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THE DEFENSE OF ASSUMPTION OF RISK UNDER MONTANA'S PRODUCT LIABILITY LAW

Robert C. Lukes

The phrase "assumption of the risk" is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression, its felicity leads to lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas.

— Justice Felix Frankfurter (1943)

The doctrine of implied assumption of risk arose in the context of negligence and historically provided a complete bar to recovery when a party voluntarily encountered a known risk. In the context of products liability, the majority of jurisdictions follows the Restatement (Second) of Torts (Restatement Second) which provides that contributory negligence is not a defense to an action based in strict liability in tort for a defective product. Indeed, because most states operated under the all or nothing rules of contributory negligence at the time that Restatement Second 402A swept the nation, the recognition of a defense that would totally bar recovery contravened the general purposes behind the recognition of strict liability in tort. In the context of negligence, the assumption of risk is now typically subsumed under comparative negligence. However, the defense has retained its distinct character in actions for product defects based in strict liability in tort. Generally, only two narrow defenses in products liability law have emerged from the common law.
These defenses are "misuse" and "assumption of risk."5

Montana law on products liability is generally in accord with the foregoing statements concerning negligence and the assumption of risk. In Montana, contributory negligence is not a defense to a products liability action.6 The assumption of risk was originally the only valid defense to a products liability action in Montana.7 The Montana Legislature codified the defense of misuse in 1987.8 Thus, the available defenses in products liability actions in Montana generally accord with American jurisprudence. Yet, the Montana Supreme Court's recent interpretation of these defenses has placed the state's jurisprudence into a solitary position among the many states.

This Article focuses on the assumption of risk as a defense to products liability actions in Montana. In response to the 1987 statute, the Montana Supreme Court redefined the defense of assumption of risk in Lutz v. National Crane Corp.9 This Article discusses Lutz in light of the general rules regarding the assumption of risk and the new statute.

In Part I, this Article discusses the evolution of the common law doctrine of assumption of risk in the context of negligence and products liability. Part II focuses on the Montana Supreme Court's application of the doctrine of assumption of risk in products liability prior to its codification in 1987. Part III discusses

5. Recognize that these defenses were incorporated in the language of Justice Traynor in the landmark products liability case of Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963). In defining an action for a defective product based on strict liability in tort, Justice Traynor wrote: "To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use." Id. at 901 (emphasis added). See generally Robert E. Keeton, Assumption of Products Risks, 19 Sw. L.J. 61, 73 (1965).
7. See Zahrte v. Strum, Ruger & Co., Inc., 203 Mont. 90, 661 P.2d 17 (1983); Brown v. North American Mfg. Co., 176 Mont. 98, 576 P.2d 711 (1978). Note that in an early products liability case, the Montana Supreme Court upheld a summary judgment for the defendant due to the contributory negligence of the plaintiff. See Duncan v. Rockwell Mfg. Co., 173 Mont. 382, 567 P.2d 936 (1977). In dissent, Justice Shea criticized the court for allowing contributory negligence to operate to defeat the claim, specifically relying on comment n to the Restatement Second argument that only assumption of risk was a defense in products liability. See id. at 389-90, 567 P.2d at 940-41 (Shea, J., dissenting). This error by the court was clarified in Brown, which acknowledged that contributory negligence is not a defense in products liability actions and accepted the language from the Restatement Second. See Brown, 176 Mont. at 110-11, 765 P.2d at 719.
the Montana statute concerning products liability and its effect on assumption of risk. Part IV focuses on Lutz and discusses how the Montana Supreme Court defined and applied the statutory language of assumption of risk. Because the court intertwined the defenses of assumption of risk and misuse in Lutz, this Article also briefly discusses the alternative defense of misuse in Part IV. In Part V, this Article further analyzes the supreme court's treatment of the assumption of risk defense in products liability actions and offers recommendations to both the court and the legislature for possible future improvements.

I. THE ASSUMPTION OF RISK

A. Traditional Common Law & Assumption of Risk

As a defense to an allegation of negligence, the doctrine of assumption of risk arose in the context of employer and employee relations. Courts traditionally recognized assumption of risk in three circumstances: (1) by express consent; (2) from a duty perspective; and (3) as a misconduct defense. First, by contract the plaintiff may expressly consent to conduct that would otherwise be considered negligent. The second circumstance arises when a relation between the plaintiff and defendant demonstrates that the plaintiff has knowledge that the defendant will not provide protection from risks that arise in the relation; in this circumstance it may be implied that the plaintiff assumed the risk. The third circumstance occurs when a plaintiff is cognizant of a risk created by the defendant, but decides nevertheless to voluntarily engage in the activity, thereby limiting the defendant's liability. The focus of the assumption of risk in the context of products liability arises under this third form, i.e., the misconduct of the plaintiff. As Professor

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11. See Keeton et al., supra note 3, § 68.


13. See Keeton et al., supra note 3, § 68 at 481.

14. See id. Professor Keeton also points out that the plaintiff consents to dangers created by defendant in the past, not to future dangers. Thus, when a woman walks out into a stream of traffic, one cannot imply that she has consented to have the cars drive negligently and run her down. See id. at 484-85.
Keeton wrote, "It is now generally recognized that the basis of the defense is not contract but consent, and that it is available in many cases where no express agreement exists." 15

Another important factor that distinguishes the assumption of risk from ordinary comparative negligence arises out of this concept of consent: the test for whether the plaintiff assumed the risk is subjective. 16 This contrasts with comparative negligence, which prescribes an objective test for plaintiff's conduct based on the standard of a reasonable person. However, under the doctrine of assumption of risk, the court focuses on the plaintiff's actual knowledge, her appreciation of the risk or defect, and whether she voluntarily encountered the risk. 17 Thus in this context, the plaintiff's impressions at the time and general knowledge of the risk are at issue.

B. Products Liability Law & the Assumption of Risk

Most jurisdictions recognize the assumption of risk as a defense to an action based in strict liability in tort for a defective product. After rejecting contributory negligence as a defense to strict liability, one of the comments to section 402A of the Restatement Second states:

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. 18

Many courts use this language from the Restatement Second to define the assumption of risk in the context of products liability. 19 Some courts have also used a three-part test to define as-

15. Id. at 484.
18. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n. (1965). Again, note that the Restatement Second was drafted during the era when contributory negligence acted as a total bar to recovery.
19. See Comment, The Knowledge Element of Assumption of Risk as a Defense
assumption of risk:

(1) the plaintiff actually knew and appreciated the particular risk or danger created by the defect;
(2) the plaintiff voluntarily encountered the risk while realizing the danger; and
(3) the plaintiff's decision to encounter the known risk was unreasonable.20

One possible distinction between the doctrine of assumption of risk in the context of products liability as compared with its operation under negligence law lies in the subject matter of the plaintiff's consent.21 Under the common law defense of assumption of risk in a negligence action, it was generally sufficient if the plaintiff "fully [understood] a risk of harm to himself or his things caused by the defendant's conduct."22 Yet, in the context of products liability, courts may require the plaintiff to have known of the specific defect in the product that created the danger.23 This requirement of specificity is reflected in the language employed by the Restatement Second. However, the alternative three-part test used by some courts appears to require only knowledge of the risk created by the defect. Yet, in many jurisdictions it is not enough that the plaintiff knew that the product was generally dangerous. For assumption of risk to apply, the plaintiff must have known that a specific defect rendered the product dangerous and that the defect actually caused the injury.24


21. Certainly this difference stems from the very character of a products liability action. In strict liability in tort for a defective product, the enquiry focuses on the nature of the defective product and not on the conduct whereby it was created.

22. RESTATEMENT (SECOND) OF TORTS § 496C (1965).


24. In fact, some courts may require that the plaintiff knew of the defect and
Another interesting distinction arises in the assumption of risk's historical application in the negligence arena. Under common law, a plaintiff's actions did not have to be unreasonable before the defense could apply. A plaintiff's assumption of risk that was *reasonable* may have limited recovery, so long as the assumption was voluntary. More recently, courts have adopted the position in negligence actions that the plaintiff's assumption of risk must be *unreasonable* before the defense applies. This modern development is even more pronounced in the area of products liability. Most courts, in accord with the Restatement Second, now require that the plaintiff's assumption of risk be *unreasonable*.

II. ASSUMPTION OF RISK UNDER MONTANA COMMON LAW

A. The Doctrine as Applied in Negligence Actions

The Montana Supreme Court has recognized the complex nature of the doctrine of assumption of risk. Under the implied assumption of risk, when a plaintiff "voluntarily encounters a known risk which defendant has negligently allowed to come into being, he relieves the defendant of liability." The assumption of risk essentially applies when one voluntarily exposes herself to a danger that she fully appreciates.

appreciated the danger it presented. See Ellithorpe v. Ford Motor Co., 503 S.W.2d 516, 522 (Tenn. 1973). But see Baker v. Chrysler Corp., 127 Cal. Rptr. 745 (Cal. Ct. App. 1976). One should recognize that this area of the law suffers from slack language, and courts may often simply refer to knowledge of the "risk" or the "danger" with little or no analysis of the issue.


29. Id. at 436, 506 P.2d at 1368.

30. See Shahrokhfar v. State Farm Mut. Auto Ins., 194 Mont. 76, 82, 634 P.2d 653, 657 (1981). More specifically, the court has defined the elements of assumption of risk in the context of negligence as:

- (1) knowledge, actual or implied, of the *particular condition* creating the risk;
- (2) appreciation of this condition as dangerous;
- (3) a voluntary remaining or continuing in the face of the *known dangerous*
The supreme court has more recently ruled that the doctrine of assumption of risk no longer operates as a separate defense to negligence claims in Montana. The court held that the "conduct of the parties should be compared based upon evidence of negligence and contributory negligence, as established by reasonable and prudent person standards." Thus, in Montana, the doctrine of assumption of risk in negligence actions has now been entirely subsumed under comparative negligence.

The most significant remaining body of Montana law in which the doctrine remains viable is in products liability law. The Montana Supreme Court recognized this defense prior to its codification in 1987. The court reasoned that it was appropriate that the assumption of risk remain an independent and viable defense in this limited area of products liability because contributory negligence was not available.

B. The Assumption of Risk in Products Liability Prior to Codification in Montana

This section will chronologically review the common law doctrine of assumption of risk as discussed by the Montana Supreme Court in all six cases which addressed the issue over a period of fifteen years.

The Montana Supreme Court first addressed the assumption of risk in the context of products liability law in Brown v. North American Manufacturing Co. In Brown, the issue of assumption of risk arose because the defendant claimed that the danger in the product was open and obvious. The supreme court relied

condition; and
(4) injury resulting as the usual and probable consequence of the dangerous condition.


32. Mead, 264 Mont. at 477, 872 P.2d at 790.


35. See id. at 93, 661 P.2d at 18.

36. 176 Mont. 98, 576 P.2d 711 (1978). But see supra note 7 discussing an early Montana products liability case which recognized contributory negligence as a defense.
on the Restatement Second and supporting case law to hold that "[t]he fact that a danger is patent does not prevent a finding the [sic] product is in a defective condition, unreasonably dangerous to the particular plaintiff."\textsuperscript{37} The court recognized that the open or patent character of a defect was not conclusive, but only a factor to be considered in its analysis of the assumption of the risk.\textsuperscript{38}

In \textit{Brown}, the court analyzed the doctrine of assumption of risk in terms of "proximate cause," noting that the plaintiff's conduct could break the chain of causation.\textsuperscript{39} Relying on the language from the Restatement Second, the supreme court recognized that the assumption of risk is a defense in products liability actions. Expanding upon the Restatement Second language, the court noted that "[i]n addition to realizing the existence of the defect or danger and voluntarily doing an act which exposes him to it, the plaintiff must perceive and appreciate the risk involved, i.e., the probability of harm."\textsuperscript{40}

The court also explicitly noted that the defense is based upon a subjective standard. To articulate this standard, the Montana Supreme Court quoted at length from a federal district court in Pennsylvania, which stated:

The standard to be applied is a subjective one, of what the particular plaintiff in fact sees, knows, understands and appreciates. In this it differs from the objective standard which is applied to contributory negligence. . . . If by reason of age, or lack of information, experience, intelligence, or judgment, the plaintiff does not understand the risk involved in a known situation, he will not be taken to assume the risk, although it may be found that his conduct is contributory negligence because it does not conform to the community standard of the reasonable man.\textsuperscript{41}

The supreme court explained that the Restatement Second requires "a showing of knowledge of the danger which is subjective,\textsuperscript{37}  \textsuperscript{38}  \textsuperscript{39}  \textsuperscript{40}  \textsuperscript{41}
conscious and personal to the plaintiff."42 Acknowledging the burden that this requirement placed on defendants, the court provided that defendants may use circumstantial evidence to prove these subjective elements.43

The Montana Supreme Court in Brown thoroughly introduced and discussed the doctrine of assumption of risk in products liability cases.44 The court included the primary considerations regarding assumption of risk in its analysis. The court's reliance upon comment "n" of the Restatement Second placed it in accord with most jurisdictions. Furthermore, the discussion of the subjective character of the defense was quite exhaustive. The only two points missing from the Brown opinion were: (1) whether the plaintiff's knowledge must be of the danger, the defect, or both; and (2) whether the assumption of the risk must be unreasonable.45 The supreme court resolved these issues in later cases.

The Brown court's reasoning and conclusion are correct. Whether a defect is open and obvious is an issue of contributory negligence, which is based on the standards of a reasonable user of the product. Because contributory negligence is not an available defense in products liability, it would be an error to consider this question. The only relevant inquiry remaining is whether the plaintiff had subjective knowledge of the defect.46 In this context, a court could appropriately consider the open and obvious character of the defect as circumstantial evidence of the

42. Id. at 112, 576 P.2d at 719-20 (1978) (relying on Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809 (9th Cir. 1974)). The court additionally noted that jury instructions for the assumption of risk must use the subjective standard, and these instructions should not employ the words "actual" or "implied" when referring to the plaintiff's knowledge. See id. at 114, 576 P.2d at 721.

43. See id. at 112, 576 P.2d at 720 (relying on Sperling v. Hatch, 88 Cal. Rptr. 704 (Cal. Ct. App. 1970)).

44. It is interesting to note the significant number of national treatises on products liability that refer to Montana case law in the context of assumption of risk and the Brown case in particular.

45. Justice Shea, in his special concurrence, points out this defect in the majority opinion. He claims that the majority failed by not including the additional requirement that the plaintiff's conduct in assuming the risk was unreasonable. See Brown, 176 Mont. at 119-22, 576 P.2d at 723-25 (Shea, J., concurring).

One should note that the majority opinion did identify the question, "[w]as it unreasonable for plaintiff to act as he did?" Id. at 112, 576 P.2d at 720. However, because the court determined that inadequate evidence was presented that the plaintiff had actual knowledge and appreciation of the danger, it apparently never reached this question. See id. at 112-13, 576 P.2d at 720.

46. The open and obvious character of the defect should not be an issue in whether the product was "misused."
plaintiff’s knowledge of the defect.

The Montana Supreme Court next analyzed the issue of assumption of risk in products liability law in *Kopischke v. First Continental Corp.* After noting the subjective standard applied in *Brown*, the court initially held that when the plaintiff purchased an automobile with an “as is” clause, she did not contractually assume the risk of the defect. The supreme court recognized that a person must have “knowledge of the particular condition that creates such risk” to assume the risk, and the “as is” clause was insufficient for this purpose.

However, after resolving the issue at bar, the supreme court attempted to clarify the doctrine of assumption of risk in light of Montana’s recent adoption of comparative negligence. The plaintiff essentially contended that assumption of risk is part of contributory negligence and is, therefore, within the ambit of the comparative negligence statute. The defendant claimed that assumption of risk is an independent defense and could, therefore, still act as a total bar to recovery. After a rather long analysis, the court in dicta noted that “we will follow the modern trend and treat assumption of the risk like any other form of contributory negligence and apportion it under the comparative negligence statute.

Despite *Kopischke*, the Ninth Circuit Court of Appeals certified the following question to the Montana Supreme Court several years later in *Zahrte v. Sturm, Ruger & Co., Inc.*: "Does the defense of assumption of risk still exist as a complete bar to plaintiff’s recovery in a products liability action in the State of Montana?" Although the dicta in *Kopischke* had answered this question, the question arose again in response to subsequent developments in related case law. In the year after *Kopischke*, the Montana Supreme Court abolished the implied assumption of risk as a defense in negligence actions, assuming it under comparative negligence. Thus, the question remained whether

47. 187 Mont. 471, 610 P.2d 668 (1980).
49. *Id.*
51. *See id.* at 501, 610 P.2d at 684.
52. *See id.* at 501-02, 610 P.2d at 684.
53. *Id.* at 507, 610 P.2d at 687.
54. 203 Mont. 90, 661 P.2d 17 (1983).
55. *Zahrte*, 203 Mont. at 91, 661 P.2d at 17.
56. *See id.* at 92-93, 661 P.2d at 18 (referring to Abernathy v. Eline Oil Field Serv., Inc., 200 Mont. 205, 650 P.2d 772 (1982)).
assumption of risk was a viable defense in products liability and, if so, whether it was apportioned under the rules of comparative negligence or was independent of the statutory apportionment and could still act as a total bar to the plaintiff's recovery.

In Zahrte, the supreme court answered the certified question by noting that assumption of risk is different in products liability actions and that it does constitute a defense separate from contributory negligence. Because the defense is based on a subjective standard, with a significant burden on the defendant, it is an appropriate defense in products liability actions. The court seized the opportunity to restate and perhaps modify the doctrine of assumption of risk in Montana: "Plaintiff must have a subjective knowledge of the danger and then voluntarily and unreasonably expose himself to that danger before assumption of risk will become operative in a strict liability case." Finally, the court in Zahrte declared that assumption of risk is a viable defense in strict liability actions, but it must be compared against the conduct of the defendant.

Only a few months later, in autumn of 1983, the Montana Supreme Court returned to the issue in Kuiper v. Goodyear Tire & Rubber Co. As in Brown, the court considered the effect of the "open and obvious danger" of the product. The court relied upon Brown and reiterated that the open and obvious character of a defect was merely a factor to consider in deciding whether the plaintiff assumed the risk. After a somewhat confusing analysis, the supreme court in Kuiper held:

[T]he only duty imposed on the user is to act reasonably with respect to the product which he knows to be defective and dangerous. It is only when the user unreasonably proceeds to use a product which he knows to be defective and dangerous, that he violates this duty and relinquishes the law.

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57. See id. at 94, 661 P.2d at 19.
58. Id. at 93-94, 661 P.2d at 18-19. Note the alteration in the court's definition by explicitly requiring that the conduct be unreasonable. See id. at 94, 661 P.2d at 19 (Gulbrandson, J., dissenting).
59. See id. at 94, 661 P.2d at 19.
60. 207 Mont. 37, 673 P.2d 1208 (1983).
61. Kuiper, 207 Mont. at 58, 673 P.2d at 1219-20. Apparently this issue arose in Kuiper because of the age of the product. See id. at 43, 62-63, 673 P.2d at 1212, 1222. The supreme court again refers to the assumption of risk in the context of proximate cause. See id. at 59, 673 P.2d at 1220. This analysis does not appear to be particularly helpful and, as noted, has apparently been abandoned by the court in more recent years.
62. Id. at 63-64, 673 P.2d at 1222.
The court's reasoning in Kuiper had the potential to alter again the assumption of risk. In addition to focusing on the unreasonable character of the user's conduct, the court indicated that the product user must have knowledge of both the defect and the danger. However, later case law in Montana ignored this distinction, and furthermore, it was altered by statute in 1987.

The supreme court returned to the issue of assumption of risk five years later when it decided Krueger v. General Motors Corp. Although the court's decision in Krueger arose after the Montana legislature enacted its products liability law, the cause of action accrued before the statute took effect. In Krueger, the Plaintiff injured himself after he disengaged the front drive shaft on a truck he was attempting to repair. The truck rolled down an incline, severely injuring the plaintiff. The Krueger decision addressed whether the trial court erred in instructing the jury regarding the affirmative defense of assumption of risk.

The trial court submitted a jury instruction which required the defendant to prove three basic elements in order to establish the defense of assumption of risk: "(1) that the plaintiff knew before the injury that the truck would roll; (2) that the plaintiff voluntarily encountered the danger knowing this; and (3) that the plaintiff unreasonably exposed himself to that danger."

The defense argued that this instruction essentially required that the plaintiff have a death wish for the jury to apply the assumption of risk. The Montana Supreme Court disagreed. After noting that Montana had accepted the assumption of risk as enunciated by the Restatement Second and the applicable subjective standard, the court analyzed the jury instructions employed at the trial level. The court acknowledged that the plaintiff must have known that the truck would roll. However,
the court emphasized that the plaintiff was not required to have knowledge of the specific injuries which would result. Rather, the instruction simply required that the plaintiff have knowledge of the danger which the trial court articulated according to the specific facts of the case. Although the Montana Supreme Court expressed a preference for the Montana pattern instructions as used by the court in Zahrte, the court found no error in the instruction used at the trial level in Krueger.

The final case that the Montana Supreme Court decided under the common law defense was Greytak v. Rego Co. Greytak concerned a defective valve on a propane tank at a residence in Winnett, Montana. Despite knowing that the tank was leaking and pinpointing the defect to a leaky valve, the plaintiff returned to the gas-filled basement several times before an explosion occurred. The main issue presented in the case was whether proving the assumption of risk required that the plaintiff have knowledge of the danger or the actual defect present in the product.

The Montana Supreme Court held in Greytak that the plaintiff was not required "to know of the specific defect before the defense of assumption of risk became operative." The court distinguished knowledge of the defect from knowledge of the "particular condition that constituted the danger." The jury instruction used by the trial court required the defendant to show that the plaintiff had actual knowledge of the danger. The court held that this was the correct instruction, and that Montana law does not require that the plaintiff know of the actual defect which caused the danger. Thus, in Greytak, the su-

72. See id. at 277, 783 P.2d at 1347. The court stated, "[i]n order for GM to assert the defense, Krueger must have had subjective or actual knowledge that the truck would roll. This does not require that he have knowledge of the severity of the injuries he would suffer." Id.
73. See id.
74. See id.
75. 257 Mont. 147, 848 P.2d 483 (1993). Although the case was presented to the court long after the statute was enacted in 1987, the tort accrued in 1986 and the statute did not apply. See id. at 149, 848 P.2d at 485.
76. See id.
77. See id. at 150, 848 P.2d at 485.
78. See id. at 151-53, 848 P.2d at 485-87. Recall that Kopischke indicated that the plaintiff must have knowledge of both. See supra notes 47-49 and accompanying text.
79. Greytak, 257 Mont. at 151, 848 P.2d at 486.
80. Id.
81. See id. at 152, 848 P.2d at 486-87.
82. See id. at 153, 848 P.2d at 487.
preme court allowed the more general showing of awareness of the danger to defeat the plaintiff’s claim.\(^3\)

The decision in *Greytak* is the last case that arose under the common law defense and represents the supreme court’s final statement on the assumption of risk prior to the legislature’s modification of the law. *Greytak* essentially follows the analysis used by most jurisdictions in requiring a subjective standard and that the plaintiff’s act of encountering the danger be unreasonable. However, the court departed from the majority of jurisdictions when it required that the plaintiff only have general knowledge of the danger. As noted, the more widely accepted rule declares that the plaintiff must have specific knowledge of the actual *defect* which creates the danger and voluntarily encounter the danger. Although the difference may not be significant in some cases, it certainly lessens the burden on the defendant, as evidenced by the result in *Greytak*.

However, this standard enunciated in *Greytak* was short-lived. As noted, the legislature intervened in 1987 and changed the common law defense of the assumption of risk in Montana.

III. MONTANA’S PRODUCTS LIABILITY STATUTE

In 1987, the Montana legislature enacted a law to “clarify” products liability actions (the products liability statute).\(^4\) The first section of the statute repeats verbatim the core language concerning the defective product from section 402A of the Restatement Second.\(^5\) The products liability statute also clarifies the concept of “tracing” with regards to defects that result from improper design rather than manufacturing defect.\(^6\) However, the most significant contribution of the statute is the codification of the affirmative defenses available in a products liability action.\(^7\)

Montana’s products liability statute, in accord with prior case law and the Restatement Second, recognizes that contribu-

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\(^3\) See id. at 152-53, 848 P.2d at 486-87. The court then reversed the lower court’s order for a new trial. See id. at 155-56, 848 P.2d at 488-89.


\(^6\) See MONT. CODE ANN. § 27-1-719(4) (1995). In order to “trace” the defect, the plaintiff must prove that the defect existed at the time the product left the manufacturer.

Tory negligence is not a defense in this arena. The statute prescribes exactly which defenses are available in Montana: (1) a modified form of assumption of risk, and (2) the defense of misuse of the product. Although the defense of misuse is largely beyond the scope of this Article, one should note that this defense had not previously been recognized by the Montana Supreme Court. Thus, one of the most significant impacts of the statute is certainly the addition of the defense of misuse to Montana products liability law.

The first statutory defense relies on the concept of assumption of risk. Although the legislature invoked this concept in the statute, it avoided using the phrase “assumption of risk.” The pertinent part of the statute, defining the affirmative defense commonly referred to as assumption of risk, states that the defense will apply when “[t]he 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.” The statutory language provides for a three-part test, the first part of which may be satisfied if either of two conditions are met. First, either the user or consumer must have “discovered” the defect, or the defect must have been “open and obvious.” Second, the user or consumer must have “unreasonably made use of” the product. Third, this use must have “caused or contributed to” the injury.

Several aspects of the statutory language warrant discussion. The potential changes in the law under the first part are the most significant. The first sub-section of the first part presents nothing controversial: the language “discovered the defect” essentially codifies the subjective test that focuses on the user's

91. But see Trust Corp. of Montana v. Piper Aircraft Corp., 506 F. Supp. 1093 (D. Mont. 1981). The United States District Court of Montana recognized that the Montana Supreme Court had never applied the defense of misuse in a products liability case. See id. at 1097. Despite this recognition, the federal court held that misuse was a defense, defining its scope in reference to foreseeable misuses. See id. at 1097-98.
or consumer's knowledge of the defect. 99 However, close analysis of the first part reveals two significant alterations in the existing defense of assumption of risk.

One significant change in the first part of the statute concerns the subject-matter of the plaintiff's knowledge. The statute now explicitly requires knowledge of the defect. 100 Thus, the statute has effectively overruled Greytak. 101 Mere knowledge or discovery of the danger created by the defect should no longer be sufficient to allow the defense to apply. 102 This is somewhat surprising given that the bill was likely sponsored by business interests motivated to reduce defendant's liabilities for product defects. Recognizing the motivation behind the law leads one to conclude that this alteration was unintentional.

However, because the first part of the statute is drafted in the disjunctive form, the defense may apply even if the plaintiff did not discover the defect. The statute provides that an affirmative defense may exist where the "defect was open and obvious." 103 This language in the second sub-section of the first part is a dramatic shift from prior Montana case law. Significantly, this sub-section makes no reference to the knowledge of the user or consumer. Therefore, the statutory language apparently contemplates an objective test to determine whether the defect was open and obvious to a reasonably prudent person. This contravenes the generally accepted jurisprudence of most states and essentially reverses Montana case law dating back to Brown v. North American Manufacturing Co. 104 As previously noted, Brown held that:

The fact that a danger is patent does not prevent a finding the product is in a defective condition, unreasonably dangerous to the particular plaintiff. Rather, the obvious character of a de-

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101. The Montana Supreme Court foreshadowed this change even in Greytak. When discussing the knowledge required of the plaintiff, the court stated, "At the time Greytak's cause of action accrued, it was not necessary for a plaintiff to know of the specific defect before the defense of assumption of risk became operative." Greytak, 257 Mont. at 151, 848 P.2d at 486.
102. Whether the burden is greater to show that a plaintiff knew of a defect or knew of the danger is fact specific. Although the discussion generally concludes that the burden is greater to show knowledge of a defect, this may not always be the case. Note that the language of the Restatement Second requires that the plaintiff must "discover the defect and [be] aware of the danger." See RESTATEMENT (SECOND) OF TORTS § 402A cmt. n. (1965).
Thus, the inclusion of the "open and obvious" language shifts the test from a purely subjective viewpoint under prior Montana case law to an objective focus on the character of the product to determine whether the defect was so patent that the plaintiff's knowledge of the defect should be constructively implied.

The statutory language in the second part of the test is also notable. The statute now clearly requires that plaintiff's use of the product must be unreasonable for the defense to apply, thus resolving any prior ambiguities. This language provides for an objective test as to whether the plaintiff's use of the product with knowledge of the defect violates the conduct of a reasonably prudent person. Although the Montana Supreme Court had oscillated on this point in the past, the court has required this element in its more recent decisions. Furthermore, this position is in accord with the majority of jurisdictions and the Restatement Second.

The language in this section is notable also for its use of the phrase "made use of the product." Typically under the assumption of risk, plaintiff's act of encountering the product with a particularized subjective knowledge must have been unreasonable. Similar language is found in comment n of the Restatement Second. However, as we shall see, the Montana Supreme Court's later interpretation of this phrase proved significant in limiting the application of the defense. The court's decision to refer to the "use" in this section of the statute creates a point of potential confusion between this altered assumption of risk defense and the defense of misuse. Potentially, the two defenses may be merged into one with the entire focus on the reasonableness of the use.


108. See supra text accompanying note 18.

109. See infra Part IV.B. Perhaps in its decision to expand the traditional assumption of risk defense to include a partially objective test, the legislature attempted too drastic a revision—one that could not practically be incorporated in one section of the statute.
Thus, although the legislature entitled the bill "An Act Clarifying the Law Relating to Products Liability Actions; Defining Two Defenses Available in Products Liability Case; and Providing an Immediate Effective Date," the statute clearly altered the law in Montana. This is illustrated by the fact that the statute avoided reference to "assumption of risk." Clearly, the most significant alteration in the assumption of risk is the change from a purely subjective test to a test which includes an objective focus on the open and obvious character of the product.

This Article now turns to the Montana Supreme Court's application of this affirmative defense after the 1987 statute. For ease of discussion, this Article continues to refer to the statutory defense as "assumption of risk," despite the legislature's avoidance of this term.111

IV. THE MONTANA SUPREME COURT'S APPLICATION OF THE STATUTORY DEFENSE OF ASSUMPTION OF RISK

The Montana Supreme Court has considered only two products liability cases under the new products liability statute.112 The first case was Hart-Albin Co. v. McLees Inc.113

A. Hart-Albin Co. v. McLees Inc.

In Hart-Albin, the court focused on the defense of misuse.114 Although this Article has generally avoided discussing this alternative defense, for reasons that will soon become apparent, it is now necessary to discuss briefly the defense of misuse.


112. The Montana Supreme Court also briefly noted the statute in Papp v. Rocky Mountain Oil & Minerals, 236 Mont. 330, 340, 769 P.2d 1249, 1255 (1989). The relevant issue in Papp was whether a building was a product for purposes of products liability law. See id. at 334, 769 P.2d at 1252. The affirmative defense of assumption of risk was not addressed by the court.

113. 264 Mont. 1, 870 P.2d 51 (1994).

114. See Hart-Albin, 264 Mont. at 4-7, 870 P.2d at 53-54.
The Montana products liability statute provides that an affirmative defense is available when "[t]he product was unreasonably misused by the user or consumer and such misuse caused or contributed to the injury." The classic scenario to illustrate misuse depicts a lawnmower used as a hedgetrimmer.

The allegedly defective product in Hart-Albin was an electrical cord which caused a fire in the plaintiff's department store. The defendants claimed that the cord was misused by the plaintiffs in two ways: (1) it was inappropriately misassembled; and (2) it was used in a flammable display. In Hart-Albin, the court stated that it would define the term "unreasonably misused" according to its generally accepted use in products liability law.

The general rule of the defense of misuse is that "a manufacturer is not responsible for injuries resulting from abnormal or unintended use of a product if such use was not reasonably foreseeable." The supreme court in Hart-Albin stressed the importance of foreseeability in ascertaining what constituted unreasonable misuse. Foreseeability is the central focus in the defense of misuse. If the misuse was reasonably foreseeable, it was not a misuse; whereas, if the misuse was reasonably unforeseeable, the plaintiff's use of the product was an unreasonable misuse, providing a viable defense.

This analysis accords with the general jurisprudence of misuse. The only effective means to distinguish misuse from ordinary use is to apply standards of reasonableness which inevitably are defined in the context of foreseeability and whether a

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115. Mont. Code Ann. § 27-1-719(5)(b) (1995). The defendants in Hart-Albin claimed that because the alleged defect was a failure to warn, the range of defenses was not limited by the statute. See Hart-Albin, 264 Mont. at 5, 870 P.2d at 53. The court disagreed and held that regardless of the asserted defect, because the action was based on strict liability in tort, the defenses were limited by those provided in section 27-1-719 of the Montana Code. See id. at 5, 870 P.2d at 53.

116. See, e.g., id.

117. See id. at 3, 870 P.2d at 52.

118. See id. at 5, 870 P.2d at 53.

119. See id. at 6, 870 P.2d at 53-54.

120. Id. at 6, 870 P.2d at 53 (citing Trust Corp. of Montana v. Piper Aircraft Corp., 506 F. Supp. 1093, 1097 (D. Mont. 1981)).

121. See Hart-Albin, 264 Mont. at 6, 870 P.2d at 53-54.

122. See id.

123. Ironically, the business forces behind adoption of Montana product liability
reasonable manufacturer could foresee the particular use of the product. Using an objective standard based on foreseeability is also appropriate because it furthers the policies behind adopting strict liability in tort for product defects. This standard does not penalize the diligent manufacturer who investigates possible misuses. However, a subjective standard which focused on what a particular manufacturer had foreseen would encourage companies to avoid investigation of possible misuses, thereby greatly increasing potential defects.

The supreme court in *Hart-Albin* considered both asserted claims of misuse separately. Concerning the first alleged misuse of the product, the defendant conceded that the product could be misassembled. Because of this admission, the court held that the defendant had foreseen this particular misuse, and it was thereby improper for the trial court to have presented the jury with a misuse defense instruction.\(^{124}\) The supreme court also held that because the second alleged misuse of the product was so incorporated with the concept of misassembly, the alternative misuse defense was precluded by the foreseeability of the misassembly.\(^{125}\) Thus, the court allowed neither defense of misuse in *Hart-Albin*.

As noted, the Montana Supreme Court's definition of misuse comports with the generally accepted rule.\(^{126}\) The prevailing jurisprudence recognizes that the product design must survive the "foreseeable consequences of misuse," and that "foreseeable use includes any particular use which should be known to a reasonably prudent manufacturer."\(^{127}\) Thus, although the defense of misuse and assumption of risk are somewhat intertwined, it is critical to note that the concept of misuse focuses on an objective standard of what a prudent manufacturer could foresee.

This crucial point indicates how the court in *Hart-Albin* erred. The court found dispositive the defendants' concession that it foresaw the possibility of this misuse and removed the

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125. *See id.* at 7, 870 P.2d at 54.
question from the jury as a matter of law. However, the effect of the defendants' admission should have been more limited. In remaining true to an objective test, the admission should only have been a factor in the jury's determination of whether the misuse was reasonably foreseeable by a prudent manufacturer. Although the circumstances may be rare in which a manufacturer goes beyond the duty of a reasonably prudent manufacturer, the test should be correctly structured.\(^{128}\)

### B. Lutz v. National Crane Corp.

The second case in which the Montana Supreme Court applied the affirmative statutory defenses is *Lutz v. National Crane Corp.*\(^{129}\) The supreme court's opinion in *Lutz* provides the most recent and comprehensive statement concerning the statutory defenses of misuse and the assumption of risk in Montana.\(^{130}\) Because the court integrally intertwined these defenses, its discussion of misuse is noted here in order to fully appreciate the court's analysis of assumption of risk.

In *Lutz*, the plaintiff's spouse was electrocuted when a crane's cable, which was sideloading steel pipes, hit a power line above the crane.\(^{131}\) The plaintiff claimed that because the crane did not have an insulated link to prevent electrocution it was defectively designed.\(^{132}\) The defendant in *Lutz* argued that the decedent misused the crane by sideloading the pipes and that the statutory defense of misuse should limit recovery.\(^{133}\) The

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128. A manufacturer might be so diligent as to consider and "foresee" many more potential "misuses" than the reasonably prudent manufacturer. This type of diligence by a manufacturer should not be discouraged by a court. The holding in both *Hart-Albin* and *Lutz* encourages manufacturers to wear blinders so that they may claim that they did not foresee that particular misuse. One policy behind accepting strict liability in tort for products defects is to force responsibility on manufacturers to ensure that they create safe products in the future. Both *Hart-Albin* and *Lutz* militate against that broader policy.

129. 267 Mont. 368, 884 P.2d 455 (1994).

130. The opinion in *Lutz* is one of the last opinions authored by Justice Harrison before his retirement. Recall that Justice Harrison also wrote the court's opinion for *Brandenburger v. Toyota Motor Sales, U.S.A.*, 162 Mont. 506, 513 P.2d 268 (1973), where the Montana Supreme Court first adopted strict liability in tort under § 402A of the Restatement Second.

131. See *Lutz*, 267 Mont. at 372, 884 P.2d at 457.

132. See id. at 373, 884 P.2d at 457.

133. See id. at 373-74, 884 P.2d at 458. The jury in *Lutz* apportioned 20% of the liability to the decedent. See id. at 371, 884 P.2d at 457. The Montana Supreme Court reversed this determination and ordered the trial court to reinstate the jury's full verdict. See id. at 389, 884 P.2d at 467.
supreme court in *Lutz* relied upon its interpretation of misuse as stated in *Hart-Albin*, focusing on the foreseeability of the misuse. Because the court found the manufacturer in *Lutz* had reasonably foreseen the misuse of sideloading, the court held that the defense of misuse was not available as a matter of law.

The supreme court in *Lutz* focused on two facets of the misuse: (1) the knowledge of the manufacturer; and (2) the reasonable foreseeability of the misuse. First, the court indicated, as in *Hart-Albin*, that where “the party asserting the unreasonable misuse defense acknowledges the foreseeability of the misuse, then, as a matter of law, it is improper for the court to submit that issue for determination to the trier of fact.” Second, the court noted that because sideloading was not uncommon, this type of use was reasonably foreseeable and, hence, a reasonable misuse.

The first part of the court’s analysis is essentially identical to its treatment of misuse in *Hart-Albin* and accordingly evidences the same mistake. By the court’s own definition, the defense of misuse implies an objective test based on a reasonableness standard. Under such a test, the subjective foreseeability of the use by the particular manufacturer should be of more limited relevance. The correct procedure would have been to present the test to the trier of fact to determine whether this use was foreseeable and therefore reasonable. As noted, although the defendant’s knowledge of this type of use may be a factor in determining whether the misuse was reasonably foreseeable, it should not entirely remove the question from the jury.

The court’s second focus on the misuse was more properly

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134. *See id.* at 375-76, 884 P.2d at 459-60.

135. *See id.* at 377, 884 P.2d at 460.

136. *Id.*

137. *See id.* at 376, 884 P.2d at 460. It is interesting to consider an alternative characterization of the use of the crane in *Lutz*. One might assume that the proper characterization of the use should include the cause of the injury. Although the supreme court characterizes the use in *Lutz* as merely “sideloading,” perhaps a more accurate characterization would be “sideloading below electrical wires.” However, the greater specificity with which the use is characterized, the less likely it that it may reasonably be foreseen.


139. *But see* Armentrout v. FMC Corp., 842 P.2d 175, 188 (Colo. 1992) (“Defendant’s actual awareness of a particular type of misuse involved with its product, including knowledge acquired from prior incident reports, may be considered in determining that the misuse was reasonably foreseeable.”).
considered. This consideration provides for an objective determination as to whether the particular misuse was reasonably foreseeable. As noted, this is the proper analysis. In Lutz, the most important point regarding misuse is that the supreme court determined that, because the defendant conceded that it could foresee the misuse of sideloading, sideloading was not an unreasonable misuse per se, and thus the defense of misuse was unavailable as a matter of law.

The court in Lutz then turned to the application of the assumption of risk under the products liability statute. Despite the legislature's revision of the law, the Montana Supreme Court indicated that the assumption of risk is still analyzed under a subjective standard. For the assumption of risk to apply under the facts in Lutz, the court found that Lutz actually must have known that the cable would come in contact with the live electrical wire, that he would suffer serious injury or death, and that he voluntarily encountered that danger.

At trial, the defendant attempted to introduce evidence concerning the plaintiff's knowledge of the potential danger. This evidence included: Lutz's training, including his responses and understanding in the licensing procedure; his knowledge of the warning on the crane; his prior instruction regarding crane safety; his knowledge of the crane manual; his knowledge gleaned from videotapes; and testimony concerning conversations that he had participated in before his death. The trial court limited much of the evidence the defendant attempted to present, and the supreme court upheld these limitations upon review.

In applying Montana's new products liability statute, the Montana Supreme Court in Lutz basically divided the statutory language into two parts. The first part concerns whether the plaintiff discovered the defect or whether it was open and obvious. The second part concerns whether the plaintiff "unrea-

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140. See Lutz, 267 Mont. at 378, 884 P.2d at 461 (citing Krueger v. General Motors Corp., 240 Mont. 266, 783 P.2d 1340 (1989)). This is proper under the statutory phrase "discovered the defect." The supreme court in Lutz did not address the companion phrase "open and obvious." Presumably, under this language, an objective test should be used to determine whether knowledge of the defect will be attributed to the plaintiff. See discussion infra Part V.

141. See Lutz, 267 Mont. at 378, 884 P.2d at 461.

142. See id.

143. See id.

144. See id. at 378-79, 884 P.2d at 461.

145. See id. at 379, 884 P.2d at 461.
reasonably made use of the product."\textsuperscript{146} The court focused on this \textit{unreasonable misuse} in terms of foreseeability. Because the defendant acknowledged foreseeing its product being used in this particular manner, the court concluded that the use was thereby not unreasonable. The court reasoned that because sideloading was a reasonably foreseeable misuse, it could not be considered as an unreasonable use under the assumption of risk.\textsuperscript{147} The Montana Supreme Court concluded that the trial court improperly presented the defense to the jury and removed the portion of liability assigned to the plaintiff because of the assumption of risk defense.\textsuperscript{148} In essence, the court permitted the words "unreasonably made use of" to read the defense of misuse back into the defense of assumption of risk. Thus, because the court found the misuse reasonable, not only was sideloading with the crane not a misuse, but the trial court should not have submitted the defense of assumption of risk to the jury.\textsuperscript{149}

The court's conclusion and analysis in \textit{Lutz} are erroneous for several reasons. First, the court erred by limiting the evidence presented to the jury regarding the plaintiff's knowledge of the defect and the dangers of electrocution.\textsuperscript{150} Because the assumption of risk is a subjective test, the plaintiff's knowledge in this respect is exactly what is at issue. Although the court denied the evidence in part because it was afraid that the issue of contributory negligence would be placed before the jury,\textsuperscript{151} the only effective way to cure this without eviscerating the defense is through proper jury instructions.\textsuperscript{152} Otherwise, the jury has no evidence to infer the subjective knowledge of the plaintiff.

Second, the court required \textit{Lutz} to have had actual knowledge that the accident would occur and that he would be seriously injured.\textsuperscript{153} The court appears to have agreed with plaintiff's counsel who argued that for the assumption of risk to apply, the

\textsuperscript{146} See id.
\textsuperscript{147} See \textit{Lutz}, 267 Mont. at 380, 884 P.2d at 462.
\textsuperscript{148} See id. at 380, 389, 884 P.2d at 462, 467.
\textsuperscript{149} See id. at 379-80, 884 P.2d at 461-62.
\textsuperscript{150} See id. at 378-79, 884 P.2d at 461.
\textsuperscript{151} See id. at 376-77, 884 P.2d at 460.
\textsuperscript{152} A simple instruction to the jury could be based on the statutory language of Montana's product liability statute. This instruction should inform the jury that if they find the "defective product unreasonably dangerous," then comparative negligence is not a defense for this claim. Additional instruction can reinforce this message by stating that the only defenses to a products liability action in Montana are misuse and the assumption of risk.
\textsuperscript{153} See \textit{Lutz}, 267 Mont. at 379, 884 P.2d at 461.
plaintiff must have had a "death wish."\textsuperscript{154} The specificity of this knowledge conflicts with the court's own prior holdings. Furthermore, the statute cannot be read to have changed the nature of the knowledge required. In \textit{Krueger}, the Montana Supreme Court correctly stated the level of knowledge required when it said, "Krueger must have had subjective or actual knowledge that the truck would roll. This does not require that he have knowledge of the severity of the injuries he would suffer."\textsuperscript{155} Accordingly, in \textit{Lutz}, the court should have merely required that the plaintiff knew that the cable would touch the wire and that he would be shocked. To require that he knew that he would be seriously injured or killed was error.\textsuperscript{156}

Third, the court erred by reading the result of its analysis under the defense of misuse into the assumption of risk. This resulted from the court looking to the statutory language, "unreasonably made use of the product,"\textsuperscript{157} and then focusing on the foreseeability of the misuse.\textsuperscript{158} Although, as noted, this is partly due to the statutory language employed by the legislature, it does ignore the court's own imposition of a subjective standard. Thus, the pertinent question remains under the statutory language: What is the focus of the "unreasonable" misuse under the assumption of risk?

In this context, it is helpful to return briefly to the defense of misuse for a proper juxtaposition of the modifier "reasonable." Under misuse, because an objective test should be applied, the "reasonability" requirement focuses on the generally foreseeable character of the particular misuse. However, because the assumption of risk is still defined by the court as a subjective test, the reasonability requirement must somehow relate to the subjective knowledge of the plaintiff. The proper question in this context should be whether the plaintiff's use of the product, with knowledge of the defect (or with the patent condition of the defect), was unreasonable. Thus, the jury should evaluate the plaintiff's decision to voluntarily encounter the risk with knowledge of the defect under an ordinarily prudent person standard.

\textsuperscript{154} \textit{See} \textit{id.} at 379, 884 P.2d at 462.
\textsuperscript{155} \textit{Krueger v. General Motors Corp.}, 240 Mont. 266, 277, 783 P.2d 1340, 1347 (1989).
\textsuperscript{156} One should note that this standard is still very high. It will generally be very difficult to show that someone knowingly subjected themselves to a harm, no matter how small.
\textsuperscript{158} \textit{See} \textit{Lutz}, 267 Mont. at 375-77, 884 P.2d at 459-60.
to determine whether the decision to use the product with this knowledge was unreasonable.

When the test is properly focused on the subjective knowledge of the plaintiff, the general foreseeability of the misuse in this context is irrelevant. The particular type of use of the product is not at issue under the assumption of risk. Rather, at issue is the plaintiff's decision to use the product with a particular subjective knowledge of the defect. Thus, whether the product is commonly used in this particular fashion or whether the defendant foresaw this misuse is simply not relevant under assumption of risk. To reiterate this point, the question to the jury in this context should be whether the plaintiff's decision to use the product with this subjective knowledge was unreasonable, not whether the type of use was unreasonable.

The Montana Supreme Court has inappropriately intermingled the two affirmative defenses to products liability in Montana. As clearly pointed out by the three dissenting justices in Lutz, misuse is based on an objective standard of reasonable foreseeability, whereas assumption of risk is grounded in the subjective knowledge of the plaintiff. Although the statutory language may be prone to confusion, allowing the defendant manufacturer's admission—that it could foresee the particular misuse of the product—to defeat both affirmative defenses was an error.

V. ANALYSIS AND RECOMMENDATIONS FOR THE FUTURE

A. Analysis of the Recent Case Law

Montana's product liability statute marks a dramatic shift in the history of this defense. The legislature apparently anticipat-
ed three possible defenses: 1) misuse; 2) assumption of risk; and 3) patent defects. However, the legislative intent has not been realized. The Montana Supreme Court has applied the statute in a manner which focuses on the foreseeability of the plaintiff's use of the product. When the manufacturer admits foreseeing a particular misuse of its product, the court has denied all affirmative defenses as a matter of law. This is a harsh result which contrasts markedly with prior Montana case law and the apparent intent of the legislature.

From a practical standpoint, one should note that the effect of Hart-Albin and Lutz was to eviscerate nearly all affirmative defenses in products liability actions. Once the plaintiff has proved a defective product unreasonably dangerous and the element of causation, the matter is essentially closed except for a damages determination. The supreme court has effectively taken two statutory defenses that were already narrow and difficult to prove and heightened the burden to an unrealistic level. This does not comport with common sense or prior case law.

Although this Article focuses on assumption of risk, a brief comment concerning the affirmative defense of misuse is in order. There is a difference between what is reasonably foreseeable and what an individual or party can foresee. For example, it is reasonably foreseeable that an automobile driver will exceed the speed limit or not wear her seat belt, but it is not reasonably foreseeable that a driver may attempt to use his vehicle as a projectile in attempting to "fly" over a narrow gorge. In the context of this question, one can see that because the query remains in the objective form, the concept of reasonableness may be applied to limit the scope of foreseeability.

However, when the question of misuse is transformed into a subjective inquiry to a specific manufacturer, the element of "reasonableness" is removed, and the scope of the concept is greatly enlarged. Again, for example, the scope of the foreseeable is nearly unlimited when the question is posed to a single entity, such as a manufacturer: "Could you have foreseen that a vehicle could be used to "fly" over the gorge?" It can only be bounded by the reaches of the imagination and is no longer tempered by the concept of reasonableness. Nevertheless, it is this type of admission by the manufacturers that the supreme court in Hart-Albin and Lutz has permitted to remove the defense of misuse as a matter of law. This reasoning avoids the statutory language that
refers to "unreasonable" misuse. It is one thing for the court to use the concept of foreseeability to define reasonableness; however, this use has had the effect of removing the concept of reasonableness from the inquiry. Once again, retaining the objective character of the test for misuse is significant to ensure the law is properly applied.

Concerning the doctrine of assumption of risk, one should note that even the traditional common law doctrine was narrow and difficult to prove. As a practical matter, it is difficult enough to prove that a person knew that she was exposing herself to danger. However, it is virtually impossible to prove that a person knew the severity of the resulting injury or that a person had a "death wish."

When this interpretation is combined with reading misuse into the defense of assumption of risk, little remains of an already narrow defense. The court's error under the assumption of risk portion of the statute concerns the application of the phrase "unreasonably made use of." This analysis should not consider whether the type of misuse was unreasonable. Rather, the correct focus is whether the use by the plaintiff with the subjective knowledge of the defect was unreasonable.

It is also important to note that the Montana Supreme Court has yet to address the "open and obvious" language contained in the new statute. Undoubtedly, this will be decided by the court in the near future. The legislature apparently intended to reverse the Brown decision by implying a plaintiff's subjective knowledge of a defect when it is patently obvious. Presumably, even a person exercising a minimal amount of care would notice a defect that was open and obvious. Thus, this provision comports with strict liability in tort because this is still a much lesser standard than that used in comparative negli-

161. It is appropriate to remind the reader that these statutory defenses are apportioned comparatively by the jury. Under this concept, if a plaintiff recognized that using a product was dangerous and that a certain degree of injury was foreseeable, a jury could still apportion a minor degree of liability if the actual injury that occurred was considerably more severe than the plaintiff had assumed.
162. As noted, the test under the statutory language is most properly characterized as primarily a subjective test, but with an objective component. The first part of the test focuses on whether the plaintiff had subjective knowledge of the defect. The second part of the test focuses on whether the use of the product with this subjective knowledge was reasonable. The reasonableness of the use with this subjective knowledge is in turn analyzed as whether a reasonably prudent person would have used the product with this particularized subjective knowledge.
gence. The court's treatment of this section in the future should prove both interesting and significant.

B. Supporting Policy Considerations

The policies behind the adoption of strict liability in tort are familiar to most practitioners and are frequently recited by the courts. These policies include the recognition that the manufacturers have placed the goods in the stream of commerce seeking a profit, that they are in the best position to spread the cost of injuries to users and correct defects, and that users should not be liable for injuries that are generally not their fault, despite the fact that a manufacturer used due care.

However, it is important to recognize that the Restatement Second and the modern courts have adopted strict liability and not absolute liability. The reason for this limitation on liability is found in competing policy considerations. If absolute liability were imposed on manufacturers, it could stifle the manufacture of many new and beneficial products, denying average consumers many of the goods they seek. In short, the ripple effects upon the economy and society from the imposition of absolute liability could be staggering.

Strict liability is a compromise. The opposing policy considerations are significant. Our society has placed a high value on business growth, the jobs that it produces, a diversified marketplace, affordable goods, and the introduction of new goods into the marketplace. Economic growth is critical in our society. It produces jobs and ultimately results in the introduction of new and more affordable goods into the marketplace. These competing considerations weigh against absolute liability. The Montana legislature recognized these considerations when it enacted the products liability statute in 1987 and, accordingly, it provided several defenses. Because the policy considerations in favor of liability for defective products is strong, these defenses are narrow. However, because there are significant opposing considerations, the legislature did provide defenses, and liability for defective products is not absolute.

In the wake of Hart-Albin and Lutz, products liability is approaching an absolute. Once a defective product is shown, the

story is essentially finished. This defeats the intent of the Montana legislature and ignores the important competing policy considerations that justify the imposition of strict rather than absolute liability. It is important that we recognize the compromise that has been made and return to a law that properly reflects all the policy considerations involved in these matters.

C. Future Action by the Montana Legislature

A viable solution to the intermingling and evisceration of the defenses would be for the Montana legislature to re-draft the statute. Legislative action at this point is appropriate to restore the original intent of the 1987 products liability statute and to amend any original drafting errors. Indeed, action is necessary to restore the policy equilibrium behind adopting strict liability in tort for defective products.

The important considerations that a new statute should address have all been outlined previously in this Article. In brief summary, a new statute should be enacted to ensure the following:

1. The defense of misuse should not be intermingled or confused with the defense of assumption of risk;

2. the defense of misuse should be based on an objective standard;

3. the defense of assumption of risk should be based on a subjective test;

4. the defense of assumption of risk should not consider the type of use at the time, but only whether the use was reasonable in light of the plaintiff's particularized subjective knowledge;

5. the fact that the defect was open and obvious may be used to imply that the plaintiff was aware of the defect; and

6. the open and obvious section of the statute should be separated from the other portion of assumption of risk for clarity.

Possible new language for a statute has been supplied in the footnotes. The language supplied in the footnote seeks to ef-
fectuate all of these changes by first placing the "open and obvious" language into an independent section. Second, the supplied statute attempts to prescribe the correct objective and subjective standards for the defenses with specific references to perspective. Third, in accord with the language of the Restatement Second, the recommended statute requires that the consumer "discovers the defect and is aware of the danger." And fourth, the recommended statute seeks to prevent misuse from entanglement with the assumption of risk by defining the term "unreasonably misused" and removing any reference to this term from the assumption of risk section.

Certainly, different language could accomplish the desired goals with equal or greater efficacy. This Article seeks only to generate a discussion among practitioners through an analysis of the current law and to provide a starting place to correct the law's present inequities and confusion.

VI. CONCLUSION

Under the current statutory interpretation by the Montana Supreme Court, the affirmative defenses available in products liability actions have been drastically narrowed. The court's focus is entirely on the foreseeability of the use by the defendant manufacturer. If the plaintiff can demonstrate this subjective foreseeability, all defenses are removed from the defendant as a matter of law. This result was not intended by the Montana legislature. The court's interpretation creates an unfair jurisprudence for the defendant manufacturers and vitiates valid policy considerations. Both the court and the legislature should attempt to remedy this situation to avoid any future injustice under Montana's law of products liability.

(5) Except as provided in this subsection . . . :

(a) The user or consumer of the product discovered the defect and was aware of the danger, and with this knowledge unreasonably encountered the danger posed by the defect, which caused or contributed to the injury;

(b) The product defect was open and obvious and a reasonably prudent person would not have encountered the danger posed by the defect; or

(c) The product was unreasonably misused by the user or consumer and such misuse caused or contributed to the injury. A product is considered to be "unreasonably misused" when a reasonably prudent manufacturer would not have foreseen this particular use.

166. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. n. (1965).