PRODUCTS LIABILITY—WHEN CIRCUMSTANTIAL PROOF CAN SUPPORT AN INFERENCE THAT A DEFECT EXISTED IN A MANUFACTURER'S HANDS: A NEW JERSEY DILEMMA—*Moraca v. Ford Motor Co.*, 66 N.J. 454, 332 A.2d 599 (1975).

In November of 1967, Thomas Moraca purchased a 1968 Lincoln Continental from Merlin Motor Company.[1] Six months later he set out on a business trip, and at some point during the trip, he heard a noise in the front of the car.[2] At that moment, the car, not responding to Moraca's steering efforts, veered off the road, struck a tree, and ultimately split into two pieces.[3]

Moraca, having incurred severe injuries, sued both the manufacturer and the retailer, alleging a manufacturer's defect in the steering mechanism.[4] Evidence adduced at trial established that the car had traveled approximately 11,000 miles, and that just prior to the business trip, the power steering fluid reservoir had been filled because it was low.[5] Additionally, a state police officer testified that the physical evidence showed that the car was "in a side skid" when it left the road and had moved "in a straight line without any turning whatsoever."[6]

Moraca offered expert testimony to establish that two manufacturing defects—a rough bearing surface and a bent sector shaft—had caused the power steering fluid to leak, thereby resulting in a locking of the power steering unit.[7] Defendants' experts admitted that "there would be an audible noise" if fluid were lost from the power steering unit, but they maintained that there was neither seal damage nor loss of fluid.[8] They also stated that the bent sector shaft resulted from the

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[1] Moraca v. Ford Motor Co., 132 N.J. Super. 117, 120, 332 A.2d 607, 609 (App. Div. 1974), *aff'd*, 66 N.J. 454, 332 A.2d 599 (1975).

[2] Moraca v. Ford Motor Co., 66 N.J. 454, 458–59, 332 A.2d 599, 601 (1975).

[3] Moraca v. Ford Motor Co., 132 N.J. Super. 117, 121, 332 A.2d 607, 609 (App. Div. 1974), *aff'd*, 66 N.J. 454, 332 A.2d 599 (1975). Moraca claimed that he released the accelerator when the car began to slide, but thought that he did not brake while making an effort to turn the wheel. 132 N.J. Super. at 121, 332 A.2d at 609.

[4] Moraca v. Ford Motor Co., 66 N.J. 454, 456, 332 A.2d 599, 600 (1975).

[5] *Id.* at 458–59, 332 A.2d at 601.

[6] *Id.* at 459, 332 A.2d at 601.

[7] Moraca v. Ford Motor Co., 132 N.J. Super. 117, 121–22, 332 A.2d 607, 609 (App. Div. 1974), *aff'd*, 66 N.J. 454, 332 A.2d 599 (1975). Expert testimony revealed that the rough bearing surface would rub the seal to the point where, finally, power steering fluid would be lost. 132 N.J. Super. at 121, 332 A.2d at 609. This testimony also established that the bent sector shaft would result in "eccentric" rotation of the shaft, thereby causing the seal to stretch, allowing the fluid to escape. *Id.* at 121–22, 332 A.2d at 609.

[8] Moraca v. Ford Motor Co., 132 N.J. Super. 117, 122, 124, 332 A.2d 607, 609–10, 611 (App. Div. 1974), *aff'd*, 66 N.J. 454, 332 A.2d 599 (1975). One expert testified that the

impact of the crash[9] and was therefore not a manufacturing defect. After presenting this evidence, Moraca requested the trial judge to charge the jury that he need not prove a specific defect, but only that the accident resulted from "some defect in the car."[10] He further sought a charge which would permit the jury to infer from "the total effect of the circumstances shown from purchase to accident" that a product defect caused the accident.[11] The trial judge refused both requests, stating that they were encompassed in his own charge.[12] Upon special interrogatories the jury found that there was no defect, and the trial court "entered a verdict of no cause of action."[13] Plaintiff appealed to the appellate division on the ground that the trial court should have granted his requested charges.[14] The appellate division, with one judge dissenting, ruled in favor of the plaintiff[15] and reversed

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noise would be like that of " 'marbles running down a pipe.' " 132 N.J. Super. at 124, 332 A.2d at 611.

[9] Moraca v. Ford Motor Co., 132 N.J. Super. 117, 122, 332 A.2d 607, 610 (App. Div. 1974), *aff'd*, 66 N.J. 454, 332 A.2d 599 (1975).

[10] Moraca v. Ford Motor Co., 66 N.J. 454, 456–57, 332 A.2d 599, 600 (1975) (emphasis added).

[11] *Id.* at 457, 332 A.2d at 600. The requested charges read as follows:

> "Nor is the plaintiff required to establish the specific defect that existed in the product. Rather, in order to recover for breach of warranty, the plaintiff must present evidence from which it is reasonable to infer or conclude that more probably than not, the harmful event ensued from some defcet [*sic*] in the product, whether the defect is identifiable or not, and that the defect arose out of the design or manufacture of the product or while it was in the control of the defendant, and that the defective product proximately caused injury or damage to the plaintiff.
>
> "A breach of warranty may be established where the total effect of the circumstances shown from purchase to accident is adequate to raise an inference that the product was defective and that such condition was causally related to the mishap that occurred."

132 N.J. Super. at 122, 332 A.2d at 610.

[12] Moraca v. Ford Motor Co., 66 N.J. 454, 457, 332 A.2d 599, 600 (1975).

[13] Moraca v. Ford Motor Co., 132 N.J. Super. 117, 122–23, 332 A.2d 607, 610 (App. Div. 1974), *aff'd*, 66 N.J. 454, 332 A.2d 599 (1975). The jury also found that the plaintiff was not contributorily negligent. 132 N.J. Super. at 123, 332 A.2d at 610.

[14] Moraca v. Ford Motor Co., 132 N.J. Super. 117, 123, 332 A.2d 607, 610 (App. Div. 1974), *aff'd*, 66 N.J. 454, 332 A.2d 599 (1975). Plaintiff had also requested that his " 'circumstantial evidence' " charge be given when the jury interrupted its deliberation to ask the trial judge whether the defendant manufacturer could circumstantially be found liable if the jury found no defect and no contributory negligence, but the court denied this request. 132 N.J. Super. at 122–23, 332 A.2d at 610.

[15] Moraca v. Ford Motor Co., 132 N.J. Super. 117, 125, 127, 332 A.2d 607, 611, 612 (App. Div. 1974), *aff'd*, 66 N.J. 454, 332 A.2d 599 (1975). The appellate division noted that at different times in his charge and also in the first special interrogatory, the trial judge spoke of " 'any defect,' " while at the same time making mention of the "plaintiff's 'contended' for or 'claimed' defect." 132 N.J. Super. at 125, 332 A.2d at 611. This and other statements by the trial judge led the appellate court to "conclude that the issue of

and remanded the case for a new trial.[16]

The defendants appealed from this decision to the Supreme Court of New Jersey.[17] In *Moraca v. Ford Motor Co.*,[18] the supreme court agreed with the appellate division that the trial judge had committed reversible error by failing to include in his charge the concept that a defect can be established by circumstantial evidence.[19] However, Justice Sullivan, writing for the majority, pointed out that "[t]he real question in this case is whether plaintiff's proofs are sufficient to invoke application of the circumstantial evidence rule."[20] Under that rule, a court will consider particularly " 'the age and prior usage of the product in relation to its expected life span, durability and effective operability without maintenance,' " to ascertain whether a permissible inference can be drawn that a defect in the product arose in the defendant's hands.[21] Applying this rule to the facts of the case, the court found that "a critical malfunction" of the steering system in a six-month-old Lincoln which had been driven only 11,000 miles should not normally occur if the car had been properly maintained and operated.[22] Concluding from "[t]he totality of the evidence and circumstances" that plaintiff had also sufficiently negated other probable causes of the malfunction, the court found that a reasonable inference could be drawn that such malfunction existed before the car left the manufacturer's control and, therefore, held that the evidence was sufficient to support a finding of a manufacturer's defect.[23] This finding appeared to conflict with the seemingly hard-line approach enunciated only four months earlier by the same court in *Scanlon v. General Motors Corp.*,[24] thereby placing in doubt New Jersey's posi-

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liability was submitted to the jury predicated solely upon the specific defects asserted by plaintiff's experts." *Id.*

[16] Moraca v. Ford Motor Co., 132 N.J. Super. 117, 127, 332 A.2d 607, 612 (App. Div. 1974), *aff'd*, 66 N.J. 454, 332 A.2d 599 (1975). Although not discussed by defendants on appeal or at trial, the appellate court suggested that, on remand, prolonged usage in itself should not preclude drawing an inference of a manufacturer's defect, and that, therefore, the issue of the existence of a manufacturer's defect is one for the jury. *See* 132 N.J. Super. at 125–26, 332 A.2d at 612.

[17] Moraca v. Ford Motor Co., 66 N.J. 454, 456, 332 A.2d 599, 600 (1975). The defendants appealed as of right which is permitted in New Jersey when there is a dissent in the appellate division. N.J.R. 2:2–1(a)(2).

[18] 66 N.J. 454, 332 A.2d 599 (1975).

[19] *Id.* at 458, 332 A.2d at 601.

[20] *Id.*

[21] *Id.* (quoting from Scanlon v. General Motors Corp., 65 N.J. 582, 593, 326 A.2d 673, 678 (1974)). For a discussion of *Scanlon* and its implications in light of the supreme court's decision in *Moraca* see notes 77–107 *infra* and accompanying text.

[22] 66 N.J. at 460, 332 A.2d at 602.

[23] *Id.* at 459–60, 332 A.2d at 601–02.

[24] 65 N.J. 582, 326 A.2d 673 (1974). *See* notes 77–107 *infra* and accompanying text.

tion on the quantum of proof necessary to create a jury issue in cases of strict liability involving allegedly defective products.

In strict products liability cases, a plaintiff must normally prove not only that a defect existed and that the product caused the plaintiff's injury, but also that it existed in the hands of the defendant.[25] While it is often most difficult to prove by direct evidence the existence of a defect, it is virtually impossible to prove by the same type of evidence that the defect existed at the time the product left the defendant's control.[26] For this reason, a plaintiff will frequently rely on circumstantial evidence to prove his case.[27]

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[25] W. PROSSER, THE LAW OF TORTS § 103, at 671–72 (4th ed. 1971) [hereinafter cited as PROSSER]; Freedman, *"Defect" in the Product: The Necessary Basis for Product Liability in Tort and in Warranty*, 33 TENN. L. REV. 323, 327 (1966); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 840–42 (1966); Rheingold, *Proof of Defect in Products Liability Cases*, 38 TENN. L. REV. 325, 326 (1971); Note, *Proof of Defect in a Strict Products Liability Case*, 22 ME. L. REV. 189, 191–92 (1970).

[26] Forde, *Products Liability—Use of Circumstantial Evidence and Inferences To Prove That a Product Was Defective and That the Defect Existed When the Product Left Defendant's Control*, 1972 TRIAL LAW. GUIDE 42, 44, 56. There are several reasons why direct evidence is very seldom available in such cases. Many times "the product is lost or destroyed" and other times the product's user may have died from the failure of the product. Rheingold, *supra* note 25, at 343. In any case, it is rare that "a person will be able to testify from his personal knowledge that a particular product was sold in a certain defective condition." Reader v. General Motors Corp., 107 Ariz. 149, 154–55, 483 P.2d 1388, 1393–94 (1971). *See* Scanlon v. General Motors Corp., 65 N.J. 582, 592, 326 A.2d 673, 678 (1974).

[27] Forde, *supra* note 26, at 56; Rheingold, *supra* note 25, at 340.

Circumstantial evidence within the context of products liability is indirect proof which permits a reasonable inference that, more probably than not, the injury resulted from a defect which existed in the product while it was in the hands of the defendant. *See* PROSSER, *supra* note 25, § 103, at 671–73.

Use of circumstantial evidence in strict products liability cases is very similar to the application of the res ispa loquitur doctrine. *Id.*; Forde, *supra* note 26, at 56–60. When res ipsa loquitur is applied it is necessary that

> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; [and] (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant . . . .

PROSSER, *supra* note 25, § 39, at 214.

If these and other conditions are met, then it is reasonable to infer that more probably than not, the accident occurred due to the defendant's negligence. *See* 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 12.03[1], at 285–86 (1973) [hereinafter cited as L. FRUMER & M. FRIEDMAN]; Waltz, *Res Ipsa Loquitur in the Products Liability Field*, 36 CLEV. B.J. 261, 261, 280 (1965).

Although neither negligence nor exclusive control may be present in strict products liability cases involving manufacturing defects, the inferences permitted under the classical res ipsa loquitur doctrine have also been recognized to be applicable to these cases. PROSSER, *supra* note 25, § 103, at 672–73; Forde, *supra* note 26, at 56–58. Hence, where the facts permit it, a reasonable inference can be drawn that more likely than not a defect existed in the hands of the defendant. PROSSER, *supra* note 25, § 103, at 672–73.

Through circumstantial evidence, a plaintiff in many jurisdictions need only show the existence of *some* defect which can be traced to the defendant.[28] While the very happening of the accident with all its attendant circumstances may be sufficient in some cases to permit the required inference, prolonged use[29] and other possible causes of an accident[30] may operate to weaken or destroy that inference.[31]

Prolonged use by itself generally does not render the inference impermissible as a matter of law.[32] For example, in *Mosier v. American Motors Corp.*,[33] the evidence submitted indicated that a man-

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[28] Rheingold, *supra* note 25, at 328–29. *See, e.g.*, Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631, 640 (8th Cir. 1972); Sabloff v. Yamaha Motor Co., 59 N.J. 365, 366, 283 A.2d 321, 321, *aff'g* 113 N.J. Super. 279, 273 A.2d 606 (App. Div. 1971); Codling v. Paglia, 32 N.Y.2d 330, 337–38, 298 N.E.2d 622, 625, 345 N.Y.S.2d 461, 465 (1973).

Plaintiffs generally do not have to prove a specific defect, but one commentator has pointed out that there is a problem with applying the term " 'specific.' " He observes:

> Taking an example with layers of increasing specificity, it could refer to: (a) the mechanism that caused a car to go off the road; (b) the mechanism that caused its steering to fail; (c) the mechanism that caused the tie rod to break; or (d) the mechanism that caused the steel in the tie rod to fracture.

Rheingold, *supra* note 25, at 329.

[29] This term refers to the "natural deterioration resulting from use and lapse of time." 1 L. FRUMER & M. FRIEDMAN, *supra* note 27, § 11.03, at 211; *see id.* at 211–12; PROSSER, *supra* note 25, § 103, at 674.

[30] Included in other possible causes is the possibility of misuse, whether by the plaintiff or prior users. *See* PROSSER, *supra* note 25, § 103, at 674–75.

[31] *See id.* at 673–74. *See also* 1 L. FRUMER & M. FRIEDMAN, *supra* note 27, § 11.03, at 214.4; Rheingold, *supra* note 25, at 340.

[32] *See* Rheingold, *supra* note 25, at 340. *See, e.g.*, Pryor v. Lee C. Moore, Corp., 262 F.2d 673 (10th Cir. 1958), *cert. denied*, 360 U.S. 902 (1959) (circumstantial evidence of defective weld in fifteen-year-old derrick was sufficient to establish a jury question); Spotz v. Up-Right, Inc., 3 Ill. App. 3d 1065, 280 N.E.2d 23 (1972) (testimony regarding existence of a defective weld in a fifteen-year-old scaffolding supported finding of defendant liability even though three other causes were possible); Tucker v. Unit Crane & Shovel Corp., 256 Ore. 318, 473 P.2d 862 (1970) (expert testimony of a defective weld in a nine-year-old crane was probative of defendant's liability).

Occasionally "the prolonged use factor may loom so large as to obscure all others in a case." Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 336, 319 A.2d 914, 923 (1974) (twenty-year-old crane). In such cases a plaintiff's failure to produce other evidence from which an inference of a defect can be drawn will result in a directed verdict for defendant, since plaintiff's use of the product over an extended period of time will render the inference that defendant was responsible for the defect unreasonable. *See* Carney v. Sears, Roebuck & Co., 309 F.2d 300, 306 (4th Cir. 1962) (dictum); Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672, 681 (Iowa Sup. Ct. 1970).

[33] 303 F. Supp. 44 (S.D. Tex. 1967), *aff'd*, 414 F.2d 34 (5th Cir. 1969). The plaintiffs instituted the action against the manufacturer and seller for, *inter alia*, breach of implied warranties, alleging that the accident was caused by a malfunction of the steering mechanism. 303 F. Supp. at 47–48. For a discussion of the equivalence of actions grounded in strict products liability and breach of implied warranty see note 55 *infra* and accompanying text.

ufacturing defect in the steering assembly of a car caused it to roll out of control, thereby injuring the plaintiff passengers.[34] In considering those factors which might affect the reasonableness of the inference that a defect existed while the automobile was in the control of the defendants, the court noted that "eight months and 2,920 miles between the date of purchase and the accident do not render the two so remote as to negate the" conclusion that a defect existed in the defendants' hands.[35]

Even where the inference that a defect was present while the product was in the defendant's hands could be strengthened by a relatively short usage,[36] courts assess the possibility that plaintiff misuse may exist.[37] A plaintiff may negate the possibility of such misuse by presenting evidence describing how the product was used[38] or by indicating that nothing in the evidence shows that misuse is a possible cause.[39] Courts additionally may require that other possible causes besides plaintiff misuse be negated,[40] but normally the plaintiff

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Both the manufacturer and the retailer of a product can be subject to strict products liability if the product was defective when it passed through their hands. *See* Scanlon v. General Motors Corp., 65 N.J. 582, 590, 326 A.2d 673, 677 (1974); 2 L. FRUMER & M. FRIEDMAN, *supra* note 27, § 19 A *et seq.*; RESTATEMENT (SECOND) OF TORTS § 402, comment *f* (1965).

[34] 303 F. Supp. at 47, 51. At the time of the accident, the car swerved from one side of the highway to the other, rolled over and finally came to a halt. *Id.* at 47. Several witnesses later testified that they had observed after the accident that a portion of the steering assemblage had been severed. *Id.* Experts for the plaintiffs testified that a crack which had existed for some length of time eventually permitted an essential portion of the steering mechanism to separate and thereby cause loss of front wheel control. *Id.* at 49. This was consistent with plaintiff's testimony that the car had started vibrating and that it had appeared that the automobile was not going in the direction in which the steering wheel was being turned. *Id.*

[35] *Id.* at 51–52. Affirming the district court, the Fifth Circuit stated that at least four factors appeared to enter into the trial court's decision: (1) the age and usage did not preclude an inference that defendants were responsible for the defect; (2) nothing indicated improper use by the owner; (3) testimony was given to the effect that there was no previous accident involving the auto; and (4) the inspection procedures employed by the defendants were "less than stringent." 414 F.2d at 36–37.

[36] PROSSER, *supra* note 25, § 103, at 673.

[37] *See, e.g.*, Franks v. National Dairy Prods. Corp., 414 F.2d 682, 685 (5th Cir. 1969); American Motors Corp. v. Mosier, 414 F.2d 34, 37 (5th Cir. 1969); Corbin v. Camden Coca-Cola Bottling Co., 60 N.J. 425, 434, 290 A.2d 441, 445–46 (1972).

[38] *See, e.g.*, Franks v. National Dairy Prods. Corp., 414 F.2d 682, 685 (5th Cir. 1969); Corbin v. Camden Coca-Cola Bottling Co., 60 N.J. 425, 428, 434, 290 A.2d 441, 442, 445 (1972).

[39] *See* American Motors Corp. v. Mosier, 414 F.2d 34, 37 (5th Cir. 1969).

[40] *See* Caskey v. Olympic Radio & Television, 343 F. Supp. 969, 975 (D.S.C. 1972); Franks v. National Dairy Prods. Corp., 282 F. Supp. 528, 531 (W.D. Tex. 1968), *aff'd*, 414 F.2d 682 (5th Cir. 1969); Reader v. General Motors Corp., 107 Ariz. 149, 155, 483 P.2d 1388, 1394 (1971).

must only overcome those possibilities which are "reasonably probable."[41] However, it has been held that every reasonably probable cause need not be negated where the affirmative circumstantial evidence sets apart one of these causes as the more probable cause of the accident.[42]

However, where there is a failure to present *any* evidence, other than the fact of the malfunction itself, which would tend to either negate other possible causes or affirmatively support an inference that the defect existed in the hands of the manufacturer, the court may refuse to submit the case to the jury and direct a verdict for the manufacturer.[43] *Larson v. Thomashow*[44] serves as an illustration of this approach. In this case, the defendant in an action resulting from a two-car collision counterclaimed against the manufacturer of his automobile in strict liability and breach of warranty.[45] The defendant testified that the drive shaft of his car separated from the rear axle and dragged along the highway causing the car to come to a gradual halt.[46] While defendant had left his car to find help, plaintiff crashed into defendant's car, and as a result plaintiff sued the defendant for the injuries incurred.[47] The defendant's vehicle had traveled 24,000 miles since its purchase 28 months before. Further, it had been "serviced regularly" by the retailer and had been repaired twice by two different service stations.[48] The defendant testified that, as far as he knew, no work had been performed on the joint of the rear axle and

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[41] *See* PROSSER, *supra* note 25, § 103, at 674.

[42] *See* Spotz v. Up-Right, Inc., 3 Ill. App. 3d 1065, 1072, 280 N.E.2d 23, 28 (1972). In this case, the plaintiff was injured in a fall which resulted from the collapse of a scaffold. *Id.* at 1067, 280 N.E.2d at 24. He sued the manufacturer of the fifteen-year-old scaffold in strict liability and introduced evidence to show that the cause of the accident was the separation of a clamp from a cross brace and that this separation was due to a defective weld in the original manufacture. *Id.* at 1067–70, 280 N.E.2d at 24–26. The defendant contended that the clamp separation could have resulted from other causes besides the manufacturing defect. *Id.* at 1070–71, 280 N.E.2d at 26. He suggested, for instance, that there was evidence of plaintiff misuse and abuse of the product. *Id.* at 1070, 280 N.E.2d at 26. Nevertheless, the court stated that "it was not incumbent upon the plaintiff to disprove all other possible causes" and concluded that

> where there is sufficient evidence based upon the testimony of several witnesses to substantiate the claimed cause of the collapse of the scaffold, a jury question is presented as it is only necessary that the conclusion arrived at by the jury be based on an inference that is, itself, reasonable under the facts.

Id. at 1072–73, 280 N.E.2d at 28.

[43] *See* Brown v. Ford Motor Co., 287 F. Supp. 906, 910, 913 (D.S.C. 1968); notes 44–53 *infra* and accompanying text.

[44] 17 Ill. App. 3d 208, 307 N.E. 2d 707 (1974).

[45] *Id.* at 210–11, 219, 307 N.E.2d at 710–11, 716.

[46] *Id.* at 211, 307 N.E.2d at 711.

[47] *Id.* at 210–12, 307 N.E.2d at 710–12.

[48] *Id.* at 218–19, 307 N.E.2d at 716.

drive shaft.[49] The trial court directed a verdict on the counterclaim against Thomashow and in favor of General Motors, the manufacturer.[50] On appeal, the court noted that a party claiming strict products liability need not negate other possible causes of a defect, but would not find for Thomashow on his mere contention that a drive shaft should not fall out after 24,000 miles of use.[51] Rather, it held that

> there [was] a complete absence of probative facts upon which a jury could base a reasonable inference that the drive shaft was defective when it left General Motors' control.[52]

While not required, then, to negate all probable causes of the accident in order to support an inference that some defect existed at the time the car left the manufacturer's control, Thomashow failed to present *any* evidence upon which a jury could reasonably draw this critical inference. In reaching its decision the court reaffirmed the "necessity to produce either direct or circumstantial evidence that would allow the jury to draw the reasonable inference that the defect" was present while the product was in the defendant's hands.[53]

New Jersey first approached the problem of circumstantial proof in strict products liability cases in the landmark decision of *Henningsen v. Bloomfield Motors, Inc.*[54] In that case, plaintiffs, husband and wife, sued the manufacturer and the retailer on the theory of implied warranty[55] for injuries sustained by the wife when their car crashed

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[49] *Id.* at 219, 307 N.E.2d at 716. The court noted, however, that Thomashow was not a mechanic and that "no records of any of the repair work [were] introduced into evidence . . . nor did any of the mechanics who performed the work testify." *Id.*

[50] *Id.* at 218–19, 307 N.E.2d at 716.

[51] *Id.* at 220–24, 307 N.E.2d at 717–20.

[52] *Id.* at 222, 307 N.E.2d at 719. The court specifically distinguished Spotz v. Up-Right, Inc., 3 Ill. App. 3d 1065, 280 N.E.2d 23 (1972), as exemplifying a case where there was sufficient evidence to establish that a defect existed in the defendant's control. 17 Ill. App. 3d at 222, 307 N.E.2d at 718–19. *See* note 42 *supra* and accompanying text.

[53] 17 Ill. App. 3d 208, 222, 307 N.E.2d at 719.

[54] 32 N.J. 358, 161 A.2d 69 (1960).

[55] *Id.* at 364–65, 161 A.2d at 73. The plaintiffs also sued on theories of negligence and breach of express warranty. The negligence claims were dismissed at trial and the case went to the jury for consideration only of the implied warranty issue. *Id.* at 365, 161 A.2d at 73.

The fact that this case was determined on the issue of implied warranty does not preclude its applicability to a case brought in strict liability. New Jersey has recognized that the "treatment of the manufacturer's liability to ultimate purchasers or consumers in terms of implied warranty is simply using a convenient legal device or formalism." Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 64, 207 A.2d 305, 311 (1965). The use of implied warranty terminology has been the conceptual vehicle for implementing the public policy of placing liability on manufacturers for damages or injuries due to defective products. *Id.* at 64–65, 207 A.2d at 311–12. This same purpose is more properly expressed in terms of " 'strict tort liability.' " *Id.* at 66, 207 A.2d at 312. The functional relationship of these

ten days and 468 miles after its purchase.[56] No one but the plaintiffs themselves had driven the vehicle, and neither had it been serviced nor had it been involved in any accidents prior to the one resulting in this suit.[57] At the time of the accident Mrs. Henningsen heard a noise under the hood. The steering wheel then rotated between her hands, and the car angled sharply to the right, striking a sign and a wall.[58] The damages sustained rendered the car "a total loss."[59] At trial, an expert, whose testimony was later deemed of little probative impact by the supreme court, stated that a malfunction, which was "due to [a] mechanical defect or failure," occurred " 'from the steering wheel down to the front wheels.' "[60] Upon this evidence, the jury found for the plaintiffs against both the retailer and the manufacturer.[61] Affirming the decision of the trial court, the New Jersey supreme court held that

> the *total effect of the circumstances* shown *from purchase to accident* is adequate to raise an inference that the car was defective and that such condition was causally related to the mishap.[62]

Although this "total effect of the circumstances" approach does not view any one factor as always controlling, in *Jakubowski v. Minnesota Mining & Manufacturing*[63] the court sought to specify when the lack of one type of proof might prevent a reasonable inference of defendant responsibility for the defect.

Jakubowski relieved a fellow worker who was operating a grinding machine to which an abrasive disc was attached.[64] While Jakubowski was operating this machine, the disc broke, striking and injuring him.[65] He sued the disc's manufacturer for breach of implied warranty on the theory that his injury had been caused by a defect in the disc.[66] The trial court granted the defendant's motion for involun-

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terms has been recognized in various jurisdictions. *See, e.g.*, Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631, 636 (8th Cir. 1972); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963); Suvada v. White Motor Co., 32 Ill. 2d 612, 617–21, 210 N.E.2d 182, 185–87 (1965).

[56] 32 N.J. at 364, 368–69, 161 A.2d at 73, 75.

[57] *Id.* at 409, 161 A.2d at 97–98.

[58] *Id.* at 369, 161 A.2d at 75. The sudden veering of the car was confirmed by a bus driver traveling in the lane next to plaintiff. *Id.*

[59] *Id.*

[60] *Id.* at 369, 411, 161 A.2d at 75, 98.

[61] *Id.* at 369, 161 A.2d at 75.

[62] *Id.* at 409, 161 A.2d at 97 (emphasis added).

[63] 42 N.J. 177, 199 A.2d 826 (1964).

[64] *Id.* at 180–81, 199 A.2d at 828.

[65] *Id.* at 181, 199 A.2d at 828.

[66] *Id.* at 179–80, 199 A.2d at 827. The plaintiff also sued in negligence and breach of

tary dismissal, but the case was reversed by the appellate division.[67] In reversing the appellate division,[68] the New Jersey supreme court delineated the methods by which a plaintiff may establish through circumstantial evidence that a defect existed in the hands of the defendant. The court held that a plaintiff who cannot rely on direct evidence to prove that there was a defect for which defendant is responsible may introduce "other evidence which would permit an inference" of this fact.[69] This circumstantial evidence would appear to be that which has an affirmative effect, since the court also instructs that when neither direct evidence nor other evidence which could support this critical inference is available,

> it is necessary to negate other causes of the failure of the product for which the defendant would not be responsible, in order to make it reasonable to infer that a dangerous condition existed at the time the defendant had control.[70]

A plaintiff, then, can rely on that circumstantial evidence which, through its own force, points to one cause as being more probable than another; or he may depend on that circumstantial proof which, by eliminating other causes, leaves only one possible cause—a defect for which defendant is responsible.

In analyzing the application of these methods of circumstantial proof to the facts of this case, the *Jakubowski* court determined that the break in the disc could have resulted from four different possibilities: two causes—manufacturing defect or faulty design—for which defendant would be responsible; and two causes—mishandling or overuse—for which defendant would *not* be responsible.[71] Examining the plaintiff's affirmative evidence, which consisted of expert tes-

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express warranty, but these claims were dismissed by the trial court, and this decision was later affirmed by the appellate division on the ground that plaintiff had failed to present a prima facie case. *Id.*

The proof required in a products liability suit predicated upon negligence is often identical to that required in an action grounded upon strict liability. *See* PROSSER, *supra* note 25, § 103, at 671. In addition, one commentator points out that

> few lawyers try cases on a strict liability or breach of warranty basis alone, even if they have a good case. They prefer to present a suit built on negligence, if they can, in order to make out a case that will lead a jury to award damages.

Rheingold, *supra* note 25, at 326 n.5. *See also* Dunn, *Preparation And Handling Of Products Liability Cases: Machinery And Equipment*, 32 INS. COUNSEL J. 650, 651 (1965).

[67] 42 N.J. at 180, 199 A.2d at 827-28.

[68] *Id.* at 188, 199 A.2d at 832.

[69] *Id.* at 184, 199 A.2d at 830.

[70] *Id.*

[71] *Id.* at 186, 199 A.2d at 831.

timony, the *Jakubowski* court found that it did not support the critical inference that a defect existed while the product was in the defendant's control. Although the plaintiff's expert testified that the breaking of the disc could only have resulted from a defect,[72] the court noted that the expert opinion had not taken into account "the manner and extent of . . . handling" during the prior usage of the disc.[73] The court observed that, since this disc was a product subject to wear and tear, it would be "mere guesswork" to draw an inference that the defect existed prior to sale without considering the manner and extent of the prior use.[74]

Since plaintiff failed through expert testimony to establish that a defect existed in the defendant's hands, the court explained that the plaintiff could have done so by negating the other possible causes in this case—misuse and overuse by the plaintiff and by the previous operator. Plaintiff introduced evidence that he properly used the disc, but none was introduced to negate the prior operator's possible misuse or overuse.[75] This failure, the court held, prevented the drawing of the requisite inference.[76]

In *Scanlon v. General Motors Corp.*,[77] the New Jersey supreme court continued its delineation of strict products liability proofs and offered its most comprehensive analysis in this area. Plaintiff, having received delivery of a new Impala station wagon from I. J. Demarest, a dealership for Chevrolet, was injured approximately nine months later when the car went out of control and collided with a telephone pole.[78]

Scanlon brought a personal injury action grounded in strict liabil-

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[72] *Id.* at 186–87, 199 A.2d at 831.

[73] *Id.* at 187, 199 A.2d at 832.

[74] *Id.* at 184, 186–88, 199 A.2d at 830–32. This disc was found by plaintiff's employer to be good for only five operations. *Id.* at 184, 199 A.2d at 830. Hence, the disc's durability was relatively short and increased the necessity to account for "the manner and extent" of the previous use in order to create an inference based on more than mere surmise or conjecture. *Id.* at 186, 199 A.2d at 831; *see id.* at 187–88, 199 A.2d at 832. *See also* Scanlon v. General Motors Corp., 65 N.J. 582, 595, 326 A.2d 673, 680 (1974).

Chief Justice Weintraub, joined by Justices Francis and Jacobs, dissented from the majority's requirement in this case that plaintiff present evidence negating the possibilities of mishandling and overuse. 42 N.J. at 188–90, 199 A.2d at 832–33. He maintained that such possibilities were not "realistically involved" and therefore did not have to be negated. *Id.* at 189, 199 A.2d at 833. However, he stated further that even "if we ought seriously to entertain those possibilities . . . still a jury could readily infer there was no mishandling" or overuse. *Id.* at 190, 199 A.2d at 833.

[75] *Id.* at 184, 186, 199 A.2d at 830, 831.

[76] *Id.* at 186, 199 A.2d at 831.

[77] 65 N.J. 582, 326 A.2d 673 (1974).

[78] *Id.* at 587–88, 326 A.2d at 675–76.

ity against General Motors Corporation, the manufacturer of the Impala, and against the retailer.[79] Scanlon purported to show in his testimony that the car had "malfunctioned violently."[80] He also sought to prove through his expert witness that a defect in a specific part in the carburetor caused the malfunction.[81] Contrary to this testimony, defendant entered evidence that this part "was 'intact, undamaged, and in one piece' " subsequent to the accident.[82] Plaintiff also asserted that the Impala had been serviced twice by Demarest prior to the accident but that Demarest had made no carburetor adjustments.[83] Plaintiff stipulated that he could not say whether anyone else had ever serviced the carburetor, since his wife—not he —was the car's primary driver.[84]

Upon the evidence entered, defendants' motions for involuntary dismissal were granted by the trial court, but the appellate division reversed and remanded the case for a new trial.[85] The New Jersey supreme court reversed the appellate division and reinstated the trial court's judgment.[86] The court based its reversal on the fact that, although plaintiff had introduced enough evidence to establish the existence of some defect,[87] plaintiff had failed to establish through

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[79] *Id.* at 586, 326 A.2d at 675.

[80] *Id.* at 587–88, 598, 326 A.2d at 675–76, 681. However, it should be noted that the plaintiff did not speak of any malfunction when he described the accident to the police officer investigating the occurrence, nor did he mention it when he returned to Demarest, the dealer, six months later. *Id.* at 588, 326 A.2d at 676.

[81] *Id.* at 588–89, 326 A.2d at 676. The plaintiff's expert did not examine the vehicle or any of its parts, and therefore his testimony was primarily confined to answering hypothetical questions. *Id.* Although the expert never actually stated that the carburetor was defective, he theorized that the plastic fast-idle cam broke, jamming the carburetor linkage and keeping the accelerator open to the extent it was open when the jamming occurred. *Id.* at 589, 326 A.2d at 676.

[82] *Id.* at 589, 326 A.2d at 676. This was proved by setting out "a chain of possession of the cam" through photographic evidence and introduction of the cam itself. *Id.* Defendant also indicated that the body shop that repaired the wrecked Impala had made no repairs on the carburetor, and the body shop's owner testified that the car functioned " 'all right' " subsequent to its repair. *Id.* at 589, 326 A.2d at 676–77.

[83] *Id.* at 587, 600, 326 A.2d at 675, 682. *See also* Petitioner's Brief for Certification and Second Supplemental Appendix at 3, Scanlon v. General Motors Corp., 65 N.J. 582, 326 A.2d 673 (1974) [hereinafter cited as Petitioner's Brief].

[84] 65 N.J. at 588, 326 A.2d at 676.

[85] 65 N.J. at 587, 326 A.2d at 675; Petitioner's Brief, *supra* note 83, at 1.

[86] 65 N.J. at 601, 326 A.2d at 683.

[87] *Id.* at 598, 326 A.2d at 681. The court specified that to prove that a defect exists a plaintiff must show only "that 'something was wrong' with the product." *Id.* at 591, 326 A.2d at 677. "[T]he mere occurrence of an accident" does not satisfy this burden, but "additional circumstantial evidence, such as proof of proper use, handling or operation of the product and the nature of the malfunction" may strengthen the inference to the point of establishing that a defect exists. *Id.* Also, expert testimony given by one who checked

direct or circumstantial evidence that the defect was present when the car was in the defendants' control.[88]

The court in *Scanlon* first addressed itself to the use of affirmative evidence in establishing the critical inference. Justice Clifford, writing for the majority, explained that as age increases, various products need maintenance in order to function properly, and therefore, wear and tear becomes an increasingly possible cause of any malfunction that might occur.[89] Age, he pointed out, however, is not at all times controlling. Rather, "*all* the evidence," especially the relation of "the age and prior usage of the product . . . to its expected life span, durability and effective operability without maintenance," enter into the determination of whether it is reasonable to infer that an injury would not have happened at this time in the product's life span without a defect for which defendant would be responsible.[90] Weigh-

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the product or by one who has an opinion on its design may prove the existence of a defect. *Id.* at 591, 326 A.2d at 678.

Applying this reasoning to the facts, the court held that the violent malfunctioning of the correctly operated Scanlon vehicle was enough to establish the presence of a defect in the car "at the time of the accident." *Id.* at 598, 326 A.2d at 681 (footnote omitted).

[88] *Id.* at 599–601, 326 A.2d at 682–83. The court asserted that it could have avoided the issue of whether the defect was present in the hands of the defendants, since it could have found that plaintiff, under the circumstances of this case, failed to prove the existence of the specific defect—a defective cam—which he alleged was the cause of the accident. *Id.* at 596, 326 A.2d at 680. This theory was "destroyed" by the introduction of the cam and uncontroverted photographic evidence demonstrating that the cam was not broken. *Id.* at 596–97, 326 A.2d at 680–81. Since the plaintiff relied on a single theory, which had its underlying facts utterly disproved, the court held that the case could have been dismissed on this point alone. *Id.*

In Sabloff v. Yamaha Motor Co., 59 N.J. 365, 283 A.2d 321, *aff'g* 113 N.J. Super. 279, 273 A.2d 606 (App. Div. 1971), however, the New Jersey high court stated that "the plaintiff is not necessarily confined to the explanation his expert may advance." 59 N.J. at 366, 283 A.2d at 321. Based on this holding, Scanlon argued that he should not be bound by his expert's theory. 65 N.J. at 598, 326 A.2d at 681. The *Scanlon* majority pointed out, in response, that *Sabloff* was decided six weeks after the *Scanlon* trial and implied that the *Scanlon* defendants could not have been expected to defend against any other case but the one based on a specific theory. *Id.* Thus, the court concluded that "plaintiff cannot now be heard to argue for reversal on a question foreign to the initial proceedings." *Id.*

Notwithstanding this narrow possible ground for reversal, the court chose to analyze and decide *Scanlon* as if *Sabloff* had been decided at the time of the trial. *Id.*

[89] 65 N.J. at 593, 326 A.2d at 678. The court indicated, though, that the newness of even a complicated instrumentality may "justif[y] an inference that the defect arose while in the control of the manufacturer." *Id.* at 594–95, 326 A.2d at 679–80 (citing Realmuto v. Straub Motors, Inc., 65 N.J. 336, 322 A.2d 440 (1974) (five-day-old used car driven approximately 140 miles after purchase); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (eleven-day-old car registering 468 miles); and Sabloff v. Yamaha Motor Co., 113 N.J. Super. 279 (App. Div.), *aff'd*, 59 N.J. 365 (1971) (two-day-old motorcycle driven approximately 50 miles after purchase)).

[90] 65 N.J. at 593, 326 A.2d at 678–79 (emphasis added). The court noted that, in

ing these factors in this case, Justice Clifford noted that an automobile is a complicated instrumentality needing maintenance, repairs, and adjustments, and hence he concluded that because the nine-month-old Scanlon vehicle had traveled 4,000 miles, it could not reasonably be inferred that the defect arose while the car was in the defendants' hands:

> [W]e hold *as a matter of substantive law* that in the circumstances of this case the "other evidence" offered does not justify the drawing of an inference that any defect existed in the hands of the manufacturer or retailer.[91]

Plaintiff, although failing to establish that a defect existed in the hands of the defendants primarily through affirmative evidence, could still support an inference of this fact through negation of other causes. Hence, the court next addressed itself to supporting the critical inference solely through negation of other possible causes. Drawing a distinction between complex and simple instrumentalities, the court reasoned that simple instrumentalities, like the disc in *Jakubowski*, do not require expert testimony to help discern other possible causes of an accident.[92] However, as the instrumentality becomes more complex, additional causes not readily apparent to laymen must be considered, thereby necessitating expert testimony which would chart and negate "the most likely of these" causes.[93] Applying this reasoning to the evidence presented in *Scanlon*, the majority concluded that since a car is a complex instrumentality, the plaintiff should have negated "the most likely of these" additional causes.[94] It also concluded that plaintiff failed to negate even those causes apparent to laymen, such as improper maintenance [95]

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exceptional cases, evidence that the defect existed in the hands of the defendant may be shown by circumstantial evidence without considering the product's age. "For example, where specifically identified, the nature of such a defect may justify the inference that it was present while in the manufacturer's control." *Id.* at 593 n.4, 326 A.2d at 679.

[91] *Id.* at 599, 326 A.2d at 682 (emphasis added).

[92] *Id.* at 594, 326 A.2d at 679. *See also* Corbin v. Camden Coca-Cola Bottling Co., 60 N.J. 425, 290 A.2d 441 (1972).

[93] 65 N.J. at 594, 600, 326 A.2d at 679, 682.

[94] *Id.* at 600, 326 A.2d at 682.

[95] *Id.* at 600, 326 A.2d at 682–83.

Justice Pashman maintained in a vigorous dissent that requiring the plaintiff to negate other possible causes not apparent to a layman placed an unreasonable burden on the consumer and was not compatible with the court's trend in following "the liberal and modern view favoring a jury trial for a purchaser injured in the use of a mass-produced article." *Id.* at 604–05, 326 A.2d at 685.

He also contended that the facts surrounding the accident alone were sufficient to support an inference that a defect existed in the defendant's hands. Specifically, he stated

In *Moraca*, the court applied the "circumstantial evidence criteria" enunciated in *Scanlon* and found that the evidence presented met those criteria.[96] This result was reached despite the fact that the prolonged-use factor was greater than that in *Scanlon*. Seeking to reconcile these seemingly contrary decisions, Justice Sullivan pointed out that the *Scanlon* circumstances "indicated driver fault as the real cause," supporting this view with the facts that Scanlon himself had stated that he had lost control of the car while passing another car and that Scanlon did not mention any malfunction to the policeman at the scene of the accident, nor to the retailer six months later.[97] Justice Sullivan explained that, in light of such circumstances, "plaintiff's naked claim . . . that the carburetor had jammed was insufficient to make out a circumstantial case of some unidentified manufacturer's defect."[98]

Justice Clifford, dissenting in *Moraca*, maintained, however, that the proof requirements of *Scanlon* were more stringent than the majority indicated, and challenged the majority's position with two criticisms. The first was that the critical inference could not be drawn primarily from the affirmative evidence introduced by Moraca. He contended that if the critical inference could not be drawn as a matter of substantive law in *Scanlon*, where the prolonged use was nine months and 4,000 miles, then it could not be drawn where the prolonged use was six months and 11,000 miles.[99] Apparently then, he did not view the affirmative evidence and circumstances of *Moraca* as being sufficiently distinguishable from those in *Scanlon* to justify permitting the critical inference in *Moraca*.

Since the plaintiff failed to establish that some defect existed in the hands of the defendant primarily through affirmative evidence, Justice Clifford, following *Scanlon*'s directive, maintained that plaintiff must submit expert testimony that charts and negates the most likely causes not apparent to a layman in order to support the critical inference.[100] Thus, Justice Clifford's second criticism was that Moraca failed to satisfy this negation requirement, since his "experts did not

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that "[s]udden uncontrolled acceleration followed by heavy brake application and 563 feet of skid marks surpass 'mere surmise or conjecture.' " *Id.* at 605, 326 A.2d at 685. Recognizing that the plaintiff's case could have been stronger, he reminded the majority that any "[w]eakness in plaintiff's case and factors favorable to the defense are for the jury to evaluate as to weight and credibility." *Id.*

[96] 66 N.J. at 460, 332 A.2d at 602. *See* notes 20–23 *supra* and accompanying text.

[97] 66 N.J. at 460, 332 A.2d at 602.

[98] *Id.*

[99] *Id.* at 465, 332 A.2d at 605.

[100] *Id.*

even refer to any other possible causes, much less undertake to discount them."[101]

Justice Sullivan's analysis does not seem to answer Justice Clifford's criticisms, nor does it adequately reconcile the two cases. Nowhere in *Scanlon* does the court specifically say that indications of driver error prevented a drawing of the requisite inference.[102] Rather, the import of *Scanlon* was that the plaintiff had failed to introduce any evidence which through its own force would support an inference that a defect existing in defendant's hands was the more probable cause of the accident. Such evidence did exist in *Moraca*. Affirmative circumstantial evidence, such as wheel lockage, and a noise under the hood,[103] was presented which, unlike the evidence in *Scanlon*, diminished the effect of prolonged use and made it more reasonable to conclude from "all of the evidence" that a defect existed while the product was in the control of the defendant.[104] Thus, to the extent that both *Scanlon* and *Moraca* utilize the "circumstantial evidence criteria," and to the extent that the facts are distinguishable, the two cases are reconcilable.

Viewed from this perspective, Justice Clifford's first criticism, which evinces a very narrow reading of *Scanlon*'s circumstantial evidence criteria, can be easily dealt with. Since most courts agree that prolonged use is not usually dispositive, but is merely one factor to be considered in judging whether the critical inference can be reasonably drawn, and, in this case, there was affirmative evidence which tended to set apart a defect for which defendant is responsible as being the more probable cause of the accident, the majority seems to have the better result.[105]

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[101] *Id.* Neither in the majority opinion nor in the briefs of either party was any indication given that plaintiff's experts referred to other possible causes of the accident. *See id.* at 456–61, 332 A.2d at 600–02; Brief and Appendix for Defendant-Appellant at 5–8, Moraca v. Ford Motor Co., 66 N.J. 454, 332 A.2d 599 (1975); Brief and Appendix for Plaintiff-Respondent at 6–7, Moraca v. Ford Motor Co., 66 N.J. 454, 332 A.2d 599 (1975).

[102] 66 N.J. at 463, 332 A.2d at 604 (Pashman, J., dissenting). *See* 65 N.J. at 600, 326 A.2d at 682–83.

[103] *See* 132 N.J. Super. at 120–22, 332 A.2d at 609–10; notes 2, 3 & 6 *supra* and accompanying text.

[104] 66 N.J. at 459–60, 332 A.2d at 601–02.

[105] *See* notes 32–35 *supra* and accompanying text.

Justice Pashman, who concurred in the result in *Moraca*, suggested a different point of view. He found that the court's reasoning in both *Moraca* and *Scanlon* invaded the province of the jury. *See* note 95 *supra*. He would relegate the court's role simply to "determin[ing] whether the existence of a defect while the product was under the control of the manufacturer . . . [is] something more than mere 'guess or speculation.' " 66 N.J. at 462, 332 A.2d at 603.

The whole thrust of the *Scanlon* opinion and the implication of *Moraca* is that some

Having succeeded in supporting the critical inference through primarily affirmative evidence, plaintiff Moraca, in accordance with *Scanlon*, did not have to rely solely on the negation of other causes to sustain the critical inference. Thus, the *Moraca* court did not have to reach the question of whether the evidence of negation of other causes was sufficient to permit a reasonable inference in *Moraca*. However, the majority maintained that, besides supporting a reasonable inference through primarily affirmative evidence, plaintiff had also sufficiently negated "other likely causes" as the source of the defect and seemed to say that it was reasonable to infer from the negation alone that a defect was present in the automobile when it was still in the defendant's control.[106] If this was the implication of the court, it clearly violated *Scanlon*'s mandate that, where there is prolonged use involving a complicated instrumentality, and where the critical inference cannot be drawn primarily from the affirmative evidence offered, there must be expert testimony which outlines and negates causes not apparent to a layman. Plaintiff's expert failed, as had Scanlon's, to do just that.[107] Thus, Justice Clifford's objection to this portion of the majority's opinion is well founded. It remains to be seen, however, whether the real import of this part of the *Moraca* holding is that *Scanlon* is overruled sub silentio, or that the court is simply revealing an uncertainty on the negation requirements it should impose where evidence of negation might be the only type of evidence plaintiff has to offer.

The *Moraca* decision indicates that New Jersey still maintains a position that looks to the "total effect of the circumstances," and not just merely to prolonged usage and the complexity of the product, in order to support an inference that the defect existed in the hands of the defendant. Had the *Moraca* court simply stated that the affirmative circumstantial evidence presented, despite the existence of prolonged usage and the complexity of the product, would alone have supported the inference that a defect existed in the defendant's hands, it could have avoided the discussion about the negation of

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cases, without the introduction of substantial evidence, fail to create an inference that is not based on "mere guess or speculation." *See* notes 91–94, 96–98 *supra* and accompanying text. Unless Justice Pashman was suggesting that a case be sent to the jury upon the sole showing of the existence of a defect without establishing that such a defect existed in the defendant's hands, the difference with the majority's reasoning seems only to be a matter of degree in the required quantum of evidence necessary to make an inference reasonable.

[106] 66 N.J. at 459–60, 332 A.2d at 601–02.

[107] *See* notes 100–01 *supra* and accompanying text.

other possible causes and alleviated the disparity between *Moraca* and *Scanlon*. Hopefully, the court in future cases will resolve the inconsistency between these two decisions.

Richard P. Maggi