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Products Liability: Retailer May Have Duty to Warn Even Though Product Is Not in a Defective Condition Unreasonably Dangerous to Plaintiff

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Products Liability: Retailer May Have Duty to Warn Even Though Product Is Not in a Defective Condition Unreasonably Dangerous to Plaintiff

Vernon Bigham was severely burned by a "flashover"[1] while he was repairing high voltage electrical equipment at a Northern States Power Company (NSP) substation. Claiming that his injuries were made more severe because his work clothes had melted and adhered to his skin, Bigham sued J.C. Penney Company (Penney), the seller of his clothes, in negligence, breach of warranty, and strict liability in tort. Bigham alleged that the work clothes were unreasonably dangerous because the fabric used in the clothing was of a type that melts in the presence of intense heat,[2] and that Penney was negligent in selling the clothing and in failing to warn of its propensities. NSP was joined as a third party defendant.[3] In answer to special verdict interrogatories, the jury found that the work clothes were not in a defective condition unreasonably dangerous to the plaintiff, and that there was no breach of warranty.[4] The jury also found that all three parties were

1. The flashover was an electric arc that radiated exteme heat. Bigham v. J.C. Penney Co., 268 N.W.2d 892, 894-95 (Minn. 1978). Such an arc can have a temperature of 11,000 degrees Fahrenheit at its center, and may produce temperatures of 3,000 to 6,000 degrees in the immediate area. Record, vol. III, at 34, vol. IX, at 37, Bigham v. J.C. Penney Co., 268 N.W.2d 892 (Minn. 1978).

2. At trial, the plaintiff presented evidence showing that the synthetic fabric used in his work clothing melts at a lower temperature than that at which cotton clothing burns, and that when subjected to heat, the synthetic clothing melts and adheres to the skin, causing severe burns. Record, vol. IV at 69. Plaintiff sought damages only for the exacerbated injuries caused by the clothing, and not for injuries which would have occurred in any event. 268 N.W.2d at 895; *see* note 7 *infra* and accompanying text.

3. 268 N.W.2d at 895. Plaintiff did not sue NSP, his employer, because he had recovered workers' compensation benefits and could not obtain a tort judgment against his employer due to the exclusive liability provisions of the Minnesota Workers' Compensation Act. MINN. STAT. § 176.031 (1978). At the time *Bigham* was tried, however, there was nothing to prevent defendant Penney from impleading NSP for contribution and indemnity. *See* note 7 *infra*.

4. The questions of the special verdict form dealing with liability, and the jury's answers, read in part as follows:

Section One

1. When J.C. Penney Company sold the Big Mac work clothing to Mrs. Bigham, was it in a defective condition unreasonably dangerous to the plaintiff, Vernon Bigham?

Answer No

2. If your answer to question one is yes, then answer this question: Was such defect a direct cause of plaintiff's injuries?

. . . .

Answer No

causally negligent and apportioned fault fifty percent to Penney, thirty percent to NSP, and twenty percent to the plaintiff. The court entered judgment against Penney for eighty percent of the damages and ordered NSP to contribute its share.[5] On appeal,[6] the Minnesota Supreme Court affirmed in part and reversed in part, *holding* that one may be negligent in selling a product without a warning label, even though that product is found by the jury to be not in a defective condition unreasonably dangerous to the plaintiff. *Bigham v. J.C. Penney Co.*, 268 N.W.2d 892 (Minn. 1978).[7]

Section Three

1. Was J.C. Penney Co. negligent?

Answer Yes

2. If your answer to Question 1 is yes, then answer this question: Was J.C. Penney Co's. negligence a direct cause of the plaintiff's injuries?

Answer Yes

3. Was Northern States Power Co. negligent?

Answer Yes

4. If your answer to Question 3 is yes, then answer this question: Was Northern States Power Company's negligence a direct cause of the plaintiff's injuries?

Answer Yes

5. Was plaintiff Vernon Bigham negligent?

Answer Yes

6. If your answer to Question 5 is yes, then answer this question: Was plaintiff Vernon Bigham's negligence a direct cause of his injuries?

Answer Yes

Special Verdict, Bigham v. J.C. Penney Co., No. 36881 (Dist. Ct., Blue Earth Cty., June 6, 1976), *aff'd*, 268 N.W.2d 892 (Minn. 1978) (warranty questions omitted).

5. NSP was ordered to contribute an amount corresponding to 30% of the total damages, three-eighths of the amount of the judgment. 268 N.W.2d at 895.

6. Penney and NSP appealed from the order denying their post-trial motions for judgment n.o.v. or a new trial. *Id.* at 894.

7. The *Bigham* court also held that Lambertson v. Cincinnati Corp., 257 N.W.2d 679 (Minn. 1977), which held that an employer's liability for contribution was not to exceed available worker's compensation benefits, was not applicable. 268 N.W.2d at 898-99 & n.7. Nevertheless, the supreme court reversed that part of the trial court's judgment that held NSP responsible for 30% of the damages, reasoning that since Bigham had assumed the risk of the "flashover," which was the only part of the accident for which NSP was responsible, he was barred from recovering against NSP. *Id.* at 898-99. The assumption of risk defense was not available to Penney, although the plaintiff assumed the risk of a flashover, he did not assume the risk of exacerbated injuries caused by the clothing. *Id.* at 895-96.

In exonerating NSP, the supreme court stated that "[t]he question of NSP's negligence should not have been submitted to the jury at all, given its finding that plaintiff had assumed the risk." *Id.* at 899. The court apparently did not consider the principle that the negligence of all persons causally at fault must be submitted to the jury for apportionment of fault, even if some of those persons could not be liable to the plaintiff. *See, e.g.*, Hart v. Cessna Aircraft Co., 276 N.W.2d 166, 169 (Minn. 1979); Lines v. Ryan, 272 N.W.2d 896, 902-03 (Minn. 1978); Frey v. Snelgrove, 269 N.W.2d 918, 923 (Minn. 1978); Connar v. West Shore Equip. of Milwaukee, 68 Wis. 2d 42, 45,

Suppliers of consumer goods are subject to liability when their products are defective and harm results from the defect.[8] When a supplier has failed to exercise due care in the design or manufacture of a product, a consumer can recover in a negligence action for injury caused by that product.[9] A supplier can also be found liable in negligence for failing to explicitly warn consumers of hazards attending the use of the product.[10] Moreover, if it is foreseeable that the product may be used in a manner that the supplier does not intend and that such a use may result in harm, the supplier may be liable for negligently failing to warn against that particular manner of use.[11]

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227 N.W.2d 660, 662 (1975); Payne v. Bilco Co., 54 Wis. 2d 424, 430-31, 195 N.W.2d 641, 646 (1972); 4 J. HETLAND & O. ADAMSON, MINNESOTA PRACTICE, MINNESOTA JURY INSTRUCTION GUIDES 148, comment at 128 (2d ed. 1974) [hereinafter cited as MINNESOTA JIG II]. *See generally* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.5, at 254-56 (1974).

The supreme court was nevertheless correct in stating that NSP's negligence should not have been submitted to the jury, although not for the reason it mentioned. Bigham did not seek damages caused only by the flashover. Instead, he sought damages for the exacerbated injuries caused by the melt-and-cling effect of the clothing. Since neither the plaintiff nor NSP caused the exacerbation itself, neither party's negligence should have been submitted to the jury. *See* pages 1009-22 *infra*.

8. Plaintiffs are able to recover from remote distributors as well as the immediate distributor of a product causing harm, so long as it can be proven that the defect existed at the time the product left that distributor. *See, e.g.*, MacPherson v. Buick Motor Co., 217 N.Y. 382, 390, 111 N.E. 1050, 1053 (1916); Baxter v. Ford Motor Co., 168 Wash. 456, 463, 12 P.2d 409, 412 (1932). *See also* Heise v. J.R. Clark Co., 245 Minn. 179, 186, 71 N.W.2d 818, 823 (1958).

9. *See* Lovejoy v. Minneapolis-Moline Power Implement Co., 248 Minn. 319, 325, 79 N.W.2d 688, 693 (1956); Schubert v. J.R. Clark Co., 49 Minn. 331, 339, 340, 51 N.W. 1103, 1105, 1106 (1892). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96, at 647 (4th ed. 1971).

10. *See, e.g.*, Halvorson v. American Hoist & Derrick Co., 307 Minn. 48, 55, 240 N.W.2d 303, 307 (1976) ("The manufacturer or supplier has the duty to give a reasonable warning as to the dangers inherent, or reasonably foreseeable when using goods in the manner specified." (quoting, with approval, trial court's instructions to the jury)); Westerberg v. School Dist. No. 792, 276 Minn. 1, 11, 148 N.W.2d 312, 318 (1967); RESTATEMENT (SECOND) OF TORTS § 395 (1965) [hereinafter cited as RESTATEMENT].

11. Lovejoy v. Minneapolis-Moline Power Implement Co., 248 Minn. 319, 325, 79 N.W. 688, 693 (1956); RESTATEMENT, *supra* note 10, § 388, comment g. The supplier's duty is twofold: first, the duty to give adequate instructions for the safe use of the product, and second, the duty to warn of the dangers inherent in its improper use. *See* Frey v. Montgomery Ward & Co., 258 N.W.2d 782, 787-88 (Minn. 1977). *See also* Clark v. Rental Equip. Co., 300 Minn. 420, 426-27, 220 N.W.2d 507, 511 (1974) (improper use of scaffolding was foreseeable and should have been warned against); McCormack v. Hankscraft Co., 278 Minn. 322, 333, 154 N.W.2d 488, 496-97 (1967) (in addition to a duty to provide instructions on the proper use of a vaporizer, manufacturer had duty to warn of dangers from an accidental overturning of the vaporizer, since overturning was a foreseeable risk); Hartmon v. National Heater Co., 240 Minn. 264, 272, 60 N.W.2d 804, 810 (1953 (manufacturer of gas conversion burner had duty to warn inexperienced operators that removal of "plug" might result in explosion).

When a product is defective and harm results, a plaintiff is also able to recover in strict tort liability even though the supplier has exercised all possible care.[12] The elements of strict liability are set forth in section 402A of the *Second Restatement of Torts.*[13] It may be easier for an injured consumer to recover under a strict liability theory than in a negligence action, because the plaintiff need only show that the product was sold in a defective condition that resulted in harm; the plaintiff need not undertake the difficult and often expensive task of proving that the supplier breached its duty of reasonable care.[14]

On the other hand, *Restatement* § 388(b) imposes liability only if the supplier "has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition . . . ." Hence, there is no duty to warn against an obvious danger. *See* RESTATEMENT, *supra* note 10, § 388, comment k.

12. RESTATEMENT, *supra* note 10, § 402A, comment a. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963). *See generally* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer),* 50 MINN. L. REV. 791 (1965); Wade, *On the Nature of Tort Liability for Products,* 44 MISS. L.J. 825 (1973).

13. RESTATEMENT, *supra* note 10, § 402A provides,

> (1) One who sells any products 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 this property, if
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> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (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.

14. *See* Keeton, *Products Liability—Problems Pertaining to Proof of Negligence,* 19 Sw. L.J. 26 (1965). Important policy rationales underlie the willingness of courts to expand the scope of products liability in this way. First, by marketing his product, the supplier assumes an obligation to the consuming public. RESTATEMENT, *supra* note 10, § 402A, comment c. *See* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring). Second, the supplier, not the consumer, has the expertise to guard against risks of injury. *See* McCormack v. Hankscraft, 278 Minn. 322, 338, 154 N.W.2d 488, 500 (1967) ("[T]he consumer . . . possesses neither the skill nor the means necessary to protect himself adequately from either the risk of injury or its disastrous consequences."). Third, the supplier is better able than the consumer to absorb and spread the costs of product-related injuries. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring). Finally, strict liability provides the manufacturer with an incentive to take steps necessary to ensure the safe manufacture and use of its products. *See* Lee v. Crookston Coca-Cola Bottling Co., 290 Minn. 321, 327-28, 188 N.W.2d 426, 431-32 (1971); McCormack v. Hankscraft, 278 Minn. 322, 154 N.W.2d 488 (1967).

The ability of plaintiffs to recover in strict liability is not limited to cases in which the product itself is flawed.[15] Strict liability is also available as a theory of recovery for injuries caused by products made unsafe by lack of adequate warning against dangers attendant to use.[16] For purposes of strict liability, a product sold without a warning is in a defective condition if the seller has reason to anticipate that use of the product without such a warning would be unreasonably dangerous.[17] If, however, an adequate warning is given, and the product is safe if the warning is heeded, the product is not defective or unreasonably dangerous.[18]

In 1967, the Minnesota Supreme Court followed the trend in other jurisdictions and expressed its approval of the doctrine of strict liability[19] as embodied in section 402A of the *Second Restatement of Torts*.[20] In subsequent cases, the Minnesota court has adopted com-

15. When one unit of a particular product is flawed due to a deviation from standard production procedures, it may be said to have a "unit defect" or "production defect." A "design defect," by contrast, inheres in every unit of the product, the inadequacy having occurred at the planning stages. Although all items of the product conform to the given specifications, those specifications are deficient. A third class of defect involves a failure to warn when such failure renders the product unreasonably dangerous. *See generally* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY, § 16, A[4][f][i], at 3B-118.1 to -119. For an excellent commentary on the meaning of "defective," see Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 426-29, 573 P.2d 443, 452-53, 143 Cal. Rptr. 225, 234-35 (1978). *See also* note 38 *infra*.

16. *See, e.g.*, Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155, 158-59 (8th Cir. 1975) (Minnesota law); Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 811 (9th Cir. 1974) (Montana law); Basko v. Sterling Drug., 416 F.2d 417, 428 (2d Cir. 1969) (Connecticut law). *See generally* Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 SW. L.J. 256 (1969); Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976).

17. RESTATEMENT, *supra* note 10, § 402A, comment h.

18. *Id.*, comment j. There has been some dispute about whether strict liability for failure to warn is different from liability for negligent failure to warn. *Compare* Skaggs v. Clairol, Inc., 85 Cal. Rptr. 584, 587-88 (Cal. Ct. App. 1970) (cited in *Bigham*, 268 N.W.2d at 896-97) (instructions on strict liability misleading and unnecessary when adequate instructions on negligent failure to warn have been given) *and* Anderson v. Klix Chemical, 256 Or. 199, 203, 472 P.2d 806, 808 (1970), *overruled*, Phillips v. Kimwood Mach. Co., 269 Or. 485, 497-98, 525 P.2d 1033, 1039 (1974) (strict liability for failure to warn is based in negligence) *with* Hamilton v. Hardy, 37 Colo. App. 375, 385-87, 549 P.2d 1099, 1107-08 (1976) (refusal to instruct jury on alternative theory of strict liability in failure-to-warn case was reversible error, as strict liability raises issue of whether product was unreasonably dangerous whereas negligence deals with reasonableness of not warning). *See generally* Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398 (1970); Wade, *supra* note 12, at 836-37.

19. *See* McCormack v. Hankscraft, 278 Minn. 322, 338, 154 N.W.2d 488, 500 (1967).

20. *See* 2 L. FRUMER & M. FRIEDMAN, *supra* note 15, at § 16A[3] & n.2 (majority of states have adopted the rule of strict tort liability).

ments h and j of section 402A, which impose strict liability for failure to warn.[21] In *Halvorson v. American Hoist and Derrick Co.*,[22] a design defect case, the supreme court approved the trial court's instruction that a product sold with warnings is not in a defective condition nor unreasonably dangerous if it would be safe when used in accordance with the warnings.[23] The reasoning of *Halvorson* suggests that if adequate warnings are not given, the product would be deemed to be in a defective and unreasonably dangerous condition.[24]

Strict liability is a broader theory of recovery than is negligence; courts and commentators recognize that once the plaintiff proves the elements of negligence in a products liability setting, the elements of strict liability are established as well.[25] In *Halvorson,* the jury found that even though the plaintiff proved the manufacturer's negligence, the product was not defective.[26] The Minnesota Supreme Court held these findings to be "inconsistent and irreconcilable,"[27] reasoning that "[i]f a product is not dangerous and defective in the absence of safety devices, it is not negligence to manufacture it that way."[28]

In *Bigham,* the jury found that Penney was negligent, presumably for selling the clothing without a warning label.[29] The jury also

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21. Farr v. Armstrong Rubber Co., 288 Minn. 83, 89, 179 N.W.2d 64, 69 (1970) (citing comment h); Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 39, 171 N.W.2d 201, 206 (1969) (comments h and j found to be applicable).

22. 307 Minn. 48, 240 N.W.2d 303 (1976).

23. *Id.* at 54, 240 N.W.2d at 306.

24. *See also* Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155, 158 (8th Cir. 1975) (applying Minnesota law) ("Failure to provide . . . warnings will render the product unreasonably dangerous and will subject the manufacturer to liability for damages under strict liability in tort."); Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 39, 171 N.W.2d 201, 206 (1969).

25. The presence of a "defect" or a "defective condition" rendering a product unreasonably dangerous for its foreseeable uses is a common element of both a finding of negligence and a finding of strict liability. Without proof of a defect there could be no liability as a matter of law under either theory. Halvorson v. American Hoist & Derrick Co., 307 Minn. 48, 56-58, 240 N.W.2d 303, 307-08 (1976). *See also* Worden v. Gangelhoff, 308 Minn. 252, 254, 241 N.W.2d 650, 651 (1976) (whether the suit is in negligence, warranty, or strict liability, the plaintiff must establish that the injury was caused by a defective, unreasonably unsafe product (quoting, with approval, W. PROSSER, *supra* note 11, § 103, at 671-72)) (dictum); Wade, *Strict Tort Liability of Manufacturers,* 19 Sw. L.J. 5, 14-15 (1965).

26. 307 Minn. at 51-52, 240 N.W.2d at 305.

27. *Id.* The court stated that ordinarily it would remand such inconsistent findings for a new trial, but found that the facts of *Halvorson* would not justify liability because the danger was obvious, known, and specifically warned against.

28. *Id.* at 56, 240 N.W.2d at 307.

29. Although the negligence interrogatory was nonspecific, *see* note 4 *supra,* plaintiff argued on appeal that the general negligence finding represented the jury's determination that Penny had breached its duty to warn "because the clothing was

found, however, that the clothing was not in a defective condition unreasonably dangerous to the plaintiff.[30] In attempting to reconcile the jury's finding of no defect with the finding of negligence,[31] the court first distinguished *Halvorson* by reasoning that in *Halvorson* the harm was due to a defect in the design of the product whereas in *Bigham* the harm was due to the lack of warning about the risks of using the product. The court stated that a failure to warn has no bearing on the determination of whether a product is defective; rather, only the design and manufacturing processes need to be considered. The court concluded, therefore, that "failure to warn of the potential hazards from the use of a product is a separate issue,"[32] and affirmed the judgment against Penney.

In a further effort to reconcile the verdict answers, the supreme court noted that the jury had been instructed that a product is defective if it is unreasonably dangerous to the "ordinary user."[33] The court reasoned that it was not inconsistent for the jury to find that although Penny was negligent, presumably for failing to warn the unusual consumer of dangers inherent in the product, the clothing was not

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not labelled as to its flammability." Brief of Plaintiff-Respondent at 14. The court incorporated this explanation into its decision. *See* text accompanying note 32 *infra*.

30. 268 N.W.2d at 896.

31. In its effort to reconcile the answers, the *Bigham* court relied on federal constitutional law: "[T]he Seventh Amendment to the Constitution of the United States requires that '[w]here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.' " 268 N.W.2d at 897 (quoting A & G Stevedores v. Ellermann Lines, 369 U.S. 355, 364 (1962)). This argument apparently was uncritically adopted from plaintiff's brief. *See* Brief of Plaintiff-Respondent at 11-12. To the extent that this argument suggests that the states are bound by the Seventh Amendment as a matter of federal law, it is in error. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Adamson v. California, 332 U.S. 46 (1947). The requirement that answers be reconciled where possible is a matter of state, not federal law. *See, e.g.*, Crohn v. Dupree, 291 Minn. 290, 293, 190 N.W.2d 678, 680 (1971); Reese v. Henke, 277 Minn. 151, 155, 152 N.W.2d 63, 66 (1967) (cited by *Bigham*, 268 N.W.2d at 897); Bell v. Northern Pac. Ry., 112 Minn. 488, 493, 128 N.W. 829, 831 (1910); Valerius v. Richard, 57 Minn. 443, 445, 59 N.W. 534, 535 (1894).

32. 268 N.W.2d at 896. Apparently the court meant that liability for failure to warn involves an issue separate from the question of whether a product is defective. *See* notes 39-42 *infra* and accompanying text.

33. 268 N.W.2d at 897; Record, vol. XIII, at 72. This instruction was from MINNESOTA JIG II, *supra* note 7, 118S, at 98:

> A product is in a defective condition if, at the time it leaves the seller's hands, it is in a condition which is unreasonably dangerous to the ordinary user.
>
> A condition is unreasonably dangerous if it is dangerous when used by an ordinary consumer who uses it with the knowledge common to the community as to the product's characteristics and common usage.

See 268 N.W.2d at 897 & n.4.

defective because it was safe for an "average consumer."[34]

The apparent inconsistency in the jury verdict may have resulted from the trial court's jury instructions. Although the *Restatement* makes it clear that the lack of a warning can render a product defective,[35] the trial court did not state that principle in its instructions.[36] Instead, the jury was instructed that a defective product is one that is dangerous "when used by an ordinary consumer who uses it with the knowledge common to the community as to the product's characteristics and common usage," and that "a product is not defective when it is reasonably safe for normal use and handling."[37] The court failed to explain to the jury that a product is defective if it is unsafe

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34. "In this case, the claimed inconsistencies in the verdict may be resolved to read that the work clothing was not 'defective' because it was not unreasonably dangerous to the average consumer, but that Penney was negligent in selling it without warning of its flammability." 268 N.W.2d at 897.

The *Bigham* court also stated, "Plaintiff, whose work subjects him to fire hazards, is in a position analogous to that of a consumer who has a common allergy. See, Restatement, Torts 2d, § 402A, comment *j*." 268 N.W.2d at 897 (emphasis in original). This assertion is illogical. Comment j provides that there is no duty to warn a consumer of the dangers inherent to commonly known allergens such as eggs or milk. In the view of the court, Bigham did not need to be warned of a danger because his work made him "allergic" to Penney fabric, in the same way that one's immunity system might create an allergic reaction to eggs or milk. The result of the court's analysis is to eliminate the strict liability action under comment j of *Restatement* § 402A.

A second problem with the common allergy analogy becomes obvious as the court develops an explanation of appropriate causes of action. The court follows its reference to common allergy with a reference to Sterling Drug, Inc. v. Yarrow, 408 F.2d 978, 993 (8th Cir. 1969), a case in which a manufacturer was held liable under both § 402A and the *Restatement*'s negligent-failure-to-warn provision—§ 388. The court in *Sterling Drug* observed that the duty-to-warn standard is consistent under § 402A and § 388. The *Bigham* court failed to explain how, given the consistency found by the Eighth Circuit, Minnesota courts could impose liability in negligence when none is found in strict liability.

The court's common allergy analogy fails on a third level. Although "fire hazards" might somehow be construed as common allergies, the plaintiff was "sensitive" to fabric in *Bigham*, not to fire.

35. RESTATEMENT, *supra* note 10, comments h, j. *See* text accompanying notes 17-18 *supra*.

36. The sole reference to failure to warn in the jury instructions was given in conjunction with the instructions on the elements of negligence: "The seller of goods has a duty to give a reasonable warning as to the dangers inherent or reasonably foreseeable when used in goods in the manner of their intended use so long as such use is one that the seller should reasonably foresee." Record, vol. XIII, at 75-76, Bigham v. J.C. Penney Co., 268 N.W.2d 892 (Minn. 1978).

37. *Id.* at 72-73. These instructions conform to the standard jury instructions, *see* MINNESOTA JIG II, *supra* note 7, 118GS at 96-98, with the exception of an optional sentence that the trial court omitted: "The defect may be in the product itself, in its preparation, in its container or packaging, or in the instruction necessary for its safe use." *Id.*

due to a lack of warning. This was a serious omission, because the term "defective" is used in a special sense in a failure-to-warn case, and failure to instruct the jury on its meaning can easily result in jury confusion.[38]

Unfortunately, the supreme court did nothing to correct the instruction, and its reasoning is likely to engender additional confusion. The court failed to recognize that a product that is unreasonably dangerous absent warnings is, for the purposes of strict liability, legally defective.[39] In holding that Penney could be found negligent for failing to warn of the dangers attendant to use of the product, but that such lack of warning did not render the product defective, *Bigham* appears to support the position that strict liability is unavailable as a theory of recovery in a failure-to-warn case, since the finding of a "defect" is necessary to impose strict liability.[40] The effect of *Bigham* is to relegate all claims based on inadequate and insufficient warnings to recovery in negligence, thereby preventing injured consumers with such claims from asserting a strict liability cause of action.[41] Plaintiffs in Minnesota would not be permitted to

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38. [T]he term "defective" raises many difficulties. Its natural application would be limited to the situation in which something went wrong in the manfacturing process, so that the article was defective in the sense that the manufacturer had not intended it to be in that condition. To apply it also to the case in which a warning is not attached to the chattel or the design turns out to be a bad one or the product is likely to be injurious in its normal condition, is to use the term in a Pickwickian sense, with a special, esoteric meaning of its own. It is not without reason that some people, in writing about it, speak of the requirement of being "legally defective," including the quotation marks. To have to define the term to the jury, with a meaning completely different from the one they would normally give to it, is to create the chance that they will be misled. To use it without defining it to the jury is almost to ensure that they will be misled.

Wade, *supra* note 12, at 831-32 (footnotes omitted).

39. *See* text accompanying note 17 *supra.*

40. 268 N.W.2d at 897. *See* note 32 *supra.*

41. If, as some cases indicate, a showing of negligent conduct by the seller in failing to warn is a prerequisite for imposition of strict liability, *see* note 18 *supra,* then *Bigham* may be correct in its implicit restriction of failure to warn to negligence. There is, however, a difference between strict liability and negligence, both in emphasis and in proof. The Oregon Supreme Court recognized this distinction: "[An] article can have a degree of dangerousness because of a lack of warning which the law of strict liability will not tolerate even though the actions of the seller were entirely reasonable . . . ." Phillips v. Kimwood Mach. Co., 269 Or. 485, 498, 525 P.2d 1033, 1039 (1974). Whereas negligence focuses on the conduct of the defendant, strict liability is concerned with whether the condition of the product conforms to the reasonable expectations of the consumer. *Id.; see* Hamilton v. Hardy, 37 Colo. App. 375, 385-87, 549 P.2d 1099, 1106-08 (1976). Applying this principle to a failure-to-warn case, a plaintiff in negligence would have to establish that defendant's conduct was a breach of the duty of care required of a reasonably prudent seller, while a plaintiff in strict liability would

merely assert that the product was dangerous to an extent exceeding consumer expectation because the product lacked a warning; when failure to warn is at issue the only acceptable trial framework would be that of determining whether the defendant failed to use due care in putting the product on the market without a warning.[42]

The *Bigham* court should have corrected the trial court's instructions to make them comply with established principles of strict liability. When failure to warn is at issue, the judge should instruct the jury that a product that is not otherwise flawed or improperly made is defective if it is unreasonably dangerous due to the absence of a warning of dangers that are inherent in the foreseeable uses of the product.[43] An alternative and preferable solution would be to abandon use of the terms "defect" and "defective" when instructing juries in failure-to-warn cases. Instead, the trial court should ask by special interrogatory only whether the product, absent a warning, was unreasonably dangerous to the consumer. If the jury answers affirmatively, the trial court should then hold that the product was defective, and impose strict liability.[44]

An additional difficulty with the *Bigham* court's reasoning is the apparent limitation of the scope of strict liability to products that are

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only be required to show that the product, absent warning, does not meet ordinary consumer expectations as to safety. *See* Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 430, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978) (design defect); Seattle First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 542 P.2d 774 (1975).

42. It has been a generally accepted practice for plaintiffs to base products liability actions on more than one theory of recovery. Commentators have argued, however, that courts should insist that one theory be chosen and that plainttiffs would then choose strict liability, since it is the broader, less burdensome theory. Keeton, *supra* note 18, at 409 & n.25. Dean Wade has written that the confusion created by permitting plaintiffs to choose among theories or to bring a separate count on each theory outweighs any advantage and is not justifiable. "As time goes on and we have more experience with the recently developed theories, they will surely merge into a single tort action." Wade, *supra* note 12, at 849. *Cf.* Goblirsh v. Western Land Roller Co., 310 Minn. 471, 476-77, 246 N.W.2d 687, 690 (1976) (plaintiff not prejudiced by absence of instruction on implied warranty, since he received benefit of "stronger and broader instruction on strict liability"). *But cf.* Hansen v. Cessna, [1978] PROD. LIAB. REP. (CCH) ¶8231 (7th Cir. 1978) (Wisconsin law requires juries to be able to consider multiple bases for recovery, including negligence, because jurors "might be misled by a strict liability instruction.").

43. At a minimum, the optional sentence in the *Jury Instruction Guides, supra* note 7, *see* note 37 *supra,* should be given, but it should be modified so that the jury is informed that the defect can occur not only in inadequate instructions for use, but also in the lack of warning. If this solution is adopted, the jury should be specifically charged that a product that is unreasonably dangerous absent adequate warnings is defective.

44. *See* note 38 *supra;* Wade, *supra* note 25, at 15 ("defect" has no independent meaning in failure-to-warn cases; "[t]he only real problem is whether the product is 'unreasonably dangerous' " when not accompanied by adequate warnings).

dangerous to the "ordinary" or "average" consumer.[45] Under section 402A of the *Restatement,* which imposes strict liability if the product is unreasonably dangerous to the "ultimate user,"[46] the "average" or "ordinary" status of the user has no bearing on the determination of whether the product was defective.[47] Instead, strict liability is imposed whenever the product is unreasonably dangerous when used in a foreseeable manner, regardless of the status of the user.[48] The *Bigham* court, for unexpressed reasons, believed that the words "ordinary consumer" in the jury instruction were determinative of plaintiff's right to recover.[49] The court does not explain why, having heard the instruction on defectiveness, a jury would reasonably have understood that instruction to exclude the unusual user from recovery in strict liability. Furthermore, since the special verdict interrogatory specifically asked whether the product was defective and unreasonably dangerous to the plaintiff,[50] it is difficult to infer that a "no" answer was based on the jury's perceiving Bigham to be a non-ordinary customer. It is therefore apparent that the standard Minnesota strict liability instruction is ambiguous. Problems such as those in *Bigham* may be avoided in the future by substituting the less confusing language of comment i of *Restatement* section 402A.[51]

Had the jury been properly instructed, the jury's answers to the special interrogatories could not have been reconciled, and the supreme court would have been required to reverse and remand for a new trial.[52] Because the jury instructions were improper, however,

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45. 268 N.W.2d at 897. *See* text accompanying notes 33-34 *supra.*

46. *See* note 13 *supra.*

47. Although the term "ordinary consumer" is found in comment i to § 402A, it is not used to limit the types of consumers who can recover for unsafe products. Comment i states that an article that is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics" is "unreasonably dangerous." RESTATEMENT, *supra* note 10, § 402A, comment i. "Ordinary consumer" is used in the *Restatement* as a standard for determining community knowledge and expectations, against which the product's dangerousness is measured. The term in no way limits recovery to ordinary consumers; nor does it provide that only those who use a product in an ordinary manner may recover under § 402A.

48. RESTATEMENT, *supra* note 10, § 402A, comment g. Even if an article is safe for its ordinary or intended use, a plaintiff can still recover if he was injured while using the product in an unintended but "foreseeable" or "reasonably expected" manner. *See, e.g.,* Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 428, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978); Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 39, 171 N.W.2d 201, 206 (1969); Ford Motor Co. v. Matthews, 291 So. 2d 169, 175 (Miss. 1974). *See also* Waite v. American Creosote Works, Inc., 295 Minn. 288, 291, 204 N.W.2d 410, 412 (1973).

49. 268 N.W.2d at 897. *See* note 34 *supra.*

50. *See* note 56 *infra.*

51. *See* note 47 *supra.*

52. If the jury had been instructed that a product made unsafe by the lack of a

there were two possible bases on which the *Bigham* court could have resolved the inconsistencies in the answers.

First, the negligence finding and the finding of no defect could have been explained by reference to the trial court's instructions on the two theories of recovery. The strict liability instruction defined defectiveness in terms of dangerousness to an ordinary consumer;[53] the jury could have properly found, therefore, that the clothing would have been safe when used by an ordinary consumer and thus was not defective. Since the negligence instruction, however, applied the broader test of foreseeable use,[54] it may have been appropriate for the jury to have found that Penney was negligent in failing to warn consumers. Thus, in light of these instructions, the answers were not necessarily inconsistent. Although this explanation of the inconsistency is plausible, it is not very likely, given that the erroneous strict liability instruction was not emphasized by the trial court,[55] and that the strict liability interrogatory on the special verdict form did not use the term "ordinary consumer."[56]

The second and more likely explanation for the apparent inconsistency is the trial court's treatment of the failure-to-warn issue.[57] The jury may have failed to find the existence of a defect because the trial court did not instruct the jury that a product is defective when the absence of a warning renders it unreasonably dangerous. A finding of negligent failure to warn, therefore, was not inconsistent with the finding of no defect. By reconciling the answers in this fashion, the supreme court could have affirmed the judgment without approving the trial court's failure to instruct the jury in accordance with the

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warning is defective, a finding of negligent failure to warn would have been irreconcilably inconsistent with a finding that the product was not defective, and the court would have had to reverse under the authority of Halvorson v. American Hoist & Derrick Co., 307 Minn. 48, 51-52, 240 N.W.2d 303, 305 (1976). *See* text accompanying notes 26-28 *supra*.

53. *See* text accompanying note 33 *supra*.

54. *See* note 36 *supra*.

55. The term "ordinary consumer" appears once in the 20-page jury charge. Record, vol. XIII, at 72. At trial, the plaintiff did not take the position that he was not "an ordinary consumer"; indeed, he claimed the opposite. *See* Record, vol. XIII, at 54; note 33 *supra*. Only on appeal, in his attempt to explain the inconsistency in the verdict, did plaintiff claim that he was not an ordinary consumer. Brief of Plaintiff-Respondent at 13-14. In accepting this argument, the supreme court disregarded the rule that a party may not on appeal assert a position contrary to that taken at trial. *See, e.g.*, Rogers v. Minneapolis St. Ry., 218 Minn. 454, 457, 16 N.W.2d 516, 518 (1944). *See also* Bruno v. Belmonte, 252 Minn. 497, 503, 90 N.W.2d 899, 903 (1958).

56. The special interrogatory on strict liability read, "When J.C. Penney Company sold the Big Mac work clothing to Mrs. Bigham, was it in a defective condition unreasonably dangerous to the plaintiff, Vernon Bigham?" *See* note 4 *supra*.

57. *See* text accompanying notes 39-41 *supra*.

principles of strict liability for failure to warn. The court could have limited its holding to the circumstances of *Bigham*—in which the proper instructions were neither requested by counsel nor given by the trial judge[58]—while ensuring that juries in future failure-to-warn cases would be adequately instructed.

Although the *Bigham* court did attempt to reconcile the answers on the basis of the instructions given, its reasoning was deficient. By relying on the trial court's definition of defect, the supreme court has given that erroneous instruction implicit sanction. In stating that negligence for failing to warn could be found even though the product was not defective, the *Bigham* court has intimated that a failure to warn does not render a product defective under the principles of strict liability. Moreover, by not indicating how a jury should properly be instructed, the court has increased the potential for prejudice to litigants in failure-to-warn cases.[59]

The supreme court's task undoubtedly was made more difficult by the omissions and errors in the jury instructions. Regrettably, the reasoning of the supreme court's affirmation of the judgment has unnecessarily aggravated these errors, perpetuating the incorrect definition of defect in the standard jury instruction, and has thereby introduced uncertainty into the theoretical basis of liability for failure to warn. It is hoped that future Minnesota Supreme Court decisions will disavow the implications of *Bigham* and affirmatively adopt the prevailing principles of strict liability for failure to warn.

58. The court would have been justified in limiting its holding to the circumstances of the case if it had applied the rule that jury instructions that have been requested by counsel and given by the court during the trial become the law of the case and are binding on the jury, court, and counsel. If the instructions are not objected to during trial or on motion for a new trial, the appellate court will go beyond the law of the case only to avoid substantial injustice. *See, e.g.*, Erickson v. Sorenson, 297 Minn. 452, 455, 211 N.W.2d 883, 885 (1973); Jacobski v. Prax, 290 Minn. 218, 224, 187 N.W.2d 125, 129 (1971); Holkestad v. Coca-Cola Bottling Co., 228 Minn. 249, 180 N.W.2d 860 (1970). *See also* note 55 *supra*.

59. *See* text accompanying note 42 *supra*.