Developments in Montana Products Liability Law, 1977-1987

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I. INTRODUCTION

A decade has elapsed since this Review published what is now the principal dissertation on products liability law in Montana. That article, written during the early stages of development of products liability law in this state, was drafted with two main objectives. First, it addressed issues likely to be raised in future products liability litigation. Second, it offered a framework for analysis principally to guide courts and counsel in furthering the growth of that law. After ten years, it is time to assess developments in the law, and determine what direction courts and counsel have taken and should take in the future.

This article in many ways follows the format used by the authors of the 1977 article. Initially, this article recapitulates basic developments in the areas of strict liability, negligence, and warranty in Montana federal and state courts during the past ten years. The focus then narrows towards specific issues, particularly those involving affirmative defenses and evidentiary matters. Finally, this article sets forth recommendations for future development and summarizes legislation enacted by the 1987 Montana Legislature.

II. DEVELOPMENTS IN LIABILITY THEORIES SINCE 1977

A. Strict Liability in Tort

The Montana Supreme Court adopted the doctrine of strict liability in actions for injuries caused by defective products in Brandenburger v. Toyota Motor Sales, U.S.A., Inc. in 1973. The authors of the 1977 article discussed Brandenburger and its earliest progeny in some depth. Although the authors presumably an-
ticipated that significant developments would occur often in the years following 1977, such has not been the case. Several decisions have addressed the strict liability doctrine since that time, both in federal and state court in Montana, but the developments have not always been striking. Moreover, court decisions have frequently suffered from a lack of clarity and of serious analysis. The courts have sometimes failed to keep the doctrine of strict liability analytically distinct from other theories of recovery. Much of the problem, however, is due to the failure of bench and bar alike to comprehend and articulate fully the meaning of strict liability in an action to recover damages to persons or property caused by defective products.

The authors of the 1977 article classified product defects by three categories: manufacturing defects, design errors, and a special species of design error commonly referred to as the "failure to warn" theory. Each class of defect will be addressed in light of its development in Montana.

1. Manufacturing Defects

A manufacturing defect is an unintended and latent imperfection in a particular portion of an otherwise acceptable line of products. Cases involving allegations of manufacturing defects fit easily into the parameters of strict liability doctrine, as an aggrieved party need only establish by a preponderance of the evidence that the allegedly defective product was not manufactured according to the standards or intentions of the manufacturer itself, and that the defect created an unreasonable risk of harm to the party using the product. Few, if any, cases since 1977 have discussed the manufacturing defect problem in any detail. Duncan v. Rockwell Manufacturing Co. stands out as the principal manufacturing defect case in Montana during the past ten years. Duncan reveals the problems that an injured plaintiff faces in a manufacturing defect case where the defect does not manifest itself for several years following purchase.

Plaintiff Roy Duncan had purchased and used for several years a table saw manufactured by Rockwell Manufacturing Co. The saw came fully assembled at the time of the purchase. Duncan observed and inspected the saw prior to the sale and noticed no

6. Id. at 295-96.
7. Id. at 255-70. See also AM. LAW PROD. LIAB. 3D §§ 28-34 (1987).
8. Tobias & Rossbach, supra note 1, at 255.
9. Id.
defect. Following purchase, the saw was placed on the back of Duncan's truck and was transported some distance to his workshop. The saw was then used every day for approximately three or four months without incident. The saw was moved and then stored for nearly fifteen months. When he used it again, Duncan seriously injured his hand. Following the accident, it was discovered that one of the four legs of the table saw was one-quarter inch shorter than the other three.\footnote{11}

Duncan sued Rockwell and the retailer of the table saw in strict liability and breach of warranty. Following discovery, both defendants moved for summary judgment.\footnote{12} Defendants argued that the product had been subjected to substantial wear through travel and continuous actual use. There was no direct evidence of a manufacturing defect that existed at the time of purchase. Continuous use of a product in the face of a lack of direct evidence should entitle the defendants to summary judgment, or so defendants argued.\footnote{13} The district court agreed, and on appeal, the Montana Supreme Court affirmed.\footnote{14}

In a somewhat controversial decision, the Montana Supreme Court agreed that, in this particular case, plaintiff had failed in his burden of proof to establish the existence of a manufacturing defect.\footnote{15} Relying on its previous decision in \textit{Barich v. Ottenstror},\footnote{16} the court concluded that "[t]he law will not automatically presume the defect to have been extant at the time the product was under the control of the defendant, from a mere demonstration of a possible defect at the time of the accident."\footnote{17} The court agreed with the plaintiff that continued use of a product over time would not in itself prevent recovery, so long as the plaintiff offered satisfactory proof of an original defect. "However, where no direct evidence of such defect exists and proof must be made by inference, . . . continued use by [the] plaintiff may well preclude a finding [that] the product was defective when placed in the stream of trade."\footnote{18} The court distinguished this case from those in which there was a malfunction of a "recently acquired machine, which
manifests a latent defect." The court concluded that the type of defect observed by Duncan "would be obvious to anyone using the product for even the shortest period of time upon a simple inspection."

Although agreeing with the court's statement of the law, Justice Haswell concluded that the summary judgment should have been vacated, and the matter remanded for a trial on the merits. He argued that the evidence clearly established an inference that the table saw may have been defective at the time of manufacture. Relying on Barich and Brandenburger, Justice Haswell reasoned that the inference was sufficiently genuine so as to preclude summary judgment. In a separate dissent, Justice Shea agreed with Justice Haswell's analysis, and further pointed out other serious errors in the district court's judgment. Justice Shea maintained that the real basis of the district court's summary judgment for the defendants was that the plaintiff was guilty of contributory negligence. Relying upon section 402A of the Restatement of Torts, Second, Justice Shea pointed out that contributory negligence could not be a defense to a strict liability claim.

Despite the perceptive observations of the dissenters, Duncan is still the law in Montana. Although more recent decisions of the Montana Supreme Court suggest that a plaintiff may not be held as strictly to his duty to inspect a product upon purchase, plaintiff's counsel must take care in a manufacturing defect case to develop fully any evidence, whether direct or circumstantial, to establish that the alleged manufacturing defect existed at the time of manufacture.

An obvious "defect" of sorts in the Duncan decision is the failure of the Montana Supreme Court to develop an analytical model for assessing manufacturing defect cases. Recently, in Rix v. General Motors Corp., the court finally articulated the basic analytical framework to be used in manufacturing defect cases. Michael Rix was injured when a GM two-ton chassis cab, equipped with a water tank by the dealer, struck from behind the pick-up truck he was driving. Rix sued General Motors solely under strict liability in tort on the theory that the brake line in the cab was defectively

19. Id. at 388, 567 P.2d at 939.
20. Id.
21. Id. at 389, 567 P.2d at 940 (Haswell, J., dissenting).
22. Id. (Shea, J., dissenting).
23. Id. at 390, 567 P.2d at 941.
designed. At trial, the court instructed the jury in such a way as to raise the subject of manufacturing defect. The jury returned a verdict for the defendant. 26

The Montana Supreme Court reversed the jury verdict in favor of General Motors on the grounds that the jury instructions did not contain the law applicable to plaintiff’s design defect theory. 27 Anticipating the possibility that a manufacturing defect theory might arise in this case and other cases in the future, the court explained the legal basis for pleading a defect theory. The Rix court chose its standard from a dissenting opinion in a New York case, Caprara v. Chrysler Corp., which states: 28

We will now discuss strict liability under a manufacturing defect theory. Under a manufacturing defect theory, the essential question is whether the product was flawed or defective because it was not constructed correctly by the manufacturer:

[M]anufacturing defects, by definition, are “imperfections that inevitably occur in a typically small percentage of products of a given design as a result of the fallibility of the manufacturing process. A [defectively manufactured] product does not conform in some significant aspect to the intended design, nor does it conform to the great majority of products manufactured in accordance with that design.” (Henderson, Judicial Review of Manufacturers’ Conscious Design Choices: The Limits of Adjudication, 73 Col. L. Rev. 1531, 1543). Stated differently, a defectively manufactured product is flawed because it is misconstructed without regard to whether the intended design of the manufacturer was safe or not. Such defects result from some mishap in the manufacturing process itself, improper workmanship, or because defective materials were issued in construction. 29

Although the concept of manufacturing defects may need refinement in subsequent litigation, the Rix decision offers a good starting point for development. It is unfortunate, however, that it has taken the Montana Supreme Court nearly fourteen years since the adoption of strict liability to articulate these concepts.

2. Design Defects

Design error cases are generally subcategorized in one of two

26. Id. at ____, 723 P.2d at 197.
27. Id. at ____, 723 P.2d at 200.
29. Rix, ____ Mont. at ____, 723 P.2d at 200 (quoting Caprara, 52 N.Y.2d at 129, 417 N.E.2d at 552, 436 N.Y.S.2d at 258 (Jasen, Jones & Meyer, J.J., dissenting)).
ways. The first is the inadvertent design error, where the manufacturer unintentionally designs a product in such a way that it will result in an unreasonable risk of harm to the product's user. The second is the "conscious design choice," which the manufacturer knows in advance may present a risk of harm to the user. Manufacturers adopt arguably dangerous designs only because, in their analysis, the advantages of efficiency and economy outweigh the risks of harm. Some reported strict liability cases in state and federal court in Montana since 1977 have involved design error theories. As with manufacturing defect cases, however, courts have only recently attempted to explain the elements of a design error case, distinguishing between those design errors which are unintended and those which flow from conscious choice.

In *Rix*, the Montana Supreme Court relied upon the dissent in the New York Court of Appeals' decision in *Caprara* to explain the standard for a design defect case:

> We now discuss strict liability under a design defect theory. The focus is not whether the product was made according to specifications, but whether the specifications of the manufacturer were in some way defective. We adopt the following statement from *Caprara*, 436 N.Y.S.2d at 258-59:

> In contrast a design defect is one which "presents an unreasonable risk of harm, notwithstanding that it was meticulously made according to [the] detailed plans and specifications" of the manufacturer (*Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471, 479, 426 N.Y.S.2d 717, 403 N.Y.2d 440 *supra.*). Thus, unlike manufacturing defects, design defects involve products which are made in precise conformity with the manufacturer's design but nevertheless result in injury to the user because the design itself was improper.

The court examined defect cases from other states. It also reviewed and considered a number of learned articles and treatises on the subject. The court eventually decided to limit itself to dis-

31. *Id.* at 261-62.
32. *Id.*
33. *Rix*, ___ Mont. at ___, 723 P.2d at 200 (quoting *Caprara*, 52 N.Y.2d at 130, 417 N.E.2d at 552-53, 436 N.Y.S.2d at 258-59 (Jasen, Jones & Meyer, J.J., dissenting)).
cussing a standard for measuring conscious design choices resulting in a risk of harm. It adopted by judicial fiat the standard set forth in pertinent provisions of the Uniform Product Liability Act (UPLA) in its 1979 version.  

(1) A manufacturer who sells a product in a defective condition unreasonably dangerous because of a design defect is subject to liability for harm thereby caused to the ultimate user.  

(2) A product may be in a defective condition unreasonably dangerous if the manufacturer should have used an alternative design.  

(3) In determining whether an alternative design should have been used, the jury should balance so many of the following factors as it finds to be pertinent at the time of manufacture.  

(a) The reasonable probability that the product as originally designed would cause serious harm to the claimant.  

(b) Consideration of the reasonable probability of harm from the use of the original product as compared to the reasonable probability of harm from the use of the product with the alternative design.  

(c) The technological feasibility of an alternative design that would have prevented claimant's harm.  

(d) The relative costs both to the manufacturer and the consumer of producing, distributing and selling the original product as compared to the product with the alternative design.  

(e) The time reasonably required to implement the alternative design.  

The court emphasized that "it would be appropriate for the [trial court] to supplement the foregoing factors based upon the proof submitted in the course of trial."  

The foregoing analysis is applicable only to cases alleging un-


36. *Rix, ___ Mont. at ___,* 723 P.2d at 201 (citing UNIF. PROD. LIAB. ACT § 104(B)).

37. *Rix, ___ Mont. at ___,* 723 P.2d at 201.
reasonably dangerous design choices.\textsuperscript{38} The court has not yet offered a pertinent analysis for a case of inadvertent design error. Nevertheless, the various citations listed by the court may provide an ample source of material to attorneys in understanding and articulating theories of recovery, and defenses, related to inadvertent design error cases as well as those involving conscious design choices. Again, as in the case of manufacturing errors, it is unfortunate that the court took as long as it did following \textit{Brandenburger} to develop a framework for analysis of products liability cases involving design errors.

3. \textit{Failure to Warn}

Failure to warn is really a species of design defect. Typically, cases alleging failure to warn involve prior knowledge by the manufacturer of some dangerous aspect of the product. The claim then focuses upon the failure of the manufacturer to warn of these dangerous propensities, or in certain instances, the failure of the manufacturer to develop and utilize an \textit{adequate} warning of these propensities.\textsuperscript{39} Most strict liability cases in state and federal court in Montana have involved the failure of manufacturers to use any warning, or at the very least, an adequate warning. A rich body of case law has developed in this area.

The failure to warn problem was first addressed by the Montana Supreme Court in \textit{Brown v. North American Manufacturing Co.}\textsuperscript{40} Plaintiff Deane Brown lost his left leg in the auger of a self-unloading feed wagon manufactured by North American Manufacturing Co. His attorneys sued North American in negligence and strict liability in tort. Plaintiff's theory of recovery was premised upon design defects in the auger, as well as a failure to warn of particular dangers posed by the design. The jury awarded a verdict to the plaintiff, and the defendant appealed.\textsuperscript{41}

North American's principal argument on appeal was that the only conclusion supported by the evidence introduced at trial was that the danger in the auger was so "open and obvious" to the plaintiff that he should have been barred from any recovery.\textsuperscript{42} North American relied upon decisions from other jurisdictions holding that products were neither defective nor unreasonably dangerous within the meaning of section 402A if the danger engen-
dered by use of the products was open and obvious to the user. The supreme court rejected that rule. Relying upon other authorities, the court turned back to the text of 402A and observed that the "open and obvious danger" rule advocated by North American was not contained in the rule or the comments thereto. Rather, the rule originated in a court decision predating the Restatement, and was therefore subject to careful scrutiny in light of the subsequent development of the strict liability doctrine. Even if the danger was open and obvious to a plaintiff, the trier of fact was not precluded from finding the product to be in a defective condition unreasonably dangerous to the plaintiff. The open and obvious character of the defect or danger posed by it was "a factor to be considered in determining whether the plaintiff . . . assumed the risk" of any dangers posed by the product. In a subsequent case, also involving injury from a grain auger, the court reaffirmed its previous position regarding the inapplicability of the open and obvious rule.

The court has also had occasion to address the evidentiary requirements necessary to establish a failure to warn. In *Hill v. Squibb & Sons, E.R.*, the court concluded that, in some instances, expert testimony would be necessary to establish whether a product warning was inadequate and therefore potentially dangerous to consumers. Plaintiff Victor Hill brought an action against a drug manufacturer for negligently marketing certain steroid products. The products in question were on all occasions administered to Hill by a physician. Hill alleged that certain package inserts sold with the drug did not contain precise warnings about possible dangerous side effects. After several years of having taken the drug, Hill developed the side effects. At trial, defendant Squibb moved for a directed verdict on the ground that no expert had testified to the inadequacy of the package insert. The district court granted the motion, and plaintiff appealed.

The court held that the duty of a drug manufacturer to warn of dangers inherent in a prescription drug is satisfied if an adequate warning is given to the medical practitioner prescribing and

43. *Id.* at 106-09, 576 P.2d at 717-18.
44. *Id.* at 107, 576 P.2d at 717.
45. *Id.* at 108, 576 P.2d at 717. Despite these observations, the court concluded from the evidence that the danger in the auger was "hidden" rather than "open and obvious." *Id.* at 108, 576 P.2d at 717-18.
48. *Id.* at 201, 592 P.2d at 1385.
administering the drug.49 As a corollary to this rule, the court observed that, since the warnings were directed to medical practitioners, only a practitioner or someone with similar experience would be qualified to testify as to the adequacy of the warning.50 The court analogized previous Montana cases in the medical malpractice field to those involving drug manufacturers. The medical malpractice cases required expert testimony to establish the standard of care.51 The court concluded that plaintiff's failure to elicit any testimony from an expert that the warning was inadequate was fatal to his claim.52

The Montana Supreme Court has also had occasion to address proper jury instructions for a failure to warn case. The first occasion came in Rost v. C.F. & I. Steel Corp.53 Plaintiffs Jack Rost, Virgil Hines, and Helen Olson were injured in an elevator accident. Deterioration of the elevator cable during operation apparently caused the accident. They sued the manufacturer of the elevator in strict liability.54 Plaintiffs pressed the issue of whether the manufacturer had failed to warn of dangerous propensities in the elevator cable.55 The trial court instructed the jury that the manufacturer had a duty to warn users of its products of the dangerous character of those products "insofar as it is known to the manufacturer if, but only if, the manufacturer has no reason to expect that those for whose use the product is supplied will discover its condition and realize the danger involved."56 The jury found for the manufacturer.57

Plaintiffs argued on appeal that the instruction misstated the defendant's duty to warn. The supreme court, relying upon section 402A of the Restatement, observed that a manufacturer "may be required to provide a warning in relation to its product if it is to avoid a determination that the product is unreasonably dangerous."58 The court acknowledged and accepted plaintiffs' argument that the elevator cable was defective because no warning concerning dangerous use of the cable was given to the ultimate purchaser and user. In short, plaintiffs' observation was that the duty to warn

49. Id. at 206, 592 P.2d at 1387-88.
50. Id. at 207, 592 P.2d at 1388.
51. Id.
52. Id.
54. Id. at 487, 616 P.2d at 385.
55. Id.
56. Id. at 488, 616 P.2d at 385.
57. Id. at 487, 616 P.2d at 384.
58. Id. at 488, 616 P.2d at 385.
is measured by an objective standard, i.e., "the care which would be exercised by a reasonable seller or expected by the ordinary consumer." Citing a related Oregon decision, the supreme court observed that "[t]his standard focuses on the condition of the product and the degree of danger which would be tolerated by the reasonable manufacturer apprised of the danger, [which] would not sell the product without a warning." The court distinguished this "objective" standard from what it referred to as the "subjective criteria" used in negligence cases. Citing Jackson v. Coast Paint & Lacquer Co., an earlier strict liability case, as well as a pertinent provision of the Restatement of Torts, the court observed that a claim against a manufacturer on a negligence theory focuses on the degree of care used by the manufacturer during the manufacturing process. It is a standard of care "measured by the knowledge and reasonable expectations of the purchaser and of the manufacturer."

The court concluded that the instruction was erroneous. "The instruction could have lead the jury to believe that the manufacturer was relieved of a duty to warn because the store owner had a prior direct experience with the elevator failing." Despite this error, the court affirmed the verdict for the defendant. The court observed that there was sufficient evidence in the record for the jury to have concluded that the proximate cause of the accident was the failure of the store owner to inspect the elevator cables properly and to observe any defects. This was a "superseding cause" operating to free the manufacturer from ultimate liability to the consumer.

Although the court's reasoning in Rost sometimes confuses negligence and strict liability concepts as well as the "objective" as opposed to "subjective" duties of care, the ultimate holding is instructive. A manufacturer is not relieved of its duty to warn of any dangerous propensities in its products, although the manufacturer may still escape the consequences of a failure to warn or of an inadequate warning if a superseding cause is found to be the proxi-

59. Id.
60. Id. (citing Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974)).
61. Id. at 489, 616 P.2d at 385.
62. 499 F.2d 809, 812 (9th Cir. 1974) cited in Rost, 189 Mont. 489, 616 P.2d 385. The Jackson case is discussed in Tobias & Rossbach, supra note 1, at 232.
63. Rost, 189 Mont. at 489, 616 P.2d at 386. This duty was imposed even though the manufacturer may have exercised due care in the manufacture of the product. Id.
64. Id.
65. Id.
66. Id. at 490, 616 P.2d at 386.
mate cause of injury.

The next failure to warn case in Montana was *Streich v. Hilton-Davis*. 67 Hilton-Davis had manufactured a chemical known as "Fusurex." This particular chemical was designed to keep seed potatoes from sprouting until they had been taken from storage, aerated, and planted. Streich, a commercial seed potato grower who had used the chemical, experienced several problems following application. Among the problems were delayed and erratic emergence following planting, multiple sprouting, and the onset of a heavy tuber resulting in small potatoes and reduced yield. Along with two of his customers, Streich sued Hilton-Davis in strict liability, negligence, and breach of warranty. Plaintiff's principal theory was that the warning on the Fusurex label was insufficient to advise users that these side effects could be observed. 68

The jury agreed with plaintiffs that the warning was inadequate. 69 The Montana Supreme Court concurred. 70 The court observed that this was a "unique products liability case," mainly because the product did exactly what the manufacturer represented it would do; which was suppressing the sprouting process. 71 The problem arose from the side effects. The court observed that plaintiff's expert had testified as to an array of scientific literature on field tests of the product. 72 The literature discussed actual risks like those experienced by the plaintiffs. Hilton-Davis' failure to provide warnings of these side effects, in the face of several scientific studies outlining the risks, was sufficient evidence of a "failure to warn." 73 This "failure to warn" amounted to a defect, within the meaning of section 402A of the Restatement. 74

The court returned to its earlier reasoning in the *Brown and Stenberg* 75 cases in a more recent decision, *Tacke v. Vermeer Manufacturing Co.* 76 Plaintiff Tacke was injured when he lost part of his right foot as a result of an accident involving compression feed rollers. At trial, the jury was instructed that a manufacturer has no duty to warn a person who actually knows of the danger. 77 The court held that it was not yet ready to accept the patent-latent

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68. Id. at ___, 692 P.2d at 442.
69. Id.
70. Id. at ___, 692 P.2d at 443.
71. Id.
72. Id.
73. Id.
74. See id. at ___, 692 P.2d at 444-47.
76. ___ Mont. ___, 713 P.2d 527 (1986).
77. Id. at ___, 713 P.2d at 531.
distinction as a bar to recovery. The court reiterated that manufacturers have a duty to warn even of a known danger.\textsuperscript{78}

The result in \textit{Tacke} strikes one as somewhat odd, as the plaintiff himself had testified at trial that he was aware that the machine which injured him was dangerous. The court seemed preoccupied, however, with Tacke's additional testimony that he did not know that he could become entangled in the rollers and thus injure himself.\textsuperscript{79} The court observed that the manufacturer had used two different warning labels at various times. The warning used on the compression roller that injured plaintiff did not have specific warnings about the specific type of accident that plaintiff experienced. The new warning, used on products manufactured after plaintiff's injury, specifically warned of the compression roller danger and even depicted a person being caught in the rollers.\textsuperscript{80}

Federal courts have also had occasion to develop the failure to warn doctrine. In \textit{Gauthier v. AMF, Inc.},\textsuperscript{81} plaintiff injured his hand when he placed it inside the discharge chute of a running snow thrower while attempting to unclog snow that had caught in the machine. The particular snow thrower had been designed by AMF in 1971. Gauthier sued the company in strict liability, alleging specific design defects. He alleged, among other things, that the warnings contained on the old machine were inadequate. From a jury verdict in favor of the plaintiff, AMF appealed to the Ninth Circuit.\textsuperscript{82}

The Ninth Circuit reversed, pointing out several errors in the lower court's handling of the evidentiary questions.\textsuperscript{83} Of critical significance was the lower court's instruction regarding warnings. At trial, AMF had offered an instruction drawn from the final paragraph of comment \textit{j} to section 402A of the Restatement.\textsuperscript{84} That paragraph reads: "Where warning is given, the manufacturer may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in a defective condition, nor is it unreasonably dangerous."\textsuperscript{85} The Ninth Circuit took exception to the district court's decision not to include this instruction. The court observed that plaintiff's expert

\textsuperscript{78. Id. at \textendash, 713 P.2d at 535.  
79. Id. at \textendash, 713 P.2d at 534.  
80. Id. at \textendash, 713 P.2d at 534-35.  
81. 788 F.2d 634 (9th Cir. 1986).  
82. Id. at 635.  
83. Id.  
84. \textit{RESTATEMENT (SECOND) OF TORTS} § 402A, comment \textit{j} cited in \textit{Gauthier}, 788 F.2d at 635.  
85. \textit{Gauthier}, 788 F.2d at 635 (citing comment \textit{j}).
had testified that warnings were not a "suitable substitute for safety features." The court agreed with AMF that the jury was left to conclude that defendant's theory of the case had no basis in Montana law. AMF had argued all along that the plaintiff should have heeded the written instructions on the machine, and that AMF had the right to assume that he would. The court noted, and AMF conceded, that adequacy of a warning is a proper jury question. However, since the legal effect of adequate warnings was an important issue of law in the case, the court had the duty to instruct the jury on that issue. Since the instruction was certainly consistent with previous Montana Supreme Court decisions, including Rost, the failure of the court to give the instruction was held to be error.

In summary, state and federal courts construing Montana law have been vigorous in developing the failure to warn doctrine. Even in situations where certain dangers are known to the user, the manufacturer has a duty strictly imposed by law to provide an adequate warning of that danger. Plaintiffs are admonished, however, to examine the issue of adequacy carefully to determine whether expert testimony will be necessary to prove that the warning is inadequate. If the product is one generally used or administered by professionals, then only those individuals are capable of testifying as to the adequacy of the warning. On the other hand, it is sufficient for a witness to simply lay a factual foundation as to side-effects, such that a jury can conclude on its own, without a specific finding by an expert, that the warnings regarding a product's dangerous propensities may be inadequate or nonexistent.

B. Negligence

Negligence has been frequently criticized as an insufficient theory on which to establish product liability in an era where the relationship between manufacturer and consumer is more attenuated. This trend may be one reason why the Montana Supreme Court has done little to develop the doctrine of negligence as it pertains to products liability. Realistically, negligence is so well de-

86. Id.
87. Id. The language from comment j was proposed as the format for the cautionary instruction.
88. Id.
89. Id. (citing Rost, 189 Mont. at 489, 616 P.2d at 385).
90. Tobias & Rossbach, supra note 1, at 233.
veloped that it needs little analysis.

The most significant reference to negligence in a products liability context was in the case of *Whitaker v. Farmhand, Inc.* 91 The Whitaker family had purchased a rather sophisticated circular sprinkling irrigation system from a Farmhand dealer. After numerous problems and complications with the system, the Whitakers brought suit against Farmhand and the local dealer. Plaintiffs sought recovery based on strict liability in tort, negligence in design, manufacture and installation, and breach of express and implied warranties. At the trial, the court concluded that plaintiffs were entitled to recover under each theory.92

On appeal, the court gave short shrift to the applicability of strict liability, believing that the facts of this particular case were more readily tried on a negligence theory.93 That conclusion is understandable, as it focused on the conduct of the defendants during installation. The court’s reasoning is still unusual, as the facts of the case are perfectly adaptable to a strict liability theory. In any event, the court’s observation that the case was better tried under a negligence theory also is not especially profound. The court’s analysis of negligence in the context of this case is extremely conclusory. At best, *Whitaker* reaffirms the proposition that human errors in the installation and operation of the product may form the basis for a negligence action.94

A negligence theory of recovery was also raised in *Stenberg*, 95 one of the two grain auger cases reviewed previously. In addition to pleading recovery based on strict liability and tort, the injured plaintiff alleged that Beatrice Foods Co., the manufacturer of the auger, was negligent in not designing a shield for the intake end of the auger.96 Interestingly, the trial court took the negligence case away from the jury on the grounds that plaintiff was guilty of contributory negligence as a matter of law.97 This trial took place before the adoption of comparative negligence in Montana.98 Although the contributory negligence doctrine has been repealed by statute,99 a ruling like that made by the trial court in the *Stenberg*

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92. Id. at 351, 567 P.2d at 919.
93. Id. at 351-52, 567 P.2d at 919-20.
94. Id. at 352, 567 P.2d at 920.
96. Id. at 125, 576 P.2d at 727.
97. Id.
98. MONT. CODE ANN. § 27-1-702 was adopted in 1975. The trial in *Stenberg* took place prior to the effective date of the comparative negligence statute. At the time *Stenberg* was tried, contributory negligence was a complete bar to a plaintiff’s recovery.
case is still possible under a comparative negligence regime. Conceivably, following presentation of plaintiff's evidence, a court could still look at the facts and conclude that, as a matter of law, a plaintiff's negligence, was certainly greater than that of the defendants. Before taking the issue of defendant's negligence away from the jury, however, a court would still be wise to consult the reasoning in Stenberg. The supreme court admonished trial courts to be careful not to create the wrong impression in the minds of a jury. In ruling that a plaintiff was guilty of contributory negligence as a matter of law, the court observed that a jury could well conclude that the trial court did not think much of the plaintiff's entire case. This could adversely affect their perceptions of the remaining theories of recovery.\textsuperscript{100} The effect would particularly be drastic if the only remaining theory of recovery was strict liability, where contributory negligence is not a valid defense.

Admittedly, the situations justifying removal of a negligence theory from the jury on the grounds that plaintiff is contributorily negligent as a matter of law are extremely rare. In any event, the possibility should convince thoughtful plaintiffs' attorneys of the problems inherent in trying cases on negligence as well as strict liability theories. If the plaintiff's case is not argued in terms of negligence, but only in strict liability, the plaintiff runs less chance of losing valuable momentum, especially in complex trials involving serious disputes over causation.\textsuperscript{101}

C. Breach of Warranty

Warranty theories of recovery remain some of the most misunderstood in the realm of products liability law. Much of the problem lies in the failure to comprehend the letter and spirit of the Uniform Commercial Code,\textsuperscript{102} the premise of most warranty theories. A review of warranty decisions in recent years supports the conclusion that courts have done a relatively poor job in developing this area of recovery. In some instances, recovery under a warranty theory has been made more difficult for a plaintiff than would be anticipated by the law. In other instances, the courts

\textsuperscript{100} Stenberg, 176 Mont at 128, 576 P.2d at 728.

\textsuperscript{101} For a discussion of the advantages of pleading and proving a case in strict liability alone, see Tobias & Rossbach, supra note 1, at 273-74.

have placed unnecessary hurdles in the way of defendants seeking to invoke defenses against these claims.

1. Express Warranties

Under Montana law, express warranties may be created in a number of ways. Typically, “any affirmation of fact or promise” about a product made by its seller to a buyer, which is part of the bargaining process, “creates an express warranty that the product shall conform to the affirmation or promise.” Express warranties are also created when any description of the product is made part of the basis of the bargain, such that the product is expected to conform to the description.

In the Whitaker decision discussed previously, plaintiffs sought recovery on a theory of breach of express warranty. Farmhand published a brochure setting forth several affirmations and promises to purchasers of its products. Specifically, the brochure represented and described the product as “movable, reliable, problem-free, safe, and capable of extensive use.” Both the trial court and the supreme court observed that the failure of the system to meet any of the criteria amounted to a breach of an express warranty. Even though Farmhand had not dealt directly with the plaintiffs, the court observed that even a remote manufacturer without privity is liable for breach of express warranty, so long as the purchaser relies on these warranties to his detriment.

The requirement that the purchaser must rely on the warranties is definitely an inaccurate statement of the law of express warranty as set forth in the Uniform Commercial Code. The concept of “reliance” per se does not appear in section 2-313 of the Uniform Commercial Code, which has been adopted without change in Montana. Comment 3 to section 2-313 provides:

104. Mont. Code Ann. § 30-2-313(1)(b), (c) (1985). It is not necessary under Montana law that a seller use formal words such as “warrant” or “guarantee” to create an express warranty. Similarly, it is not necessary that the seller have a specific intention to make a warranty. See Mont. Code Ann. § 30-2-313(2) (1985).
107. The drafters of the Uniform Commercial Code provided official comments to each section of the Code. Although the comments are not a part of Montana law, they are included in the annotations to tit. 30, chs. 1-9, of the Montana Code Annotated. The Montana Supreme Court has acknowledged that the Uniform Commercial Code comments are persuasive in interpreting the text of the specific provisions of the Code. See, e.g., Norwest
In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. 108

The Montana Supreme Court's inclusion of the reliance requirement seems based on a confusion of Uniform Commercial Code concepts with case law predating adoption of the code. 109 The court has unintentionally established an additional element for plaintiffs to meet when alleging breach of express warranty.

2. Implied Warranties

Certain warranties in the sale of products may be implied as a matter of law. The first and most common is the implied warranty of merchantability. 110 Simply stated, products carry with them an implied warranty that they will either pass without objection under the contract description, be of fair average quality within the description, and/or be fit for the ordinary purposes for which such products are used. 111 Similarly, there can be an implied warranty that goods may be fit for particular purposes. 112 This warranty arises where the seller at the time of contracting with the buyer has reason to know of any particular purposes for which the goods are required by the buyer, and that the buyer is relying upon the seller's skill or judgment to provide or furnish suitable goods. 113 A recent Montana Supreme Court decision makes abundantly clear that the courts have a difficult time understanding these warranties, as well as distinguishing between them.

In Streich, plaintiffs alleged breach of the implied warranties of merchantability and fitness for a particular purpose. 114 The drafters of the Uniform Commercial Code intended these warranties to be distinct. Comment 2 to section 2-315 of the Uniform Commercial Code, which was adopted as section 30-2-315 of the Montana Code Annotated, explains the distinction:

109. See cases cited in note 106 supra.
111. Id.
113. Id.
A “particular purpose” differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains. 115

The court revealed in its discussion of the implied warranty of fitness for a particular purpose that it did not understand this distinction. Defendant Hilton-Davis argued that the doctrine of implied warranty of fitness for a particular purpose did not apply to the facts of the case. Hilton-Davis observed that Fusurex was only acquired for use as a sprout suppressant. The plaintiffs used the product for that purpose only. This was the ordinary use of the chemical. 116 The court had already concluded that the product did not conform to its ordinary uses, such that the implied warranty of merchantability had been breached. Yet the court went on to conclude, somewhat strangely, that Hilton-Davis had also breached the implied warranty of fitness for a particular purpose. 117 In a confusing discussion, the court concluded that the ordinary use of Fusurex as a seed suppressant “meant a particular use by Streich, the fall application of the suppressant for storage of seed potatoes.” 118 Hence, the implied warranty of fitness for a particular purpose was also breached.

The court’s conclusion is striking, especially since it was not necessary to a finding of liability. There is no indication in the record that the plaintiff’s use of the product was any different than that normally intended for the product. Perhaps without realizing it, the court essentially confused the concepts of ordinary purpose and particular purpose. The problem with such an approach is that it affords a plaintiff in a breach of warranty action an additional theory of recovery where none previously existed, and especially where none was ever contemplated by the drafters of the code. Commentators on the code have previously noted confusion by other jurisdictions in this area, 119 and have concluded that courts are wise to maintain the distinction between warranties directed to

116. Streich, Mont. at 692 P.2d at 443.
117. Id. at 692 P.2d at 447.
118. Id. at 692 P.2d at 448 (emphasis added).
119. See J. White & R. Summers, supra note 102, at 357.
ordinary purposes, as opposed to those directed to particular purposes.120

III. Other Products Liability Issues

So far, this article has focused only upon the basic principles of liability, whether based in strict liability in tort, negligence, or breach of warranty. There have been several developments in collateral fields, especially in the doctrines of affirmative defenses to products liability claims. Interestingly, it is in the area of affirmative defenses that the Montana Supreme Court and the federal district courts have shepherded perhaps the most controversial changes. Some of these decisions have been characterized by significant errors and inconsistencies.

A. Affirmative Defenses

1. Strict Liability

a. Contributory negligence, assumption of the risk, and comparative fault

Most courts and commentators address the concepts of contributory negligence, assumption of the risk, and comparative fault as separate topics.121 Insofar as these concepts have been addressed by the Montana courts in the development of affirmative defenses, they are inextricably interwoven. A historical analysis suggests that the Montana courts have developed a particularly unique approach to these doctrines. Although the Montana Supreme Court has followed the lead of many jurisdictions and rejected the applicability of contributory negligence in strict liability actions,122 it has conversely developed a unique approach to the applicability of the doctrine of assumption of the risk.123 Moreover, the court has yet to address and either accept or reject the doctrine of comparative fault, which is in itself perhaps one of the most controversial topics.

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120. Id. White and Summers argue that a buyer has nothing to gain by converting a case alleging breach of the implied warranty of merchantability into a case alleging breach of the warranty of fitness for a particular purpose. It may be in the buyer's interest to pursue an action based on breach of the latter warranty only if the buyer believes that a contractual disclaimer would be effective against the warranty of merchantability, but ineffective against the warranty of fitness for a particular purpose. For a list of courts adhering to the correct interpretation of U.C.C. § 2-315, see the citations collected at J. WHITE & R. SUMMERS supra note 122, at 357.

121. See, e.g., Daly v. General Motors Corp., 20 Cal.3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

122. See text accompanying notes 124-26, infra.

123. See text accompanying notes 154-75, infra.
in the area of strict liability in tort.

In Brown v. North American Manufacturing,124 the Montana Supreme Court observed that strict liability is not tantamount to liability without fault. The court recognized limitations on liability as set forth in comment n to section 402A of the Restatement.

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.128

The court then acknowledged that this standard of conduct would apply to strict liability cases in Montana.128 In short, the court rejected most versions of contributory negligence as acceptable affirmative defenses to strict liability claims. Satisfactory proof of the elements of assumption of the risk, however, would amount to an absolute bar to recovery, even if the plaintiff was able to demonstrate the elements necessary to sustain a strict liability claim.

Following Brown, development of affirmative defenses took place primarily in federal court decisions. In Kelly v. General Motors Corp.,127 Chief United States District Judge James Battin recognized that negligence or conduct-based considerations cannot be interjected into actions sounding solely in strict liability.128 That case did not involve the validity of an affirmative defense, but rather, the assertion of a third-party complaint based on negligence theories.129 Several months later, in Zahrte v. Sturm, Ruger & Co.,130 Senior United States District Judge William Murray was called upon to address the concepts of contributory negligence and affirmative defense in a strict liability action. Plaintiff Tim Zahrte was injured when he set or tossed his pistol onto the stoop in front

125. RESTATEMENT OF TORTS § 402A, comment n cited in Brown, 176 Mont. at 110, 576 P.2d at 719.
128. Id. at 1044-49.
129. Id. at 1044.
of his house, resulting in discharge of the weapon into his hand. He sued the pistol manufacturer in strict liability.\textsuperscript{131} At trial, defendant argued that Zahrte knew that a dangerous condition existed in the weapon, that it was obvious, and that Zahrte voluntarily exposed himself to that danger when working with the pistol. Defendant advanced this assumption of the risk defense as a complete bar to recovery. The court instructed the jury that the defense would constitute an absolute bar.\textsuperscript{132} Following trial, the jury concluded that the plaintiff had indeed assumed the risk of his injury, and was therefore not entitled to damages. Plaintiff then moved for a new trial or judgment notwithstanding the verdict, arguing that the court had erred in its instructions to the jury on this subject.\textsuperscript{133}

As of the time of the decision, the Montana Supreme Court had not yet addressed the issue of apportionment of loss between an injured plaintiff and a manufacturer where the plaintiff’s fault had contributed in part to his injury. Judge Murray acknowledged the development of what is commonly referred to as the doctrine of comparative fault.\textsuperscript{134} Judge Murray specifically cited two developments in California, where a pure system of comparative fault had been adopted in strict liability cases.\textsuperscript{135} He then considered whether comparative fault was available in Montana. He rejected arguments by the defendant that Montana’s comparative negligence statute embodied the comparative fault concept. He concluded that the statute pertained only to damages for negligence, not strict liability.\textsuperscript{136} Moreover, Judge Murray found that “policy reasons” militated against utilizing the comparative negligence statute.\textsuperscript{137} Under Montana’s comparative negligence scheme, a plaintiff who is found to be more than fifty percent at fault for his injuries could not recover anything. Judge Murray concluded that this would be unfair. The system of pure comparative fault like that adopted in California, however, would minimize the potential for windfalls either to the plaintiff or to the defendant.\textsuperscript{138}

Although the court would not adopt comparative fault via the comparative negligence statute, it was similarly unwilling to adopt

\textsuperscript{131. Id. at 390.}
\textsuperscript{132. Id.}
\textsuperscript{133. Id.}
\textsuperscript{134. Id. at 391 n.1.}
\textsuperscript{135. Id. at 391 (citing Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978))).}
\textsuperscript{136. Id. at 391-92.}
\textsuperscript{137. Id. at 392.}
\textsuperscript{138. Id.}
plaintiff's argument that assumption of the risk should operate only as a partial bar to recovery. Citing Brown v. North American Manufacturing Co. and comment n of section 402A, the court reasoned that assumption of the risk and comparative fault are necessarily distinct. Assumption of the risk, according to the court, was a difficult defense to establish, and defendants should not have to face the prospect of funding a full recovery to a plaintiff who is found to have known and appreciated the dangers inherent in the product. The court concluded that it was therefore correct in instructing the jury that assumption of the risk would amount to an absolute bar to recovery. Judge Murray left it for the Montana Supreme Court to decide whether to absorb assumption of the risk into a pure comparative fault scheme.

Five months later, another federal court sitting in Montana reached a slightly different conclusion. In Trust Corp. of Montana v. Piper Aircraft Corp., Federal District Judge Paul Hatfield adopted the doctrine of comparative fault as set forth in California, and merged the doctrine of assumption of the risk into that doctrine. Trust Corporation of Montana was the personal representative of the estate of Marlin Wagner. Wagner was the pilot of an aircraft that struck a telephone wire shortly after takeoff, resulting in a crash. Plaintiff's principal argument was that the shoulder harness in the plane was improperly designed, and had it not been so, Wagner would have survived the crash. At issue, then, was the so-called "second collision" theory of products liability.

Defendant answered plaintiff's complaint alleging several affirmative defenses, including contributory negligence, assumption of the risk, and misuse. Plaintiff moved to strike these defenses as inappropriate in a strict liability action. Although Judge Hatfield agreed that these particular defenses should be stricken, he concluded that a jury was still entitled to consider the plaintiff's fault as a damage-reducing factor.

The principal difference between Judge Hatfield's reasoning in Trust Corp. of Montana and Judge Murray's reasoning in Zahrte

139. 176 Mont. at 110-11, 576 P.2d at 719.
140. Id. at 392-93.
141. Id. at 393.
143. Id. at 1098-99.
144. Id. at 1094.
145. Id.
146. Id. at 1098.
147. Id.
is that Judge Hatfield was convinced that the Montana Supreme Court would adopt the pure comparative fault doctrine.\textsuperscript{148} Under pure comparative fault, even assumption of the risk would not then operate as a complete bar to recovery.\textsuperscript{149} Judge Hatfield was influenced by a recent Montana Supreme Court decision, \textit{Kopischke v. First Continental Corp.}\textsuperscript{150} \textit{Kopischke} involved a claim for negligence by a driver against the seller of an automobile. The plaintiff had been seriously injured when the automobile disintegrated while in motion, causing the accident. The defendant in \textit{Kopischke} had raised the defense of assumption of the risk.\textsuperscript{151} Although the supreme court concluded that the defendant had failed to establish the requisite elements of that doctrine, the court announced in dicta that assumption of the risk would be treated "like any other form of contributory negligence and [would be] apportion[ed] under the comparative negligence statute."\textsuperscript{152} Judge Hatfield took this statement as an indication that the Montana Supreme Court would rule in a similar fashion in a products liability case.\textsuperscript{153} Such a ruling would essentially amount to the adoption of the comparative fault doctrine.

For at least three years, several judges and attorneys in Montana assumed that comparative fault would be the general rule in strict liability cases. Insofar as the specific affirmative defense of assumption of the risk was concerned, however, there was still the prospect that it would operate as an absolute bar to recovery once the requisite elements of the defense were established at trial. All of these conclusions were cast to the wind by the Montana Supreme Court in 1983 when it announced a unique and questionable rule on the role of assumption of the risk in products liability cases.

The Montana Supreme Court’s decision was announced in another phase of the \textit{Zahrte} case.\textsuperscript{154} Shortly after Judge Murray denied a new trial to Zahrte in federal court, his attorneys appealed the decision to the Ninth Circuit Court of Appeals.\textsuperscript{155} In an unusual move, the Ninth Circuit certified several of the legal issues to

\begin{footnotes}
\textsuperscript{148} Id. at 1096.
\textsuperscript{149} Id.
\textsuperscript{150} --- Mont. ---, 610 P.2d 668 (1980) cited in \textit{Trust Corp. of Mont.}, 506 F. Supp. at 1097.
\textsuperscript{151} Id. at ---, 610 P.2d at 687.
\textsuperscript{152} Id.
\textsuperscript{153} \textit{Trust Corp. of Mont.}, 506 F. Supp. at 1097.
\textsuperscript{155} Id. at ---, 661 P.2d at 17.
\end{footnotes}
the Montana Supreme Court for review. Specifically, the Ninth Circuit asked the Montana Supreme Court to decide whether the defense of assumption of the risk still existed as a complete bar to a plaintiff's recovery in a Montana based products liability action. Although other questions were also certified, the Montana Supreme court confined its decision to the first question. The court surprised bench and bar alike by concluding that assumption of the risk, while an affirmative defense, was not a complete bar to a plaintiff's recovery.

The court engaged in a historical analysis of its previous decisions. It began its review with an explanation of its decision in Brown. The court concluded that the issue of whether assumption of the risk was a complete bar to recovery had never actually been litigated in that case. The court then acknowledged the Kopischke decision, where it stated that assumption of the risk would be compared just as contributory negligence was compared under the comparative negligence statute in regular negligence actions. The court then commented upon another non-products liability case involving assumption of the risk, Abernathy v. Eline Oilfield Services, Inc. In Abernathy, the supreme court had abolished the doctrine of implied assumption of the risk as a defense to negligence actions. Abernathy thus amounted to a clarification, if not a complete repudiation, of its previous observations in Kopischke.

The court somehow concluded from this historical exegesis, that the doctrine of assumption of the risk, while still applicable in products liability actions, should not operate as an absolute bar to recovery. Drawing on language in the Kopischke decision, the court held that assumption of the risk in a products liability action would be treated like any form of contributory negligence and apportioned under the comparative negligence statute.

The reasoning in Zahrte is arguably the Montana high court's most convoluted to date in the field of products liability law. The

156. Id.
157. Id.
158. Id. at --, 661 P.2d at 19.
159. Id. at --, 661 P.2d at 18.
160. Id.
161. Id.
162. ___ Mont. ___, 650 P.2d 772 (1982). Abernathy was a non-products liability case.
163. See the discussion in Zahrte, ___ Mont. at --, 661 P.2d at 18.
164. Id. at --, 661 P.2d at 18-19. Upon receipt of the court's opinion, the Ninth Circuit vacated Judge Murray's decision and remanded the case for trial. Zahrte, 709 F.2d 26.
decision is so internally inconsistent as to invite serious question as to the true basis for the ruling. Some have suggested that the court deliberately ignored a serious attempt to adopt the comparative fault doctrine in Montana. Such an accusation may be unfair, as it is not clear that the court was ever asked to address comparative fault principles. Nevertheless, the conclusion that assumption of the risk was not an absolute defense was a slap in the face to the reasoned holdings of federal and state judges who had addressed the question previously.

The court's decision contains a number of internal inconsistencies. The court acknowledged that assumption of the risk involves application of a subjective standard to the plaintiff's conduct. Similarly, the court acknowledged that contributory negligence "involves the application of a 'reasonable man' standard which necessarily is objective." Since the comparative negligence statute deals only with traditional negligence, and not assumption of the risk, it is difficult to discern how the court could conclude that assumption of the risk could be apportioned under the comparative negligence statute.

Furthermore, the court observed that assumption of the risk in a strict liability action is somehow different from common law assumption of the risk as applied to negligence actions. There is no support for this proposition. The court reasoned that the defense "as applied in a strict liability action involves unreasonable exposure to the danger created by the defective product." Presumably, the element of unreasonability had nothing to do with the common law doctrine of assumption of the risk, a finding not explained in the decision.

The strangeness of the Zahrte decision is capitalized by its misconstruction of the court's previous holding in Brown. The majority claimed that the issue of assumption of the risk was never really litigated in Brown. The decision clearly contradicts the court's own observation that the standards as set forth in comment n to section 402A, including the provision on assumption of the risk being an absolute defense to strict liability, set forth the law in

165. See, e.g., the dissent of Justice Gulbrandson, discussed in text accompanying notes 171-75, infra.  
166. See the Briefs of Appellant and Respondent, Zahrte v. Sturm, Ruger & Co. Copies of all briefs submitted to the Montana Supreme Court are kept by the State Law Library in its archives in Helena, Montana.  
167. Zahrte, __ Mont. at __, 661 P.2d at 18.  
168. Id.  
169. Id. (emphasis in original).
Montana.\textsuperscript{170}

The \textit{Zahrte} decision was not unanimous. In his dissent, Justice Gulbrandson\textsuperscript{171} criticized the majority for using the certification process to announce a change in the law without guidance to the federal court as to when that change occurred.\textsuperscript{172} Justice Gulbrandson maintained that assumption of the risk was still an absolute defense in Montana, even after the \textit{Abernathy} decision.\textsuperscript{173} The justice also observed that the majority had unnecessarily refused to extend comparative principles except in the limited area where a plaintiff had voluntarily and unreasonably exposed himself to a known danger—something that amounted to a departure from the rule in \textit{Brown}.\textsuperscript{174} He concluded that the decision would prevent consideration of comparative fault principles in cases “where the plaintiff voluntarily and \textit{reasonably} exposes himself to a known danger, or where the plaintiff has engaged in negligent conduct.”\textsuperscript{175}

Since \textit{Zahrte}, the Montana Supreme Court has not departed from its unusual holding.\textsuperscript{176} As of this writing, the only apparent affirmative defense to a strict liability claim is the modified variety of assumption of the risk. It is a partial defense, treated like comparative negligence in a negligence case, even though assumption of the risk does not involve consideration of objective conduct.

b. Misuse

Some jurisdictions have recognized the defense of misuse as a possible affirmative defense to a strict liability claim.\textsuperscript{177} As developed by these jurisdictions, misuse consists of an unintended and unforeseeable use of the product which produces injury even without consideration of any possible defect in the product.\textsuperscript{178} The only mention of the defense of misuse in Montana was in the \textit{Trust Corp. of Montana} case discussed previously.\textsuperscript{179} In a footnote to that opinion, Judge Hatfield observed that one could argue that misuse is actually a form of negligence, and therefore is inconsis-

\footnotesize{170. See \textit{Brown}, 176 Mont. 98, 110-11, 576 P.2d 711, 719.}
\footnotesize{171. \textit{Zahrte}, ___ Mont. at ___, 661 P.2d at 19 (Gulbrandson, J., dissenting).}
\footnotesize{172. Id.}
\footnotesize{173. Id.}
\footnotesize{174. Id.}
\footnotesize{175. Id. at ___, 661 P.2d at 20 (emphasis added).}
\footnotesize{176. \textit{Zahrte} was affirmed in \textit{Kuiper v. Goodyear Tire & Rubber Co.}, ___ Mont. ___, 673 P.2d 1208 (1983).}
\footnotesize{177. See, e.g., \textit{Kinard v. Coats Co.}, Inc., 37 Colo. App. 555, 553 P.2d 835 (1976).}
\footnotesize{178. Id. at 557, 553 P.2d at 837.}
\footnotesize{179. \textit{Trust Corp. of Mont. v. Piper Aircraft Corp.}, 506 F. Supp. 1093. See text accompanying notes 142-53, \textit{supra}.}
tent with the doctrine of strict liability.\textsuperscript{180} Moreover, it seems inappropriate to categorize "misuse" as an affirmative defense. In situations where the plaintiff's use of the product is established as the sole proximate cause of injury, it is conceptually better to say that the plaintiff has simply failed to establish causation.

At least one commentator has recognized that, with the trend toward comparative fault principles, "courts should distinguish between unforeseeable misuse as it relates to a plaintiff's failure to prove causation . . . and misuse that is characterized as an affirmative defense because it combines with a defect to cause injury."\textsuperscript{181} Even though the Montana Supreme Court has not yet adopted comparative fault, there is as yet no indication that it will ever recognize a separate doctrine of misuse as an affirmative defense.

c. Other Defenses

Other possible affirmative defenses have been advanced against strict liability claims, but without much success. The most notable defense rejected by the court is the "disclaimer" of liability that has its roots in the Uniform Commercial Code (U.C.C.).\textsuperscript{182} The supreme court has recognized that these disclaimers may operate to bar claims based in breach of warranty.\textsuperscript{183} However, because the U.C.C. does not purport to repudiate tort principles, disclaimers on product labels or in instruction booklets cannot operate to preclude tort liability, including strict liability in tort.\textsuperscript{184}

2. Negligence

Presumably, products liability actions grounded in negligence are still subject to the defense of comparative negligence. Existing case and statutory law make this conclusion self-evident. One problem, which has not yet been addressed by the courts, is how to

\textsuperscript{180} Id. at 1096 n.5.


\textsuperscript{182} See MONT. CODE ANN. § 30-2-316 (1985). A broader discussion of disclaimers is contained in the text accompanying notes 186-207, infra.

\textsuperscript{183} Thompson v. Nebraska Mobile Homes, ___ Mont. ___, 647 P.2d 334, 338 (1982).

\textsuperscript{184} See id.; see also Kopischke, 187 Mont. 471, 610 P.2d 668; Whitaker v. Farmhand, Inc., 173 Mont. 345, 567 P.2d 916 (1977). The policy reason for this holding is simple. Warranty law is drafted for the benefit of people with commercial sophistication. Businessmen are presumed to be competent enough to know the effects of disclaiming rights to recovery for unacceptable purchases. On the other hand, consumers do not directly negotiate with manufacturers or sellers for the contract terms of products purchased by them. Rather, they buy the products virtually "as is," thus making contractual language of disclaimers tantamount to an adhesion contract, or worse.
approach a multifaceted products liability claim, where the plaintiff seeks to recover on negligence as well as strict liability. Under existing law, the only affirmative defense that the defendant may plead against the plaintiff on a strict liability theory is assumption of the risk.\textsuperscript{185} However, if the plaintiff continues to argue negligence in the manufacture or design of the product, one may assume that the defendant would still be entitled to plead a comparative negligence defense against the plaintiff. The problem that has yet to be worked out is how to handle the possible inconsistencies where a jury finds the defendant strictly liable but also finds that the plaintiff is more than fifty percent negligent, even though the defendant is contributorily negligent. Whether the plaintiff may recover all his damages, a portion, or none at all, remains an open question.

3. Warranty

The Uniform Commercial Code provides for the exclusion of modification of express and implied warranties.\textsuperscript{186} With regard to express warranties, words of conduct creating as well as negating such warranties must be construed together, except that words of negation or limitation are regarded as ineffective where mutual construction would be unreasonable.\textsuperscript{187} Implied warranties, particularly those pertaining to merchantability, may be excluded by so-called “disclaimers.”\textsuperscript{188} These disclaimers must be conspicuous. Implied warranties of fitness may be excluded by general language, whereas the implied warranty of merchantability must be specifically disclaimed.\textsuperscript{189}

Courts in Montana have at least recognized the validity of disclaimers. In the \textit{Whitaker} case cited previously, defendants attempted to argue that the warranties contained in their sales brochures had been disclaimed by subsequent language contained in a manual accompanying the product. Adhering to the rationale in statute and that expressed by the commentators to the code, the court concluded that a “disclaimer or limitation of warranty contained in a manufacturer’s manual received by the purchaser sub-

\textsuperscript{185.} See Zahrte, Mont., 661 P.2d 17.
\textsuperscript{186.} \textit{MONT. CODE ANN.} § 30-2-316 (1985).
\textsuperscript{187.} \textit{MONT. CODE ANN.} § 30-2-316(1) (1985).
\textsuperscript{188.} \textit{MONT. CODE ANN.} § 30-2-316(2) (1985).
\textsuperscript{189.} \textit{Id. MONT. CODE ANN.} § 30-1-201(10) (1985) provides that a contract term or clause is “conspicuous” if “it is so written that a reasonable person against whom it is to operate ought to have noticed it.” The statute further provides that a contract provision within the body of the contract is “conspicuous” if it is in larger type than other provisions, or is in contrasting color.
sequent to sale does not limit recovery for implied or express warranties made prior to or at the time of sale." 190 With particular reference to the comments to the U.C.C., the court concluded that a conflict between a specific express warranty and a clause excluding all warranties would be resolved in favor of finding that the warranty prevails. 191

The court later ruled upon the propriety of a disclaimer of implied warranties. That issue was addressed in *Transcontinental Refrigeration Co. v. Figgins.* 192 A refrigerator company sued its lessor for accelerated rent allegedly due from breach of the lease agreement. The lessor counterclaimed, arguing for rescission of the contract and, where appropriate, monetary damages, due to alleged defects in the refrigeration equipment. The lower court found for the defendant on the counterclaim, and the supreme court affirmed. 193 The lessee pointed to language in the lease of the product disclaiming implied warranties of merchantability and fitness for a particular purpose. The court noted that the disclaimer of warranties in the contract was "in the same type face as the rest of the contract, and was not indented, underlined or inked in a contrasting color . . . and in no way distinguishable or set apart from the other contract provisions." 194 Under these circumstances, the court concluded that the disclaimer was not conspicuous and therefore ineffective as a matter of law.

The disclaimer defense proved more successful in *Schlenz v. John Deere Co.,* 195 a federal court case decided a few years later. In this case, John Deere's contract of sale contained disclaimer language like that contemplated by the statute. The words of disclaimer were printed in significantly larger type face than the other printing in the body of the text. Indeed, the disclaimers were the only words in the body of the text printed in capital letters. 196 Under these facts, Judge Hatfield found the disclaimer was conspicuous and therefore preclusive of claims based on breach of implied warranties. 197 With regard to express warranties, however, Judge Hatfield followed the lead of the Montana Supreme Court in

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191. *Id.*
193. *Id.* at 17, 585 P.2d at 1304.
194. *Id.* at 19, 585 P.2d at 1305.
196. *Id.* at 228. The paragraph of disclaimer provided that the manufacturer "EX-PRESSLY DISCLAIMS THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS." An accompanying warranty specifically provided that the manufacturer did "NOT MAKE ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS."
197. *Id.*
Whitaker and concluded that a subsequent exclusion of express warranties was insufficient to destroy the express warranty of safety set forth in the operator’s manual provided by the manufacturer. 198

Implicit in the Schlenz decision is the recognition that the court, and not the jury, decides whether a disclaimer is conspicuous. This is what the drafters of the U.C.C. contemplated; their wishes are codified in statute. 199 However, the Montana Supreme Court has at least on one occasion implied that the effectiveness of a disclaimer is a jury question. The implication was raised in Thompson v. Nebraska Mobile Homes Corp. 200 The case involved claims for strict liability in tort and breach of warranty by a mobile home buyer against the manufacturer and the seller of the home. The district court dismissed the strict liability claim prior to trial. The jury was then instructed only on theories of negligence, fraud, and breach of warranty. Specifically, the jury was instructed that disclaimers can be a defense to warranties. The jury found for the defendants on all theories, and the plaintiff appealed. The only issue on appeal, however, was whether the district court had erred in dismissing the claim for strict liability in tort. 201 The court did not address matters pertaining to breach of warranty. Nevertheless, it is evident from the district court’s handling of the warranty issue that the law regarding disclaimers was not followed. The statute defining “conspicuous” requires the court, and not the jury, to make all conclusions about conspicuousness. 202 Any inference in the Thompson decision that this is a jury question is inconsistent with the statute and Judge Hatfield’s interpretation of state law in the Schlenz case. 203

The subject of disclaimers was also raised in a more recent case, Vandalia Ranch, Inc. v. Farmers Union Oil & Supply Co. 204 The court reaffirmed its previous holding in Whitaker that a disclaimer or limitation of warranty contained in a manufacturer’s manual received subsequent to sale does not limit recovery for im-

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198. Id. at 228-29.
199. See Mont. Code Ann. § 30-1-201(10) (1985). Although the reasons for this provision are not readily apparent, it is likely that the drafters of the code were striving for consistency in interpretation of the concept of conspicuousness. Consistency may be obtained to a greater degree by judicial decision-making. With greater consistency, commercial enterprises can be more certain as to whether disclaimers on their products will be effective.
200. ___ Mont. ___, 647 P.2d 334.
201. Id. at ___, 647 P.2d at 336.
203. Id.
204. ___ Mont. ___, 718 P.2d 647 (1986).
plied or express warranties made before or at the time of sale. The more interesting language of the opinion concerns acknowledgment of another finding by the district court in that case that the disclaimers were unconscionable. Unconscionability of disclaimers of warranties has been raised in at least one other jurisdiction. The unconscionability argument has caused much concern to manufacturers who have otherwise felt that their disclaimers were clearly in compliance with Uniform Commercial Code guidelines. In any event, the unconscionability argument remains one to be watched for in subsequent litigation.

B. Evidentiary Considerations

1. Causation and Tracing the Defect

A few supreme court decisions in the products liability field have made instructive comments on the element of causation. Whether a plaintiff brings his action in strict liability in tort, negligence, or breach of warranty, causation is often the critical element the jury focuses upon when deciding whether the plaintiff is entitled to recover.

In Brown v. North American Manufacturing Co., the court tacitly acknowledged that proximate cause remains the critical legal concept with reference to causation. Recent decisions of the Montana Supreme Court in the area of medical malpractice have given credence to the "substantial factor test" in cases where more than one cause contributes to an accident or injury. In his concurring opinion in Streich v. Hilton-Davis, Justice Morrison commented on the appropriateness of the substantial factor test to strict liability cases. Practitioners are therefore urged to be careful when evaluating the causation issue in a products case. If there is any indication that two or more separate causes have contrib-

205. Id. at ___, 718 P.2d at 649.
206. Id.
207. See Durham v. Ciba-Geigy Corp., 315 N.W.2d 696 (S.D. 1982). In that case, the Supreme Court of South Dakota held that a manufacturer's disclaimer of warranty and limitation of consequential damages, as set forth in a clause accompanying the sale of a product, was invalid as unconscionable and contrary to public policy. This decision was reached in spite of the language of the South Dakota Commercial Code permitting disclaimers of warranties.
208. 176 Mont. 98, 576 P.2d 711.
211. Id. at ___, 692 P.2d at 450 (Morrison, J., concurring).
uted to an accident or injury in a products liability context, the traditional "but for" proximate cause instruction may be inappropriate. If given, it may be grounds for reversal.\textsuperscript{212}

In the previous discussion of \textit{Rost}, mention was made of the court's recognition of superseding cause.\textsuperscript{213} To date, there is no indication that the Montana Supreme Court has abandoned the theory that superseding cause may prove to be a critical element in future products liability actions. Thus, if a defendant is in a position to show that an additional factor brought about the accident without regard to any specific design or manufacturing defect, a plaintiff's recovery might be barred.

Problems with the lack of evidence relative to causation can spell the early end of an otherwise plausible products liability case. Such was the problem faced by the plaintiff in \textit{Brothers v. General Motors Corp.}\textsuperscript{214} Plaintiff was driving her vehicle down a Montana highway under relatively normal conditions. While driving around a gradual bend on the highway, the driver noticed a problem with the steering wheel. Eventually the wheel would not turn. The car failed to go around the bend, moved into the right lane, and down into the median ditch.\textsuperscript{215} Plaintiff sued the manufacturer and seller of the vehicle for damages in strict liability in tort and negligence. Following discovery, defendants moved for summary judgment. The motion was granted, and the plaintiff appealed.\textsuperscript{216}

The supreme court affirmed, largely on the grounds that plaintiff was unable to meet her burden in showing that a defect caused the injury, and that the defect was traceable to any of the defendants.\textsuperscript{217} According to the record, a mechanic had examined the plaintiff's vehicle subsequent to the accident, but had found nothing wrong. The steering column itself was removed, and again, nothing was found to be wrong. An expert in the field of mechanical engineering had also examined the steering column and found nothing wrong. No reason was given for any possible defect. In the face of this evidence, both the district court and the appellate court could only conclude that summary judgment was war-

\begin{footnotesize}
\textsuperscript{212} See \textit{Rudeck}, Mont. at \textendash, 709 P.2d at 628-29 (substantial factor instruction required in all cases where acts of two or more defendants contribute to injury—implication that failure to give instruction under these circumstances may warrant reversal).


\textsuperscript{215} \textit{Id.} at 480-81, 658 P.2d at 1109.

\textsuperscript{216} \textit{Id.}

\textsuperscript{217} \textit{Id.} at 482-83, 658 P.2d at 1110.
\end{footnotesize}
ranted. The court acknowledged that a plaintiff may make out a prima facie case of liability on circumstantial as opposed to direct evidence. Yet the court noted that even circumstantial evidence of cause was lacking. Such evidence could have been met by “proof of the circumstances of the accident, similar occurrences under similar circumstances, and elimination of alternative causes.”

The court emphasized that no attempt was made to offer any evidence of similar occurrences under similar circumstances. Moreover, and perhaps more importantly, the plaintiff had failed to eliminate any alternative causes for the accident. No evidence was offered to show whether tire failure, loss of hydraulic power steering, or other possible problems may have contributed to the accident.

The *Brothers* decision remains perhaps the court’s simplest articulation of what evidence may be necessary to establish causation in a products liability case. It is further support for the observation that, at least in the strict liability context, proof of an accident itself will generally be insufficient to support a claim for liability.

In the *Brothers* case cited above, the plaintiff’s inability to trace any defect to the manufacturer was ultimately fatal to the plaintiff’s claim. Similar problems resulting from an inability to trace the defect had been discussed in the *Duncan* case. Another Montana Supreme Court decision, *St. Paul Mercury Insurance Co. v. Jeep Corp.*, also highlights the problem. In that case, plaintiff was the subrogee of a party whose Jeep Wagoneer had caught fire while being driven on the highway. The insurance company brought a products liability action against the Jeep manufacturer on theories of strict liability, breach of warranty, and res ipsa loquitur. A directed verdict in favor of the defendant was affirmed on appeal by the Montana Supreme Court. The supreme court pointed to plaintiff’s failure to elicit any testimony to show a defect in the Jeep, and that the defect had caused the fire. Indeed, plaintiff’s own expert witness testified at trial that he could not establish that a defect existed in the product when it had left the

218. Id.
219. Id.
220. Id.
221. Id.
223. 175 Mont. 69, 572 P.2d 204 (1977).
224. Id. at 70, 572 P.2d at 205.
225. Id.
manufacturer.\textsuperscript{226}

The \textit{St. Paul} decision, like that in \textit{Brothers}, illustrates the absolute necessity of being able to trace the defect. The fact that the supreme court has affirmed two summary judgments and one directed verdict suggests that some attorneys have not been careful in establishing this particular element of a strict liability action.

2. \textit{Subsequent Remedial Measures}

Rule 407 of the Federal and Montana Rules of Evidence provides that evidence of subsequent remedial measures "is not admissible to prove negligence or culpable conduct in connection with the event."\textsuperscript{227} Admissibility of such evidence is permitted only when the evidence is offered for another purpose, such as proving ownership of property, control of property, impeachment, or the feasibility of certain precautionary measures.\textsuperscript{228} For several years, courts have wrestled with the question of whether this doctrine, which was developed for use in negligence actions, is also applicable to claims based on strict liability in tort.\textsuperscript{229}

Although some jurisdictions have concluded that the necessity of removing negligence concepts from strict liability makes rule 407 inapplicable,\textsuperscript{230} the Montana Supreme Court and the Ninth Circuit Court of Appeals, construing state and federal rules of evidence, respectively, have concluded that the rule is applicable in strict liability actions. The Ninth Circuit reached that conclusion in the \textit{Gauthier} case cited previously.\textsuperscript{231} At trial, plaintiff Gauthier had brought into court a 1984 Toro snow thrower similar to the 1971 model designed by AMF, for the purpose of comparing it to AMF's model that had caused the accident. Gauthier's attorney referred to the 1984 model and its safety features in such a way as to inform the jury of subsequent remedial measures. Plaintiff's expert testified that the 1984 model provided safety features that the

\textsuperscript{226} \textit{Id.} at 72, 572 P.2d at 206.

\textsuperscript{227} The full text of the rule, either in its federal or state version, is as follows:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

\textsuperscript{228} \textit{See supra} note 227.

\textsuperscript{229} \textit{See} the cases cited at Gauthier v. AMF, Inc., 788 F.2d 634, 636-37 (9th Cir. 1986).


\textsuperscript{231} \textit{Gauthier}, 788 F.2d at 637.
1971 model did not.\textsuperscript{232} The Ninth Circuit Court of Appeals acknowledged the reasoning of some courts that the goals of rule 407 are not subverted by permitting evidence of subsequent remedial measures in strict liability actions.\textsuperscript{233} The court rejected such reasoning, however, at least where the issue is defective design. The court noted that juries in defective design cases are essentially asked to decide whether the product is unreasonably dangerous in relationship to any benefits incurred by use of the product. The infusion of the "unreasonably dangerous" standard in a defective design case essentially makes the standard of proof equivalent to a negligence standard of reasonableness.\textsuperscript{234}

The language of the opinion seems to imply that rule 407 applies to all strict liability cases, whether premised on design or manufacturing defects.\textsuperscript{235} Despite this lack of clarity, the court did reason that evidence of subsequent remedial measures might be admissible under the exceptions set forth in rule 407, especially if the evidence is offered to prove feasibility, or for impeachment.\textsuperscript{236}

The Montana Supreme Court reached a similar decision with respect to the Montana version of rule 407 in \textit{Rix}.\textsuperscript{237} The court observed that, in a manufacturing defect case, evidence of design modification is without probative value and irrelevant because the safeness of the original design is not in issue. In design defect cases, the court concluded that "evidence of subsequent changes or alterations in design is not probative of whether the product was defectively designed at the time of manufacture." Without citing \textit{Gauthier}, the court essentially followed the reasoning of the Ninth Circuit,\textsuperscript{238} recognizing that the "evidence of design changes might be probative on matters such as technological feasibility and impeachment."\textsuperscript{239}

3. \textit{Expert Testimony}

Earlier discussions of the \textit{Hill}\textsuperscript{240} and \textit{Brothers}\textsuperscript{241} decisions point to the obvious need to utilize expert testimony in certain strict liability cases. However, an argument that plaintiff's case

\begin{itemize}
  \item \textsuperscript{232} \textit{Id.} at 636.
  \item \textsuperscript{233} \textit{Id.} at 636-37.
  \item \textsuperscript{234} \textit{Id.} at 637.
  \item \textsuperscript{235} \textit{Id.} at 638.
  \item \textsuperscript{236} \textit{Id.} at 637.
  \item \textsuperscript{237} \textit{Rix v. General Motors Corp.}, Mont., 723 P.2d 195 (1986).
  \item \textsuperscript{238} \textit{Gauthier}, 788 F.2d at 634.
  \item \textsuperscript{239} \textit{Rix}, Mont. at , 723 P.2d at 203.
  \item \textsuperscript{241} 202 Mont. 477, 658 P.2d 1108.
\end{itemize}
failed for want of expert testimony fell on deaf ears in the *Streich* case. Defendant Hilton-Davis contended at trial and on appeal that the plaintiffs needed an expert witness to testify that the warning on the product was in some way inadequate, thus making the product defective and unreasonably dangerous. The court distinguished the facts in *Streich* from those in its earlier decision in *Hill*, noting that plaintiff's expert witness at the very least laid a foundation that Hilton-Davis knew or should have known of the results of scientific studies pointing out several adverse side effects from the use of Fusurex. The fact that plaintiff's expert did not specifically testify that the warning was therefore inadequate was not tantamount to a lack of expert testimony on the nature of the warning. Once evidence of side effects was introduced, the court concluded that a layman could very easily conclude, without further expert guidance, that the warning was inadequate.

4. **Evidence of Other Accidents**

In *Tacke*, the supreme court rejected a narrow test for admissibility of evidence of other accidents in a strict liability action. Drawing on reasoning from non-products liability cases, the court observed that evidence of other accidents need not be identical to that of the instant case to be admissible. The trial court need only find that the accident involved at trial and other accidents are "similar" in nature. If the accidents are similar, the evidence is admissible to show that the product was either manufactured or designed defectively.

5. **Res Ipsi Loquitur**

The Montana Supreme Court has twice rejected consideration of the res ipsa loquitur doctrine in products liability cases. In *Brothers*, plaintiff attempted to overcome his problems with producing evidence of a defect by arguing the application of the res ipsa loquitur doctrine. The court concluded that res ipsa loquitur is grounded in traditional concepts of negligence. Since negligence focuses on human conduct, as opposed to strict liability,

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243. *Id.* at ____, 692 P.2d at 443.
245. *Id.* at ____, 713 P.2d at 532 (citing Runkle v. Burlington Northern, 188 Mont. 286, 292, 613 P.2d 982, 986 (1980)).
246. *Id.*
248. *Id.* at 481-82, 658 P.2d at 1110.
which focuses on the nature of the product, the doctrine of res ipsa loquitur is simply inapplicable to strict liability actions. The court reiterated and clarified its position in Rix, concluding that the doctrine was applicable only to products liability actions grounded on a negligence theory.

C. Miscellaneous Issues

1. "Defective Condition" Versus "Unreasonably Dangerous"

California has dropped the standard of "unreasonably dangerous" from requirements of proof in strict liability actions. Similar attempts to modify the evidentiary standard in Montana have found some support, but have not yet been accepted as a rule of law. In specially concurring opinions in Brown and Stenberg, Justice Shea argued for elimination of the "defective condition" criterion, maintaining that strict liability could be established so long as the plaintiff was able to present evidence that the product was in an "unreasonably dangerous" condition. Justice Shea's analysis is based on a reading of the comments to section 402A which emphasize the concept of "unreasonably dangerous" as opposed to "defective condition." On several occasions, however, the Montana Supreme Court has rejected Justice Shea's position, preferring to keep the traditional language of defective condition unreasonably dangerous as an evidentiary requirement.

Some confusion as to whether the defective condition requirement has been abandoned was brought about by a recent decision, Kleinsasser v. Superior Derrick Service, Inc. In that decision, the supreme court affirmed a lower court finding that defendants were not negligent for injuries suffered in a derrick accident. At trial, the jury was instructed on both negligence and strict liability. The instruction on strict liability was unquestion-
ably confusing. The portion of the instruction given provided that “defective means ‘unreasonably dangerous’.”

However, the verdict form given to the jury made no mention of strict liability in tort. The verdict form referred only to the law of negligence. When the jury concluded that defendants were not negligent, the foreman simply signed the verdict form and returned it to the court. On appeal, the court declined comment on whether the instructions on strict liability were correct, observing that plaintiff’s failure to object to the language of the verdict form precluded discussion of any potential errors related to strict liability.

Justice Morrison reasoned in his concurring opinion that the court had given its stamp of approval to the elimination of the requirement of defective condition in jury instructions. Although the majority admittedly failed to comment on the language of the strict liability instruction, its silence can hardly be construed as acceptance of Justice Shea’s position. If the majority had intended to abandon the defective condition requirement in strict liability cases, it would have engaged in extensive discussion on that subject and would have expressly announced any intention to abandon the standard. Justice Morrison’s conclusion that the defective condition requirement has been eliminated is therefore highly questionable.

2. Scope of Liability and Damages

State and federal courts in Montana have shown a willingness to extend the doctrine of strict liability to the distant frontiers. In Thompson, the Montana Supreme Court concluded that a plaintiff could sue in strict liability even though the only damage experienced is to the product itself. Further, in Streich, the Montana Supreme Court concluded that a commercial purchaser could sue in strict liability and recover commercial damages. With that ruling, the Montana Supreme Court joined a growing number of jurisdictions that have concluded that recovery for commercial losses is acceptable.

259. Id. at ___, 708 P.2d at 570.
260. Id. at ___, 708 P.2d at 571.
261. Id.
262. Id. at ___, 708 P.2d at 572 (Morrison, J., specially concurring).
263. 198 Mont. 461, 647 P.2d 334.
264. Id. at ___, 647 P.2d at 337.
265. ___. Mont. ___, 692 P.2d 440.
266. Id. at ___, 692 P.2d at 445.
The federal courts have also been somewhat innovative. In *Kelly*, the federal court prohibited a third party indemnity action for negligence when the plaintiff's first party claim was based solely on strict liability. The plaintiff was injured in the rollover of a General Motors pickup. Plaintiff sued General Motors and the manufacturer of the pants that he wore at the time of the accident. Plaintiff alleged that the burn characteristics of the pants enhanced the severity of his injuries. The pants manufacturer filed a third party complaint against the fabric manufacturer, arguing that it should be indemnified by the fabric manufacturer for any judgment obtained by the plaintiff.

The fabric manufacturer moved to dismiss the third party complaint on the grounds that it could not be liable for indemnification when the plaintiff was seeking recovery only on a strict liability theory. In an unusual opinion, the federal court agreed, believing that the infusion of negligence concepts in the third party indemnity action would be confusing and prejudicial to the plaintiff in the presentation of his case on strict liability. For some inexplicable reason, the court apparently rejected the possibility of bifurcating trial of the strict liability and indemnity actions in order to avoid prejudice to the plaintiff.

3. Retailer Liability

Section 402A of the Restatement contemplates that a "seller" of a defective and unreasonably dangerous product may be subject to the doctrine of strict liability. In some instances, the seller of the product is also the manufacturer. Nevertheless, in a modern economy, the responsibilities of manufacturing and selling are often separate. A question has arisen as to whether a party that merely sells, but does not manufacture, a defective product is also liable to the ultimate consumer for any unreasonable risk of harm posed by the use of the product. Several jurisdictions have read 402A literally and concluded that the seller is also liable, although it is entitled to cross-claim against the manufacturer for indemnity or contribution.

The issue of retailer liability in Montana has twice been raised. In both instances, however, the court has never reached a

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269. *Id.* at 1044.
270. *Id.* at 1047.

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Many Montana attorneys have taken the position that 402A is probably applicable to a seller, and that the seller’s only avenue of relief is to file against the manufacturer on an indemnity or a contribution theory. Typically, sellers use this avenue in an attempt to tender the defense of the action to the manufacturer. In some instances, manufacturers agree in advance by contract to indemnify sellers for any harm that the product may cause. Only if it can be established that the seller has an independent basis of liability does the action for indemnity or contribution fail.

At some future time, a seller may move for summary judgment, arguing that strict liability cannot be imposed on one who is not in a position to know of any defect in the product. The Montana Supreme Court has expressed an unwillingness to hold sellers liable for defective products in negligence actions, so long as the defect was latent and not discoverable by the seller. Whether the court will extend this doctrine to strict liability claims remains an open question.

4. Statutes of Limitations

As with actions grounded in negligence, strict liability claims are subject to the tort statutes of limitation. Disputes over the


274. Indemnity is the right of one discharging a tort obligation to recover the whole amount of the obligation from another, on the grounds that as between them the primary liability was on the one against whom indemnity is given. See, e.g., DeShaw v. Johnson, 155 Mont. 355, 472 P.2d 298 (1970); Ryan Mercantile Co. v. Great Northern Ry. Co., 294 F.2d 629 (9th Cir. 1961), aff’d 186 F. Supp. 660 (D. Mont. 1960). Contribution is the right of one tortfeasor, compelled to discharge the entire obligation to an injured party, to a ratable portion of the obligation from the other tortfeasor. See Mont. Code Ann. § 27-1-703(1)-(3) (1985).

275. To “tender the defense” of an action to a party simply means to request the party to assume another party’s defense, including the payment of any judgment rendered against all parties, as well as the costs and attorney fees involved in the defense.

276. Likewise, a seller may be required to indemnify the manufacturer for any torts committed by the seller.

277. This situation usually arises where the manufacturer is sued for some latent defect in its product, whereas the seller or retailer is sued because it made certain representations or warranties about the product that it knew or should have known were unfounded.


application of these limitation periods center almost exclusively on the circumstances which toll the running of the statute. These disputes, which began in the federal courts, remain largely unresolved.

In *Hornung v. Richardson-Merrill, Inc.* federal judge Russell Smith held that any tort-based products liability claim would not accrue until the injured party learned, or in the exercise of reasonable care should have learned, the cause of his injuries. This protection is generally referred to as a “discovery rule.” *Hornung* involved a products liability action against a manufacturer for allegedly adverse side effects arising from the use of the manufacturer’s drug products. The plaintiff was injured sometime around September, 1963, but his claim was not filed against the defendant until September, 1968, approximately two years after the running of the personal injury statute of limitations. Judge Smith’s conclusion that the plaintiff was not automatically barred from bringing his action was premised on the belief that a plaintiff in a products liability action should be afforded the same protections as those afforded in a medical malpractice action, where an aggrieved party may not know the source of his injury until some time after undergoing the treatment giving rise to the injury. Judge Smith did place an equitable limitation upon claims filed after the expiration of the limitations period. A defendant would have to show that it was in some way prejudiced by plaintiff’s delay in bringing the suit.

A similar analysis was rejected several years later by federal judge William Murray in *Much v. Sturm, Ruger & Co.* Judge Murray took a more conservative approach to the application of so-called “discovery rules” to products liability actions. Statutes of limitation governing fraud and malpractice actions contain

281. *Id.* at 185 (citing Johnson v. St. Patrick’s Hosp., 148 Mont. 125, 417 P.2d 469 (1966)).
284. *Id.* at 185 n.9.
285. *Id.* at 185 (citing Grey v. Silver Bow Cnty., 149 Mont. 213, 425 P.2d 819 (1967)).
286. 502 F. Supp. 743 (D. Mont. 1980). Unlike the plaintiff in *Hornung,* the *Much* case was not concerned with side effects from drugs, but from injuries sustained by misfire of a Ruger pistol.
287. “The period prescribed for the commencement of an action for relief on the ground of fraud . . . is within 2 years, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting fraud . . . .” *See Mont. CODE ANN.* § 27-2-203 (1985).
288. An action for medical malpractice must be “commenced within 3 years after the date of injury or 3 years after the plaintiff discovers or through the use of reasonable dili-
specific provisions allowing the aggrieved party time to discover the facts supporting a claim for relief; the tort statute of limitation has no such provisions. Judge Murray declined to read a discovery rule into the statute without prior guidance from the Montana Supreme Court. 289 He also expressed concerns that a discovery rule "would destroy the very policies which justify the statute of limitations." 290 Plaintiffs would be induced into failing to inquire into the causes of injury, to the prejudice of defendants who were entitled to protection from stale claims. 291 Interestingly, Judge Murray's opinion does not cite or otherwise refer to Hornung.

In Bennett v. Dow Chemical Co., 292 the Montana Supreme Court recognized both the Hornung and Much decisions, but did not decide which was the more accurate statement of the law. 293 The court confined its ruling to a much narrower question; i.e., whether the tort statute of limitations would be tolled until a plaintiff had consulted with an attorney or had otherwise discovered his legal right to sue for an injury. The court declined to toll the statute in such a fashion. 294

Resolution of the so-called "discovery rule" awaits either a definitive ruling from the Montana Supreme Court or a statutory amendment by the Montana Legislature. Arguably, a precise discovery rule may be beyond formulation. Discovery provisions offer fairness to a plaintiff who may not have reason to know the cause of an injury. However, claims long withheld from a judicial forum pose the prospect of undue prejudice to a defendant facing liability long after the injury, especially when the disappearance of relevant evidence and changing circumstances may make presentation of
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defenses difficult or impossible. These concerns suggest that courts will be left to balance the competing interest of plaintiffs and defendants on an ad hoc basis.

Limitation periods for warranty claims have also been the subject of litigation. The outcome of this litigation, however, has been much more certain. Claims based on breach of express or implied warranties under the Uniform Commercial Code must generally be brought within four years of the breach. A claim for relief under the U.C.C. accrues "when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." The foregoing provisions contemplate the existence of a contract between a buyer and seller. In the absence of contractual privity between seller and ultimate purchaser, any claims by the purchaser sounding in warranty will be deemed tort claims, and subject to the statutes of limitations.

IV. RECOMMENDATIONS FOR REFORM AND FURTHER DEVELOPMENT

A. Strict Liability

Some advocates of tort reform have expressed the concern that strict liability represents a radical shift in tort liability concepts. Nevertheless, the doctrine is here to stay. Moreover, it is difficult to argue that the doctrine is unfair, especially in a society where the manufacturer has significantly more bargaining power in the marketplace than the consumer, and where evaluating the conduct of one manufacturer is made difficult, if not impossible, by the involvement of numerous planners and workers in the design and manufacturing processes. These developments through the years have convinced courts that suing manufacturers in negligence presents an almost insurmountable task to the aggrieved plaintiff. There is no indication that society's economic structure has so changed that strict liability in tort is no longer necessary to provide plaintiffs the needed avenue of relief when they are injured by defective products.

Although the doctrine is definitely here to stay, and although it undoubtedly serves a valid purpose in the panoply of tort remedies, the Montana Supreme Court's treatment of the doctrine has often been one-sided. This is particularly evident in the failure to

295. MONT. CODE ANN. § 30-2-725(1) (1985). Parties to a contract may by agreement lower the limitations period to not less than one year; they may not extend it. Id.

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develop fair and meaningful affirmative defenses. Moreover, the failure of the court to develop specific criteria for the applicability of the doctrine engenders a great deal of uncertainty to plaintiffs and defendants alike in anticipating the limits of the doctrine.\footnote{298} Although the \textit{Rix} decision is a hopeful sign that the court will pay more attention to the development of criteria in the future, it would perhaps be best if the legislature stepped in and began codifying the doctrine. Codification should include specific criteria for establishing manufacturing defects, design defects, whether inadvertent design errors\footnote{300} or conscious design choices, and the failure to warn. The Restatement of Torts and model legislative acts like the UPLA could serve as the starting point for legislation in Montana. The legislature should strive for precision when defining the scope of liability and damages, and should obviate the need for the judiciary to define key concepts in the statute. There is a need for certainty in identifying the rights and responsibilities of manufacturers and consumers. Both will benefit if each knows in advance of litigation what rights will be honored and what obligations will be imposed. This degree of certainty is not assured when development of the tort system is left solely to the courts.

In addition to codifying the basic elements of strict liability actions and defenses, the legislature should reverse the path taken by the Montana Supreme Court in \textit{Zahrte} concerning affirmative defenses. The legislature should enact a pure comparative fault scheme in strict liability actions, with the only exception that assumption of the risk should remain an absolute defense to recovery. Comparative fault simply infuses an element of fairness into the liability matrix. Plaintiffs whose conduct may not approach assumption of the risk, yet still be negligent, should not be entitled to recover the full amount of their damages, even when it can be successfully argued that the defendant’s product was in a defective condition, unreasonably dangerous. Comparative fault principles should be used to reduce proportionately the damages awarded by the jury. Unlike Montana’s comparative negligence scheme, the system should be pure, such that a plaintiff who is even found to be ninety-nine percent at fault should still recover the one percent of the total damages attributable to the defects in the defendant’s

\footnote{298} This problem has been obviated to some extent by the decision in \textit{Rix v. General Motors Corp.}, Mont. 723 P.2d 195.
\footnote{299} \textit{Id.}
\footnote{300} Presumably, evidence of industry and/or government standards would be admissible on the question of whether the product design posed an unreasonable risk of harm to the product’s user. \textit{See Tobias & Rossbach, supra} note 1, at 259.
\footnote{301} 203 Mont. 90, 661 P.2d 17 (1983).
product. Pure comparative fault is more in keeping with the policies behind strict liability.

The suggestion that Montana approve a pure comparative fault scheme in strict liability cases is admittedly controversial. Critics of the scheme have argued that it defeats the central purpose of strict liability, which is transferring the risk of harm from defective products from the injured consumers to the responsible manufacturer. Critics also argue comparative fault is conceptually incongruous with strict liability, as it infuses conduct-based considerations like negligence into an action where conduct is not at issue. Such infusion is also said to be confusing to juries who will allegedly be confused by handling concepts which are analytically distinct. Each argument reflects the narrow theoretical framework in which they are rooted, which is a tort system designed to serve only the plaintiff’s needs. A tort system should not be fashioned solely with the interests of the potential plaintiff in mind. The interests of potential defendants must also be considered. When conceptualizing a tort system that accommodates the interests of all parties to litigation, the arguments made by the critics lose their force, and become less appealing.

It is objectively difficult to argue that the goals of strict liability are subverted by comparative fault, when studied in the broader context of the tort system. The goals are merely balanced by the equally legitimate goal of preventing plaintiffs from receiving financial windfalls, despite their wrongful conduct. Similarly, the alleged incongruity dissipates into theoretical limbo, as the ultimate goal of the tort system is to hold each party to account for its faults. The fault of one is measured by the deficiencies in his product; the fault of the other is measured by his or her conduct. Finally, it is unlikely that juries will be confused by these distinctions, as instructions can be carefully drafted to guide the jury in the process of determining each party’s respective fault.

Assumption of the risk should be reinstated as an absolute bar to recovery. As Judge Murray pointed out in the first Zahrt decision, assumption of the risk is an extremely difficult defense to establish. If a party is subjectively aware of the dangers posed by using a certain product, yet knowingly proceeds in such a way as to bring those risks of danger upon him, there is no just reason why he should recover for any defects. This is especially true in cases

302. See, e.g., Tobias & Rossbach, supra note 1, at 277.
303. Id.
304. Id.
involving claims based on a conscious design choice. It is inconsis-
tent to allow a plaintiff to argue that the design choice involved
more risks than benefits when the plaintiff appreciated the risks
and yet consciously invoked the benefits of the product by using it.

The legislature should also consider enactment of the criteria
set forth in section 402B of the Restatement.\textsuperscript{306} This section incor-
porates strict liability into situations where a manufacturer has not
so much \textit{manufactured} a defective product, as \textit{misrepresented} cer-
tain qualities in the product.\textsuperscript{307} Although 402B is vaguely reminis-
cent of the concept of negligent misrepresentation, it is essentially
different. The conduct of the defendant in representing the prod-
uct is no longer an issue. Thus, even if the manufacturer exercises
due care in the representation of his product, he will still be held
strictly liable in tort if the representations are later shown to be
untrue.

\textbf{B. Negligence}

Negligence concepts are already so well defined in statute and
common law that they need no further development by the court.
Should the Montana Legislature eventually adopt a comparative
fault scheme, however, it will probably no longer be necessary for
plaintiffs to plead negligence as a theory of recovery. Strict liability
will then completely subsume negligence theories, especially if a
pure comparative fault system is adopted.\textsuperscript{308}

\textbf{C. Warranty}

Even if the legislature eventually adopts a codified scheme of
strict liability standards, warranty theories of recovery will not and
should not disappear. They continue to have much applicability to
commercial transactions. Although the legislative scheme for war-

\textsuperscript{306}. \textit{Restatement (Second) of Torts} § 402(B) provides as follows:
\begin{quote}
Misrepresentation by Seller of Chattels to Consumer. 
One engaged in the business of selling chattels who, by advertising, labels, or
otherwise, makes to the public a misrepresentation of a material fact concerning
the character or quality of a chattel sold by him is subject to liability for physical
harm to a consumer of the chattel caused by justifiable reliance upon the misrep-
resentation, even though
(a) it is not made fraudulently or negligently, and
(b) the consumer has not bought the chattel from or entered into any contrac-
tual relation with the seller.
\end{quote}

\textsuperscript{307}. \textit{See id.}

\textsuperscript{308}. This prediction may be wishful thinking. It has been the author’s experience that
law schools over-emphasize instruction in standard negligence principles to the detriment of
strict liability. This is unfortunate, as strict liability principles are now entering almost
every facet of tort law, and not just products liability.
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ranty actions is well developed, it will be necessary for the courts to interpret the laws more carefully. In future cases, the court should repudiate holdings which are inconsistent with the letter and spirit of the Uniform Commercial Code. Specifically, plaintiffs should no longer be required to establish reliance upon particular express warranties. Similarly, defendants should not be exposed to the prospect that they will be liable for breach of implied warranty of merchantability as well as the breach of implied warranty for fitness for a particular purpose, especially when the product in question was purchased and used for the ordinary purposes intended for that product.

V. ENACTMENTS OF THE 1987 MONTANA LEGISLATURE

As this article goes to press, the Montana Legislature has enacted several changes in products liability law. These changes, signed into law by the governor, will certainly influence the future development of products liability law in Montana.

Senate Bill 380 codifies the language of section 402A of the Restatement. It clarifies the Restatement to the effect that a manufacturer, wholesaler, or retailer of a product may be held strictly liable in tort. It provides for two affirmative defenses to strict liability claims. Manufacturers, wholesalers, and retailers may defeat liability in whole or in part if they can establish that the “user or consumer of the product discovered the defect or the defect was open and obvious and the user or consumer unreasonably made use of the product and was injured by it”; and/or (2) the “product was unreasonably misused by the user or consumer and such misuse caused or contributed to the injury.” Other varieties of contributory negligence may not be asserted. The affirmative

309. Specifically, the court should repudiate the holdings in Whitaker and Streich criticized in this article. The drafters of the Uniform Commercial Code have put a great deal of work and effort into interpretation of this document. The courts should pay close attention to the official comments to the code and reject interpretations clearly outside the proper scope of the code language.

310. See text accompanying notes 114-18, supra.

311. S. B. 380, 50th Mont. Leg. (1987) was signed by the governor on April 4, 1987. No effective date is set forth in the law, so it automatically becomes effective on October 1, 1987. See MONT. CODE ANN. § 1-2-301(1) (1987) (providing for October 1 effective date for all legislation not containing specific effective dates).

312. S. B. 380, § 1(1).

313. S. B. 380, § 1(5)(a). For the purpose of invoking the defense, the requirement that the consumer make unreasonable use of the product applies whether the consumer discovered the defect, or whether the defect is open and obvious.

314. S. B. 380, § 1(5)(b).

315. S. B. 380, § 1(5). Presumably, failure to discover a defect is among those varieties of contributory negligence not permissible as a defense.
defenses mentioned above will “mitigate or bar recovery and must be applied in accordance with” the comparative negligence statute. 316

Senate Bill 380 essentially incorporates a modified comparative fault scheme into strict liability cases. The first defense acknowledges the limited defense of assumption of the risk, but apparently goes further by repudiating Brown and its progeny by imposing comparative liability on a plaintiff who makes unreasonable use of a product where the defect is open and obvious. 317 The second defense precludes recovery in whole or in part for “unreasonable misuse.” This confusing concept is not defined in the statute, and will undoubtedly invite litigation. Of particular concern will be the issue of whether the user’s conduct is to be measured by objective criteria or subjective knowledge.

Senate Bill 121 318 establishes criteria for determining when firearms or ammunition may not be considered defectively designed. Specifically, plaintiffs will no longer be permitted to argue that the benefits of the product are outweighed by the risks of injury or death posed by the products. 319 Injuries from discharge of a firearm or ammunition will be deemed “proximately caused by the discharge of the product,” 320 and not by the “potential [of the product] to cause serious injury, damage or death . . . .” 321 A claim for relief may be predicated upon “improper selection of design alternatives.” 322

Senate Bill 121 limits plaintiffs in their attempts to seek recovery for firearm or ammunition related injuries. The legislature may be faulted for not expressly declaring in statute the policy reasons behind this limitation. Moreover, in view of the confusion surrounding the adoption and subsequent rejection of Constitutional Initiative 30, the legislature’s attempt to limit any tort remedies may be open to judicial scrutiny. 323 Further, inquiries here are

316. S. B. 380, § 1(6).
317. See text accompanying notes 40-46, supra.
319. S. B. 121, § 1(1).
320. S. B. 121, § 1(2)(b).
321. Id.
322. S. B. 121, § 1(3).
323. This initiative, passed by Montana’s voters on November 4, 1986, amends Mont. Const. art. II, § 16, by authorizing the legislature to modify or even eliminate common law rights and remedies. However, the Montana Supreme Court voided the amendment, citing technical errors in the presentation and explanation of the initiative to the voters. See State ex rel. Montana Citizens for the Preservation of Citizens’ Rights v. Waltermire, ___ Mont. ___, ___, P.2d ___, 44 St. Rptr. 913 (1987).
outside the scope of this article. All that need be stated is that the recent legislative changes will likely invite significant interpretive litigation, contrary to the intentions of the drafters of these changes.

VI. Conclusion

The authors of the 1977 article anticipated that products liability law would be well developed in Montana within a few years. Perhaps due to the size of the state's population, this has not been the case. Moreover, when the courts are faced with developing products liability law, they have failed to articulate sufficiently certain standards so as to apprise the bench and bar of the direction of the law. In certain instances, development of the doctrine has been considerably one-sided, and without a proper analytical justification. This article has shown some of the weaknesses in the existing law. Attorneys, courts, and legislators should carefully attend to the development and refinement of the law of products liability, including recent statutory amendments, and construct a system that is fair to manufacturers and consumers.
