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Chapter 10: Products Liability

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CHAPTER 10

Products Liability

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§ 10.1. Warranty Protection Not Extended to Bailment Situations. *Mason v. General Motors Corporation*,[1] casts substantial doubt on the view that Massachusetts warranty law provides the necessary quality and breadth of legal redress for product related injuries, thus eliminating the need to adopt some form of strict liability in tort.[2] While the Massachusetts legislature has removed many of the traditional impediments[3] to plaintiffs seeking access to the courts with a breach of warranty claim,

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§ 10.1. [1] 397 Mass. 183, 490 N.E.2d 437 (1986).

[2] Two years after Justice Traynor gave birth to strict liability in tort in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), the American Law Institute published the RESTATEMENT (SECOND) OF TORTS § 402A (1965) in the following form:

> (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
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965). The traditional fatal failure to furnish notice of breach of warranty which Justice Traynor avoided in *Greenman* would not be an issue under § 402A. Privity, disclaimers and limitations of remedy provisions are similarly non issues under the strict liability in tort doctrine.

[3] *See generally* G.L. c. 106, §§ 2-316A and 2-318. § 2-316A which provides, in part, that both disclaiming and limiting the remedies of implied warranties by a seller or manufacturer under § 2-314 (merchantability) and § 2-315 (fitness for a particular purpose) are unenforceable in consumer transactions. Similarly, a manufacturer of consumer goods may not limit remedies with regard to an express warranty given by the manufacturer unless the manufacturer "maintains facilities within the [C]ommonwealth sufficient to provide reasonable and expeditious performance of the warranty obligations." § 2-318 eliminates lack of privity as a defense in warranty and negligence cases and removes the failure to give notice of breach of warranty under § 2-607(3)(a) as a bar to an action in warranty unless the defendant is able to prove prejudice.

judicial pronouncements which have favorably compared Massachusetts warranty law to strict liability in tort are overstated and somewhat misleading.[4]

The Supreme Judicial Court of Massachusetts, in *Mason*, indicated that although it has consistently observed that warranty law is "congruent in nearly all respects" with strict liability in tort,[5] special emphasis must now be placed on the "nearly" term. This emphasis results from one basic restriction imposed upon the expanding warranty theory of recovery albeit inconsistent with the modern trend of opinions in other jurisdictions relating to either warranty law or strict liability in tort.

Specifically, the Court acknowledged the legislative abolition of privity as a defense to a non-purchasing plaintiff, but insisted that there be a contract of sale or lease as a prerequisite to a cause of action based on breach of warranty.[6] Troubled by the absence of the foregoing relationships and unable to find a warranty arising from the chain of distribution in which the decedents could qualify as beneficiaries,[7] the previous claim of similarity between strict liability in tort and Massachusetts warranty law[8] became tenuous and was rejected by the Court.

In *Mason*, a father sought and received permission from the defendant automobile dealer to drive with his son in a demonstration Corvette. While driving in the allegedly defective vehicle, the father and son were involved in an accident and were fatally injured. According to the Court, the father and son were participants in a bailment and as a result their

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[4] In Hayes v. Ariens Co., 391 Mass. 407, 462 N.E.2d 273 (1984) the Court, quoting from Back v. Wickes Corp., 375 Mass. 633, 640, 378 N.E.2d 964, 969 (1978), observed that Massachusetts warranty law is "congruent in nearly all respects with the principles expressed in Restatement (Second) § 402A (1965)." Speaking about elimination of privity by § 2-318, the Court in Swartz v. General Motors Corp., 375 Mass. 628, 630, 378 N.E.2d 61, 63 (1978) noted that "[t]he result is to provide a remedy as comprehensive as that provided by § 402A of the Restatement . . . ." While it is clear that Massachusetts warranty law has been modified in the direction of § 402A, a plaintiff under § 402A may still find himself in a superior position when compared to the limitations of warranty evidenced by the instant decision and the limitations of the Massachusetts legislative amendments under §§ 2-316A and 2-318. For example, the unenforceability of disclaimers and limitation of remedies under § 2-316A applies only to consumer transactions and the elimination of notice of breach is dependent on the defendant's failure to sustain the burden of proving prejudice.

[5] Mason v. General Motors Corp., 397 Mass. 183, 189, 480 N.E.2d 437, 441 (1986) (quoting Back v. Wickes Corp., 375 Mass. at 640, 378 N.E.2d at 964).

[6] *Mason*, 397 Mass. at 187–88, 490 N.E.2d at 440.

[7] The Court indicated that had a warranty been given to anyone that the decedents could claim as beneficiary to under § 2-318, the elimination of privity in Massachusetts would be relevant. Given that the decedent father apparently entered into a bailment relationship with the defendant dealer, if a warranty could be found to have resulted from that bailment relationship, the privity prerequisite would be satisfied without dwelling on the absence of a privity requirement in Massachusetts.

[8] *See supra* note 4.

representative was unable to avail herself of the warranty theory of recovery afforded to purchasers and lessees. Acknowledging that chapter 106, section 2-318 dispensed with privity as a defense to a claim based on the implied warranty of merchantability, the Court held that the facts of *Mason* did not justify a cause of action where no warranty had been created in favor of the decedents, either directly or indirectly.[9] According to the Court, the absence of an allegation that the Corvette was either sold or leased by the defendant dealer to the decedents or to someone from whom they could be considered beneficiaries, was sufficient grounds for awarding summary judgment in favor of the defendant dealer.[10] The Court concluded that an implied warranty may only arise as an appendage to a sales or lease transaction and not a bailment.

The disintegration of privity as a litigation barrier was considered beneficial to plaintiffs only where an independently created warranty was breached and the Court was reluctant to imply warranty coverage in the instant bailment transaction on the basis of section 2-318. It was decided that this section of the Code only refers to the eradication of privity as a shield or defense and not as an offensive sword of warranty. The Court's analysis dissipated when it gratuitously rationalized the exclusion of bailment as a subject matter for warranty implication by explaining the reasoning behind the legislature's inclusion of lease transactions within the scope of warranty coverage.

Section 2-318, already held inapplicable to bestow warranty protection to the decedents or their representatives in a bailment transaction, was, according to the Court, sufficient to include a lease transaction as a category eligible for warranty treatment. Section 2-318 provides that:

> Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier . . . for breach of warranty . . . , although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to . . . be affected by the goods.[11]

It is interesting that lessors are mentioned as potential target defendants under section 2-318 and that the result is that lessees are afforded warranty protection under section 2-314, the implied warranty of merchantability, even though no mention of lessor is made in that latter section.[12]

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[9] Two types of warranty claims exist. The first involves injuries to parties within the *vertical* chain of distribution. The other involves injuries to persons connected to the *horizontal* chain enabling *foreseeably* injured, non-purchasing plaintiffs to benefit.

[10] 397 Mass. at 189–90, 490 N.E.2d at 442.

[11] G.L. c. 106, § 2-318.

[12] G.L. c. 106, § 2-314. (1) Unless excluded or modified by section 2-316, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a

That section 2-314 includes lease transactions is certainly not offensive to either the intended scope of Article 2[13] of the Uniform Commercial Code or to the spirit of coverage articulated in the Official Comments.[14] What is dubious, however, is the selective treatment of inclusion furnished to leases and the apparent retreating policy position of warranty coverage evidenced by the Court's exclusion of bailments.

Extending warranty protection in *Mason* would appear to have been not only permissible, but correct. The previously quoted language of section 2-318 contains additional and potentially vulnerable categories of defendants, including a "supplier" who might reasonably expect the victims to be affected by the product in question. A bailor of goods would appear to fit within the "supplier" category. This statutory language suggests that the legislature's intent was to protect those involved in bailments as in the case of leases. As a result of the *Mason* opinion, we are witnessing an attenuating change in the Court's attitude toward consumer protection under Massachusetts warranty law.

Moreover, in addition to the desirable statutory consistency of adding bailment transactions to the scope of permissible warranty coverage, the policy of strict liability in tort, that cause of action which has been considered unnecessary in Massachusetts, would appear to cry out for

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merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must at least be such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such foods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified by section 2-316, other implied warranties may arise from course of dealing or usage of trade.

[13] G.L. c. 106, § 2-102 provides that "this Article applies to transactions in goods . . . ." The scope appears to be broad enough to encompass bailments. *See generally*, Back v. Wickes Corp., 375 Mass. 633, 378 N.E.2d 964 (1978), where the Court applied warranty law to leases.

[14] Official Comment 2 to Section 2-313 states:

> Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such a bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their containers . . . .

coverage in this particular bailment situation.[15] In *Mason*, the defendant dealer apparently considered the father to be a potential buyer of a vehicle.[16] The demonstration vehicle was a marketing tool which may have been dangerously defective and causally connected to the fatal injuries suffered by the decedents. The demonstration vehicle was, in a sense, placed in the stream of commerce and accordingly, the policy of product responsibility should be broad enough to embrace all those who may be foreseeably injured as a result of this market-distribution process.

There are distinct and important differences between the two major strict liability actions relating to products causing injuries: breach of the implied warranty of merchantability and strict liability in tort. These differences relate to the easing of plaintiffs' burdens in proceeding against the responsible product suppliers. Disclaimers, limitations of remedies, statutes of limitation problems, prerequisites of privity and notice requirements which traditionally burden plaintiffs in warranty actions, are not relevant to the strict liability theory of recovery analysis. It was largely because of these warranty limitations that the doctrine of strict liability in tort was created.[17]

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[15] *See generally*, 30 Trial Lawyers of America Law Reporter, 196–98 (June 1987). These pages provide an insightful survey of those cases which have applied both warranty and strict tort liability to nonsales transactions. For example, the lead case discussed, Thorpe v. Robert F. Bullock, Inc., found that the defendant manufacturer may be strictly liable for injuries incurred during a demonstration of product prior to sale. Thorpe v. Robert F. Bullock, 179 Ga. App. 867, 348 S.E.2d 55 (1986), *aff'd*, 256 Ga. 744, 353 S.E.2d 340 (1987). *See also* Davis v. Gibson Products Co., 505 S.W.2d 682 (Tex. Civ. App. 1973) (strict liability may be applicable to one injured while "trying out" a sheathed machete in the defendant's store); Hadley v. Hillcrest Dairy, Inc., 341 Mass. 624, 171 N.E.2d 293 (1961) (Recovery was permitted in warranty where milk jug broke in plaintiff's hand without the necessity of proving the sale of the container). But note that several decisions were cited in *Mason* which have rejected warranty recovery to nonsale transactions. All such jurisdictions, however, enjoy the availability of the less restrictive strict liability in tort theory of recovery.

[16] The Court accepted the defendant's response to interrogatories for purposes of resolving the motion for summary judgment, indicating that the father was considered a potential customer who was permitted to test drive the vehicle. 397 Mass. at 195, 490 N.E.2d at 445.

[17] *See* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944). Justice Traynor, in a concurring opinion, suggested the basis for a socially directed cause of action that bore fruit nineteen years later in his majority opinion in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In *Escola*, Justice Traynor argued that those who possess superior means to prevent the marketing of defectively dangerous products are best able to absorb the loss as a business cost. Thereafter, in *Greenman*, although Justice Traynor recognized that the injury causing power tool was negligently manufactured, his agenda extended to creating a more plaintiff-oriented cause of action. In rejecting the technical and troublesome notice prerequisite of the alternative claim of breach of warranty, Justice Traynor emphasized the strict liability character of warranty law and held that an injured consumer not in privity with the manufacturer should not be required to give notice of breach as a prerequisite to recovery. Finally, he noted

Because the Massachusetts legislature has amended Article 2 of the Uniform Commercial Code to substantially remove the traditional impediments to warranty recovery, it is not difficult to understand why the belief that Massachusetts warranty law is "nearly" synonymous with strict liability in tort has been created. The narrow interpretation of who can sue and who can be sued, evidenced in *Mason*, however, highlights the significant difference between the two defective product actions. Strict liability in tort is a judicially created response to the determination that neither warranty law nor negligence as a theory of recovery has been consistently adequate to serve the interests of product purchasers and users in our economically oriented society. It may be some time before the Massachusetts Supreme Judicial Court makes the same determination.[18]

§ 10.2. Admissibility of "State of the Art" as a Defense in Products Liability Actions. In *Anderson v. Owens-Illinois, Inc.*,[1] the First Circuit Court of Appeals, applying Massachusetts law, upheld the admissibility of state of the art evidence in a warranty claim relating to the dangers of asbestos even though such evidence was considered "irrelevant" by an earlier Massachusetts decision, *Hayes v. Ariens*.[2] The court in *Anderson* read Massachusetts law to "require a seller to warn only of reasonably foreseeable or scientifically discoverable dangers."[3] The earlier *Hayes* opinion explained that for the purpose of a warranty action, a warning must be given:

> by an ordinarily prudent vendor *who . . . is fully aware of the risks presented by the product*. A defendant vendor is held to that standard regardless of the knowledge of risks that he actually had or reasonably should have had when the sale took place. The vendor is presumed to have been fully informed at the time of the sale of all risks. The state of the art is irrelevant . . . . Under *Hayes*, the duty to warn is triggered by the fact of danger and not by the knowledge or scienter of danger.[4]

Because the allegedly warnable dangers in *Hayes* were determined to be obvious by the circuit court in *Anderson*, the *Hayes* language refusing to exculpate the seller from a warning responsibility in a strict liability warranty action, even where the dangers were not reasonably knowable,

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that while strict liability had previously been based on warranty law, the harsh technical requirements of contract law should be eliminated in favor of a less burdened tort based theory of recovery.

[18] For a thoughtful analysis relating to the bailment warranty coverage issue, see Justice Liacos' dissent in *Mason*, 397 Mass. at 194–96, 490 N.E.2d at 444–45.

§ 10.2. [1] 799 F.2d 1 (1st Cir. 1986).

[2] 391 Mass. 407, 462 N.E.2d 273 (1984)

[3] Anderson v. Owens-Illinois, Inc., 799 F.2d 1, 2 (1st Cir. 1986).

[4] 391 Mass. at 413, 462 N.E.2d at 277 (emphasis in original).

was considered by the *Anderson* court to be dicta. In *Hayes*, the Supreme Judicial Court rejected the concept of culpability as an element of a strict liability warranty action and, accordingly, was unconcerned about what the defendant should have reasonably known about the danger. Instead, the *Hayes* Court indicated that the focus should be on whether a particular warning is adequate.

The *Anderson* court, in contrast, referred to a more recently decided decision, *MacDonald v. Ortho Pharmaceutical Corporation*,[5] as support for its position that Massachusetts law has moved away from *Hayes* and toward the admissibility of state of the art evidence. In *MacDonald*, the Court remarked that the "duty is to provide . . . reasonable notice of the nature, gravity and likelihood of known or knowable side effects."[6] While this may provide some support for a claim that Massachusetts now permits state of the art evidence in breach of warranty claims, two weaknesses are apparent. First, because the issue in *MacDonald* involved the adequacy of warning relating to known side effects from the ingestion of oral contraceptives, the *Anderson* court also should have read the language relating to the responsibility to warn of unknowable defects as dicta, as it did in *Hayes*.[7] If dicta is not available to substantiate the Massachusetts law rejecting state of the art evidence relating to warranty actions, as in *Hayes*, it should not be drawn upon to illustrate a so called changing position as it was in *MacDonald*. Second, *MacDonald* involved a combined action relating to both negligence and warranty and thus the "knowable" language may be attributable to the culpability aspect of the negligence portion and not to the warranty aspect of the claim.

The *Anderson* decision neither adds to nor detracts from the current state of Massachusetts product liability law. Nevertheless, it does provide an important starting point to what may soon be a heated debate involving the availability of "the state of the art" as an acceptable defense in strict products liability actions.

§ 10.3. "Duty to Warn" Applicable Where Product Itself Found Not Defective. In a negligence based warning case, *Laaperi v. Sears Roebuck & Company*,[1] a significant issue under consideration was whether the

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[5] 394 Mass. 131, 475 N.E.2d 65 (1985).

[6] *Anderson*, 799 F.2d at 4, quoting MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 139, 475 N.E.2d 65, 70 (1985).

[7] Note that Justice O'Connor, in *Hayes*, cited both Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 447 A.2d 539 (1982); and Phillips v. Kimwood Machine Co., 269 Or. 485, 525 P.2d 1033 (1974), in support of rejecting the culpability issue in strict liability warning cases. Whether dicta or not, it appears that a seriously crafted message was communicated in *Hayes*. 391 Mass. at 413, 462 N.E.2d at 277–78.

§ 10.3. [1] 787 F.2d 726 (1st Cir. 1986).

manufacturer and retail seller of a smoke detector powered by electric current had a duty to warn that the product may not operate in an electrical fire. The plaintiff argued that had he been warned of this danger, he would have purchased a battery-powered product instead.

In its opinion, the court observed that liability may ensue even where the product is not defective in design or manufacture if the dangers associated with the product's foreseeable use should be communicated and are not.[2] Although there was no evidence of defect, the evidence was sufficient to infer that the failure to warn enhanced the harm caused by the fire.[3] In response to the defendant manufacturer's claim that the danger of an electrical fire incapacitating an electrical smoke detector was *obvious* and no duty to warn should be imposed, the court held that the "obvious" issue was one for jury determination and was not to be decided as a matter of law.[4]

The court's treatment of the "obvious" issue is consistent with the modern trend of decisions. That the purchaser had some expertise regarding smoke detectors was not considered relevant. The warnings were measured according to the traditional "average user" or "reasonably prudent person" standard because the product was broadly marketed through catalogs and flyers.

Although the *Laaperi* decision vacated the jury's verdict regarding damages, its affirmance of the district court's handling of the legal issues presented by these unique facts is sound. The First Circuit's opinion clearly reiterates the policy of imposing a "duty to warn" requirement on manufacturers who send their product into a marketplace of unwary consumers. The court attempted to balance society's need to warn these consumers with the appropriate imposition of liability commensurate with culpability.

§ 10.4. Manufacturer's "Duty to Warn" Alleviated by Superseding Misuse of Product. In *Mitchell v. Sky Climber, Inc.*,[1] the Supreme Judicial Court of Massachusetts refused to impose a duty to warn, based on negligence, on a supplier of a non-defective component lift motor which was improperly assembled into scaffolding equipment and ultimately caused the death of plaintiff's decedent. The defendant neither assembled

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[2] *Id.* at 730.

[3] *Id.*

[4] *Id.* at 731–32. See Uloth v. City Tank Corp., 376 Mass. 874, 384 N.E.2d 1188 (1978), where the Court rejected the "inflexible rule that negligent design of an obviously dangerous product precludes finding a manufacturer or a designer liable."

§ 10.4. [1] 396 Mass. 629, 487 N.E.2d 1374 (1986). *See generally* Tate v. Robbins & Myers, Inc., 790 F.2d 10 (1st Cir. 1986), where a 1980 manual was sought to be admitted in connection with a product manufactured in 1943 on duty to warn issue.

nor designed the scaffolding rigging, but voluntarily distributed a manual which addressed the issues of "safety, rigging, operating, and maintenance information." The manual, however, failed to provide a warning against cutting the insulation of electrical wiring. The decedent was killed by an electric shock arising from his contact with live wires exposed when their insulation was cut as a result of the improper rigging.[2]

The issue, in *Mitchell*, was whether a component part manufacturer who initially had no duty to warn created such a duty by voluntarily lecturing on the safe operation of the assembled product. According to the Court, while such duty may be created, the manufacturer, on these facts, had no duty to place "a warning of a possible risk created solely by the act of another that would not be associated with a foreseeable use or misuse of the manufacturer's own product."[3]

In another alleged negligent design guard decision, both the manufacturer and retailer were similarly absolved of responsibility for the plaintiff's injury.[4] In *West v. Sears Roebuck & Company*, the United States Court of Appeals decided that the jury could have reasonably concluded that causation was not established where an allegedly defective lawnmower picked up a metal pipe which struck the plaintiff. That the plaintiff chose to use the mower in an area of "thick unmowed grass where unknown objects might lurk" was considered a sufficient showing of negligence on behalf of the plaintiff to interrupt the causal connection between a guard related defect and the plaintiff's injury.[5]

§ 10.5. Warranty and Negligence Claims Are Distinct Causes of Actions in Massachusetts — Differing Results Allowed on Each Count. In *Richard v. American Manufacturing Company*,[1] the plaintiff crushed his hand when a press he was using was unexpectedly started by another employee. The evidence suggested that a "simple guard" could have reduced the risk "without undue cost or interference with the performance of the machinery." The Appeals Court affirmed the superior court's jury determination of negligent design. Because of the uncomplicated nature of the evidence relating to the defect, the court was unconcerned about the absence of expert testimony.[2]

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[2] Mitchell v. Sky Climber, Inc., 396 Mass. 629, 630, 487 N.E.2d 1374, 1375 (1986).

[3] *Id.* at 632, 487 N.E.2d at 1376.

[4] *See* West v. Sears Roebuck & Co., 780 F.2d 169 (1st Cir. 1986).

[5] *Id.* at 171.

§ 10.5. [1] 21 Mass. App. Ct. 967, 489 N.E.2d 214 (1986).

[2] *Id.* at 967, 489 N.E.2d at 215. *See generally* Coy v. Simpson Marine Safety Equipment, Inc., 787 F.2d 19 (1st Cir. 1986), where the court denied a motion for a judgment n.o.v. finding that the plaintiff's evidence, including expert opinion testimony, was adequate to find the motorcycle helmet in issue defective.

The defendant argued that because the plaintiff's action was brought in two counts, negligence and breach of warranty, the verdicts were inconsistent in that the jury found in favor of the defendant on the breach of warranty claims; but, nevertheless, in response to special questions, found the defendant seventy percent negligent. The Appeals Court affirmed the judgment noting that although the finding of negligence indicates that there is also an existing breach of warranty, the defenses of the two actions are quite distinct.[3]

According to the court, the defense to breach of warranty is similar to the traditional assumption of risk defense because the plaintiff "may not recover if it is found that, after discovering the product's defect and being made aware of its danger, he nevertheless proceeded unreasonably to make use of the product and was injured by it."[4] According to the court, although the jury may have considered the plaintiff's actions to have been unreasonable in a breach of warranty sense, and possibly equivalent to contributory negligence in a negligence sense, the plaintiff was not disqualified from recovery in negligence unless his negligence was found to be greater than that of the defendant. Such was not the case in the instant action.

As evident from the Appeals Court's holding in *Richard*, in Massachusetts it is clear that actions in warranty and actions in negligence are separate and distinct. As a result, it is possible for plaintiffs to win on one count and fail on the other.

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[3] Richard v. American Mfg., 21 Mass. App. Ct. 967, 967, 489 N.E.2d 214, 215 (1986). In another recent decision, failure to wear a seat belt was not considered a defense to breach of warranty since the evidence failed to indicate that the decedent unreasonably proceeded to use the vehicle "which [she knew] to be defective and dangerous." MacCuish v. Volkswagenwerk A. G., 22 Mass. App. Ct. 380, 494 N.E.2d 390 (1986). *See generally*, Hayes v. Ariens Co., 391 Mass. 407, 462 N.E.2d 273 (1984).

[4] *Richard*, 21 Mass. App. Ct. at 968, 489 N.E.2d at 215, quoting Correia v. Firestone Tire & Rubber Co., 388 Mass. 342, 357, 446 N.E.2d 1033, 1041 (1983). *See generally*, Tringali v. Hathaway Machinery Co., Inc., 796 F.2d 553 (1st Cir. 1986). In *Tringali*, the United States Court of Appeals affirmed the lower court's determination of negligence where the manufacturer failed to install a cover and safety brake for a port winch shaft installed on a vessel. Note the interesting discussion of various issues involved where defendant subsequently filed for bankruptcy.