for compensation and risk spreading is, after all, rooted in moral values—or sympathy. Recall that even a dog knows the difference between being kicked and tripped over.⁹¹ A society might conclude that where someone is injured by a product or a thing produced by a manufacturer or held by a custodian, fairness dictates that the manufacturer or custodian who has produced, owned, and/or benefitted from the product or thing ought to bear the loss. This is a reflection perhaps of a rather primal notion that where one person's property injures another, the owner ought to pay. We are, one might argue, allowed to do whatever we want so long as we do not hurt others. Or, perhaps we might add that one who benefits from an injury causing product or thing must pay whether or not she is negligent. Alternatively one might state that between two "innocents" the one who benefitted from the injury producing product, thing, or activity involved ought to pay.

To the contrary, one might argue that fault—in the sense of blame-worthiness—has become a relevant moral criterion in our society. That is, in America we generally *should not* impose liability where someone is not at fault. As I read Holmes' lectures on tort in *The Common Law*,⁹² this is his basic point. Someone stuck on maxims might say: One is allowed to do whatever one wants to do as long as one doesn't commit an intentional tort or fail to exercise due care. Only when one acts with "fault" should one be liable. It seems that precisely these moral questions underlie tort reform debates.

At this point I will end this morality play. With confidence I can say that others know, or believe they know, more about morals than I do; I have said enough to draw some simple conclusions. First, as I said, morality might justify a liability-without-fault rule. Second, however, morality does not explain the truncated Learned Hand formula. In fact, if a society adopted such a liability-without-fault rule, risk, utility, and unreasonably dangerous are concepts that need not enter the fact finder's thought processes. Alternatively, if a society's morality scheme dictated liability *only* where fault was involved, its tort rules would limit liability to "blameworthy" conduct; they would not presume

90. See, e.g., *Ross v. La Coste DeMonterville*, 502 So. 2d 1026, 1032 (La. 1987).

91. O.W. Holmes, *supra* note 87, at 3.

92. *Id.* at 77-110.

knowledge. From this moral perspective one cannot really be "blamed" if one did not know or should not have known of a risk beforehand, for how could a person without knowledge of a risk morally appreciate what he or she was doing?

Professor Fletcher has argued for a moral basis of liability whenever an actor causes injury to the plaintiff through the creation of a non-reciprocal risk.⁹³ Reciprocity is gauged in reference to the universe of commonly accepted background risks. Perhaps an unreasonably risky product or thing poses a non-reciprocal risk on an injured victim but the reasoning seems a little circular to me. Courts, in deciding if an actor is strictly liable, do not talk about reciprocity; they talk about risk, utility, and presumed knowledge. Further, nothing inherent in the concept of reciprocal risk even implicates a presumption of knowledge.

One could say perhaps, that it just seems fair to presume knowledge because the defendant has superior access to information and might even try to suppress relevant information. Accepting these assumptions, the presumption of knowledge might be fair. But should it apply in every case? Should it be irrebuttable? These are issues I address later.

To summarize, morality has not satisfied me in my search for an explanation of strict liability in action. If the reader feels otherwise, now would be a good place to stop reading because it only gets murkier.

D. History

The truncated Hand formula grew out of the work of scholars like Professor John Wade and Dean Page Keeton. While it has its roots, as noted repeatedly, in negligence, that does not explain it. Why adopt it? France, like Louisiana, has strict liability, but the French do not limit it to unreasonably dangerous things.⁹⁴ Theirs is much broader. Belgium, like Louisiana, limits strict liability⁹⁵ to unreasonably dangerous things. Be that as it may, this little sojourn into comparative law does not explain the truncated Hand formula. What other jurisdictions do may provide the justification for a decision after a court decides what to do. It may even push in the direction of deciding what to do, but it does not explain strict liability in action.

E. Deterrence

Dean Calabresi has argued that a strict liability system in certain contexts might lead to more efficient deterrence than would a fault-

93. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537 (1972).

94. See, *Ross*, 502 So. 2d at 1032; Tomlinson, *Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking*, 48 La. L. Rev. 1299 (1988).

95. See *King v. Louviere*, 543 So. 2d 1327 (La. 1989).

based system.⁹⁶ Turning to the present arena, the manufacturer of a product, and to a lesser extent, the custodian of an unreasonably dangerous thing, are in the best position to detect defects in their products or things. One might note that the presumption of knowledge *forces* the custodian or manufacturer to discover or pay. Likewise, the manufacturer is in the best position to develop safer products. The custodian is in the best position to "own or guard" safer things. A rule holding someone liable, without negligence, for damages caused by her products may well encourage efforts to make products or things safer.⁹⁷ Likewise, Calabresi-type liability would ideally cause those subject to it to take account of *all* of the costs of their activities.⁹⁸ If the defendant sells a product, as a manufacturer does, heightened liability will increase the manufacturer's costs, which will increase the price. This in turn will lower production. Consumers will then face prices that include accident costs. Consumers need not add accident costs to the price; the price would already include those costs. Thus, consumers purchase at appropriate levels.⁹⁹ But, if liability is to be imposed according to its deterrence benefits, why limit this liability to unreasonably dangerous products and things? Dean Calabresi does not. He, as noted earlier, would hold the cheapest cost avoider liable in contexts other than just products liability and Louisiana Article 2317 "thing" cases.¹⁰⁰

There are, of course, counter arguments to Calabresi. Peter Huber has contended that strict products liability leads to over deterrence.¹⁰¹ It might cause the cessation of the production of useful products, increased prices for products still produced, and a chilling effect on the production of new products. The reason is no doubt attributable to the effect of uncertainty on human behavior and most basically to the fact that Calabresi-type liability would probably increase a manufacturers' costs, as noted above.

There is an important theoretical point here that merits a simple explanation and sheds some light on this debate. In the absence of transaction costs and victim fault (which we can assume for now) *both* strict liability *and* negligence are efficient.¹⁰² Both adequately deter without over deterring. Return for a moment to the hypotheticals set forth

96. See, e.g., Calabresi, *supra* note 45 and Calabresi and Hirschhoff, *supra* note 46.

97. See Calabresi and Hirschhoff, *supra* note 46, at 1062.

98. Calabresi, *supra* note 45, at 69-70.

99. *Id.* For a wonderful description and critique of Calabresi's theory of liability, see Blum and Kalven, *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U. Chi. L. Rev. 239 (1967).

100. Calabresi, *supra* note 45, deals with strict liability in the automobile accident contexts.

101. P. Huber, *Liability: The Legal Revolution and Its Consequences*, ch. 10 (1988).

102. See, e.g., A. Polinsky, *An Introduction to Law and Economics* 37-49 (1983).

above relating to the car with the bad brakes. The manufacturer faced a \$25,000 loss which would have cost it \$500,001 to avoid. The failure to find and install the missing part was not negligent under the Learned Hand negligence formula, so the manufacturer would neither pay the \$25,000 nor incur the \$500,001 cost of avoidance. Under both Calabresi strict liability and the truncated Hand formula, the manufacturer would still not incur the cost of avoidance because \$500,001 is greater than \$25,000, the ex ante cost of the accident happening. But, the manufacturer would have to pay the \$25,000. As a result, under either rule the outcome is efficient; the \$500,001 is not spent and the accident happens, but, in one case the manufacturer does not owe \$25,000 (negligence) and in the other (Calabresi strict liability) it does. The difference is purely distributional.¹⁰³

Likewise, in the Article 2317 hypothetical, the custodian under a negligence rule will not incur the costs of discovery, buying the brake defect monitoring machine, because together with the other relevant accident avoidance costs B (\$25,200) exceeds $P \times L$ (\$25,000). *Concomitantly*, the custodian will not pay the \$25,000 because she is not negligent. Under a Calabresi strict liability rule if the custodian is the cheapest cost avoider she will still *not* get the brakes repaired because \$25,200 is greater than \$25,000; however, the custodian will pay the accident costs. Again, the difference is purely distributional. Under either rule the outcome, from an accident avoidance perspective, is efficient. Either rule efficiently deters.

Although either rule is efficient, the rules do have different distributional effects because defendants pay more in accident costs under Calabresi strict liability than they do under a fault system, so they have less wealth. This might result in some contraction of the industry. The issue becomes even more complex where one relaxes various simplifying assumptions dealing with victim fault and the effect of levels of activity on accident frequency. However, the conclusion is clear; whether negligence or Calabresi strict liability is more efficient depends upon the circumstances.¹⁰⁴ Thus the deterrence issue is muddled.

Importantly, however, Calabresi "strict" liability is really more like absolute liability, as I have used that phrase. Under Calabresi's approach, the decision maker determines who the cheapest cost avoider is, not whether risks are unreasonable. Decision makers do not consider risk and utility; they do not engage in presumptions of knowledge. Thus the deterrence argument must be explored under the truncated Hand formula for strict liability.

103. See Calabresi and Hirschhoff, *supra* note 46, at 1077.

104. See, e.g., Shavell, *supra* note 46.

Deterrence in the context of the truncated Hand formula is equally unsettling. Does the formula encourage an over investment in knowledge or not? Clearly it encourages people to develop cheap ways to discover and avoid risk. But does it ask us to spend too much? Problems may well arise because the actor does not know the costs of discovery until those costs are incurred but in no case would a rational actor spend greater than $P \times L$ on discovery. A rational actor would still rather pay judgments, or premiums, than excessive discovery costs. Again, the ambiguities inherent in deterrence do not explain the rule we have.

Interestingly, one of Calabresi's arguments for what he calls strict liability relates to the failures of the fault (negligence) system. He points to the focus on historic facts and particularistic, uncommon events.¹⁰⁵ He also points to the high costs of case-by-case decision making characteristic of a negligence regime.¹⁰⁶ It is here that we may see some theoretical justification for strict liability in action. But, in the interests of full disclosure, I warn the reader not to get her hopes up because, like everywhere else, there are problems here too.

F. Administrative Costs

Courts have long crafted tort rules in light of their potential effect on the administration of justice.¹⁰⁷ Many traditional "no duty" rules were based on the fear that potential liability would open the floodgates of litigation; this is an *administrative costs argument*.¹⁰⁸ It appeals to the courts' concerns for their own time and ability. Case-by-case decision making is expensive. It is expensive for sovereigns funding court systems; it is expensive for judges, lawyers, parties, witnesses, and all their families. One way to avoid this expense would be to create "categorical liability rules" or "no liability rules" which would do away with, or cut back on, case-by-case decision making. I have a hunch that absolute liability rules may essentially do this. Rules are made at the activity level and then courts can more easily apply those rules to particular cases. In those particular cases the parties need not litigate the question of whether or not the activity is one that is subjected to absolute liability. That question has been previously answered and memorialized in a rule.

Obviously negligence cases provide a dynamic contrast. Each case is decided on its own facts. Decision makers consider the issue of knowledge in light of the particular facts involved as well as risk prevention. Likewise, strict liability in action cases require a case-by-case

105. Calabresi, *supra* note 45, at 255-63.

106. *Id.* at 286-87.

107. See L. Green, *supra* note 75, at 74-96.

108. See *id.* See also Galligan, *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 La. L. Rev. 6, 42-44 (1990) [hereinafter *Augmented Awards*].

examination of risk and utility to determine if the product or thing is unreasonably dangerous. However, there is, as noted, a difference between negligence and strict liability in action, and that difference relates to the knowledge issue. Knowledge is presumed or, in other words, lack of knowledge is not a defense in strict liability cases. In present parlance, knowledge or the lack thereof is *not* an issue at trial. The parties need not litigate it; the judge and jury need not concern themselves with it. What benefits, if any, does this provide? It arguably reduces the costs of the trial.

First, not litigating the knowledge issue arguably cuts down on trial time. It takes away one of the two components of the definition of negligence. It removes BK from B for the decision maker using the Learned Hand formula. It reduces the Learned Hand formula to a risk versus utility analysis—knowledge is sidestepped. Parties seeking to persuade on the knowledge issue might be expected to elicit expert testimony on the subject. Persuading the fact finder on the knowledge issue necessarily takes up time at trial—both the judge's and jurors' time. *Concomitantly*, the knowledge issue frequently involves a difficult credibility question. That is, the defendant testifies that she neither knew nor should have known of the risk whereas the plaintiff presents evidence that defendant knew or should have known of the risk. Ultimately, it comes down to a judgment call by the jury—whom should it believe? Resolving such credibility questions, while part of the jury's job, takes time. The presumption of knowledge takes this "credibility" question out of the case and saves time. By removing the knowledge issue from the trial, strict liability in action reduces the trial's complexity.

Empirically, I would not be surprised to find that lawyers spend significant time and energy arguing about what defendants in negligence cases knew or should have known about risks. Likewise, the effort to persuade on the knowledge issue requires discovery on the issue. It mandates investigations concerning prior incidents. It involves discovering and studying those incidents.

Thus, one could argue that the presumption of knowledge reduces the administrative costs of case-by-case decision making where it applies. It keeps the case-by-case approach for risk and utility but *not* for knowledge. Courts have noted the administrative savings accompanying presumptions of knowledge. In *Halphen v. Johns-Manville Sales Corp.*,¹⁰⁹ Justice Dennis of the Louisiana Supreme Court, while discussing the unreasonably dangerous per se category of cases wherein state of the art evidence was inadmissible, stated:

The costs of administering the unreasonably dangerous per se category of products liability cases will be reduced by eliminating

109. 484 So. 2d 110 (La. 1986).

litigation over the date when a product's danger became scientifically knowable. In unreasonably dangerous per se cases, as in construction defect cases now, the parties should not be forced to produce experts in the history of science and technology to speculate, and possibly confuse jurors, as to what knowledge was available and what improvements were feasible in a given year.¹¹⁰

Amongst other sources, Justice Dennis cited the New Jersey Supreme Court's opinion in *Beshada v. Johns-Manville Products Corp.*¹¹¹ In *Beshada* the New Jersey Supreme Court decided that compliance with the state of the art at the time of manufacture would not exculpate a defendant manufacturer in a failure to warn/asbestos case. One of the factors underlying the court's decision was the effect that consideration of state of the art evidence would have had on the "[f]act finding process."¹¹² It stated:

Scientific knowability, as we understand it, refers not to what in fact was known at the time, but to what *could have been* known at the time. In other words, even if no scientist had actually formed the belief that asbestos was dangerous, the hazards would be deemed "knowable" if a scientist could have formed that belief by applying research or performing tests that were available at the time. Proof of what could have been known will inevitably be complicated, costly, confusing and time-consuming. Each side will have to produce experts in the history of science and technology to speculate as to what knowledge was feasible in a given year. We doubt that juries will be capable of even understanding the concept of scientific knowability, much less be able to resolve such a complex issue. Moreover, we should resist legal rules that will so greatly add to the costs both sides incur in trying a case.¹¹³

I could not have said it better myself. The New Jersey court noted another important issue relating to cost and knowledge. Knowledge is further complicated because if a defendant had no actual knowledge of a risk, one must inquire as to what she should or even could¹¹⁴ have

110. *Id.* at 119.

111. 90 N.J. 191, 447 A.2d 539 (1982).

112. *Id.* at 207, 447 A.2d at 548.

113. *Id.* at 207-208, 447 A.2d at 548 (emphasis added).

114. See Galligan, *The Louisiana Products Liability Act: Making Sense of It All*, 49 La. L. Rev. 629, 672-75 (1989) [hereinafter *Making Sense*], wherein your author humbly (but ably) argued that there is a difference between what one knew or could have known of and what one knew or should have known of. The latter is the accepted statement of the standard for knowledge in negligence whereas the Louisiana Products Liability Act,

known. This plunges the decision maker into an investigation of whether the manufacturer or custodian had adequately invested in research and development *before* the time of manufacture. This is expensive to determine.¹¹⁵ Both *Halphen* and *Beshada* have been subsequently limited;¹¹⁶ however, what they say about the cost of the knowledge issue still holds true.

Reliance on a truncated negligence formula may be cost effective for another reason. As Dean Wade noted,¹¹⁷ it allows judges and juries to deal with familiar concepts, concepts familiar to them from negligence law—risk and utility. Although Dean Keeton¹¹⁸ and others have noted that strict products liability is separate and distinct from negligence, even he advocated a risk/utility approach for determining if a product is unreasonably dangerous. The familiar risk/utility test lets courts apply the same factors they apply in negligence cases—except knowledge—in strict liability in action cases. By resorting to a truncated negligence test, courts may have avoided the time and confusion inherent in the development of new legal doctrine. Certainly even truncated negligence formulas have led to unrest and litigation; however, one need only compare the development of strict liability in France under Civil Code article 1384¹¹⁹ with its development in Louisiana under Article 2317 to conclude that the Louisiana experience has been far smoother.¹²⁰ For, in the great state of Louisiana, the courts adopted an unreasonable risk of harm requirement which the French did not. France's decision has led to one hundred years of confusion in French jurisprudence and the development of countless subsidiary rules.¹²¹ Happily, we have avoided that chaos in Louisiana. No doubt Louisiana still has time to experience an eruption of new rules; however, the close kinship between strict liability in action and negligence may save us. It has certainly eased our development of strict liability under Article 2317.

But why then has strict liability in action been so limited? If a presumption of knowledge really saves time, why have not courts more

in defining the state of the art, uses the phrase "knew or could" have known. See La. R.S. 9:2800.59(A) and (B) (1991). In actuality, the phrase "knew or could have known" was taken from the certified question in *Halphen*. Likewise, the court in *Beshada* used the same standard of knew or could have known.

115. See *Beshada*, 90 N.J. at 208, 447 A.2d at 548-49.

116. See La. R.S. 9:2800.52-.59 (1991); Galligan, Making Sense, *supra* note 114. *Beshada* has also been limited. See *Feldman v. Lederle Laboratories*, 97 N.J. 429, 455, 479 A.2d 374, 388 (1984) (limiting *Beshada* to asbestos cases).

117. Wade, *supra* note 15, at 838-41.

118. Keeton, *supra* note 24, at 37-39.

119. See Tomlinson, *supra* note 94. See also Taylor, "No Fault" Takes a French Twist: A French Re-Examination of the Nature of Liability, 9 Loy. L.A. Int'l & Comp. L.J. 545 (1987).

120. See *Ross v. La Coste DeMonterville*, 502 So. 2d 1026, 1029-32 (La. 1987).

121. *Id.* at 1031.

generally adopted it in ordinary negligence cases? Nationally, the answer is not clear. Perhaps the imposition of non-delegable duties¹²² serves some of this function in some classes of cases. In Louisiana the presumption of knowledge is rather widespread. It applies in products cases¹²³ and in any case where a thing causes injury.¹²⁴ That leaves cases where man alone (or man and a "safe" thing) causes damage. In such cases the risk is usually known or knowable so a presumption of knowledge would add little. Imagine a speeding defendant who injures the plaintiff. Do we seriously contend that a court must presume a defendant has knowledge that speeding is dangerous? Everyone knows that; no court would entertain a serious claim that the defendant did not know of the risks of speeding. Because all know of the risk, the cost of knowledge is \$0; thus a presumption of knowledge would add nothing. For B (whatever it is) - 0(BK) still equals B. This, of course, is true in any strict liability case where the defendant *has* knowledge that its product or thing is dangerous. In such a case, like *Kent* was, BK is \$0 so B - BK equals B which renders the strict liability case no more than a garden variety negligence case.¹²⁵

Anecdotally, one recent case provides some evidence for the administrative efficiency of a presumption of knowledge.¹²⁶ There was an explosion in the catalytic cracking unit at Shell's facility in Norco, Louisiana. Lawsuits followed; one was a class action. Shell was willing to settle certain claims of one class admitting it was strictly liable under Article 2317 but *not* negligent. The parties thus avoided a costly dispute over the knowledge issue. Interestingly, the settlement also signifies that a defendant may be willing to admit to strict liability but not the blameworthiness attached to negligence. That is, it will admit it had an unreasonably dangerous thing in its custody but not that it knew. Admitting knowledge might be bad for its public image. Thus, it may be willing to fight and spend on that issue alone. The presence of a presumption of knowledge avoids that fight.

In short, administrative concerns may help to explain strict liability in action. Of course, as with any justification, there are counter arguments.

122. *Maloney v. Rath*, 69 Cal. 2d 442, 445 P.2d 513, 71 Cal. Rptr. 897 (1968). As a realist, one is left with the definite impression that Louisiana courts using Louisiana Civil Code article 2317 reach the same results in cases that common law courts reach employing negligence. Not only do courts use the fiction of the non-delegable duty, but they also impose duties to discover defects. See, e.g., *Shaw v. Fidelity & Cas. Ins. Co.*, 582 So. 2d 919 (La. App. 2d Cir. 1991).

123. See *Galligan, Making Sense*, supra note 114, at 668-70, 678.

124. See *Kent v. Gulf States Utils. Co.*, 418 So. 2d 493 (La. 1982).

125. See *Lablit v. Tangipahoa Parish Council*, 581 So. 2d 732 (La. App. 1st Cir. 1991), as quoted and discussed in supra note 31.

126. *In re Shell Oil Refinery*, Civil Action Nos. 88-1935, 88-2719 (E.D. La. 1991).

G. Problems With The Presumption of Knowledge

1. Recovery v. Administrative Savings

Strict liability, as noted in the deterrence discussion, may cause defendants to pay more judgments or spend too much on discovering risks. This will affect their cash flow and may in the short run impact their economic positions. However, even if one were to assume that the presumption of knowledge might lead to some short term economic dislocation for defendants we still might find that the administrative gains from *not* litigating the knowledge issue offset the arguable societal losses caused by allowing recovery. There may be other types of cases where the administrative gains do not offset the perceived losses. In such cases the truncated Hand formula would be inefficient. The trick would be to identify those cases. Right now, I dare not attempt such a weighty task; however, we can point to certain types of cases where courts and legislatures have relaxed presumptions of knowledge in strict liability cases.

One that immediately comes to mind in the field of products liability is the handling of the state of the art defense. Most state courts and legislatures that have considered the issue in the design and warning contexts have concluded that manufacturers who, at the time the product on trial left their control, neither knew nor could have known about their product's dangers or about safer alternatives, are not liable.¹²⁷ Courts will not hold manufacturers to a standard requiring knowledge of the unknowable. *Halphen* and *Beshada*, rightly or wrongly from a policy perspective, have been limited.¹²⁸ For instance, in Louisiana design and warning cases, there is now an interesting mix of strict liability and negligence concepts.¹²⁹ A plaintiff first establishes a prima facie case under a time of trial, strict liability type standard. Knowledge of risk, safer alternatives, and feasibility of safer products are presumed. To establish a prima facie case, the plaintiff must show that under those

127. See, e.g., La. R.S. 9:2800.52-.59 (1991). See also Ariz. Rev. Stat. Ann. §§ 12-681, 12-683 (1982); Ark. Stat. Ann. § 16-116-104 (1987); Idaho Code § [6-1406] 6-1306 (1948, 1979, 1980); Ind. Code § 33-1-1.5-4 (1983); Ky. Rev. Stat. Ann. § 411.310 (Baldwin 1991); Mo. Ann. Stat. § 537.764 (Vernon 1988); Neb. Rev. Stat. §§ 25-21, 182 (1989); Tenn. Code Ann. § 29-28-105 (1980); *Phelps v. Sherwood Medical Indus.*, 836 F.2d 296 (7th Cir. 1987); *Carter v. Johns-Manville Sales Corp.*, 557 F. Supp 1317 (E.D. Tex. 1983); *Gosewisch v. American Honda Motor Co.*, 153 Ariz. 389, 737 P.2d 365 (Ariz. Ct. App. 1985), vacated in part, 153 Ariz. 400, 737 P.2d 376 (1987); *Malin v. Union Carbide Corp.*, 219 N.J. Super. 428, 530 A.2d 794 (1987); *Maxted v. Pacific Car and Foundry Co.*, 527 P.2d 832 (Wyo. 1974).

128. See sources cited in supra note 116.

129. See Galligan, *Making Sense*, supra note 114, at 648-85.

presumptions the product's risks are greater than its utility.¹³⁰ Then, the defendant may exculpate herself by proving that at the time of production she was *not* negligent although the standard of care may be somewhat higher than in an ordinary negligence case.¹³¹ Stated differently, the plaintiff avoids a directed verdict under the truncated Learned Hand formula by establishing $B - BK < P \times L$. The plaintiff bears the burden of proof here and, obviously, the defendant may dispute the plaintiff's claim. However, the defendant will prevail, even though the jury believes the plaintiff, if the defendant carries the burden of proof on a reverse Learned Hand formula; that is, the defendant pays (assuming plaintiff proves $B - BK < P \times L$) unless *it* shows $B > P \times L$.¹³² Returning to the relevancy of state of the art, decision makers no doubt concluded an irrebuttable presumption of knowledge in design and warning cases would hinder production and development of newer and safer products. Alternatively, they may have decided that an irrebuttable presumption would cut too deeply into the profits of producers. Who knows? However, where entire product lines are attacked one might conclude that the effect of an irrebuttable presumption of knowledge would be great in terms of its influence on a manufacturer's conduct. One might also expect such a presumption to attract claims and claimants which, as noted in the next section, might offset any supposed administrative gain.

Interestingly, the presumption of knowledge remains irrebuttable in mismanufacture cases.¹³³ Perhaps here, decision makers, seeing that there are not an inordinate number of claims, and that product lines are not attacked but merely single products, decided that an irrebuttable presumption of knowledge would not be too harsh. Concomitantly, the gain in savings from a presumption of knowledge is potentially significant in individual mismanufacture cases. This is because plaintiffs, whose sympathies decision makers have probably adopted, need not challenge the implementation and operation of quality control programs and their costs. Moreover, because such suits, as noted, only affect individual products, the effect on the manufacturer's "bottom line" is probably not great. Moreover, the pool of plaintiffs is more limited in mismanufacture cases than in design and warning cases.

Turning to Article 2317 strict liability in Louisiana, some courts have been equally "flexible" with the presumption of knowledge. In *Bell v. State of Louisiana*¹³⁴ the plaintiff was leaving a football game

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. 553 So. 2d 902 (La. App. 4th Cir. 1989).

at the Louisiana Superdome in New Orleans when she tripped on a hole in some padding. She sued the state as custodian of the Superdome alleging strict liability under Louisiana Civil Code article 2317. The appellate court held that the state was not strictly liable concluding that it would be unrealistic to expect maintenance employees to discover and fix all the holes throughout the Superdome,¹³⁵ i.e. such an obligation would cost too much. The reasoning is contrary to what would happen under an irrebuttable presumption of knowledge. Perhaps the court perceived the discovery costs to be so high that it decided to jettison the presumption of knowledge approach and not hold the state strictly liable. The opinion gives little insight on this important point.

In fact, after the incident in *Bell* the Louisiana legislature passed a statute which basically does away with Article 2317 strict liability claims against the state in non-building cases. The plaintiff now must prove that the state either knew or had constructive knowledge (should have known) of the risk which caused the injury as well as its unreasonably dangerous condition.¹³⁶ Perhaps the legislature could have determined that imposing a presumption of knowledge upon the state was inappropriate, but why? The state provides services which private industry does not. Frequently this is so because providing these services is not profitable enough to attract entrepreneurs. Under this hypothesis, a presumption of knowledge which made recovery somewhat easier for plaintiffs might unduly burden the state financially. As such, the legislature has prohibited the use of a presumption of knowledge against the state in non-building cases. Interestingly, the legislature preserved strict liability, and its presumption of knowledge, where defects in state buildings cause injuries.

Returning to the private sector, how irrebuttable is the presumption of knowledge in Louisiana strict liability cases? In *Entrevia v. Hood*¹³⁷ the Louisiana Supreme Court articulated what may be a different approach to Article 2317 strict liability, that is, different from the *Kent* presumption of knowledge approach. As I read the case, the court did not abandon the presumption of knowledge approach. Instead, it noted that the presumption of knowledge approach presents "a useful approach . . . a helpful, although indirect way to show judges familiar with weighing considerations of social utility in negligence cases that the policy consideration part of the judicial process should not be different in cases under article 2317."¹³⁸ But, then the court went on to state

135. The court stated: "It would be unrealistic to expect maintenance employees to find and immediately repair every tiny hole or missing grout in the stairs and walkways in a structure as large as the Superdome." *Id.* at 908.

136. La. R.S. 9:2800 (1991).

137. 427 So. 2d 1146 (La. 1983).

138. *Id.* at 1150.

that "the suggested method [the presumption of knowledge] is indirect and entirely unnecessary once the judge understands that the standards or patterns of utility and morality which he must consider in deciding if a risk is unreasonable will be found in the life of the community, in the same way that they will be found by the legislator."¹³⁹

I must admit I tarry over the words "entirely unnecessary;" what do they mean? Is the presumption of knowledge no longer a viable analytic method? What replaces it? Whatever the answers to these questions, the court did expressly note that negligence and Article 2317 cases are *not* identical because: "the inability of a defendant to know or prevent the risk is not a defense in a strict liability case but precludes a finding of negligence."¹⁴⁰ So whatever the "entirely unnecessary" language meant for the presumption of knowledge, even under the *Entrevia* court's language, knowledge is still clearly *not* an issue in strict liability.

Furthermore, I am not sure what the court means by "prevent the risk." I read it in connection with knowledge. If a defendant did not know of a risk she could not prevent its occurrence; that fact is not a defense in a strict liability case. I do not believe that the court is saying that where the burden of avoiding a risk (aside from the burden of discovering the risk) is greater than the severity of any expected accident, discounted to present value, there is still strict liability. In that case the risk of harm would be reasonable not unreasonable.

Finally, recall that the court in *Entrevia* emphasized that there *is* a difference between strict liability and negligence cases. Perhaps all the quoted language from *Entrevia* was meant to do was serve as a counterweight or balance to *Kent*. Justice Lemmon's opinion in *Kent* emphasized the similarities between Article 2317 and strict liability. *Kent* presented those similarities. In *Kent* the defendant had knowledge of the risks its thing, an uninsulated electric line, presented. As a result, the cost of obtaining knowledge, BK, was O. Therefore $B - BK = B$. Consequently, it was exactly the same as a negligence case—it was actually decided as a negligence case. "Strict" liability—the presumption of knowledge—added nothing! This is always true where $BK = O$. Thus in a case like *Kent*, strict liability and negligence meet. However, *Entrevia* warns the uncritical reader not to *overemphasize* the similarities. *Oster* seems to reiterate all that *Kent* and *Entrevia* say. The earlier quote¹⁴¹ was quite consistent with *Kent*. However, later in *Oster*, Justice Cole wrote:

Although courts, including this court, have described the unreasonable risk of harm criterion as requiring the court to

139. *Id.*

140. *Id.*

141. See *supra* text accompanying note 30.

balance the likelihood and magnitude of harm against the utility of the thing, the balancing test required by the unreasonable risk of harm criterion does not lead itself well to such neat, mathematical formulations. In addition to the likelihood and magnitude of the risk and the utility of the thing, the interpreter should consider a broad range of social, economic, and moral factors including the cost to the defendant of avoiding the risk and the social utility of the plaintiff's conduct at the time of the accident.¹⁴²

The second quoted sentence reads a lot like *Entrevia*, stressing the fact that the court must consider all relevant social factors. Of course the first sentence, and the first clause of the second sentence emphasize the risk/utility test. In any event, might one push *Entrevia* even further?

Highlighting the "do what a legislator would do" approach one might agree that although the truncated Hand formula is useful, courts retain the power to *abandon* it in cases where utility and morality point in a different direction. It seems, despite what the court said about knowledge in *Oster* above, that the costs of discovery might well be a relevant factor to a legislator in certain types of cases. Liability without regard to the costs of obtaining knowledge might impose undue costs on society. Design and warning cases are one area where, by legislation in Louisiana, knowledge is a relevant criteria. Now, by statute, Article 2317 liability of the government is another. The plaintiff must prove knowledge or constructive knowledge. If under *Entrevia* the courts are to put themselves in the position of a legislator and legislators have concluded that, in particular cases, knowledge *should* be an issue, might not courts do the same? Cases where the presumption of knowledge would lead to inefficiencies beyond the savings in time in not litigating the knowledge issue are a prime example. One problem with this freedom would be that case-by-case deviation from the truncated Hand formula would eat into its alleged administrative savings. Moreover, I wonder if *Oster* may inhibit the freedom to consider knowledge that I have grafted onto *Entrevia* for argument's sake.

In any event, an interesting side issue arises. Could it be that the presumption of knowledge is most useful and most efficient in cases where courts feel the cost of knowledge (BK) is *not* great? That is, a presumption of knowledge might be most useful where BK is usually small and is unlikely to make a great difference in the $B < P \times L$ balance. If that is true then strict liability cases will turn out like most negligence cases (except those at the margin).¹⁴³ The difference is we

142. *Oster v. DOTD, State of La.*, 582 So. 2d 1285, 1289 (La. 1991).

143. If BK is very small it is unlikely that removing it from consideration will have any outcome on the effect of the case except when $B - BK$ is almost equal to $P \times L$ in which case any BK may make a difference.

will not spend time and money investigating and litigating over a usually small figure, BK. Both of the hypotheticals cited earlier¹⁴⁴ involved huge BK's. Under the logic set forth in this paragraph they would not be good candidates for strict liability. This hypothesis may explain why in some cases, where BK is arguably large, such as design and warning cases where a state of the art question arises, the strict liability in action presumption of knowledge is relaxed. I believe the evidence and conclusions in this regard would be spotty and erratic.

So where does that leave Louisiana with regard to the truncated Hand formula? To me it seems a fine way to charge juries in deciding whether a thing or product is unreasonably dangerous.¹⁴⁵ However, appellate courts, especially the Louisiana Supreme Court, may have more power to reexamine results under the truncated Hand formula by taking a look at all factors under the "*Entrevia* test." As a jury or judge usually will have decided that risk is greater than utility in finding liability, the court ought not lightly dispose of that finding. Since the lower court decision maker did *not* consider knowledge nor its cost, the appellate court might want to examine the effect of the presumption of knowledge on the primary activity of the defendant and others like her vis-a-vis the administrative savings the presumption engenders. In making that inquiry, courts should focus on categories of defendants and things, thus instructing future trial judges. This would preserve the truncated Hand formula's administrative gains in the large "category" of cases.

Alternatively, one might argue that the risk/utility balance only goes to a determination of "breach." That is, did the defendant breach her duty to manufacture safe products and keep safe things? Or, did the thing or product present an unreasonable risk of harm? Then all the language in *Entrevia* and *Oster* regarding social and moral factors, factors other than risk and utility, could be read as a reminder that "breach," the failure to exercise the relevant level of care, is not all there is to the case. In a strict liability case the level of care is ordinary, reasonable care; but, the duty to exercise that level of care is triggered whether or not defendant knew or should have known of the relevant risk. However, before the standard of care is apposite, there must be a duty to protect the plaintiff from the relevant risk. In that vein one must look at the parties and their relationship. Additionally, the breach of a duty must legally or proximately cause the plaintiff's injuries. On that question, the decision maker would want to consider all the circumstances surrounding the victim's injury. So, risk and utility—the unreasonably dangerous requirement—might relate only to the breach issue while the other factors are still relevant. But they are relevant to the question of

144. See *supra* text accompanying notes 39-44.

145. See *supra* note 18 and accompanying text.

duty, *not* breach. If this is what the court means in *Entrevia* and *Oster*, it would be better to separate out these concerns than to make the "unreasonably dangerous" requirement bear so much analytical responsibility. An additional thorn that the presumption of knowledge raises concerning administrative costs is the rent seeking plaintiff.

2. Rent Seeking

As I mentioned earlier, courts have long recognized that administrative concerns might dictate no duty rules, resulting in no recovery. Historically, in certain types of cases, courts have stated that administrative concerns justified denying recovery to certain classes of plaintiffs. For instance, infliction of emotional distress, either intentional¹⁴⁶ or negligent,¹⁴⁷ was long characterized by no duty rules. For years, courts refused to allow recovery for intentionally or negligently inflicted mental distress because they were concerned that allowing recovery would open the floodgates of litigation. That is, courts would be forced to hear many, many cases involving emotional distress claims.¹⁴⁸ Of equal weight, courts were worried that if they did not categorically deny recovery, many of the filed cases would not involve bona fide emotional distress claims. Thus courts would be forced to separate bona fide from fraudulent claims.¹⁴⁹ Concomitantly, in the bona fide cases, courts would need to "value" the freedom from disruption of mental or emotional tranquility. Fearing this administrative burden, courts for many years simply refused recovery. Courts dealt with the issue categorically by denying recovery rather than on a case-by-case basis. What justified the refusal of recovery even to those who admittedly suffered severe emotional distress was the administrative costs that a contrary rule would entail.

The economic harm rule,¹⁵⁰ the rule that one may not recover for negligently caused economic harm absent personal injury or property damage, is also justified by administrative concerns. Allowing recovery for economic loss would force courts to distinguish between bona fide claims and spurious claims. Likewise, recognizing a duty would force courts to determine whether markets had already taken account of the possibility of the economic loss involved at trial. In such cases the plaintiff would have already been compensated for the risk or loss

146. See generally *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952).

147. See generally *LeJeune v. Rayne Branch Hospital*, 556 So. 2d 559 (La. 1990).

148. See generally *Daley v. Lacroix*, 384 Mich. 4, 179 N.W.2d 390 (1970).

149. See *Prosser, Wade & Schwartz*, supra note 51, at 396 n.1.

150. I borrow the phrase "economic harm rule" from D. Laycock, *Modern American Remedies* 23 (Supp. 1989).

through market forces and their effect on price setting.¹⁵¹ To avoid these administrative costs, most courts simply rule that there is no duty to protect against such economic harm.

The privity of contract bar in tort cases involving defective products provides another example.¹⁵² Rather than decide, case-by-case, if a product was unreasonably dangerous to remote purchasers and what effect upstream contracts might have on downstream liability, courts simply deferred to a contract paradigm for decision making and denied recovery absent privity. Courts commented on the unworkability of a contrary rule, referring to all the cases that would be filed.¹⁵³

These are all instances where courts used administrative concerns to justify no recovery rules. In each of them, courts refused recovery to broad classes of people on administrative grounds even though some within the class had bona fide claims. The high cost of separating those bona fide claims on a case-by-case basis led to categorical "no duty" rules. I have so far opined that strict liability in action may arguably be supported by administrative factors—avoiding the cost of litigating the knowledge issue. However, this rule has a pro-plaintiff posture. That is, more plaintiffs would recover under this rule than under a traditional negligence formula. Although reduction of administrative costs may in the twenty-first century be a reason to extend liability, this increased liability presents a deep, but not fatal, problem with the doctrine.

If the presumption of knowledge makes it easier for plaintiffs to recover one might expect that more plaintiffs will pursue claims. Arguably any plaintiff who would lose if he must prove knowledge but win if he need not would sue and win under the truncated Hand formula but would not sue, or at least not win, under the Hand formula. Moreover, some who might even recover under a negligence regime still might not sue in negligence because the cost of litigating knowledge is too great. Such plaintiffs might sue under the truncated Hand formula if it really reduces litigation costs. Thus the truncated Hand formula may well lead to more recovery and more suits. Lower litigation costs might even encourage those uncertain of recovery under the truncated Hand formula to pursue recovery. The down side of all this is that this pursuit of claims may offset, or eat up, any administrative savings which the rule creates. That is, the savings in cheaper trials may be offset by the cost of more trials. Rent seeking plaintiffs, those seeking to profit by an extended liability rule, may eat up all the administrative gains.¹⁵⁴

151. See Galligan, *Augmented Awards*, *supra* note 108, at 72-73.

152. See *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

153. *Id.* (Alderson, J., concurring).

154. See, Galligan, *Augmented Awards*, *supra* note 108, at 72-73.

This, in effect, is one of the problems with pro-plaintiff administrative savings devices.

Aside from political bias it may help to explain the prevalence of rules based on administrative convenience that favor defendants. Determining if administrative savings are offset by rent seeking is an empirical matter; however, it is an empirical matter of great concern. For, if reducing the cost of trials makes it easier for plaintiffs to recover, thus reducing administrative costs, which in turn leads to more plaintiffs suing, then the savings in administrative costs of presuming knowledge may be offset by the increased cost of more trials. Of course, we may conclude that the increased cost is worth it because we are compensating more, we are spreading risk better, and it *seems fairer*. Those are not administrative considerations. This is an impossible state of affairs to resolve without more knowledge than we now have. One might argue that there are really not more cases filed under the truncated Hand formula than under the Hand formula because plaintiffs would still bring cases to trial albeit as negligence cases. Again one has no answers until the empirical work is done. Even then I suspect a dearth of value-free solutions.

3. *Cumulating Claims*

Another question that may arise is whether or not the presumption of knowledge in itself really does save costs on those cases where it applies. If plaintiffs usually *combine* negligence claims with strict liability claims then parties will still do discovery and present evidence on the knowledge issue, even though they are bringing strict liability claims. That is, if the plaintiff decides to overkill by litigating both a negligence claim and a strict liability claim, then any administrative savings under the truncated Hand formula would be offset by the costs of trying to prove knowledge under the Hand formula. Empirically, we need to know if plaintiffs with strict liability cases continue to file negligence claims too. More importantly we need to know whether, even if plaintiffs file such claims, they take them seriously or just ignore the negligence claim and pursue the strict liability claim alone. Economically, a lawyer with a contingency fee arrangement has little incentive to needlessly pursue the knowledge issue unless, of course, juries who find negligence return higher verdicts, or a higher allocation of fault to defendants, as opposed to juries who find strict liability under a truncated Hand formula. Of course, higher recoveries in negligence cases would be contrary to our supposed abhorrence of punitive damages in Louisiana. If damages are compensatory they ought to be the same no matter how the plaintiff got hurt. The allocation of fault issue is more involved.¹⁵⁵

155. The allocation of fault issue is more involved because it forces an analysis of

One potential way to solve the cumulated claim problem without doing the empirical work would be to simply do away with the negligence cause of action in any case where a presumption of knowledge (strict liability) is available. This is, in essence, what the Louisiana legislature did with the passage of the Louisiana Products Liability Act. In setting forth exclusive theories of recovery against a product manufacturer, the legislature did away with the plaintiff's general negligence cause of action in a products liability case. Thus, in a Louisiana products case the personal injury plaintiff may only utilize the Act and may not pursue a general negligence claim.

IV. RECONNOITERING

Now would be a good time to do a little backtracking and explaining. From my perspective, the administrative convenience of a rule presuming knowledge provides the most promise for an explanation of the truncated Hand formula. As always, there are problems. Although the truncated Hand formula might lead to an over-investment in knowledge, would not the rational producer/custodian stop investing in knowledge when it appeared $B - BK + \text{Investments in knowledge}$ was approaching $P \times L$ and instead pay the judgment? And, would not that same producer/custodian have to invest in knowledge under the Hand formula at least up to the same point because until she made that investment she would not know if $B < P \times L$, or not? The difference of course is that under the typical negligence Hand formula the producer/custodian does not pay if $B > P \times L$. Under the truncated Hand formula a defendant may pay even if $B > P \times L$; however, this would occur only if $B - BK < P \times L$.

Likewise, the presumption of knowledge will not lead to administrative savings if plaintiffs continue to press their negligence claims with strict liability claims. Finally, even if the truncated Hand formula does lead to administrative savings, rent seeking may consume them. Thus

the conduct of a plaintiff who is blameworthy vis-a-vis the defendant who, if strictly liable, is not blameworthy in the traditional sense of the word. Louisiana courts have wrestled with this problem. In one case the supreme court suggested that the courts compare causation. *Howard v. All State Ins. Co.*, 520 So. 2d 715 (La. 1988). In *Dobson v. Louisiana Power and Light*, 567 So. 2d 569 (La. 1990), Justice Dennis suggested that in a comparative negligence case the court should employ the Learned Hand formula. If the court is serious about the truncated Learned Hand formula, then in a case with a contributorily negligent plaintiff and a strictly liable defendant, the court would compare the plaintiff's B (burden of avoiding the accident) with the defendant's $B - BK$ (burden of avoiding minus the cost of discovery). The party with the lowest figure ought to bear a higher share of the fault as it was cheaper for her to avoid the accident. As noted, this all assumes that the court takes the presumption of knowledge seriously as a matter of policy.

the administrative savings argument, while promising, is still a rocky road. One way to deal with that rocky road is to maintain the flexibility to sidestep the truncated Hand formula in appropriate cases. Louisiana may have done this. The problem here is to not let the costs of flexibility eat up the administrative savings a presumption of knowledge provides. Still I am not so blind as to say that courts or legislatures are consciously focusing on the administrative convenience argument. I feel there still is the potential for an explanation here, but it must be examined in light of some of the other purposes of tort law that seemed to lack promise earlier.

First, the truncated Hand formula arguably does lead to more recoveries. While this seems a blessing from a compensation perspective, it is part of its curse as a cost savings rule. As noted, providing compensation does not require a risk/utility balance. But, if we can alter the risk/utility balance a little, we can compensate more without abandoning negligence altogether. This has morality and deterrence implications as well. Recall that I set forth two competing moral arguments. One supported a type of absolute liability: between two innocents the one who benefits from a product or thing and is in the best position to guard against risk ought to pay. The other argument supported negligence: a person ought to pay only when they are somehow blameworthy. Note how the truncated Hand formula supports both while arguably saving money. It only imposes liability when risk is greater than utility minus knowledge. That is, the truncated Hand formula imposes liability where, in that favorite concept of negligence fans, there is an *unreasonable* risk of harm. Alternatively, the truncated Hand formula moves toward the first maxim by imposing liability on producers of unreasonably dangerous products and custodians of unreasonably dangerous things even where they have no knowledge of the risk. It plays both sides of the fence.

Concomitantly, the deterrence debate rages but it rages largely on a theoretical level, for no court has adopted a scheme of strict liability as "pure" as Calabresi's. The truncated Hand formula again walks the middle ground. It does not purport to impose absolute liability or even "cheapest cost avoider" liability. It pays heed to those who fear that absolute liability or "pure" strict liability would over deter. But, at the same time, it does not allow defendants to escape liability by claiming they did not know of a risk. By assuming knowledge, the truncated Hand formula disposes with case-by-case analysis on the knowledge issue (but not the risk/utility balance) and relies on a categorical rule to encourage investments in knowledge, research, and development, which Calabresi's approach would do across the board.

One may simultaneously note that the truncated Learned Hand formula reaches a compromise between traditional case-by-case negligence decision making and categorical liability rules. While the case-by-case

aspect continues in the risk/utility balance, there is a categorical rule about knowledge.

As for risk spreading, courts now generally only impose strict liability in action on superior risk spreaders such as: manufacturers, businesses, and even homeowners. While risk spreading concerns alone might ignore risk and utility, a slight alteration of the negligence formula has furthered risk spreading goals without bowing to them.

Thus, when all of the purposes of tort law, administrative convenience, morality, deterrence, compensation, and risk spreading are considered together, the truncated Hand formula begins to make some theoretical and practical sense. One last point that merits consideration is behavioral—the nature of courts.

Judges are conservative as a group, not necessarily politically, but institutionally. They are not eager to change rules. They pay attention to precedent. They pay attention to superior courts' decisions. They listen to scholars who argue that absolute liability would shut down industry. On the other hand, they also listen to those who tell them heightened liability rules against certain defendants may increase product safety. They also pay attention to the facts of cases and their natural human tendencies. They are compassionate. Compassion, I feel, provides a push towards liability in difficult cases. Given all these competing factors, rules usually change slowly.

As such, one could imagine how a judge faced with conflicting arguments about absolute liability, Calabresi type strict liability, and negligence might pick a middle ground. It may well be best for our modern day Solomons to split these rules in half—and then put them back together. Halfway points are not always best, but they often appeal to our sense of fairness. The truncated Hand formula is an illustration of a halfway rule. It sounds and looks a lot like negligence in that it retains the risk/utility test. But, it cuts out half of the traditional negligence formula: knowledge. By retaining the risk/utility balance, courts keep familiar doctrine and appeal to defense interests. By presuming knowledge, courts increase compensation, spread risk, and half-way accept Calabresi's deterrence arguments. Thus, this approach appeals to both plaintiffs and their lawyers. And, the formula does all this while arguably saving money. The rule allows the courts, like Mickey Mantle, to hit from both sides of the plate.

Is the truncated Hand formula a step in an evolutionary (cyclical?) process toward absolute liability? Is it an aberration in our negligence/fault regime? I am not sure; only time will tell. Recent developments predict a negative answer to the first question for now. Is it an enduring middle ground approach? Is it a rule that fosters administrative convenience? Or, is it a rule of judicial convenience and self-preservation? Perhaps it is both of these last two things. Whatever, the truncated Hand formula *is* what we have; it *is* strict liability in action.

V. CONCLUSION

This paper has posited that strict liability, as it exists and not as it is theoretically articulated, is simply negligence with knowledge of the risk presumed. Like the old hag Niall kissed, strict liability is not what it may at first seem—what our initial impressions tell us. As such, strict liability presents us with a truncated Learned Hand formula. One is strictly liable not when $B < P \times L$ (negligence), but when $B - BK < P \times L$. The questions this formula raises are many. Answers are few. Administrative convenience provides some solutions but leaves other questions unanswered. The other purposes of tort law are ambiguous on this point. However, only when all purposes of torts are considered together, and when the lawyer reminds herself of the conservative nature of courts, does a glimmer of explanation appear. Only then do we begin to see just why we have it.

After witnessing the hag's transformation, Niall, future King of Tara, recognized that what at first seems ugly and brutal may reveal a more attractive side. As Royal Rule counselled him, "without fierce conflict [Royal Rule] . . . may not be won."¹⁵⁶ Awareness of this idea enlightens. Likewise, awareness of the nature of strict liability in action enlightens us as to why we have it; and, it may enlighten our view of torts in general.

156. J. Campbell, *supra* note 1, at 118.

