INTRODUCTION

In the area of products liability, the doctrine of strict tort liability has attracted a great deal of scholarly attention.1 Nevertheless, the case law involving strict tort liability in some jurisdictions, such as Nebraska, is relatively sparse.2 Consequently, the Nebraska Supreme Court has not had the opportunity to fully analyze the plethora of issues involved in strict liability. Nor has the court had the opportunity to fully develop the theoretical foundation for strict liability. This lack of opportunity has hindered the court's treatment of those issues which must be resolved on the basis of the theoretical foundation chosen.3 The current state of strict tort liability in Nebraska has been further complicated by the legislative enactment of a bill placing significant restrictions on products liability actions.4 This article will examine the Nebraska case law to determine whether there is a coherent rationale underlying strict liability and will evaluate the practical and theoretical impact that the recent legislation may have on strict tort liability in Nebraska.

JUSTIFICATIONS FOR STRICT LIABILITY

The evolution of the doctrine of strict liability has been well documented in legal periodicals.5 "It developed out of the need to

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5. Perhaps the best such documentation can be found in Strict Liability, supra note 3 and Prosser, The Assault Upon the Citadel, 69 Yale L.J. 1099 (1960).
break down the barriers to recovery placed before the plaintiff in
negligence and breach of warranty actions.\textsuperscript{6} Chief Justice Traynor was among the first to espouse the doctrine that a manufacturer should be held strictly liable for placing a defective product on the market, when the defect causes an injury to a human being.\textsuperscript{7} Dean Prosser aided the evolution of strict liability in tort by arguing that the doctrine of strict liability should be based squarely in tort law devoid of any "illusory contract mask."\textsuperscript{8} Chief Justice Traynor and Dean Prosser, both members of the American Law Institute, were instrumental in the formulation of section 402A of the Restatement (Second) of Torts which set forth the basic doctrine of strict tort liability.\textsuperscript{9} Rather than being a restatement of what the law was, section 402A was a statement of what the law was to become.\textsuperscript{10} Within six years, strict tort liability for defective products became the majority rule.\textsuperscript{11}

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\item \textit{The Assault}, \textit{supra} note 5, at 1134.
\item Annot., 13 A.L.R.3d 1057, 1065 (1967). \textbf{Restatement (Second) of Torts} § 402A (1966) states:
\begin{itemize}
\item Special Liability of Seller of Product for Physical Harm to User or Consumer
\item (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
\item (a) the seller is engaged in the business of selling such a product, and
\item (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
\item (2) The rule stated in Subsection (1) applies although
\item (a) the seller has exercised all possible care in the preparation and sale of his product, and
\item (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
\end{itemize}
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\textit{Id.}
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11. Carmichael, \textit{supra} note 10, at 530. For a discussion of this phenomena, see [1977] 1 PROD. LIAB. REP. (CCH) ¶ 4070, which states:
\begin{quote}
The highest courts of most of the states have now adopted the strict liability in tort doctrine, either expressly or by inference, though not all in the exact form of the Restatement (Second) of Torts Section 402A. There have been no decisions in Alabama, Massachusetts, District of Columbia, Utah, Virginia, and Wyoming applying the doctrine. Alabama has declined to ac-
Over the years, numerous justifications have been advanced to support the imposition of strict tort liability.\textsuperscript{12} Courts have argued that imposing strict liability on the manufacturer will increase product safety by deterring manufacturers from placing defective products on the market.\textsuperscript{13} The deterrence argument is supported by the fact that the manufacturer is in the best position to guard against harmful defects.\textsuperscript{14} However, in reality, a manufacturer held strictly liable would in most cases be liable for negligence as well.\textsuperscript{15} It is doubtful, therefore, that the imposition of strict liability will deter the manufacturer much more than the imposition of negligence liability.\textsuperscript{16} Moreover, the existence of liability insurance in some cases will impede the deterrent effect of strict liability. The small manufacturer whose insurance policy is based on industry-wide rather than individual standards of performance would have no incentive to improve the safety record of his products because his premiums would not be correspondingly reduced.\textsuperscript{17} However, the deterrent effect of strict liability would fail to recognize the no fault concept and applies, instead, its own "extended manufacturer's liability" doctrine. The District of Columbia has cited the Restatement (Second) of Torts Section 402A, but has not yet felt required to adopt the theory with all of its implications. There are opinions in North Carolina and Wyoming indicating that the doctrine would be applied in proper factual situations. A federal court has predicted that Utah will apply the doctrine.

\textit{Id.}


15. \textit{The Assault, supra} note 5, at 1119.

16. \textit{Id.} at 1119-20. For example, the application of res ipsa loquitur to a traditional negligence cause of action would result in a manufacturer being liable in virtually every case where the same liability would attach by virtue of strict tort liability. \textit{Id.}

17. Morris, \textit{Enterprise Liability and the Actuarial Process—The Insignificance of Foresight}, 70 Yale L.J. 554, 560-67 (1961). This is a nuance of the freeloader problem. Here the small manufacturer is the freeloader. He would prefer not to implement safety devices in an attempt to decrease his insurance premiums because he anticipates an industry wide premium reduction resulting from other manufactur-
remain for a large manufacturer whose premiums are experience rated.18

A second justification for strict liability is that it provides a short cut for holding a manufacturer ultimately liable.19 Whether by virtue of res ipsa loquitur,20 negligence per se,21 or a series of warranty actions,22 the manufacturer is generally held liable for injuries resulting from his defective product. Through the adoption of strict liability in tort, the manufacturer’s liability is imposed directly and more efficiently.23 However, this justification for strict tort liability is unpersuasive. First, there is little merit to the argument that strict liability should be imposed on manufacturers merely because the application of res ipsa loquitur may impose liability on a manufacturer who was not in fact negligent.24 Second, in warranty cases, liability is not always imposed on a retail seller where there has been an opportunity for inspection.25 In addition, liability for physical harm is not always recoverable where the product sold was not fit for the purpose for which it was made.26

19. Franklin, Tort Liability for Hepatitis: An Analysis and a Proposal, 24 STAN. L. REV. 439, 461 (1972); Keeton, supra note 12, at 1331; Wade, Chief Justice Traynor and Strict Tort Liability for Products, 2 HOFSTRA L. REV. 455, 457 (1974) [hereinafter cited as Traynor and Strict Tort]. See generally The Assault, supra note 5, at 1119-20
20. Franklin, supra note 19, at 461; Wade, Strict Tort Liability of Manufacturers, 19 SW. L.J. 5, 8-9 (1965) [hereinafter cited as Liability of Manufacturers].
21. Traynor and Strict Tort, supra note 19, at 458; Liability of Manufacturers, supra note 20, at 9.
22. The Expansion, supra note 12, at 137.
23. Franklin, supra note 20, at 461; The Assault, supra note 5, at 1123-24; Traynor and Strict Tort, supra note 8, at 457-58.
24. The Assault, supra note 5, at 1119-20.

It is said, again, that the doctrine of res ipsa loquitur is applied, in many cases, to impose liability upon defendants who in reality have not been negligent at all; and that the strict liability merely formulates, as a general rule, what goes on all the time in fact. The hypothesis is very likely true, although it is not capable of proof, and the number of instances in which it has occurred is probably far smaller than the proponents would have us believe; but the conclusion does not follow. One might as well say that because circumstantial evidence sometimes results in the conviction of the innocent, all criminal defendants should be found guilty; or that, because skid marks on the pavement may now and then permit the jury to find against defendants who in fact have exercised all due care, all automobile drivers should be held liable without fault.

Id.
26. Id.
Thus, there are some cases where liability will be imposed under strict liability where it might not have been imposed via the warranty approach. The adoption of strict liability therefore may result in changes more profound than can be justified by the avoidance of circuity of action.\textsuperscript{27} Although both the product safety and circuity of action justifications are somewhat tenuous, courts have cited them to buttress the stronger rationales for strict liability.\textsuperscript{28}

Two major rationales for strict liability are the consumer expectations rationale, and the risk distribution or enterprise liability rationale.\textsuperscript{29}

Under the consumer expectations rationale, liability is imposed upon the manufacturer because he places attractively packaged and well-advertised goods on the market, implicitly representing that they are safe for their intended use.\textsuperscript{30} The sup-

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\textsuperscript{29} Note, 19 WAYNE L. REV. 1299, 1301 (1973). For an example of the application of these doctrines, see Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1960). The \textsc{Restatement (Second)} of \textsc{Torts} § 402A (1965) is based upon the consumer expectations rationale. Note, 6 \textsc{Tex. Tech. L. Rev.} 311, 311-12 (1974). Many jurisdictions have specifically adopted the Restatement position. See cases cited in note 36 infra.

\textsuperscript{30} See Putman v. Erie City Mfg. Co., 338 F.2d 911, 914 (5th Cir., 1964) (applying Texas law); Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1965); Markle v. Mulholland's, Inc., 265 Or. 169, ---, 509 P.2d 529, 532 (1973); Jacob E. Decker and Sons, Inc. v. Capps, 139 Tex. 609, ---, 164 S.W.2d 818, 832-33 (1942). The \textit{Decker} court stated:

A party who processes a product and gives it the appearance of being suitable for human consumption, and places it in the channels of commerce, expects some one to consume the food in reliance on its appearance that it is suitable for human consumption. He expects the appearance of suitableness to continue with the product until some one is induced to consume it as a food. But a modern manufacturer or vendor does even more than this under modern practices. He not only processes the food and dresses it up so as to make it appear appetizing, but he uses the newspapers, magazines, billboards, and the radio to build up the psychology to buy and consume his products. The invitation extended by him is not only to the house wife to buy and serve his product, but to the members of the family and guest to eat it. In fact, the manufacturer's interest in the product is not terminated when he has sold it to the wholesaler. He must get it off the wholesaler's shelves before the wholesaler will buy a new supply. The same is not only true of the retailer, but of the house wife, for the house wife will not buy more until the family has consumed that which she has in her pantry. Thus the manufacturer or other vendor intends that this appearance of suitableness of the article for human consumption should continue and be effective until some one is induced thereby to consume the goods. It would be but to acknowledge a weakness in the law to say that he
plier intends that in purchasing a product consumers will rely on his assurances of safety. Thus, the manufacturer should be held liable when injury results from a defective product. This consumer expectations rationale was part of the underlying justification for section 402A of the Restatement (Second) of Torts.

Adoption of the consumer expectations rationale has a significant impact on the extent of the manufacturer's liability. First, if the consumer is aware of the defect, the basis of strict liability is absent and the manufacturer should not be held liable. Such a limitation is found in section 402A. Second, the extension of strict liability to bystanders is not mandated under the consumer expectations approach. Unlike purchasers, bystanders do not have any reason to expect safe product performance since they have not relied upon the manufacturer's representations in purchasing or using the product.

Although the definition of strict tort liability outlined in section 402A has been specifically adopted by many courts, the con-

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139 Tex. at —, 164 S.W.2d 832-33.
31. Jacob E. Decker and Sons, Inc. v. Capps, 139 Tex. 609, —, 164 S.W.2d 828, 829 (1942); The Assault, supra note 5, at 1123.

the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods . . . .

Id. Similarly, Comment g requires that "the rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Id. § 402A Comment g. Finally, Comment i states that "[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Id. § 402A Comment i.

33. Keeton, supra note 12, at 1332-33.
34. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1966). However, the Restatement also adds the requirement that the plaintiff must unreasonably incur the defect. Id.
sumer expectations rationale intrinsic to section 402A has not been the principal justification for the adoption of strict liability.\textsuperscript{37} Instead, the risk distribution rationale has been the primary justification for strict liability.\textsuperscript{38}

Under the risk distribution rationale, it is argued that "manufacturers, as a group and an industry, should absorb the inevitable losses which must result in a complex civilization from the use of their products, because they are in the better position . . . to pass such losses on to the community at large."\textsuperscript{39} Two premises underlie the risk distribution rationale. First, this rationale is based upon "the doctrine of the diminishing marginal utility of money, which asserts that the taking of small sums away from many persons is less traumatic to those involved than taking a large sum from one person."\textsuperscript{40} Second, the risk distribution theory finds support in that it may lead to a more efficient allocation of resources.\textsuperscript{41} Greater efficiency occurs when the manufacturer is forced to internalize the cost of accidents by purchasing insurance and then passing the costs on to consumers.\textsuperscript{42} The costs are passed on to consumers in the form of higher prices which reduce the demand for unsafe products.\textsuperscript{43} However, greater efficiency will not result in all circumstances. It has been persuasively argued that in a world of complete product information and rational consumers, the imposition of strict liability leads to a less efficient allocation of resources than traditional negligence.\textsuperscript{44} If the consumer has inad-


\textsuperscript{39} The Assault, \textit{supra} note 5, at 1120.


\textsuperscript{41} Franklin, \textit{supra} note 5, at 463.

\textsuperscript{42} Id.

\textsuperscript{43} Id.

\textsuperscript{44} See Posner, \textit{Strict Liability: A Comment}, 2 J. LEGAL STUDIES 205, 205-12, 221 (1973). Professor Posner stated:

1. Economic theory provides no basis, in general, for preferring strict liability to negligence, or negligence to strict liability, provided that some version of a contributory negligence defense is recognized. Empirical data might enable us to move beyond agnosticism but we do not have any.

2. A strict liability standard without a contributory negligence defense is, in principle, less efficient than the negligence-contributory negligence standard. Empirical data could of course rebut the presumption derived from theory.
equate product safety information, he may be willing to purchase a greater quantity of a given product at a cheaper price than he would have been willing to purchase had he possessed more product safety information. Even if he has adequate information, he must be capable of comprehending the risk with which he is confronted or else he will make an erroneous trade-off between cost and safety. Hence, for strict liability to result in greater efficiency of resource allocation, the consumer must be incapable of making effective cost-safety trade-offs or the consumer must lack adequate information about product safety.

It thus appears that the risk distribution theory is premised either upon the doctrine of diminishing marginal utility of money or upon the occurrence of a more efficient allocation of resources. If there has been any hesitancy to accept the risk distribution rationale, it is not because courts question those premises but “probably because it embarks upon a broad theory of ‘enterprise liability’ from which the courts thus far have tended to shy away.”

The extent of strict liability will often vary depending upon whether the consumer expectations rationale or the risk distribution theory is adopted. For example, under the risk distribution theory, a bystander should be as entitled to recover in strict tort as a consumer. The bystander, however, would not be entitled to recover if liability was based on the consumer expectations rationale. Similarly, if strict tort liability is based on the consumer ignorance justification for the risk distribution rationale, then the consumer’s knowledge of the risk should not constitute a defense. However, it should be a defense under the consumer ex-

Id. at 221. See generally Coase, Problem of Social Cost, 3 J. L. AND ECON. 1 (1960).
45. See note 44 supra.
46. See Calabresi and Bass, supra note 40, at 81.
47. See generally Posner, supra note 44 and Calabresi and Bass, supra note 40.
49. Perspective, supra note 35, at 169. Dean Prosser argues that whatever premise underlies the risk distribution theory, there is no reason to distinguish between a consumer and a bystander under that theory. Since the bystander is not a party to the sale, he is unable to protect himself. Thus Dean Prosser concludes that the bystander may be entitled to more protection than the consumer. Id.
50. Perspective, supra note 35, at 170. See note 35 and accompanying text supra.
51. Under the consumer ignorance justification, the consumer is presumed to be unable to make cost-safety trade-offs because he cannot foresee injury occurring to himself. See text and discussion at note 45 supra. Even with knowledge of the
Thus, the theoretical justification adopted for strict liability may be important in determining the extent of that liability.53

CASE LAW

In developing the doctrine of strict liability in tort, the Nebraska Supreme Court has relied on a number of theoretical justifications.

Strict tort liability in Nebraska had its origin in Zorinsky v. American Legion Post No. 154 and Asher v. Coca Cola Bottling Co.55 In Zorinsky, the Nebraska Supreme Court reversed the lower court's decision for failure to submit the issue of implied warranty to the jury.56 In recognizing an implied warranty for food sales, the court argued that the consumer relied upon the restauranteur's skill in providing wholesome food and that public safety demanded that protection be provided.57 Thus, the court apparently adopted the consumer expectations rationale and the deterrence rationale to justify an implied warranty for food sold for immediate consumption. The contract requirement of privity in implied warranty cases was eliminated in Asher.58 In eliminating the privity requirement, the court in Asher also used language indicating approval of the consumer expectations rationale.59

risk he still overly discounts the chances of his being injured by that risk. Id. Thus his knowledge of the risk should not operate to bar his recovery under strict tort.


54. 163 Neb. 212, 79 N.W.2d 172 (1956).


56. 163 Neb. at 222, 79 N.W.2d at 178. In Zorinsky, a customer sued a restaurant for injuries allegedly sustained when the customer's mouth was cut by a piece of glass in sherbert served at the restaurant. Id. at 213, 79 N.W.2d at 173.

57. Id. at 219, 79 N.W.2d at 179.

58. 172 Neb. at 860, 112 N.W.2d at 255. In Asher, the consumer sued the manufacturer of a bottled beverage. The plaintiff incurred injuries while drinking from a soft drink bottle which contained a dead mouse. Id. at 856, 112 N.W.2d at 253-54.

59. The Asher court said that the reason for adopting implied warranty without privity was set forth in the following cases which emphasize the consumer's reliance on product representation: Manzoni v. Detroit Coca-Cola Bottling Co., 363 Mich. 235, --, 109 N.W.2d 918, 921 (1961); Colvin v. John Powell & Co., 163 Neb. 112, 117, 77 N.W.2d 900, 906 (1956); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, --, 164 S.W.2d 832-33, 828 (1942); Freeman v. Navarre, 47 Wash. 2d 760, --, 289 P.2d 1015, 1021 (1955); 172 Neb. at 860, 112 N.W.2d at 253-56. See note 30 and accompanying text supra. The development of strict tort liability in Nebraska has closely followed the
The Nebraska Supreme Court first adopted strict tort liability in *Kohler v. Ford Motor Co.* The adoption of this doctrine appeared to be based upon the same consumer expectations rationale found in earlier soft drink bottle cases. The court specifically held that "a manufacturer is strictly liable in tort when an article he placed in the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes an injury to a human being rightfully using that product." In reaching that holding, the court said that there was no distinction between the soft drink bottle cases based on implied warranty and the case at hand. In establishing a strict tort cause of action, the court said that it was only announcing a clarifying change of label. Thus, it could be argued that the consumer expectations rationale supported the imposition of strict liability in *Kohler* as it had supported the use of warranty in *Asher*, the soft drink bottle case. The *Kohler* court found it unnecessary to expressly state the rationale for its adopting strict tort liability but cited authority which supported the consumer expectations approach. Thus, the court in *Kohler* may have based its adoption of strict tort liability on the consumer expectations rationale. On the other hand, the court may have cited these authorities not for the purpose of adopting a traditional development of strict tort liability in other jurisdictions. It first appeared in the form of an implied warranty in food cases in which the privity requirement was later dropped. Then, liability was extended to other products and was recognized as being founded in tort, distinct from any liability based on contract. *The Assault*, supra note 5, at 1103-04.

60. 187 Neb. at 429-30, 191 N.W.2d at 603-04. In *Kohler*, the plaintiff was injured when an allegedly defective steering gear caused the plaintiff's automobile to crash. *Id.* at 431, 191 N.W.2d at 603-04.
62. 187 Neb. at 436, 191 N.W.2d at 606.
63. *Id.* at 435, 191 N.W.2d at 606.
64. *Id.*
65. *Id.* at 434-35, 191 N.W.2d at 606. See notes 58-59 and accompanying text supra.
66. 187 Neb. at 434-46, 191 N.W.2d at 606. The *Kohler* court cited *Greenman*, in which both the consumer expectations rationale and the risk distribution rationale were advocated. *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963). However, the court also relied on the *Restatement (Second) of Torts § 402A* (1965) and *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 358, —, 161 A.2d 69, 84 (1960) which are basically predicated on the consumer expectations approach. See note 30 supra.

The court in *Henningson* held that the implicit product representations made by the seller and the inability of the consumer to inspect for defects justified the elimination of the privity requirement. 32 N.J. at —, 161 A.2d at 83-84. Finally, the court in *Kohler* referred to an article by Dean Prosser. This landmark article set forth numerous justifications for strict liability. *The Assault*, supra note 5, at 1114-24.
rationale, but rather with a view toward suggesting several justifications for the imposition of strict liability.

The next Nebraska case involving strict tort liability was *Hawkins Construction Co. v. Matthews Co.* In *Hawkins*, a construction company—lessee brought suit against the lessor and the manufacturer of scaffolding to recover for damage caused to a building and to the scaffolding as a result of a defect in the scaffolding. The trial court instructed the jury on breach of warranty and strict tort liability. The Nebraska Supreme Court found a breach of warranty and affirmed the decision of the trial court. However, the court specifically stated that strict tort liability was based on the enterprise liability rationale. Second, the court rejected the contention that a lessor could not be held strictly liable in tort. Third, the court considered the status of the strict tort defenses. "[T]raditional 'contributory negligence' in the sense of a failure to discover a defect or to guard against it, is not a defense to a suit in strict tort, or for a breach of warranty. Assumption of risk and misuse of the product are." However, a recent Nebraska case, *Herman v. Midland Ag Service, Inc.* has put the status of these defenses in doubt, by emphasizing that the strict liability com-
ments in *Hawkins* were dicta.\(^{75}\)

Finally, the *Hawkins* court considered what type of damages are recoverable under strict tort liability. It is clear from the court's opinion that product damage is not compensable under strict tort.\(^{76}\) However, it is not clear whether recovery of non-product property damage is similarly barred.\(^{77}\) The court appeared to preclude recovery of product damage on the basis that an adequate remedy was already provided by the Uniform Commercial Code.\(^{78}\) Since both product and non-product damage are recoverable under the Uniform Commercial Code, it could be argued that recovery of all property damage is excluded by *Hawkins*.\(^{79}\) However, such an interpretation appears inconsistent with a recent Nebraska Supreme Court decision.\(^{80}\) Under the enterprise liability

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\(^{75}\) Id. at 376, 264 N.W.2d at 173. The Court of Appeals for the Eighth Circuit has held that under Nebraska law, contributory negligence is not a defense while assumption of risk and product misuse are defenses. However the Eighth Circuit relied solely on *Hawkins* in reaching these conclusions. *Melia v. Ford Motor Co.*, 534 F.2d 795, 801 (8th Cir. 1976); *Sherrill v. Royal Indus., Inc.*, 526 F.2d 507, 511 (8th Cir. 1975).

\(^{76}\) 190 Neb. at 559-63, 209 N.W.2d at 652-54. For the purposes of this article, product damage means damage to the defective product itself. The *Hawkins* court divided damages into three categories: personal injury, non-product physical damage, and product damage. In denying recovery for product damage, the court held that recovery for such damage would be the same as allowing recovery for loss of bargain. Note, 7 CREIGHTON L. REV. 396, 410-11 (1974).

\(^{77}\) 190 Neb. at 568, 209 N.W.2d at 656 (McCown, J., concurring); 190 Neb. at 570-73, 209 N.W.2d at 657-59 (Clinton, J., concurring); Note, 7 CREIGHTON L. REV. 396, 415 (1974).

\(^{78}\) 190 Neb. at 562, 209 N.W.2d at 653. The *Hawkins* court held that:

If the loss is merely economic, the Uniform Commercial Code has given the purchaser an ample recourse under the particular provisions and requirements of the code. Placed broadly, it is the law of sales, and not the law of torts, which protects the buyers interest in the benefit of his bargain... [E]very purchaser has a right to be protected from personal injury regardless of the terms of the sale. But these jurisprudential and public policy considerations and arguments are not persuasive when losses are purely commercial, and the parties are free to contract between themselves and the Uniform Commercial Code as enacted by the Legislature protects this interest and provides the remedy in case of breach. *Id.* at 562-63, 209 N.W.2d at 653.


[H]owever, when purely economic damages, absent the physical injury provided in the Restatement (Second) of Torts Section 402A, are sought, there is dispute. Most jurisdictions disallow recovery of consequential damages on a theory of strict liability in tort on the ground that the law [of] contracts still controls. The greatest confusion arises when the only loss is damage to the product itself. One line of cases says that the product is as
rationale accepted by *Hawkins*, the determination of whether non-
product property damage is recoverable depends on which prem-
ise is chosen to support this rationale. If the court adheres to the
notion of the diminishing marginal utility of money, all damages
would logically be recoverable.81 However, this premise is incon-
sistent with *Hawkins'* refusal to allow recovery for product
damage. On the other hand, if the Nebraska Supreme Court bases
enterprise liability on the belief that individuals are incapable of
making cost-safety trade-offs, then only damages for personal in-
jury should be compensable under strict liability.82 This premise
would be consistent with the interpretation that *Hawkins* barred
recovery of all property damage. If *Hawkins'* acceptance of the en-
terprise liability rationale was premised on the consumer's inabili-
ty to make cost-safety trade-offs, that acceptance is weakened by
recent dicta in *Herman* allowing recovery for non-product property
damage.83

After *Hawkins*, the Nebraska Supreme Court reasserted its
preference for the consumer expectations rationale for strict liabil-
ity in *Fisher v. Gate City Steel Corp.*84 In *Fisher*, the trial court
submitted the case to the jury on the issue of negligence and strict
liability.85 Among numerous assignments of error, the plaintiff
claimed that the trial judge erred in failing to submit the case to
the jury on the issue of implied warranty.86 The supreme court in
affirming the trial court's decision held that there was no prejudi-
cial error because "the strict liability theory is essentially the lia-

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81. See *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 155-56, 45 Cal. Rptr. 17, 27-28 (1965) (Peters, J., dissenting). Any loss, whether personal injury or property loss, could be spread among many people reducing the total trauma associated with that loss. See note 40 and accompanying text supra.
82. Individuals should not be allowed to recover for property damage because under this premise their ability to adequately evaluate the chances of such losses is not impaired in the same manner as their ability to evaluate the chances of bodily injury. Since their ability to make trade-offs is not impaired, there is no efficiency lost by allowing individuals the ability to make their own choices where only property damage is involved. See Note 46 and accompanying text supra.
83. In *Herman*, the court implied that non-product property damage was recoverable. See notes 107-109 and accompanying text infra.
84. 190 Neb. 699, 211 N.W.2d 914 (1973). In *Fisher*, an employee of a construction company brought suit against the manufacturer for personal injury damage caused by defective construction equipment. The jury returned a verdict for the defendant. *Id.* at 700-01, 211 N.W.2d at 916.
85. *Id.* at 701, 211 N.W.2d at 916.
86. *Id.* at 702, 211 N.W.2d at 917.
STRICT TORT LIABILITY

bility of implied warranty divested of the contract doctrines of privity, disclaimer, and notice. In so doing, the court reaffirmed the statement in Kohler that implied warranty and strict tort liability are essentially the same doctrines and thereby strengthened the conclusion that the consumer expectations rationale is the basis for strict tort liability in Nebraska.

The next case offering insight into the justification for strict liability in tort came more than two years after Fisher. In McDaniel v. McNeil Laboratories, Inc., the Nebraska Supreme Court relied on the comments to section 402A of the Restatement (Second) of Torts in determining that submission of the case to the jury on strict tort liability was improper. Quoting comment i of section 402A, the court held that the article sole must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. By relying on this section to establish the parameters to the application of strict tort liability, the Nebraska Supreme Court again implicitly expressed its preference for the consumer expectations rationale.

In the recent case of Waegli v. Caterpillar Tractor Co., the consumer expectations rationale was again indirectly relied upon by the Nebraska Supreme Court. Although the plaintiff Waegli

87. Id. at 703, 211 N.W.2d at 917.
88. See notes 60-66 and accompanying text supra.
89. The first case involving strict tort liability to be presented to the supreme court after Fisher was Friedrich v. Anderson, 191 Neb. 724, 217 N.W.2d 831 (1974). In Friedrich the court was confronted with a second impact case where the plaintiff was injured in an automobile accident in which his head struck the gearshift lever. Id. at 725, 217 N.W.2d at 833. In discussing the nature of a design defect, the court shed little light on the justifications for strict liability in tort. Id. at 731-33, 217 N.W.2d 836-37. Although the plaintiff sought recovery under strict tort, it appears that the supreme court decided the case only on the negligence theory. Note, 54 Neb. L. Rev. 172, 179-80 (1975).
90. 196 Neb. 190, 241 N.W.2d 822 (1976). In McDaniel, a patient sued a drug manufacturer for injuries caused by one of the defendant’s products. Id. at 191-92, 241 N.W.2d at 823-24. The plaintiff pleaded four theories of recovery; however, the trial court only presented the issue of negligence to the jury. On appeal, the plaintiff contended that the trial court erred in failing to submit the case to the jury on the issue of strict liability. Id. at 196, 241 N.W.2d at 826. The supreme court affirmed the trial court’s refusal to submit the case on the additional theories of recovery. Id. at 204, 241 N.W.2d at 830.
91. Id. at 196-201, 241 N.W.2d at 826-28.
92. Id. at 197, 241 N.W.2d at 827.
94. 197 Neb. 824, 251 N.W.2d 370 (1977). The plaintiff in Waegli was injured by the allegedly defective heavy equipment he was operating. Id. at 824-26, 251 N.W.2d at 371-72. For a discussion of the Waegli case and the implications it raises with respect to strict tort liability, see Note, 11 Creighton L. Rev. 374 (1977).
plead strict liability in tort, breach of warranty and negligence as theories of recovery, the case was tried only on negligence and strict liability.95 The trial court dismissed the case without specifying the grounds for the dismissal and Waegli appealed.96 The supreme court affirmed the trial court's decision.97 In justifying the dismissal of the strict liability count, the court said that a condition of a recovery under the doctrine of strict liability is that the plaintiff be unaware of the claimed defect.98 However, it refused to determine whether knowledge of the defect was an affirmative defense or whether lack of knowledge of the defect was an element of the cause of action.99 Such a determination was not necessary for the disposition of the case.100 Nevertheless, the Waegli ruling that a plaintiff's knowledge of the defect bars recovery under strict tort supports the view that the consumer expectations rationale is followed by the Nebraska Supreme Court.101

The most recent case involving strict liability in tort is Herman v. Midland Ag Service, Inc.102 In Herman the plaintiff sought recovery upon three theories: breach of implied warranty, negligence, and strict liability in tort, but the trial court submitted the case to the jury on the first two theories only.103 The trial court returned a verdict for the plaintiff which the defendant appealed.104 The supreme court reversed the decision and remanded the case for a new trial citing various errors of the trial court.105 In discussing two of the errors, the court made significant statements regarding strict tort liability.106

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95. 197 Neb. at 826, 251 N.W.2d at 372.
96. Id.
97. Id. at 828, 251 N.W.2d at 373.
98. Id. at 826, 251 N.W.2d at 372.
99. Id.
100. Id. The court was not required to decide this issue because the defendant obviously knew of the defect. Id.
101. See notes 29-33 and accompanying text supra. Although the court focused its attention on the plaintiff's knowledge of the defect, the plaintiff was also determined to be contributorily negligent. 197 Neb. at 828, 251 N.W.2d at 373. Thus it is unclear whether knowledge of the defect alone is a defense to strict tort liability in Nebraska. Under the Restatement, the plaintiff must not only have knowledge of the defect but he must also unreasonably incur the danger of the defect. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1966).
102. 200 Neb. 356, 264 N.W.2d 161 (1978). In Herman, the plaintiff received burns from anhydrous ammonia when he attempted to transfer the ammonia from the defendant's nurse tank to an applicator tank. Id. at 357, 264 N.W.2d at 163. While attempting to make the transfer, the valve on the nurse tank hose somehow opened, causing the pressurized ammonia to be released in the plaintiff's face. Id. at 362, 264 N.W.2d at 165.
103. Id. at 357-58, 264 N.W.2d at 163.
104. Id. at 358, 264 N.W.2d at 163.
105. Id. at 380, 264 N.W.2d at 173.
106. In the first error, the trial court gave an instruction stating that "a supplier
The court reviewed three early cases involving suppliers who dealt with dangerous substances.\(^{107}\) The court stated that the defendant in those cases would now be held liable under the standards applicable to strict tort liability.\(^{108}\) The significance of that statement becomes apparent only after looking at the nature of those cases. In two of those cases, recovery was allowed for non-product property damage.\(^{109}\) Thus, the court is apparently now authorizing the recovery of non-product property damage under strict tort liability in Nebraska. If this is a correct interpretation, it adds needed clarification to the dicta in *Hawkins* regarding strict tort damages.\(^{110}\) However, it is not clear to what degree the third error was relied upon by the supreme court in reversing the trial court's decision.\(^{111}\)

In perhaps a more salient statement, the court distinguished the three dangerous substance cases from the present case on the basis that "here the plaintiff knew the dangerous nature of the substance he was dealing with."\(^{112}\) The court equated "strict accountability" with strict tort liability.\(^{113}\) It then stated that a defendant was not held to strict accountability for a dangerous product where the plaintiff was aware of the dangerous nature of the product.\(^{114}\) Therefore, the supreme court implied that a plaintiff's knowledge that he was dealing with an inherently dangerous

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\(^{107}\) *Id.* at 372-73, 264 N.W.2d at 170. The cases cited were: *Rose v. Buffalo Air Serv.*, 170 Neb. 806, 104 N.W.2d 431 (1960); *Colvin v. John Powell & Co.*, 163 Neb. 112, 77 N.W.2d 900 (1956); *Rasmussen v. Benson*, 133 Neb. 449, 275 N.W.674 (1937).

\(^{108}\) *Id.* at 373, 264 N.W.2d at 170.

\(^{109}\) *Rose v. Buffalo Air Serv.*, 170 Neb. 806, 104 N.W.2d 431 (1960) (recovery for crop damage to sugar beets caused by defective crop spray); *Colvin v. John Powell & Co.*, 163 Neb. 112, 77 N.W.2d 900 (1956) (recovery for death and injury to cattle which ate molasses from barrels containing parathion).

\(^{110}\) See notes 81-83 *supra*.

\(^{111}\) See notes 105-106 and accompanying text *supra*.

\(^{112}\) *Id.* at 373, 264 N.W.2d at 169-70.

\(^{113}\) *Id.* at 371, 264 N.W.2d at 169-70.

\(^{114}\) *Id.* at 373, 264 N.W.2d at 170.
product would bar his recovery in strict tort. This strict tort defense would arguably apply even where a product was defective and the plaintiff did not know of the existence of the defect.115

The adoption of such a defense would substantially alter the doctrine of strict liability in tort. Individuals who deal with dangerous substances such as demolition experts, would be precluded from suing the manufacturer under strict tort even if the product was defective. Such a limitation is contrary to the consumer expectations rationale which the Nebraska Supreme Court has apparently adopted. Like the consumer of any product, the person who purchases a dangerous substance has legitimate expectations of product performance. When such a product proves to be dangerously defective and causes injury to the consumer, he should be able to recover under strict tort. The mere fact that he knew the product was dangerous does not indicate that he had knowledge of the defect. If he had no knowledge of the defect, his legitimate product expectations would be frustrated by the defect as in any other defective product case. While the plaintiff's knowledge of a defect and his unreasonable incurrence of that defect should constitute a defense to strict tort,116 mere knowledge that the product is inherently dangerous should not be a defense when the product is also defective and injury results therefrom. In the Herman case, the plaintiff's knowledge that anhydrous ammonia was a dangerous substance should not have precluded his recovery in strict tort if the container proved to be defective.117

A second significant statement by the Herman court regarding strict tort liability in Nebraska arose from the defendant's contention that Hawkins made assumption of risk a defense in strict liability and warranty actions.118 The court emphasized that the discussion in Hawkins regarding strict tort liability was merely dicta.119 This statement concerning Hawkins is significant in two

117. See id.
118. The defendant raised as an assignment of error the trial court's failure to instruct the jury that assumption of risk was a defense in an action for breach of warranty. 200 Neb. at 359, 264 N.W.2d at 164. Although the supreme court resolved this issue on the basis of proximate cause, it briefly examined the status of the defenses to strict tort liability. Id. at 377, 264 N.W.2d at 172.
119. Id. at 376, 264 N.W.2d at 172. In reaching this conclusion the Herman court stated:

The defendant points out that in Hawkins Constr. Co. v. Matthews Co., Inc., 190 Neb. 546, 209 N.W.2d 843, we said ... "traditional contributory negligence in the sense of a failure to discover a defect or to guard against it, is not a defense to a suit in strict tort, or for breach of warranty. Assumption of risk and misuse of the product are. Restatement, Torts 2d, § 402A, com-
ways. First, the Herman court limited the precedential value of the Hawkins dicta that traditional contributory negligence is not a defense in strict liability cases. The court, however, did not further elaborate on the current status of the strict tort defenses under Nebraska law. Second, by emphasizing that much of Hawkins was dicta, the court also brought into question the precedential value of Hawkins' acceptance of the enterprise liability rationale. By questioning the only Nebraska case to expressly adopt the enterprise liability rationale, the Herman court may have cleared the way for explicit judicial acceptance of the consumer expectations rationale.

An examination of all the strict tort cases reveals that the Nebraska Supreme Court has often couched its decisions in language which supports the consumer expectations approach. The court has also favorably cited section 402A of the Restatement (Second) of Torts, which is largely based on the consumer expectations approach. Moreover, the genesis of strict liability in Nebraska appears to rest upon the consumer expectations rationale. Notwithstanding this propensity of the supreme court, there is reason to suspect that the court may adopt a different rationale for strict tort liability. The Nebraska Supreme Court has not been presented many cases which require the adherence to one particular rationale for a logically sound resolution of the issues. In

120. Id. at 376, 264 N.W.2d at 172.
121. Id. See note 119 supra.
122. The consumer expectations rationale evidently was the basis of every Nebraska strict liability case except Hawkins.
125. See notes 54-59 and accompanying text supra.
Hawkins, the one occasion in which the court was presented with such a case, the court relied on the enterprise liability rationale. However, it now appears that the court may abandon the Hawkins position. Although the consumer expectations approach appears to underlie most of the Nebraska Supreme Court's strict tort decisions, the court has never explicitly adopted that rationale as the primary justification for strict tort liability. The supreme court's firm commitment to one of the rationales will only become apparent when it is required to adjudicate more complex cases like Hawkins. Such cases will not only give the court the opportunity to explicitly examine the justifications for strict tort liability, but will also permit it to set the parameters of that doctrine by its consistent adherence to a single justification.

Although it is not possible to say with certainty what justification underlies strict tort liability in Nebraska, some conclusions regarding the status of strict liability in Nebraska can be drawn. It is patently clear that a cause of action based on strict liability in tort is recognized in Nebraska. Additionally, a lessor may be sued under strict tort liability. Recovery for product damage in strict tort is precluded. However, recovery for non-product property damage is allowed. While the exact status of the defenses to

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128. Kohler v. Ford Motor Co., 187 Neb. 428, 436, 191 N.W.2d 601, 606 (1971). The essential elements which the plaintiff must prove to entitle him to recover under a strict tort cause of action include:

1) that the defendant placed the product on the market and the defendant knew or should have known that the product would be used without inspection for defects.
2) that the product was defective at the time it was placed on the market and left the defendants' possession.
3) that the plaintiff was unaware of the extent and nature of the claimed defect.
4) that the claimed defect was the proximate cause of the accident and any injury to the plaintiff while the product was being used in the way and for the general purpose for which it was designed and intended.
5) that the defect made the product unreasonably dangerous and unsafe for its intended use.
6) that the plaintiff sustained damages as the direct and proximate result of the defect.
7) the nature, extent and amount of the damages sustained.

Melia v. Ford Motor Co., 534 F.2d 795, 800 (8th Cir. 1976) (applying Nebraska law).
130. Id. at 559-63, 209 N.W.2d at 652-54.
131. See notes 109-10 and accompanying text supra. See also Herman v. Midland Ag Serv., Inc., 200 Neb. 356, 294 N.W.2d 161 (1978).
strict tort is unclear after Herman,\textsuperscript{132} the plaintiff's knowledge that the product is defective will bar his recovery.\textsuperscript{133} However, it is not clear whether the plaintiff must also unreasonably incur the defect in order for the defense to apply.\textsuperscript{134} It is also unclear whether the plaintiff or the defendant has the burden of proof regarding the plaintiff's knowledge of the defect.\textsuperscript{135}

**LEGISLATION**

Nebraska has recently enacted legislation, L.B. 665, which could have a significant impact on strict liability in tort.\textsuperscript{136} The act has six major provisions.\textsuperscript{137} First, L.B. 665 establishes a statute of limitations of four years on all product liability actions.\textsuperscript{138} Second, L.B. 665 establishes a statute of repose of ten years on any product

\begin{itemize}
\item \textsuperscript{132} See note 120 and accompanying text supra.
\item \textsuperscript{133} Waegli v. Caterpillar Tractor Co., 197 Neb. 824, 826, 251 N.W.2d 370, 372 (1977).
\item \textsuperscript{134} In Hawkins the court apparently adopted the Restatement approach requiring unreasonableness. 190 Neb. at 569, 209 N.W.2d at 655. However, in Waegli the court primarily focused its analysis on the plaintiff's knowledge of the defect. 197 Neb. at 826, 251 N.W.2d at 372. Herman may have further extended the impact of the plaintiff's knowledge. The supreme court implied that a plaintiff's knowledge that he was dealing with an inherently dangerous product would bar recovery. See notes 113-115 and accompanying text supra. See also 200 Neb. at 371-73, 264 N.W.2d at 169-70.
\item \textsuperscript{135} See note 95 and accompanying text supra.
\item \textsuperscript{137} See generally Nebraska Legislative Floor Debate on L.B. 665, 85th Legis., 2d Sess. 06508-09 (1978) (statement of Senator DeCamp). A seventh provision, not specifically discussed in this note,
\item clears up any ambiguity in one of the rules of evidence and specifically conforms it to its intended purpose. It provides that subsequent remedial measures taken by a manufacturer shall not be used as substantive proof of liability in 'strict liability in tort' actions. Most lawyers believe that this has always been the intent of the rule. However, a few courts have refused to extend the rule beyond negligence actions even though the rule presently says 'negligence or culpable conduct.' This change makes it clear that the words 'culpable conduct' include within their meaning the sale of a defective product.
\item \textsuperscript{139} L. B. 665, § 2(1), 1978 Neb. Laws 565. Products liability action as used in L.B. 665 means any action brought against a manufacturer, seller, or lessor of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formulation, installation, preparation, assembly, testing, packaging, or labelling of any product, or the failure to warn or protect against a danger or hazard in the use, misuse, or intended use of any product, or the failure to provide proper instructions for the use of any product.
\end{itemize}

Id. § 1 at 565. The word "product" as used in L.B. 665 is intended to mean the same as the word "goods" as defined in section 2-105 of the Uniform Commercial Code.
liability action except breach of warranty. Third, the act precludes strict tort liability actions from being brought against anyone except the manufacturer of the product. Fourth, the act specifically authorizes the state of the art defense in any product liability action based upon negligent or defective design, testing, or labeling of a product. Fifth, L.B. 665 brings strict tort actions within the scope of the comparative fault statute. Finally, the act adopts strict reporting provisions for insurance companies which insure against product liability losses. The legislative history contains few comments which indicate the strict liability rationale underlying L.B. 665. In order to evaluate the impact of L.B. 665 on the application of and the justification for strict tort liability, it is necessary to examine each statutory provision set forth above.

The establishment of a four-year statute of limitations in all products liability actions does not change the existing Nebraska law. Negligence actions were previously governed by a four-year statute of limitations. Warranty actions involving defective products were also previously subject to a four-year statute of limitations, although it was unclear whether the four-year contract statute or the four-year tort statute controlled.


139. L.B. 665, § 2(2), 1978 Neb. Laws 565. That provision has two qualifications: (1) that any product liability claim which existed at the time this statute went into effect, July 22, 1978, must be brought within two years of that date, id. § 2(4) at 556; and (2) that claims of indemnity or contribution of a manufacturer or seller are not within the statute of limitations or repose of the act, id. § 2(3) at 565-66.


141. Id. § 4 at 566.

142. Id. § 6 at 566-67.

143. Id. § 8 at 567-69.

144. A trial lawyer testifying in opposition to L.B. 665 before the Banking Committee said “the whole idea of products liability is to place the cost of that injury on society, indeed, but by way of the persons who can do something about it.” Hearings on L.B. 665 Before Banking, Commerce, and Ins. Comm., 85th Legis., 2d Sess. 47 (1978) (statement of Mr. Cannoi.). Such a justification resembles the cost distribution analysis advocated in Calabresi and Bass, supra note 38, at 76. Additionally, a senator opposed to L.B. 665 expressed his desire to see something included in the bill which would encourage product safety. Alternatively, he would allow recovery for injuries received when relying on product representation. Nebraska Legislative Floor Debate on L.B. 665, 85th Legis., 2d Sess. 07874 (1978) (statement of Senator Chambers). The Nebraska Supreme Court recognized these rationales in Zorinsky v. American Legion Post No. 1, 163 Neb. 212, 222, 79 N.W.2d 172, 177-78 (1956).


146. See generally 2 L. FRUMER & M. FRIEDMAN, PROD. LIAB. § 16A [5][h] (1978). These authors stated:

[T]he contract background of warranty actions has caused debate among the cases as to whether the personal injury or tort statutes of limitations
The enactment of the ten-year statute of repose was one of the most controversial provisions of the act. The statute of repose requires that any product liability action, except one under section 2-275 of the Uniform Commercial Code must be commenced within ten years after the date the injury causing product was first sold or leased for use or consummation. The statute begins to run when the product is first sold to or leased by a consumer. However, the statute does not begin to run when the product is sold to a wholesaler or retailer. It has been argued that such statutes are unjust because they may preclude an individual from filing suit before an injury has occurred. Nevertheless, similar statutes of repose have been enacted in other states and in other areas of the law. The apparent motivation for the statute of repose was the impact of uncertainty as to future inflation on liability insurance premiums. The legislature made a policy decision that allowing individuals the right to sue forever was outweighed by society's interest in not impeding business with high insurance costs. Thus, the statute of repose is consistent with efficiency of

should be applied, or whether the contract period governs. Cases have gone both ways, with many of them stating that in actions for the recovery of personal injuries, a warranty claim is governed by the statute relating to negligence.


149. Id. See Nebraska Legislative Floor Debate on L.B. 665, 85th Legis., 2d Sess. 06861 (1978) (statement of Senator Bereuter).


154. Nebraska Legislative Floor Debate on L.B. 665, 85th Legis., 2d Sess. 06478-79, (1978) (statement of Senator DeCamp). The legislature procured evidence indicating that 96% to 97% of the products liability claims are filed within the first six years after the initial sale. The legislators felt that it was desirable to set an absolute limit on the period during which those claims were filed. They believed that a predictable term of years would be much more conducive to projecting the impact of inflation, the number of litigants involved, and the increase in litigation. It was hoped that this predictability would reduce insurance rates by eliminating the cost of the uncertainty surrounding the three or four percent of the claims accruing after six years. This rate reduction would relieve manufacturers of some of the heavy insurance costs associated with products liability claims. Id.

resource allocation, a premise underlying the risk distribution rationale.156

The provision of L.B. 665 limiting strict tort liability to the manufacturer may alter existing Nebraska law.157 Under this provision, only those parties who fabricated all or part of a defective product would be liable in strict tort.158 Thus, a retailer, wholesaler, or other intermediate vendor would not be held strictly liable although they may be liable under negligence or warranty theories.159 By limiting strict liability to manufacturers, the legislature apparently accepted a rationale other than the consumer expectations approach ostensibly recognized by the Nebraska

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156. See note 41 and accompanying text supra.
157. L.B. 665, § 3, 1978 Neb. Laws 566. Although no plaintiff has recovered against a nonmanufacturer under strict tort liability, the Nebraska Supreme Court has not objected to suits against nonmanufacturers on that ground. Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 563, 209 N.W.2d 643, 654. Moreover, in a recent case the Nebraska Supreme Court stated that Colvin, originally decided on the ground that the defendant dealt with a dangerous substance, would now be decided the same way under strict tort. Herman v. Midland Ag Serv., Inc., 200 Neb. 356, 372-73, 284 N.W.2d 161, 170 (1978). In Colvin recovery was allowed against a nonmanufacturer. Colvin v. John Powell & Co., 163 Neb. 112, 137, 77 N.W.2d 900, 916 (1956). By inference the Nebraska Supreme Court has approved of the amenability of lessors to suit under strict tort. Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 563, 209 N.W.2d 643, 654 (1973). The actual change in Nebraska law caused by this provision of the act may extend further than the mere limitation placed on who may be sued. It has been held that the duty of a lessor is not limited to the mere obligation of providing a product free of unreasonably dangerous defects at the time of the lease. The nature of a lease has been said to impose a continuing obligation on the lessor to provide a safe product throughout the term of the lease. Cintron v. Hertz Truck Leasing and Rental Serv., 45 N.J. 434, —, 212 A.2d 769, 778-79 (1965). The Nebraska Supreme Court has not had the opportunity to decide whether or not the obligation of the lessor under strict tort is a continuing one as in Cintron; see generally Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 563, 209 N.W.2d 643, 654 (1973), however, by enacting this provision the legislature has precluded the supreme court from exercising that opportunity.

158. Nebraska Legislative Floor Debate on L.B. 665, 85th Legis., 2d Sess. 06487 (1978) (statement of Senator DeCamp). Most jurisdictions have adhered to the belief that the rule of strict liability in tort stated in the Restatement applies if the seller is engaged in the business of selling products for use or consumption. 'It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant.' There is case law applying the rule of strict liability in tort to a manufacturer, wholesaler and retailer.


Throughout the legislative debate, the view was expressed that many provisions of L.B. 665 were intended to aid manufacturers being saddled with high insurance premiums. However, there was some controversy over whether the act would contribute to reducing liability insurance premiums. Out of this uncertainty arose the insurance company reporting provision of the act. The provision requires insurance companies to report basic statistical information regarding their liability insurance policies. This may prove to be significant, to the extent that it will provide sufficient information for the legislature to monitor the impact and adequacy of the other provisions in the act.

L.B. 665 expressly establishes the state of the art defense "in any product liability action based upon negligent or defective design, testing, or labeling." In recognizing this defense to product liability actions, the legislature wanted to insure that the existence of either negligence or a defect would be determined by technology existing at the time the product was manufactured rather than by technology existing at the time the accident occurred. "State of the art" was used by the legislature as a label for that body of knowledge which the manufacturer would have been able to draw upon in designing and producing his products. The legislature specifically defined the "state of the art" as the best technology reasonably available at the time the product was first sold. Thus, "state of the art" is not necessarily the industry standard at
the time of the sale since the whole industry may have failed to adequately utilize the available technology in eliminating defects.\(^ {169}\)

This legislative provision does not appear to change existing Nebraska law.\(^ {170}\) Whether this section does in fact change existing Nebraska law hinges on the interpretation given to the word "testing."\(^ {171}\) Testing may be defined as the process through which the manufacturer checks a product's structural characteristics, i.e., design testing. On the other hand, testing may be defined as the process through which the manufacturer checks for mistakes in the production process, i.e., production miscarriage testing. By making the "state of the art" a defense, a negligence standard is incorporated into strict liability because the manufacturer is judged by whether he used the best technology reasonably available.\(^ {172}\) Under the first interpretation of "testing," existing Nebraska law would not be changed, since a reasonableness standard is already imposed in design defect cases.\(^ {173}\) However if the second interpretation of "testing" is adopted, strict tort liability in Nebraska would in effect be abrogated. Introducing a reasonableness standard into strict liability by means of the state of the art defense would make strict liability equivalent to negligence in production miscarriage cases as well as design cases. The manufacturer of an unreasonably dangerous defective product could be exculpated by proving that he took all reasonable means of employing existing technology to avoid such production miscarriage defects. This is the same standard employed in negligence cases.\(^ {174}\) There is no direct reference in the legislative history of L.B. 665 explaining the meaning of "testing." However, it does not appear that L.B. 665 was intended to change existing law as drastically as the second interpretation of "testing" would suggest.\(^ {175}\) The primary purpose of incorporating this provision into the act was to codify the belief that the existence of either a defect or negligence would be determined by

\(^{169}\) Nebraska Legislative Floor Debate on L.B. 665, 85th Legis., 2d Sess. 07873 (1978) (statement of Senator Kelly).


\(^{171}\) Interview with Professor J. Patrick Green, Creighton University School of Law, in Omaha, Nebraska (Aug. 23, 1978).

\(^{172}\) Nebraska Legislative Floor Debate on L.B. 665, 85th Legis., 2d Sess. 07873 (1978) (statement of Senator Kelly).


reference to standards existing at the time of production.\textsuperscript{176} Thus, it is doubtful that "testing" will or should be interpreted to include production miscarriage testing.

The final statutory provision relates to comparative fault, and may be subject to varying interpretations.\textsuperscript{177} It is apparent from the face of the provision that an element of comparative fault will be added to strict tort actions.\textsuperscript{178} The statute incorporates strict liability actions into the comparative negligence statute.\textsuperscript{179} In so doing, it raises a question as to what constitutes contributory negligence on the part of the plaintiff in strict tort actions. Under one interpretation contributory negligence could be interpreted to mean the unreasonable incurrence of a known defect or the misuse of a product.\textsuperscript{180} On the other hand, contributory negligence could be interpreted to mean that the plaintiff did not exercise due care for his own safety.\textsuperscript{181} This is equivalent to the definition of traditional contributory negligence.\textsuperscript{182} Under the first interpretation, the present status of strict tort defenses, as set forth in \textit{Hawkins}, would not change since only the plaintiff's unreasonableness in incurring the known defect or the plaintiff's misuse of a

\begin{itemize}
\item \textsuperscript{176} See note 169 and accompanying text \textit{supra}.
\item \textsuperscript{177} L.B. 665, § 6, 1978 Neb. Laws 566-67 (to be codified in \textit{NEB. REV. STAT.} § 25-1151).
\item \textsuperscript{179} L.B. 665, § 6, 1978 Neb. Laws 566-67. That section provides:
   In all actions brought to recover damages for injuries to a person or to his property caused by the negligence or act or omission giving rise to strict liability in tort of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence or act or omission giving rise to strict liability in tort of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff, and all questions of negligence or act or omission giving rise to strict liability in tort and contributory negligence shall be for the jury.
   \textit{Id.} (emphasis omitted).
\item \textsuperscript{181} Interview with Professor J. Patrick Green, Creighton University School of Law, in Omaha, Nebraska (Aug. 23, 1978).
\item \textsuperscript{182} W. PROSSER, \textit{HANDBOOK OF THE LAW OF TORTS} 416-417 (4th ed. 1971).
\end{itemize}
product would constitute defenses within the comparative negligence statute. However, under the second interpretation, the present state of Nebraska law would be altered because traditional contributory negligence would become a defense to strict tort actions.  

The legislative history of L.B. 665 contains many references to the comparative fault provision which may be helpful in evaluating the above alternatives. The first reference to comparative fault indicates that the act is intended to insure that all of the plaintiff's fault is compared with all of the defendant's fault in determining damages in product liability cases. This statement is sufficiently ambiguous to be used in support of either interpretation of contributory negligence. Two other references to the comparative fault provision are equally unavailing to the interpretation of contributory negligence. One reference provides a hypothetical which is too ambiguous with respect to the plaintiff's knowledge of the defect to be useful in interpreting contributory negligence. The other reference also fails to indicate which definition of contributory negligence is preferred. However, it does seem to imply


184. With the exception of the first excerpt, all of the citations to the legislative history are quotes of Senator DeCamp, the Chairman of the Banking, Commerce and Insurance Committee. The Banking Committee was the committee which studied and proposed the products liability act under examination.

185. Statement of Intent on L.B. 665: Banking, Commerce and Ins. Comm., 85th Legis., 2d Sess. (1978). This statement provided that:

The current statute whereby the negligence, if any, of both parties is compared by the jury in its determination of damages will be extended to all blameworthy conduct or fault. This should insure that the negligence or other culpable conduct of the claimant will be compared with the negligence or other culpable conduct of the defendant in arriving at damages. Currently, in product liability actions based on theories other than negligence, it is an all or nothing at all situation. This is frequently unfair to either one party or the other.

Id.

186. Senator DeCamp stated:

Okay, I'm going to use the word, comparative fault, and I'm going to cite the example that I already gave here and I'm going to say that . . . Okay, I'm going to use the example of the lady or man driving a car going a hundred miles an hour going down the street and going through a stop light and having an accident and then some defect in the product let's say a steering wheel that didn't function exactly right, that was supposed to do a certain thing and it didn't. In this case the jury would also take into consideration the fact that they were violating the law and instead of some comparative fault there. The manufacturer was at fault because it was a defective product. The individual was at fault because they did the particular conduct that gave rise to this incident.

187. Senator DeCamp's reference was:
that either definition must include the common law defenses to strict tort liability.\textsuperscript{188} Thus, irrespective of whether traditional contributory negligence is included in the term contributory negligence, produce misuse and unreasonable incurrence of a known defect are within the statutory meaning of contributory negligence.

A fourth reference to the comparative fault provision is more illuminating.\textsuperscript{189} It illustrates that the intent of the comparative fault provision is to benefit both plaintiffs and defendants.\textsuperscript{190} However, only plaintiffs will benefit if the definition of contributory negligence is restricted to the unreasonable incurrence of a known defect or product misuse. They would benefit because the unreasonable incurrence of a defect and product misuse would no longer

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\textsuperscript{189} The fourth reference was as follows:

\texttt{Since I am limited on time, I will try to deal somewhat quickly with some of the other major concepts in the legislation and I think one of the most important ones is 'contributory negligence' and this is important because I think in the statute we are doing a benefit to both sides. There seems to be a view now that there is no contributory negligence. Let's take a practical example so we can all kind of understand what we are talking about. Let's assume Farmer Schmit is out working on his tractor and he has got a power takeoff, one of these jobbies that revolves around and you hear of people getting their arms caught in it at times or leg, clothes. Farmer Schmit over the years had kind of cut corners, let's say, and he has pulled off some of the safety guards. He has done a couple of other things wrong. He doesn't stop it when he is supposed to. One day, Farmer Schmit gets down and he, cutting corners again, in other words contributing to the accident, commits an act of negligence and his clothes get caught in there, it twists around and it takes his leg off. He gets concerned about it and goes to his lawyer and they discover that there is a defect in this product that also probably was a partial contributing factor. Under the present system, you would go into the court and you would say, all or nothing. In other words, prove the defect caused it, and if you could, they wouldn't consider the fact that Farmer Schmit caused part of the problem himself or they would say it was strictly Farmer Schmit's negligence and not any defect in the product that caused it. Under the theory we would put into law here, the jury would be allowed and instructed that if there was negligence by Farmer Schmit and if there was a defect, they would judge and weigh and give a certain value to this and a certain value to that. So that his contributory negligence would mitigate against, to a degree, a total recovery. He might get 40%, 50%, 60%. So we are going to put that into law.}
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\texttt{Nebraska Legislative Debate on L.B. 665, 85th Legis., 2d Sess. 06480-81 (1978) (emphasis added).}
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\textsuperscript{190} Id. at 06480.
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be absolute bars to recovery in all situations. Where the culpable conduct of the plaintiff was slight or less than slight in comparison with the defendant's conduct, the culpability of the defendant merely mitigates the damages rather than totally barring recovery.\textsuperscript{191} On the other hand, if the statute makes traditional contributory negligence a strict tort defense, both sides will benefit. Plaintiffs will still benefit by the fact that unreasonable incurrence of a defect and product misuse will not be absolute defenses in all situations. Defendants will benefit by the establishment of the defense of traditional contributory negligence which was not recognized as a common law defense to strict liability in Nebraska. Thus, in enacting L.B. 665, the legislature ostensibly intended to make traditional contributory negligence a defense to strict tort liability.\textsuperscript{192}

The final reference to comparative fault in the legislative history offers the most conclusive evidence of the legislative intent. This series of comments referred to the impact of the act on Hawkins.\textsuperscript{193} The first comment apparently stated that L.B. 665 was not intended to overrule Hawkins in any way.\textsuperscript{194} Since Hawkins refused to recognize traditional contributory negligence as a strict liability defense, traditional contributory negligence apparently was not intended to be made a defense under L.B. 665. However, a question later arose concerning the exact impact of L.B. 665 on Hawkins.\textsuperscript{195} The chairman of the Banking, Commerce

\hspace{1cm} 192. While this legislative reference to comparative negligence also provides an illustrative hypothetical, it did not aid the interpretation of the statute because it failed to indicate whether the contributory negligence involved was traditional contributory negligence or was an unreasonable incurrence of a known defect. See note 189, supra.
\hspace{1cm} 193. Hawkins set forth the strict tort defenses although a recent case has questioned the precedential value of Hawkins in that regard. See notes 72-75 and accompanying text supra.
\hspace{1cm} 194. It stated:
Section 3, in products liability actions, there has arisen a doctrine of tort recovery which is called strict liability in tort. Now this doctrine was first adopted in Nebraska with the case of Kohler versus Ford Motor Company, 187 Nebraska 428. The doctrine was limited to actions for bodily injury by the case of Hawkins Construction versus Matthews, 190 Nebraska 546, and it is not intended that this bill will in any way overrule the Hawkins case.
\hspace{1cm} 195. Senator DeCamp, the chairman of the Banking Commerce and Insurance Committee, said:
Mr. President, the question has come up, does this bill apply to real estate and I want to make it clear, if I never made it clear before, which I thought I did. No, it does not apply to real estate. Absolutely not. Definitely not. Unequivocally not. The question was also raised that I said that this does not change the rule on the Hawkins case, I repeat that. It does not change
and Insurance Committee said

[t]o clarify my reference to the Hawkins case found at 190 Nebraska 546 in the recent debate on L.B. 665, I was refer-
ing [sic] to the rule that limits the doctrine of strict liabil-
ity in tort to recoveries for bodily injury and not for
property damage. I did not intend to convey the idea that
L.B. 665 would not require a balancing of fault through
Section 5. L.B. 665 is intended to make contributory negli-
gence a defense in strict liability actions.196

If the intent of the statute was not to overrule Hawkins by es-

tablishing traditional contributory negligence as a defense in strict
tort actions, then the legislator had no reason to qualify his earlier
statement regarding the impact of L.B. 665 on Hawkins. Moreover,
it would be anamolous to say that L.B. 665 “makes” contributory
negligence a defense if contributory negligence is interpreted to
define a defense which Hawkins had previously recognized. Thus,
it appears that in enacting L.B. 665 the legislature intended to es-

tablish traditional contributory negligence as a defense to strict
tort liability. However, it is only an absolute defense where the
plaintiff's contributory negligence is more than slight in compari-
son with the defendant's fault.197 Additionally, it appears that the
unreasonable incurrence of a known defect and product misuse
are now only partial defenses in those cases where the plaintiff's
fault is only slight in comparison with the defendant's fault.198

Applying a comparative fault doctrine to strict tort liability
may seem incongruous because the defendant's liability is not
predicated on fault.199 However, comparative fault is not inconsis-

the rule. The particular rule that I was talking about was the one, I think a
question was raised by Senator Fowler or Senator Cullan that day, that is
the specific rule. There are several matters in the Hawkins Case. I was
specifically limiting my remarks to one particular one and maybe by final
reading I will find a little letter that I was going to read into the record,
somewhere on my desk, and read that in to clarify it even more. But we are
talking about limited rule on the Hawkins case.

Nebraska Legislative Floor Debate on L.B. 665, 85th Legis., 2d Sess. 07262
196. Nebraska Legislative Floor Debate on L.B. 665, 85th Legis., Sess. 07263
(1978) (emphasis added).
198. Id. By unreasonably incurring a known defect or misusing a product, the
plaintiff has committed conduct which is encompassed within traditional contribu-
tory negligence. See note 181 and accompanying text supra. Therefore the plain-
tiff's unreasonableness in incurring the known defect must be compared with the
defendant's fault in assessing damages if his culpability is slight or less than slight
in comparison with the defendant's culpability. If the plaintiff's culpability is more
than slight in comparison with that of the defendant, the plaintiff's recovery is to-

tally barred. See note 191 and accompanying text supra.
199. Levine, Strict Products Liability and Comparative Negligence: the Collison
tent with the rationales underlying strict tort liability and may logically follow from the risk distribution theory. A number of states have applied comparative fault to strict tort actions judicially and others have done so legislatively. However, the states applying comparative fault to strict tort actions consider strict tort liability as being predicated on some notion of fault rather than being an absolute liability. Legislative history indicates that the Nebraska legislators also view strict tort liability as being based on fault concepts. Consequently, the application of comparative fault to strict tort actions does not create a fault-no-fault conflict.

L.B. 665 may significantly change existing law in several areas. The most important change under L.B. 665 could be the creation of a statute of repose. However, the act could be construed to establish traditional contributory negligence as a defense in strict tort actions. This construction would also significantly alter existing law. While the legislature in enacting L.B. 665 did not rely upon any specific rationale for strict tort liability, it apparently did not

200. Feinberg, The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2D (Can Oil and Water Mix?), 1975 INS. COUNSEL J. 39, 52. The commentator notes:

Comparative negligence has as its main purpose, the apportioning of the loss according to the contributory conduct of the actors. The purpose underlying strict products liability would not seem to be frustrated by a simultaneous application of comparative negligence, in fact it would seem to be furthered. The manufacturer would still be held accountable for all harm which his defective products cause, but the inequitable results of holding the manufacturer liable for that part of the harm caused by the consumer's own contributory conduct and of totally denying recovery to a consumer who is held to have 'assumed the risk' or 'misused the product' even though he was probably less at fault than the manufacturer, would be eliminated. The end result would be a much desirable system in which the only consideration would be what loss was proximately caused by whose conduct.

Id. See also Levine, Buyer's Conduct As Affecting the Extent of a Manufacturer's Liability in Warranty, 52 MINN. L. REV. 627, 647 (1968).


204. Feinberg, supra note 200, at 51-52.

205. See note 186 supra.
CONCLUSION

While there have been many justifications advanced for the adoption of strict tort liability, there appear to be two basic rationales. First, there is the consumer expectations rationale which is based on explicit and implicit product representations made by the manufacturer. Second, there is the risk distribution theory which is an amalgam of various theories based on the lack of consumer information, the diminishing marginal utility of money, or the consumer's inability to make cost-safety trade-offs. The two theories often lead to different conclusions regarding the parameters of strict tort liability.

The Nebraska Supreme Court apparently has relied on the consumer expectations approach in justifying the imposition of strict liability on the manufacturers of defective products. However, adherence to that rationale has not been unwavering. An explanation for this indecisiveness is that the court has not been confronted with many difficult cases demanding adherence to a particular theory for their adjudication. In Hawkins, the only such case presented to the court, a firm position was taken but was later abandoned. The Nebraska Supreme Court may expressly adopt the consumer expectations approach. However, its decisive adherence to that theory will probably not occur until the court is faced with the adjudication of difficult cases, such as suits by innocent bystanders.

Additionally, to the extent that the courts have relied on the consumer expectations approach, their justification for strict liability in tort has been undermined by the legislature. In enacting recent legislation, the legislature has apparently relied on an efficiency argument to impose some significant changes in strict tort liability. A few of the changes, especially the limitation of strict tort actions to actual manufacturers, may be difficult to reconcile with the consumer expectations approach. Consequently, the Nebraska courts will probably be forced to reevaluate their adherence to the consumer expectation approach. Such a thorough re-examination appears necessary, not only to reconcile the case law with the legislation, but also to insure that the justification adopted will remain viable when applied in the context of novel and more complex situations.
INTRODUCTION

Prior to 1946, courts consistently denied recovery for prenatal injuries to a child subsequently born deformed or dead. Denial of recovery was based on the rationale that (1) a defendant could owe no duty of care to a person who was not in existence at the time of his action; and (2) the difficulty of proving any causal connection between the alleged negligence and the damage was too great and thus increased the damage of fictitious claims. In 1946, the United States District Court for the District of Columbia permitted an action to be brought by a parent on behalf of his injured child. There, the injuries upon which the suit was based occurred while the viable fetus was still in its mother's womb. In 1949, the Minnesota Supreme Court established viability of a fetus as a requirement in an action for prenatal injuries when it interpreted a wrongful death statute to include recovery by a prenatally injured stillborn child's estate. Since this initiation of the modern trend, a clear majority of jurisdictions have permitted a wrongful death action by a prenatally injured fetus.

In Egbert v. Wenzl® the Nebraska Supreme Court refused to follow this majority view. Upholding its decision in Drabells v.
Skelly Oil Co., the court unanimously dismissed the action for wrongful death of a prenatally injured child. The court found that "the Legislature did not exhibit the intention to include a viable fetus within the scope of Nebraska's wrongful death statute."10

This casenote will review the applicable caselaw and examine the Egbert decision in light of the recent changes in prenatal tort law.

FACTS AND HOLDING

The plaintiffs' claim arose out of an automobile accident allegedly caused by the defendant's negligence. Mrs. Egbert, who was eight months pregnant at the time her car was struck by that of the defendant, delivered a stillborn child the following day.11 Mr. and Mrs. Egbert subsequently filed a wrongful death action against the defendant.12 The petition alleged that they "suffered pecuniary loss, and loss of society, comfort, and companionship as the result of the death of the prospective child."13 The defendant's demurrer was sustained by the district court on the ground that the claim failed to set forth a cause of action. Plaintiffs elected to stand on their petition, and it was subsequently dismissed.14

On appeal to the Nebraska Supreme Court, plaintiffs sought a reversal of Drabbels v. Skelly Oil Co.15 Their arguments attacked the case as being outmoded on the grounds that:

Drabbels does not now represent the weight of authority; that the view a fetus is part of the mother has been discredited; that had the fetus been born alive, it would have been entitled to maintain an action for damages; and that damages due to the loss of a viable fetus are no more diff-

10. 199 Neb. at 576, 260 N.W.2d at 482. NEB. REV. STAT. § 30-809 (Reissue 1975) provides that:
Whenever the death of a person shall be caused by the wrongful act, neglect or default, of any person, company or corporation, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.
11. 199 Neb. at 573-74, 260 N.W.2d at 481.
12. Id. at 573, 260 N.W.2d at 481.
13. Id. at 574, 260 N.W.2d at 481.
14. Id.
cult to ascertain than the death of an infant child.\textsuperscript{16}

The court sidestepped these substantive issues. Instead, it found that, since the right to maintain a wrongful death action was purely statutory in nature,\textsuperscript{17} the outcome of the case must be predicated upon legislative intent.\textsuperscript{18}

Speaking for the court, Judge Brodkey concluded that the legislature did not intend to include prenatal injuries within the wrongful death statute for two reasons. First, the Nebraska wrongful death statute could not be read "as affecting any change in the common law beyond that which is clearly indicated."\textsuperscript{19} Thus, since the common law tort rule held that an unborn fetus was not a person, coverage for such wrongful deaths could only be permitted upon the legislature's specific expression to that effect.\textsuperscript{20} The second reason is related to the first. In his search for evidence of an intention to include the unborn fetus within the statute's meaning of person, Judge Brodkey noted that in the twenty-six years since the Drabbels decision, which first apprised the legislature of its need for a specific pronouncement, the legislature had not acted to amend its definition.\textsuperscript{21} Consequently, the court held that it must be assumed that the legislature did not intend to include the unborn fetus within the coverage of the statute.\textsuperscript{22}

\textbf{BACKGROUND}

The legal treatment of unborn children has long been in a state of flux.\textsuperscript{23} In addition judicial interpretation of person in statutes permitting recovery for tortiously caused death are disappointingly incongruous and furnish little guidance toward predictability since the tests vary greatly depending upon the court, the particu-
lar facts, and the statute involved. The statute involved.

Wrongful death statutes originated in England with the Fatal Accidents Act of 1845. This act filled the common law void by providing the first civil action for the death of a person caused from tortiously inflicted personal injuries. The statute provided that if the death of a person occurred as the result of wrongful conduct, such that the injured party would have been able to maintain an action for damages but for his death, the tortfeasor would still be liable for the injury.

Today, every United States jurisdiction has a statute permitting recovery for tortiously caused death. These enactments are normally patterned after Lord Campbell's Act. The legislatures of the various states have uniformly followed one of two basic

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24. Compare Wendt v. Lillo, 182 F. Supp. 56, 62-63 (N.D. Iowa 1960) where the United States District Court for the Northern District of Iowa found in its construction of Iowa's survival statute that its coverage of a person extended to prenatally injured viable fetuses with McKillip v. Zimmerman, 191 N.W.2d 706, 709 (Iowa 1971), wherein the Iowa Supreme Court interpreted the same statute against coverage for both viable and nonviable fetuses and Porter v. Lassiter, 91 Ga. App. 712, —, 87 S.E.2d 100, 102-103 (1955), which construed a wrongful death statute's coverage of person to include not only viable fetuses but also those that are "quick" at the time of the prenatal injury, in other words "so far developed as to move or stir in the mother's womb." Id. at —, 87 S.E. 2d at 102.


26. See, e.g., Baker v. Bolton, 170 Eng. Rep. 1033 (1808). The defendants were proprietors of a stagecoach which overturned injuring the plaintiff and killing his wife. Lord Ellenborough held that in a civil court "the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence." Id.

27. Lord Campbell's Act, supra note 25, at § 1. The Act further stated that even though the wrongful death action was for the benefit of the next of kin, it must be brought by and in the name of the deceased's personal representative. Id. § 2.

28. 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1:9, at 29 (2d ed. 1975). For a general discussion and compilation of all applicable wrongful death statutes in the United States, see 2 S. SPEISER, RECOVERY FOR WRONGFUL DEATH Appendix A, at 643-787 (2d ed. 1975) [hereinafter cited at SPEISER]. See also W. PROSSER, supra note 1, § 127 at 902.

29. 1 SPEISER, supra note 28, § 1:9 at 29. The commentator notes that:

Lord Campbell's Act was the progenitor, both in the United States and in Canada for death statutes modeled after it. The first wrongful death statute in the United States was enacted in New York in 1847. At the present time there are statutes in all American states that create a right to recover for wrongful death. Many of these substantially embody the provisions of Lord Campbell's Act and create a right of action for losses suffered by statutorily designated beneficiaries by reason of the death. Others, of somewhat varying types and specific provisions, may be broadly classified as
forms. First, there is the survival statute which provides for the preservation of a decedent's cause of action subsequent to his death. The intention is to preserve a tort action on behalf of the deceased for the wrong done to him, regardless of whether the death resulted from the injury or some other cause. A common requirement, however, is that the decedent must live long enough after the tort to incur expenses or suffer pain. The other form commonly adopted is referred to as a wrongful death statute. This differs from the survival statute in that it vests an original right of action in a limited class of the decedent's beneficiaries on his death. Thus, the wrongful death statute is designed to compensate the deceased's beneficiaries for the pecuniary loss that they have suffered as a result of his death.

An obstacle encountered in judicial examinations of wrongful death statutes is the necessity to circumscribe the limits of statutory coverage; such endeavors focus on persons covered under the Act. Like Lord Campbell's Act, the modern-day statutory descendents typically base recovery upon the death of a person. Consequently, as applied to prenatal injuries, courts cannot permit a personal representative to recover unless it is first decided that the fetus, whose death arose out of a tortious act, was a person within the intended meaning of the statute. However, since the statutes alter the common law, they tend to be strictly construed. Often, this has meant limiting the definition of person to include statutes under which death damages are measured by the loss occasioned to decedent's estate by the death.

36. Id. at 454-57. But see, e.g., CONN. GEN. STAT. ANN. § 52-556 (West) (any action for injuries resulting in death); FLA. STAT. ANN. § 768.03 (West) (minor child); GA. CODE ANN. § 105-1307 (a child); MINN. STAT. ANN. § 573.02 (Supp. 1969) (West) (when death is caused); N.Y. EST. POWERS & TRUSTS § 5-4.1 (McKinney) (decedent); PA. STAT. ANN. tit. 12, § 1691 (Furdon) (whenever death shall be occasioned).
only children born alive.\textsuperscript{39} Some courts have required any extensions beyond this ordinary application to come from the legislature.\textsuperscript{40}

\textit{Dietrich v. Northampton}\textsuperscript{41} was an early case deciding whether an infant who died shortly after birth could have brought suit to recover damages for its prenatal injuries had it survived. In this case, the child’s mother, four or five months pregnant at the time, slipped and fell on a highway, negligently maintained by the defendant town. As a result, she miscarried and the prematurely-born child lived for only ten or fifteen minutes.\textsuperscript{42} The administrator of the child’s estate brought a wrongful death suit against the town for negligent maintenance of the highway.\textsuperscript{43} The court denied recovery on the ground that the mother was the only person to whom the damage was done:

\begin{quote}
[As the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff’s intestate within its meaning . . . .\textsuperscript{44}
\end{quote}

The court’s rationale, as stated by Justice Holmes, was universally followed for many years although its basic premise was challenged in 1900.\textsuperscript{45} This attack came from Judge Boggs in his dissenting opinion in \textit{Allaire v. St. Luke’s Hospital}.\textsuperscript{46} The majority of the Illinois court supported the \textit{Dietrich} rule, which resulted in a denial of recovery to an infant born deformed as a result of the prenatal injuries negligently inflicted upon it shortly before its birth.\textsuperscript{47} The dissent, however, argued that the fetus must be considered a life distinct from that of its mother when it reaches the prenatal stage of viability.\textsuperscript{48}

It was not until 1946 that an American court affirmatively
adopted the viability rule. *Bonbrest v. Kotz*\(^4^9\) was brought on behalf of a *live* infant\(^5^0\) by her father to recover for injuries sustained when “taken from its mother's womb through professional malpractice . . . .”\(^5^1\) The United States District Court for the District of Columbia relied on the viability requirement and quoted from *Montreal Tramways v. Leveille*:\(^5^2\)

If a child *after birth* has no right of action for prenatal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, if born alive and *viable* should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother:\(^5^3\)

This opened the door to an abrupt reversal of the well-established trend begun in *Dietrich*. Within twenty-three years, every jurisdiction had retreated from the older view:\(^5^4\) Courts now allow a child born alive to maintain an action for the consequences of prenatal injuries,\(^5^5\) and if the injuries cause death *after* birth, a wrongful death action will lie:\(^5^6\)

Two problems which have resulted in substantial disagreement in the area of prenatal torts still plague the courts. The first involves determining whether the fetus had developed to such an extent by the time of the original injury that recovery could be

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50. The law regarding stillborn infants is discussed in the text accompanying notes 71-75 infra.
51. 65 F. Supp. at 139.
52. 4 D.L.R. 337 (1933). This Canadian case permitted recovery for prenatal injuries sustained by a viable child born alive. *Id.* at 345.
53. 65 F. Supp. at 141-42.
54. W. Prosser, *supra* note 1, § 55 at 337. The last jurisdiction which overruled the *Dietrich* rule was Texas. See Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967). This case expressly overruled Magnolia Coca-Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935). See *Id.* at 822.
granted. The second problem concerns whether the child must, in fact, be born alive to allow recovery for wrongful death.

The resolution of the first issue has spawned some rather muddled and ambiguous criteria. The goal of these judicial inquiries has been to locate a clearly identifiable event upon which the injured child's recovery can rest. Although most cases permitting recovery involved viable fetuses, a few jurisdictions have allowed an action in cases where the stillborn fetus was "quick." However, when actually faced with the decision of whether damages can be awarded for prenatal injuries to an infant born alive, almost all jurisdictions "have allowed recovery even though the injury occurred during the early weeks of pregnancy, when the child was neither viable nor quick."

Judicial resolution of the second issue has been equally uncertain. Verkennes v. Cornea was the first American case to permit a wrongful death action to be maintained when the child was stillborn as the result of prenatal injuries. In Verkennes, both the mother and the viable child died during delivery and a malpractice suit was brought by the husband-father. In granting the action, the Minnesota Supreme Court relied heavily on Judge Boggs' dissent in Allaire as well as language in Montreal Tramways and Bonbrest. The court concluded that "[i]t seems too plain for argument that where independent existence is possible and life is destroyed through a wrongful act a cause of action arises under the statute ...."

57. W. Prosser, supra note 1, § 55 at 337.
58. Porter v. Lassiter, 91 Ga. App. 712, —, 87 S.E.2d 100, 103 (1955). The reasoning in the Porter decision was extended a year later by the Georgia Supreme Court in Hornbuckle v. Plantation Pipeline Co., 212 Ga. 504, 93 S.E.2d 727 (1956). The Hornbuckle court stated: "If a child born [alive] after an injury sustained at any period of its prenatal life can prove the effect on it of a tort, it would have a right to recover." Id. at —, 93 S.E.2d at 728. Kelly v. Gregory, 282 App. Div. 542, —, 125 N.Y.S.2d 696, 698 (1953). See Note, 21 Okla. L. Rev. 114 (1966), which noted the cases cited above. The author stated:

Some jurisdictions allow recovery even though the child is not viable if it is "quick" at the time of injury or death . . . . The rationale is that the child becomes a person (or legal entity) when he becomes "quick," or when muscle activity begins. One medical authority places this time somewhere near the end of the fourth month of gestation. Such movements can usually be felt by the mother who presumably is allowed to testify concerning such movements.

Id. at 120.
59. W. Prosser, supra note 1, § 55 at 337.
60. 229 Minn. 365, 38 N.W.2d 838 (1949).
62. 229 Minn. at —, 38 N.W.2d at 841.
63. Id. at —, 38 N.W.2d at 841.
64. Id. at —, 38 N.W.2d at 841.
Since Verkennes, several rationales have been proffered in support of allowing an action for the wrongful death of a viable fetus. First, courts have ruled that life is destroyed when a viable fetus is fatally injured because once the fetus reaches the viability stage it is capable of independent existence outside the mother's womb. Second, some jurisdictions have held that it is illogical to make liability dependent upon whether death from fatal injuries occurred just before or just after birth. Thirdly, it is unjust to deny the action because this permits the tortfeasor to avoid liability for his wrongdoing. Finally, since property law has recognized the legal rights of the unborn child and criminal law has viewed it as a separate entity, recovery should be forthcoming.

Those courts that have rejected the Verkennes theory in favor of one requiring live birth have commonly done so out of deference to their wrongful death statutes. They emphasize that wrongful death actions cannot be maintained because their legislatures did not intend the fetus to be included within their statutory definitions of a "person." Other reasons stated by the courts revolve around the issue of damages. One state court denied recovery for the wrongful death of a stillborn child because the factors militating for recovery where the child is born alive were absent. An-
other refused the action on the ground that the allowance of damages would be punitive and thus contrary to the purpose of the wrongful death statute. Another potential ground for denying the action is that to allow it would permit the parents to obtain double recovery—once for their personal injuries and another for the death of their unborn child.

ANALYSIS

Egbert firmly established Nebraska's position against wrongful death coverage for stillborn infants. Since only a minority of the thirty-seven jurisdictions ruling on the issue have denied recovery, the Nebraska court's decision represents the minority view.


The jurisdictions which do not consider a stillborn fetus a "person" under their wrongful death statutes are: Kilmer v. Hicks, 22 Ariz. App. 552, —, 529 P.2d 706, 708
The court’s analysis in *Egbert* was very limited. Judge Brodkey refused to directly address the issue of whether a fetus can enjoy legal status as a *person* by holding that the determination must be left to the legislature. He stated that “[w]e express no opinion with respect to the existence of the fetus as a person in either the philosophical or scientific sense. We hold only that the Legislature did not exhibit the intention to include a viable fetus within the scope of our wrongful death statute.” Thus, the Nebraska Supreme Court favored a strict construction of the statute.

Though this discussion may have been limited, the court did open a Pandora’s box when they “adhere[d] to the rule of law previously established in *Drabbels*, in 1951” without further discussion of the difficult problems involved.

*Drabbels v. Skelly Oil Co.* involved a situation quite similar to that in the principal case. Although this decision, like *Egbert*, was grounded upon presumed legislative intent, the court further ruled “that an unborn child is part of the mother until birth and, as such, has no juridical existence.” A modern look at the court’s rationale represents an interesting paradox. To support its

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In explaining its rationale, the North Carolina Supreme Court noted:

We have based our decision on the ground there can be no evidence from which to infer "pecuniary injury resulting from" the wrongful prenatal death of a viable *en ventre sa mere*; it is all sheer speculation. Consequently, it is not necessary for us to decide . . . whether a viable child . . . , who is born dead, is a person within the meaning of our wrongful death law.


77. 199 Neb. 576, 260 N.W.2d 480, 482 (1977).

78. Id.

79. For a general discussion of judicial construction of other wrongful death statutes, see notes 35-40 and accompanying text supra. 1 SPEISER, supra note 28, § 1:12 at 32-35.

80. 199 Neb. at 576, 260 N.W.2d at 482.

81. 155 Neb. 17, 50 N.W.2d 229 (1951).

82. This case involved a situation where a woman eight months pregnant was injured when a defective bottle of gas exploded. The explosion resulted in the stillbirth of the fetus. The action was brought by the administrator of the estate of Coleen Ann Drabbels, deceased, for her wrongful death. Id. at 18, 50 N.W.2d at 230.

83. Id. at 23-24, 50 N.W.2d at 232.

84. Id. at 22, 50 N.W.2d at 232.
opinion, the Drabbels court quoted language from cases which clearly represented the majority view in 1951. But, by the time the Nebraska Supreme Court was called upon to rehear the issue in Egbert, each of those decisions had been overruled. Consequently, none of the American decisions quoted by the court in Drabbels as a basis for its decision have any continuing precedential value.

At the time of the Drabbels decision, the only case permitting a cause of action for a prenatally injured stillborn child was Verkennes. The court in Drabbels rejected the viability theory developed in Verkennes stating:

The Verkennes case is contrary to the great weight of authority . . . . If the child had been born alive there would have been authority to sustain a recovery, although it appears at present to be a minority view. The viability theory appears to be vulnerable . . . . [M]edical science may accelerate the birth of a viable child and thereby accelerate the time it came into judicial existence as a person independent of the mother. But we can find no convincing authority that a child born dead ever became a person insofar as the law of torts is concerned.

Thus, the court appeared to focus much of its attack against Verkennes on the fact that it lacked common law precedent.

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85. Id. at 22-23, 50 N.W.2d at 232.
86. Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900), denied recovery for the wrongful death of a child born alive who was injured before birth. This holding was later reversed by Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953). The Amann court reversed the Allaire rule and held "that plaintiff, as administratrix of the estate of a viable child, who suffered prenatal injuries and was thereafter born alive, has a right of action against the defendant whose alleged negligence caused the injuries. . . ." Id. at —, 114 N.E.2d at 417-18.

Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884) denied recovery for the wrongful death of a child born alive who was injured before birth. Dietrich was inferentially overruled by Torigian v. Watertown News Co., 352 Mass. 446, —, 225 N.E.2d 926, 927 (1967). In Torigian, it appeared that the intestate was not viable at the time of the injury to the mother, and that is was born prematurely, living only a few hours. Recovery was allowed under the wrongful death statute, the intestate being deemed a "person." 1 SPEISER, supra note 28, § 4:35 at 549 n.26.

Magnolia Coca-Cola Bottling Co. v. Jordan, 124 Tex. 347, 124 Tex. 347, 78 S.W.2d 944 (1935) denied recovery for the wrongful death of a child born alive who was injured before birth. Magnolia was expressly overruled by Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967). Leal held that a cause of action was available where a child born alive died of prenatal injuries. Id. at 822.

See also 1 SPEISER, supra note 28, § 4:36 at 56.
88. Id. at 23, 50 N.W.2d at 232 (emphasis added).
89. Id. at 21, 50 N.W.2d at 231. See also 1 SPEISER, supra note 28, § 4:36 at 555-56.
Today, however, this authority is present to such an extent that it far exceeds the authority remaining to support the Nebraska view.\textsuperscript{90} The \textit{Egbert} case presented to the Nebraska court an opportunity to reexamine its holding in \textit{Drabbels}, and to decide whether the \textit{convincing} authority which it found lacking in \textit{Verkennes} had emerged in the twenty-six years since the \textit{Drabbels} opinion. Although there are reasonable arguments on both sides of the question,\textsuperscript{91} the majority of state jurisdictions now permit such an action and have abundantly satisfied themselves with \textit{convincing} reasons for doing so.\textsuperscript{92}

Another very strong argument to which the court might have looked is based upon the United States Supreme Court decision of \textit{Roe v. Wade}.\textsuperscript{93} Although the primary import of this landmark decision was in finding \textit{criminal} abortion statutes unconstitutional, the Court also addressed itself to the rights of the unborn. Mr. Justice Blackmun, speaking for the Court, found that the word "person," as used in the fourteenth amendment did not include the unborn child.\textsuperscript{94} He noted that while many areas of the law recognized that they acquired certain rights,\textsuperscript{95} "\textit{[p]erfection of the interests involved, . . . has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.}"\textsuperscript{96} Although this would appear to support Nebraska's denial of the action for stillborn children, the United States Supreme Court's decision further concluded that the state does possess an "important and legitimate interest in potential life, [and that] the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications."\textsuperscript{97} Thus, while refusing to grant every unborn fetus the status of a "person," \textit{Roe} appears to offer evidence of the Supreme Court's willingness to do so once the fetus becomes viable.

\textbf{CONCLUSION}

\textit{Egbert v. Wenz}\textsuperscript{98} affirmed the Nebraska rule first set forth in

\begin{itemize}
\item \textsuperscript{90} See cases cited at note 76 \textit{supra}.
\item \textsuperscript{91} See text at notes 65-70 \textit{supra}.
\item \textsuperscript{92} See cases cited at note 76 \textit{supra}.
\item \textsuperscript{93} \textit{Roe v. Wade}, 410 U.S. 113 (1973).
\item \textsuperscript{94} \textit{Id.} at 158.
\item \textsuperscript{95} \textit{Id.} at 160-61. \textit{See also} text at notes 68-70 \textit{supra}.
\item \textsuperscript{96} 410 U.S. at 162.
\item \textsuperscript{97} \textit{Id.} at 163.
\item \textsuperscript{98} 199 Neb. 573, 260 N.W.2d 480 (1977).
\end{itemize}
Drabbels v. Skelly Oil Co. Both cases held that a specific expression of legislative intent was a prerequisite to statutory wrongful death coverage for the unborn child. Egbert, however, did not consider the substantive issue of the fetus' legal status. Rather than wait for a specific directive from the legislature, the court might have addressed the issue itself. The weight of authority now supports this view and permits recovery for the prenatal torts inflicted upon a child that was viable at the time of the injury.

The viability theory is, of course, far from flawless. In the quest for an identifiable event to mark the child's existence for liability purposes, the courts have created somewhat arbitrary rules. The live birth theory was one example of this. Others include the attempts to define the issue in terms of "quickness" and "viability." Each of these alternatives proves equally arbitrary in practice. The majority of jurisdictions have now adopted the viability theory and thus supplied the precedent requested by the Nebraska Supreme Court. The evolution of this trend since the Drabbels decision could have elicited a more thorough analysis of the issue.

Gary M. Gallner—'79

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100. See cases cited in note 76 supra.