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Products Liability

ROBERT L. PARKS,* ABIGAIL C. WATTS-FITZGERALD** AND THOMAS A. WATTS-FITZGERALD***

The authors discuss recent developments in Florida law in the area of products liability. The distinctions between the three theories of recovery in products liability actions, negligence, implied warranty and strict liability, are clarified through close and detailed analysis. The authors prefer strict liability to the other two causes of action because of its lessened burden of proof on plaintiffs and its less intricate analysis. The examination of case law, however, leads the authors to conclude that the courts are often applying the strict liability doctrine incorrectly.

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I. INTRODUCTION

The essence of an action in tort involving liability for injuries occasioned by the use of a product is to require a manufacturer to

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compensate members of the public if his product is found to be unreasonably dangerous by virtue of a defective condition.[1] The application of the products liability label is a relatively recent development; recovery by victims of defective products, however, has long been familiar in the tort area, initially under common law negligence theories and later under various warranty theories. The plethora of theories of recovery has contributed to the confusion among the courts and commentators that has characterized this area.[2] The efforts of the American Law Institute have been beneficial in codifying the principles and concepts of strict liability for manufacturers of products deemed to contain defective conditions that are unreasonably dangerous.[3] Strict liability has taken its place with negligence and warranty in the arsenal of plaintiffs' attorneys, with excellent effect. By virtue of the variations inherent in these theories, previously insurmountable hurdles to recovery have been overcome. Unfortunately, recent case law in Florida documents a failure by the bench and the bar to distinguish sufficiently among these actions and a distressing tendency for common law negligence concepts to permeate strict liability actions. The extent to which this has occurred and the ramifications for tort law will be developed more fully.

II. THEORIES OF RECOVERY

A. *Negligence*

As one of the central characters in the field of products liability, it is poetically just that an automobile should be the instrumentality responsible for ushering in the modern view of negligence in products liability. The landmark case of *MacPherson v. Buick Motor Co.*[4] has been cited innumerable times since Judge Cardozo penned the opinion stating the rule that manufacturers owe an affirmative duty of reasonable care in the design and manufacture of their products.[5] The formal acceptance of the *MacPherson* ruling occurred in the *Restatement of Torts* § 395 (1934), establishing the

1. For a general discussion of the scope of the action in products liability and a collection of alternative definitions, see 72 C.J.S. *Products Liability* §§ 1-3 (Supp. 1975).

2. As recently as 1968, one Florida court perceived the existence of 29 separate theories related to products liability. Royal v. Black & Decker Mfg. Co., 205 So. 2d 307 (Fla. 3d DCA 1968).

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

4. 217 N.Y. 382, 111 N.E. 1050 (1916).

5. For a case which retained the requirement that the instrumentality be potentially dangerous for liability to inure to the manufacturer, see A.E. Finley & Assocs. v. Medley, 141 So. 2d 613 (Fla. 3d DCA 1962).

liability of the manufacturer if he failed to exercise reasonable care in manufacturing a product which foreseeably would pose an unreasonable risk of harm to a user or to those associated with the user or consumer.[6] The liability that devolves upon the negligent manufacturer is founded on traditional negligence principles. Breach of a duty, imposed by law, which is the legal cause of an injury is essential in a products liability action sounding in negligence. The scope of the duty imposed depends upon the reasonable foreseeability[7] of injury from use of a given product. Even when courts are inclined to characterize an action as involving an inherently dangerous commodity, the duty of the producer is not gauged under a standard different from that of reasonable foreseeability.[8] The characterization of an action as a negligence action, rather than as an action sounding in products liability, may have significant consequences in terms of the applicable period during which access to the courts will be allowed.

Section 95.11(3)(a) of the Florida Statutes[9] provides a four-year period of limitation on negligence actions. The computation of the four-year period is governed by section 95.031 which states, "in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues."[10] Section 95.031(1) defines the time the cause accrues as "when the last element constituting the cause of action occurs."[11] Thus, the right to bring a simple negligence case involving personal injury (as distinguished from a products liability case under a negligence theory of recovery) would have a life expectancy of four years, running from the moment the injury occurs. Subsection (2), however, takes a different tack. It is addressed to actions sounding in products liability, wherein the time allowance runs "from the time the facts giving rise to the cause of action were discovered or should

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6. The RESTATEMENT (SECOND) OF TORTS § 395 (1965) differed from the 1934 version by reducing the "substantial bodily harm" criterion to merely "physical harm." The substantial harm-trivial harm distinction has, in the opinion of some commentators, commingled concerns of foreseeability with elements utilized to ascertain the level of damages recoverable. For a discussion of the factors involved, see L. FRUMER & M. FRIEDMAN, 1 PRODUCTS LIABILITY § 5.03(1)(b)(ii) (1978).

7. *See, e.g.*, Tampa Drug Co. v. Wait, 103 So. 2d 603, 607 (Fla. 1958).

8. *Compare* Adair v. Island Club, 225 So. 2d 541 (Fla. 2d DCA 1969) *with* Walker v. National Gun Traders, Inc., 116 So. 2d 792 (Fla. 3d DCA 1960), for opposite outcomes in the determination of a duty to third persons involving two inherently dangerous products, a chlorine gas tank and a second hand revolver.

9. FLA. STAT. § 95.11(3)(a) (1977). Chapter 95 of the Florida Statutes was heavily revised in 1974. 1974 Fla. Laws ch. 74-382.

10. FLA. STAT. § 95.031 (1977).

11. *Id.* § 95.031(1).

have been discovered with the exercise of due diligence."[12] But, rather than allowing the four years associated with a negligence action, the products liability action need only begin "within twelve years after the date of delivery of the completed product to its original purchaser . . . regardless of the date the defect in the product was or should have been discovered."[13] The fundamental difference between a classic limitations statute and a statute extinguishing any cause of action based on the passage of time from a delivery date has been recognized by the Florida courts.[14] The protection to manufacturers of such a statute of repose is readily apparent—any product delivered longer than twelve years past cannot support a cause of action on the basis of products liability. If counsel for plaintiff can convince the court that an injury caused by an instrumentality commonly considered a product is in reality one sounding in negligence, the four-years-from-the-last-element rule will still open the doors of the court, whether the instrumentality was delivered twelve or twenty years past. As yet, examples of the ingenuity of plaintiffs' counsel in this area do not abound in the reported opinions, but there is every likelihood that such cases will be brought as negligence actions in the absence of any other recourse to the courts.[15]

Negligence may be defined as "the failure to do what a reason-

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12. *Id.* § 95.031(2). Questions concerning the last element giving rise to the cause of action and the time at which plaintiff had knowledge sufficient to start the statute running often turn on minute distinctions. For a discussion of these problems in the context of medical malpractice and negligence, see Steiner v. Ciba-Geigy Corp., 364 So. 2d 47 (Fla. 3d DCA 1978).

13. *Id.*

14. Bauld v. J.A. Jones Constr. Co., 357 So. 2d 401 (Fla. 1978) (legislature has authority to revise statute of limitations even though some plaintiffs would thereby lose right to bring suit).

15. The validity of this absolute 12-year limitation was recently undermined by the Supreme Court of Florida in Overland Constr. Co. v. Sirmons, [1979] FLA. L. WEEKLY 103 (Fla. Mar. 1) (No. 76-2192). In *Overland*, the court held that FLA. STAT. § 95.11(3)(c) (1975) was unconstitutional. The court construed FLA. CONST. art. 1, § 21 (guarantee of access to the courts) as an override of a statute of limitations which serves to bar a cause of action before it legally exists. The court was confronted only with § 95.11(3)(c), which prevents a cause founded on design, planning or construction of an improvement to real property from arising against a professional engineer, registered architect or licensed contractor after 12 years. The rationale, however, would appear to make the holding applicable to FLA. STAT. § 95.031(2) as the pertinent language is virtually identical. Section 95.11(3)(c), the section attacked in *Overland*, provides: "In any event the action must be commenced within 12 years after the date of actual possession by the owner . . . ." Section 95.031(2) states: "Actions for products liability . . . must be begun within the period prescribed . . . but in any event within 12 years after the date of delivery . . . ." Therefore, the continuing validity of § 95.031 as an absolute bar to a products liability action after 12 years have elapsed is questionable at best.

able and prudent person would ordinarily have done under the circumstances, or the doing of what a reasonable and prudent person would not have done under the circumstances, resulting in injury to another."[16] One aspect of the cause of action in negligence, therefore, revolves around the existence of a defect in the product. The presence of a defect is fundamental to all three forms of products liability actions, with particular emphasis on the type of proof of the defect required and the nexus of the defect to the alleged injury. In negligence, it is essential to the cause of action, and often the most troublesome burden, that the complaint allege that a defect in the product was the proximate cause of the plaintiff's injury.[17] Similarly, the burden of establishing proximate causation in a negligence action requires that the plaintiff prove a specific defect. In strict liability, by contrast, the plaintiff need not prove a specific defect because a defective product determination may arise from an evaluation of all the variables in a given case.[18] Apart from the mere burden of proving the existence of the defect, the plaintiff in a negligence action must also allege the defective conditions resulting in plaintiff's injury. In a recent case,[19] for instance, a university student was electrocuted when a model airplane he had purchased came into contact with a primary power line causing electricity to course through the aircraft's control wires, resulting in the youth's death. The complaint in the wrongful death action alleged that the components sold to decedent in their sealed cartons were defectively manufactured. The trial court dismissed the complaint, finding that plaintiff's failure to identify specifically the defects rendered the complaint incapable of stating a cause of action. On appeal, the District Court of Appeal, Third District, affirmed the ruling of the trial court.

Oftentimes, plaintiff's burden will not lie solely in framing an artful complaint in order to present evidence to the finder of fact, but will instead center on the type of evidence required to meet his burden of proof. In an action sounding in both negligence and implied warranty, a plaintiff, injured by particles of glass which pierced her eye when a soda bottle exploded, relied on the doctrine

16. 23 FLA. JUR. *Negligence* § 2 (1959) (citing DeWald v. Quarnstrom, 60 So. 2d 919 (Fla. 1952)).

17. *See, e.g.*, Royal v. Black & Decker Mfg. Co., 205 So. 2d 307 (Fla. 3d DCA), *cert. denied*, 211 So. 2d 214 (Fla. 1968).

18. Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185, 1206-08 (1976); *see also* Armor Elevator Co. v. Wood, 312 So. 2d 514 (Fla. 3d DCA), *cert. denied*, 350 So. 2d 14 (Fla. 1975) (action for breach of implied warranty of fitness).

19. Rice v. Walker, 359 So. 2d 891 (Fla. 3d DCA 1978) (per curiam).

of res ipsa loquitur when it was impossible to demonstrate affirmatively that no intervening force had affected the condition of the bottle since it left the control of the manufacturer.[20] The appellate court was called upon to determine whether the trial court had properly granted appellee's motion for a directed verdict. As the court stated, "[t]he answer to that question depends upon whether or not appellant adduced sufficient evidence during the presentation of her case to invoke the doctrine of res ipsa loquitur."[21] The appellate court, relying on earlier "bottle cases," determined that sufficient evidence to invoke the doctrine had been presented if "on the whole it is more likely that there was negligence associated with the cause of the exploding bottle than there was not."[22] The effect of the invocation of res ipsa loquitur is therefore twofold; it will get the plaintiffs safely by a motion for summary judgment or directed verdict, and it will establish a prima facie case.[23]

The utility of the res ipsa loquitur doctrine is not limitless, however. In *Dayton Tire & Rubber Co. v. Davis,*[24] the trial court instructed the jury on res ipsa loquitur in an action involving a death allegedly occurring due to the failure of a tire on decedent's automobile. One of plaintiff's experts had testified that the blowout was the result of burned polyester cords in the tire body, which had to have occurred during the manufacturing process. Conflicting evidence indicated that such a condition might not have been responsible for the failure of the tire, and at any rate, several alternative causes, including the negligence of the operator of the vehicle in properly maintaining the tire, were raised by competent evidence. The majority, although faced with a formidable dissent on this point, held that although res ipsa loquitur does not generally apply to tire failure cases, the evidence adduced at trial was sufficient to allow a jury properly to apply the doctrine if it should so choose and, therefore, the instruction was properly given by the trial court.[25]

Subsequently, the Supreme Court of Florida consolidated *Dayton Tire* with another case,[26] almost identical on its facts, to consider the propriety of the use of the res ipsa loquitur doctrine by

20. Steele v. Royal Crown Cola Bottling Co., 335 So. 2d 586 (Fla. 3d DCA 1976), *cert. denied,* 345 So. 2d 426 (Fla. 1977).

21. *Id.* at 588.

22. *Id.*

23. *See also* Groves v. Florida Coca-Cola Bottling Co., 40 So. 2d 128 (Fla. 1949).

24. 348 So. 2d 575 (Fla. 1st DCA 1977).

25. *Id.* at 586.

26. Goodyear Tire & Rubber Co. v. Hughes Supply Inc., 336 So. 2d 1221 (Fla. 4th DCA 1976).

the respective district courts of appeal.[27] The court found fault with the majority opinions of both of the district courts, believing that the lower courts had attenuated the traditional res ipsa doctrine by allowing its application where there had been no showing of the manufacturers' exclusive control and where the facts surrounding the occurrence were discoverable and provable.[28] The court felt that once the tire had left the control of the manufacturer and had been put into service, res ipsa was inappropriate. This holding seems incongruous, especially in view of the clearly analogous series of "exploding bottle cases,"[29] which allowed a res ipsa charge solely on proof that nothing unusual had occurred to the bottles in transit from manufacturer to injured consumer. The retention of res ipsa in products liability actions in such a limited guise is somewhat inconsistent with the supreme court's recent trend toward liberalization of remedies in the consumer-oriented development of the law. In essence, the court is establishing a doctrine of res ipsa applicable only by reference to a time-based standard: the time since purchase or use of the product prevents application of the doctrine. This is a far cry from the traditional application of the doctrine which contemplated "a common sense inference of negligence where direct proof of negligence is wanting, provided certain elements consistent with negligent behavior are present."[30] Merely quantifying the validity of the rule by a time-based standard ignores the reality underlying the rule—that certain occurrences are, in the fullness of human experience, unlikely to occur without some contributing fault. Moreover, there may be circumstances where the existence of some direct proof is not destructive of the availability of this common sense inference.

Since res ipsa loquitur, for the most part, only gets the plaintiff to the jury, the existence of some direct proof along with a res ipsa charge is unlikely to dictate results always favorable to the plaintiff. If the lower courts have extended the use of the doctrine, it may be due solely to their recognition that juries inevitably apply a personal res ipsa doctrine regardless of the jury instructions. If, for instance, in general experience, tires with low mileage do not malfunction,

27. Dayton Tire & Rubber Co. v. Davis, 358 So. 2d 1339 (Fla. 1978) (consolidated by order of the court).

28. *Id.* at 1342-43.

29. *Id.* at 1343 n.9. The court evidently felt that certain limited circumstances can justify retention of the doctrine. The "exploding bottle cases" and the case of Yarborough v. Ball U-Drive Sys., Inc., 48 So. 2d 82 (Fla. 1950), mentioned in the court's footnote, apparently are to be the limiting parameters for res ipsa in the products liability area.

30. *Id.* at 1341.

then res ipsa loquitur—the accident does speak to the jury. In addition, a defendant is not really disadvantaged by the charge because it is not conclusory in itself; it only becomes so in the absence of proof adduced by the defendant that his product was safe. The onerous burden of proving a defect and tying it to the conduct of the manufacturer has no doubt eased the conscience of the courts which have put such doctrines as res ipsa loquitur to good use when the equities of a given case move them. After *Dayton Tire,* however, its use will be severely circumscribed.

Judicial awareness of the heavy burden on plaintiff to prove his case is evident in other areas as well. For instance, a court may ameliorate plaintiff's burden of proof by allowing the admission of evidence concerning a manufacturer's knowledge of a defective condition as a result of prior occurrences involving the product. In *Warn Industries v. Geist,*[31] a winch operator was permitted to introduce evidence regarding a previous accident with one of defendant-manufacturer's winches. The court observed that admissibility in such cases was usually limited to "the purpose of showing the dangerous character of the instrumentality and defendant's knowledge thereof."[32] This rationale apparently would allow the introduction of evidence with proper instruction limiting it only to the questions of the foreseeability of an injury and the knowledge reasonably to be imputed to the manufacturer.

Allowing the admission into evidence of recall letters is another way in which a court may ease plaintiff's burden of proof. In *Harley-Davidson Motor Co. v. Carpenter,*[33] the plaintiff, injured in a motorcycle accident, brought a products liability action in negligence to recover damages from the manufacturer. The trial court admitted into evidence a recall letter which described a defect in the product plaintiff had been operating, which was alleged to have been the proximate cause of the injury. The appellate court said, "[e]ven though the recall letters were not admissible to show that the defect discussed existed in the particular motorcycle owned by the plaintiff or caused the accident, they were admissible to show that the defect existed in the hands of the manufacturer."[34]

As in the case of evidence of prior occurrences, the true effect of such "limited" admissions is the subject of some conjecture. So long as products liability actions are couched in negligence, the need

31. 343 So. 2d 44 (Fla. 3d DCA), *cert. denied,* 353 So. 2d 680 (Fla. 1977).
32. *Id.* at 46.
33. 350 So. 2d 360 (Fla. 2d DCA 1977).
34. *Id.* at 361.

to prove a specific defect proximately related to the injury complained of will militate towards stylized results. This promotes neither certainty in the law nor consistency in results from juries instructed to regard telling evidence for only limited purposes. This artificiality should commend strict liability actions to both the bench and the bar, as the relaxed burden of proving a proximate defect should obviate much of the need to conjure up exceptions to afford justice in a particular set of circumstances.

1. SECONDARY COLLISIONS: THE CRASHWORTHY DOCTRINE

The strict requirements of negligence actions, that the defect be specifically proven and be a proximate cause of plaintiff's injuries, have placed a heavy burden on Florida plaintiffs in "second collision" litigation. A "second collision" case arises when the asserted defect was not a proximate cause of the initial collision, but nevertheless caused or aggravated the occupants' injuries by subjecting them to secondary impacts. The Supreme Court of Florida passed on the issue of negligent design and manufacture in secondary collisions in the case of *Ford Motor Co. v. Evancho.*[35] The certified question before the court was "whether a manufacturer of automobiles may be liable to a user of the automobile for a defect in manufacture which causes injury to the user when the injury occurs as a result of a collision and the defect did not cause the collision?"[36] The court examined the two leading cases on this question, *Evans v. General Motors Corp.*[37] and *Larsen v. General Motors Corp.*[38] In *Evans,* a broadside collision had resulted in severe injuries which plaintiff asserted would have been substantially avoided by a more adequately designed frame. The majority in *Evans* concluded that despite a manufacturer's knowledge of the likelihood of collisions, no duty arose to ensure that the vehicle was accident-proof or foolproof. So long as engaging in collisions was not the lawful, intended purpose of the vehicle, the manufacturer was exonerated.[39] The rationale of the *Evans* decision became the basis for similar opinions in a number of jurisdictions.[40] In deciding *Larsen,* however, the United States Court of Appeals for the Eighth Circuit took a contrary position on the manufacturer's duty. The decedent in *Larsen*

35. 327 So. 2d 201 (Fla. 1976).
36. *Id.* at 202.
37. 359 F.2d 822 (7th Cir. 1966).
38. 391 F.2d 495 (8th Cir. 1968).
39. 359 F.2d at 825.
40. These decisions were collected by the Supreme Court of Florida in Ford Motor Corp. v. Evancho, 327 So. 2d 201, 203 n.2 (Fla. 1976).

was impaled by the steering shaft, which was driven aft by a head-on collision. The court found the rationale of *Evans* unpersuasive, reasoning that the function and intended use of automobiles is to provide a means of transportation as safe as is reasonably possible in light of the state of the art.[41] The court stated: "This duty of reasonable care in design rests on common law negligence that a manufacturer of an article should use reasonable care in the design and manufacture of his product to eliminate any unreasonable risk of foreseeable injury."[42] The *Larsen* ruling became the more widely accepted view in the following years.[43]

The Supreme Court of Florida in *Evancho* adopted the *Larsen* standard and answered the certified question in the affirmative. In Florida, the manufacturer is liable not only for injuries caused by the intended use of the product, but also for those injuries caused by an unintended but foreseeable use, *e.g.*, secondary collisions. This result is in accordance with the usual standard, that a manufacturer's liability for negligence is governed by the foreseeability of the harm. The utility of the *Evancho* decision, however, is limited by the difficulties of proof in a negligence action.

The requirement of foreseeability may forestall a judgment holding a manufacturer liable for injuries from secondary impacts caused by a defect in the design of a product. A case in point is *Outboard Marine Corp. v. Apeco Corp.*[44] Plaintiff was injured when the steering mechanism of a pleasure boat failed. He sued both the supplier of the mechanism and the manufacturer of the craft. The plaintiff's evidence tended to establish that the only proximate cause of his injury was the engine defect. The supplier, on its crossclaim for indemnification against the manufacturer, tried to prove that the negligent design of the safety rails on the boat was in part responsible for plaintiff's injuries. Despite expert testimony to this effect, the trial court ruled that a jury question was not raised with regard to the adequacy of the design as a contributing cause of the injury.[45] The essence of the ruling was that the supplier had failed to demonstrate the foreseeability of the injury resulting from the combination of the design defect and the malfunction of the engine.[46]

41. 391 F.2d at 503.

42. *Id.* (footnote omitted).

43. Decisions imposing this greater duty on manufacturers were collected by the Supreme Court of Florida in *Evancho*, 327 So. 2d at 203 n.3.

44. 348 So. 2d 5 (Fla. 3d DCA 1977) (per curiam), *cert. denied*, 357 So. 2d 187 (Fla. 1978).

45. *Id.*

46. *Id.* at 6.

Although foreseeability has always been a potential bar to recovery in a negligence action, its influence in the secondary collision area is likely to be particularly important. The foreseeability standard, within the experience of the trier of fact, will provide the necessary safeguards and limitations on the secondary collision action, so that it does not become merely a means of reaching an additional solvent defendant.

2. THE DUTY TO WARN UNDER A NEGLIGENCE STANDARD

Florida case law delineates two conditions under which a manufacturer has a clear duty to provide potential consumers with fair and adequate warnings regarding possible dangers associated with the use of its products: where products are deemed inherently dangerous;[47] and where products, although not inherently dangerous, could foreseeably cause injury if defective in manufacture or design.

If a plaintiff is able to prove that the product responsible for his injury comes within the inherently dangerous classification, then he will be relieved of the burden of proving that his injury was of a type foreseeable by the manufacturer. The District Court of Appeal, First District, rebuffed such an attempt in *Dayton Tire & Rubber Co. v. Davis,*[48] where the trial court, in its charge to the jury, had brought an automobile tire under the rule governing inherently dangerous products. The appellate court found the charge to constitute reversible error in that no reasonable person could find an automobile tire to be dangerous in and of itself. Stating that "[w]hen used in its ordinary and intended fashion, a tire presents no danger whatsoever,"[49] the court took note of *Odum v. Gulf Tire & Supply Co.,*[50] in which a federal district court in Florida expressly found a tire not to be within the category of products classified as inherently dangerous. The First District observed that if the charge had been upheld, a jury would be required to find a tire manufacturer negligent if the jury found a failure to inspect and warn even if such failure did not constitute negligence.[51]

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47. "[I]n order to properly label a commodity inherently dangerous, it must be dangerous in and of itself. The fact that it becomes dangerous due to a defect does not necessarily make the product an inherently dangerous commodity requiring the strict duty of care." Dayton Tire & Rubber Co. v. Davis, 348 So. 2d 575, 581 (Fla. 1st DCA 1977).

48. *Id.*

49. *Id.* at 582.

50. 196 F. Supp. 35 (N.D. Fla. 1961).

51. 348 So. 2d at 582. The Supreme Court of Florida discussed the manufacturer's duty to warn in the context of inherently dangerous products in Tampa Drug Co. v. Wait, 103 So. 2d 603 (Fla. 1958). In that case, the decedent's death was caused by the inhalation of carbon tetrachloride vapors while he was cleaning his home. Noting that the product was not defec-

The court in *Dayton* went on to establish a standard for measuring the liability of a manufacturer of a product not inherently dangerous for failure to warn consumers of possible dangers associated with the use of that product. The court stated: "Whether or not the manufacturer or retailer should have warned the consumer of a product's dangerous propensities is a question for the jury based upon the manufacturer's foreseeability of injury to the consumer."[52] The burden of proof is on the plaintiff to show that the defendant knew or should have known of an alleged defect which proximately caused plaintiff's injury and that the defendant negligently failed to provide adequate warning.[53] To sustain a claim for damages predicated on a failure to warn of an alleged defect in product design, the evidence must demonstrate that the defendant had knowledge of the condition.[54]

It might appear that manufacturers could easily insulate themselves from liability for failure to warn consumers of the dangerous propensities of their products by merely appending a catchall warning to the item. Properly phrased, such a warning might even avoid liability as a result of a defect the manufacturer should have had knowledge of, but which, in fact, had escaped his attention. Such a facile solution, however, would probably be ineffective in most cases because a mere warning is insufficient to render the manufacturer blameless. To be an effective protective device, even under the comparative negligence system of *Hoffman v. Jones*,[55] the warning must *adequately* inform the user of the type of care he must exercise to minimize potential danger of use or misuse of the product.[56]

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tive but was by its nature dangerous, the court stated that "with regard to this type of article the liability of a manufacturer or distributor is predicated on a failure to give adequate warning of the inherent danger." *Id.* at 608. This requirement that a manufacturer provide adequate warnings on inherently dangerous products has been followed in subsequent cases and applied to a variety of products. *E.g.*, Edwards v. California Chem. Co., 245 So. 2d 259 (Fla. 4th DCA), *cert. denied*, 247 So. 2d 440 (Fla. 1971) (explosives); Lake v. Konstantinu, 189 So. 2d 171 (Fla. 2d DCA 1966) (pharmaceuticals).

52. 348 So. 2d at 582.

53. *See* Vandercook & Son, Inc. v. Thorpe, 322 F.2d 638 (5th Cir. 1963) (manufacturer not required to warn of danger it had no reason to foresee, there having been no malfunctions in numerous machines sold previously). *See also* L. FRUMER & M. FRIEDMAN, *supra* note 6, § 8.

54. Thus, an importer who distributed foreign built automobiles containing alleged design defects would be entitled to summary judgment when no evidence appears of record "to support the knowledge of [the] defendant of the alleged design defect." Skinner v. Volkswagon of America, Inc., 350 So. 2d 1122 (Fla. 3d DCA 1977).

55. 280 So. 2d 431 (Fla. 1973). The Supreme Court of Florida replaced the contributory negligence rule with the comparative negligence doctrine and established standards for the application of comparative negligence.

56. Dayton Tire & Rubber Co. v. Davis, 348 So. 2d 575, 581 (Fla. 1st DCA 1977).

In determining the adequacy of a warning, the trier of fact may look to a variety of factors, including the character of the plaintiff and the special knowledge he may possess. Thus, in *Wickham v. Baltimore Copper Paint Co.*,[57] the District Court of Appeal, Third District, held that a professional painter and his employer could not successfully plead the inadequacy of a warning label on a can of paint as a basis for recovery when the warning admonished the user against inhalation of the vapors or spray mist and recommended that the product not be used absent adequate ventilation. The injury in *Wickham* occurred despite plaintiff-employee's use of a mask to avoid inhalation of fumes. The court reasoned that since the plaintiff had read the warning and used the safety device, the adequacy of the warning was not a material issue, as "both the employer and employee user of the commercial product were cognizant of the dangers involved."[58]

The adequacy of a warning label can be a material issue, however, when the injury occurs under circumstances casting doubt on the efficacy of the warning in alerting a user to the sort of hazard to which he might be exposed. In *Mathis v. National Laboratories*,[59] a school employee wore rubber gloves while using a cleaning solvent supplied by her employer. The product contained concentrated carboloic acid which, despite the gloves, turned the black woman's hands white, a condition known as hypopigmentation. The suit alleged that the manufacturer of the solvent was negligent in failing to warn on its label that dilution of the product was required. The trial court, relying on *Wickham*, entered final summary judgment in favor of the defendant. The District Court of Appeal, Third District, distinguished its earlier decision in *Wickham* because there,

> both the injured party and his employer *read* and *understood* the warning label on the product and actually took precautions against the *known* danger involved with the product's use. Unlike the facts *sub judice*, the alleged inadequacy of the label in *Wickham* was not the proximate cause of the damages sustained.[60]

Summary judgment was deemed inappropriate, as "issues dealing with the adequacy of a warning and instruction on a product's label are questions of fact, not law."[61]

57. 327 So. 2d 826 (Fla. 3d DCA 1976).
58. *Id.* at 827.
59. 355 So. 2d 117 (Fla. 3d DCA 1978) (per curiam).
60. *Id.* at 118 (emphasis in original).
61. *Id.*

Under Florida law, the duty of a manufacturer to give warning against dangerous propensities of his product is absolute if the product is one deemed to be inherently dangerous in its intended state. If the product is not inherently dangerous but may, due to its condition, pose a foreseeable threat of injury to the user or consumer, an adequate warning will be required. To constitute an adequate warning, the manufacturer must ensure that the warning effectively instructs potential users against the danger the product may pose. Whether the warning is adequate is a question for the trier of fact when the evidence indicates that the failure to warn was a proximate cause of the damages sustained by the plaintiff.

B. *Implied Warranties*

The second traditional theory of recovery in products liability cases is that of breach of implied warranty.[62] Two significant divisions exist within the purview of products liability suits under warranty: common law implied warranty and implied warranty governed by the Uniform Commercial Code.[63]

1. COMMON LAW IMPLIED WARRANTY[64]

The elements of a cause of action under common law implied warranty have been variously stated by the courts. In general, four primary characteristics are recognized as essential to any recovery. As the District Court of Appeal, Fourth District, stated in *Sansing v. Firestone Tire & Rubber Co.*:[65]

> Liability is imposed under the theory of implied warranty when it has been proved that: (1) Plaintiff was a foreseeable user of the product; (2) The product was being used in the intended manner at the time of the injury; (3) The product was defective when transferred from the warrantor; and (4) The defect caused the injury.[66]

Originally, an action based on an implied warranty theory was

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62. Breach of an express warranty will, of course, also give rise to a cause of action. The express warranty action, however, has been firmly fixed within contract law and is subject almost exclusively to the dictates of that branch of jurisprudence, instead of paralleling the metamorphosis of the implied warranty action into a tort remedy with only vestigial connections to the contract field.

63. FLA. STAT. §§ 672.314-.315 & .318 (1977).

64. For an extensive development of the historical underpinnings of implied warranty in Florida, see Ausness, *From Caveat Emptor to Strict Liability: A Review of Products Liability in Florida*, 29 U. FLA. L. REV. 410 (1972).

65. 354 So. 2d 895 (Fla. 4th DCA 1978).

66. *Id.* at 896 (citing McCarthy v. Florida Ladder Co., 295 So. 2d 707 (Fla. 2d DCA 1974).

grounded in contract law in a manner analogous to an express warranty action.[67] Contract principles limited recovery until the privity requirement was struck down regarding both inherently dangerous products[68] and defective products which are neither reasonably safe nor fit for their intended use.[69]

The contractual overtones of an implied warranty action have not been completely obliterated, however, since the Florida courts have extended liability only to manufacturers and not to retailers of a defectively designed or manufactured product.[70] The hardship which may be posed to a plaintiff when recovery against the retailer is denied is not easily rationalized when the sole barrier to such recovery is the privity requirement.[71] If the product is in fact unreasonably dangerous, it might be more appropriate simply to allow the

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67. The contractual nature of the action began to recede as courts became accustomed to imposing liability on the basis of a determination of the existence of an implied warranty as a matter of law independent of any action of the parties to the particular transaction. *E.g.*, Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953). *See also* 28 FLA. JUR. *Sales* § 134 (1968).

68. Recovery of damages by one not in privity with the manufacturer had been barred at common law, thereby effectively preventing an action on an implied warranty theory. In Mathews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956), the Supreme Court of Florida held that recovery in a products liability case could be founded on implied warranty even in the absence of privity when the product involved was inherently dangerous.

69. The privity requirement was abrogated completely in Bernstein v. Lilly-Tulip Cup Corp., 177 So. 2d 362 (Fla. 3d DCA 1965), *aff'd*, 181 So. 2d 644 (Fla. 1966). The court held that privity was no longer required in an action against a manufacturer even when the product was not inherently dangerous. The defendant-manufacturer could be held liable to an appropriate user on an implied warranty theory for a product or product design found to be defective or not reasonably safe or fit for its intended purpose at the time it left the control of the manufacturer. *See* THE SUPREME COURT COMM. ON STANDARD JURY INSTRUCTION, FLORIDA STANDARD JURY INSTRUCTIONS pt. IV-PL, at 1-2 (1975) (implied warranty). *See also* Marrilla v. Lynn Craft Boat Co., 271 So. 2d 204 (Fla. 2d DCA 1973); Barfield v. U.S. Rubber Co., 234 So. 2d 374 (Fla. 2d DCA 1970).

70. *E.g.*, Carter v. Hector Supply Co., 128 So. 2d 390 (Fla. 1961); *cf.* Toombs v. Fort Pierce Gas Co., 208 So. 2d 615 (Fla. 1968) (dangerous instrumentality exception to the privity requirement in action against retailers). For a discussion of the abrogation of the privity requirement in suits against manufacturers of defective products, see note 69 *supra*.

The likelihood of holding a retailer liable increases dramatically, however, if the retailer represents to a consumer that the product is his own. The considerations behind this rule are clearly concerned with the expectations of the consumer. For representative authority, see Smith v. Regina Mfg. Corp., 396 F.2d 826 (5th Cir. 1968); Ford Motor Co. v. Mathis, 233 F.2d 267 (5th Cir. 1963); Carney v. Sears, Roebuck & Co., 309 F.2d 300 (4th Cir. 1962); Sears, Roebuck & Co. v. Marris, 136 So. 2d 883 (Ala. 1962).

The majority of jurisdictions, following the lead of California in Chief Justice Traynor's opinion in Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (Cal. 1964), holds retailers liable for harm to consumers due to the retailer's essential position in the manufacturing-marketing enterprise and his potential ability to ensure the safety of the product or to put pressure on the manufacturer toward that end. *See, e.g.*, LaGorga v. Kroger Co. 275 F. Supp. 373 (W.D. Pa. 1967); Wachtel v. Rosel, 271 A.2d 84 (Conn. 1970) Davis v. Gibson Prods. Co., 505 S.W.2d 682 (Tex. Civ. App. 1973).

71. *See* Ausness, *supra* note 64.

action against the retailer, thereby recognizing in the commercial setting his right of indemnification or contribution from the manufacturer. This approach would be more consistent with the general rationale of implied warranty actions, where the seller's actual or constructive knowledge of the defect is immaterial to the question of liability.[72] The impact of the restriction imposed by the privity requirement in an implied warranty action has been minimized greatly with the advent of the strict liability action in Florida. The contractual problems inherent in an implied warranty are alleviated by the use of the strict liability theory,[73] without placing on the plaintiff the often onerous burden of proof required in a negligence action.[74]

2. IMPLIED WARRANTIES UNDER THE UNIFORM COMMERCIAL CODE

With the advent of the Uniform Commercial Code (UCC) in Florida,[75] there was some concern by the trial bar that the UCC would subsume and ultimately extinguish the common law action in implied warranty. Not only did this dire prediction not occur,[76] but, rather, the implied warranty cause of action has been extended to the sale of used goods.

Traditionally, a products liability action for injury caused by secondhand or used goods was a disfavored cause of action regardless of the theory relied upon. Implied warranties did not run to used

72. Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963).

73. Under the strict liability standard, plaintiff is relieved of the contractual problems of privity, notice, waiver and disclaimer.

74. *See* notes 16-61 and accompanying text *supra*.

75. FLA. STAT. §§ 672.314-.315 & -.318 (1977).

76. The District Court of Appeal, First District, clearly stated that the doctrine of implied warranty survived the enactment of the UCC: "Unless the legislature has in unequivocal terms spelled out to the courts of the State that it has by the enactment of the omnibus Uniform Commercial Code severed the implied warranty doctrine from the jurisprudence of the State, we will not be the operator of the guillotine." Ford Motor Co. v. Pittman, 227 So. 2d 246, 249 (Fla. 1st DCA 1969).

The enactment of the UCC served to codify preexisting law in Florida which had centered around application of the concepts of merchantability, the fitness of a product for the normal uses to which a commodity is customarily put, and fitness for a particular purpose, a standard presupposing the seller's knowledge of the ultimate intended use of the product by the particular consumer. Both concepts seek to limit to some degree the liability of a seller for injuries caused by unforeseeable uses which he should not reasonably be required to protect against. *E.g.*, Smith v. Burdines, Inc., 144 Fla. 500, 198 So. 223 (1940); Brown v. Hand, 221 So. 2d 454 (Fla. 2d DCA 1969); Arcade Steam Laundry v. Bass, 159 So. 2d 915 (Fla. 2d DCA 1964).

Enactment of the UCC did, however, make significant changes in preexisting Florida law with respect to third party beneficiaries of both types of implied warranties. Section 672.318 of the Florida Statutes (1977) extended the seller's warranty to both members and guests of the buyer's household and to employees of the buyer who may reasonably be expected to be affected by the condition of the goods.

goods in Florida.[77] In *Knipp v. Weinbaum,*[78] however, the District Court of Appeal, Third District, held that under certain circumstances, implied warranties could extend to used goods.[79] In *Knipp,* plaintiff purchased a secondhand motorcycle. Several hours after the sale, a defective weld collapsed, injurying the plaintiff. The bill of sale included an "as is" disclaimer. The trial court granted summary judgment, and plaintiff appealed from the adverse ruling, alleging that the count in implied warranty raised a material issue of fact as to the effect the parties intended the "as is" clause to have. Before agreeing with the plaintiff, the appellate court examined the law existing before and after the adoption of the UCC in Florida, finding that "the law does imply warranties in this sale of used merchandise."[80]

The court in *Knipp* also closely examined the apparent elimination of any warranty by virtue of the "as is" clause and section 672.316(3)(a) of the Florida Statutes, which states: "Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty."[81] By restrictively interpreting this provision, the court found that the phrase "unless the circumstances indicate otherwise" precludes "automatic absolution" from liability.[82] While a seller may prevent warranties from attaching to used goods by such language, the efficacy of the attempt will, under the *Knipp* rule, become a question of fact requiring evidence as to the circumstances surrounding the transaction.

3. THE DEMISE OF IMPLIED WARRANTIES

As is evident from a review of case law after the advent of strict liability in Florida, claims sounding in implied warranty are becom-

77. *See* Tampa Ship Bldg. Co. v. General Constr. Co., 43 F.2d 309, 311 (5th Cir. 1930); Lambert v. Sistrunk, 58 So. 2d 434 (Fla. 1952); U.S. Rubber Prods. v. Clark, 145 Fla. 631, 200 So. 385 (1941).

78. 351 So. 2d 1081 (Fla. 3d DCA 1977).

79. It should be noted that actions in implied warranty on used goods, although open to criticism, are likely to survive since, although strict liability has tended to replace implied warranty generally, the law of strict liability with respect to used goods is unsettled. *Id.* at 1086.

For a full and critical discussion of *Knipp,* and of a similar case involving used aircraft, Miles v. Kavanaugh, 350 So. 2d 1090 (Fla. 3d DCA 1977), see Murray, *Commercial Law, 1978 Developments in Florida Law,* 33 U. MIAMI L. REV. 853, 859-60 & nn.24 & 26 (1979).

80. 351 So. 2d at 1085.

81. FLA. STAT. § 672.316(3)(a) (1977).

82. 351 So. 2d at 1084.

ing a rarity. Just as implied warranty altered the scope of products liability by removing the onus of proving actual or constructive knowledge of the defect—so essential to a successful negligence count—strict liability relaxed the burden on plaintiff by expanding the protection to bystanders[83] and alleviating the problems of notice, disclaimers and privity which had made recovery difficult in implied warranty actions.

The standards applied to determine whether a product is merchantable under implied warranty[84] are similar to the criteria utilized in determining whether a product is in an unreasonably dangerous defective condition, the standard under strict liability. For all practical purposes, Florida has eliminated any privity or contract concepts in implied warranties of merchantability.[85] In essence, a manufacturer who produces a defective product which is not reasonably safe for its intended use is responsible for injury caused by the defect.[86] So, the two theories have become quite comparable. In *Sansing v. Firestone Tire & Rubber Co.*,[87] for instance, plaintiffs were injured by the explosion of a tire and sought recovery in negligence, breach of implied warranty and strict liability in tort. The trial court struck the strict liability count and charged the jury only with respect to the warranty theory of recovery. Assignment of error was predicated on, *inter alia,* this refusal to allow the strict liability theory to go to the jury. The District Court of Appeal, Fourth District, determined, after a comparison of the elements of strict liability and of implied warranty, that the standards of safety imposed by the two theories were practically indistinguishable.[88] Thus, the court determined that when the trial court instructed the jury on the warranty count, "from the totality of the instructions given, the trial court, although having struck the claim for strict liability, did in fact substantially instruct on strict liability. The two theories . . . have become so intertwined that the distinction . . . has no practical significance."[89] When, as in *Sansing,* one standard on which recovery is founded so totally absorbs another that a charge on either is sufficient to guide a jury to a just result, it seems

83. West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976).

84. The UCC suggests six standards for merchantability. FLA. STAT. § 672.314(2) (1977).

85. *See* 29 U. FLA. L. REV. 398, 403-07 (1977).

86. *Compare* Vandercook & Sons, Inc. v. Thorpe, 344 F.2d 930 (5th Cir. 1965), *rehearing denied,* 395 F.2d 104 (5th Cir. 1968) *and* McCarthy v. Florida Ladder Co., 295 So. 2d 709 (Fla. 2d DCA 1974) *with* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

87. 354 So. 2d 895 (Fla. 4th DCA 1978).

88. *Id.* at 896.

89. *Id.* at 897.

unlikely that the growth of the law will long permit the subsumed doctrine to exist.[90]

C. *Strict Liability*

An addition to the traditional negligence and implied warranty theories of recovery, strict liability emerged from the seminal case of *Greenman v. Yuba Power Products, Inc.*[91] and the *Restatement (Second) of Torts.*[92] It was heralded as a totally distinct theory of recovery which allowed plaintiff to sidestep the doctrinal hurdles of negligence[93] and implied warranty.[94] The historical background from which the doctrine emerged and the national impact of strict liability have been extensively and adequately dealt with elsewhere.[95] Still, a brief outline of the elements, as well as the impact of the doctrine in Florida, is in order.[96]

1. WHAT IS STRICT LIABILITY?

Strict liability is a rule under which liability may be imposed upon a manufacturer of a product regardless of negligence or the failure to exercise reasonable care.[97] Considerations of fault, due care and negligence are inapplicable. The plaintiff need not prove specific acts of negligence, as he would if pleading solely under negligence, and this substantially lessens the burden of proof under strict liability.[98] The standards of liability, as well as its limits, are clearly delineated in section 402A of the *Restatement*:

90. Although this decision suggests that the implied warranty action is absorbing the strict liability action, the authors of this article suggest that the wider scope of the strict liability doctrine will cause the reverse to obtain.

91. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

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

93. For instance, in negligence actions, the plaintiff is required to prove a specific defect or act of negligence. *See* notes 16-17 and accompanying text *supra*. *See also* notes 4-46 and accompanying text *supra*.

94. For instance, in an implied warranty action, the plaintiff must surmount the obstacles of notice requirements, disclaimers and privity. For a discussion of the privity aspects, see notes 67-74 and accompanying text *supra*.

95. *E.g.*, Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

96. Strict liability, as delineated by the RESTATEMENT (SECOND) OF TORTS § 402A, was expressly adopted by the Supreme Court of Florida in West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976). For a discussion of this landmark decision, see Murray, *1976 Developments in Florida Law—Commercial Law*, 31 U. MIAMI L. REV. 895, 898-99 (1977); 29 U. FLA. L. REV. 398 (1977).

97. *See* Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

98. *See* Green, *supra* note 18, at 1207; 4 W. ST. U.L. REV. 283, 286 (1977).

> (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.[99]

The section specifies that strict liability is imposed for reasons outside the traditional negligence and warranty theories:

> (2) The rule stated in subsection (1) applies although
>
> > (a) The seller has exercised *all possible care* in the preparation and sale of his product, and
> > (b) The user or consumer has not bought the product from or entered into any *contractual relationship* with the seller.[100]

The phrase "all possible care" in subsection (a) negates application of negligence principles, while subsection (b) expressly excludes warranty considerations.[101]

Public policy considerations gave birth to the new doctrine. The major policies distinguished by the courts and commentators are: (1) that the manufacturer is in a better position to protect against harm through improvement of the product; (2) that the risk of loss should not fall upon an innocent party, but should be spread among all consumers by an increase in the manufacturer's prices; (3) that the manufacturer is in a better position to insure against liability; (4) that the manufacturer should stand behind his product, and that he impliedly represents that it is reasonably fit for use when he places it in the stream of trade; and (5) that by holding the manufacturer to a higher standard, there will be a continual upgrading in the safety of products.[102] In sum, the policies indicate a mandate away from emphasis on fault to a risk-shifting policy based upon "enterprise liability."[103] The potential risk of loss due to an

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99. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

100. *Id.* § 402A(2) (emphasis added).

101. *Id.* § 402A, Comment a. The courts have recognized the independence of strict liability from negligence and warranty. Smith v. Fiat Roosevelt Motors, Inc., 556 F.2d 728, 730 (5th Cir. 1977); West v. Caterpillar Tractor Co., 336 So. 2d 80, 90 (Fla. 1976).

102. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965); Green, *supra* note 18, at 1190-91; Wade, *supra* note 97, at 826.

103. West v. Caterpillar Tractor Co., 336 So. 2d 80, 92 (Fla. 1976).

unreasonably dangerous defect in products liability cases is to be seen as a risk of doing business in the modern commercial world, and strict liability is the outgrowth of this philosophical change.

Under strict liability, however, the manufacturer is not to be viewed as an insurer.[104] The limitations on such liability are provided by section 402A of the *Restatement*: (1) the defendant must be engaged in the business of selling the product; (2) the product must be shown to be "defective"; (3) the defective condition must render the product unreasonably dangerous; and (4) the defect must be a cause of plaintiff's injury.[105] Consequently, although an automobile can cause injury, the manufacturer is liable only if the automobile is defective in some way that makes it unreasonably dangerous.[106]

Strict liability under section 402A was adopted in Florida by the supreme court in *West v. Caterpillar Tractor Co.*[107] The court outlined the above elements for holding a manufacturer liable, with one exception. Rather than merely stating that the defect must "cause" the injury, the court held that the existence of a "proximate causal connection" between the defect and injury must be shown. The authors suggest that the supreme court either misconstrued the doctrine entirely or poorly phrased this aspect of the elements of strict liability.[108] Proximate causation is a concept peculiarly applicable to negligence and should not enter into a strict liability analysis. Proximate cause "is applied by the courts to those more or less undefined considerations which limit liability *even where the fact*

104. Wade, *supra* note 97, at 828.

105. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

106. Thus, if the owner left a vehicle standing without putting on a handbrake and the vehicle rolled into plaintiff, plaintiff could not hold the manufacturer liable. The product was not in an unreasonably dangerous defective condition. If the owner, however, had just purchased a new car and had put on the handbrake, but the vehicle injured plaintiff due to a defective part that allowed the brake to release, then strict liability could be applicable.

107. 336 So. 2d 80 (Fla. 1976); *see* note 96 *supra*.

108. The present confusion among Florida district courts about strict liability may be attributable to the decision of the supreme court in *West*. The opinion is unclear about what exactly is being implemented under the strict liability label. The court stated that strict liability, as delineated by § 402A of the *Restatement*, is adopted in Florida. 336 So. 2d at 87. Later in the opinion, however, the court cited to the leading California case on strict liability, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). 336 So. 2d at 89. The California rule that developed from *Greenman* does *not* require, as does § 402A, that the defect be unreasonably dangerous for liability to be imposed. The issue is further clouded by the definition of strict liability provided in *West:* "Strict liability means negligence as a matter of law or negligence per se, the effect of which is to remove the burden from the user of proving specific acts of negligence." 336 So. 2d at 90. Under § 402A, however, strict liability is not considered a type of negligence and the manufacturer can be held liable regardless of the amount of due care exercised.

of causation is clearly established."[109] The *Restatement* uses only the phrase "harm thereby caused"; the omission of "proximate" would seem to indicate that under strict liability, "cause-in-fact," not proximate cause, should be the governing consideration.[110]

> The use of proximate cause can best be seen as a reflex reaction—a verbal crutch whose familiarity breeds contempt for rational analysis. One can speculate that the reason why proximate cause has surfaced in products liability cases is the courts' fear that, without proximate cause, manufacturers will be insurers of their products. Courts are, therefore, faced with the perplexing problem of limiting a section 402A action so that it does not become coextensive with insurance.[111]

The inclusion of proximate causation in strict liability analysis in *West* creates difficulties for the development of the doctrine in Florida. The courts must establish the meaning proximate cause shall have in the strict liability context. The strict liability rule needs the causation concept in order to determine when a manufacturer should no longer be liable for harm caused by a defect which is unreasonably dangerous. Therefore, the authors suggest that proximate cause should be defined as a standard for determining that plaintiff's injury was in fact caused by and was a foreseeable consequence of the defect. This would assuage the fear that without proximate cause manufacturers would be insurers of their products. It would also prevent courts from using proximate cause to bar recovery when, in essence, they are really applying contributory

109. W. PROSSER, LAW OF TORTS 244 (4th ed. 1971) (emphasis added).

110. For a persuasive discussion decrying the use of proximate cause terminology in strict liability analysis, see Maleson, *Negligence is Dead But Its Doctrines Rule Us From The Grave: A Proposal to Limit Defendant's Responsibility in Strict Products Liability Actions Without Resort to Proximate Cause,* 51 TEMPLE L.Q. 1 (1978).

111. *Id.* at 16 (citations omitted). The author offers a "duty-risk analysis" solution to the problem. Under this standard, the judge would formulate the duty of the defendant and then decide the scope of the risk that should be encompassed within that duty. *Id.* at 17-20; *see, e.g.,* Hishchoff, *Toward a Test for Strict Liability in Torts,* 81 YALE L.J. 155 (1972) (advocating an economic approach). The authors herein contend that proximate cause, as well as comparative negligence, may not be the appropriate answer to the problem of limiting a manufacturer's liability because of the overtones of negligence law in the doctrines. Rather, they advocate a balancing test. *See* text accompanying notes 195-200 *infra.*

That negligence law may be easily, if inappropriately, incorporated into strict liability analysis is apparent from decisions of the lower courts. For instance, the District Court of Appeal, First District, has held that under strict liability, proof of a subsequent improvement in a product "is not an evidentiary fact ipso facto to infer negligence in the manufacture of the original product." Ellis v. Golconda Corp., 352 So. 2d 1221, 1224 (Fla. 1st DCA 1977). The inquiry, however, should not be whether there was negligence in the manufacture of the product, since § 402A states that liability is imposed regardless of due care. RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965).

negligence as an absolute bar to recovery.[112]

The influx of negligence principles into strict liability resulting from the language of the *West*[113] opinion causes misdirection of strict liability analysis.[114] In keeping with the policies behind the strict liability doctrine,[115] inquiries should be limited to whether the product was defective and whether the defect caused injury to the plaintiff. Questions concerning the plaintiff's conduct should not be addressed in the context of causation, but only after liability has been determined.[116]

2. STRICT LIABILITY OF RETAILERS

Section 402A of the *Restatement (Second) of Torts* establishes that strict liability applies to those "engaged in the business of selling such a product."[117] Comment f to this section further defines the class of defendants as extending "to any manufacturer of such a product, to any wholesaler or retail dealer or distributor, and to the operator of a restaurant."[118] In *West,* the Supreme Court of Florida, in adopting strict liability, held that the rule applies to manufacturers.[119] Subsequently, the Florida courts implicitly extended the scope of liability to include retailers.[120]

Of course, a retailer always has recourse against the manufacturer for indemnification. In *Pender v. Skillcraft Industries, Inc.*,[121]

112. The Supreme Court of Florida has abrogated contributory negligence and adopted comparative negligence, confining questions of plaintiff's conduct to the area of damages. *See* note 55 and accompanying text *supra.*

Nevertheless, the District Court of Appeal, Second District, recently held that a plaintiff could not recover when his conduct was the sole cause of the accident. Watson v. Lucerne Mach. & Equip. Co., 347 So. 2d 459, 461 (Fla. 2d DCA 1977). Such language is inappropriate within the strictures of products liability and comparative negligence. Plaintiff's conduct is no longer the determinative inquiry under strict liability and should be relevant only in apportioning damages if the product is found to be defective. Although the Second District did find that the product was not defective, the holding should have been based solely on this determination.

113. For a discussion of the problems this infusion of negligence principles has caused in the area of defenses, see notes 142-208 and accompanying text *infra.*

114. *See* note 112 *supra.*

115. *See* notes 101-02 and accompanying text *supra.*

116. *See* note 112 *supra.*

117. RESTATEMENT (SECOND) OF TORTS § 402A(1)(a) (1965).

118. *Id.* Comment f.

119. 336 So. 2d at 92.

120. *E.g.*, Rice v. Walker, 359 So. 2d 891 (Fla. 3d DCA 1978) (allowing amendment of complaint which failed to state cuase of action in strict liability against retailer because it lacked allegations showing how components were defective); Knipp v. Weinbaum, 351 So. 2d 1081 (Fla. 3d DCA 1977) (allowing amendment of complaint to include cause of action in strict liability against retailer).

121. 357 So. 2d 45 (Fla. 4th DCA 1978).

the District Court of Appeal, Fourth District, extended the applicability of indemnification to strict liability cases. A retailer is entitled to indemnification if the defect in the product is latent and the retailer had no knowledge nor should have known of such defect.[122] Normally, however, a retailer may be reimbursed for his costs of litigation only if he is found liable under the primary action and entitled to indemnification by the manufacturer. If the retailer is found not liable, he must bear the costs of litigation. The Fourth District, finding no justification for this result, determined that even if the retailer is exonerated of all liability in the primary action, he is still entitled to indemnification for court costs and attorney's fees.

3. STRICT LIABILITY AND USED GOODS

The relationship between used merchandise and strict liability is complex. Although Florida courts have imposed liability under negligence[123] and implied warranty[124] theories for injuries resulting from used goods sold by the defendant, the applicability of strict liability[125] raises different considerations because it places liability on one outside of the original manufacturing and marketing chain. The expectations of the parties become relevant. A consumer expects a new product to be reasonably safe. Purchase of a used product, however, is usually at a reduced price, reflecting the lower expectations of the buyer. Not only may the product be "expected" to malfunction, but also problems of proof may be compounded, as there may be no way to trace the defect to a specific cause.

Nevertheless, there may be a strong argument for imposing strict liability upon a seller of used products if that seller places an *unreasonably* dangerous defective product in the stream of commerce. A case-by-case determination may be appropriate, with primary focus on whether the product was unreasonably dangerous. The "reasonableness" would be determined by examination of all factors. Public policy may demand such an approach in order to ensure that safety standards, even for used merchandise, be kept within acceptable limits.

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122. *Id.* at 46. The passive wrongdoer is generally entitled to indemnification from the active wrongdoer. W. PROSSER, *supra* note 109, at 312.

123. Knipp v. Weinbaum, 351 So. 2d 1081, 1085-86 (Fla. 3d DCA 1977) (reversing summary judgment for defendant because of disputed facts about degree of care).

124. *Id.* at 1084-85 (citing Brown v. Hall, 221 So. 2d 454 (Fla. 2d DCA 1969)).

125. The District Court of Appeal, Third District, has held that a plaintiff should be permitted to amend his complaint to state a cause of action in strict liability against a seller of used goods. *Id.* The court, however, did not reach the question of whether the doctrine of strict liability should apply to used goods.

4. THE SCOPE OF LIABILITY

The scope of protection afforded by strict liability was left open in section 402A, which provides that the defendant is liable to the "ultimate user or consumer."[126] *West v. Caterpillar Tractor Co.,*[127] however, settled the question for purposes of Florida law. The Supreme Court of Florida stated:

> The public policy which protects the user and the consumer of a manufactured article should also protect the innocent bystander. . . . Injury to a bystander is often feasible. A restriction of the doctrine to the users and consumers would have to rest on the vestige of the disappearing privity requirement.[128]

This holding is in accordance with the policy foundation of strict liability—that the seller should bear the risk of loss.[129] Therefore, there is no rational justification for prohibiting parties other than a user or consumer from suing for damages if it is foreseeable that the product may cause injury or harm to these parties.[130]

5. LIABILITY FOR DESIGN DEFECTS AND FAILURE TO WARN

A cause of action under strict liability for defective design is directed to the whole line of products rather than to a specific item. The question is not whether the particular product was defective but whether the manufacturer should have marketed the product at all. It is an attack on the manufacturer's conscious design choice and should be governed by practical considerations concerning ability, cost and feasibility of eliminating the risk at the time of manufacture and the degree and likelihood of harm. In Florida, subsequent improvement in the design of a product is inadmissible in an action based upon strict liability.[131] This inflexible rule seems inappropriate, since plaintiff may be able to show that the risk was known and could have been economically eliminated at the time the product entered the marketing stream.

The relationship between strict liability and the duty to warn is set out by the comments to section 402A of the *Restatement (Second) of Torts.* Failure to give an adequate warning may render

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126. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965). *See also id.* Comment l.

127. 336 So. 2d 80 (Fla. 1976).

128. *Id.* at 89; *accord,* Watson v. Lucerne Mach. & Equip., Inc., 347 So. 2d 459, 461 n.1 (Fla. 2d DCA 1977).

129. *See* text accompanying notes 102-03 *supra.*

130. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment o (1965).

131. Ellis v. Golconda Corp., 352 So. 2d 1221, 1224 (Fla. 1st DCA 1977).

a product defective.[132] In addition, an adequate warning may be necessary to prevent a product from being unreasonably dangerous.[133] By the use of such a warning, a product otherwise unreasonably dangerous may be rendered reasonably dangerous, thereby eliminating strict liability.[134] Consumer expectations are the key to the necessity and adequacy of the warning.[135]

The case law in Florida on warnings and defects in design in the strict liability context is sparse. A recent decision of the District Court of Appeal, First District, is particularly troublesome with respect to defective design and failure to give adequate warning. In *Hethcoat v. Chevron Oil Co.*,[136] plaintiff's husband was killed while removing a deteriorated inner lining from a heating chamber. The lining could only be removed by an acetylene torch, which caused a violent explosion due to combustible vapors remaining in the chamber even after drainage. The First District held that there was no design defect. The reasoning, however, is syllogistic due to a combination of the facts. The intended use of the heating chamber caused combustible gases to collect and the maintenance of the chamber required that the inner lining be removed by torch. Plaintiff alleged, in addition, that the failure of the manufacturer to warn against the danger was a sufficient ground to hold the manufacturer liable. The court found the plaintiff's argument in this regard unpersuasive, stating that "[t]o hold that every part subject to repair at a grave risk must have a posted warning would result in an impossible and even undesirable situation."[137] Again, the logic is specious. The warning that the manufacturer had given merely stated: "Remove all oil from heater."[138] The manufacturer, at a very small burden to himself, could have included the phrase "by the use of steam" in the warning instructions in order that the user might have made the chamber safe by eliminating the combustible vapors which, when ignited, caused the explosion. The authors of this article contend that the court erred in its conclusion. Comment h to section 402A of the *Restatement* states: "Where, however, [the manufacturer] has reason to anticipate that danger may result from a particular use . . . he may be required to give adequate warning of the danger

132. RESTATEMENT (SECOND) OF TORTS § 402A, Comment h (1965).

133. *Id.* Comment j.

134. Wade, *supra* note 97, at 841-42. The adequacy of a warning is determined by "its clarity, its prominence, whether it is attached to the product or is provided separately." *Id.* at 842.

135. RESTATEMENT (SECOND) OF TORTS § 402A, Comment j (1965).

136. 364 So. 2d 1243 (Fla. 1st DCA 1978) (per curiam).

137. *Id.* at 1244-45.

138. *Id.*

. . . and a product sold without such warning is in a defective condition."[139] From the facts stated in *Hethcoat,* one could conclude that the manufacturer had reason to anticipate the danger of the explosion and that a jury question was presented as to the adequacy of the warning and the possible defect in design.

At least one commentator[140] has concluded that failure to warn and design defect cases belong solely within the confines of negligence principles in that such determinations should be governed by standards of negligence and foreseeability. Although there may be merit to this approach, the *Restatement* provides support for including these grounds within section 402A actions.[141]

III. Defenses to a Products Liability Action

A. *Introduction*

Regardless of the theory of recovery utilized, the plaintiff must prove that defendant placed a defective product in the stream of trade and that the defect caused injury to plaintiff. Absent proof of such defect, the defendant is not liable. Regardless of the theory of recovery upon which suit is based, a possible defense is that one of the essential elements of the cause of action is missing. In a negligence action,[142] defendant could prove that no duty was owed to plaintiff or that plaintiff's injury was not proximately caused by the defect in the product. In an action for breach of implied warranty, defendant could prove that plaintiff was a nonuser or nonconsumer —merely a bystander—and thereby successfully defend.[143] In a strict liability case, however, defenses based upon the elements of the action are not as readily available because strict liability is premised solely on public policy considerations,[144] which result in a reduced burden of proof for the plaintiff. Nevertheless, a defendant may, as a defense, prove that there was no defect in the product or that, even if there were a defect, it did not make the product unreasonably dangerous.[145]

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139. Restatement (Second) of Torts § 402A, Comment h (1965).

140. Maleson, *supra* note 110, at 26-27.

141. Restatement (Second) of Torts § 402A, Comments h & j (1965).

142. *See* text accompanying note 7 *supra.* The traditional elements necessary for actionable negligence are: (1) the existence of a legal duty owed by defendant to plaintiff; (2) a breach of that duty; (3) proximate causation; and (4) injury or damages. W. Prosser, *supra* note 109, at 143.

143. *E.g.,* Engel v. Lawyers Coop. Publishing Co., 198 So. 2d 93 (Fla. 3d DCA 1967).

144. *See* text accompanying notes 102-03 *supra.*

145. The standard for strict liability is that the product be in "a defective condition unreasonably dangerous." Restatement (Second) of Torts § 402A(1) (1965).

B. *Affirmative Defenses*

Certain longstanding defenses have barred plaintiffs from recovery in products liability cases even when the burden of proof regarding the elements of the particular cause of action was met. Contributory negligence,[146] assumption of risk[147] and the "open and obvious doctrine"[148] served as vestigial barriers to recovery in Florida. Florida case law over the past several years, however, has evinced a trend away from the absolute defenses represented by these doctrines.

The growing national dissatisfaction with these absolute bars to recovery[149] appeared in Florida in a series of decisions[150] which uprooted the traditional barriers in favor of a simpler system revolving around the concept of comparative negligence. Many commentators,[151] however, disagree with the method of the courts in their approach to defenses in products liability cases. They believe that many courts are erroneously grouping the three theories of recovery, allowing defenses, which should be applicable only to one theory, to be utilized regardless of the theory of recovery.[152] That is, since the elements of the cause of action and the burden of proof for both plaintiff and defendant are distinct and different for each theory, defenses having their foundation in negligence should not be applied to a theory of recovery based on strict liability. As one commentator observed:

> Now that Section 402A has gained general acceptance and *caveat venditor* seems to be the philosophy of the day, it would be reasonable to expect that the painful doctrinal contortions of the past century have been laid to rest. However, it is becoming

146. *E.g.*, Coleman v. American Universal, Inc., 264 So. 2d 451 (Fla. 1st DCA 1972) (contributory negligence available as defense in breach of implied warranty action). The Supreme Court of Florida replaced contributory negligence with comparative negligence. *See* note 54 *supra*.

147. *E.g.*, Southern Turpentine Co. v. Douglass, 61 Fla. 424, 54 So. 385 (1911) (employee assumes all risks necessarily incident to his employment).

148. *E.g.*, Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956) (implied warranty does not protect against hazards apparent to plaintiff).

149. *See* W. PROSSER, *supra* note 109, at 433-34 (discussing contributory negligence doctrine).

150. *E.g.*, Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977) (abolished implied assumption of risk as an absolute defense); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (abrogated contributory negligence).

151. *E.g.*, Green, *supra* note 18, at 1197-98 (basis of liability differs between negligence and strict liability, issues of legal causation are inapplicable to strict liability); Maleson, *supra* note 110, at 21-26 (courts analyze strict liability within traditional confines of negligence).

152. The three theories are negligence, implied warranty and strict liability.

> increasingly obvious that they persist. Courts that were once concerned with justifying exceptions to the privity limitation have become similarly preoccupied with justifications for their occasional departures from a standard of strict responsibility for all harm resulting from the manufacturer of a defective product. The analytical structure of the cases is curiously similar despite the fact that the underlying premises have shifted radically from limited fault-based liability to strict liability. The result is doctrinal havoc.[153]

Strict liability emerged as a distinct theory of recovery in products liability cases, not as an offshoot of the two traditional approaches, warranty and negligence.[154] Thus, courts should analyze strict liability as an independent doctrine governed by the distinct analytical framework established by section 402A of the *Restatement* which was explicitly adopted by the Supreme Court of Florida in *West v. Caterpillar Tractor Co.*[155] Despite this express implementation of the *Restatement* standard, however, the court stated that "[t]he ordinary rules of causation and the defenses applicable to negligence are available under our adoption of the *Restatement* rule."[156] In this the court seems to have construed strict liability as a type of negligence, not as an independent theory of recovery governed by the standards and limitations expressed in section 402A. This unfortunate confusion persists, appearing in the treatment of affirmative defenses in subsequent Florida case law.

1. CONTRIBUTORY NEGLIGENCE

In *Hoffman v. Jones*,[157] the Supreme Court of Florida abrogated the doctrine of contributory negligence as an absolute bar to recovery in favor of the more equitable concept of comparative negligence.[158] The supreme court adopted the "pure" form of comparative negligence, in which plaintiff's recovery is merely reduced by

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153. Maleson, *supra* note 110, at 12.

154. *See, e.g.*, W. PROSSER, *supra* note 109, at 494. Dean Prosser observed that the policy underlying strict liability is "that the defendant's enterprise, while it will be tolerated by the law, must pay its way." *Id.* (citation omitted). Moreover, social justice requires that liability be imposed on the defendant regardless of fault, because he is better able to bear the loss. *Id.* For an amplification of the various public policy reasons for strict liability, see text accompanying notes 102-03 *supra*.

155. 336 So. 2d 80, 88 (Fla. 1976). The supreme court recognized that strict liability was to be construed as an "independent [body] of products liability law." *Id.*

156. *Id.* at 90.

157. 280 So. 2d 431 (Fla. 1973); *see* note 55 and accompanying text *supra*.

158. Comparative negligence is an affirmative defense which is waived if not raised in defendant's answer. FLA. R. CIV. P. 1.110(d) & 1.140(b).

that proportion of fault attributable to him.[159] The *Hoffman* rule was specifically limited to negligence actions, since, as the court noted, comparative negligence is appropriate to a system of "liability based on a fault premise."[160] Nevertheless, the supreme court later extended the applicability of comparative negligence to strict liability actions.[161] Therefore, under strict liability, plaintiff's recovery is reduced by that proportion which can be attributed to his own conduct in "voluntarily and unreasonably proceeding to encounter a known danger."[162] Nevertheless, the courts are not correctly applying the new doctrine regarding strict liability cases but are reintroducing fault principles into the theory to bar recovery rather than apportion damages. One example of negligence terminology in a strict liability context is the District Court of Appeal, Second District, case of *Watson v. Lucerne Machinery & Equipment Co.*[163] In *Watson,* the Second District essentially applied contributory negligence standards to bar recovery under the guise of proximate cause.

2. ASSUMPTION OF RISK

Another traditional defense in products liability cases has recently been abrogated in Florida. In *Blackburn v. Dorta,*[164] an action sounding in negligence, the Supreme Court of Florida abolished implied assumption of the risk[165] as an absolute defense, merging it into the doctrine of comparative negligence. In an attempt to unravel elements of the defense, which it designated "a potpourri of labels, concepts, definitions, thoughts and doctrines,"[166] the court divided the doctrine initially into primary and secondary assumption of the risk.

The court quickly dismissed primary assumption of risk, finding that it came within the general rubric of negligence and that no purpose was served by continuing an artificial distinction.[167] In moving to secondary assumption of risk, the court further dissected the

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159. 280 So. 2d at 438.

160. *Id.* at 436.

161. West v. Caterpillar Tractor Co., 336 So. 2d 80, 90 (Fla. 1976).

162. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

163. 347 So. 2d 459 (Fla. 2d DCA 1977).

164. 348 So. 2d 287 (Fla. 1977).

165. Express assumption of risk, which was viewed by the court as a contractual concept, was explicitly left untouched by the decision. The court defined express assumption of risk as those situations involving either an express contract not to sue for injury or loss, or where *actual* consent to participate was given. *Id.* at 290.

166. *Id.* at 290.

167. *Id.* at 291.

doctrine by delineating two subcategories, pure or strict assumption of the risk and qualified assumption of the risk.[168] The court dismissed pure assumption of the risk as an absolute defense, finding that there was no justification for its continuance as a viable principle of law. After analysis of qualified assumption of risk, the court concluded that there was no reason for distinguishing between this defense and contributory negligence and held, therefore, that this form of assumption of risk was merged into the defense of contributory negligence and was to be guided by the principles of comparative negligence enunciated in *Hoffman v. Jones.*[169]

Assumption of risk is traditionally defined as voluntary and unreasonable conduct in proceeding to meet a known danger.[170] The Supreme Court of Florida went to great lengths to distinguish the various subcategories of the doctrine, only to hold that they all were subsumed in contributory negligence, with the exception of express assumption of the risk. This result was readily foreseeable after the decision in *Hoffman.* Although the theory of recovery was based on negligence, it is apparent that the abrogation would extend to all three theories of recovery in products liability cases. The reasoning of the court is applicable whether the action sounds in negligence, implied warranty or strict liability. The root of the doctrine is plaintiff's conduct. Since *Hoffman,* plaintiff's conduct is no longer a complete bar to recovery but rather a factor in determining damages. And so, if there is negligence, breach of an implied warranty or an unreasonably dangerous defective product, plaintiff's conduct, whether labeled contributory negligence or one of the enunciated types of assumption of the risk, will only be relevant with respect to apportioning fault.

3. THE OPEN AND OBVIOUS DOCTRINE

Until recently, the open and obvious doctrine[171] had been relied on by Florida courts to defeat recovery by a plaintiff if it were found that the danger complained of was obvious and patent to the reasonable man.[172] The doctrine originated in a New York case, *Campo v.*

168. Pure assumption of risk was defined as conduct which bars recovery but is nonetheless reasonable. Implied assumption of risk was described as unreasonable conduct which bars recovery. *Id.*

169. 280 So. 2d 431 (Fla. 1973).

170. *See* Darling, *The Patent Danger Rule: An Analysis and a Survey of Its Vitality,* 29 MERCER L. REV. 583, 602 (1978).

171. Also referred to as the "patent danger" doctrine.

172. For a list of jurisdictions that also have repudiated the doctrine, see Darling, *supra* note 170, at 606-08.

Scofield,[173] and was introduced to Florida law in dictum by the case of *Matthews v. Lawnlite Co.*[174] The underlying premise of the doctrine is that the manufacturer is under no duty to the plaintiff to render a machine safe from readily apparent dangers. Thus, the inquiry focuses upon plaintiff's conduct in light of the situation, rather than upon defendant's negligence, breach of implied warranty or manufacture of a defective product. With the demise of contributory negligence and assumption of risk as absolute defenses, however, the abrogation of the open and obvious doctrine appeared certain, for it is nothing more than assumption of risk under a different facade.

On January 18, 1979, the Supreme Court of Florida in a well-reasoned decision confronted the issue in *Auburn Machine Works Co. v. Jones.*[175] Plaintiff sought recovery for the loss of a limb, claiming that the trench-digging machine which caused the injury departed from reasonable engineering standards because it lacked a simple chain guard which would have prevented plaintiff's injury. Rejecting the defendant's assertion of the patent danger doctrine,[176] the supreme court held that the doctrine would no longer serve as an absolute bar to recovery by an injured plaintiff. Rather, the obviousness of the danger could only be utilized as a defense, guided by the principles of comparative negligence.[177] The court stated:

> The patent danger doctrine encourages manufacturers to be outrageous in their design, to eliminate safety devices, and to make hazards obvious.
>
> . . . .
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> The patent danger doctrine protects manufacturers who sell negligently designed machines which pose formidable dangers to their users. It puts the entire accidental loss on the injured plaintiff, notwithstanding the fact that the manufacturer was partly at fault. This is inconsistent with the general philosophy espoused by this Court.[178]

In rejecting the doctrine as an absolute bar to recovery, the supreme court recognized a burgeoning movement in other jurisdic-

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173. 301 N.Y. 468, 95 N.E.2d 802 (1950).

174. 88 So. 2d 299 (Fla. 1956). "An implied warranty does not protect against hazards apparent to the plaintiff." *Id.* at 301.

175. 366 So. 2d 1167 (Fla. 1979).

176. Defendant relied primarily on Farmhand, Inc. v. Brandies, 327 So. 2d 76 (Fla. 1st DCA 1976). The court in *Farmhand* applied the doctrine subject to certification of the question to the Supreme Court of Florida. But the supreme court was precluded from resolving the question because the case was settled on appeal.

177. 366 So. 2d at 1171-72.

178. *Id.* at 1170-71.

tions.[179] In 1976, the New York Court of Appeals overruled the often cited case of *Campo* in *Micallef v. Miehle Co.*[180] In abrogating the doctrine, the court in *Micallef* noted: (1) that legal scholars have long attacked it; (2) that the rigid doctrine is a vestige from pre-products liability law; and (3) that it amounts to assumption of risk as a matter of law. This compelling reasoning represents the trend in the United States in actions for negligence, breach of implied warranty and strict liability.[181]

Significantly, the erosion of the open and obvious doctrine in Florida began at the district court level. The District Court of Appeal, Fourth District, in *Blaw-Knox Food & Chemical Equipment Corp. v. Holmes*,[182] held that the doctrine was no longer viable in an action based upon negligence:

> Deprived of its support from New York, the viability of the patent danger doctrine in Florida has further been put into doubt by . . . *Blackburn v. Dorta*.
> . . . [W]e now hold that the patent danger doctrine is also merged into the defense of contributory negligence and the principles of comparative negligence.[183]

The reasoning of the Fourth District was persuasive in light of the recent Florida trend away from absolute bars to recovery. Anticipating the correct result in *Auburn*,[184] the Fourth District determined that the patent danger doctrine should not alone bar plaintiff from

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179. The modern trend in the nation is to abandon the strict patent danger doctrine as an exception to liability and to find that the obviousness of the defect is only a factor to be considered as a mitigating defense in determining whether a defect is unreasonably dangerous and whether plaintiff used that degree of reasonable care required by the circumstances.

Id. at 1169.

180. 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976). The decision in *Farmhand*, which reaffirmed the *Campo* rule, *see* note 176 *supra*, was rendered prior to the *Miscallef* decision and the decision of the Supreme Court of Florida in West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976).

181. *See, e.g.*, Davis v. Fox River Tractor Co., 518 F.2d 481 (10th Cir. 1975) (obviousness of danger does nothing to obviate the danger); Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973) (obviousness of danger does not ipso facto preclude recovery); Beloit Corp. v. Harrell, 339 So. 2d 992 (Ala. 1976) (conduct of plaintiff and condition and use of product are factual issues for jury, not a defense as a matter of law); Byrns v. Riddell, Inc., 113 Ariz. 264, 550 P.2d 1065 (1976) (held open and obvious doctrine inconsistent with modern law of strict liability in tort); Olson v. Chesterton Co., 256 N.W.2d 530 (N.D. 1977) (*Campo* rule does not preclude liability); Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975) (obviousness of peril not a defense to strict liability).

182. 348 So. 2d 604 (Fla. 4th DCA), *cert. dismissed*, 351 So. 2d 405 (Fla. 1977).

183. *Id.* at 607.

184. "*Blaw-Knox* . . . is consistent with our holding in the present case." *Auburn*, 366 So. 2d at 1172 n.2.

presenting his case. Instead, the patentness of the danger should serve merely as one factor in determination of liability.

The District Court of Appeal, Second District, also confronted the doctrine in *Watson v. Lucerne Machinery & Equipment, Inc.*[185] Although stating that it did not base its holding on the patent danger rule,[186] the court clearly was influenced in holding against plaintiff because it continually referred to the machine as one which "presented obvious dangers."[187] The case indicates that the Second District was uneasy with, as well as unsure of, the doctrine.

Predictably, this clear conflict among the district courts was resolved by the supreme court. The decision in *Auburn* put to rest a doctrine which had outlived its usefulness, if indeed it ever served a proper function.[188] Moreover, the decision should be applauded in that it once again brings Florida law within the modern trend of products liability and harmonizes Florida law with the earlier decisions which abrogated contributory negligence[189] and assumption of risk[190] as absolute defenses.

C. *The Spectres Linger*

Although the Supreme Court of Florida has mandated a retreat from absolute defenses to a comparative negligence standard, the courts have been unable to deal adequately and consistently with the new approach. As previously mentioned, the doctrines of contributory negligence and assumption of risk still act as bars to recovery *sub silencio* in some cases. In *Watson v. Lucerne Machinery & Equipment, Inc.*,[191] an employee was killed while under a citrus-sampling machine after having been warned to stay clear of the machine. Decedent's personal representative brought suit under strict liability, alleging that the machine was defective due to inadequate safety devices. The District Court of Appeal, Second District, held that the decedent was the proximate cause of his own death.

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185. 347 So. 2d 459 (Fla. 2d DCA), *cert. denied*, 352 So. 2d 176 (Fla. 1977).

186. *Id.* at 461 n.2. "Under *Dorta* it is arguable that the patent danger doctrine might be included in one of the many variations of assumption of the risk." *Id.*

187. *Id.* at 461. The danger was "clearly visible." *Id.* at 460.

188. The doctrine has been severely critized by numerous commentators. *E.g.*, L. FRUMER & M. FRIEDMAN, *supra* note 6, § 7.02 (1960 & Supp. 1978); F. HARPER & F. JAMES, THE LAW OF TORTS, § 28.5, at 1542-43 (1956); Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturer's Liability for Patently Dangerous Products*, 48 N.Y.U. L. REV. 1065 (1973); Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521 (1974).

189. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

190. Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977).

191. 347 So. 2d 459 (Fla. 2d DCA), *cert. denied*, 352 So. 2d 176 (Fla. 1977).

Proximate causation, however, is a term of art used in conjunction with negligence principles. Nowhere in section 402A of the *Restatement* or in the comments appended thereto is there a reference to proximate causation in the sense it is used under negligence theories. Section 402A states that the manufacturer is liable for physical harm "caused" to the plaintiff—meaning cause-in-fact of the injury.[192] The correct analysis in *Watson* should have been that although the machine was the "cause" of decedent's death, it was not "in a defective condition unreasonably dangerous."[193] In other words, it was not unreasonably dangerous when used properly. Thus, the outcome of the Second District was correct, although the opinion was incorrectly worded. The standard under a section 402A action is that of a "defective condition unreasonably dangerous." If the product is such, then liability is imposed, with plaintiff's conduct only becoming an issue in measuring damages. The court, rather than stating that the machine was not unreasonably dangerous, found that the death was not proximately caused by a defect in the product. This unnecessary determination only adds to the confusion in distinguishing products liability theories and their respective elements.[194]

Abolition of the "all or nothing" approach has served to shift the steps of analysis in products liability cases. The landmark cases have relegated plaintiff's conduct to a secondary level of inquiry. The primary inquiry now should be whether the defendant acted negligently, breached an implied warranty or introduced an unreasonably dangerous defective product into the stream of trade. If plaintiff can establish his case at this primary level, summary judgments or directed verdicts would be inappropriate despite evidence of plaintiff's misconduct.[195] Instead, the secondary level of inquiry should then focus on plaintiff's conduct in light of all the circumstances as well as the state of the art of the industry involved.[196] Plaintiff, under the principles of comparative negligence, should recover that proportion of the judgment due to defendant's liability.

In negligence actions, the recovery would be determined by comparing the fault of the plaintiff, his own negligence, with that of the defendant in failing to exercise due care. Under strict liability, the analysis becomes somewhat more difficult because this

192. *See* Green, *supra* note 18, at 1197-98.

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

194. *See also* Wade, *supra* note 97, at 843.

195. Misconduct is here defined as contributory negligence or one of the many types of assumption of risk.

196. *See also* Wade, *supra* note 97, at 843.

theory properly does not encompass fault principles.[197] In fact, many commentators have severely criticized the use of comparative negligence in a strict liability action, arguing that "[i]f we have abandoned fault as a touchstone of liability [in strict liability actions], we must, of necessity, abandon its doctrinal trappings."[198] In essence, within a strict liability theory of recovery, what is being compared under comparative negligence is the conduct of plaintiff and the defect in the product. The problems of apportioning fault become obvious in this "apples and oranges" comparison. The solution may be found by using a balancing rationale, rather than the doctrine of comparative negligence. Since a manufacturer is not an insurer under strict liability,[199] defenses should be available to mitigate damages. Rather than using a doctrine founded in negligence, however, the courts should use one that expressly takes into account the industry and the consumer, in a balancing of costs and benefits. Strict liability is a judicially-created doctrine, explicitly based upon public policy considerations of risk allocation, cost distribution and the hope of continual upgrading of safety standards.[200] In keeping with these policies, the issue is the condition of the particular product, not the plaintiff's conduct in relation to that of the manufacturer.

D. *Misuse*

Although Florida case law indicates that the defense of misuse is not utilized within the products liability framework, many jurisdictions have introduced this "newly" developed defense in products liability cases. In essence, defendant is relieved from liability if plaintiff uses the product in a manner not reasonably contemplated by the manufacturer and such misuse causes the injury.[201] In negligence cases, for example, it is said that it is the plaintiff's abnormal use[202] of the product rather than the manufacturer's negli-

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197. *See* note 154 *supra*.

198. Maleson, *supra* note 110, at 37. *See also* Note, *Comparative Fault and Strict Products Liability: Are They Compatible?*, 5 PEPPERDINE L. REV. 501 (1978).

199. *See* West v. Caterpillar Tractor Co., 336 So. 2d 80, 90 (Fla. 1976); Note, *supra* note 198, at 506.

200. *See* Maleson, *supra* note 110, at 10-12.

201. Although the lower courts do not appear to have used the concept in recent products liability cases, the Supreme Court of Florida has mentioned misuse in the context of negligence. West v. Caterpillar Tractor Co., 336 So. 2d 80, 90 (1976).

One commentator advocates a similar balancing test for determining whether a product is unreasonably dangerous. Maleson, *supra* note 110, at 35-38.

202. "Normal" usage may include conduct that defendant could reasonably foresee. Also, defendant must take precautions either in product design or in warnings to prevent

gence which *proximately caused* the injury. In implied warranty cases, it is asserted that no warranty by the manufacturer attaches to the misuse of a product; the manufacturer is entitled to rely on the fact of a reasonable or intended use of his product.[203] In some jurisdictions, misuse in a strict liability case acts as a bar to recovery.[204]

The misuse doctrine should be used not as an absolute defense[205] but rather as a factor in determining whether the product was dangerously defective. It may be that this interpretation would aid the Florida courts in deciding strict liability cases. For example, in *Watson v. Lucerne Machinery & Equipment, Inc.*,[206] the tangled discussion of proximate cause and obvious defect in the context of strict liability was unnecessary. The court could have found that misuse of the machine was the sole cause of the danger[207] and that, therefore, the product in and of itself was not in a defective condition unreasonably dangerous to the user or consumer. "[S]trictly speaking, [misuse] is not an affirmative defense, but is the converse of the requirement that the product be used in a reasonably foreseeable manner."[208]

IV. CONCLUSION

In summary, it is manifest that products liability law in Florida is still unsettled, at least at the district court level. This state of affairs springs not so much from the absence of guiding precedent as from the confusion reigning among the opinions of the courts. As the courts struggle to apply the three theories of products liability recovery, they frequently fail to draw distinct lines between the competing theories and their essential elements. History and habit seem to have overcome the dictates of the Supreme Court of Florida and the commentators as negligence, implied warranty and strict liability are haphazardly invoked to support a court's conclusion because of an inability to apply or to recognize the distinctions

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harm. Defendant, however, is not liable for an unforeseeable, abnormal use of his product which causes injury.

203. *See* W. PROSSER, *supra* note 109, at 639.

204. *See* Wade, *supra* note 97, at 846 (misuse should be used only in determining whether product is unsafe, not whether plaintiff is "contributorily negligent").

205. *See* Vargo, *The Defenses to Strict Liability in Tort: A New Vocabulary with an Old Meaning*, 29 MERCER L. REV. 447, 458 (1958).

206. 347 So. 2d 459 (Fla. 2d DCA), *cert. denied*, 352 So. 2d 176 (Fla. 1977); *see* text accompanying notes 193-95 *supra*.

207. Decedent was killed after he crawled under the machine.

208. Frank & Ringkamp, *Products Liability Primer*, in PERSONAL INJURY ANNUAL 415, 424-25 (L. Frumer & M. Minzer eds. 1978).

inherent in each doctrine.

Strict liability, the emerging theory of products liability, has become infested with elements of negligence due to some loosely worded opinions. These decisions have served as precedent, establishing and perpetuating the confusion. This article has sought to highlight this trend in the Florida courts, to segregate the various theories, to facilitate their proper application, and to advocate an increased sensitivity within the courts to the development of the law in this field.

Strict liability has virtually supplanted the two "older" theories of recovery due in part to its lesser burden of proof and in part to its facility of application without the use of the elaborate legal fictions engendered by the older theories. Unfortunately, counsel for plaintiffs continue to plead actions founded on all three theories. While this tendency is understandable in light of the existing judicial confusion, it enhances the opportunity of the courts to render decisions which interweave threads of each cause of action. The time has come for the courts to recognize and guard against this tendency. Strict liability, as enunciated in section 402A of the *Restatement (Second) of Torts*, should be the preferred choice of the bench and the bar to resolve the vagaries of the present products liability action.