1974

Products Liability: The Victim's Conduct as a Bar to Recovery—The Minnesota Supreme Court Reaffirms the Magnuson "Limiting Factors" [Waite v. American Creosote Works, 295 Minn. 288, 204 N.W.2d 410 (1973)]

Follow this and additional works at: http://open.mitchellhamline.edu/wmlr

Recommended Citation

Available at: http://open.mitchellhamline.edu/wmlr/vol1/iss1/7

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.
© Mitchell Hamline School of Law
PRODUCTS LIABILITY: THE VICTIM'S CONDUCT AS A BAR TO RECOVERY—THE MINNESOTA SUPREME COURT REAFFIRMS THE MAGNUSON "LIMITING FACTORS"
[Waite v. American Creosote Works, 295 Minn. 288, 204 N.W.2d 410 (1973)].

I. INTRODUCTION
With the advent of Section 402A of the Restatement (Second) of Torts\(^1\) and the decision of the California Supreme Court in Greenman v. Yuba Power Products\(^2\), strict liability in tort expanded rapidly as a preferred theory of recovery in personal injury cases arising out of the use of defective products.\(^3\) In the decade since strict liability was first advanced as a viable theory of recovery, the application of the doctrine has produced confusion, in large part because of the repetition of strict liability rubric without a clear analysis of the meaning and purpose of strict liability.\(^4\)

This confusion was well illustrated in Magnuson v. Rupp Manufacturing, Inc.\(^5\), a 1969 decision of the Minnesota Supreme Court, recently reaffirmed in Waite v. American Creosote Works, Inc.\(^6\). It is the purpose of this comment to analyze the law in Waite and Magnuson in light of recent products liability developments and to suggest a more appropriate rationale of products liability law in Minnesota.

II. THE EVOLUTION OF WAITE
The Minnesota Supreme Court first approved Section 402A seven years ago in McCormack v. Hankscraft Co.\(^7\). The policy rationale underlying the court's decision to adopt Section 402A for subsequent cases was the desirability of imposing the cost of accidents arising out of the use of defective products upon the maker of the product. The manufacturer is the better loss-bearer because he is in a better position to reduce or eliminate the risk of

---

1. Restatement (Second) of Torts § 402A (1965).
3. 1 L. Frumer & M. Friedman, Products Liability § 3, at 1-29 to 1-30 (1973).

It was stated in this treatise in 1964: "the courts generally are reluctant to impose strict liability as such. It does not seem to trouble them so much when they do so under the guise of finding a breach of warranty." This statement is no longer accurate in light of the trend toward strict liability in tort since that date. Id.

6. 295 Minn. 288, 204 N.W.2d 410 (1973).
7. 278 Minn. 322, 154 N.W.2d 488 (1967). Hankscraft did not lay down any rules for the application of strict tort liability except to say that the theory would be thereafter recognized when the facts required.
injury and to absorb or pass on the costs than is the consumer who is without the necessary expertise or ability to protect himself from either the risk or the pecuniary consequences of injury. 8

The first Minnesota case to actually apply Section 402A was Kerr v. Corning Glass Works, 9 in which the supreme court set out the necessary elements of proof in a strict liability case. The court stated that in order for a plaintiff to recover on a strict liability theory he must prove that:

1. he was injured;
2. the injury was caused by a defect in defendant's product; and
3. the defect was present in the product when it was sold by the defendant. 10

In Kerr, the plaintiff had been injured when a baking dish manufactured by the defendant exploded. Applying the above elements the court held that the plaintiffs should be denied recovery because of their inability to show that the defect in the baking dish, a bruise in its bottom, had existed when the dish left the hands of the defendant. 11 Though the case was tried on a res ipsa loquitur theory, the plaintiffs were denied the benefit of the inference that the bruise existed when the dish left the hands of the manufacturer. Because the dish had been out of the control of the defendant for a period of at least 7 months, and possibly as long as 47 months, before it exploded, it was equally probable that its bruise was caused by some mishandling of an intervening party. 12

Almost immediately following its decision in Kerr, the Minnesota court reconsidered its strict liability formulation. In Magnuson v. Rupp Manufacturing, Inc., 13 the court considered Section 402A in detail, emphasizing the necessity of establishing limitations on the rule of strict liability to prevent its transformation to absolute liability. 14

The limiting factors proposed by the court in Magnuson took the form of a

8. Id. at 338, 154 N.W.2d at 500. The theory behind the rule of strict liability is that the pecuniary loss will ultimately fall on the one who caused it. First Nat'l Bank v. Otis Elevator Co., 2 Ariz. App. 80, 406 P.2d 430 (Ct. App. 1965). One purpose of imposing strict products liability is to insure that the costs of injuries resulting from defective products are borne by the makers of the products rather than the injured persons. Other reasons are the implied representation by the manufacturer or seller that the products are suitable and safe for their intended use, and the fact that the manufacturer and seller are in a better position than the consumer to know the condition of the product. RESTATEMENT (SECOND) OF TORTS § 402A, comment c at 349-50 (1965). See Jackson v. Muhlenberg Hosp., 96 N.J. Super. 314, 232 A.2d 879 (Super. Ct. 1967), rev'd on other grounds, 53 N.J. 137, 249 A.2d 65 (1969) (dictum).
10. Id. at 117, 169 N.W.2d at 588.
11. Id. at 118-19, 169 N.W.2d at 589.
12. Id. at 119, 169 N.W.2d at 589.
14. Id. at 45, 171 N.W.2d at 209.

Liability on the basis of implied warranty or breach of a tort duty is not so strict or absolute as to justify recovery on the part of the user who merely shows that an injury was suffered in the course of the use. . . . Everyone would recognize that a manufacturer is not responsible for any and every hurt that one suffers. Therefore, the courts which impose strict liability eliminating negligence must adopt some rules or principles as a substitute for negligence as a delimiting principle. Id.
PRODUCTS LIABILITY: VICTIM'S CONDUCT

"five-point" test for liability, requiring a plaintiff to prove: (1) that there was a defect, (2) that it caused unreasonable danger, (3) that it was in existence at the time the property was in possession of the defendant to be charged, (4) that it caused injury, and (5) that the injury was not caused by any voluntary, unusual, or abnormal handling by the plaintiff.\(^{15}\) The court indicated that a plaintiff, to meet the fifth requirement, must prove that he made a proper use of the product,\(^ {16} \) that he was in the exercise of due care for his own safety,\(^ {17} \) that he was not aware of the defect,\(^ {18} \) and that he did not mishandle the product.\(^ {19} \) The first four requirements were equivalent to the test set forth in Kerr and contained nothing new or startling. The fifth requirement, however, first formulated in Magnuson, was to cause lingering controversy.

In Magnuson the plaintiff was injured when he was thrown from his snowmobile, striking his knee on a protruding sparkplug. The location of the sparkplug was obvious, and the plaintiff was well aware of it.\(^ {20} \) That awareness had a significant effect on the court's analysis and application of strict liability law. The court held that the plaintiff's awareness of the sparkplug's condition negatived the existence of both defect\(^ {21} \) and the unreasonably dangerous condition required by Section 402A.\(^ {22} \) The court also found that the plaintiff's use of the snowmobile while aware of the positioning of the sparkplug was a superseding, intervening cause of the accident.\(^ {23} \) In addition, the court said that where the defect is obvious, the plaintiff must show a proper use of the product.\(^ {24} \) Finally, the court stated, as a policy matter, that if the purpose of strict liability is to permit reliance on the manufacturer to supply a product in accordance with his representations, then the product is not defective if it is no different than the consumer expects it to be.\(^ {25} \)

The significance of the court's decision is in its insistence upon all five elements as requirements of a plaintiff's proof and in the manner in which the court interpreted and applied the elements of strict liability. The decision in Magnuson seemed to restrict severely a plaintiff's ability to recover under a

\(^{15}\) Id. at 39-40, 171 N.W.2d at 206.
\(^{16}\) Id. at 45, 171 N.W.2d at 209.
\(^{17}\) Id. at 43, 171 N.W.2d at 208. The court does not explicitly adopt this as an element of proof, but their intention to produce that result is evidenced by their supplying of emphasis to the words "[T]he Illinois Court indicated that it is . . . necessary to prove that the plaintiff was in the exercise of due care for his own safety," and by their statement in the syllabus by the court that "[e]ven though strict liability may be adopted, it is nevertheless necessary to prove that plaintiff was in the exercise of due care for his own safety." Id. at 33, 171 N.W.2d at 203.
\(^{18}\) Id. at 40-41, 171 N.W.2d at 207.
\(^{19}\) Id. at 42-43, 171 N.W.2d at 208.
\(^{20}\) Id. at 41, 171 N.W.2d at 207.
\(^{21}\) Id. at 42, 171 N.W.2d at 208.
\(^{22}\) Id.
\(^{23}\) Id. at 43, 171 N.W.2d at 208.
\(^{24}\) Id. at 45, 171 N.W.2d at 209.
\(^{25}\) Id. at 45, 171 N.W.2d at 209-10.
strict liability theory.

In the 3 years following the Magnuson decision, however, the Minnesota Supreme Court failed to apply the rules and principles established in Magnuson as limiting factors in a strict liability action. None of the cases decided during this period mentioned the "five-point" test. During this period there were indications that the court had adopted the test set forth in the concurring opinion in Magnuson, rather than the majority opinion. In Farr v. Armstrong Rubber Co. and Lee v. Crookston Coca-Cola Bottling Co. the court held that in order to establish a prima facie case of strict liability against a manufacturer, a plaintiff need merely introduce evidence that: (1) he was injured by the product, (2) the product was in a defective condition unreasonably dangerous for its use, and (3) the defective condition existed when the product left the hands of the manufacturer. The court concluded that where the evidence would reasonably support a finding of these three elements, the plaintiff would be entitled to a jury instruction on strict liability.

Although Magnuson was cited in both Farr and Lee as authority for the holdings, the court did not refer to the fifth requirement of the "five-point" test set forth by the majority in Magnuson. Both Lee and Holkestad v. Coca-Cola Bottling Co. involved explosions of bottles containing carbonated beverages. In both cases the Minnesota Supreme Court was concerned with the question of whether the doctrine of res ipsa loquitur, irrelevant in Kerr, could be applied. In discussing the core of the res ipsa inference, the requirement that it be more probable than not that the defect existed when the product left the hands of the defendant, the Lee court stated the obvious proposition that a plaintiff, to avail himself of the desired inference, must eliminate the probability of mishandling by some intervening party. Lee and Holkestad, therefore, both entailed the possibility of mishandling or abnormal handling, either by the plaintiffs or by intermediate handlers of the

27. 285 Minn. at 46-47, 171 N.W.2d at 210 (Rogosheske, J., concurring).
29. 290 Minn. 321, 188 N.W.2d 426 (1971).
30. 290 Minn. at 329, 188 N.W.2d at 432; 288 Minn. at 90-91, 179 N.W.2d at 69.
31. 288 Minn. at 91, 179 N.W.2d at 69.
32. 288 Minn. 249, 180 N.W.2d 860 (1970).
34. 290 Minn. at 329, 188 N.W.2d at 432.
beverage bottles. The court in both cases found that those possibilities had been sufficiently negatived to allow the plaintiff to take advantage of the inference that the defect must have existed when the bottles left the hands of the defendants. Applying the elements of a strict liability case as set out either in Farr or Lee leads to the same conclusion.

In such a fact situation, application of the fifth element in the test set out by the court in Magnuson is only a restatement of the obvious, that the plaintiff has made out a prima facie case that the defect existed when the bottles left the hands of the defendants. To characterize such a plaintiff's conduct as abnormal or unusual use is simply to subsume those terms under the general heading of causation. In this situation, therefore, the fifth element of Magnuson merely confuses a very basic element of causation.

If the fifth requirement in Magnuson is viewed as only a restatement of a simple causation issue, however, the plaintiff in that case should have been able to meet it. The defect was, as stated, obvious. The plaintiff established the dangerous position of the sparkplug and the fact of injury. Any attempts to show a misuse of the snowmobile or mishandling on the part of the plaintiff should properly have been raised by way of defense or by way of rebuttal to the plaintiff's prima facie case of strict liability.

The plaintiff's awareness of the defect, however, resulted in a different analysis and imposed a greater burden upon plaintiff than that found in cases, such as Lee and Holkestad, involving latent defects. The plaintiff's awareness of the sparkplug's position negatived the existence of a defect and also made it impossible for the plaintiff to prove that the condition was unreasonably dangerous. This analysis could not, of course, have been used in Lee and Holkestad. In addition, the court stated that where a defect is obvious the plaintiff must show that he made a proper use of the product. Awareness, therefore, seems to have shifted the burden on the misuse issue from the defendant to the plaintiff.

What the Minnesota Supreme Court appears to have established in the strict liability cases it has considered is a distinction between the treatment of latent and patent defects. Under Minnesota law, where the plaintiff is aware of the defect, his ability to recover would seem to be severely restricted. This apparent dichotomy between the treatment of the two types of cases, turning on the question of the plaintiff's awareness of the defect, makes Waite's reaffirmation of the fifth element of the Magnuson test puzzling.
There were no issues raised in *Waite* as to the awareness of the plaintiff or of any possible intervening mishandling.

This creates doubts as to whether the latent-patent distinction is justifiable, and, even assuming no such distinction is made, whether the fifth element of the *Magnuson* test is analytically worthwhile. The remainder of this comment will, therefore, analyze the major elements of a products liability case as set out by the Minnesota Supreme Court with a view toward determining a more appropriate rationalization of strict liability theory in Minnesota.

III. A Point-by-Point Analysis of the “Five-Point” Test

A. The Existence of a Defect

In *Magnuson*, the Minnesota Supreme Court stated that, since the plaintiff was aware of the position of the sparkplug, it could not be considered to be defective as to him. The court seems to have said, based upon a quotation from *Greenman v. Yuba Power Products, Inc.*\(^43\), that the factor of awareness will render no longer defective an otherwise clearly defective product.\(^44\)

The quoted portion of *Greenman* reads as follows:

To establish the manufacturer’s liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.\(^45\)

While this excerpt from *Greenman* may have been subject to differing interpretations at that time, the California Supreme Court, in light of the apparent confusion surrounding the interpretation and application of *Greenman*, has now clarified its position on the issue. In *Cronin v. J.B.E. Olson Corp.*\(^46\) and *Luque v. McLean*\(^47\) the California Supreme Court stated that, although the above-cited portion of the *Greenman* decision has been applied by the courts as the holding of the case, it was meant only to be a recitation of the facts that plaintiff had established at trial. The true holding of the case is: A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.\(^48\) It seems obvious from the holding itself and from the subsequent explanation of that holding in *Cronin* and *Luque* that the question of awareness of the defect, if it enters into the litigation at all, must enter as an element of assumption of the risk.\(^49\)


\(^{44}\) 285 Minn. at 40-42, 171 N.W.2d at 207-08.

\(^{45}\) 59 Cal. 2d at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

\(^{46}\) 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

\(^{47}\) 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).


\(^{49}\) In *Luque*, the California court noted that the awareness language in *Greenman* was susceptible of two interpretations. First, it might mean that the defect must be latent, and second, it might mean that the defect must be one as to which the plaintiff has not assumed the risk of injury. 8 Cal. 3d at 144, 501 P.2d at 1168, 104 Cal. Rptr. at 448. For a discussion of assumption
Since the excerpt from Greenman relied upon by the court in Magnuson has been subsequently explained so as to negate the interpretation given the opinion in that latter case, any further reliance upon the earlier analysis would be misplaced. There remains only the basic definition of defect adopted by the Minnesota court as a test of liability: "If an article is defective, not reasonably fit for ordinary purposes for which it was sold or used, a defect arises out of the manufacture and if it proximately causes the injury, then liability exists." Since it is arguable that the snowmobile was not fit for the ordinary purposes for which it was intended, snowmobiling, the plaintiff in Magnuson should have been able to reach a jury on the question of the existence of a defect.

B. The Causation Question

As to causation, the Minnesota Supreme Court stated in Magnuson:

Defendant contends that the injury was proximately caused by the act of the plaintiff in the operation of the snowmobile and not by any defect that is or was unreasonably dangerous. It can also be argued that even though there was a defect, plaintiff's operation of the snowmobile was a superseding, intervening cause and proximate cause of the injury. Here again the awareness is important. Plaintiff being aware of the sparkplug and claiming it to be defective and then doing what he did, it would appear that defendant would be insulated from responsibility because the direct and proximate cause of the injury was plaintiff's operation of the snowmobile.

That causation analysis seems unduly artificial and is somewhat reminiscent of previous judicial struggles to determine, in negligence cases, the sole proximate cause of an injury. With the advent of comparative negligence statutes, however, the courts acquired added flexibility in the determination and submission to juries of causation questions.

An analysis of the Magnuson facts on the basis of general negligence principles serves to demonstrate the artificiality of the court's resolution of the causation issue. Following Springrose v. Willmore, in which the Minnesota Supreme Court eliminated the distinctions between contributory negligence and assumption of risk, the issue of contributory fault on the part of the plaintiff, however characterized, would, in the ordinary negligence case, be submitted to the jury under the comparative negligence statute. Rather than determine as a matter of law the sole cause of an accident, therefore, the question is left to the jury to assess proportionate degrees of fault on the part of risk and the concept of awareness, see notes 124 to 137 infra and accompanying text.

50. 285 Minn. at 40, 171 N.W.2d at 207.
51. Id. at 43, 171 N.W.2d at 208.
53. See, e.g., Riley v. Lake, 295 Minn. 43, 203 N.W.2d 331 (1972); Winge v. Minnesota Transfer Ry., 294 Minn. 399, 201 N.W.2d 259 (1972).
54. 292 Minn. 23, 192 N.W.2d 826 (1971).
55. Id. at 24-25, N.W.2d at 827.
of each party who has contributed to the accident.

While this is not meant to be an argument in favor of the application of comparative fault to strict liability cases, it does serve to illustrate the artificiality of any attempt to resolve *Magnuson* in terms of causation. It seems clear that the snowmobile was defective and that the defect was a cause of Magnuson's injuries. The more intricate causation analysis only serves to obscure the true issue of whether the plaintiff's conduct, in the specific case, however labeled, is so blameworthy that it should bar his recovery. Taking a similar approach, the *Magnuson* concurring opinion acknowledged the presence of the defect and proximately caused injury and focused on the plaintiff's conduct as a legal bar to his recovery.\(^5\) That approach is procedurally and analytically sound.

C. Existence of the Defect at the Time of Sale by the Defendant

Mishandling of the product will bar plaintiff's recovery under the *Magnuson* test.\(^5\) It is semantically and conceptually difficult to distinguish mishandling from misuse. The latter, however, is generally limited to the plaintiff's unforeseeable and improper use of the product,\(^5\) while the former includes any substantial alteration of the product after it leaves the defendant's possession if that alteration causes the defect or combines with a pre-existing defect to cause the injury.\(^5\) If the product left the possession of the seller while in a safe condition and the conduct of the consumer or some third person caused the defect or combined with the defect to cause the

---

56. 285 Minn. at 48-50, 171 N.W.2d at 211-12.
57. "[F]or the doctrine to apply, there must be no mishandling after manufacture. . . ." Id. at 42, 171 N.W.2d at 208.

One federal court has defined misuse as follows:

Neither would contributory negligence constitute a defense, although use different than that contemplated to be safe by ordinary users/consumers, that is, "misuse," would refute a defective condition or causation. "Misuse" would include much conduct otherwise labeled contributory negligence and would constitute a defense. Greeno v. Clark Equip. Co., 237 F. Supp. 427,429 (N.D. Ind. 1965).


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

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

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

The comments explain the import of the last clause of this section as follows:

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. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained. *Id.* comment g at 351.
injury, many courts deny recovery.\textsuperscript{60} Such an alteration may occur in any one of the three ways. First, the product may require further processing before use by the ultimate consumer and the defect may be created in the course of that processing. Second, a third person may have control of the product before it reaches the ultimate consumer, and he may tamper with the product or carelessly damage it in a manner that will make it defective. Third, the ultimate consumer may tamper with or damage the product after receiving it or permit someone else to do so while it is in his control.

That either of the last two listed events will relieve the manufacturer of liability is clear.\textsuperscript{61} The effect of the former is less certain, but it appears that whether responsibility for the condition of the product will be shifted to the processor will depend upon the nature of the services he is to perform and the extent that he is expected to alter the product.\textsuperscript{62} Because few courts have considered this troublesome question in any depth, the \textit{Restatement} contains a caveat as to whether Section 402A will apply to the seller of a product which is expected to be substantially changed before it reaches the user or consumer.\textsuperscript{63}

To implement that caveat, the \textit{Restatement} requires the plaintiff to establish that the product was in a defective condition at the time that it left the hands of the defendant.\textsuperscript{64} Plaintiff can do so by showing that the product was...


\textsuperscript{61} R. Hursh & H. Bailey, \textit{American Law of Products Liability} 2d § 1:30 (1974).

\textsuperscript{62} \textit{Restatement (Second) of Torts} § 402A, comment p at 357 (1965).

Thus far the decisions applying the rule stated have not gone beyond products which are sold in the condition, or in substantially the same condition, in which they are expected to reach the hands of the ultimate user or consumer. . . .

It seems reasonably clear that the mere fact that the product is to undergo processing, or other substantial change, will not in all cases relieve the seller of liability under the rule stated in this Section. If, for example, raw coffee beans are sold to a buyer who roasts and packs them for sale to the ultimate consumer, it cannot be supposed that the seller will be relieved of all liability when the raw beans are contaminated with arsenic, or some other poison. Likewise the seller of an automobile with a defective steering gear which breaks and injures the driver, can scarcely expect to be relieved of the responsibility by reason of the fact that the car is sold to a dealer who is expected to "service" it, adjust the brakes, mount and inflate the tires, and the like, before it is ready for use. On the other hand, the manufacturer of pigiron, which is capable of a wide variety of uses, is not so likely to be held to strict liability when it turns out to be unsuitable for the child's tricycle into which it is finally made by a remote buyer. The question is essentially one of whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes. No doubt there will be some situations, and some defects, as to which the responsibility will be shifted, and others in which it will not. . . . \textit{Id.}

\textsuperscript{63} Id. Caveat 2 at 348. "The Institute expresses no opinion as to whether the rules stated in this Section may not apply . . . (2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer. . . ." \textit{Id.}

\textsuperscript{64} Id. comment g at 351.
expected to and did reach him without substantial change of condition. Thus where the defect is such that it cannot be traced directly back to defendant, the plaintiff must be able to eliminate intermediate mishandling as a cause of the defect.

When the Magnuson requirement that the plaintiff negative mishandling as part of his prima facie case is viewed in this context, it would appear that the court is merely attempting to impose the general Restatement rule that the plaintiff must establish that the product was defective at the time that it left the hands of the defendant.

D. The Unreasonably Dangerous Condition of the Product

The unreasonably dangerous requirement adopted by the Minnesota court has been generally recognized as a necessary element of a plaintiff's proof in a strict liability action. The Restatement requires plaintiff to establish not only that the product in question was defective, but also that its defective condition was "unreasonably dangerous" to the plaintiff or his property. In defining what is meant by "unreasonably dangerous," the comments state that the product "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 character." The expectation of the ordinary user is, therefore, the controlling factor.

The ordinary consumer test embodies two related, but separable, principles. First, a product which contains hidden dangers unfairly surprises the user who is without the ability or resources to inspect and test it himself. The expectation of the ordinary user is, therefore, the controlling factor.

---

65. Id.
66. See, e.g., Daleiden v. Carborundum Co., 438 F.2d 1017 (8th Cir. 1971):
   Circumstantial evidence may be used to establish that the product was defective when it left the manufacturer's hands.

   [But] [i]n order to prove a defect, a plaintiff is not required to eliminate with certainty all possible causes of an accident. It is sufficient if the evidence reasonably eliminates improper handling or misuse of the product by others than the manufacturer, thus permitting the jury to reasonably infer that it was more probable than not that the product was defective. Id. at 1021-22. (Citations omitted)

   See also Lee v. Crookston Coca-Cola Bottling Co., 290 Minn. 321, 188 N.W.2d 426 (1971);
67. See, e.g., Davis v. Wyeth Laboratories, Inc., 399 F.2d 121, 128 (9th Cir. 1968) ("The true test in a case of this kind is whether the product was unreasonably dangerous."); Mitchell v. Miller, 26 Conn. Supp. 142, 214 A.2d 694 (Super. Ct. 1965); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); R. Hursh & H. Bailey, supra note 61, §4:11.
68. Restatement (Second) of Torts § 402A (1965) states that 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 caused thereby. The comments state that the rule of this section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Id. comment i at 352-53.
70. Restatement (Second) of Torts § 402A, comment i at 352-53 (1965).

The 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 com-
versely, some products are so useful or desirable that the dangers they pose are acceptable if disclosed to the user. 71

It has been argued that a rule of "strict liability" which permits recovery for injuries arising out of defects in products only when those defects give rise to unreasonable dangers is borrowed from negligence theory. 72 That is an apt observation, since both traditional negligence analysis and the "unreasonable danger" analysis make liability depend upon whether the utility of the product or conduct in question outweighs, in light of all of the circumstances, the risk of injury and the burden of taking precautions to prevent it. 73

In attempting to apply that analysis, Magnuson has confused the ordinary

71. Compare, supra note 72, at 17.


Thus, the test for imposing strict liability is whether the product was unreasonably dangerous, to use the language of the Restatement. 74

73. Compare Hall v. E.J. Du Pont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972) with United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). In Hall the court states that a resolution of the question of whether a product is unreasonably dangerous involves a balancing of the utility of the product against the magnitude of the risk of injury arising out of its use. In Carroll Towing the test for the existence of a duty in a negligence action was stated as the mathematical function of three variables, i.e., whether the burden of taking adequate precautions is greater than the probability of harm multiplied by the probable gravity of the harm.

One commentator has discussed the manner in which these variables should be balanced in a strict liability case:

The factors involved in making the determination include: (1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger, (6) the avoidability of injury by care in the use of the product, and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive. Wade, supra note 72, at 17.
consumer's awareness of the danger with the individual plaintiff's awareness of the existence of the defect. Magnuson held that plaintiff's awareness of the defect is sufficient to take a defective product out of the unreasonably dangerous category, thereby barring a plaintiff's recovery.\textsuperscript{74} Even as negligence analysis this would be improper. Most courts which use the unreasonably dangerous test apply an objective standard much like that of the reasonable man and consider the foreseeability of the danger, not the obviousness of the defect.\textsuperscript{75} A test of unreasonable danger which relies on the plaintiff's awareness of the defect err in shifting from an objective to a subjective standard and in ignoring the question of whether the danger is as obvious as the defect.

The fact that the individual plaintiff is aware of the dangers presented by a product does not necessarily imply that the ordinary consumer would be equally aware. At best, the fact of plaintiff's awareness may be some indication that the product is no more dangerous than contemplated by the ordinary user or consumer. If the individual plaintiff is more informed and cautious than the ordinary consumer, he will be punished for his vigilance by the Magnuson rule and denied recovery.\textsuperscript{76}

Although the courts agree that a product cannot be unreasonably dangerous if the ordinary consumer is aware of its dangers,\textsuperscript{77} and one can even argue that a product is not defective in the face of such awareness,\textsuperscript{78} there is no authority for the proposition that the ordinary consumer's mere awareness of the defect will preclude a finding that a product is unreasonably dangerous. Although the Minnesota court could have thought that its contrary holding was consistent with strict liability's goal of protecting the consumer against unfair surprise, that theory breaks down when one examines the nature of the defects and the products marketed in modern society.

The fact that the ordinary consumer is aware of the defect does not necessarily imply that he is equally aware of all of the risks inherent in the defect, the likelihood of injury, or its possible seriousness. Design defects, for ex-

\textsuperscript{74} 285 Minn. at 42, 171 N.W.2d at 208. "The awareness, which has been clearly established by plaintiff's testimony . . . certainly takes this snowmobile out of the category of being unreasonably dangerous." \textit{Id.}

\textsuperscript{75} See, e.g., Dorsey v. Yoder Co., 331 F.Supp. 753 (E.D. Pa. 1971), in which the court held that the obviousness of a defect in a product does not bar a finding that it was unreasonably dangerous. The court also held that the proper test of the unreasonable danger of a product is whether a reasonable manufacturer would continue to market his product in the same condition as he sold it to the plaintiff with knowledge of the dangerous consequences.

\textsuperscript{76} At least one other court may apply a similar rule. See Maas v. Dreher, 10 Ariz. App. 520, 460 P.2d 191 (Ct. App. 1969). That court commented, "The subjective appreciation of danger by plaintiff might well be pertinent in establishing these affirmative defenses to the extent that such defenses are applicable in strict liability cases." \textit{Id.} at 522, 460 P.2d at 193-94.

\textsuperscript{77} See \textsc{Restatement (Second) of Torts} § 402A, comment i at 352 (1965).

\textsuperscript{78} Magnuson v. Rupp Mfg. Co., 285 Minn. 32, 45, 171 N.W.2d 201, 210 (1969). "Perhaps the product is not regarded as defective if it is no different from what the consumer expected it to be." \textit{Id.}
ample, are obvious to the consumer in the sense that he is aware of their existence. Since he is seldom equally aware of the dangers arising out of those defects, however, the products still should be considered unreasonably dangerous. Moreover, the consumer is frequently deceived as to the potential dangers of such products by the manufacturers’ advertisements and representations which give him a false sense of security when buying and using the products.

By misapplying the unreasonably dangerous requirement in a manner which emphasizes its harshness, Magnuson raises the question of whether the test is worth preserving at all. Although it is still generally considered an essential element of a cause of action in strict liability, the unreasonably dangerous requirement has been criticized for impeding full implementation of the spirit of strict liability.

The function of the limitation is, at best, unclear. It has been suggested that the qualification was added to prevent manufacturers of products having an inherent capacity for causing harm from become insurers of such products. In practice, however, the effects of the limitation reach far beyond that modest objective, imposing upon the plaintiff in a strict liability action a burden of proof more appropriate to a negligence action. That result flies in the face of the declared purpose of the strict liability doctrine.

The similarity between proving negligence and proving the unreasonably dangerous condition of the product has prompted two courts to abandon the unreasonably dangerous test. Reasoning that the requirement imposed upon

79. Cf. Robbins & Eisberg, The Legal Subtleties of Strict Liability, in 44 Minnesota Practice Manual 83, 94-102 (1970). In analyzing the unreasonably dangerous product, the authors cite statistics showing that a large number of injuries are caused each year by design defects in such common household products as doors, washing machines, refrigerators, and toys. Many of these defects the authors describes are patent. The high rate of injury, however, certainly indicates that the danger of those defects may not be so obvious.

80. "The consumer no longer has means or skill enough to investigate for himself the soundness of a product, . . . and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trademarks." Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 467, 150 P.2d 436, 443 (1944) (Traynor, J., concurring).


84. Id.


Yet the very purpose of our pioneering efforts in [strict liability in tort] was to relieve the plaintiff from problems of proof inherent in pursuing negligence . . . and warranty . . . remedies, and thereby "to insure that the costs of injuries resulting from defective products are borne by the manufacturers. . . ." Id. at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442. (citations omitted)

the plaintiff a significant burden which "rings of negligence," the California Supreme Court held that a plaintiff seeking recovery in strict liability need not establish that the product defect which caused his injury made the product unreasonably dangerous. Any other rule, concluded the court, would represent a step backward. In addition, the court recognized that conditioning strict liability upon the finder of fact's conclusion that the product is, first, defective, and second, unreasonably dangerous, establishes a bifurcated standard of proof that is of necessity more difficult to reach than a unitary one.

By abrogating the unreasonably dangerous requirement, these decisions promote the purposes and public policy considerations underlying the development of strict liability in tort. By easing the plaintiff's burden of proof, these two jurisdictions have taken steps to insure that the cost of injuries resulting from defective products will be borne by the manufacturer, the person best able to prevent their occurrence. These decisions represent the better-reasoned rule and should be followed in the future in Minnesota.

E. The Fifth Requirement—Voluntary, Unusual, or Abnormal Handling

Perhaps the most perplexing portion of the Magnuson decision is the fifth element of the "five-point" test, the requirement that plaintiff prove the "injury was not caused by any voluntary, unusual, or abnormal handling by the plaintiff." The court's authority for this proposition is drawn from portions of Comments g, h, and i of Section 402A of the Restatement (Second) of Torts. The comments read in part as follows:

  g. Defective condition. . . . The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

  h. A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling . . . or from abnormal preparation for use . . . the seller is not liable.

  i. Unreasonably dangerous. The rule stated in this section applies only were the defective condition of the product makes it unreasonably dangerous to the user or consumer. . . . The 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.

88. Id.
89. Id.
90. See note 8 supra.
92. RESTATEMENT (SECOND) OF TORTS § 402A, comment g at 351 (1965).
93. Id. comment h at 351-52.
94. Id. comment i at 352-53.
These comments have been inconsistently interpreted by the courts, generating a confusion which the Minnesota Supreme Court compounded in *Magnuson* and *Waite*. The fifth element is difficult to understand, particularly since it appears to be drawn from the quoted comments of the *Restatement*. Apparently, abnormal handling refers to Comment h, which discusses misuse or abuse of a product. The term "unusual" handling appears to be repetitious of the term "abnormal" handling. The term "voluntary" is particularly confusing. It seems to refer to the use of a product with awareness of the existence of a defect in the product.

For purposes of clarity, the fifth element of the decision should not be construed as referring to mishandling of a product. Mishandling, according to Comment g of the *Restatement*, refers to alteration of a product at some time after it is delivered in a safe condition by the maker of the product. Thus, it seems clear that "mishandling" does not constitute part of that fifth element for purposes of analysis. The mishandling aspect of a strict liability case is more properly viewed as a part of two essential elements of plaintiff's proof, *i.e.*, that the product was defective and that the defect was the proximate cause of his injury.\(^5\) If the product causing injury has been altered, it is arguable that it is not defective. If it is established that the alteration made the product dangerous, the plaintiff's proof will fail, since he will be unable to prove the existence of a defect or that the defect was the proximate cause of his injury.

This leaves, as part of the fifth element, the issue of misuse, abnormal use, or abuse of a product. The *Magnuson* decision applies these elements as part of the plaintiff's burden of proof. Whether the defendant's product was properly used is a relevant consideration according to strict liability theory.\(^6\) Evidence of misuse or improper use of the product, either by the plaintiff or by any person other than the defendant tends to disprove causation or the existence of a defect.\(^7\)

Since a manufacturer is entitled to expect a normal use of his product, it is generally recognized that a plaintiff who used a product for a purpose neither intended nor reasonably foreseeable by the defendant is barred from recovery.\(^8\) The issue of misuse thus depends upon whether the manufacturer could have reasonably foreseen the use of the product,\(^9\) since he is under a duty to manufacture products which are reasonably safe for all foreseeable uses, including those which are abnormal.\(^10\) It is, therefore, generally agreed

---

\(^{55}\) For a discussion of mishandling, see notes 57 to 66 *supra* and accompanying text.


\(^{100}\) Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972). *See also*
that a manufacturer may be held liable for an injury caused by a defect in the design of a product even though the plaintiff misused the product, if that misuse was reasonably foreseeable.\textsuperscript{101}

In discussing the misuse issue in \textit{Magnuson}, however, the Minnesota Supreme Court appeared to deviate from this general rule, stating:

\begin{quote}
In this state it would appear that plaintiff, as part of his case, where the condition is obvious, must show that he made proper use of the product. Defendant agrees that the use of this snowmobile in hunting fox was not unusual, accidents can occur, but the doctrine plaintiff seeks to recovery under is strict liability, \textit{and not absolute liability}. Plaintiff has the burden of proving proper use of the machine as part of his case, and, being aware of the condition and voluntarily doing what he did, he has not sustained this burden, and there was no question for the jury.\textsuperscript{102}
\end{quote}

The difficulty with this rationale is two-fold. First, who has the burden of proof on the issue of misuse of a product remains unclear. Second, the court makes the question of misuse turn on the plaintiff's awareness of a defect.

As to the burden of proof in cases involving a misuse of a product, \textit{i.e.}, a use of a product neither intended nor reasonably foreseeable, the courts are split.\textsuperscript{103} The courts requiring the plaintiff to prove a normal use of the product do so on the theory that imposing such a requirement on the plaintiff is really nothing more than making him prove that he was injured by a defect in a product made by the manufacturer. The validity of this point of view is illustrated by referring to the definition of defect cited with approval by the court in \textit{Magnuson}.\textsuperscript{104} Under a warranty/strict liability definition of defect, a plaintiff must prove that the product was not fit for the ordinary purposes for which it was intended.\textsuperscript{105} If the plaintiff fails to do so, he will fail in proving one of the essential elements of a strict liability case.

If this point of view is taken, it seems absurd to make the defense of misuse turn on one of the essential elements of a plaintiff's proof in a strict liability case. Characterizing misuse as a defense serves only to muddy the issue of the existence of a defect. Since the plaintiff must prove, as part of his case, that he was injured by a defect in a product made by the defendant, the defendant can offer proof that the plaintiff used the product for a purpose neither intended nor reasonably foreseeable. His evidence tends to rebut the essential elements

\textsuperscript{101} Thomas v. General Motor Corp., 13 Cal. App. 3d 81, 91 Cal. Rptr. 301 (Ct. App. 1970) (holding that a manufacturer may be held liable for a defect in the design of a product where its misuse by the plaintiff was reasonably foreseeable); Byrnes v. Economic Mach. Co., 41 Mich. App. 192, 201, 200 N.W.2d 104, 108 (1972) ("A manufacturer has a duty to use reasonable care in designing his product to guard against unreasonable risk. [Citations omitted] This may even include misuse which may be reasonably anticipated.").

\textsuperscript{102} 285 Minn. at 45, 171 N.W.2d at 209.

\textsuperscript{103} \textit{See generally} J. R. Hursh & H. Bailey, supra note 61, § 4:40.

\textsuperscript{104} 285 Minn. at 39, 171 N.W.2d at 206.

of a strict liability case and, if the jury accepts the defendant's rebuttal evidence, it will return a verdict for the defendant.

A good illustration of these proof problems can be found in those cases denominated as "res ipsa loquitur." There the plaintiff must prove that he was injured by a defect in a product made by the defendant and that the defect existed when it left the defendant's hands. In the res ipsa cases it is necessary for the plaintiff to rely upon certain circumstantial inferences to prove that he was injured by a defect that existed when the product left the manufacturer's hands. Where the product has been destroyed, and no expert testimony is available to establish the existence of a defect, the plaintiff may prove the defect by showing the absence of his own misuse of a product and the absence of such misuse by any intervening parties. When this is done, the plaintiff will reach the jury on the strict liability issue.

In such situations, the issue of misuse of the product must be disproved by the plaintiff. If he is unable to do so, he will not be entitled to a res ipsa instruction and may lose his case on a motion for a directed verdict. If, however, the court is satisfied that the plaintiff has sufficiently negatived any misuse of the product, the case will go to the jury, which will decide whether the plaintiff has proved the elements of his case by a preponderance of the evidence. The burden of proof on the misuse issue is, therefore, quite clearly on the plaintiff.

Many of the cases stating that the plaintiff has the burden of proving his freedom from misuse are explainable as res ipsa cases, in which the circumstantial inferences necessary to the application of the doctrine must be established by the plaintiff. Denominating misuse of the product as a defense is inaccurate in those cases, since the issue is raised of necessity by the plaintiff. Any evidence the defendant may have will tend to rebut the showing made by the plaintiff, forcing courts in some cases to rule as a matter of law that no defect exists or that the defect was not present at the time the product left the defendant's hands.

When the plaintiff's proof is more substantial, he will have no need to rely upon the procedural device of res ipsa loquitur, and thus may argue that he need not establish the absence of his own misuse. Such cases present the question of whether the plaintiff should be permitted to shift, somehow, the burden of proof on the issue of misuse to the defendant. If the plaintiff pro-

108. Id.
109. Id.
duces an expert who testifies that in his opinion the product was not safe for a particular use, does the defendant somehow assume the burden of disproving this testimony by a preponderance of the evidence?

Though Magnuson seeks to avoid this seeming inequity by requiring the plaintiff to negative his own misuse in every instance, the issue is in reality a false one. In situations of this nature the courts must take a more pragmatic view of fact situations, avoiding the highly structured and sterilized viewpoint of the court in Magnuson. Under appropriate instructions the essential elements of a products liability case can be presented to the jury for their consideration without a strained after-the-fact analysis and categorization of a plaintiff's conduct.

IV. THE CONCEPT OF AWARENESS

The concept of awareness permeates the "five-point" Magnuson test and, thus, may serve as the focus of analysis. In effect, the Magnuson court ruled as a matter of law that a plaintiff's awareness of a defective condition will bar his recovery under the strict liability doctrine.112 As noted earlier, the plaintiff's awareness of a defective condition not only takes an otherwise obviously defective product out of the defective and unreasonably dangerous category, but also, when coupled with his voluntary use of the product, constitutes a misuse and the proximate cause of any injury he may sustain.113 Thus, the plaintiff's awareness of the defect is relevant not only in proving the defective and unreasonably dangerous condition of a product, but also the proper use of the product to establish that his injury was not caused by any voluntary, unusual, or abnormal handling.

This latter requirement may mean that a plaintiff who was aware of the defect must prove that his injury was not caused by his voluntary handling of the product. The court so intimated in Magnuson while discussing abnormal use and the burden of proving proper use, "Plaintiff has the burden of proving proper use of the machine as part of his case, and, being aware of the condition and voluntarily doing what he did, he has not sustained this burden. . . ." (emphasis added).114 That is the only plausible explanation of the presence of "voluntary" in the fifth requirement.

The better reasoned rule does not inquire whether the plaintiff voluntarily used the product after discovering the defect, but rather, whether the plaintiff made an unreasonable use of the product after becoming aware of the danger presented by the defective condition.115 It is not hard to imagine a use of a product which would be totally reasonable under the circumstances, even though the user was aware of the existence of an obvious defect.116 Where the

---

112. 285 Minn. at 44, 171 N.W.2d at 208.
113. Id. at 45, 171 N.W.2d at 209.
114. See text accompanying note 42 supra.
115. 8 Cal. 3d at 145, 501 P.2d at 1170, 104 Cal. Rptr. at 450.
116. A good example would be General Motor's Corvair. Many were aware of the presence of the gas tank in the rear of the car, but normal use of the car was considered reasonable. It
user does make such a reasonable use, he should not be denied recovery, for he has not misused the product, nor has he assumed the risk of injury unless he was also aware of the danger or risk presented by the defect. Minnesota's decision to adopt the contrary rule will produce unjust results.

Other jurisdictions have disavowed any distinction between patent and latent defects. Modern theories of products liability do not preclude recovery solely because the danger is obvious, much less when only the defect is obvious. These theories hold that the manufacturer should bear the costs of injuries caused by his products because he is in a better position to control and eliminate dangerous defects than is the consumer. Thus, imposing strict liability may be more useful where the defect is patent than where it is latent, as the manufacturer will be even better able to discover patent defects than latent ones and thus prevent their recurrence. Second, though products liability does not employ a fault standard, the additional element of the manufacturer's fault, present when a product is marketed with a patent and dan-

would be illogical to expect a consumer who has spent a fair sum of money on a new product to forego use of the product because a defect is obvious where the danger is not.

117. Misuse occurs when a product is used in an unforeseeable or unintended manner. 1 R. HURSH & H. BAILEY, supra note 39, § 5A:12. Consequently, the mere fact that a user is aware of a defect should not constitute misuse or abnormal handling when the use is reasonably foreseeable or intended by the manufacturer.

118. In Luque v. McLean, 8 Cal. 3d 136, 145, 501 P.2d 1163, 1170, 104 Cal. Rptr. 443, 449-50 (1972), the court expressed that the "awareness language" in the Greenman decision means in effect that a person urging strict liability must not have assumed the risk of the defective product. As such, it concluded, "for such a defense to arise, the user or consumer must become aware of the defect and danger and still proceed unreasonably to make use of the product." (emphasis added). Id. at 146, 501 P.2d at 1170, 104 Cal. Rptr. at 450.

See also Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 423, 261 N.E.2d 305, 308 (1970), quoting People ex rel. General Motors Corp. v. Bua, 37 Ill. 2d 180, 226 N.E.2d 6 (1967), where contributory negligence is defined as "voluntarily and unreasonably proceeding to encounter a known danger, or proceeding unreasonably to make use of a product after discovery of a defect and becoming aware of the danger."


121. "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. ..." Requiring the defect to be latent would severely limit the cases in which the financial burden would be shifted to the manufacturer. It would indeed be anomalous to allow a plaintiff to prove that a manufacturer was negligent in marketing an obviously defective product, but to preclude him from establishing the manufacturer's strict liability for doing the same thing. The result would be to immunize from strict liability manufacturers who callously ignore patent dangers in their products while subjecting to such liability those who innocently market products with latent defects. Luque v. McLean, 8 Cal. 3d 136, 142, 501 P.2d 1163, 1169, 104 Cal. Rptr. 443, 449 (1972), quoting in part from Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701, (1962).
gerous defect, makes the imposition of the costs of injury upon the manufac-
turer seem more rather than less equitable. The patent-latent dichotomy
would reward with immunity manufacturers who "callously ignore patent
dangers in their products" while holding strictly liable those who "innocently
market products with latent defects."

It is possible, however, that the Minnesota court did not intend to make a
distinction between latent and patent defects with its awareness requirement,
but rather to require that the defect be one as to which the plaintiff had not
assumed the risk of injury. A close reading of Magnuson reveals that the
plaintiff's awareness of the defect constitutes a bar to his recovery in much
the same manner as assumption of risk. It has been suggested that the
function of the requirement is to borrow the concept of assumption of risk
from negligence theory. That defense, however, has traditionally required
not only an awareness of the defective condition, but also a subjective appre-
ciation of the danger and an unreasonable use of the product in light of that
appreciation. It is inconceivable that a less exacting standard would be
applied in a strict liability action, given its policy and purpose.

The Minnesota rule that mere awareness of the defective condition is suf-
ficient to bar recovery remains erroneous, then, even when viewed as an
assumption of risk rule. The better reasoned authorities hold that assump-
tion of risk, while a valid defense in a strict liability action,\textsuperscript{129} consists there, just as in a negligence action, of the plaintiff's "voluntarily and unreasonably proceeding to encounter a known danger."\textsuperscript{130} Under this rule the plaintiff's awareness is only one element to be proved in establishing the defense,\textsuperscript{131} and is by no means the controlling factor.

Other courts which have considered the issue have said that a plaintiff's use of a product with notice of its defect would not bar recovery in a strict liability action,\textsuperscript{132} for it is essential to the defense of assumption of risk that there be a knowledge and appreciation of the risk\textsuperscript{133} as well as an awareness of the physical presence of the defect. As the Illinois Supreme Court has noted,\textsuperscript{134} the test of whether a user has assumed the risk of using a dangerously defective product is fundamentally subjective in the sense that it is plaintiff's own knowledge, understanding, and appreciation of the danger which must be assessed rather than that of the reasonably prudent person.

In failing to apply this subjective knowledge test \textit{Magnuson} not only departs from the weight of authority, but also reaches an illogical result. The plaintiff cannot assume the risk of a danger of which he is ignorant. A rule that requires only the plaintiff's awareness of the defect to establish a defense defeats the policy considerations underlying the doctrine of strict liability by imposing upon the plaintiff a higher standard of proof than that required for a negligence action despite strict liability's avowed purpose of setting up a lesser standard of proof.\textsuperscript{135}

This error is compounded by requiring the plaintiff to prove that he was unaware of the defect. If the function of the "awareness" concept is to carry over from the field of negligence, the assumption of risk defense,\textsuperscript{136} it should properly be raised as an affirmative defense. The California Supreme Court

or consumer must become aware of the defect and the danger and still proceed unreasonably to make use of the product. \textit{Id.} at 243, 71 Cal. Rptr. at 314. Similarly, the \textit{Halepeska} court held that since the plaintiff did not have full knowledge and appreciation of the risk arising from the defect, no defense based on voluntarily encountering a recognized risk could be sustained. \textit{See also} I R. \textit{HURSH} \& H. \textit{BAILEY}, \textit{supra} note 39, § 5A:26.

\textsuperscript{129} See authorities cited note 128 supra.

\textsuperscript{130} \textit{Restatement (Second) of Torts} § 402A, comment \textit{n} at 356 (1965).

\textsuperscript{131} Sweeney \textit{v.} Mathews \& Co., 46 Ill. 2d 64, 66, 264 N.E.2d 170, 171 (1970). "In determining [whether particular conduct constitutes an assumption of risk] a trier of fact may consider such factors as the user's age, experience, knowledge and understanding, as well as the obviousness of the defect and the danger it poses."; Higgins \textit{v.} Paul Hardeman, Inc., 457 S.W.2d 943, 948 (Mo. App. 1970).

\textsuperscript{132} Higgins \textit{v.} Paul Hardeman, Inc., 457 S.W.2d 943, 948 (Mo. App. 1970): "[T]he gut issue is not whether the defect was discovered but whether the product was unreasonably used after discovery of the defect."


\textsuperscript{135} Lee \textit{v.} Crookston Coca-Cola Bottling Co., 290 Minn. 321, 188 N.W.2d 426 (1971); \textit{Restatement (Second) of Torts} § 496D (1965).

\textsuperscript{136} See text accompanying notes 124 \& 125 supra.
has expressly held that assumption of the risk is a defense, and that it is therefore improper to instruct the jury that the plaintiff must prove that he had not assumed the risk.\textsuperscript{137} Placing the burden of proof on the plaintiff not only impedes his recovery unnecessarily but is also contrary to the weight of authority and inconsistent with the policy considerations behind the adoption of strict tort liability.

V. Conclusion

The strict liability formulation now rather firmly established by the holdings of \textit{Magnuson} and \textit{Waite}, is rendered analytically dysfunctional by its emphasis on "limiting factors" that defeat the policies which originally gave rise to strict liability. Its insistence that the plaintiff's awareness should bar his recovery permeates all elements of the so-called "five-point" test of liability, creating doubt as to whether the victim of a dangerous product with a patent defect has a cause of action at all. The awareness bar also confuses and subverts the familiar doctrine of assumption of risk to the detriment of the victim.

The fifth point of the "five-point" test, which requires the plaintiff to prove that his injury was not caused by his voluntary, unusual, or abnormal handling of the product is not analytically useful. It needlessly complicates the naturally troublesome causation questions and forces the injured victim to bear all of the costs of foreseeable misuses of the product, no matter how serious the defect. The unreasonably dangerous requirement, too, is notably ungenerous to the accident victim.

A strict liability rule, if it fails to ease the burden which would be imposed on the plaintiff were he proceeding on a negligence theory, fails altogether. The rigid and formularized "limiting factors" of the \textit{Magnuson-Waite} test, literally interpreted and applied, may make proving up a case of strict liability even more difficult in some respects than proving up a case of negligence. Because of this failure to effectuate the broad remedial purposes of the strict liability doctrine, the \textit{Magnuson-Waite} test should be rejected in favor of a more fluid and generous analysis, such as that employed by the California courts.

\footnotesize{\textsuperscript{137} Luque v. McLean, 8 Cal. 3d 136, 145, 501 P.2d 1163, 1169, 104 Cal. Rptr. 443, 449 (1972).}