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The Eighth Circuit Struggles with Strict Tort Liability in Nebraska: *Sherrill v. Royal Indus., Inc.*, 526 F.2d 507 (8th Cir. 1975)

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The Eighth Circuit Struggles with Strict Tort Liability in Nebraska

Sherrill v. Royal Indus., Inc., 526 F.2d 507 (8th Cir. 1975).

I. INTRODUCTION

Product liability suits have captured the bar's interest for quite some time.¹ However, the relatively recent expansion of the law in this area has resulted in many uncertainties, especially when the theory of recovery is grounded in strict tort.² While the theories of negligence and implied warranty still exist,³ the adoption of

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1. In 1962, one practicing attorney remarked:

In trial tactics, I was asked to cover products liability. We have had considerable experience in our office recently in connection with products liability cases. In fact, we have found that it is hidden gold.

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In these products liability cases you have three shots at them.

First of all, you can proceed on the theory of negligence

.
Secondly, you can go to the breach of warranty and fitness of use.

Thirdly, you can bring your action under the old *res ipsa loquitur* theory.

National Association of Claimants' Counsel of America, Proper Handling of a Tort Case from Beginning to End 115-16, Apr. 13, 1962.

2. See Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713 (1970) (discussing revisions of the Restatement drafts).
3. The doctrine of *res ipsa loquitur* would presumably not apply in a strict tort suit, since under *res ipsa* the plaintiff must prove that a product is defective. Proof may, however, be offered through circumstantial evidence. See *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971); accord, *Riha v. Jasper Blackburn Corp.*, 516 F.2d 840 (8th Cir. 1975).

Remedies also are available under the Uniform Commercial Code. The relevant Code provisions, however, represent a codification of product liability law in the midst of extreme changes. Consequently, the Code is behind decisional law in many states. Its provisions provide an alternative, but frequently unsatisfactory and unused, basis of recovery. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 98, at 658 (4th ed. 1971).

This note's extensive reliance upon California law may be mislead-

Restatement section 402A⁴ and the decision in *Greenman v. Yuba Power Products, Inc.*⁵ have shifted the litigation focus to strict tort. Although both *Greenman* and the Restatement appear to set out the theory in relatively straight-forward terms, much discussion has been generated concerning the true nature of such terms as "defect" and "unreasonably dangerous," and concerning the establishment of defenses.⁶ Though the majority of states have adopted strict tort in one form or another, the rationale varies.⁷ The law in Nebraska is unclear, the Nebraska Supreme Court having rendered decisions in only two or three cases involving strict tort.⁸

ing. Though in California (and presumably in Nebraska) strict liability is grounded in tort, strict liability under warranty is also a viable theory. California is generally regarded as the most liberal in allowing plaintiffs' recovery, but the apparent ease with which some California courts apply the strict tort theory is deceiving. While application of strict tort on the basis of warranty often leads to semantic difficulties, the terms "defect," "unreasonably dangerous," and others, present similar problems of definition and application under the tort theory.

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

5. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

6. See Dickerson, *Products Liability: How Good Does a Product Have To Be?*, 42 IND. L.J. 301 (1967); Lascher, *Strict Liability in Tort for Defective Products: The Road To and Past Vandermark*, 38 S. CAL. L. REV. 30 (1965); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93 (1972); Keeton, *Assumption of Products Risks*, 19 SW. L.J. 61 (1965); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); Lambert, *Tort Law*, 35 J. ASS'N TRIAL LAWYERS OF AM. 33, 84 (1974); Schwartz, *A Products Liability Primer*, 33 J. AM. ASS'N OF TRIAL LAWYERS 64 (1970); Comment, *Products Liability: For the Defense-Contributory Fault*, 33 TENN. L. REV. 464 (1966); 6 CREIGHTON L. REV. 434 (1973); Note, *Products Liability and Section 402A of the Restatement of Torts*, 55 GEO. L.J. 286 (1966); Annot., 54 A.L.R.3d 352 (1973).

For an interesting discussion of a dispute in one jurisdiction over whether contributory negligence or assumption of the risk is the correct defense to an action in strict tort see Groark, *Contributory Negligence—An Integral Part of Product Liability Cases*, 56 ILL. B.J. 904 (1968), and Postilion, *Strict Liability and Contributory Negligence: The Two Just Don't Mix*, 57 ILL. B.J. 26 (1968).

7. See 1 CCH PROD. LIAB. REP. ¶ 4060, for the current status of strict liability by state.

8. Strict liability in tort was adopted in *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971), and partially clarified in *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973). The cause of action was before the court again in *Friedrich v. Anderson*, 191 Neb. 724, 217 N.W.2d 831 (1974), though there is some question whether the *Friedrich* opinion actually considered the strict tort issue. See Note, *Second Impact Liability in Nebraska*, 54 NEB. L. REV. 172 (1975), which concludes that the court grounded its decision on the negligence theory, and that it failed to consider either the breach of

There has been disagreement nationally over the establishment of defenses,⁹ but only one Nebraska case has reached this issue.¹⁰

In *Sherrill v. Royal Industries, Inc.*,¹¹ the court was faced with issues involving both the plaintiff's prima facie case and the defenses to that case. The court looked to Nebraska law on the issues, the ultimate issue centering around the defense of assumption of the risk. The appeal focused solely on the trial court's jury instructions. Therefore this note will analyze both the court's interpretation of Nebraska law and the jury instructions in some detail.¹²

warranty or strict liability issues. See also 8 CREIGHTON L. REV. 233 (1974).

Strict tort liability was central to the discussion in *Bridgeford v. U-Haul Co.*, 195 Neb. 308, 238 N.W.2d 443 (1976), which considered the constitutionality of a statute holding truck lessors strictly liable. The case holding, however, dealt only with the statute and did not affect tort theory.

After *Kohler*, but before *Hawkins*, a case involving negligent design reached the Nebraska court. See *Libby-Owens-Ford Glass Co. v. L&M Paper Co.*, 189 Neb. 792, 205 N.W.2d 523 (1973). The case, dealing solely with property damage, was, possibly for tactical reasons, not tried on a strict liability theory. The *Kohler* court had declined to reach the property damage issue in applying strict tort; and subsequently, in *Hawkins*, the court explicitly refused to extend strict tort to pure property damage.

9. See, e.g., Lascher, *supra* note 6, at 51. Freedman, *The Comparative Negligence Doctrine Under Strict Liability: Defendant's Conduct Becomes Another "Proximate Cause" of Injury, Damage or Loss*, 1975 INS. L.J. 468; Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1147-48 (1960).
10. In *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973), the court held that assumption of the risk and product misuse are defenses to strict tort, though contributory negligence (the failure to discover a defect or guard against it) is not.

Noel contends that the issue of assumption of the risk in general, as well as the specific delineation of the theory, is important in guiding judges in the directing of verdicts. Noel, *supra* note 6, at 122, 128.

11. 526 F.2d 507 (8th Cir. 1975).
12. With only a few Nebraska cases in the area, the NEBRASKA JURY INSTRUCTIONS offer no instructions for strict tort liability. See NEBRASKA SUPREME COURT COMMITTEE ON PATTERN JURY INSTRUCTIONS, NEBRASKA JURY INSTRUCTIONS No. 11.20 (Supp. 1975) [hereinafter cited as NJI].

The value of pattern instructions has been recognized by the courts. Nebraska Supreme Court Chief Justice Paul W. White commented:

It is the earnest hope of the Supreme Court that the use of these Nebraska Pattern Jury Instructions will enhance the operation of trial by jury, while substantially reducing the number of cases in which we have had to set aside jury verdicts because of erroneous instructions.

White, *Foreword to NJI* at vi (1969).

The Nebraska Supreme Court adopted the following rule in 1968:

II. THE FACTS

The plaintiff, North Platte Sherrill,¹³ purchased a grain auger from W.R. Grace & Co., an implement dealer, in November, 1968.¹⁴ Royal Industries, Inc. manufactured the machine, but neither Grace nor Royal fully assembled the product.¹⁵ Sherrill, a farmer, put the machine together himself.¹⁶

While using the auger in October, 1968, to carry grain from his truck to his bin, Sherrill's clothing caught in the rotary drive shaft and coupler which were located on the outside of the auger.¹⁷ His clothing wound around the shaft, severing his left hand and causing bruises, lacerations and loss of skin.¹⁸ Sherrill, afterwards, denied he was aware of the danger of the rotating shaft.¹⁹

A diversity suit was commenced in Nebraska federal district court against the dealer and the manufacturer.²⁰ The case was tried and submitted to the jury²¹ solely on the theory of strict tort liability for defective design of the auger.²² The defendants

(a) Whenever Nebraska Jury Instructions (NJI) contains an instruction applicable in a Civil or Criminal Case, and the Court, giving due consideration to the facts and the prevailing law, determines that the jury should be instructed on the subject, the Nebraska Jury Instruction shall be used.

NJI at ix (1969).

Given the importance placed upon the pattern instruction, the Nebraska Supreme Court Committee on Pattern Jury Instructions will presumably move slowly and cautiously in adopting a strict tort instruction. It is hoped that the analysis in this note will be of practical value to the practitioner in drafting instructions during the interim.

13. "North Platte" is, apparently, Mr. Sherrill's first name.

14. 526 F.2d at 509.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* Although the facts of *Sherrill* are not set forth in detail in the case, the incident appears to have resulted from Mr. Sherrill's clothing being caught in and wrapped around a power take-off shaft (PTO). In one study of 100 farm accidents, a PTO was involved in 23.3% of the cases. Farm Dep't., National Safety Council, Analysis of Portable Farm Elevator and Auger Accidents to Determine Corrective Measures 9, Sept., 1969. The study further notes that "multiple injuries are most often caused by contact with the power-take-off shaft." *Id.* at 25.

19. 526 F.2d at 512.

20. *Id.* at 509.

21. *Id.* Recognition of this fact is of aid in evaluating the decision. One of the major criticisms of *Friedrich v. Anderson*, 191 Neb. 724, 217 N.W.2d 831 (1974), is that the court dismissed the case by affirming the summary judgment granted below. See 8 CREIGHTON L. REV. 233, 247 (1974).

22. The weight of authority today recognizes strict liability in tort for de-

alleged assumption of the risk, and the jury returned a general verdict for the defendants.²³ After the trial court's denial of Sherrill's motion for a new trial, he appealed, alleging that the lower court's jury instructions were either erroneous or incomplete concerning the definitions of assumption of risk and the term "unreasonably dangerous," and concerning the elements of strict liability in Nebraska.²⁴

III. APPELLANT'S CONTENTIONS

A. Assumption of the Risk

The assumption of risk instruction given essentially stated that if the plaintiff knew and appreciated the danger of the auger shaft but voluntarily chose to encounter the danger, he assumed the risk.²⁵ Though the appellant did not quarrel with the basic

fective design. See *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); W. PROSSER, *supra* note 3, § 96, at 644-45; cf. *Friedrich v. Anderson*, 191 Neb. 724, 217 N.W.2d 831 (1974); Noel, *Recent Trends in Manufacturer's Negligence as to Design, Instructions or Warnings*, 19 Sw. L.J. 43 (1965); Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962). But see Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

One court has observed that strict tort focuses on the condition of a dangerous article designed in a particular way, whereas negligence looks to the manufacturer's reasonableness in designing and selling the article. *Roach v. Kononen*, 525 P.2d 125 (Ore. 1974). That court, however, noted that there is probably little difference between the two theories, since the factors considered in each are the same:

The comparative design with similar and competing machinery in the field, alternate designs and post accident modification of the machine, the frequency or infrequency of use of the same product with or without mishap, and the relative cost and feasibility in adopting other design [sic] are all relevant to proof of defective design.

Id. at 129, quoting from *Hoppe v. Midwest Conveyor Co.*, 485 F.2d 1196, 1202 (8th Cir. 1973); cf. *Garcia v. Halsett*, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (Ct. App., 1st Dist. 1970) (accident preventable through installation of two-dollar switch).

23. 526 F.2d at 509.

24. *Id.* This note is limited to a discussion of two matters: (1) the assumption of the risk instruction and (2) the inclusion of the phrase "plaintiff was unaware of the defect" in the instruction setting forth the necessary elements of the plaintiff's case. The *Sherrill* opinion also considers the relevancy of the phrase "unreasonably dangerous" in a strict tort case, and the manufacturer's duty to guard against "obvious" dangers.

25. The instruction, as given, was:

You are instructed that in connection with the defense of "as-

instruction, he contended that the jury should have been instructed additionally that "inadvertence, momentary inattention, diversion of attention, or involuntary slipping and falling do not constitute assumption of even the most obvious risk."²⁶ The court rejected this, stating the instruction as given correctly stated Nebraska law.²⁷

In Nebraska, assumption of the risk and misuse of the product are defenses to strict tort actions, while traditional contributory negligence is not.²⁸ Assumption of the risk, which involves a choice made more or less deliberately without reference to any due care by the plaintiff, occurs when the plaintiff knows of a dangerous condition, appreciates its danger and deliberately exposes himself to the danger and risk of injury.²⁹ On the other hand contributory negligence requires a failure of the plaintiff to exercise due care to discover a defect or to guard against its presence.³⁰ Assumption of the risk applies only to known dangers and the plaintiff must have knowledge of the unreasonable character of the risk.³¹

sumption of risk," the burden is upon each defendant to prove, by a preponderance of the evidence, each and all of the following propositions:

1. That the plaintiff knew and appreciated the danger;
2. That the plaintiff voluntarily or deliberately exposed himself to that danger; and
3. That as a proximate result of that danger, the injury to the plaintiff occurred.

If a defendant has failed to establish any or all of the above-numbered propositions by a preponderance of the evidence, you will disregard such defense as to that defendant.

If a defendant has established each of the above-numbered propositions by a preponderance of the evidence, your verdict will be in favor of that defendant and against the plaintiff.

526 F.2d at 510 n.4.

This instruction corresponds to NJI Nos. 2.02A, 3.31, with certain deletions from the pattern instructions that refer to defendant's negligence. NJI No. 3.31, was approved in *Schmidt v. Johnson*, 184 Neb. 643, 171 N.W.2d 64 (1969).

26. 526 F.2d at 510.

27. *Id.* The court also noted that the proposed clarification would not have helped, since the plaintiff's testimony failed to show that these factors were present. *Id.* n.5.

28. *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973); accord, RESTATEMENT (SECOND) OF TORTS § 402A, comment n (1965). Traditional contributory negligence, the failure to discover a defect or to guard against it, does not encompass product misuse.

29. *Fritchley v. Love-Courson Drilling Co.*, 177 Neb. 455, 129 N.W.2d 515 (1964).

30. *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943).

31. *Jensen v. Hawkins Constr. Co.*, 193 Neb. 220, 226 N.W.2d 346 (1975).

[A] plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character, or the danger involved, including the magnitude thereof, and voluntarily accepts the risk.³²

Additionally, assumption of the risk is a jury question³³—an affirmative defense that must be pleaded and proved by the defendant.³⁴

The appellant's attempt in *Sherrill* to have the assumption of the risk instruction clarified as to inadvertence and momentary inattention has some support.³⁵ However, the instruction as given appears to follow the pattern jury instruction adopted in Nebraska.³⁶

B. Plaintiff's "Unawareness" as Part of the Prima Facie Case

Although treated as a separate issue by the court, appellant's

32. *Id.* at 226, 226 N.W.2d at 350-51.

33. *Barton v. Hobbs*, 181 Neb. 763, 151 N.W.2d 331 (1967); *Surface v. Safeway Stores*, 169 F.2d 937 (8th Cir. 1948) (Nebraska law).

34. 177 Neb. 455, 129 N.W.2d 515 (1964).

35. *See, e.g., W. Prosser, supra* note 3, § 68, at 456; *Elder v. Crawley Bock Mach. Co.*, 441 F.2d 771 (3d Cir. 1971).

The following excerpt is from the transcript of a meeting sponsored by the American Trial Lawyers Association (Eighth Circuit) and the Nebraska Association of Trial Attorneys:

MR. [W.T.] BARNES: . . . I know our various states differ on assumption of risk With respect to Nebraska law, will you tell us . . . what are these things that you must prove?

MR. [A.G. (Duke)] SCHATZ: There are just two things . . . which you must prove in Nebraska:

Number one, you must obviously prove knowledge by the plaintiff of the known or alleged known dangerous condition.

Number two, you must prove the subsequent voluntary assumption of the risk.

In that connection I point out the theory that . . . even though the plaintiff knew of the situation, if there were a momentary distraction caused by the defendant himself, that might get the plaintiff over the hurdle of the assumption of the risk in Nebraska, in my opinion.

MR. BARNES: Because he did not assume the risk.

MR. SCHATZ: That's right.

MR. BARNES: Even though he had knowledge of it, he was distracted, and therefore he did not assume it.

MR. SCHATZ: That's right.

American Trial Lawyers Association (Eighth Circuit) & Nebraska Association of Trial Attorneys, *Techniques of Persuasion* 19, May 14-15, 1965.

36. 526 F.2d at 11. *See pp. 711-17 infra* as to whether the definition of assumption of the risk in negligence should to be modified in strict tort cases.

next contention actually is entwined with the assumption of risk issue.

One of the trial court's instructions on the issues to be decided in order to find the defendants liable was:

If you find that:

3. Mr. Sherill was unaware and had no reason to be aware of the claimed defect;

You may then find the defendants or a defendant liable for the injuries of Mr. Sherrill.³⁷

Although this instruction arguably was approved in *Kohler v. Ford Motor Co.*³⁸ because the Nebraska high court quoted the trial court's instruction, the appellant argued this element of proof was overruled in *Hawkins Construction Co. v. Matthews Co.*³⁹ when the court stated that traditional contributory negligence in the sense of a failure to discover a defect or to guard against it, is not a defense to a suit in strict tort. A brief discussion of the point by the Nebraska Supreme Court Committee on Pattern Jury Instructions also concluded that it would be an error to require the plaintiff to prove his unawareness of the defect.⁴⁰

The court of appeals rejected appellant's contention because the implication of approval in *Kohler* was not specifically rejected in *Hawkins*, and also the court did not find any harmful error even if the instruction did shift the burden of proof.⁴¹ While the court's analysis as to the latter is probably true, the questioned instruction has a lineage which suggests it incorrectly states an element of the plaintiff's case.⁴²

The leading case and one which *Kohler* looked to as "succinctly" stating the fundamental principle of strict tort liability⁴³ is *Greenman v. Yuba Power Products, Inc.*⁴⁴ There Justice Traynor wrote:

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for

37. 526 F.2d at 510-11.

38. 187 Neb. 428, 191 N.W.2d 601 (1971).

39. 190 Neb. 546, 209 N.W.2d 643 (1973).

40. NJI, No. 11.20 comment (Supp. 1975).

41. 526 F.2d at 511.

42. Throughout its opinion, the court suggested that the case lacks substance; and in one part it noted, somewhat skeptically, Sherrill's assertion that he did not know that the revolving shaft was dangerous. Clearly, Mr. Sherrill did not arouse the court's sympathies.

43. 187 Neb. at 36, 191 N.W.2d at 607.

44. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1965).

defects, proves to have a defect that causes injury to a human being.⁴⁵

But later in the opinion Traynor apparently attempted to clarify the theory:

To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith [the defective product] in a way it was intended to be used as a result of a defect in design and manufacture of which *plaintiff was not aware* that made the Shopsmith unsafe for its intended use.⁴⁶

Kohler looked to the first *Greenman* passage:

We hold that a manufacturer is strictly liable in tort when an article he placed in the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes an injury to a human being rightfully using that product.⁴⁷

However the trial court instruction in *Kohler* evidently followed the second *Greenman* formulation, at least in part, stating:

To recover against the defendant, the plaintiff must prove by a preponderance of the evidence: . . . 3. The plaintiff was unaware of the claimed defect.⁴⁸

It is more likely, given the date of the trial and the similarity in wording, that plaintiff's attorneys in *Kohler* submitted instructions to the court patterned after the California Jury Instructions, Civil

45. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

46. *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701 (emphasis added).

47. 187 Neb. at 436, 191 N.W.2d at 606.

48. *Id.* at 436, 191 N.W.2d at 607. The instruction as given by the trial court was, in part:

To recover against the defendant, the plaintiff must prove by a preponderance of the evidence: 1. The defendant placed the 1960 Ford Falcon automobile in question on the market for use, and the defendant knew, or in the exercise of reasonable care should have known, that the automobile would be used without inspection for defects in the steering sector shaft; 2. The steering sector shaft was in a defective condition at the time it was placed on the market and left the defendant's possession; 3. The plaintiff was unaware of the claimed defect; 4. The claimed defect was the proximate cause or a proximately contributing cause of any injury to the plaintiff occurring while the automobile was being used in the way and for the general purpose for which it was designed and intended; 5. The defect, if it existed, made the automobile unreasonably dangerous and unsafe for its intended use; 6. The plaintiff sustained damages as the direct and proximate result of the claimed defect

Id. Compare this instruction with THE COMMITTEE ON STANDARD JURY INSTRUCTIONS, CIVIL, OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA, CALIFORNIA JURY INSTRUCTIONS, CIVIL No. 9.01 (5th ed. 1969) [hereinafter cited as BAJI], note 49, *infra*.

(BAJI).⁴⁹ Language similar to that in *Kohler* and *Sherrill* was used by the trial courts in two post-*Greenman* California cases—*Cronin v. J.B.E. Olson Corp.*⁵⁰ and *Luque v. McLean*.⁵¹ These two cases make up a major part of the disputed instruction's history.

While the *Cronin* opinion was concerned primarily with whether the plaintiff had to prove that the defect was "unreasonably dangerous" as Restatement section 402A requires, the "unaware of" language was present in the trial court's instruction.⁵² However Justice Sullivan, in *Cronin*, deferred to his opinion rendered the same day in *Luque* for construction of the awareness language.⁵³

In *Luque*, the plaintiff fell while clearing debris from his lawn mower's path.⁵⁴ His hand went into an unguarded hole in the housing and was mangled.⁵⁵ Although the suit was originally brought in negligence, breach of warranty and strict tort, the plaintiff withdrew all counts at the close of the evidence except the one grounded in strict liability.⁵⁶ The trial judge withdrew the

49. *Kohler* was decided in 1971. At that time, the following instruction, recommended in California, appears to have been the basis for at least part of the *Kohler* instruction.

The defendant . . . (manufacturer) (retailer) . . . is not required under the law so to create and deliver its product as to make it accident proof; however, he is liable to the plaintiff for any injury suffered by him if the plaintiff establishes by a preponderance of the evidence all of the facts necessary to prove each of the following conditions:

First: The defendant placed the _____ in question on the market for use, and the defendant knew, or in the exercise of reasonable care should have known, that the particular _____ would be used without inspection for defects in the particular part, mechanism or design which is claimed to have been defective;

Second: The _____ was defective in design or manufacture at the time it was placed on the market and delivered;

Third: The plaintiff was unaware of the claimed defect;

Fourth: The claimed defect was a [proximate] [legal] cause of any such injury to the plaintiff occurring while the _____ was being used in the way and for the general purpose for which it was designed and intended, and

Fifth: The defect, if it existed, made the _____ unreasonably dangerous and unsafe for its intended use.

BAJI, *supra* note 48.

50. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

51. 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

52. 8 Cal. 3d at 127 n.5, 501 P.2d at 1158 n.5, 104 Cal. Rptr. at 438 n.5.

53. *Id.* at 130 n.11, 501 P.2d at 1160 n.11, 104 Cal. Rptr. at 440 n.11.

54. 8 Cal. 3d at 140, 501 P.2d at 1166, 104 Cal. Rptr. at 446.

55. *Id.*

56. *Id.* at 140-41, 501 P.2d at 1166, 104 Cal. Rptr. at 446.

assumption of the risk instruction due to insufficient evidence.⁵⁷ After a verdict and judgment for the defendants, the plaintiff appealed.⁵⁸

The primary contention and the issue which Justice Sullivan specifically addressed was whether or not the plaintiff had to establish that he was not aware of the defect at the time of the accident. The thrust of plaintiff-appellant's argument was directed at sub-part three of the jury instruction.⁵⁹

The *Luque* court undertook a detailed review of *Greenman* and concluded the plaintiff's burden in a products liability case is met if he establishes ingredients to meet Traynor's first *Greenman* formulation.⁶⁰

After an analysis of the evolution of the California Jury Instructions, concerning strict products liability, the *Luque* court concluded that the instruction committee based its recommended instruction on the second formulation in *Greenman* instead of the first,⁶¹ which *Luque* reaffirmed as stating California law.⁶² The court specifically rejected the notion that the plaintiff had to prove he was unaware of the defect.⁶³

Ordinary contributory negligence does not bar recovery in a strict liability action. "The only form of plaintiff's negligence that is a defense to strict liability is that which consists in *voluntarily and unreasonably proceeding to encounter a known danger*, more commonly referred to as assumption of risk. For

57. *Id.* at 141, 501 P.2d at 1166, 104 Cal. Rptr. at 446.

58. *Id.*

59. The complete instruction was:

In this action, the plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues:

- 1) That the mower manufactured and sold by the defendants was defective at the time of the accident, and
- 2) That the defect, if any, existed at the time of manufacture and sale of the mower,
- 3) That the Plaintiff was not aware of the defect, if any, at the time of the accident, and
- 4) That the plaintiff was using the mower in a manner in which it was intended to be used, and
- 5) That said defect, if any, was a proximate cause of the injury to the plaintiff, and
- 6) The nature and extent of the injuries, and
- 7) The amount of damages.

Id. at 141 n.1. (Emphasis added by the court to indicate contested portions of the instruction).

60. *Id.* at 141, 501 P.2d at 1166-67, 104 Cal. Rptr. at 446-47.

61. *Id.* at 141-42, 501 P.2d at 1167, 104 Cal. Rptr. at 447.

62. See pp. — *supra* for the two *Greenman* passages.

63. 8 Cal. 3d at 146, 501 P.2d at 1170, 104 Cal. Rptr. at 450.

such a defense to arise, the user or consumer must become aware of the defect and danger and still proceed unreasonably to make use of the product."⁶⁴

The *Luque* court further indicated that the defendant had the burden of establishing the defense,⁶⁵ and reversed the lower court judgment for the defendants, finding that the instruction imposed a prejudicially erroneous burden of proof on the plaintiff.⁶⁶

Not surprisingly, the California Committee on Standard Jury Instructions—Civil responded to the *Luque* opinion. According to the committee, the pre-*Luque* instructions were designed to express California law in accordance with *Greenman* and *Vandermark v. Ford Motor Co.*⁶⁷ For comparison purposes the pertinent portions of the instructions are set out in the footnotes.⁶⁸ In 1972, BAJI No.

64. *Id.* at 145, 501 P.2d at 1169-70, 104 Cal. Rptr. at 449-50, quoting from *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 243, 71 Cal. Rptr. 306, 314 (Ct. App., 1st Dist. 1968). The Restatement provides:

Contributory 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.

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

65. 8 Cal. 3d at 145-46, 501 P.2d at 1170, 104 Cal. Rptr. at 450.

66. *Id.* at 139, 501 P.2d at 1165, 104 Cal. Rptr. at 445. See also 6 CREIGHTON L. REV. 434, 439 n.23 (1973) (concise discussion of *Luque* holding); Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U. L. REV. 1065, 1094-96 (1973) (characterizing California approach as "anti-402A"); Shapo, *A Representational Theory of Consumer Protection: Doctrine Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1294 (1974); Donaher, Piehler, Twerski & Weinstein, *The Technological Expert in Products Liability Litigation*, 52 TEX. L. REV. 1303, 1305 & n.13 (1974).

67. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). See BAJI No. 9.00, comment at 276.

68. BAJI No. 9.00-01, were either individually or together, intended to define strict tort.

The [manufacturer] [retailer] of an article who places it on the market for use under circumstances where he knows that such article will be used without inspection for defects in the particular part, mechanism, or design which is claimed to have been defective, is liable for injuries proximately caused by defects in the manufacture or design of the article which caused it to be unreasonably dangerous and unsafe for its intended use and of which the user was not aware, pro-

9.00 was revised to reflect the *Luque* and *Cronin* opinions;⁶⁹ BAJI No. 9.01 was disapproved and deleted by the committee.⁷⁰ Also in response to *Luque*, the committee published BAJI No. 9.02, which set forth the affirmative defense of assumption of the risk.⁷¹

vided the article was being used for the purpose for which it was designed and intended to be used.

[An article is unreasonably dangerous if it 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.]

The plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove each of the foregoing conditions.

BAJI No. 9.00 (bracketed portions by the committee). The middle paragraph defining "unreasonably dangerous" is common to instructions 9.00 and 9.01. See note 49 *supra*. In one article critical of the jury instructions formulated for strict tort prior to Nos. 9.00 and 9.01, the author failed to address the "awareness" issue. See Lascher, *supra* note 6, at 48-51, 62.

69. The _____ of an article is [liable] [subject to liability] for injuries proximately caused by a defect in the article which existed when the article left possession of the defendant[s], provided that the injury resulted from a use of the article that was reasonably foreseeable by the defendant[s].

BAJI No. 9.00 (1972 Revision) (Supp. 1975) (bracketed material in original).

70. See BAJI No. 9.01 (1973 Supp. Serv. Pamphlet No. 1).

71. If plaintiff assumes the risk of harm from the use of a defective product, he may not recover damages for an injury resulting from such defect.

In order for the plaintiff to have assumed such risk, he must have had actual knowledge of the defect and an appreciation of the risk or danger involved in using the defective product together with an understanding of the magnitude of such risk and must thereafter have voluntarily and unreasonably proceeded to use the product to his injury.

In determining whether the plaintiff unreasonably proceeded to use the product, you should consider what a reasonably prudent person with the same knowledge would have done under the same or similar circumstances.

For a person to act voluntarily, he must have freedom of choice. This freedom of choice must come from circumstances that provide him a reasonable opportunity, without violating any legal or moral duty, to safely refuse to expose himself to the danger in question.

In determining whether the plaintiff assumed such risk, you may consider his maturity, intelligence, experience and capacity, [and the requirements of his employment,] along with all the other surrounding circumstances as shown by the evidence.

See BAJI No. 9.02 (1974 Supp. Serv. Pamphlet No. 2).

Subsequently, however, in *Nga Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), the court, again through Justice Sullivan, adopted a comparative negligence system, and noted:

[W]e have recognized in this state that this defense [assump-

Drawing from the California cases, the plaintiff-appellant in *Sherrill* clearly had more on his side discrediting the third part of the *Kohler* instruction than just the notes of the Nebraska Supreme Court Committee on Pattern Jury Instructions. While the decisions of the California Supreme Court are certainly not controlling in Nebraska, the *Kohler* court, in adopting strict tort, relied heavily on California's *Greenman* opinion, utilizing the Restate-

tion of risk] overlaps that of contributory negligence to some extent "To simplify greatly, it has been observed . . . that in one kind of situation, to wit, where a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence"

Id. at 824, 532 P.2d at 1240-41, 119 Cal. Rptr. at 872-73, quoting from *Grey v. Fibreboard Paper Prods. Co.*, 65 Cal. 2d 240, 245, 418 P.2d 153, 156, 53 Cal. Rptr. 545, 548 (1966).

[T]he defense of assumption of the risk is also abolished to the extent that it is merely a variant of the former doctrine of contributory negligence; both of these are to be subsumed under the general process of assessing liability in proportion to negligence.

Id. at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

Later, the committee withdrew BAJI No. 9.02 due to an alleged conflict between it and the express assumption of the risk instruction adopted pursuant to *Nga Li*, which was intended for ordinary negligence actions. See BAJI No. 9.02 (Supp. 1975). Specifically, some questioned whether under the two instructions it was easier to assert assumption of the risk in a strict liability action than in a negligence action. *Id.* In *Nga Li*, a negligence action, the court did not discuss how strict product liability, with its defenses, would fit into the comparative negligence system. See generally Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2d (Can Oil and Water Mix?)*, 42 INS. COUNSEL J. 39 (1975); Freedman, *The Comparative Negligence Doctrine Under Strict Liability: Defendant's Conduct Becomes Another "Proximate Cause" of Injury, Damage or Loss*, 1975 INS. L.J. 468; 17 DE PAUL L. REV. 614 (1968). Cf. Comment, *Colorado Comparative Negligence and Assumption of Risk*, 46 U. COLO. L. REV. 509 (1975); Note, *Torts: Oklahoma's Uncharted Land of Comparative Negligence*, 27 OKLA. L. REV. 122 (1974); Comment, *Comparative Negligence Legislation: Continuing Controversy Over the Doctrine of Assumption of the Risk in Oregon*, 53 ORE. L. REV. 79 (1973); 41 TEX. L. REV. 459 (1963). For a discussion of the Nebraska comparative negligence statute and assumption of the risk see Note, *Assumption of Risk as a Defense in Nebraska Negligence Action Under the Comparative Negligence Statute*, 30 NEB. L. REV. 608 (1951). See also Noel, *supra* note 6, at 118, for a discussion of *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). Noel contends that *Dippel* indicates that comparative negligence can be meshed with strict tort relatively easily, although it may be difficult in theory. He concludes that the jurors will diminish damages if they think the plaintiff is partly responsible, even if told that contributory negligence is not applicable.

ment,⁷² *Henningsen*⁷³ and Dean Prosser's landmark law review article⁷⁴ merely as additional support. In fact the Nebraska high court paraphrased the excerpt from *Greenman* which Justice Sullivan cited in *Luque* as correctly stating the law.⁷⁵ This was reaffirmed in *Hawkins*:

We laid down the broad rule [in *Kohler*] that "a manufacturer is strictly liable in tort when an article he placed in the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes an injury to a *human being* rightfully using that product."⁷⁶

In neither *Hawkins* nor *Kohler* did the Nebraska court cite or use language similar to the passage from *Greenman* which, according to Justice Sullivan in *Luque*, the California jury instruction committee erroneously used to formulate their first instruction on strict liability. There is no Nebraska case law requiring the plaintiff to prove he was unaware of the defect; moreover the instruction upon which, in all probability, those in *Kohler* were based, has been specifically disapproved by the same court that authored the opinion upon which Nebraska's strict tort law is based. Clearly the appellant in *Sherrill* had a more forceful basis for rejecting the trial court's instruction than appears on the face of the opinion.

IV. ASSUMPTION OF THE RISK AS A DEFENSE TO STRICT TORT

Defenses to strict tort where the defendant was obviously aware,⁷⁷ although not necessarily appreciative of, the defect create anomalies. Is the manufacturer to be held to the duty of designing

The Eighth Circuit recently refused to apply Nebraska's comparative negligence statute to a strict liability case:

We additionally observe the application of the Nebraska comparative negligence statute would, under the language of the statute, be extremely confusing and inappropriate in a strict liability case. . . .

Plaintiff's suggestion to instruct the jury to apply some form of comparative fault is better directed to the state court and Nebraska legislature in the first instance.

Melia v. Ford Motor Co., 534 F.2d 795, 802 (8th Cir. 1976).

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

73. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 248, 161 A.2d 69 (1960).

74. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

75. See pp. 707-08 *supra*.

76. 190 Neb. at 559, 209 N.W.2d at 652 (1973) (emphasis added) (footnote omitted).

77. See Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 9 INT'L SOC'Y OF BARRISTERS Q. 15 (1974).

a reasonably safe product, and then the plaintiff precluded from recovery even though the injury was one which the duty was intended to prevent?⁷⁸ Specifically, if, as with the unshielded auger in *Sherrill*, the product was designed defectively, should the manufacturer be relieved of liability even if the injured plaintiff knew of the danger? In one case, involving a power punch press, the court stated:

The public interest in assuring that safety devices are installed demands more from the manufacturer than to permit him to leave such a critical phase of his manufacturing process to the haphazard conduct of the ultimate purchaser. The only way to be certain that such devices will be installed on all machines—which clearly the public interests requires—is to place the duty on the manufacturer where it is feasible for him to do so.⁷⁹

One author asserts that even warning the public may not be enough:

[W]here a manufacturer knows of a danger not generally appreciated by the public, could correct that danger, but instead merely places a warning on the product, the product may still be considered unreasonably dangerous. Such an interpretation would be consistent with a purpose of strict liability, promoting greater care in the production of goods, and thereby providing more effective public protection.⁸⁰

Clearly the thrust of the above arguments is to compel the manufacturer to make his product safe.⁸¹ However there are

78. See *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402, 290 A.2d 281 (1972) (rejecting contributory negligence as a defense); cf. *Bahlman v. Hudson Motor Co.*, 290 Mich. 683, 288 N.W. 309 (1939).

It is undoubtedly true that the negligence of the driver caused the car to overturn, but defendant's representations were not for the purpose of avoiding an accident, but in order to avoid or lessen the serious damages that might result therefrom. . . . The particular construction of the roof of defendant's car was represented as protection against the consequences of just such careless driving as actually took place. Once the anticipated overturning of the car did occur, it would be illogical to excuse defendant from responsibility for these very consequences.

Id. at 689, 288 N.W. at 312 (emphasis added). *Bahlman* also rejected contributory negligence as a defense in that particular case.

79. 60 N.J. at 410, 290 A.2d at 285.

80. Note, *supra* note 6, at 307. Compare with RESTATEMENT (SECOND) OF TORTS § 402A, comment j (1965).

81. See also *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970) (obviousness of lack of safety device did not preclude jury finding unreasonable risk); *Balido v. Improved Mach., Inc.*, 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (Ct. App., 2d Dist. 1973) (manufacturer did not do enough to insure safety devices were installed by the machine's third owner); *Bartkewich v. Billinger*, 432 Pa. 351, 247 A.2d 603 (1968) (absence of safety device constituted defective design

counterquestions as to how safe a product should be made to protect a careless consumer. If too much is required, consumers, especially those with low incomes, may be prevented from purchasing the product.⁸²

Perhaps then, a balancing aspect must prevail. Professor Robert Keeton has asked:

Should we not instead say that the defendant's negligence unfairly confronted plaintiff with a hard choice in which exposure to defendant's negligently created risk seemed the lesser evil and that, therefore, the defendant should be liable?⁸³

This choice element receives support in comment *n* to Restatement section 402A,⁸⁴ where the plaintiff must voluntarily, as well as unreasonably, proceed to encounter a known danger.⁸⁵ The Restatement's general approach to assumption of risk confirms this:

The plaintiff's acceptance of the risk is not to be regarded as voluntary where the defendant's tortious conduct has forced upon him a choice of courses of conduct, which leaves him no reasonable alternative to taking his chances. . . . The existence of an alternative course of conduct which would avert harm, or protect the right or privilege, does not make the plaintiff's choice voluntary, if the alternative is one which he can not reasonably be required to accept.⁸⁶

One given example of an unreasonable choice which could preclude finding assumption of the risk concerned a girl who was on a date. Her companion started drinking heavily and she had a choice of continuing riding in the drunkard's car or to get out in a particu-

only where injury of type normally expected from normal product use); *Scott v. Dreis & Krump Mfg. Co.*, 26 Ill. App. 3d 971, 326 N.E.2d 74 (1975) (manufacturer had nondelegable duty to install safety devices on industrial equipment).

82. The layman's probable inclination to hold the manufacturer liable for all losses on the theory that he is better able to pay is simply not practical. Such reasoning ignores the "economic facts of life." It is not the "deep-pocketed manufacturer" who will bear the loss imposed upon him—rather, it is the public who will have to pay as consumers.

Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267, 284. Cf. *Symposium: Products Liability: Economic Analysis and the Law*, 38 U. CHI. L. REV. 1 (1970). See also McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3, 40-42, 50-51 (1970); Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUDIES 205 (1973); R. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 4.5, -.14, -.15 (1973).

83. Keeton, *supra* note 6, at 71. Cf. Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17, 68 (1961).

84. See note 64 *supra*.

85. Cf. Noel, *supra* note 6, at 126-28.

86. RESTATEMENT (SECOND) OF TORTS § 496E, comment c (1965).

larly undesirable area. It was suggested that the choice to continue traveling was neither voluntary nor unreasonable.⁸⁷

Another form of compulsion, economic duress, has also been held not to preclude a finding of assumption of risk in a negligence case.⁸⁸ However, a federal court in the same jurisdiction has held that assumption of the risk did not bar recovery in strict tort where the plaintiff was subjected to economic duress.⁸⁹ In *Messick v. General Motors Corp.*,⁹⁰ the plaintiff drove a new automobile over fifteen thousand miles but constantly had problems with the front end wobbling.⁹¹ After taking the car to the dealer eight times with unsatisfactory results, he took it to a private mechanic, who also could not fix the problem, but who did advise the owner that continuing to drive the car in its condition was dangerous.⁹² The owner then demanded that General Motors replace the vehicle, but he continued to use it because it was essential to his business.⁹³ After being injured when the car went into a ditch, plaintiff sued on negligence and strict tort grounds.⁹⁴

The court found the negligence count barred by voluntary assumption of the risk,⁹⁵ but in reviewing comment *n* to Restatement section 402A, the appellate court upheld the jury verdict for the plaintiff on the strict tort count because the plaintiff was acting under economic duress in that he had to continue using the automobile to earn his living.⁹⁶ Significant to the decision was the plaintiff's extensive and mandatory use of the vehicle in his work and the relatively large amount of his income he had committed to financing the automobile during the period he was seeking satisfaction from the manufacturer.

The concept of duress as a factor in negligence is not new.⁹⁷ In *Clayards v. Dethick*,⁹⁸ sewer contractors dug a trench across

87. Greenhill, *Assumed Risk*, 20 Sw. L.J. 1, 17 (1966).

88. *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex. 1963).

89. See Comment, *Economic Coercion as Plaintiff's Defense to Volenti Non Fit Injuria in Strict Liability Actions*, 4 ST. MARY'S L.J. 379 (1972).

90. 460 F.2d 485 (5th Cir. 1972) (Texas law). But see *Henderson v. Ford Motor Co.*, 519 S.W.2d 87 (Tex. 1974); Note, *Henderson v. Ford Motor Co.: Defense and Proof of Defect Limits to Recovery in Product Liability Actions*, 29 Sw. L.J. 644 (1975).

91. 460 F.2d at 486.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 489.

96. *Id.* at 494.

97. See Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 154-59 (1961).

98. 116 Eng. Rep. 932 (Q.B. 1848).

the entrance to a stable.⁹⁹ A stable worker tried to lead a horse over the ditch, but the animal slipped and was killed.¹⁰⁰ The trial court submitted the defendants' negligence to the jury and also observed that:

[I]t could not be the plaintiff's duty to refrain altogether from coming out of the mews [stable] merely because the defendants had made the passage in some degree dangerous: that the defendants were not entitled to keep the occupiers of the mews in a state of siege till the passage was declared safe, first creating a nuisance and then excusing themselves by giving notice that there was some danger: though, if the plaintiff had persisted in running upon a great and obvious danger, his action could not be maintained.¹⁰¹

The jury returned a verdict for the plaintiff and defendants appealed.

Plaintiff's attorneys argued that the trial court's leaving of the question of plaintiff's fault to the jury was correct as "[h]e could not afford to keep his horse at home."¹⁰² Queen's Bench affirmed the lower court, Lord Coleridge remarking, "the plaintiff was not bound to abstain from pursuing his livelihood because there was some danger."¹⁰³

Although economic duress has not been addressed by the Nebraska high court, choice in relation to assumption of the risk has. In *Schwab v. Allou Corp.*,¹⁰⁴ an elderly woman slipped on the icy steps of her apartment and was injured.¹⁰⁵ The trial court found for the plaintiff and the defendants appealed.¹⁰⁶ Defendants contended the plaintiff assumed the risk of the icy steps as a matter of law.¹⁰⁷ The court found no assumption of the risk involved:

The evidence shows that both the front and rear exits were icy. The evidence does not show any freedom of choice to the plaintiff with respect to leaving the apartment. Assumption of risk is predicated upon an implied consent to be treated negligently. *If the person against whom the doctrine is applied is deprived of a choice in the matter, the risk is not assumed, although it may be encountered.*¹⁰⁸

This reasoning was reaffirmed in *Makovika v. Lukes*,¹⁰⁹ where

99. *Id.* at 932-33.

100. *Id.*

101. *Id.* at 933-34.

102. *Id.* at 934.

103. *Id.* at 935.

104. 177 Neb. 342, 128 N.W.2d 835 (1964).

105. *Id.* at 343, 128 N.W.2d at 837.

106. *Id.*

107. *Id.* at 351, 128 N.W.2d at 841.

108. *Id.* at 352, 128 N.W.2d at 841 (emphasis added).

109. 182 Neb. 168, 153 N.W.2d 733 (1967).

the court also appears to have adopted the Restatement formulation.¹¹⁰

This reasoning certainly has appeal when applied to the *Sherrill* case. In the past two years as lead time for new farm equipment increased, farmers became increasingly satisfied to obtain any new or used piece, of a particular item. A "buyer's market" did not exist in most farm products whereby the purchaser could freely shop for the ideal implement.¹¹¹

The alternative to new equipment is to purchase used items, however older items are even less likely to have safety features.¹¹² It would be highly impractical to do without in a situation like that in *Sherrill* where the alternative is time-consuming and exhausting manual labor as well as decreased production.

110. The Restatement provides:

Necessity of Voluntary Assumption

(1) A plaintiff does not assume a risk of harm unless he voluntarily accepts the risk.

(2) The plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to

(a) avert harm to himself or another, or

(b) exercise or protect a right or privilege of which the defendant has no right to deprive him.

RESTATEMENT (SECOND) OF TORTS § 496E (1965). Cf. *Bitsos v. Red Owl Stores, Inc.*, 459 F.2d 656 (8th Cir. 1972). See also *Farmers Co-op Elevator Ass'n v. Strand*, 382 F.2d 224 (8th Cir. 1967) (Nebraska law); W. PROSSER, *supra* note 3, § 68, at 450-53; W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 55, at 311-13 (2d ed. 1955).

111. The price of farm machinery increased 16% from 1973 to 1974, and 23% from 1974 to 1975. A 10 to 11% increase is projected for 1976; however, manufacturers appear to be rebuilding inventories as demand slackens. *NEBRASKA FARMER*, Jan. 3, 1976, at 14. Another periodical notes that 12% fewer tractors were sold in 1974 than in 1973, but that "[m]ore units would have sold, . . . but the pipeline was drained dry in 1973 and they couldn't build them fast enough to fill all orders last year." *SUCCESSFUL FARMING*, Apr., 1975, at 14.

112. One study noted that an informal survey showed: "Most V-belt drives were unshielded, even on machines of recent vintage. . . . Most PTO shafts on new machines are shielded, but on many units the stub shaft shield, where the shaft connects to the elevator, is in need of improvement." Farm Dep't, National Safety Council, *supra* note 18, at 33.

Lead time for safer designs to be implemented may also be a problem. One study of Michigan and Ohio farm accidents concludes: "It takes 10 years after a new tractor design is provided before it is involved in as much as 50 percent of the total tractor use by employees in Michigan and Ohio." H. Doss & R. Pfister, *Nature and Extent of Farm Machinery Use in Relation to Frequency of Accidents in Michigan and Ohio* 22, Sept., 1972 (Agricultural Engineering Dep't, Michigan State University).

On the other side, the manufacturer deserves adequate notice as to his exposure. Once a court finds economic duress which precludes voluntary assumption of a particular product risk, the manufacturer has clear notice as to what his manufacturing methods and designs must encompass.

V. CONCLUSION

Although the *Sherrill* court justified its approval of the trial court's instructions by way of previous Nebraska case law, there appears to have been sufficient basis upon which those instructions could have been disapproved.

Whether the instructions were prejudicial to the plaintiff is not altogether clear because the court was unimpressed with plaintiff's case and statements at the trial. Arguably, however, *Sherrill* may have been forced to encounter the danger of the rotating auger due to lack of a feasible alternative.

In future Nebraska strict liability cases, the trial court should revise the *Kohler* instruction, deleting "unaware of." Not only is this in line with the law according to *Greenman* and the holding in *Kohler*, but any possibility of a subtle shift of the burden of proof is removed.

Finally those involved in litigating the products liability case may address the assumption of the risk issue more in terms of free choice to avoid the anomalous situation addressed in *Bexiga*. This may necessitate a revision of Nebraska Jury Instruction No. 202A and 3.31, not necessarily using "choice" specifically, but to reflect Restatement section 402A, comment *n* and section 496E which define the defense in terms of "voluntarily" and "reasonably" encountering the risk.

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