Summer 1974

From Codling to Bolm to Velez: Triptych of Confusion

Aaron Twerski
Brooklyn Law School, aaron.twerski@brooklaw.edu

FROM CODLING, TO BOLM TO VELEZ: TRIPTYCH OF CONFUSION*

*Aaron D. Twerski***

It is a rare event for a leading Court of Appeals to hand down three major opinions in a quickly developing field of law within a one-year time span. One would have expected that, having been granted the opportunity to speak thrice on the subject of products liability[1] a full decade after the formal adoption of strict liability by leading courts throughout the country,[2] the New York Court of Appeals would have seized the moment to crystallize the law and rid itself of shopworn concepts. Such expectations were only partially realized. The court did in fact break new ground in apparently establishing strict tort liability as an independent cause of action,[3] expanding tort liability to second collision damages,[4] and limiting the scope of disclaimers against non-bargaining third parties.[5] However, despite three separate opportunities the court neglected to clarify the nature and scope of its commitment to the strict tort liability concept. By failing to con-

* The author gratefully acknowledges the able assistance of Harvey Weinig, a June 1974 graduate of the Hofstra Law School. Mr. Weinig's contribution goes far beyond that of research assistance. His perceptions added much to the substance of the article.

This paper was prepared during a period in which the author was involved in a study sponsored by the National Science Foundation, entitled *Product Liability: A Study of the Interaction of Law and Technology*, (Grant Number GI-34857). The report of the study appears in 12 DUQUESNE L. REV. (Spring, 1974). Although this paper developed apart from that study, the contributions of Professor William Donaher of the Duquesne Law School and Professors Alvin Weinstein and Henry Piehler of Carnegie-Mellon University—co-members of that NSF study team—to my overall thinking is gratefully acknowledged.

** B.S. University of Wisconsin; J.D. Marquette University; Teaching Fellow, Harvard Law School, 1966-67; Professor of Law and Associate Dean, Hofstra University School of Law.

1. Codling v. Paglia, 32 N.Y. 2d 330, 298 N.E. 2d 622, 345 N.Y.S. 2d 461 (1973); Bolm v. Triumph Corp., 33 N.Y. 2d 151, 305 N.E. 2d 769, 350 N.Y.S. 2d 644 (1973); Velez v. Craine & Clark Lumber Corp., 33 N.Y. 2d 117, 305 N.E. 2d 750, 350 N.Y.S. 2d 617 (1973).

2. *See, e.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); McCormack v. Hankscraft Co., 278 Minn. 322, 338-40, 154 N.W.2d 488, 500-501 (1967); Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965); Suvada v. White Motor Co., 32 Ill. 2d 612, 621, 210 N.E.2d 182, 187 (1965); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 118 (Miss. 1966); Webb v. Zern, 422 Pa. 424, 427, 220 A.2d 853, 854 (1966); Dippel v. Sciano, 37 Wis.2d 443, 459, 155 N.W.2d 55, 63 (1967).

3. Codling v. Paglia, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628, 345 N.Y.S.2d 461, 469 (1973).

4. Bolm v. Triumph Corp., 33 N.Y.2d 151, 305 N.E.2d 769 350 N.Y.S.2d 644 (1973).

5. Velez v. Craine & Clark Lumber Corp., 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1973).

front the policy considerations underlying contributory fault, disclaimers, and antiquated duty rules, the New York court has placed itself in the position of being at the same time among the most progressive and retrogressive courts in the nation in the product liability field. Such an uneven performance deserves serious academic analysis.

I. CODLING V. PAGLIA: IS NEW YORK SERIOUS ABOUT STRICT LIABILITY?

Codling is a most difficult case to read. Within the text of only seven printed pages the court addressed such issues as (1) the abolition of privity;[6] (2) the evidentiary burden on plaintiff in a strict liability case;[7] (3) the effect of product misuse in a strict liability action;[8] (4) the consequences of plaintiff's failure to discover a defect in the product;[9] (5) the consequences of plaintiff behavior that is unrelated to the product defect;[10] (6) the impact of *Dole v. Dow Chemical Co.*[11] on a pre-*Dole* voluntary settlement,[12] and (7) the issue of comparative fault in the post-*Dole* era.[13] Given the scope of the decision and the brevity of the opinion one is not surprised to find that the case does not deal adequately with the rather substantial questions raised by the court. What is astonishing, however, is the realization that the court failed to perceive that it was deciding issues of great moment for the next decade of product liability litigation. By failing to advert to its own leading decisions, as well as the leading product liability decisions throughout the country, one wonders whether the court fully appreciated the potential impact of its pronouncements in *Codling* on these highly significant and heavily debated issues. Before examining the arguments in greater detail, a review of the facts seems in order.

On August 2, 1967, Christino Paglia was driving a four month old Chrysler sedan with just over 4,000 miles on the odometer when suddenly his vehicle crossed the solid double line on the highway and collided with an auto coming from the opposite direction driven by Frank Codling. At no time prior to the acci-

6. 32 N.Y.2d 330, 338, 298 N.E.2d 622, 626, 345 N.Y.S.2d 461, 466 (1973).
7. *Id.* at 340, 298 N.E.2d at 627, 345 N.Y.S.2d at 468.
8. *Id.* at 343, 298 N.E.2d at 629, 345 N.Y.S.2d at 470.
9. *Id.* at 343, 298 N.E.2d at 629, 345 N.Y.S.2d at 471.
10. *Id.* at 344, 298 N.E.2d at 629, 345 N.Y.S.2d at 471.
11. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).
12. 32 N.Y.2d 330, 344, 298 N.E.2d 622, 630, 345 N.Y.S.2d 461, 471 (1973).
13. *Id.* at 344, 298 N.E.2d at 630, 345 N.Y.S.2d at 471.

dent had Paglia experienced any difficulty with the steering mechanism. At the time of the accident he was driving along at a speed of 45 to 50 miles per hour, when suddenly and unexplainably his vehicle started to drift over the solid double line into the northbound lane. There was evidence that at no time prior to impact did Paglia either blow his horn or apply his brakes. Paglia sued Chrysler for negligence and breach of implied warranty. The jury returned a verdict for plaintiff on implied warranty grounds alone. The court used the occasion to set forth the elements of a cause of action for strict products liability:[14]

> We accordingly hold that, under a doctrine of strict products liability, the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages; provided: (1) that at the time of the occurrence the product is being used (whether by the person injured or damaged or by a third person) for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages.

A. Goldberg and Mendel and Codling and . . . .

The plaintiff, Christino Paglia, it will be recalled, brought suit on grounds of negligence and breach of implied warranty of merchantability. He was victorious on *implied warranty grounds alone*. The court affirmed the finding of defect in favor of both Paglia and Codling under a "doctrine of strict products liability." The altogether obvious next question: Is this doctrine of "strict products liability" one arising under the *Uniform Commercial Code* or is it a common law tort doctrine? It is with considerable diffidence that the author poses the question. Since the advent of strict liability in *Greenman v. Yuba Power Products, Inc.*,[15] and the American Law Institute pronouncement in the *Restatement (Second) of Torts* § 402A, there is probably no question that has been more heavily debated.[16] Courts have attempted

14. 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628, 345 N.Y.S.2d 461, 469 (1973).

15. 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

16. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *m* (1965). Comment *m* addresses itself to the tort nature of strict liability and frees the concept from limitations imposed by the *Uniform Commercial Code*. It provides:

> "*Warranty.*" The liability stated in this Section does not rest upon negli-

with marginal success to draw distinctions between situations where the *U.C.C.* provisions should apply and those where the tort strict liability concept should prevail.[17] Some courts have opted for a *Code* analysis in all products cases including personal

---

gence. It is strict liability, similar in its nature to that covered by Chapters 20 and 21. The basis of liability is purely one of tort.

A number of courts, seeking a theoretical basis for the liability, have resorted to a "warranty," either running with the goods sold, by analogy to covenants running with the land, or made directly to the consumer without contract. In some instances this theory has proved to be an unfortunate one. Although warranty was in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach, it has become so identified in practice with a contract of sale between the plaintiff and the defendant that the warranty theory has become something of an obstacle to the recognition of the strict liability where there is no such contract. There is nothing in this Section which would prevent any court from treating the rule stated as a matter of "warranty" to the user or consumer. But if this is done, it should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.

The rule stated in this Section does not require any reliance on the part of the consumer upon the reputation, skill, or judgment of the seller who is to be held liable, nor any representation or undertaking on the part of that seller. The seller is strictly liable although, as is frequently the case, the consumer does not even know who he is at the time of consumption. *The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties*; and it is not affected by limitations on the scope and content of warranties, or by limitation to "buyer" and "seller" in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands. *In short, "warranty" must be given a new and different meaning if it is used in connection with this Section.* It is much simpler to regard the liability here stated as merely one of strict liability in tort (emphasis added).

17. *See, e.g.*, Price v. Gatlin, 241 Ore. 315, 405 P.2d 502 (1965); Markle v. Mulholland's, Inc., 509 P.2d 529 (Ore. 1973); Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973); Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970). *See generally*, Dickerson, *Was Prosser's Folley Also Traynor's? or Should the Judge's Monument be Moved to a Firmer Site?* 2 HOFSTRA L. REV. 469 (1974); Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communications Barriers*, 17 CASE W. RES. L. REV. 5 (1965); Littlefield, *Some Thoughts on Products Liability Law: A Reply to Professor Shanker*, 18 CASE W. RES. L. REV. 10 (1966); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974 (1966); Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965); Reitz, *Warranties and Product Liability: Who Can Sue and Where*, 46 TEMP. L.Q. 527 (1973).

injury cases[18] whereas others have shifted to a strict liability approach even in economic loss cases.[19] It has been clear for almost a decade that depending on whether the tort approach or the *U.C.C.* approach is utilized such issues as privity, notice of breach, statutes of limitation, and disclaimers *may* receive different treatment by the courts.[20] Yet, here in New York in a rather standard personal injury products case, we are attempting to guess whether or not the ground rules for products litigation lie within the purview of the *Code* or tort law.

The failure of the New York court to place this new strict products liability doctrine into a doctrinal perspective, given the national debate on the subject, is disturbing, but given the previous debate within the New York Court of Appeals on the subject, the omission is simply mystifying. Four years ago, *Mendel v. Pittsburgh Plate Glass Co.*[21] created a national sensation of sorts. On October 25, 1965, plaintiff, Cecile Mendel opened and was walking through the entrance doors leading from the street into the premises of the Central Trust Company when the door struck her, causing her to fall to the ground and sustain personal injuries. Some seven years prior to the accident the offending door had been installed in the Central Trust Company building by the Pittsburgh Plate Glass Company. Plaintiff brought suit against Pittsburgh Plate Glass claiming the door was defective and that it breached an implied warranty of fitness for particular use. The issue presented to the court was whether the case was to be governed by the tort or contract statute of limitation. If the tort statute governed, then plaintiff had three years from the time of injury to bring suit. If the contract statute controlled, the statute

18. *See, e.g.*, Ciociola v. Delaware Coca-Cola Bottling Co., 53 Del. 477, 172 A.2d 252 (1961).

19. *See, e.g.*, Santor v. A & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

20. *See, e.g.*, Handy v. Uniroyal, Inc., 327 F. Supp. 596 (D. Del. 1971); Tucker v. Capital Mach., Inc., 307 F. Supp. 291 (M.D. Pa. 1969); Gardiner v. Philadelphia Gas Works, 413 Pa. 415, 197 A.2d 612 (1964); Everhart v. Rich's Inc., 128 Ga. App. 319, 196 S.E.2d 475 (1973) Marshall v. Murray Oldsmobile Co., 207 Va. 972, 154 S.E.2d 140 (1967). *See generally*, Murray, *Pennsylvania Products Liability: A Clarification of the Search for a Clear and Understandable Rule*, 33 U. PITT. L. REV. 391 (1972); Murray, *Products Liability—Another Word*, 35 U. PITT. L. REV. 255 (1973); Murray, *Random Thoughts on Mendel*, 45 ST. JOHN'S L. REV. 86 (1970).

Professor Murray argues cogently that the courts have adopted an over-literal approach to the reading of the *U.C.C.* If courts were willing to indulge in sophisticated analysis, sections such as 2-318, 2-607 and 2-725 would not stand in the way of plaintiff recovery since these sections provide leeway for the consumer-user who suffers personal injury as a result of a defective product.

21. 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

in effect at the time of *Mendel* imposed a six-year limitation from the time of sale. Plaintiff argued vociferously that *Goldberg v. Kollsman Instrument Corp.*[22] had established a "tort strict liability" doctrine in New York. The Court of Appeals took the occasion to review the then New York strict liability approach. They said:[23]

> The appellants argue that *Blessington* does not apply to the instant case because our decision in *Goldberg v. Kollsman Instrument Corp.* (12 N.Y. 2d 432) created in favor of third-party strangers to the contract, a cause of action in tort and not in warranty and, therefore, the three-year-from-the-time-of-the-injury, rather than the six-year-from-the-time-of-the-sale, limitations period should apply. We do not agree. When *Goldberg* was before us, we were confronted with the issue of whether or not a cause of action other than in negligence should exist in favor of those persons not in privity with the contract of sale. After determining that the cause of action should exist, two avenues were open to us—either to establish, as other jurisdictions already had, a new action in tort, or to extend our concept of implied warranty by doing away with the requirement of privity. While there is language in the majority opinion in *Goldberg* approving of the phrase "strict tort liability", it is clear that Goldberg stands for the proposition that notwithstanding the absence of privity, the cause of action which exists in favor of third-party strangers to the contract is an action for breach of implied warranty. The instant action being one for personal injuries arises from a breach of warranty, it is our opinion that *Blessington* controls and, therefore, the applicable Statute of Limitations is six years from the time the sale was consummated (CPLR 213, subd. 2).

Justice Breitel, joined by two other dissenters, reviewed the literature and leading cases.[24] He contended that the tort theory was clearly emerging as the dominant products theory and should govern the case. Yet, here we are again in *Codling*, in a case based on implied warranty of merchantability, wondering whether the strict liability doctrine is based in tort or in contract. The language of *Codling* has a clear tort orientation but the holding is on warranty grounds. Indeed, two product decisions later in *Velez*,[25] when dealing with the validity of a disclaimer provision,

22. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).
23. 25 N.Y.2d 340, 343, 253 N.E.2d 207, 209, 305 N.Y.S.2d 490, 493 (1969).
24. *Id.* at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495.
25. 33 N.Y. 2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1973).

the most that the court is willing to say is that that "strict products liability sounds in tort rather than in contract."[26] Perhaps this does now signal that *Codling* is indeed tort based, but how different is this language from that of *Goldberg v. Kollsman Instrument Corp.* which used tort terminology, and was later defined in *Mendel* as only loosely tort but truly based in contract. It is strange indeed but one searches the *Codling* opinion in vain for even a footnote to *Mendel.* Query: Could *Mendel* have been forgotten so short a time after it created a major storm within the legal community?[27] Or was the court hedging and still undecided as to which approach to favor? There remains the possibility that the New York court does not wish to get caught up in the tort-contract debate and that it proposes to face disclaimer, statute of limitation, and notice of breach problems independent of any doctrinal setting.[28] If indeed this is the approach the court intends to follow then it should have imparted this information through the appropriate use of dicta in *Codling.* Too much has transpired in New York case law to have to start the guessing game once again.[29]

II. Contributory Negligence as a Defense to Strict Liability: An Unexplained Phenomenon

The author's critique of *Codling* has heretofore focused on what the court failed to say. Undoubtedly the silence will eventually be broken and the issues will be resolved. More serious are

26. *Id.* at 124, 305 N.E.2d at 754, 350 N.Y.S.2d at 623.

27. *See, e.g., Symposium on Mendel v. Pittsburgh Plate Glass Company,* 45 St. John's L. Rev. 63, 71, 76, 86, 96, 104 (1970); McLaughlin, *Annual Survey on N.Y. Law, Civil Practice,* 22 Syracuse L. Rev. 55, 61 (1971); Murray, *Products Liability—Another Word,* 35 U. Pitt. L. Rev. 255, 269 (1973).

28. Under this approach the court would involve itself in an enlightened statutory analysis of the *U.C.C.* to determine whether its provisions were meant to effect plaintiffs in personal injury litigation. *See* Murray, *Random Thoughts on Mendel,* 45 St. John's L. Rev. 86 (1970).

29. As this article was going to press the Appellate Division (Second Department) decided *Rivera v. Berkeley Super Wash, Inc.* (N.Y. L.J. April 18, 1974). The case presented the *Mendel* problem to a post-*Codling* court. On October 2, 1967 plaintiff, an eight year old boy accompanied his aunt to a self-service laundry. The aunt placed some wet laundry in an extractor machine to extract excess moisture from the laundry in order to facilitate quicker drying. The lid of the extractor was supposedly incapable of opening during the machine's operating cycle. Due to an alleged defect the lid of the extractor popped open while the machine was still in operation. The infant plaintiff reached in to remove some laundry and his arm was caught in the rotating machine causing multiple fractures eventually resulting in the amputation of his arm.

The *Mendel* problem was raised by the defendant, Boch Laundry Machine Co. Boch had sold and delivered the allegedly defective machine in 1959 some *eight years* prior to

the court's pronouncements on contributory negligence as a defense to strict product liability. Here the court has spoken definitively on perhaps the most crucial issue in the entire field of products law. Again, one would have expected that when faced with such a momentous issue the court would have addressed the serious policy conflicts with appropriate argumentation and discussion of the relevant authorities. Instead, the New York Court of Appeals placed itself in an extreme minority among the nations' courts in a decision which is almost totally devoid of reference to the leading cases and scholarly works that have so thoroughly weighed the competing policies.[30] The end result is that

---

the accident. Under *Mendel*, defendant was entitled to the six-year statute of limitation which ran from the time of sale. The issue was raised in terms of the six-year statute of limitation (former CIVIL PRAC. ACT, § 48, N.Y. CPLR § 213) because the four year limitation period set forth in § 2-725 of the *U.C.C.* has only prospective application from September 27, 1964.

In a lengthy and well reasoned opinion Justice Shapiro concluded that *Codling* had established a strict tort liability doctrine and that *Mendel* would not apply to the new tort doctrine which would instead be governed by the three year statute of limitations for personal injury (N.Y. CPLR § 214), Subdivision 5) which runs from the time of injury. Under the reasoning of the court plaintiffs now have three possible causes of action in a product liability case: (1) common law negligence (2) breach of warranty and (3) strict products liability, and will have the option of the three-year from time of accrual or four year from time of sale statute of limitation depending on the cause of action pursued.

The Appellate Division was split 3-2 with the two dissenting justices unconvinced that the Court of Appeals is prepared to overrule *Mendel*. The decision bears out the author's position that *Codling* and *Velez* are susceptible to different interpretations. Although this author believes the majority has reasoned to the correct and clearly preferable result there is good reason for the conservation of the dissent. If the *Codling* court meant to make *Mendel* a dead letter they had reason to clearly delineate that strict liability was a pure tort doctrine.

30. The following courts have rejected contributory negligence as a defense to a products case and have followed *Restatement (Second) of Torts* § 402A(n) that only voluntary and unreasonable assumption of the risk is a defense: Ferraro v. Ford Motor Co., 423 Pa. 324, 223 A.2d 746 (1966); O.S. Stapley Co. v. Miller, 103 Ariz., 556, 447 P.2d 248 (1968); Barth v. B.F. Goodrich Tire Co., 265 Cal. App.2d 228, 71 Cal. Rptr. 306 (1968); DeFelice v. Ford Motor Co., 28 Conn. Sup. 164, 255 A.2d 636 (1969); Williams v. Brown Manufacturing Co., 45 Ill.2d 418, 261 N.E.2d 305 (1970); Baker v. Rosemurgy, 4 Mich. App. 195, 144 N.W.2d 660 (1966); Keener v. Dayton Electric Manufacturing Co., 445 S.W.2d 362 (Mo. 1969); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. 1967); Bachner v. Pearson, 479 P.2d 319 (Alaska 1970); Perfection Paint & Color Co. v. Konduris, 258 N.E.2d 681 (Ind. 1970); Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 171 N.W.2d 201 (1969); Brown v. Quick Mix Co., 75 Wash.2d 833, 454 P.2d 205 (1969); Benson v. Beloit Corp., 443 F.2d 839 (9th Cir. 1971) (applying Oregon law); Mooney v. Massey Ferguson, Inc., 429 F.2d 1184 (9th Cir. 1970) (applying New Mexico law); Vernon v. Lake Motors, 26 Utah 2d 269, 488 P.2d 302 (1971); Shields v. Morton Chemical Co., CCH PROD. LIAB. RPTR. ¶7107 (Sup. Ct. Idaho 1974); Ford Motor Co. v. Mathews, CCH PROD. LIAB. RPTR. ¶7105 (Sup. Ct. Miss. 1974); Kirkland v. General Motors Corp., CCH PROD. LIAB. RPTR. ¶7097 (Sup. Ct. Okla. 1974). L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY, § 8.06 (1973); W. PROSSER, LAW OF TORTS, § 67 (3d ed. 1964). *See also* R. Keeton, *Assumption*

New York litigants must face the most oppressive contributory negligence doctrine in the country without even having the cold comfort of believing that the court was fully cognizant of the ramifications of its decision.

Under *Codling*, in order for plaintiff to recover for injuries sustained from a defective product, he must satisfy the court that: (1) the product was being used for the purpose normally intended; (2) that if the plaintiff was himself the user of the product he would not, by the exercise of reasonable care, have *both discovered the defect and perceived its danger and* (3) that by the exercise of reasonable care the person injured would *not otherwise have averted his injury.*[31]

A. Normal Use

The first requirement is not exceptional. There is general agreement that this is nothing more than another way of stating the proximate cause issue.[32] Thus, even if the manufacturer admits that a product is defective, the injury must fall within the scope of the risk of the defect. If, for example, a defective automobile tire with inadequate beading, which was sold for normal driving conditions, is subjected to race car use, liability may be in question. The defense is not contingent upon the tire being free

---

of Products Risks, 19 SW. L.J. 61 (1965); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93 (1972); G. Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267 (1968).

There is little authority supporting the court's opinion and even that was not cited. New Hampshire and Wisconsin have both upheld contributory negligence as a defense to a strict liability case. *See* Stephan v. Sears Roebuck & Co. 266 A.2d 855 (N.H. 1970) *and* Dippel v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967). The Wisconsin position is of only marginal importance since Wisconsin is a comparative negligence jurisdiction and thus even a finding of contributory fault will not bar a plaintiff from recovering, but only reduce his recovery. The court in *Codling* does cite to Maiorino v. Weco Products, 45 N.J. 570, 214 A.2d 18 (1965) but neglects to indicate that the New Jersey Supreme Court has had second thoughts about the wisdom of *Maiorino*. In Ettin v. Ava Truck Leasing, Inc., 53 N.J. 463, 251 A.2d 278 (1969) the court indicated general agreement with *Restatement* § 402A(n) and found it possible to explain existing New Jersey cases under *Restatement* principles. For further developments supporting contributory negligence as a defense see: Coleman v. American Universal of Florida, Inc. 264 So.2d 451 (D. Ct. of App., Fla. 1972); Florida Power and Light Co. v. R.O. Products, Inc., CCH PROD. LIAB. RPTR. ¶7145 (U.S. Ct. of App. 5th Cir. 1974) (recognizing ambiguity in Florida law as to whether contributory negligence or product misuse is a defense). Hensley v. Sherman Car Wash Equip. Co., CCH PROB. LIB. RPTR. ¶7141 (Colo. Ct. of App. 1974) (no decisional Equip. Co., CCH on contributory negligence as defense to strict liability).

31. Codling v. Paglia, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628, 345 N.Y.S.2d 461, 469 (1973) (emphasis added).

32. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 96 (1972).

of defect—it may well be a poorly manufactured tire; rather, it arises because of a policy determination that even a manufacturer of a poorly beaded tire should not be subject to liability when his product is put to a use beyond the parameters of normal conditions for that product. Where the line is drawn is clearly a policy matter, and the courts are well guided by almost a half-century of proximate cause cases which have given content to this rather elusive concept.

The abnormal use limitation on liability is a rather limited one: for example, what if plaintiff was driving his car with the poorly beaded tire at a rate of speed ten miles over the speed limit? Clearly no one is prepared to declare this behavior to be outside the tolerance of normal use. If plaintiff is denied recovery against the manufacturer, (as he *may be* under *Codling* on contributory negligence grounds) it will *not* be because he is abusing the product in such a fashion as to bring the product use outside the scope of the risk created by the defect. Or should plaintiff continue to use the tire after he *should have* noted some breakage on its surface, which arose from the defective beading, plaintiff would not be precluded from recovering because he subjected the tire to abnormal use. His continued use after some notice, actual or constructive, that something may be wrong with the tire is clearly a normal and foreseeable consequence. No one would deign to cut off liability on such facts on the ground that the tire was being subject to abnormal use.

B. Duty to Discover the Defect

The serious problem with contributory fault in *Codling* arises from the second and third provisos set forth by the court as a prerequisite to plaintiff recovery.[33] First, it must be established that if plaintiff was himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and have appreciated the risk. To appreciate how onerous a burden plaintiff must carry in New York a comparison with strict liability standards, as articulated in *Restatement* § 402A, is in order. Comment *n*, entitled *Contributory Negligence*, provides:[34]

> Since the liability with which this Section deals is not based

33. In New York plaintiff has the burden of proving freedom from contributory negligence in a standard negligence case. Fitzpatrick v. International Ry. Co., 252 N.Y. 127, 169 N.E. 112 (1929). This burden is to remain with the plaintiff even in a strict liability action.

34. RESTATEMENT (SECOND) OF TORTS, § 402A, Comment *n* (1965).

> upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see section 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

The *Restatement* position, which has been widely adopted,[35] specifically frees a plaintiff from a duty to inspect a product for defects. The reason for removing the burden from the consumer is quite clear: The thrust of strict liability law has been to place on the manufacturer the duty of manufacturing a *reasonably safe product*.[36] We are no longer concerned as to whether the manufacturer has acted reasonably in putting the product in the market place. The shift from substandard manufacturer conduct to product defectiveness as the criterion for liability should mean at the very least that *a consumer has a right to expect a non-defective product*. As long as negligence was the criterion for liability, a consumer had no absolute right to expect that a product would reach his hands in a non-defective condition. Manufacturers bore no responsibility for producing a defect-free product. If the defendant used reasonable care in the manufacturing process, he would not be held liable. However, once the *sine qua non* for manufacturer liability is product defectiveness, it makes no sense to place a duty to inspect before use on the consumer.[37] If he is entitled to a non-defective product, why should he be required to inspect it to assure himself that the product he is about to use is non-defective?

The duty to inspect formulated by the *Codling* court has a strange twist to it. Apparently the court was concerned that it

35. *See* cases cited *supra*, note 31. *See also*, Prosser, *The Fall of the Citadel, (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 838 (1966).

36. *See, e.g.*, Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

37. *But cf.*, UNIFORM COMMERCIAL CODE § 2-316 (3)(b), and Comment 8, (1962 official text and comments) [hereinafter cited as U.C.C.]. *See also*, Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk*, 25 VAND. L. REV. 93, 110, 118 (1972).

had created too harsh a doctrine of contributory negligence. To temper justice with mercy the court provided that the failure to inspect would not bar recovery unless the plaintiff, by use of reasonable care, would have *both* discovered the defect and perceived its danger. Thus it is not enough that a reasonable man would have discovered the defect, unless the discovery would have made a reasonable man aware of the risk inherent in the defect. If this be a mitigating factor, this author is at a loss to understand how the blow is softened. If a reasonable man would have discovered the flaw, and the flaw would not have appeared to carry risks to the user, then the user is simply not contributorily negligent.[37.1] The discovery of a flaw in a product does not *ipso facto* make the user contributorily negligent—it is only when a reasonable man would not continue to use the product because he perceives an unreasonable risk to himself that we censure his conduct by denoting it as negligent. What then is gained by creating the appearance of a double pronged test for contributory fault? The court could have simply said that the traditional notions of contributory negligence govern in a product liability case.

There are two other possible explanations worthy of consideration. The requirement that a reasonable man would have both discovered the defect and perceived the risk might not refer to the reasonable man at all, but rather to the particular plaintiff involved in the litigation. The New York court might simply have chosen an awkward method of articulating the *Restatement* position that voluntary and unreasonable assumption of the risk is a defense to a strict liability case.[38] Given the close parallelism between the two pronged *Codling* test and the "voluntary and unreasonable" standard of the *Restatement*, the possibility exists that the court believed that it was merely paraphrasing the *Restatement*. *Codling*, however, contains no language which would substantiate this approach. The *Restatement* position is rooted in *subjective* assumption of the risk and the defense cannot be made out unless there is proof that plaintiff himself *did in fact* appreciate the risk.[39] *Codling* is riddled with language pointing to the traditional "reasonable man" test which is based

37.1. *See* Weinstein, Twerski, Donaher, and Piehler, Product Liability: The Interaction of Law and Technology, 12 DUQUESNE L. REV. (1974).

38. RESTATEMENT (SECOND) OF TORTS, § 402A, Comment *n* (1965).

39. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *n* and Section § 496D, Comment *c* (1965).

on a wholly *objective* standard.[40] Thus the issue is not what *this plaintiff* understood but whether a *reasonable user* would have discovered the defect and perceived the risk.

A more plausible explanation is that the court sought to tighten up contributory negligence somewhat by requiring that plaintiff not be barred unless a reasonable plaintiff would have discovered the defect and also have perceived the *particular risk* which actually developed. Thus it would not be sufficient if plaintiff merely failed to discover a defect and that a reasonable man would not have continued to use the product; we must also determine that a reasonable man would not have used the product because he would have perceived the precise harm which might befall him if he did continue to use the product. If this is what the court meant then one may question the doctrinal soundness of their decision. The requirement of perception of risk in assumption of the risk proceeds from the premise that we censure plaintiff's conduct because he voluntarily decided to encounter a risk and to take his chances. To determine whether in any given instance plaintiff's conduct is worthy of censure we seek to evaluate just how much of the risk plaintiff did in fact perceive. However, what the court apparently proposes in *Codling* is an inquiry as to whether a reasonable man *would have* perceived this precise risk if he *would have* been reasonably attentive. We must now question what is to be gained by this inquiry. There appears to be only one answer: if the contributory negligence in failing to inspect would not have disclosed the risk, then it is not the proximate cause of the plaintiff's harm. If the court is choosing this method to say that proximate cause, with regard to contributory negligence, is to be read narrowly and that plaintiffs should not be held to be the proximate cause of their own harm unless the harm suffered comes clearly within the ambit of the risk, then there is very little cause for concern. This is, after all, the traditional approach to contributory negligence.[41] If however, the court is applying the "precise risk" test to contributory negligence for the mere purpose of delimiting the operation of the defense, it is making an unholy compromise. The major burden for product safety belongs on the manufacturer. Speculation as to whether the plaintiff would have discovered the precise risk which he did

40. 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973); *see also, Velez v. Craine & Clark Lumber Corp.*, 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1973).

41. Smithwick v. Hall & Upson Co., 59 Conn. 261, 21 A. 924 (1890). *See also* W. PROSSER, LAW OF TORTS 421 (4th ed., 1971).

not in fact discover adds very little to consumer protection.

C. General Contributory Negligence

Although imposing a duty to inspect on the user-consumer is, in this author's opinion, ill conceived and almost wholly unsupported by authority, there is good reason to believe that the impact on actual results in products litigation will be minimal. Since the issue is whether a *reasonable man* would have discovered the defect and perceived the risk arising therefrom, the issue will be, in the main, for the jury. Given prevailing attitudes toward consumer expectations, it is doubtful that juries will be anxious to find that a consumer should have discovered a defect. The second part of the *Codling* contributory negligence test, however, is bound to have a profound impact on who prevails in a products case. It provides that in order for plaintiff to recover, it must be established "that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages."[42]

Let us return for a moment to the hypothetical discussed earlier in which plaintiff was speeding while travelling on a poorly beaded tire. In our earlier discussion we established that plaintiff's activity could not be considered to be an abnormal use of the product. Speeding at 35 miles per hour in a 25 mile per hour zone is hardly an abusive use of a tire. But suppose that we establish that had plaintiff been travelling at the speed limit, he would have been able to avoid the accident entirely. His contributory negligence is now clearly a substantial factor in the causation of his injury. Should contributory negligence be a defense? The New York court answers in the affirmative. To this writer the result seems outrageous.

The duty of producing a non-defective product has been placed on the manufacturer. The harm that has befallen the plaintiff is directly within the risk of the defect against which the manufacturer has a duty to guard. The defendant has a clear duty to manufacture tires that will not disintegrate at 35 miles per hour. By establishing the contributory negligence defense we are removing from the defendants' liability picture a whole range of foreseeable users to whom a clear duty is owed—*viz.*, duty to manufacture a nondefective product. Why then the exculpation for the defendant?

One may argue that this is common to contributory negli-

42. 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628, 345 N.Y.S.2d 461, 470 (1973).

gence wherever it is utilized as a defense. That is, negligent defendants have a general duty to protect even contributorily negligent plaintiffs. If plaintiffs fail to recover, it is because the law censures their activity, not because the defendant's activity is condoned. There is, however, a major distinction between the products liability picture and general negligence litigation.[43] In the standard contributory negligence case defendant is involved in negligent activity (*e.g.*, speeding), and the plaintiff in contributorily negligent activity (*e.g.*, negligent lookout). An accident occurs and both participants are the proximate causes of the harm. Although, each could reasonably foresee the possibility of the other's act, the defendant did not provide the matrix for the plaintiff's action. In products litigation, foreseeability of plaintiff's use of products is technically a moot question. Defendants can and do know the incidence of the plaintiff's use of their products. How a consumer will interact with a product is a function of product design and even of quality control. If a certain category of product use is found subject to an affirmative defense, it is a statement that defendants bear no responsibility to protect plaintiffs from that form of product use. An exemption from liability for a certain category of product use has thus been created for the benefit of defendants, and that may well affect a manufacturer's considerations of product design and quality control. It is true that defendants remain responsible to those plaintiffs who are not contributorily negligent and may, therefore, retain high product standards. That however cannot be known outside the context of a particular manufacturer's litigation experience with any given product. We cannot escape the conclusion that excluding certain categories of plaintiff behavior from the liability picture is an important statement as to whether we wish to grant a large category of foreseeable users protection from certain kinds of product failure. Who better needs non-defective tires than one travelling at speeds in excess of the speed limit?

Returning to *Codling*, the Court of Appeals sent the case back for trial to determine whether Paglia's general conduct constituted contributory negligence. The case is not clear as to what aspect of Paglia's conduct may have constituted contributory negligence. It appears, however, that Paglia failed to brake in time and at no time prior to impact did he blow his horn.[44] If the

43. This thesis is developed at some length elsewhere. *See*, Twerski, *Old Wine in a New Flask: Restructuring Assumption of the Risk*, 60 IOWA L. REV. 1 (1974).

44. 32 N.Y.2d 330, 335, 298 N.E.2d 622, 624, 345 N.Y.S.2d 461, 463 (1973).

defect which caused Paglia to cross over the center line into the opposite lane of traffic was the steering mechanism, then the conduct with which the court was concerned was that of plaintiff in failing to adequately respond to the steering problem *after the steering problem had caused the car to veer out of control.* The court phrased the question to be decided on remand as follows:[45]

> There remains, however, the question whether Paglia independently exercised that degree of care for his own safety that a reasonably prudent person would have exercised under the same circumstances, quite apart from the defective steering mechanism. Thus, in this case, the issue whether Paglia as plaintiff had exercised reasonable care in the operation of his automobile, quite separate and distinct from the defective steering mechanism, and if he did not whether such lack of care was a substantial factor in producing his damages was never submitted to the jury.

Given the facts of the case, the contributory negligence was not, as the court says, "quite separate and distinct from the defective steering mechanism." It arose because plaintiff failed to react reasonably to an emergency situation which was a direct result of the defective steering mechanism. For practical purposes Chrysler's responsibility to manufacture safe steering mechanisms has been abrogated for the class of user who needs the protection the very most—those members of the driving public who do not react well under pressure and can be subject to a charge of common law contributory negligence.[45.1]

---

45. 32 N.Y.2d 330, 343, 344, 298 N.E.2d 622, 629, 345 N.Y.S.2d 461, 471 (1973).

45.1. As this article was going to print, the New York legislature approved and sent to Governor Wilson a bill abolishing contributory negligence and assumption of risk as a complete bar to a negligence action. New York Law Journal (May 7, 1974). Instead, the legislature provided that when the negligence of the plaintiff is *not greater than* the negligence of the defendant, the plaintiff's recovery will be diminished in proportion to the amount of negligence attributable to the plaintiff. Where there is more than one defendant plaintiff can recover if his negligence is *not greater than* the negligence of all of the named defendants.

The questions raised by this statute cannot be adequately dealt with in a footnote. It is, however, important to note that the statute deals only with contributory negligence and assumption of risk as a defense to a negligence action. It remains to be seen whether the Court will apply the statute to a *Codling* strict liability case. This author would be surprised if the court were to read the statute narrowly and still continue contributory negligence and assumption of risk as an absolute bar to a products case. There is authority from cases arising under *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972) that comparative fault will be undertaken between a negligent defendant and a defendant whose liability is predicated on some form of strict liability. Walsh v. Ford Motor Co., 70 Misc. 2d 1031, 335 N.Y.S.2d 110 (Sup. Ct. Nassau County 1972)

III. Bolm and Campo: The Open and Obvious Danger Revisited.

The second of the New York trilogy of products cases, *Bolm v. Triumph Corp.*,[46] will be widely noted for the proposition that plaintiffs are entitled to recover "second collision" damages. Henceforth a plaintiff can recover for aggravation of injuries caused by a defect in the product even though the defect was not the cause of the initial accident. In taking this step, New York signficantly expanded the scope of plaintiff's recovery for injuries caused by defective products.[47] Then, in an about face, the court, without discussion and without citation to the leading cases and authorities, reaffirmed one of the most heavily criticized and ill-starred rules extant in products literature. The court gave the "patent-danger" rule a new lease on life.

The factual setting from which these issues evolved was a motorcycle-automobile collision. Plaintiff, David Bolm, was seriously injured when his motorcycle collided with a car which negligently turned into his lane of traffic. On impact, plaintiff was projected forward over the automobile and landed on the street. Apparently, immediately upon impact the plaintiff's body first made contact with a metal luggage rack or "parcel grid" which was affixed to the top of his motorcycle's gas tank. This parcel grid was located about three inches above and two and three quarter inches in front of the seat. It was plaintiff's contention that contact with the grid caused severe pelvic and genital injuries, including resultant sterility. Plaintiff brought suit against the distributor and manufacturer of his motorcycle alleging that the placement of the parcel grid constituted a defect in the design of the motorcycle. Although the design defect did not cause the

---

and Noble v. Desco Shoe Corp., 41 App. Div. 908, 343 N.Y.S. 2d 134 (1st Dept. 1973). *See also* Dipple v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967). Certainly the court's invitation to the legislature in *Codling* to change the rules on comparative negligence indicate a willingness to accomplish change once the mechanism for such change was accomplished through legislation. *See* Samore, *Codling v. Paglia: Comparative Negligence*, 38 Albany L. Rev. 18 (1973). The above discussion does not, of course, absolve the court from responsibility for the decision in *Codling*. The decision remains a bad one and may still return to haunt us in that the court has not squarely placed the responsibility for foreseeable misuse on the manufacturing company.

46. 33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973).

47. *Accord*, Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969); Ford Motor Co. v. Zahn, 265 F.2d 729 (8th Cir. 1959); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969); Grundman's v. British Motor Corp., 308 F. Supp. 303 (E.D. Wis. 1970); Storey v. Exhaust Specialties & Parts, Inc., 255 Or. 151, 464 P.2d 831 (1970); Badorek v. General Motors Corp., 11 Cal. App. 3d 902, 90 Cal. Rptr. 305 (Ct. App. 3d Dist. 1970).

accident, he contended that it aggravated and enhanced his injuries.

As noted above, the court took this occasion to expand New York product liability law and impose liability on a manufacturer of a defectively designed product for "second collision" damages which enhance injuries. Then the court turned its attention to the nature of the defect alleged in this case—a poorly positioned parcel grid. Given existing New York case authority stemming from *Campo v. Scofield,*[48] it was crucial for the court to clearly identify the precise kind of defect alleged. It will be recalled that in *Campo* plaintiff was engaged in feeding onions into an "onion topping" machine when his hands became caught in its revolving steel doors and were badly injured. He brought suit against the manufacturer of the machine alleging that it had been negligent in failing to equip it with a guard or stopping device. The court exonerated the manufacturer from liability on the following grounds:[49]

> If 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. *We have not yet reached the state where a manufacturer is under the duty of making a machine accident proof or foolproof.* Just as the manufacturer is under no obligation, in order to guard against injury resulting from deterioration, to furnish a machine that will not wear out (see *Auld v. Sears, Roebuck & Co.*, 288 N.Y. 515, affg. 261 App. Div. 918), so he *is under no duty to guard against injury from a patent peril or from a source manifestly dangerous.* To illustrate, the manufacturer who makes, properly and free of defects, an axe or a buzz saw or an airplane with an exposed propeller, is not to be held liable if one using the axe or the buzz saw is cut by it, or if some one working around the airplane comes in contact with the propeller. In such cases, the manufacturer has the right to expect that such persons will do everything necessary to avoid such contact, for the very nature of the article gives notice and warning of the consequences to be expected, of the injuries to be suffered. In other words, the *manufacturer is under no duty to render a machine or other article "more" safe—as long as the danger to be avoided is obvious and patent to all.*

48. 301 N.Y. 468, 95 N.E.2d 802 (1950).

49. *Id.* at 472, 95 N.E.2d at 804 (emphasis added).

The above-cited language had been interpreted by the Appellate Division in an earlier case as precluding "second collision" recovery,[50] and even in *Bolm* the Appellate Division found it necessary to take a circuitous route around *Campo*.[51] To alleviate this problem the Court of Appeals took the occasion to clarify the proposition that *Campo* is not a bar to *all* "second collision" recovery. *Campo*, we now learn, is only a bar to liability on the part of a manufacturer for injuries resulting from dangers which are *patent* or *obvious*. The court emphasized:[52]

> While a vehicle need not be made "crashworthy", the manufacturer should not be permitted to argue that a user of its product assumes dangers from unknown or latent defects, either in construction or design, which the manufacturer can reasonably foresee will cause injury on impact.

As a result of all this the issue to be decided by the jury in *Bolm* on remand was whether the defect was latent or patent.[53] If the former, recovery follows; if the latter, the defendant prevails.

It might suffice at this point to question why it was that the New York Court of Appeals in the year 1974, without citation to

---

50. Edgar v. Nachman, 37 A.D.2d 86, 323 N.Y.S.2d 53, *motion for leave to appeal denied* 29 N.Y.2d 483, 274 N.E.2d 312, 324 N.Y.S.2d 1029 (1971). In *Edgar*, the court, in denying recovery, stated:

> Appellant's attempt to fix liability on respondents, as stated in her proposed amended complaint, because the gas cap flew off as the result of impact and the gasoline tank was located in front of the vehicle does not spell out causes of action based on either negligence or warranty. (Campo v. Scofield, *supra*; Inman v. Binghamton Housing Authority, 3 N.Y.2d 137, 164 N.Y.S.2d 699, 143 N.E.2d 895; Walk v. J.I. Case Co., 36 A.D.2d 60, 318 N.Y.S.2d 598, mot. for lv. to app. den. 28 N.Y.2d 487, 322 N.Y.S.2d 1027, 270 N.E.2d 904 [1971].) She does not allege the gas cap or gas tank were defectively fabricated or installed, but only that they were improperly designed to withstand collision and thereby the damages were increased.

Id. at 88, 323 N.Y.S.2d at 55.

51. In sidestepping the *Edgar* prohibition of recovery for unsafe design characteristics, which do not cause the accident but merely aggravate the injuries, the lower court drew a distinction between essential items (such as the gas tank in *Edgar*) and decorative, non-essential items (such as the luggage rack). Whereas the plaintiff in *Edgar* would require the manufacturer to take affirmative steps in redesigning the automobile to lessen the severity of the injuries, the plaintiff in *Bolm* "[i]s not obligating the manufacturer to provide him with greater protection against impact, but is requiring the manufacturer to refrain from including decorative and non-essential items which will increase his injuries if he is involved in a collision." 41 A.D.2d 54, 60, 341 N.Y.S.2d 853, 846 (4th Dept. 1973).

52. 33 N.Y.2d 151, 157, 305 N.E.2d 769, 772, 350 N.Y.S.2d 644, 649 (1973).

53. 33 N.Y. 151, 160, 305 N.E.2d 769, 774, 350 N.Y.S.2d 644, 651 (1973).

cases and authority, decided to reaffirm the *Campo* "patent danger" rule after it had been the subject of harsh criticism by courts and scholars alike.[54] However, in this instance, there is even stronger reason for questioning the affirmation of the rule: in *Bolm* the fact pattern presented the archetypal case in which the application of the "patent danger" rule has the potential of producing a devastatingly unjust result.

The rule which denies plaintiffs recovery when the dangers they encounter are open and obvious suffers a basic flaw. It focuses the attention of the court and jury on only one aspect of negligence theory—the probability of the harm. In order for a defendant's conduct to be declared negligent or a product defective and unreasonably dangerous, the conduct or product must be measured against a standard. The negligence standard is derived by weighing the probability and the gravity of anticipated harm against the burden of precaution (i.e. the steps which a defendant would have to undertake to prevent that harm from occurring).[55] Similarly, with regard to defective products, one can only determine whether a product is defective by measuring the product in question against some standard. Dean Wade has extrapolated this notion into the following risk-utility criteria:[56]

> (1) The usefulness and desirability of the product—its utility to the user and the public as a whole.
>
> (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
>
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
>
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing ts usefulness or making it too expensive to maintain its utility.
>
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.

---

54. F. HARPER & F. JAMES, THE LAW OF TORTS § 28.5 (1956); Noel, *Manufacturer's Negligence in Design or Directions for the Use of a Product*, 71 YALE L.J. 816, 838 (1962); *see also*, Pike v. Frank G. Hough Co., 2 Cal.3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

55. *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 17 (1965); RESTATEMENT (SECOND) OF TORTS § 283, Comment *e* (1965); W. PROSSER, LAW OF TORTS 149 (4th ed. 1971).

56. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837 (1973). *Contra*, Cronin v. J.B.E. Olson Corp., 20 Cal. App. 3d 33, 97 Cal. Rptr. 459 (Ct. App. 3d Dist. 1971). The lower *Cronin* court felt that it was acceptable to define defect without reference to 'unreasonable danger.' This decision was vacated. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). *See also* Keeton, *Strict Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973).

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

By taking into account all of the above criteria and by evaluating the competing factors, it can then be determined whether the product is or is not unreasonably dangerous. It is clear that this process requires trade-offs. For example, a product may have a low probability of causing harm but if harm does result the consequences may be very serious. One cannot blithely conclude that the product is unreasonably dangerous. It well may be that the cost of producing a safer product is prohibitive and thus the product may be "reasonably dangerous." Should the probability of harm be substantial, however, then we might conclude that even if the cost of making the product safer is high, it must be undertaken. The risk, combined with the gravity of harm, would be unacceptable to society, and the product would thus be declared unreasonably dangerous. Note that the issue is not the foreseeability of the defendant. The product is to be evaluated at the time of trial to determine whether it is in fact an unreasonably dangerous product.[56.1]

What happens when we insist that all dangers be latent before imposing liability on a product manufacturer? Clearly the obviousness of the danger is relevant to the determination of whether the product is unreasonably dangerous.[57] The more obvious the nature of the harm, the smaller the chance that injuries will result, since society can significantly reduce the chance that harm will occur by using the product in a fashion which takes into account the more obvious dangers. But that should not be the *sina qua non*. Professors Harper and James put it this way:[58]

> [T]he bottom does not logically drop out of a negligence case against the maker when it is shown that the purchaser knew of the dangerous condition. Thus if the product is a carrot-

56.1. *See* Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 840 *and* Welsh v. Outboard Marine Corp., 2 CCH PROD. LIAB. RPTR. ¶ 6940 (5th Cir. 1973).

57. *See, e.g.*, Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971).

58. 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1543 (1956); *see also* Wade, *On the Nature of Strict Tort Liability*, 44 MISS. L.J. 825, 839-840 and 840 n.46 (1973).

> topping machine with exposed moving parts, or an electric clothes wringer dangerous to the limbs of the operator, and if it would be feasible for the maker of the product to install a guard or safety release, it should be a question for the jury whether reasonable care demanded such a precaution, though its absence is obvious. Surely reasonable men might find here a great danger, even to one who knew the condition; and since it was so readily avoidable they might find the maker negligent. Under this analysis the obviousness of a condition will still preclude liability if the obviousness justifies the conclusion that the condition is not unreasonably dangerous; otherwise it would simply be a factor to consider on the issue of negligence.

Bolm is a case in point. The parcel grid which caused plaintiff's injuries was described by the Appellate Division as a "decorative and nonessential" item.[59] Did it not make the cycle unreasonably dangerous? What societal value is there in exposing consumers to this type of hazard? Admittedly the defect is obvious but this is the very kind of case where the obviousness of the danger will *not* reduce the likelihood of its occurrence. The burden of precaution against the harm is simply to eradicate a nonessential and very dangerous feature from the cycle without impairing its functional utility.

Thus, in *Bolm* we have a case where a jury facing the question as to whether a parcel grid is an open and obvious danger could respond in the affirmative.[60] Yet, it is not unlikely that left to grapple with the question as to whether the parcel grid was unreasonably dangerous a jury would conclude that the probability of the harm resulting was so high that the design should be considered to be defective.

The obviousness of the danger can legitimately come into play in one more aspect of the law suit. If the danger is obvious, an argument can be made for imposing the affirmative defense of assumption of the risk. The law has long recognized that voluntary assumption of a known risk is a defense to both negligence[61]

59. 51 A.D.2d 54, 60, 341 N.Y.S.2d 846, 853 (1973).

60. Note that Judge Jones, in dissent in *Bolm*, felt that on the record of the case he would rule as a matter of law "that plaintiff user of the motorcycle by the exercise of reasonable care would have both discovered the defective design" and "perceived the danger incident to its design and location." 33 N.Y.2d 151, 160, 305 N.E.2d 769, 774, 350 N.Y.S.2d 644, 651 (1973). This formulation is nothing more than the "patent danger" rule phrased as part of the plaintiff's burden of proof, since if a danger is patent, plaintiff should have discovered it and perceived its dangers.

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

and strict liability.[62] There are, however, two factors that distinguish assumption of the risk from the "patent danger" rule in cases involving open and obvious dangers. First, voluntary assumption of the risk is based on plaintiff's *subjective* assumption of a known risk.[63] The inquiry is not whether a reasonable user would have perceived the risk but whether this plaintiff did in fact perceive it. *Bolm*, however, is clearly oriented toward an *objective* standard. The court said it clearly:[64]

> Here the duty and thus, the liability of the manufacturer, turn upon the perception of the *reasonable user* of the motorcycle as to the dangers which inhere in the placement of the parcel grid on top of the gas tank.

This distinction has not been lost on the defense bar. Analyzing the *Bolm* rationale a leading defense publication offered the following analysis:[65]

> When the decision is examined closely, it appears that only two tests will be applied. The *trier of fact will have to determine if a reasonable product manufacturer should have anticipated that, under the circumstances of the case before it, a product user could be injured by the product or a portion thereof*—even though the product itself did not produce the accident. If the trier of fact answers that question affirmatively (and the plaintiff is a living testament to the fact that such an injury can happen), the next question will be whether a *reasonable product user* should have foreseen the possibility of the same result.
>
> It would appear that, in most cases, an affirmative answer to the first question would require the same answer to the second. After all, it would not take an expert in motorcycle design and manufacture to know that when the pelvic area is smashed into a hard object like the parcel grid, injury will result.

Furthermore, the requirement that plaintiff have a clear appreciation of the *precise* risk[66] (in order to make out the defense of assumption of the risk) is not paralleled in the "patent danger" rule. It is not clear that if a danger is generally patent that the

---

62. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *n*, (1965).

63. RESTATEMENT (SECOND) OF TORTS § 496D, Comment *c* (1965). *See also* Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971).

64. 33 N.Y.2d 151, 160, 305 N.E.2d 769, 774, 350 N.Y.S.2d 644, 651 (1973) (emphasis added).

65. Kircher, *'Second Collision'—New Approach Attempted*, 15 FOR THE DEFENSE . . . 9, (1974) (emphasis added).

66. *See* W. PROSSER, LAW OF TORTS 447 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 496D, Comment *b* (1965).

plaintiff will prevail by arguing that the precise danger which developed was not patent.[67] Cases have gone both ways on that issue.[68]

Second, and more important, even subjective assumption of the risk has been questioned as a legitimate defense when it is clear that defendant has a duty to undertake action to protect a plaintiff against his own foolish risk-taking.[69] In *Bexiga v. Havir Manufacturing Co.*[70] the New Jersey Supreme Court recently grappled with the problem. Plaintiff, John Bexiga, Jr., 18 years of age, was employed by the Regina Corporation as a power punch press operator. The ten-ton punch press that he was operating was manufactured by the defendant Havir and was almost totally devoid of safety features. Plaintiff testified that the particular operation he was directed to do required him to place round metal discs, about three inches in diameter, one at a time by hand, on top of the die. He would then depress a foot pedal thereby activating the machine. This caused a ram to descend about five inches and punch two holes in the disc. After this operation the ram would ascend and the equipment on the press would remove the metal disc and blow the trimmings away so that the die would be clean for the next cycle. The entire cycle just described would take about ten seconds. Plaintiff, John Jr., related the events leading up to the accident as follows:[71]

> Well, I put the round piece of metal on the die and the metal did not go right to the place. I was taking my hand off the machine and I noticed that a piece of metal wasn't in place so I went right back to correct it, but at the same time, my foot had gone to the pedal, so I tried to take my hand off and jerk my foot off too and it was too late. My hand had gotten cut on the punch, the ram.

67. It will be recalled that in *Messina* v. *Clark Equipment Co.*, 263 F.2d 291 (2d Cir. 1959) Judge Clark argued unsuccessfully in dissent that *Campo* "did not shift the basic inquiry as to the reasonable foreseeability of the danger to a sterile definitional quibble over whether the injury was caused by a "latent" or a "patent" defect." *Id.* at 293. The majority thought otherwise and denied plaintiff a recovery on a highly foreseeable risk simply on the ground of patency.

68. *See, e.g.*, Poretz v. R.H. Macy & Co. Inc., 119 N.Y.S.2d 211 (Sup. Ct. 1953); Inman v. Binghamton Housing Authority, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957). *Compare* Walk v. J.I. Case Co., 36 App. Div.2d 60, 318 N.Y.S.2d 598 (3rd Dept. 1971).

69. *See* Twerski, *Old Wine in a New Flask: Restructuring Assumption of Risk*, 60 IOWA L. REV. 1 (1974); James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968).

70. 60 N.J. 402, 290 A.2d 281 (1972).

71. *Id.* at 406, 290 A.2d at 283.

Plaintiff's expert testified that the punch press amounted to a "booby trap" because there were no safety devices in its basic design. He described two different types of protective safety devices both of which were known in the industry at the time of the manufacture and sale of the defective press. One was a push-button device with buttons so spaced as to require the operator to place both hands on them away from the die area to set the machine in motion. The purpose of such a safety device would be to render the machine immune from the momentary forgetfulness or inadvertance of its operator and to assure that his hands would be away from the die when the press was operational. The New Jersey Supreme Court found that a jury might well find the defendant negligent or the machine unreasonably dangerous because of its defective design. Having faced the duty issue the court was concerned that the plaintiff might be dismissed on the basis of his contributory negligence in activating the foot pedal of the machine. Indeed, the problem could be more serious for there is an argument to be made that plaintiff had voluntarily and unreasonably assumed a known risk.[72] The plaintiff had operated the machine for forty minutes and he well knew the implications of permitting the weight of a ten-ton press converging on his hand if he accidentally engaged the foot pedal while his hand was on the die. What is important though is the reason the court rejected the contributory negligence defense. The logic is irrefutable:[73]

> The asserted negligence of plaintiff—placing his hand under the ram while at the same time depressing the foot pedal—*was the very eventuality the safety devices were designed to guard against. It would be anomalous to hold that defendant 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.*

If the *Bexiga* case had been before the New York court, would plaintiff not have to convince the court that the machine defect was latent? If this were his burden, he might very well fail. The issue of the unreasonable danger of the defect might never reach

72. Since New Jersey recognizes a broad range of plaintiff's negligent conduct as a defense to even strict liability, the court was not forced to distinguish between voluntary and unreasonable assumption of a known risk and product misuse. *See* Ettin v. Ava Truck Leasing, Inc., 53 N.J. 463, 251 A.2d 278 (1969); Mairoino v. Weco Products Co., 45 N.J. 570, 214 A.2d 18 (1965).

73. 60 N.J. 402, 412, 290 A.2d 281, 286 (1972) (emphasis added).

the jury. The manufacturer's duty to design a safe machine would be washed away by the patency of the danger. The "patent danger" rule, as a threshold requirement for recovery, although within the province of the jury,[74] raises the wrong issue at the wrong time. The focus today must be on the unreasonable design of the product and why it is unreasonably dangerous. The case for the abolition of the latency requirement is a strong one indeed. If after almost two decades of sharp criticism it is being reaffirmed, we at least deserve to know what motivated the court to do so. *Bolm* offers no answer.

IV. VELEZ AND THE DISCLAIMER PROBLEM

Velez serves as a fitting third to the triptych of New York products cases. The court eschewed deciding the case on narrow grounds and sought to set forth its general approach to disclaimer law. Alas, the court sought to accomplish this feat in three short paragraphs. It cannot be done. The price to be paid in future years for this improvident discussion of disclaimer law may be very high. The chances are good that plaintiffs will suffer needlessly from some very loose language in *Velez* which apparently recognizes the validity of disclaimers in strict products liability cases. And all this without a single citation to case law or the leading authorities that have discussed this most complex problem at length.[75]

The *Velez* facts are simple. The job superintendent for a contractor ordered a quantity of lumber from the defendant lumber company. The superintendent claimed that he specified that the lumber was to be scaffold planking. Defendant's vice-president, who took the order, contended that the order was for rough spruce planking and that he had not been given any indication of how the planking was to be used. The planking was delivered and later put to scaffolding use. Plaintiffs, a carpenter and

74. 33 N.Y.2d 151, 155, 305 N.E.2d 769, 771, 350 N.Y.S.2d 644, 648 (1973).

75. *See, e.g.*, Markle v. Mulholland's Inc., 509 P.2d 529 (Ore. 1973); Hawkins Const. Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973). *See generally*, Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974 (1966); Rapson, *Products Liability Under Parallel Doctrines: Contrast Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965); Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communications Barriers*, 17 CASE W. RES. L. REV. 5 (1965); Murray, *Pennsylvania Products Liability: A Clarification of the Search for a Clear and Understandable Rule*, 33 U. PITT. L. REV. 391 (1972); Murray, *Products Liability—Another Word*, 35 U. PITT. L. REV. 255 (1973); Murray, *Random Thoughts on Mendel*, 45 ST. JOHN'S L. REV. 86 (1970).

a laborer, stepped out on the plank platform at the same time. A few seconds later a plank cracked causing plaintiffs to fall some 25 to 30 feet to the foundation below. The uncontroverted testimony was that the plank which broke was rotted on one side with a split all the way across the rotted area.

Plaintiffs brought the action against the defendant lumber company on both negligence and breach of warranty grounds. The trial court dismissed the negligence cause of action and plaintiff ultimately won a verdict on warranty grounds alone. As to the breach of warranty charge plaintiff was faced with a disclaimer problem. The invoice for the lumber which was received in evidence bore the following legend in large capital letters:

> "NO CLAIMS ALLOWED UNLESS MADE IMMEDIATELY AFTER DELIVERY"
>
> Immediately below this legend appeared the following:
>
> "NOTE—The purchaser shall be deemed to have accepted these goods as is, the seller having made no representations or warranties whatsoever with respect to their quality, fitness for use, or in any other regard thereto."
>
> The word "NOTE" was printed in the largest type used in the body of the invoice, but the text of the disclaimer is printed in the smallest type used on the invoice.[76]

Plaintiffs contended that the disclaimer should be disregarded because it did not meet the *Uniform Commercial Code* requirement that it be "conspicuous." Although the trial court sustained this contention, the Court of Appeals decided to bypass this issue and face the validity of a disclaimer to a non-bargaining third party. The court concluded that a disclaimer would not be effective. It reasoned as follows:[77]

> Subdivision (2) of section 2-316 of the Uniform Commercial Code in pertinent part provides: "to exclude or modify the implied warranty of merchantability of any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'there are no warranties which extend beyond the description on the face hereof.' " This provision is obviously addressed to the language and form to be

76. 33 N.Y.2d 117, 120, 305 N.E.2d 750, 751, 350 N.Y.S.2d 617, 619 (1973).
77. *Id.* at 124, 305 N.E.2d at 754, 350 N.Y.S.2d at 622.

> used if any exclusion of warranties is to be effective. The section does not undertake, nor does any other section of the code undertake, to specify who shall and who shall not be bound by an exclusion of warranties which meets the requirements of section 2-316.
>
> We are then thrown back on broad principles of contract law. Although strict products liability sounds in tort rather than in contract, we see no reason why in the absence of some consideration of public policy parties cannot by contract restrict or modify what would otherwise be a liability between them grounded in tort.
>
> In this case, however, we find no basis for holding that these plaintiffs should be barred from recovery by reason of the imprint of the exclusion of warranties legend on the invoice in this case. Plaintiffs were complete strangers to the contract; there is no evidence that either of them ever saw the invoice in question or knew of its contents. No authorities or rationale are tendered to support the extension of the disclaimer to plaintiffs with reference to claims predicated on strict products liability. We agree with the position of the dissenters at the Appellate Division that these plaintiffs were not bound by the terms of the contract between their employer and defendant lumber company. We see no necessity to labor the point that, in the absence of special circumstances not present here, buyer and seller cannot contract to limit the seller's exposure under strict products liability to an innocent user or bystander.

Before beginning the discussion of the above paragraphs a disclaimer is in order. A full-blown analysis of disclaimer law will not be forthcoming—the format of this article does not permit it. What follows rather are some questions which seek to probe the accuracy of the court's pronouncements.

First, the Court states that neither § 2-316 of the *U.C.C.* nor any other section undertakes to specify who shall and who shall not be bound by an exclusion of warranties which meets the requirements of § 2-316. Admittedly § 2-316 does not address itself to this problem, but one need not look far to find a discussion of the question. Section 2-318 provides as follows:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

The first comment to § 2-318 discusses within the context of a third party beneficiary the very problem which the court implies the *Code* does not consider. The comment reads:

> *The last sentence of this section does not mean that a seller is precluded from excluding or disclaiming a warranty which might otherwise arise in connection with the sale provided such exclusion or modification is permitted by Section 2-316.* Nor does that sentence preclude the seller from limiting the remedies of his own buyer and of any beneficiaries, in any manner provided in Sections 2-718 or 2-719. *To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section.* What this last sentence forbids is exclusion of liability by the seller to the persons to whom the warranties which he has made to his buyer would extend under this section. (emphasis added)

The *Code's* position is clear: the only time a warranty will flow to a non-privity plaintiff is when there exists a warranty to the party in privity. Since the New York court appears to take the position that a disclaimer of tort liability is valid with regard to the parties to the contract it would appear that the *Velez* plaintiffs should be precluded from recovering.[78]

Second, the court throughout discusses the breach of warranty question without particularizing the warranty under consideration. The trial court opinion, however, indicates that the case was submitted to the jury on grounds of breach of implied warranty of fitness for a particular purpose (*U.C.C.* § 2-315).[79] Even if one were to conclude that one can disclaim liability to the immediate purchaser and still be held liable to a non-bargaining third party for breach of implied warranty of merchantability, it makes little sense to apply this principle to the warranty of fitness. Once one has properly disclaimed the warranty of fitness to his immediate buyer and that disclaimer is valid even for tort purposes (as the court assumes it is), it makes no sense to conclude that the warranty of fitness will pass on to a non-bargaining third party. The warranty of fitness can only pass on to a third party through the reliance of the bargaining party.[80] Once the

78. *Cf.* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A [4] (1973).

79. 326 N.Y.S.2d 928 (Kings Cty. 1971).

80. Reliance is an element in proving a breach of implied warranty of fitness. U.C.C. § 2-315. *See also,* J. WHITE and R. SUMMERS, UNIFORM COMMERCIAL CODE 296 (1972); 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[5][d] (1973).

bargaining parties have disclaimed, liability would appear to be at an end.

The most important question to be faced in this entire matter, however, is not liability to third party strangers, but rather the validity of the basic disclaimer. If the disclaimer is invalid, then there is hardly a question as to its applicability to a third party stranger. As noted above, the court takes the position that it sees "no reason why in the absence of some consideration of public policy parties cannot by contract restrict or modify what would otherwise be a liability between them grounded in tort."[81]

It would appear that the court has signaled that absent some very special circumstances disclaimers between parties in privity will be recognized even in personal injury cases. If this is the court's true intent, the development is most unfortunate for product litigants in New York. One is left to wonder why the court chose to disregard the rather substantial opposition to tort disclaimer which had developed over the past decade.[82]

The *Restatement (Second) of Torts*, which gave strong impetus to the entire strict liability movement took great pains to develop the field independent of commercial law doctrine so that consumers would not be affected by *U.C.C.* limitations on recovery such as notice of breach and disclaimers. The *Restatement* position is clear—strict tort liability cannot be disclaimed.[83] In fact, authorities have agreed that strict liability in tort is "hardly more than what exists under implied warranty when stripped of the contract doctrines of privity, disclaimer, requirements of notice of defect and limitation through inconsistencies with express warranties."[84] Very simply, we must assume that moving strict liability into tort, as the court has apparently done,[85] and away from the *Code* must have been to foster some goal. If *Code* defenses can be asserted, what has been accomplished by the move to the tort analysis?

The court intimates that the only reason that the *U.C.C.* does not apply to the third party stranger is that there is no

81. 33 N.Y. 2d 117, 125, 305 N.E.2d 750, 754, 350 N.Y.S.2d 617, 623 (1973).

82. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Vandermark v. Ford Motor Co., 61 Cal.2d 256, 391 P.2d 168 (1964); Haley v. Merit Chevrolet, Inc., 67 Ill.App.2d 19, 214 N.E.2d 347 (1966).

83. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *m*, (1965).

84. Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965); *see also*, Greenman v. Yuba Power Prods., Inc., 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

85. *See* discussion *supra*. If in fact the court is still clinging to the *Code* for product defenses, then the problem discussed *infra* becomes more pronounced.

provision of the *Code* that governs. The inference at this point is that the *U.C.C.* will govern when its provisions are applicable. If so, then how does one explain the court's statement that it sees no reason why "parties cannot by contract *restrict* or *modify* what would otherwise be a liability between them grounded in tort"? Section 2-719(3) provides:

> Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

There has been substantial controversy over the meaning of this section. Comment 3 to this section indicates that the section applies only to the issue of limitation or exclusion of remedies and that a seller "in all cases is free to disclaim warranties in the manner provided in Section 2-316." If comment 3 means what it says, then the *Code* has taken the position that a total disclaimer of warranties may operate to bar recovery in personal injury but that a limitation of remedy is prima facie unconscionable. The anomaly of this position has not been lost on cognoscenti of the *Code*.[86] Be that as it may, we cannot escape the *Code* language that parties are not generally free to limit or exclude remedies when personal injury is the issue at stake. How then does the Court of Appeals square the *Code* attitude of prima facie unconscionability with regard to modification of remedies with its own position that parties are free, absent special consideration, to modify or restrict their tort liability. There remains the possibility that the "considerations of public policy" to which the court refers is the "prima facie unconscionability" posture of the *U.C.C.* To make the statement is to refute it—the Court of Appeals has set forth a general attitude of approval of contractual clauses which modify tort remedies. The *Code* in § 2-719 has, at the very least, taken a position against the validity of limitation of remedy clauses.

We are at an impasse. If the court in *Codling* shifted to a tort theory, its purpose must have been to accomplish a goal which it felt was foreclosed by the *U.C.C.* Clearly, privity could have been

86. *See* Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases*, 18 STAN. L. REV. 974 (1966). See also, J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 386 (1972).

abolished with the blessing of the *Code*.[87] Notice of defect presents no substantial obstacles even under a *Code* orientation, since the *Code* makes specific exceptions for the non-commercial consumer.[88] If the purpose was to bypass the disclaimer problem—the court has not done so. Instead it has decided to engage that problem in its own special fashion. We are truly at a loss to discover the direction of the court. The policy considerations which might upset a disclaimer or a limitation of remedy are not articulated by the court. Will the superior bargaining power of the seller be such a consideration? Will the ability of the buyer to truly fathom the risk which he has decided to bear be a factor? The court has decided that a general statement favoring disclaimers in products cases is to be our only guideline for the present. It is inevitable that this language will cut hard against injured plaintiffs until further clarification is forthcoming.

Conclusion

Codling, Bolm, and *Velez* brought New York product liability law into line with other leading courts throughout the country who had already committed themselves to a strict liability tort analysis. But, each of the decisions either created or retained some antiquated concepts as part of New York products doctrine. Age and wisdom are not antithetical. However, if the court wishes to retain old concepts (which have been heavily attacked) as part of New York products jurisprudence, then we should be told what goals the court hopes to foster by their retention. Otherwise the result will be a steady flow of cases through the appellate system designed to test whether the court really meant to place New York product liability law at variance with the developing national case law.

87. U.C.C. § 2-318, Comment 3. *See also* Murray, *Pennsylvania Products Liability: A Clarification of the Search for a Clear and Understandable Rule*, 33 U. Pitt. L. Rev. 391 (1972).

88. U.C.C. § 2-607, Comment 4. *See also* Murray, *Random Thoughts on Mendel*, 45 St. John's L. Rev. 86 (1970).