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Insurance Law: Recent Interpretation of the Temporary Substitute and Newly Acquired Clauses in the Standard Family Auto Policy

Defendant Wesley Nyquist purchased an insurance policy listing a 1958 Chevrolet effective November 15, 1966 to November 15, 1967 from plaintiff insurance company. On March 9, 1967 Nyquist sold his 1958 Chevrolet, but had acquired possession of a 1961 Chevrolet in November, 1966 which remained in an inoperative condition until August 18, 1967. Between the sale of the 1958 Chevrolet and the repair of the 1961, defendant drove a 1960 Chevrolet owned by his mother. Defendant claimed that his mother's Chevrolet should be covered under the policy as a temporary substitute vehicle, a replacement vehicle or a non-owned vehicle not furnished for regular use. Held, the 1961 Chevrolet replaced the vehicle described in the policy and therefore became the owned automobile covered by virtue of the automatic replacement provision. Since the 1961 Chevrolet was withdrawn from normal use because of its inoperability, the 1960 Chevrolet was covered as a temporary substitute for the replacement automobile. *St. Paul Fire & Marine Ins. Co. v. Nyquist*, 286 Minn. 157, 175 N.W.2d 494 (1970).

The Minnesota Supreme Court has found itself in a position requiring interpretation of the "newly acquired" and "temporary substitute" clauses three times in less than fourteen months. In construing these two clauses, the court has been forced to reconcile conflicting judicial policies. On one hand they are faced with the rising trend of public policy to view insurance as a means of protecting injured persons, and on the other they are limited by the language of the insurance contract, designed to indemnify the insured and protect the insurance company from increased risk exposure. The court has not resolved this dichotomy with consistent results. In two of the three cases coverage was denied, but in *Nyquist* the court, cognizant of public interest, extended coverage to the insured by interrelating both the newly acquired and temporary substitute automobile clauses.

Public policy has played a role of increased importance in

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1. The terms "newly acquired" and "replacement vehicle" are both used by the court to designate the clause here in question.

the courts' interpretation of insurance contracts. Both the temporary substitute and the newly acquired automobile provisions are for the insured's benefit, and are designed to make coverage definite as to the vehicle the insured intends normally to use. Ambiguity must be construed liberally in favor of the insured if any construction is necessary. In addition, with the introduction of financial responsibility laws, the courts have found themselves more concerned with protecting the injured third party than indemnifying the insured. Quaderer v. Integrity Mutual Insurance Company held when construing the terms of a policy it must be kept in mind that the public has an interest in having automobiles insured. The insurance policy should be construed to effect coverage if this can be done without doing violence to its plain language and intent.

The majority relied on the newly acquired auto clause to extend coverage from the 1958 to the 1961 Chevrolet, for which the insured's mother's 1960 Chevrolet was a substitute. The 1963 Standard Family Automobile Liability Policy, used by plaintiff insurance company, provides:

owned automobile means . . . (c) a private passenger, farm or utility automobile ownership of which is acquired by the named insured during the policy period, provided (1) it replaces an owned automobile . . .

The majority of courts have held the phrase is not ambiguous, as


4. Lloyds Am. v. Ferguson, 116 F.2d 920 (5th Cir. 1941).


7. 263 Minn. 383, 116 N.W.2d 605 (1962).


9. But see Gabrelcik v. National Indem. Co., 269 Minn. 445, 454; 131 N.W.2d 534, 540 (1964). The court appeared to reject the Quaderer rationale, but a careful reading of the dissent and subsequent concurring opinions indicated this was not its intention.

long as the new auto is acquired after issuance of the policy and during the policy period. The new vehicle must be used as a replacement for the insured vehicle, although it is not necessary that the insured vehicle be sold, as long as it is disabled or not used. The time when the insured actually acquires ownership of a new vehicle is often a material issue. The Minnesota rule has been that the registration of an automobile establishes prima facie that the registrant is the owner but evidence may be submitted to show that actual ownership is in another person.

Dike v. American Family Mutual Insurance Company was the last Minnesota case decided before Nyquist which interpreted the newly acquired automobile clause. In that case the insured acquired a Jeep, to be used for clearing snow and other off-the-highway purposes, with no intention of having it replace his insured pickup. The Jeep was acquired before the renewal of the pickup's policy, and subsequently the pickup was destroyed in an accident. The court held that the Jeep could not qualify as a newly acquired automobile. Justice Rogosheske wrote in the unanimous decision:

It is fundamental that ambiguous insurance policy provisions must be construed in favor of the insured. However, we cannot so construe a policy contrary to its plain, unequivocal language. We believe that plaintiff's policy plainly requires that an automobile be acquired as a replacement for the automobile described in the policy. Plaintiff acquired the Jeep as an additional vehicle long before he wrecked the pickup.

The second issue in the instant case was whether the

17. Id. at 417, 170 N.W.2d at 566 (emphasis added and footnotes
Chevrolet qualified as a temporary substitute automobile. A temporary substitute auto is defined in the 1963 Standard Family Automobile Liability Policy as:

any automobile or trailer, not owned by the named insured, while temporarily used with the permission of the owner as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.18

The purpose of the temporary substitute auto clause is not to defeat liability, but to define coverage by limiting the insurer’s risk to one operating vehicle per premium.19 This has the effect of extending coverage temporarily and automatically without the payment of additional premium when the insured uses an automobile not described in the policy.20

The courts have construed the words “while temporarily used” liberally in favor of the insured. The word “temporary” has no fixed meaning in the sense that it designates any distinct period of time. Temporary has been held to be the antithesis of permanent,21 and whether the use is temporary or permanent depends on the intention of the insured.22

A “substitute vehicle” within the meaning of the policy is one actually used in place of the specified automobile to the same ex-

omitted). This rationale is in accord with Brown v. State Farm Mut. Auto. Ins. Co., 306 S.W.2d 836 (Ky. 1957) where the court stressed the insurance company’s right to refuse to insure an older car.

18. RISJORD & AUSTIN, supra note 10, at 186. Except for the words “not owned by the named insured” this provision has remained substantially unchanged since 1947. The 1955 provisions also excluded vehicles owned by the named insured’s spouse (the policy definition of named insured includes the spouse) if a resident of the same household. In the 1956 Standard Policy the ownership exclusion was omitted altogether, but was readopted in 1958. The words “with the permission of the owner” were adopted in 1963 in response to decisions like Densmore v. Hartford Accident & Indem. Co., 221 F. Supp. 652 (W.D. Pa. 1963) in which the court held the insurance company liable for an accident Densmore had while driving a stolen car.


20. Lewis v. Bradley, 7 Wis.2d 586, 97 N.W.2d 408 (1959); Comment, 52 MARQ. L. REV. 146 n.3 (1968). See also Lloyd's Am. v. Ferguson, 116 F.2d 920 (5th Cir. 1941); Harte v. Peerless Ins. Co., 123 Vt. 120, 183 A.2d 223 (1962).


22. Some courts have found it sufficient if the evidence showed the intention of the owner of the substitute auto was that the insured’s use of it was to be temporary, especially if the owner maintained control over the vehicle. Little v. Safeguard Ins. Co., 137 So. 2d 415 (La. App. 1962).
tent as the insured vehicle would have been except for its withdrawal from normal use. Substitution cannot be merely coincidental, and can be proved only by showing that except for the breakdown, the insured car would have been used at the time and in the circumstances involved.

The temporary substitute auto provision can only be used to extend coverage to a vehicle "not owned" by the named insured. The Minnesota court in Gabrelcik v. National Indemnity Company decided a case in which the insured, the owner of a taxi, borrowed an automobile from her husband's used car lot to temporarily replace the insured vehicle while it was withdrawn from normal use. By strict construction of the policy language, the court held that since the replacement automobile was owned by the husband of the insured, it was excluded from coverage under the temporary substitute auto clause.

In most of the cases involving the definition of a temporary substitute auto the paramount question has been what consti-

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23. Western Cas. & Sur. Co. v. Norman, 197 F.2d 67 (5th Cir. 1952); Lewis v. Bradley, 7 Wis. 2d 586, 97 N.W.2d 408 (1959).
27. 269 Minn. 445, 131 N.W.2d 534 (1964).
28. The Gabrelcik court, however, was not deaf to public interest and did not deny all chance of recovery to the injured party. Id. at 448 n.7, 131 N.W.2d at 536 n.7. To insure a taxi the insurance company is generally required to file a certificate of coverage with the municipality. For example, the Minneapolis, Minn. Ordinance Code § 463.030 (1970) provides:

No person shall operate or permit to be operated any taxicab within the limits of the City, . . . unless and until the applicant shall execute or obtain and file . . . either an insurance policy . . . a self insurance certificate . . . or a bond.

When a certificate has been filed, there is considerable authority holding that after a judgment is obtained against the insured, if it remains unsatisfied, it may be collected from the insurer, and the injured party is not subject to policy defenses. See Minn. Stat. §§ 555.01-.02 (1969).
tutes “withdrawal from normal use because of its breakdown, repair, servicing, loss or destruction.” The majority position is that the vehicle specified in the insurance policy must be involuntarily withdrawn from all normal use before a temporary substitute will qualify for coverage. *Iowa Mutual Insurance Company v. Addy* held that the insured vehicle had not been withdrawn from normal use merely because it was fitted with heavy tire chains and was low on gas. Where the insured vehicle was not considered to be mechanically sound enough for an extended trip, or when the insured considered another vehicle to be more suited to his needs, coverage has been denied. The minority position contends that the insured can substitute another vehicle if the declared automobile is disabled and incapable of performing in its principle or normal use. *Nelson v. St. Paul Mercury Insurance Company* held that the fact the insured drove his Chevrolet on occasion after it was extensively damaged did not defeat coverage as the car had been substantially withdrawn from normal use. Withdrawal of the insured vehicle need not be total, as long as it could not have been used for the same purpose as the substituted vehicle because of its disrepair.

The problem faced by the *Nyquist* court was how coverage could be extended under the various “extended coverage” clauses of the insurance contract when it was apparent that the insurer had not been subjected to unconscionable risk. Because Wesley Nyquist had driven his mother's 1960 Chevrolet for a period of more than five months, using it without interruption for his regular use, coverage clearly could not attach through the non-owned auto clause. According to the uncontroverted evidence

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30. See cases cited at note 48 infra.
34. 83 S.D. 32, 153 N.W.2d 397 (1967).
36. A non-owned auto is defined as “an automobile or trailer not owned by or furnished for the regular use of either the named insured
the 1958 Chevrolet had been sold while it was still in operating
condition which required the court to find that the 1961 Chevro-
let was a replacement vehicle withdrawn from normal use. By
taking this intermediate step in order to fulfill the requirements
of the temporary substitute automobile clause, the court was able
to extend coverage to the insured while he was operating the
1960 Chevrolet.

The gravamen of the Nyquist court's rationale, as stated by
Justice Gallagher, was:

> When construing an insurance policy, this court is cogni-
zant of the public interest in having automobiles covered by
liability insurance, and construes any ambiguities in the pol-
icy against the insurer since the insurer chose the language.37

This reasoning was first introduced to Minnesota in Quaderer,
which in turn adopted it from American Indemnity Company v.
Davis.38 Davis used the argument cautiously to extend coverage
under the newly acquired automobile clause, and issued with it a
caveat requiring the new automobile to be an actual replacement
for the declared vehicle. The majority in Gabrelcik39 stressed
that "the insurer is entitled to rely upon language of the policy
designed to accomplish reasonable and justifiable objectives."40
However, Justice Murphy's strong dissent in Gabrelcik41 proved
persuasive to the majority in Nyquist as they extended coverage

or any relative, other than a temporary substitute automobile" (emphasis added). Rusjoa & Ausrm, supra note 10, at 186. This clause is de-
dsigned to provide coverage to the insured while he is driving a car not
owned by him for relatively short periods of time.

37. St. Paul Fire & Marine Ins. Co. v. Nyquist, 286 Minn. 157,
Co., 263 Minn. 383, 387, 116 N.W.2d 605, 608 (1962); see Minn. Safety


534 (1964). In a more recent case, Boedigheimer v. Taylor, 287 Minn.
323, 178 N.W.2d 610 (1970), the court denied coverage on the basis that
"[u]nambiguous words are to be given their natural and ordinary mean-
ing taken in their popular sense giving effect to the purpose of the
document as a whole." Id. at --, 178 N.W.2d at 613 (footnote omitted).

40. Auto insurance premium rates are structured in reliance on
the type of vehicle insured. The underwriting practices of the majority
of insurance companies surcharge liability coverage to compensate
for the increased risk exposure presented by Detroit's new "muscle
cars." The Insurance Rating Board (IRB) 13, (2d reprint effective Sept.
1, 1970) recommended premium rating factors, based on vehicle type,
that surcharged intermediate performance and sports cars 15%, and high
performance cars 30% of base premium.

(1964). Dissenting Justice Murphy argued:

> The purpose of the policy was not only to indemnify the
insured but to protect the public. The agreement comprehended
to the policy holder on the basis of the overall intent of the policy.

Nyquist rejected the majority position regarding interpretation of the newly acquired auto clause. Justice Gallagher reasoned that as long as there was only one operable car, coverage existed under the policy. Considered within purely a public policy standard such reasoning is perhaps sound, but it may be discredited by both a close analysis of the cases cited,\(^\text{42}\) and a review of recent Minnesota precedent. It is peculiar that the Nyquist court did not mention the precedent established by them less than six months earlier in Dike v. American Family Mutual Insurance Company.\(^\text{43}\) In Dike the court conclusively held the newly acquired automobile provision to be unambiguous, and in order to be “newly acquired” within its plain meaning an automobile must have been acquired after the commencement of the policy period, and must replace the automobile described in the policy. In the instant case the court disregarded this earlier precedent by holding that the 1961 Chevrolet, which was not in operating condition, could replace the 1958 Chevrolet.

The court held it made no difference that defendant Nyquist acquired *possession* of the 1961 Chevrolet prior to the effective date of the policy, since *ownership*, a prerequisite to the operation of the newly acquired clause, was acquired “sometime in 1967.” By not determining the exact date ownership attached the court leaves itself open to an anomalous result. If ownership were not acquired prior to the date of the accident, the mother’s 1960 Chevrolet could not qualify as a substitute for an owned vehicle. The court merely places its emphasis on the fact that

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that should the taxicab become disabled a substitute vehicle would be used. . . . The important consideration was that the substitute car be used as a taxicab.

*Id.* at 451, 131 N.W.2d at 558.

\(^{42}\) Nationwide Mut. Ins. Co. v. Mast, 52 Del. 127, 153 A.2d 893 (1959), stresses the term “replacement” as it is found in the insurance contract and defines it to mean:

. . . To provide or produce a substitute or equivalent in place of (a person or thing) . . . . II Shorter Oxford English Dictionary 1706 (3rd Ed. Reprint 1947).

There is no evidence that the word “replace” has a meaning peculiar to the insurance field, . . . so the ordinary meaning must govern.

*Id.* at 131, 153 A.2d at 895. This is to suggest that replacement must be replacement “in use” and not merely one of ownership. In *Nyquist* the court held the 1961 Chevrolet, inoperable at the time of acquisition, was a replacement for the useable 1958 Chevrolet. See 7 Am. Jur. 2d *Automobile Insurance* § 101 (1963).

only one vehicle was in use at a time, and the insurer was not subjected to double coverage. Rationale such as this may have inspired Chief Justice Knutson to write in his dissent: "It is not our function to rewrite insurance policies so as to provide coverage which under the clear terms of the policy the parties have not provided for."\textsuperscript{44}

Realizing that the \textit{Nyquist} decision could give rise to a broad construction of the "newly acquired" clause, the court remedied its possible error in a subsequent decision. In \textit{Fitch v. Bye}\textsuperscript{45} the court restricted the language of \textit{Nyquist} to its particular facts, and held that a replacement vehicle obtains coverage only when the insured automobile has either been disposed of, or cannot be rendered operable. The \textit{Fitch} court further held that the use of the words "acquires ownership" anticipates "future events subsequent to the commencement of the policy period."\textsuperscript{46}

After laying the groundwork for its decision by interpreting the intent of the insurance policy in the light most favorable to the insured and finding the 1961 Chevrolet qualified as a newly acquired auto, the court had but one more hurdle to clear. If coverage were going to extend to the 1960 Chevrolet, it would have to do so within the temporary substitute auto provision. At this point two problems are encountered. One is the uncontested evidence that the temporary substitute vehicle was used without restriction for a period of more than five months, and the other is the nature of the withdrawal of the 1961 Chevrolet from normal use.

In keeping with the rule of liberal construction in favor of the insured, the word "temporary" was interpreted by the Minnesota court to have no fixed temporal significance. No single test can be applied in all situations involving a temporary substitute, and Minnesota has taken the position that the length of time is not controlling, as long as the insurance company is not subject to double risk exposure, and the insured intends to use the vehicle only temporarily.\textsuperscript{47}

\begin{footnotes}
\item 44. 286 Minn. at 163, 175 N.W.2d at 498 (1970).
\item 45. --- Minn. ---, 180 N.W.2d 866, 869 (1970). This case was decided eight months after \textit{Nyquist}.
\item 46. Id. at ---, 180 N.W.2d at 869. This is a return to the position taken in \textit{Dike}. When these three recent Minnesota cases, \textit{Dike}, \textit{Nyquist} and \textit{Fitch}, are considered together they support the proposition that the newly acquired auto clause cannot extend to a vehicle owned prior to commencement of the policy, unless it can be conclusively shown that the insurer could not have been subjected to double coverage.
\item 47. Defendant \textit{Nyquist}'s intention is not easily ascertained by the facts. He sold his 1958 Chevrolet on March 9, 1967, and was involved in the accident with the temporary substitute auto on April 17, 1967 (39
\end{footnotes}
The court found the term "withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction" to be ambiguous, and therefore also subject to liberal construction. It concluded the vehicle was withdrawn by some unknown third party, and was as a consequence within the meaning of the provision. The court's rationale is faulty in its failure to consider from whose use the vehicle was withdrawn. On closer analysis it becomes apparent that the replacement vehicle became relevant only when it was withdrawn from the insured's use, and such withdrawal in the instant case occurred when Nyquist voluntarily disposed of his 1958 Chevrolet in favor of the 1961 which he knew to be in an inoperative condition. The overwhelming majority of courts have held that the temporary substitute auto clause is inoperable when the insured voluntarily withdraws the declared vehicle from use in absence of a breakdown.48

The Minnesota court in Nyquist chose to interpret the combination of the newly acquired and temporary substitute automobile provisions liberally as a general scheme to provide coverage whenever a close reading of the policy will allow. Although the court in Fitch expressed its intent to limit the Nyquist decision, it also suggests that when the facts clearly demonstrate the insurance company was not subjected to double risk exposure and the persons insured are effectively limited to the named policy holder, Nyquist may reappear. To hold otherwise would allow the insurance companies the advantage of a windfall and work injustice to the purpose and intent of assuring financial responsibility.

days later). The temporary substitute was continued in use until the repair of the 1961 Chevrolet on August 18, 1967. The facts are silent as to the reason for this delay.


Plaintiff was the purchaser and operator of a snowmobile manufactured by the defendant Rupp Manufacturing Company. While plaintiff was operating the snowmobile over rough terrain on a fox hunt, he drove the snowmobile into a ditch and the left ski of the machine caught in the snow, stopping the snowmobile abruptly. Plaintiff flew off the left side of the snowmobile striking his right knee against the protruding sparkplug, injuring himself. Alleging the protruding sparkplug to be a defect in design of the snowmobile, the plaintiff brought suit against the defendant manufacturer. The defendant appealed from an order of the district court vacating a jury verdict for defendant and granting a new trial on all issues, upon the exclusive ground that the court committed an error of law in not submitting to the jury an instruction on strict tort liability. The Minnesota Supreme Court reversed the district court’s order and reinstated the verdict, holding, as a matter of law, that plaintiff’s awareness of the defective condition precluded him from recovery under the strict liability theory. *Magnuson v. Rupp Mfg., Inc.*, 285 Minn. 32, 171 N.W.2d 201 (1969).

Strict tort liability as applied to manufacturers of defective products is a relatively new doctrine that is in a state of rapid development and proliferation. Formerly, recovery against a manufacturer was limited to the theories of negligence and breach of contractual warranty. With the development of modern market conditions such as remote manufacturers and specialized, complex production processes these two theories proved inadequate to protect the consumer. Thus in 1963 the strict tort liability theory was adopted by the California Supreme Court in the landmark decision of *Greenman v. Yuba Power Products*.

2. Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 463, 150 P.2d 436, 441 (1944). In his famous concurring opinion in that case Justice Traynor made the following observation: An injured person . . . is not ordinarily in a position to . . . identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is. See also Note, *Products Liability and Section 402A of the Restatement of Torts*, 55 GEO. L.J. 286, 288 (1966); Kessler, *Products Liability*, 76 YALE L.J. 887 (1967).
In that case the California court held a manufacturer strictly liable in tort when an article he placed on the market, knowing that it was to be used without inspection for defects, proved to have a defect that caused injury to a human being. Subsequently the strict liability theory was adopted by the Restatement (Second) of Torts (1965) and by many other states.

There are several policy reasons underlying the adoption of strict tort liability. First, the manufacturer is in the best position to distribute equitably the cost of the inevitable injuries resulting from use of defective products. By raising his price, the manufacturer can spread the loss over the entire community

4. Restatement (Second) of Torts § 402A (1965):

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
   (a) the seller is engaged in the business of selling such a product, and
   (b) it is expected to and does reach the user consumer without substantial change in the condition in which it is sold.

(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 relation with the seller.


6. Keeton, Products Liability—Some Observations About the Allocation of Risks, 64 Mich. L. Rev. 1329 (1966); Kessler, supra note 2; Prosser, supra note 1 at 1122; Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944), Justice Traynor’s concurring opinion is an articulate explanation of some of the policy reasons for strict liability.

7. This policy reason receives heavy emphasis in the Restatement (Second) of Torts § 402A, comment c at 349 (1965):

On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be
of consumers rather than letting fate select at random the victim who must bear the full loss. Second, the manufacturer is in the best position to anticipate and protect against the hazards presented by the faulty products. There is an undeniable imbalance of expertise between the manufacturer and the consumer due to such factors as the consumer's lack of technical knowledge, his inability to evaluate the quality of many goods and his lack of opportunity to inspect due to the rapid flow of goods. By contrast the manufacturer is or should be much better able to judge the quality of the items which he produces and markets and the statistical probability of a defect. Third, by placing the goods on the market and by advertising manufacturers have represented their products to be safe and suitable for use. In the case of snowmobiles, the product at issue in the Magnuson case, many television advertisements show contented consumers speeding across rugged snowy terrain in their snowmobiles. Such advertising lulls the vigilance of the consumer and causes him to place confidence in the manufacturer to produce a safe product. When the use intended by the manufacturer leads to injury to a consumer because of the defective character of the product, the manufacturer should not be able to avoid responsibility.

In strict liability several defenses based upon plaintiff's conduct may be available to the manufacturer. It is held in such cases, for example, that assumption of risk is a defense but contributory negligence is not. Whether these defenses are treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

8. Kessler, supra note 6, at 926; Prosser, supra note 6, at 1122; Escola v. Coca-Cola Bottling Co., 24 Cal. 2d at 462, 150 P.2d at 440-41 (concurring opinion): Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the occurrence of others, as the public cannot.

9. Escola v. Coca-Cola Bottling Co., 24 Cal. 2d at 467, 150 P.2d at 443; Prosser, supra note 6, at 1123: The supplier, by placing the goods upon the market, represents to the public that they are suitable and safe for use; and by packaging, advertising or otherwise, he does everything that he can to induce that belief . . . . The supplier has invited and solicited the use; and when it leads to disaster, he should not be permitted to avoid responsibility by saying that he has made no contact with the consumer.

10. Prosser, supra note 6, at 1147-48;
plicable, however, depends upon the specific character of the conduct rather than whether it fits generally into one of these two categories. The comments to Restatement (Second) of Torts § 402A define those defenses in terms of the specific character of the conduct:

If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable.

... [C]ontributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

When the cases are examined, however, they fall into a very consistent pattern, and it is only their language which is confusing. Those which refuse to allow the defense [contributory negligence] have been cases in which the plaintiff negligently failed to discover the defect in the product, or to guard against the possibility of its existence. They are entirely consistent with the general rule that such negligence is not a defense in an action founded on strict liability. Those which have permitted the defense all have been cases in which the plaintiff has discovered the defect and the danger, and has proceeded nevertheless to make use of the product. They represent the form of contributory negligence which consists of deliberately and unreasonably proceeding to encounter a known danger and is quite well settled that this is a defense against other actions based on strict liability.

See also Fake v. Addicks, 45 Minn. 37, 47 N.W. 450 (1890) (dictum).  
11. Annot., 13 A.L.R.3d 1057, 1101 (1967): There are at least four different theories under which a defendant may assert that a plaintiff's own conduct precludes him from being able to hold the defendant strictly liable in tort: (1) that the plaintiff negligently failed to discover the defective condition of the defendant's product or to guard against the possibility of its existence; (2) that the plaintiff assumed the risk of the injuries or damage which he sustained, by voluntarily and unreasonably proceeding to encounter a known danger; (3) that the plaintiff's misuse of the defendant's product, rather than any defect in the product, caused the plaintiff's injuries or damages; (4) that the plaintiff's misuse of the defendant's product concurred with the defectiveness of the product to cause the plaintiff's injuries or damages.

See also Epstein, Product Liability: Defenses Based on Plaintiff's Conduct, 1968 Utah L. Rev. 267, 269.  
13. Id., comment n at 356 (emphasis added).
These official comments establish that abnormal use of the product or discovering the danger and then voluntarily encountering the risk are defenses to strict liability but a negligent failure by the plaintiff to discover the dangerous qualities of the defect is not a defense.

The doctrine of strict tort liability was adopted by the Minnesota Supreme Court in *McCormack v. Hankschraft*.

In that case a child was injured when the boiling water of a vaporizer fell on her. It was found that although the design was intended by the defendant to serve as a safety measure to avoid the buildup of steam in the glass jar, it also had the effect of allowing the water in the jar to gush out instantaneously when the vaporizer tipped over. The court, after noting the strict liability theory, by way of dictum stated:

This rule of strict tort liability . . . qualifies as a tested legal theory along with the traditional theories of negligence and breach of warranty where the latter meet the purpose for which liability should be imposed upon a supplier of a product. However, in our view, enlarging a manufacturer's liability to those injured by its products more adequately meets public policy demands to protect consumers from the inevitable risks of bodily harm created by mass production and complex marketing conditions. In a case such as this, subjecting a manufacturer to liability without proof of negligence or privity of contract, as the rule intends, imposes the cost of injury resulting from a defective product upon the maker, who can both most effectively reduce or eliminate the hazard to life and health, and absorb and pass on such costs, instead of upon the consumer, who possesses neither the skill nor the means necessary to protect himself adequately from either the risk of injury or its disastrous consequences.

Based on this statement, which reiterates some of the policy reasons outlined earlier, it is certain that the doctrine of strict tort liability as applied to manufacturers of defective products has been accepted and approved by the Minnesota Supreme Court.

In the *Magnuson* decision the court discussed several different elements of the strict products liability doctrine. It emphasized that in order to recover the plaintiff must not be aware of the defect. The evidence indicated that the plaintiff unquestionably was aware of the position of the sparkplug. It was located at the top of the cylinder and faced towards the operator, was six to eight inches above the seat, and extended approximately one inch beyond a metal cowling that surrounded the

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14. 278 Minn. 322, 154 N.W.2d 488 (1967).
15. *Id.* at 338, 154 N.W.2d at 500.
16. *See* text accompanying note 6 supra.
18. 285 Minn. at 41, 171 N.W.2d at 207.
motor. Plaintiff was a skilled mechanic who had worked on the motor quite often and had removed and replaced the sparkplug several times. The court held, therefore, that plaintiff's awareness of the position of the sparkplug meant that it could not be considered defective or unreasonably dangerous vis-à-vis the plaintiff. The awareness of the position of the sparkplug also served to prevent the defective condition from being the proximate cause of the injury. The court reasoned that the plaintiff's awareness of the sparkplug's position coupled with his voluntary operation of the snowmobile constituted misuse of the product and was the proximate cause of his injury. His removal of a thin rubber insulator covering the sparkplug was said to constitute mishandling. The court pointed out that strict liability is not absolute liability and the manufacturer of the product is not responsible for any and every injury that results from its use. Accordingly, said the Magnuson court, the courts which adopt strict liability to supplement negligence must adopt some rule or principles to serve as limiting factors. It also indicated that the plaintiff must prove that he exercised due care for his own safety. Thus, in addition to its basic holding that a plaintiff who is aware of the defect cannot recover under strict liability, the court included dicta in its decision that could have a significant impact on the development of products liability in Minnesota. The following analysis will identify the shortcomings of the court's reasoning and explain why the Minnesota court has misapplied the law of strict products liability in this case.

As a basis for its holding that plaintiff's awareness of the defect defeats a recovery in strict liability, the Magnuson court relied on Greenman v. Yuba Power Products. In that case the injuries of the plaintiff were caused by the defective design of a Shopsmith, a combination power tool. In Greenman the plaintiff's witnesses testified that inadequate set screws were used to hold the machine together and that there were other more secure ways of fastening the parts of the machine together. The court held the manufacturer strictly liable in tort, defining the

19. Id. at 43, 171 N.W.2d at 208.
20. Id. There was a factual issue, not treated by the court, as to whether this insulator served to protect operators from injuries such as occurred in this case or only protected the electrical connection against the weather. See text accompanying note 67 infra.
21. Id. at 45, 171 N.W.2d at 209.
22. Id.
23. Id. at 43, 171 N.W.2d at 208.
essential elements of the doctrine as follows:

To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which the plaintiff was not aware that made the Shopsmith unsafe for its intended use. Based on this statement from Greenman, the Magnuson court concluded that a plaintiff who is aware of the defect cannot recover. The statement might also be interpreted, however, as requiring not just an awareness of the defect but also an awareness of the “unsafe” qualities presented by the defect. This apparent ambiguity is not explained elsewhere in the Greenman decision nor do the facts of the case provide any assistance in determining the proper interpretation. Despite this ambiguity, the function of this “awareness” principle in strict liability of manufacturers is to carry over from the field of negligence the assumption of risk defense which has traditionally been available in strict liability action. This defense has required not just a recognition of the presence of the defective condition, but rather a subjective knowledge and appreciation of the danger involved so that the decision to encounter it will be meaningful. In strict liability actions, as in negligence, the plaintiff cannot meaningfully or intelligently assume the risk unless he is aware of the hazardous qualities of the defect. Therefore, the strict liability counterpart to assumption of risk, “awareness of the defect,” should also require a finding that the plaintiff, in addition to being aware of the defective condition, subjectively recognized and appreciated the danger presented by it, before recovery is barred. Yet the Magnuson court made no such finding, but was instead content to conclude that plaintiff's knowledge of the condition alone was sufficient to bar his recovery. In this conclusion lies the critical error of the court.

While the theoretical basis of liability may have changed from negligence to strict liability, there is no reason to believe that anything less stringent than a knowledge and appreciation of the danger is required. To require a less stringent standard would be contrary to the main function of the strict liability doc-

25. Id. at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.
27. Assumption of risk is based upon a subjective analysis and may be found only when the plaintiff has: (1) knowledge of the risk, (2) appreciated the risk and (3) voluntarily chosen to encounter it. Parness v. Economics Laboratory, Inc., 284 Minn. 381, 170 N.W.2d 554 (1969); Coenan v. Buckman Bldg. Corp., 278 Minn. 193, 153 N.W.2d 329 (1967); Schrader v. Krissel, 232 Minn. 239, 43 N.W.2d 395 (1950).
trine which is to broaden the scope of liability of the manufacturer. Restatement (Second) of Torts § 402A, comment n at 356 (1965),28 unmistakably leads to this conclusion. It explicitly states that voluntarily and unreasonably proceeding to encounter a known danger, commonly known as assumption of risk, is a defense to a strict liability action and that the consumer is barred from recovery if he discovers the defect "and is aware of the danger."29 Although the court in Magnuson noted this section of the Restatement in its decision with approval,30 this particular comment to the Restatement was not discussed. There is no question but that it requires a knowledge and appreciation of the danger rather than just an awareness of the physical presence of the defect as was deemed sufficient in Magnuson. Other cases and authorities further support this conclusion.31 For ex-

28. [C]ontributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

29. Id. (emphasis added).

30. 285 Minn. at 38, 171 N.W.2d at 205.


The only form of plaintiff's negligence that is a defense to strict liability is that which consists involuntarily and unreasonably proceeding to encounter a known danger, more commonly referred to as assumption of risk. For such a defense to arise, the user or consumer must become aware of the defect and the danger and still proceed unreasonably to make use of the product (emphasis added).


While assumption of risk is a most favored contention of manufacturer-defendants, it is quite obvious that the facts must indeed be gross for the defense to be sustained. Unless and until the facts clearly establish that plaintiff knew, or should have known, of the danger and clearly appreciated, or should have appreciated, the danger, we have at most a fact question for the jury and, in all probability, a judgment for plaintiff.

Keeton, Assumption of Products Risk, 19 Sw. L.J. 61, 66 (1965); Prosser, supra note 1, at 1147; Comment, Strict Liability and the Defenses, 18
ample, the Illinois Supreme Court discussed the character of the awareness defense in *Williams v. Brown Mfg. Co.* In that case the plaintiff was injured when a trencher he was operating jumped backward and struck him. The jury found that there were several design defects including the absence of a safety device. Such absence was a defective condition whose dangerous propensities, however, apparently were not fully appreciated by the plaintiff, a qualified operating engineer. In holding for the plaintiff, the court noted that there was no evidence that would support a finding that the plaintiff had proceeded unreasonably to use the trencher after discovery of the defect and becoming aware of the danger, or that he had unreasonably proceeded to encounter a known danger. Earlier the court emphasized that an analysis of the doctrine of strict liability and the purposes to be achieved by its adoption require that the test of contributory fault be subjective, not objective. That subjective standard, said the court, is whether the particular plaintiff has proceeded unreasonably to use the product after he has discovered the defect and become aware of the danger, or has voluntarily and unreasonably proceeded to encounter a known danger.

As contrasted with this standard as developed by the Illinois court, the test adopted by the *Magnuson* court required only that the plaintiff recognize the physical presence of the defect and not the dangerous propensities arising from it. By adopting this standard, the court has ignored an essential element of the awareness defense as developed by the *Restatement* and other courts—a knowledge and appreciation of the danger presented

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32. *Id.* at 336, 236 N.E.2d at 141.
33. *Id.* at 336, 236 N.E.2d at 127 (emphasis added).
34. *See* *Restatement* (SECOND) OF TORTS § 402A, comment n at 356 (1965).
by the defect. This failure might be illusory if the court here assumed that the plaintiff recognized and appreciated the danger. This is not, however, apparent from the decision itself or the briefs. That the plaintiff was aware of the position of the sparkplug and that he was a skilled mechanic are not alone sufficient to enable the court to conclude as a matter of law that he subjectively recognized and appreciated the danger presented by the protruding sparkplug. Thus the court, in barring plaintiff's recovery as a matter of law, departed from legal precedent by failing to require that plaintiff recognize and appreciate the danger presented by the protruding sparkplug rather than merely have knowledge of its position.

In its application of the awareness defense, the critical shortcoming in the court's analysis is its failure to take cognizance of the fact that without knowledge of the danger, as distinguished from knowledge of the physical presence of the protruding sparkplug, the plaintiff was certainly in no position to encounter intelligently and voluntarily the risk presented by the snowmobile. The plaintiff cannot assume the risk of a danger of which he is ignorant. The very terms of the phrase "assumption of risk" require that the plaintiff be aware of the hazard or risk, not just the defective condition. In order to bar recovery in strict liability, there should be a knowledge and appreciation of the danger itself and not just the facts which constitute it. Without knowledge of the danger presented by the protruding sparkplug, plaintiff's decision to operate the snowmobile precisely as the manufacturer intended should not be construed to indicate that he accepted the risk of the danger presented by the defect. Although the court consciously avoids the use of the term "assumption of risk," the "awareness" theory serves the same function but overlooks the essential element—knowledge and appreciation of the danger. The court noted that when a court adopts strict liability it should establish some rules or principles to substitute for negligence as a delimiting principle. The court's reason for

36. The fact that the plaintiff was a mechanic would be more relevant in proving an awareness of the danger had there been a mechanical failure rather than a design defect. Given the nature of the defect in this case, his mechanical knowledge would be of no special benefit to him; and he is, in fact, in no better position than the average consumer in terms of foreseeing the danger presented by the protruding sparkplug. In his concurring opinion Justice Rogosheske admits there is insufficient evidence from which a trier of fact would be compelled to conclude that plaintiff subjectively realized the nature of the risk or danger. 285 Minn. at 48, 171 N.W.2d at 211.

37. Id. at 45, 171 N.W.2d at 209.
these delimiting principles was that otherwise the manufacturer would be liable for all accidents involving his products. The rule adopted in this case, however, unduly limits the manufacturer's liability. It essentially makes awareness a much more stringent test of plaintiff's conduct in strict liability than its counterpart—assumption of risk—enforces in a negligence case. Thus the court has reached the anomalous position where it requires a higher standard of proof for the plaintiff in a strict liability action than in a negligence action.

Several factors may have influenced the court to forego use of the term assumption of risk and to dispense with a finding of its essential elements. First, as stated above, the court wanted to adopt some principles to confine the scope of the manufacturer's liability. Second, the evidence itself was not sufficient to warrant the conclusion as a matter of law that assumption of risk barred recovery. Third, the court may have avoided using the term because of the confusion that surrounds its meaning in the negligence field and sought to define the defense in terms of the specific conduct of the plaintiff. Although this is certainly desirable, the authorities adopting this approach have nevertheless required a knowledge of the danger other than merely an awareness of the physical presence of the defect.

In a second aspect of its decision the Magnuson court made virtually the same error as with the awareness defense. It indicated that the protruding sparkplug was also an "obvious" defect; and, in the sense that the condition was visible for all to see, it was unquestionably correct. When defects are obvious, courts frequently invoke a doctrine developed in Campo v. Scho-

38. Justice Rogosheske admitted this in his concurring opinion. Id. at 48, 171 N.W.2d at 211. The evidence that plaintiff was aware of the position of the sparkplug and had repaired it several times is sufficient to get the assumption of risk issue to the jury, but based on the stringent subjective nature of the assumption of risk defense, is not sufficient to compel the conclusion as a matter of law that plaintiff assumed the risk.


41. 285 Minn. at 45, 171 N.W.2d at 209.
In that negligence action, plaintiff's hand became caught in an onion-topping machine; he alleged the absence of a safety device as a design defect. The court denied recovery holding that the danger presented by the absence of the safety device was obvious to the plaintiff. Therefore, no further duty is owed by the manufacturer because it is not foreseeable that any reasonable man would be injured if he exercised due care. Although there is language in the decision which indicates that only the defect, as distinguished from the danger, need be obvious to invoke the doctrine, the court clearly determined that the danger was obvious since it refers to the condition as being a "patent peril or from a source manifestly dangerous," comparing it to an axe or buzz saw. The Magnuson court states that when a condition, as distinguished from the danger presented by it, is obvious the plaintiff must show he made proper use of the product. As it did in the application of the "awareness" principle, the court again erred by inquiring whether the defect itself, rather than the dangers it presented, was obvious.

One case which stated that the obviousness of the danger and not the defect must exist was Greeno v. Clark Equip. Co. There the plaintiff was injured by a defectively designed fork-lift. The court made the following comment:

[T]he hidden nature of the defect . . . [is] no real limitation since the defendant company could not have been negligent in manufacturing a product whose danger would be perceived and appreciated by all reasonable persons exercising ordinary care. It is not negligent for one to manufacture and sell an axe or power saw because the dangers are obvious and the manufacturer can reasonably expect others in the exercise of ordinary prudence to perceive and appreciate the dangers. But it might be negligent to fashion the axe or saw from defective metal, undetectable by prudent users. "Hidden" is merely a concise way of saying that the danger could not be reasonably perceived and appreciated.

Thus the fact that the protruding sparkplug was not a latent defect and was visible for all to observe should not bar recovery unless its injury inflicting potential was also apparent. Yet the Magnuson court fails to inquire as to whether the "danger" is obvious. Had they done so on these facts they may have reached

42. 301 N.Y. 468, 95 N.E.2d 802 (1958).
43. Throughout the opinion the court refers to the "defect or danger" as being obvious. From this alternative characterization, it may be argued that if the defect is patent, then perhaps that is all that is required to come within the reach of the doctrine.
44. 301 N.Y. at 472, 95 N.E.2d at 804.
45. Id.
47. Id. at 430.
the conclusion that the danger was obvious. However, the protruding sparkplug is not comparable to an axe or power saw where the nature and operation of the hazard are easily perceived. Whether it is within the competence of a mechanic or consumer, lulled into a sense of complacency by frequent television advertisements, to foresee that a sudden stop of the snowmobile would cause his knee to strike a protruding sparkplug is questionable. From the policy reasons outlined earlier, the manufacturer should have recognized that this is a type of design hazard that creates a great likelihood of injury in the normal operation of a snowmobile. Although there is some authority for the court's position, the better view is that the crucial inquiry must be whether the danger was obvious and the fact that the defect itself is visible is not controlling.

The Magnuson court, in barring plaintiff's recovery without requiring a finding that he subjectively recognized the danger, has certainly not furthered the policy objectives of strict products liability outlined earlier. It has placed neither the loss on the one who can best distribute it nor the responsibility for an-

48. See text accompanying note 6 supra.
49. Messina v. Clark Equip. Co., 263 F.2d 291 (2d Cir. 1959). In that case plaintiff's intestate was killed when the scissor arms and bucket from an earth moving machine he was operating fell on him. Alleged as the defect was the failure of the manufacturer to provide a safety device. Citing Campo, the court denied recovery on the ground that the defect was a patent one and known to the decedent. Judge Clark dissented strongly arguing that the danger was not known to the decedent, only the parts of the earth mover which by their improper design were visible and apparent. He emphasized that Campo required a knowledge of the danger rather than the physical presence of the defective condition.
50. Ilnicki v. Montgomery Ward, 371 F.2d 195 (7th Cir. 1966). The plaintiff sued for injuries suffered as a result of operating a lawn mower. As defects he alleged the absence of the following: (1) remote control switch; (2) a protective house covering the starting knob; (3) a protective shroud over the moving blade; (4) failure to have the blades located further from the bottom of the metal housing. Despite the fact that these defects were obvious to anyone observing the machine, the court applied strict liability. See generally Olsen v. Royal Metals Corp., 392 F.2d 116 (5th Cir. 1968); Noel, Manufacturer's Negligence of Design or Directions for Use of a Product, 71 YALE L.J. 816, 838 (1962). Professor Noel asserts that the Campo doctrine indicates simply that the obviousness of the defect or danger is only one significant factor in the determination of whether or not the manufacturer has created an unreasonable risk. He observes:

The concept that the danger itself, as distinguished from the defect, must be latent, bears more precisely on the issue of unreasonable risk, but courts are apt to find that the danger is obvious whenever the alleged defect of design is obvious.
51. See text accompanying note 6 supra.
icipating defects in design on the one who can best anticipate them. By placing the burden of discovery of the dangerous propensities of a defective design on the consumer, it has placed a higher responsibility on him than on the manufacturer who is responsible for marketing the product. The manufacturer, after extended experience with the machine, is more cognizant of the danger lurking in the protruding sparkplug. To permit the manufacturer to avoid liability after an accident such as plaintiff's and to compel the user to bear the burden of discovering what the manufacturer himself has failed to observe is to place the burden upon precisely the party whom the policy considerations underlying strict liability have dictated that it should not lie. This case permits manufacturers to market defectively designed products with impunity provided the physical presence of the condition is visible to unsuspecting consumers.

Although not mentioned by the Magnuson court, the new Minnesota comparative negligence statute may have some effect on defenses based on plaintiff's conduct in a strict liability action. That statute provides that contributory negligence is no longer a complete bar to recovery but will only serve to reduce the plaintiff's damages. A thorough discussion of the implications of the comparative negligence statute is, however, far beyond the scope of this Comment and it is necessary to note only one important case. A recent Wisconsin strict liability decision, Dippel v. Sciano, construed a similar statute to apply to defenses other than contributory negligence such as assumption of risk and abnormal use of the product. The effect of this decision is to eliminate such defenses as a complete bar to plaintiff's recovery and, as with contributory negligence, to allow them only to reduce the amount of damages recoverable by the plaintiff. A similar interpretation of the new Minnesota statute would have a

52. Minn. Stat. § 604.01 (1969):
Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

53. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

54. Wis. Stat. 331.045 (1931):
Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.
significant impact on defenses based on plaintiff's conduct in strict liability actions in this state.

The court's discussion and application of the defense of abnormal or unintended use also warrants criticism. The court stated that use of the snowmobile after knowledge of the location of the sparkplug constituted misuse of the product.\textsuperscript{55} It is certainly true that plaintiff in a products liability case must prove that he used the product as it was intended to be used, and that abnormal use will defeat his claim.\textsuperscript{56} Plaintiff is barred from recovery, however, only when he has made an unforeseeable use of the product, such as using an antiseptic as a mouthwash,\textsuperscript{57} or driving on wheels at a speed in excess of rated capacity.\textsuperscript{58} In the \textit{Magnuson} case the plaintiff used the snowmobile precisely as it was intended to be used and as the manufacturer's advertisements indicated it could be used—he drove it across a snow-covered field at a high rate of speed. There was certainly nothing abnormal or unforeseeable about such use of a snowmobile. While labeling plaintiff's operation of the snowmobile when he was aware of the defect as misuse is not illogical, such reasoning normally does not speak to misuse but rather to the defense of voluntarily encountering a known danger. If we follow the court's novel interpretation of the misuse doctrine then it would be impossible for an operator to drive a similarly designed snowmobile under any circumstances without misusing it.

Another element of the court's decision susceptible to criticism is its discussion of the contributory negligence defense in a strict products liability context. The court strongly implied that the plaintiff must prove freedom from contributory negligence as a condition precedent to recovery in a strict liability action. Referring to the Illinois decision of \textit{People ex rel. General Motors Corp. v. Bua},\textsuperscript{59} with respect to the elements that plaintiff must prove in a strict liability case, the court stated: "But, in addition, the Illinois court indicated that it is still necessary to prove that the plaintiff was in the exercise of due care for his own safety."\textsuperscript{60} This indicates that the court may require the plaintiff

\textsuperscript{55} 285 Minn. at 43, 171 N.W.2d at 208.
\textsuperscript{56} \textit{Restatement (Second) of Torts} \textsection 402A, comment h at 351 (1965).
\textsuperscript{59} 37 Ill. 2d 180, 226 N.E.2d 6 (1967).
\textsuperscript{60} 285 Minn. at 43, 171 N.W.2d at 208.
in a strict liability case to prove freedom from contributory negligence. *Bua* was not a good choice of authority for this rule because in Minnesota contributory negligence is an affirmative defense to be proved by the defendant. In Illinois, however, where the plaintiff traditionally has the burden of proving freedom from contributory negligence, there is obviously a question as to whether this practice is to be continued in strict products liability cases. Thus the *Magnuson* court lifted the burden of proof on contributory negligence completely out of context from a state that has always required the plaintiff to prove freedom from contributory negligence and attempted to apply it in Minnesota where it has traditionally been an affirmative defense. This error is further compounded by the fact that a subsequent Illinois decision reversed the portion of the *Bua* case set out above prior to the use of it by the Minnesota court in *Magnuson*, and held that, henceforth in Illinois, contributory negligence in strict liability cases is to be treated as an affirmative defense. It then went on to define contributory negligence as voluntarily and unreasonably proceeding to encounter a known danger. *Bua* therefore lends no support to the Minnesota court's implication that the plaintiff must prove freedom from contributory negligence in order to recover in strict liability.

One further aspect of the decision also deserves comment although the court's rather cursory discussion of this aspect of the case leads to the conclusion that it is of limited importance. The court indicated that plaintiff's removal of a thin rubber cover over the sparkplug constituted mishandling which would also bar his recovery. The *Restatement* clearly provides that the manufacturer is not liable when the injury occurs due to subsequent mishandling by the consumer. However, whether the removal

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61. McCormick v. Malecha, 266 Minn. 33, 122 N.W.2d 446 (1963); Minn. R. Civ. P. 8.03.
63. Williams v. Brown Mfg. Co., 93 Ill. App. 2d 334, 347, 236 N.E.2d 125, 132 (1968). The court was faced with the question of whether the plaintiff is required to plead freedom from contributory negligence. The court said the statements in *Bua* had a limited purpose and meant only that contributory negligence is a defense to strict liability. It then concluded: "[W]e hold that in this action, based upon strict liability in tort, the trial court correctly held contributory negligence to be an affirmative defense." Consequently, the current Illinois rule requires defendant, not plaintiff, to plead and prove contributory negligence.
64. Id.
65. 265 Minn. at 43, 171 N.W.2d at 208.
66. RESTATEMENT (SECOND) OF TORTS § 402A, comment g at 351
of the rubber cover was such mishandling is not at all certain. It is significant to note the following statement in the respondent's brief:

Actually the insulator which was installed on the machine was a thin rubber insulator which was patently not designed for the purpose of protecting the operator but rather was designed to protect the connection against weather.67

If the cover was not designed to protect consumers from injuries due to sudden stops of the snowmobile, there is a factual issue of whether the sparkplug would have still been dangerous had the insulator remained in place. The fact that the court placed relatively slight reliance on this aspect of the case serves to indicate that the mishandling defense was tenuous on the facts presented.

The Magnuson case will have a significant impact on the development of strict liability in Minnesota. With regard to the "awareness" holding, the court may choose to minimize its effect in future cases by limiting it to the facts of Magnuson and assert that, on those facts, the court assumed that the plaintiff was aware of the danger presented by the sparkplug. Thus, in subsequent cases, the court could still require a knowledge and appreciation of the danger before the claim of the plaintiff is barred. Although this is not the interpretation suggested by the language of the decision, it would serve to avoid many of the anomalous repercussions of the decision outlined earlier in this Comment. On the other hand, the court may continue to require only an awareness of the condition, as distinguished from the danger presented by the condition, and thereby undermine the development of strict liability in Minnesota. Based on the decision itself, the latter course seems more likely because the complete failure of the court to inquire into plaintiff's awareness of the danger leads to the unmistakable conclusion that the court thought such a requirement irrelevant if, indeed, the distinction were perceived at all. The elements of the decision concerning misuse and burden of proof on contributory negligence are so obviously incorrect that they should not be followed. The decision dealt with many aspects of products liability and, as indicated throughout this Comment, raises the possibility of several novel limitations on the doctrine of strict products liability in Minnesota which have not been adopted in any other jurisdiction. As pointed out

(1965); "[T]he seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed."

by the concurring opinion, it is difficult to ascertain the basis of the court's opinion, but perhaps the decision's confusing and obscure rationale will readily lend itself to corrective revision in the future.

68. 285 Minn. at 46, 171 N.W.2d at 211.