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Patent Hazards and the Delimitation of "Defect" in Strict Liability Cases—Luque v. McLean

While mowing a neighbor's lawn, the plaintiff, Celestino Luque, left the rotary mower he was using and walked in front of it to pick up a carton in its path. Slipping on the wet grass, the plaintiff fell backwards, severely injuring his hand as it entered an unguarded aperture in the blade housing and struck the rapidly rotating blade. The aperture was marked with the word "caution," and the lawnmower's owner, besides giving the plaintiff general operating instructions, had warned him of the dangers of putting his hand into the opening. Luque was aware of the hazard, but he argued at trial that his injury was foreseeable to the defendants, the manufacturer, distributor, and seller, in the mower's 1961 production year, and that the injury could have been prevented by the addition of an inexpensive guard.¹ The plaintiff, withdrawing theories of negligence and breach of warranty, went to the jury on strict products liability theory. The trial judge felt there was insufficient evidence to warrant instructions on assumption of the risk and instructed the jury that the plaintiff would have to prove his lack of awareness of the supposed defect in order to recover under strict liability. The jury found for the defendants and the plaintiff appealed to the California Supreme Court. *Held, reversed*: Strict liability in tort applies regardless of the latent or patent nature of the alleged defect, and assumption of the risk being an affirmative defense, plaintiff is not required to prove that he was unaware of the defect. *Luque v. McLean*, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

I. PRODUCTS LIABILITY

Products liability in tort, or the recovery by the user from the seller without privity of contract for an injury proximately caused by a defect in the product, is chiefly a development of this century. Indeed, in the nineteenth century the courts seemed unwilling to deal with injuries proximately caused by unsafe or defective products unless there was a contractual relationship between the user and the seller or manufacturer upon which to base an action.² However, even in that era, the privity requirement was occasionally waived in cases involving a seller's or manufacturer's negligence where the

¹ Defendant's expert testified that the inexpensive guard postulated by Luque was not feasible and that the lawnmower itself surpassed the safety standards set by the American Standards Association for the lawnmower's production year.

² This unwillingness seems to have come about from a misreading of *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842), which held there to be no action in contract by plaintiff, a stagecoach passenger, against the manufacturer of the coach in the absence of privity of contract. Apparently, this was read as disallowing an action in tort without privity of contract between the user and the seller. W. PROSSER, *THE LAW OF TORTS* 622 (4th ed. 1971).

It should be noted, however, that dicta and commentaries show a basis for strict products liability in early English case law, especially in the area of food and drink. See, e.g., Y.B. 9 HEN. VI, f. 53B, pl. 37 (1431); *Roswel v. Vaughan*, Cro. Jac. 196, 79 Eng. Rep. 171 (1607). See generally Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099, 1104 n.31 (1960).

product was imminently or inherently dangerous to a human being.³ Yet, in general, it was felt that liability absent privity of contract "would place too heavy a burden upon manufacturers and sellers [by holding] them responsible to hundreds of persons at a distance whose identity they could not even know, and it was better to let the consumer suffer."⁴

In the 1916 case of *MacPherson v. Buick*⁵ liability in tort attached to manufacturer's negligence in the production of a defective, and resultingly dangerous, product without regard for privity because the product, if negligently made, would have imperiled life or limb. Negligence was, and still is, defined as the failure to use ordinary care in correcting, or warning against, a defect or danger in the manufacture, design, or labeling of the product—a defect the risk of which a manufacturer foresaw or should have foreseen.⁶ The burden of showing a seller's failure to use reasonable care⁷ is on the plaintiff, although lightened by the possible use of the doctrines of *res ipsa loquitur* or negligence per se.⁸

Sellers have also been found to be liable for a breach of express warranty.⁹ Under this theory, however, it is incumbent upon the plaintiff not only to prove an assertion of fact made by the seller regarding the defective product, but, additionally, to prove that he relied upon the assertion and was thereby proximately injured by the defect.¹⁰ The use of implied warranty was the first major attempt to redirect the courts' attention from the negligence or misrepresentations of the defendant to the reality of the existing defect which was the proximate cause of plaintiff's injury. The theories of implied warranty and strict liability may be regarded as identical,¹¹ since both theories can be predicated on a representation of safety in proper use

³ In *Thomas v. Winchester*, 6 N.Y. 397, 409 (1852), the court held that the mislabeling of a jar of poison was "an act of negligence imminently dangerous to the lives of others" which did not require privity of contract to be actionable in tort. Prior to *Thomas* case law in the United States supported apparently only one exception to the general necessity of privity of contract. See, e.g., *Van Bracklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 339 (N.Y. 1815), where a type of implied warranty in an action for deceit was found in the sale of unwholesome foodstuffs. But this rule of implied warranty for food was strictly limited to sales for immediate consumption. *Moses v. Mead*, 1 Denio 378, 43 Am. Dec. 676 (N.Y. 1845).

⁴ W. PROSSER, *supra* note 2, at 642. As applied to strict liability in the absence of negligence, the idea is alive even today. See, e.g., *Myers v. Montgomery Ward & Co.*, 253 Md. 282, 252 A.2d 855 (1969), where, in rejecting strict liability, the court noted that plaintiff could have chosen a safer product, in this case a lawnmower, and when he rejected a mower with a guard in favor of a model without a guard, the responsibility for subsequent injury was not to be borne by the manufacturer.

⁵ 217 N.Y. 382, 111 N.E. 1050 (1916).

⁶ Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 562, 567 (1969).

⁷ Ordinary or reasonable care seems to be a balance of the gravity of the harm and the burden of precaution. See, e.g., *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 470, 467 P.2d 229, 232, 85 Cal. Rptr. 629, 632 (1970).

⁸ Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 8-9 (1965).

⁹ *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409, *aff'd per curiam on rehearing*, 15 P.2d 1118 (1932), *aff'd on second appeal*, 179 Wash. 123, 35 P.2d 1090 (1934) (glass, represented in sales brochures as shatterproof, shattered, injuring the plaintiff).

¹⁰ Prosser, *supra* note 2, at 1136-37.

¹¹ *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963); accord, RESTATEMENT (SECOND) OF TORTS, § 402A, comment m (1965) [this section hereinafter cited as RESTATEMENT § 402A].

implicit in the presence of the product on the market. But, implied warranty may still be burdened with its contract origin and such attendant problems as disclaimer of the implied warranty.¹²

The landmark decision of the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*,¹³ written by Justice Traynor, grounded the seller's liability solely on the basis of strict liability in tort.¹⁴ In *Greenman* a defectively designed home wood-working machine allowed a piece of wood to fly out from the machine and strike the plaintiff. The court held that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."¹⁵ The court made it clear that the necessities of privity of contract or of plaintiff's reliance on an express representation, as well as the possible defenses of disclaimer of implied warranty and failure of the plaintiff to give notice of the breach of warranty, were not applicable in a strict liability action. According to *Greenman* the plaintiff could rely simply on the presence of the product on the market as a representation of the product's safety. Additionally, the court based strict products liability upon the rationale of the enterprise liability theory—a reallocation of the costs of injury by defects in the product from the consumer, who is less able to protect himself or bear the costs, to the manufacturer who, for profit, places the product on the market and can insure against the risk of injury.¹⁶

Two tests applicable in strict liability situations have emerged from the 1960's. While basically similar, and in some respects complementary, to the *Greenman* test the test enunciated in the *Restatement (Second) of Torts*, section 402A,¹⁷ is not identical to that of *Greenman*.¹⁸ The tests share, as

¹² See UNIFORM COMMERCIAL CODE § 2-316. However, after *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), disclaimer may be ineffective where implied warranty is held to include strict liability concepts.

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

¹⁴ *Greenman* itself applied to physical injury to the consumer or user. Strict liability is not limited to this. A user or consumer may recover for damage to the product itself or to other property. *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (Mo. 1963); accord, RESTATEMENT § 402A(1). Recovery has been allowed for mere economic loss where the product was not as represented. *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965). *Contra*, *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

Texas adopted strict liability in *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942), for foodstuffs. The theory was given full play with the adoption of RESTATEMENT § 402A. *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967) (for personal injury); *Franklin Serum Co. v. C.A. Hoover & Son*, 418 S.W.2d 482 (Tex. 1967) (for injury to property).

¹⁵ 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

¹⁶ *Id.* at 63-64, 377 P.2d at 901, 27 Cal. Rptr. at 701. The court cited *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion of Traynor, J.). Justice Traynor's opinion in *Escola* was perhaps the first major expression of the need to apply enterprise liability in products liability cases.

¹⁷ § 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if . . .

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

a common starting point, basic elements of proof: the plaintiff must show that he was injured by a defect in the product and that such defect was in the product when it left the seller's hands.¹⁹ The plaintiff is relieved of the burden of proving negligence on the part of the seller, although negligence may still be present.²⁰ The point of divergence of the two tests seems to be the use, in the *Restatement*, of the term "defective condition unreasonably dangerous." The California Supreme Court in *Cronin v. J.B.E. Olson Corp.*²¹ took issue with the use of the term. The court reasoned that a plaintiff might be placed in the position of proving not only the existence of the defect, but also, that the defect was unreasonably dangerous—a two-layer proof instead of a single element. Even if the proof were unitary, the court continued, it would be likely that "unreasonably dangerous" as a modification of "defect" would create an element of proof that "rings with negligence."²² Upon this argument, the court in *Cronin* refused to vary the original *Greenman* test and removed "unreasonably dangerous" as a part of plaintiff's proof in a California strict liability action.²³

(a) the seller has exercised all possible care in the preparation and sale of his product

RESTATEMENT § 402A.

¹⁸ *Clary v. Fifth Ave. Chrysler Center, Inc.*, 454 P.2d 244 (Alas. 1969) (collects cases following each approach); *accord*, *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 132, 501 P.2d 1153, 1161, 104 Cal. Rptr. 433, 441 (1972); *Glass v. Ford Motor Co.*, 123 N.J. Super. 599, 304 A.2d 562 (1973).

¹⁹ *See* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 840 (1966). *See also* Prosser, *supra* note 2, at 1114-15; Wade, *supra* note 8, at 13.

²⁰ Rheingold, *Proof of Defect in Product Liability Cases*, 38 TENN. L. REV. 325, 326 n.5 (1971). Negligence may not always be present and release from the necessity of proving negligence may, therefore, be decisive. *See, e.g.*, *Markle v. Mulholland's, Inc.*, 509 P.2d 529 (Ore. 1973). However, several writers believe that the overall effect on the plaintiff's problems of proof is small, especially with the availability of the doctrine of *res ipsa loquitur*. *See, e.g.*, Keeton, *supra* note 6, at 563; Rheingold, *supra* at 326 n.5; Wade, *supra* note 8, at 8-9.

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

²² *Id.* at 132-34, 501 P.2d at 1161-62, 104 Cal. Rptr. at 441-42. The court was particularly worried about the possible interpretation of RESTATEMENT § 402A, comment *i*, which defines unreasonably dangerous as a condition beyond the contemplation of the ordinary consumer, as some sort of reasonable man—negligence test.

²³ *Accord*, *Glass v. Ford Motor Co.*, 123 N.J. Super. 599, 304 A.2d 562 (1973).

There may be a problem with this approach, however. The California Supreme Court "simply rejects the notion that the product must be unreasonably dangerous to be defective, and then substitutes nothing in the place of that notion to give content to the term defective." Keeton, *Products Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 33 (1973). The California Supreme Court had previously discussed various definitions of "defect" pointing out that "unreasonably dangerous" may turn on negligence proofs, and perhaps may be at variance with *Greenman*. A third definition of "defect" was pointed out at that time by the court, that of the UNIFORM COMMERCIAL CODE § 2-314(2)(c): not "fit for the ordinary purposes for which such goods are used." *Jiminez v. Sears, Roebuck & Co.*, 4 Cal. 3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971). *See also* L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[4], at 3-223, -224, -224.1 (rev. ed. 1973); Keeton, *supra*, at 36-38.

While *Cronin* appears to have left the meaning of "defect" less definite than before, a floor may be laid by saying that a defect must be something more than a condition that causes injury. *See* Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366, 367, 372 (1965). For example, injury resulting from hitting oneself on the thumb with a hammer does not mean that the hammer head is defective, but where a piece of the head chips off striking the plaintiff in the eye, the head may well be found to be defective. *See* Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969). In addition, approached on a theory of enterprise liability, *Cronin* could be read to mean that a seller, while not an

II. PATENT HAZARDS

In addition to the problem of finding a workable definition of "defect," the courts have divided over the related question of whether a patent hazard, an obvious hazard normally found in the design of the product rather than created as an accident of manufacturing, is to be treated as a defect for the creation of liability or merely as a consumer's risk of use. Some support has developed for the proposition that when the design is dangerous or hazardous, but the danger is obvious to the ordinary user, the design, at least with regard to that danger, is simply not defective.²⁴ This concept may be phrased in terms of duty: a seller is under no obligation to make a hazardous product safe, or safer, when it is otherwise fit for its intended use and the dangerous aspect is readily apparent so that the user may be assumed to appreciate it.²⁵ In *Campo v. Scofield*, a leading decision denying recovery and holding there to be no such duty, it was stated that "[i]f a manufacturer does everything necessary to make the machine function properly for the purpose for which it is designed, if the machine is without any latent defect, and if its functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law's demands. . . . [The manufacturer] is under no duty to guard against injury from a patent peril or from a source manifestly dangerous."²⁶ There is, however, a trend in some more recent decisions in several jurisdictions toward allowing recovery for injury from obvious hazards, thereby bringing such hazards within the bounds of defect and allowing recovery on the same basis as latent defects where the product is judged defective or unreasonably dangerous.²⁷

absolute insurer of the safety of his product, is an insurer to the extent that he is liable for any injury proximately caused by a *condition* existing in the product when the product left the seller's hand so long as the plaintiff was not misusing the product.

²⁴ *Myers v. Montgomery Ward & Co.*, 253 Md. 282, 252 A.2d 855 (1969); *Yaun v. Allis Chalmers Mfg. Co.*, 253 Wis. 558, 34 N.W.2d 853 (1948) (negligence). See also *Dickerson, Products Liability: How Good Does a Product Have To Be?*, 42 IND. L.J. 301, 306 (1967).

²⁵ *Murphy v. Cory Pump & Supply Co.*, 47 Ill. App. 2d 382, 197 N.E.2d 849 (1964); *Bowen v. Western Auto Supply Co.*, 273 So. 2d 546 (La. Ct. App. 1973) (lawnmower guard was delivered with instructions, but the guard was not attached; the plaintiff was found to have been contributorily negligent for using the lawnmower without the guard); *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950); *Kientz v. Carlton*, 245 N.C. 236, 96 S.E.2d 14 (1957); *Freedman, "Defect" in the Product: The Necessary Basis for Products Liability in Tort and Warranty*, 33 TENN. L. REV. 323, 331 (1961).

²⁶ 301 N.Y. 468, 472, 95 N.E.2d 802, 804 (1950); cf. *Noel, Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 837-38 (1962), where the author feels that *Campo* indicates only that obviousness is one factor to be considered, without imposing a rigid requirement that the defects be latent.

²⁷ The trend may be a result either of a demand that the seller assume a duty of ensuring safety or of a pure notion of reallocation of the risk to one who can bear it more easily, or can redistribute it. Courts usually seem to combine both theories on the basis that if the seller fails to assume the duty of safety, the failure may justify the reallocation theory. See, e.g., *Balido v. Improved Mach., Inc.*, 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1972); *Rivera v. Rockford Mach. & Tool Co.*, 1 Ill. App. 3d 641, 274 N.E.2d 828 (1971); *Wright v. Massey-Harris, Inc.*, 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966); *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402, 290 A.2d 281 (1972); cf. *Metal Window Prods. Co. v. Magnusen*, 485 S.W.2d 355 (Tex. Civ. App.—Houston [14th Dist.] 1972), *error ref. n.r.e.* (minor injury insufficient to justify reallocation of the risk when balanced with the utility of the product and substantial compliance with the duty of safety).

Even if the plaintiff clears the hurdle presented by the *Campo* no-duty rule, there is another problem. "Unreasonably dangerous" is defined in the *Restatement* in terms of a condition which is more dangerous than contemplated by the ordinary consumer,²⁸ and "defective condition" is defined to mean "a condition not contemplated by the ultimate consumer."²⁹ Both of these terms relate to the problem of proof of defects which the court in *Cronin* tried to resolve, and appear to remove from the scope of "defect" an obviously hazardous product.³⁰ Language can be found in *Greenman* itself to indicate that a plaintiff cannot recover under a strict liability theory if he was aware of the existence of a defect.³¹ These statements may be dangerous traps. They may place the plaintiff in the position of having to prove that he was not aware, and had no reason to be aware of the hazard in the product. In effect, the plaintiff's prima facie proof could come to involve a refutation of the defense of assumption of the risk.³²

III. LUQUE V. McLEAN

The California Supreme Court in *Luque v. McLean*³³ re-examined the

²⁸ RESTATEMENT § 402A, comment *i*.

²⁹ *Id.* comment *g*.

³⁰ See, e.g., *Maas v. Dreher*, 10 Ariz. App. 520, 460 P.2d 191 (1969) (RESTATEMENT § 402A and *Greenman* interpreted to deny recovery—awareness); *Myers v. Montgomery Ward & Co.*, 253 Md. 282, 252 A.2d 855 (1969) (dictum—RESTATEMENT § 402A inapplicable to an obvious lack of a safety guard on a power mower).

The term "defective condition unreasonably dangerous" was, perhaps, more properly concerned with certain "unavoidably unsafe products" such as drugs, or products which are socially desirable although having associated risks, such as butter (cholesterol) or whiskey. Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23 (1966). The use of the term has grown away from this limitation and has had a regressive effect on strict liability theory. *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 132-34, 501 P.2d 1153, 1161-62, 104 Cal. Rptr. 433, 441-42 (1972). Thus, the language of the RESTATEMENT, see text accompanying notes 28, 29 *supra*, concerning conditions contemplated by the ordinary consumer seems to be a trap for plaintiffs when the language is read simply as "awareness." See, e.g., *Mass v. Dreher*, *supra*; *Myers v. Montgomery Ward & Co.*, *supra*.

³¹ "To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use." *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963) (emphasis added). This is not the holding in *Greenman*. The actual holding is set out in the text accompanying note 15 *supra*.

³² To say, in the case of a patent defect, or, in less conclusory language, an obvious hazard or danger, that a seller has no duty to place safety devices or guards on his products or to say that the user has "assumed the risk" can be far too broad. Even if the danger is patent or obvious to a user, it may not be so to an injured bystander. If there is a no-duty rule, then there could be no recovery for such a plaintiff. See Keeton, *supra* note 6, at 567.

Seemingly, one such case occurred where the decedent was run over by a bulldozer which, although designed to work forward and backward, had a large blindspot to the rear. Decedent, whose job was to direct traffic on the construction site, was killed when the vehicle backed over him. Although plaintiff recovered, under a strict no-duty rule such might not have been the result, even though the decedent was not a user, and perhaps was not aware of the extent of the blindspot. *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

Saying that there is an obvious hazard is not the same as saying that the plaintiff actually appreciated the full extent of the danger. In criticizing the no-duty theory, it has been pointed out that the questions of full appreciation and even of momentary forgetfulness may be automatically foreclosed. 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 7.02, at 117 (rev. ed. 1973).

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

language of *Greenman*, especially the language that seems to require plaintiff to prove that he was not aware of the defect,³⁴ and found that the phrase merely reiterated the fact that the plaintiff must not be shown by the defendant to have assumed the risk. Moreover, the court held that the defect need not be latent. Under *Greenman* and *Luque* the plaintiff meets his initial burden of proof when he shows an injury proximately caused by a defect existing in the product at the time it left the hands of the seller or manufacturer.³⁵

Implicit in the patent design defect cases is a balance of interests between the aware, but otherwise innocent, plaintiff and the seller, especially, but not limited to, the manufacturer, who fails to make his product safe or safer within reasonable cost limits and without destroying the usefulness of the product. For example, in one case³⁶ rearview mirrors on a bulldozer which was designed to operate in either direction would have sharply reduced the size and thus the danger of a rearward blindspot. In *Luque* and other power mower cases³⁷ inexpensive guard devices would have made the products less dangerous. Indeed, the New Jersey Supreme Court has held that hazardous industrial machinery could be found defective for a failure of the manufacturer to include safety devices so long as the devices did not render the machinery unusable for its purpose, even when there was an expectation that the subsequent purchaser (factory owner) would assume the duty to install safety devices.³⁸

³⁴ See note 31 *supra*.

³⁵ *Luque* verifies the actual holding in *Greenman*: "A Manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Luque v. McLean*, 8 Cal. 3d 136, 141, 501 P.2d 1163, 1166, 104 Cal. Rptr. 443, 446 (1972), quoting *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963). Apparently, "knowing that it is to be used without inspection for defects" is not to be transformed into or interpreted as a requirement that some defects would be so obvious that the plaintiff would automatically "inspect" the machine and by such "inspection" remove himself from the protection of the *Greenman* rule. The court in *Luque*, however, did not address this point; perhaps, the court felt that no such convoluted reasoning would be forwarded in light of their disposition of the awareness argument.

³⁶ *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 470-72, 467 P.2d 229, 232-34, 85 Cal. Rptr. 629, 632-34 (1970); see note 32 *supra*. The court in *Luque* noted that the discussion in *Pike* of patent, as opposed to latent, hazards was in terms of negligence (a duty based on the balance of the risk involved and the burden of precaution), but was also applicable to strict liability. In any event, the court stated that it would be anomalous to allow recovery for a patent defect on a negligence theory while denying it under strict liability. *Luque v. McLean*, 8 Cal. 3d 136, 144-45, 501 P.2d 1163, 1169, 104 Cal. Rptr. 443, 449 (1972).

³⁷ See, e.g., *Ilnicki v. Montgomery Ward Co.*, 371 F.2d 195 (7th Cir. 1966); *Murphy v. Cory Pump & Supply Co.*, 47 Ill. App. 2d 382, 197 N.E.2d 849 (1964); *Myers v. Montgomery Ward & Co.*, 253 Md. 282, 252 A.2d 855 (1969); *Kientz v. Carlton*, 245 N.C. 236, 96 S.E.2d 14 (1957).

³⁸ *Finnegan v. Havir Mfg. Corp.*, 60 N.J. 413, 290 A.2d 286 (1972); *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402, 290 A.2d 281 (1972).

The seller may well face the reality that an industrial purchaser who, by custom and state law, is required to place safety devices on otherwise dangerous machinery will fail to do so and the undischarged duty will be found to rest with the manufacturer for proximately resulting injuries to the industrial purchaser's employees. See *Finnegan v. Havir Mfg. Corp.*, *supra*; *Bexiga v. Havir Mfg. Corp.*, *supra*; accord, *Balido v. Improved Mach., Inc.*, 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1972). RESTATEMENT § 402A(1)(b) (which is based on the expectation that the product reaches the consumer without substantial change) may be to the contrary. *Wheeler v. Standard Tool*

The thrust of *Luque* is that a seller or manufacturer is required to market a safe product or suffer the consequences of all injuries proximately caused by the defect, a responsibility to be regarded as a cost of doing business. The duty fixed by *Luque* is in sharp contrast to the older line of thinking, still very much alive, that "the absence of these safety devices was apparent at the time of purchase, and, in a free market, [the plaintiff] had the choice of buying a mower equipped with them, of buying the mower which he did, or of buying no mower at all."³⁹

The holding in *Luque* that lack of awareness is no part of plaintiff's initial proof, although the awareness may be a possible issue in the defense of assumption of the risk, is not extremely enlightening. This is especially true when viewed through the defendant's eyes, since the issue of assumption of the risk was withdrawn from the jury by the trial court and was not commented upon by the supreme court. There are, however, indications in *Luque*, in the light of *Cronin*, which was decided the same day, which serve to give some feeling for the degree of awareness on the part of the plaintiff necessary to negate a seller's liability. These indications may serve, in addition, to delimit the concept of defect.

In *Luque* the plaintiff was well aware of the existence of the hazard. Ordinary contributory negligence, if indeed it was present, is not a defense to a strict liability action in many jurisdictions; but assumption of the risk—"voluntarily and unreasonably proceeding to encounter a known danger"—may be such a defense.⁴⁰ So too, under *Luque* and the *Restatement*, plaintiff's awareness was part of the defense.⁴¹ Also, the same court, in *Cronin*, when it removed the term "unreasonably dangerous" from the California strict liability test, would seem to have removed the "contemplated

& Mfg. Co., 359 F. Supp. 298 (S.D.N.Y. 1973) (interpreting Connecticut law); *Bexiga v. Havir Mfg. Corp.*, *supra*. But see *Dorsey v. Yoder Co.*, 331 F. Supp. 753 (E.D. Pa. 1971), where the court felt that the RESTATEMENT rule of substantial change might limit liability only where the entire product would undergo substantial modification. The RESTATEMENT expresses no opinion as to whether a court may go farther in applying strict liability to a product for which there is a substantial expectation of change before it reaches the ultimate consumer. RESTATEMENT § 402A, caveat (2), comment on caveat *p*.

³⁹ *Myers v. Montgomery Ward & Co.*, 253 Md. 282, 252 A.2d 855, 864 (1969).

⁴⁰ *Luque v. McLean*, 8 Cal. 3d 136, 145, 501 P.2d 1163, 1170, 104 Cal. Rptr. 443, 450 (1972) (emphasis in original); *accord*, *Smith v. Dhy-Dynamic Co.*, 31 Cal. App. 3d 852, 107 Cal. Rptr. 907 (1973) (actual knowledge and appreciation of a specific danger); RESTATEMENT § 402A, comment *n*.

The same rule appears in Texas cases. See *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967); *Shamrock Fuel & Oil Sales Co. v. Tunks*, 416 S.W.2d 779 (Tex. 1967); *Pizza Inn, Inc. v. Tiffany*, 454 S.W.2d 420 (Tex. Civ. App.—Waco 1970).

Where contributory negligence is available as a defense to a strict liability action, the defense has in some cases been disallowed for reasons of social justice. For example, where a factory worker is injured because of the lack of a safety guard on equipment that he is assigned to use, "[i]t would be anomalous to hold that [a manufacturer] has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against." *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402, 290 A.2d 281, 286 (1972). See also *Wheeler v. Standard Tool & Mfg. Co.*, 359 F. Supp. 298 (S.D.N.Y. 1973); *cf. Davaney v. Sarno*, 122 N.J. Super. 99, 299 A.2d 95 (1973).

⁴¹ RESTATEMENT § 402A, comment *n*, quoted in *Luque v. McLean*, 8 Cal. 3d 136, 145 n.9, 501 P.2d 1163, 1170 n.9, 104 Cal. Rptr. 443, 450 n.9 (1972). *Luque* seemed to regard the *Restatement* and *Greenman* as in basic harmony, neither requiring that the plaintiff prove his lack of awareness of the defect. *Id.* at 145-46, 501 P.2d at 1169, 104 Cal. Rptr. at 449.

condition" approach,⁴² again, at least as an element of plaintiff's proof. One may then argue that whatever awareness or "contemplation" of the danger the plaintiff had is of no consequence unless it rises to an assumption of the risk. There are several ascending stages of awareness: awareness of the fashion of the design; physical awareness that the danger or hazard exists; appreciation of the extent of the danger; carelessness in the use of the product in combination with the awareness of the danger or its extent; and, an appreciation of the danger together with a willing and unreasonable encountering of such danger. Only the last stage constitutes assumption of the risk.⁴³

The court in *Luque* also noted that a plaintiff cannot be taken to assume all commonly known risks without encountering a problem similar to the disclaimers of implied warranty.⁴⁴ If the notion of contemplation by the ordinary consumer is not an exact measure of the level of awareness which is assumption of the risk, it may be more accurate to consider it as simply a weight in the balance of risk reallocation.⁴⁵

IV. CONCLUSION

Considering *Luque* along with other patent hazard cases, it seems fair to say that the more liberal trend is to allow the plaintiff to recover—specifically, to find that there is a question of fact for the jury as to the existence of a defect—where the hazard is obvious or patent. Otherwise, a manufacturer would be advised to make all of his perchance latent errors obvious or patent, a concept in the nature of a disclaimer.

The pivotal point of *Luque* is the delimitation of the word "defect." The question of inclusion within the term "defect" of patent design hazards is one of the more difficult issues facing the courts in the products liability area. *Luque* provides no specific guides for determination of the degree of safety necessary in a product's design, or conversely, the risks a user or consumer must be taken to have accepted as the nature of the product. Yet, in *Luque* and in cases that have gone beyond it,⁴⁶ it would appear that reallocation of the risk is the decisive criterion, basing the decisions in such cases on a theory of enterprise liability.⁴⁷ Were these decisions establishing

⁴² See note 23 *supra*, and accompanying text. The point is well illustrated by RESTATEMENT § 402A, comment *i*, which defines "unreasonably dangerous": "dangerous to an extent beyond that which would be contemplated by the ordinary consumer . . . with the ordinary knowledge common to the community . . ." (Emphasis added.) While the rule is exemplified in the comment by good whiskey and its commonly known characteristics, in practice the rule has not been so applied. It should be fair under *Luque* and *Cronin* to say that the comment is neither a contributory negligence test (ordinary knowledge of the ordinary consumer) nor a limitation to latent dangers (contemplated).

⁴³ See Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of the Risk*, 25 VAND. L. REV. 93, 127 (1972).

⁴⁴ *Luque v. McLean*, 8 Cal. 3d 136, 145 n.9, 501 P.2d 1163, 1170 n.9, 104 Cal. Rptr. 443, 450 n.9 (1972), quoting from Traynor, *supra* note 23, at 371.

⁴⁵ See note 27 *supra*.

⁴⁶ See, e.g., cases cited note 38 *supra*.

⁴⁷ Roscoe Pound seemed to develop at least two stages of enterprise liability: "the insurance idea" that, as a society, we should each bear the losses of the other, and that the law's function is to place the initial burden on those who can pass the cost

a seller's duty to market a safe product mere expression of a public policy of incentive to do such, it would then be necessary that a product not be judged defective without measuring the foreseeability by the seller of risks while the product was in the user's hands. It could not follow from an incentive theory alone that a manufacturer could be liable for injuries proximately caused by a product he believed safe, since his apparent obligation would end with such a belief. Certainly, foreseeability is still important in establishing a defect. However, the outward limit of the term "defect" expands rapidly with the affirmative duty to search out the safer design⁴⁸ and, as in the case of safety devices, to see that such devices are affixed to the product.

Luque is another refinement of *Greenman* in the development of strict liability theory. *Luque*, read with *Greenman*, appears to establish the outermost limit of the development of a function of enterprise liability. Such a policy is rapidly becoming a controlling criterion of several courts in an effort to redistribute the risks of use from the consumer to the seller.⁴⁹ Risks are simply chances that certain possibly correctable hazards of using a product will create accidents; accidents are business costs which the seller can bear more easily than the user or, going somewhat farther, which the user *ought not* to be expected to bear. To put the issue in terms of defining a "defect" may beg the question since, by definition, a perfectly safe product will not injure the user. As yet, however, few courts will contend that injury alone defines "defect." Rather, for some courts, the word "defect" is a code word for the current boundary between foreseeability and pure enterprise liability, *i.e.*, a defect is the function of these two contending forces which establish the degree of social policy development which is sought to be practiced.⁵⁰ The issue of social responsibility, for either the

along to the general public; and "the involuntary Good Samaritan," probably a mere expansion of the insurance idea, that as a humanitarian principle the one more capable of bearing the loss ought to bear the loss. Pound, *Philosophy of Law and Comparative Law*, 100 U. PA. L. REV. 1 (1951).

⁴⁸ "Reduction of the threshold probability required before a defendant-manufacturer can be held liable in either negligence or strict liability has resulted from the abandonment of rigid categorical judgments about what kinds of uses and users are foreseeable, and from an increased willingness to submit such issues to juries where the determination 'depends on policy values underlying the "common affairs of life."' " Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 369 (E.D.N.Y. 1972).

⁴⁹ The rationale of *Greenman* is to be found in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion of Traynor, J.). This opinion seems to reflect both incentive and allocative theories: "Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. . . . [T]he risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." *Id.* at 461-62, 150 P.2d at 440-41.

In criticizing the concurring opinion in *Escola*, Professor Pound noted the development of a new "jural postulate" as part and parcel of a new "regime of dirigism" or humanitarian based control: "In civilized society men are entitled to assume that they will be secured by the state against all loss or injury, even though the result of their own fault or improvidence, and to that end that liability to repair all loss or injury will be cast by law on some one better able to bear it." Pound, *supra* note 47, at 14, 15.

See also *Markle v. Mulholland's, Inc.*, 509 P.2d 529 (Ore. 1973).

⁵⁰ See Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972). But see Keeton, *supra* note 23, at 38; Keeton, *Torts, Annual Survey of Texas Law*, 27