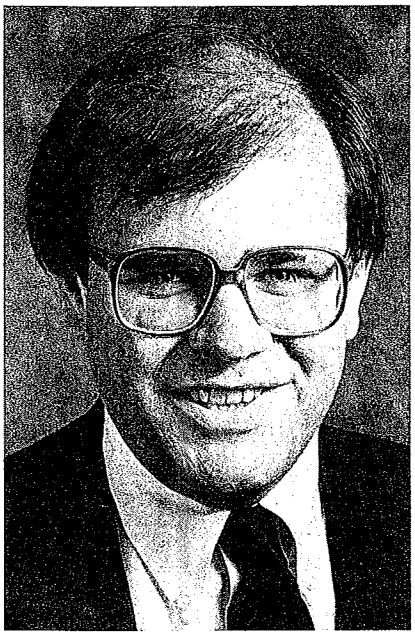

Recent Developments in Minnesota Products Liability Law

by George W. Soule and Cynthia J. Atsatt
BOWMAN AND BROOKE

The Minnesota Supreme Court and Court of Appeals have in recent years decided a number of products liability cases which have contributed to an evolution in the state's products liability law. These decisions have brought changes in the formulation of products liability theories of recovery, in the availability of theories to claimants in certain cases, and in the ways in which lawsuits are tried and submitted to juries. Many of these changes have been reflected in new products liability jury instructions (JIG III) which have received final approval of the Jury Instruction Guides Committee of the Minnesota District Judges Association and are expected to be published in 1986. The following is an overview of the most significant changes in Minnesota products liability law in recent years.

GEORGE W. SOULE is chairman of the Products Liability Committee of the Minnesota Defense Lawyers Association. He is a partner in the firm of Bowman and Brooke, working principally in the defense of manufacturers in products liability litigation. He is a 1979 graduate of Harvard Law School, where he was an editor of the *Harvard Law Review*.

CYNTHIA J. ATSATT is an associate with Bowman and Brooke and a member of the Minnesota Defense Lawyers Association. She is a 1983 graduate of the University of Minnesota Law School and, in 1984-85, served as a law clerk for the Minnesota Court of Appeals.

I. *Convergence of Strict Liability and Negligence Theories in Product Design and Warning Cases*

For many years, the Minnesota Supreme Court's formulation of strict liability allowed the submission of products liability actions on two separate theories – strict liability and negligence. Strict liability ostensibly focused on the condition of the product, while negligence focused on the conduct of the manufacturer or seller. In recent decisions, however, the supreme court has reformulated strict liability so that it is virtually the same as negligence in certain cases.

The creation of separate theories of recovery began when the supreme court adopted strict liability in tort, as "embodied in Restatement, Torts (2d) § 402 A," in *McCormack v. Hankscraft Co.*, 278 Minn. 322, 154 N.W.2d 488, 499 (1967). Under the theory, a seller is liable for injury to a person or property caused by a "product in a

defective condition unreasonably dangerous" to the person or property. The key phrase "unreasonably dangerous" is defined in Comment i to Restatement § 402A:

> The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

A form of this "consumer expectation" standard was incorporated into the strict liability instructions of JIG II, and has been consistently applied by the Minnesota Supreme Court. *See* JIG II 118 G and S; *Halvorson v. American Hoist and Derrick Co.*, 307 Minn. 48, 240 N.W.2d 303 (1976). Formulating strict liability in this way created a theory of recovery separate and distinct from ordinary negligence.

In *Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207 (Minn. 1982), the supreme court foreshadowed the rejection of the consumer expectation standard in a product design case. *Holm* specifically overruled the "patent danger rule" adopted by the supreme court in *Halvorson v. American Hoist and Derrick Co., supra,* which precluded recovery for defective product design when the product danger was obvious to the user. The court in *Holm* held that a product design is to be evaluated under a "reasonable care balancing test" even if the dangers of the product are obvious. Thus, in the *Holm* case, the failure of the aerial ladder manufacturer to incorporate safety devices to warn of the proximity of electrical wires or to prevent electrical current from passing through the product or user to ground, even though the danger of electrocution by contact with an electrical line was obvious and known to the user, was to be evaluated by the jury under a reasonable care test.

The significance of *Holm,* apart from overruling the patent danger rule, is the adoption of the reasonable care balancing test nowhere provided by § 402A or JIG II 118. The balancing test instead was taken from a New York appellate decision, *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 385-86, 348 N.E.2d 571, 577-78, 384 N.Y.S.2d 115, 121 (1976):

> . . . [A] manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner for which the product was intended, as well as an unintended yet reasonably foreseeable use.
>
> What constitutes "reasonable care" will, of course, vary with the surrounding circumstances and will involve "a balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm."

This reasonable care test sounded much like the negligence standard, prompting Justice Simonett, in a separate opinion, to note:

> As a practical matter, where the strict liability claim is based on unsafe design or failure to warn, as is this case, there is essentially no difference between strict liability and negligence.

324 N.W.2d at 215.

Two years after *Holm,* in *Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616 (Minn. 1984), the supreme court explicitly rejected the consumer expectation standard in a product design case, substituting the reasonable care balancing test. The court adopted "as additional instructions, to be substituted for the consumer expectation standard, set out in paragraph 2 of JIG II 118, the definition of that duty quoted above from *Micallef,* which we approved in *Holm*." 346 N.W.2d at 622. The court reasoned that the consumer expectation standard, which focused only on the condition of the product, was simply not appropriate for a design case, where the alleged defect "lies in a consciously chosen design." 346 N.W.2d at 622. In a design case, the jury should focus "on the conduct of the manufacturer in evaluating whether its choice of design struck an acceptable balance among several competing factors." *Id.*

JIG III has incorporated the reasonable care standard in the strict liability instruction for product design cases. The instruction directs the jury to consider "all the facts and circumstances, including, among others, the likelihood and seriousness of harm against the feasibility and burden of any precautions which would be effective to avoid the harm," in determining whether a manufacturer has exercised reasonable care. JIG III 117.

The court in *Bilotta* made clear that the reasonable care test is not to be applied in alleged manufacturing defect cases.

> In such a case an objective standard exists – the flawless product – by which a jury can measure the alleged defect. Thus, in manufacturing-flaw cases, the defect is proved by focusing on the condition of the product. The JIG II 118 consumer expectation instructions, which focus only on the condition of the product, are appropriate for this type of case, since the manufacturer's conduct is irrelevant.

346 N.W.2d at 622. The drafters of JIG III, accordingly, have prepared a separate instruction, JIG III 118, Strict Liability-Manufacturing Flaws, for submission in a case involving that allegation. This instruction "is a variation on the Restatement's consumer expection standard as it is expressed in JIG II, 118 G and S." Authorities, JIG III 118.

For some time, judges and commentators have suggested that there is no difference between negligence and strict liability in failure to warn cases. In *Bilotta,* the court noted that it had "recognized that failure-to-warn claims are based on a concept of negligence." 346 N.W.2d at 622. Justice Simonett, in separate opinions in *Holm* and *Bilotta,* reaffirmed his view that there is no difference between negligence and strict liability in warning cases. In *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 274 (Minn. 1984), the Supreme Court suggested that strict liability and negligence theories of failure to warn are "parallel." Although the court did not expressly merge the theories, it did require that future failure to warn cases be submitted on only one theory of liability, negligence or strict liability.

The drafters of JIG III have adopted one standard for evaluating failure to warn claims, whether asserted in negligence or strict liability. JIG III 119 states alternative instructions in strict liability and negligence, but both instructions incorporate the same elements. As the drafters note, the jury guidelines are "simply a matter of attaching different labels to the same substantive instruction." Authorities, JIG III 119.

II. Submission of a Single Theory of Recovery in Products Liability Actions

The convergence of strict liability and negligence has facilitated another recent development in Minnesota products liability law – the submission of a single theory of recovery in most cases. Justice Simonett advanced this approach in his separate opinion in *Holm v. Sponco Mfg., Inc., supra,* suggesting that there is no need to submit "overlapping" theories of negligence *and* strict liability, both founded in the notion of "wrongness" on the part of a product manufacturer. Submission of a single theory would also help avoid confusion to jurors and the risk of a perverse jury verdict. 324 N.W.2d at 213-16.

With the explicit merger of strict liability and negligence in *Bilotta,* the court was willing to take the step urged by Justice Simonett two years earlier. In *Bilotta,* the court endorsed, albeit mildly, the single theory of recovery concept:

> [A]ssuming proper instruction to ensure the broadest theory of recovery, a trial court could properly submit a design-defect or failure-to-warn case to a jury on a single theory of products liability. Submission of a single theory of recovery may avoid the confusion and inconsistent verdicts spawned by submission of multiple overlapping theories without restricting a plaintiff's ability to benefit from the elements of proof which make strict liability a broader theory of recovery than traditional negligence.

346 N.W.2d at 623.

One month later, the court, in *Hauenstein v. Loctite Corp., supra,* held that a plaintiff must elect one theory for submission in a failure to warn case:

> [W]e hold that hereafter, where a plaintiff seeks damages for both negligence and strict liability based solely upon failure to warn, the plaintiff may submit the case to the jury on only one theory. The plaintiff can plead and prove at trial either or both theories, but by the time the parties rest, the plaintiff must announce whether the case will be submitted to the jury on negligence or strict liability.

347 N.W.2d at 275.

The drafters of JIG III have followed the suggestion of *Bilotta* and the direction of *Hauenstein* in providing for the submission of only one theory of recovery in product design and warning cases. In an explanatory note to the products liability instructions, the drafters explained their approach:

> In accordance with [*Bilotta* and *Hauenstein*], there are single jury instructions for use in design defect and failure to warn cases. The court in *Bilotta* provided the basis for the merger of strict liability and negligence theories of recovery. Because of the merger, only one jury instruction, JIG III, 117, should be given in design defect cases, rather than one instruction on strict liability and one instruction based on negligence. In *Hauenstein* the court required the plaintiff in a failure to warn case to elect between strict liability and negligence theories of recovery. However, irrespective of the label attached to the theory, the Committee has taken the position that the substance of the failure to warn instruction is the same. Therefore, only one jury instruction, JIG III, 119, should be given in failure to warn cases.

Thus, in a design case, only one instruction, labeled "Strict Liability-Design Defect," is to be given. JIG III 119 allows the failure to warn instruction to be expressed in strict liability or negligence terms, but the substantive test is exactly the same with either option.

The new products liability instructions also raise the issue of whether an implied warranty instruction should be submitted when another products liability instruction is already being given to the jury. In *Goblirsch v. Western Land Roller Co.,* 310 Minn. 471, 246 N.W.2d 687 (1976), the supreme court held that it was proper for the trial court not to give an implied warranty charge to the jury when the personal injury-product liability case was already being submitted to the jury on a strict liability theory. The court held that an additional instruction on breach of implied warranty "merely would have been redundant and possibly confusing." 246 N.W.2d at 690. *See also Farr v. Armstrong Rubber Co.,* 288 Minn. 83, 179 N.W.2d 64 (1970). Recently, in *Continental Ins. Co. v. Loctite Corp.,* 352 N.W.2d 460 (Minn. App. 1984), the court of appeals held that "[o]nce strict liability is the broader theory of recovery, as here, warranty of fitness has been pre-empted." 352 N.W.2d at 463.

The drafters of JIG III have agreed with these cases that an implied warranty instruction should not be given when the case is submitted on another products liability theory:

> Addition of implied warranty of merchantability instructions in design defect cases would only serve to add another overlapping theory of recovery which can only lead to confusion and inconsistent jury verdicts, problems which the court in *Bilotta* hoped to avoid by submission of a case under a single theory of recovery. Therefore, the Committee is of the opinion that in cases to which strict liability applies, it is inappropriate in a design defect case to submit jury instructions based on implied warranty of merchantability . . . .

Authorities, JIG III 117.

The supreme court and the drafters of JIG III have identified at least three exceptions to the single theory of recovery rule. *Bilotta* specifically exempts the use of its new strict liability formulation in manufacturing flaw cases. The jury instruction guides provide two separate instructions for such cases, JIG III 118, Strict Liability-Manufacturing Flaws, and JIG III 120, Liability of Seller of Goods-Negligence. The latter is intended by the drafters "to apply in cases involving manufacturing flaws, where strict liability theory and negligence theory are distinct, given the fact that no actual negligence need be demonstrated in such cases." Authorities, JIG III 120.

The commentary to the new jury instructions also suggests that claims for breach of express warranty or implied warranty of fitness for a particular purpose may be submitted along with a strict liability claim where such other claims are justified by the evidence. These warranty claims may not be duplicative of strict liability claims, since the warranty claims are based upon alleged repre-

sentations and dealings that may establish a private standard of care more demanding than the general duty of reasonable care.

III. Optional Safety Devices and a Manufacturer's Duty to Design a Reasonably Safe Product

The third important products liability development in *Bilotta* was the court's pronouncements concerning the treatment of optional safety devices. The manufacturer in *Bilotta* had offered as an option a safety device which would have prevented the accident, and argued that such an offer discharged its duty to produce a reasonably safe product and insulated it from liability. The court rejected the defendant's argument, holding, as a general rule, "that a manufacturer may not delegate its duty to design a reasonably safe product." 346 N.W.2d at 624.

The court considered the defendant's argument that it should approve the rule adopted in *Biss v. Tenneco, Inc.*, 409 N.Y.S.2d 874, 64 A.D.2d 204 (1978), and stated in *Wagner v. International Harvester Co.*, 611 F.2d 224, 231 (8th Cir. 1979), that a manufacturer "fully satisfie[s] its duty of reasonable care by making [a safety device] available and advertising it as optional equipment." The *Bilotta* court stated that this rule could be "justified only where multi-use equipment is involved and the optional device would impair the equipment's utility in the uses for which the device is unnecessary." 346 N.W.2d at 624. Finding that the product involved in *Bilotta* was not multi-use and its functioning was never impaired by the installation of the optional safety device, the court held that the proposed "option offer defense" was not available. The court then stated that the product's design was to be evaluated by the jury under the reasonable care balancing test.

The principal effect of this discussion in *Bilotta* may be to preclude summary dismissals of claims against manufacturers whose optional safety devices, if installed and used, would have prevented the accidents or injuries at issue. The supreme court emphasized that optional safety devices cannot "immunize [manufacturers] from liability," and "should not provide an absolute defense for the manufacturer." 346 N.W.2d at 624. For all practical purposes, the court has rejected the *complete* "option offer defense" adopted in *Biss* and stated in *Wagner*.

Option offer defenses, then, under *Bilotta*, will present jury issues of reasonable care in the design of the product, for the decision to make a safety device optional is particularly apt for the *Bilotta* balancing test. The jury will evaluate whether the manufacturer's system for marketing the product, including the offer of safety devices as options, was reasonable under all of the circumstances. This analysis should include not only whether the product is multi-use and whether the proposed safety device would impair the product's function in certain uses, as suggested in *Bilotta*, but also whether the product is sold to and used by sophisticated consumers, whether it is customary in the industry to offer the equipment as optional, and whether "standardization of a safety device will cost more money and take more time, thus decreasing sales," 346 N.W.2d at 624, possibly making the product uncompetitive in the national or world market. It may also be reasonable for a manufacturer to offer a variety of optional safety devices, such as warning lights or bells, when the appropriateness of the devices may depend on the particular circumstances of the work environment in which the product will be used. *Cf. Shawver v. Roberts Corp.*, 90 Wis.2d 672, 280 N.W.2d 226 (1979) (cited in *Bilotta*).

The general instruction for design cases, JIG III 117, should be adequate to guide the jury in deciding an optional safety device case. An instruction stating only the basic rule adopted in *Bilotta*, "that a manufacturer may not delegate its duty to design a reasonably safe product," may unfairly overstate a manufacturer's responsibilities. If such an instruction is given, it should be accompanied by other instructions explaining the reasonable care balancing test and listing the factors that may be considered in determining whether the offer of optional safety devices was reasonable.

IV. Admissibility of Subsequent Remedial Measures in Strict Liability Actions

Rule 407 of the Minnesota Rules of Evidence provides in part:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

Adopted in 1977, the rule did not state clearly whether it applied in products liability actions based on strict liability. In fact, the advisory committee which submitted the proposed rules of evidence to the supreme court took no position on the admissibility of subsequent remedial measures to prove product defects in strict liability actions, and left the issue "for resolution by the courts." Committee Comment, Minn. R. Evid. 407.

For many years, Minnesota trial counsel and courts had no guidance from the Minnesota appellate courts on this issue. Then, in 1984, in *Dahlbeck v. DICO Co., Inc.*, 355 N.W.2d 157 (Minn. App. 1984), *pet. for rev. denied* (Minn. Feb. 6, 1985), the court of appeals stated that:

> . . . Rule 407 does not apply to strict liability because negligence is not at issue. Therefore, subsequent changes in design are admissible to prove that a product was defective. *See Unterburger v. Snow Co.*, 630 F.2d 599 (8th Cir. 1980) (similar federal rule).

355 N.W.2d at 165. Even though this issue was a signifi-

cant one of first impression in the Minnesota appellate courts, the court's conclusion was drawn without any written analysis, and probably was not necessary to decide the issues raised by the *Dahlbeck* appeal. Despite its summary nature, this statement in *Dahlbeck* remains the only clear Minnesota appellate court pronouncement on the issue, as the supreme court declined review of the *Dahlbeck* decision. Experience suggests that the language in *Dahlbeck* is being applied by Minnesota trial courts.

There are compelling reasons, however, to question the validity of the *Dahlbeck* court's pronouncement. Most importantly, the court apparently failed to consider the effect of the supreme court's reformulation of strict liability theory. In *Bilotta v. Kelley Co., Inc., supra,* decided over five months before *Dahlbeck,* the supreme court adopted a reasonable care standard for strict liability in product design cases. Thus, any distinction between negligence and strict liability, upon which the *Dahlbeck* ruling presumably relies, no longer exists in Minnesota law in a product design case. Moreover, with the reformulation of strict liability in negligence terms, the plain language of Rule 407 appears to directly preclude evidence of a subsequent remedial measure to prove lack of reasonable care in product design by a manufacturer.

The *Dahlbeck* decision also fails to recognize compelling policy arguments for the exclusion of subsequent remedial measures in strict liability actions. Rule 407 is intended to encourage manufacturers to make needed improvements by not permitting such improvements to be used against manufacturers in subsequent trials. The rule also reflects "the real possibility that subsequent repairs are frequently not indicative of past fault." Committee Comment, Minn. R. Evid. 407. Both considerations are applicable regardless of whether an action is brought in strict liability or negligence. *See Cann v. Ford Motor Co.,* 658 F.2d 54 (2d Cir. 1981), *cert. denied,* 102 S. Ct. 2036 (1982).

The *Dahlbeck* court's citation of *Unterburger v. Snow Co., supra,* in support of its statement that Rule 407 is not applicable in strict liability actions may also have been misplaced. The Eighth Circuit Court of Appeals' interpretation of Federal Rules of Evidence, while perhaps instructive, is not binding on Minnesota courts interpreting state rules. Moreover, the Eighth and Tenth Circuit Courts of Appeals are the only federal courts of appeals to hold that Rule 407 of the Federal Rules of Evidence does not apply in strict liability actions. Each of the other seven courts of appeals to rule on the issue have held otherwise. *See, e.g., Cann v. Ford Motor Co., supra; Oberst v. International Harvester Co.,* 640 F.2d 863 (7th Cir. 1980). Several other state courts have also held that subsequent remedial measures are not admissible as proof of a product defect in a strict liability action. *See, e.g., Ellis v. Golconda Corp.,* 352 So.2d 1221 (Fla. App. 1977), *cert. denied,* 365 So.2d 714 (Fla. 1978); *Haysom v. Coleman Lantern Co.,* 89 Wash.2d 474, 573 P.2d 785 (1978).

V. Limiting a Manufacturer's Duty to Warn of Open and Obvious or Known Dangers

The Minnesota Supreme Court has long recognized a claim against a manufacturer or seller for failing to warn of a danger involved in the use of a product. In recent years, the supreme court and court of appeals have placed boundaries on the duty to warn when the danger about which the warning is sought is open and obvious or known by the user.

This issue was first addressed by the Minnesota Supreme Court in a products liability case in *Westerberg v. School District No. 792, Todd County,* 276 Minn. 1, 148 N.W.2d 312 (1967). In that case, the supreme court summarized general duty to warn principles, including the following:

> It is . . . clear that there is no duty resting upon a manufacturer or seller to warn of a product-connected danger which is obvious, or of which the person who claims to be entitled to warning knows, should know, or should, in using the product, discover.

148 N.W.2d at 316. In *Sowles v. Urschel Laboratories, Inc.,* 595 F.2d 1361 (8th Cir. 1979) (applying Minnesota law), the Eighth Circuit Court of Appeals cited the same principle:

> We begin with the proposition that; under Minnesota law, [the manufacturer] was under no duty to warn of an apprehended or obvious peril. . . . This court observed recently in a similar context that " 'no one needs notice of what he knows or reasonably may be expected to know.' "

595 F.2d at 1365.

The most recent pronouncement of the Minnesota Supreme Court on the issue came in *Minneapolis Society of Fine Arts v. Parker-Klein Associates Architects, Inc.,* 354 N.W.2d 816 (Minn. 1984). Stating that "[g]enerally, there is no duty to warn if the user knows or should know of potential danger," 354 N.W.2d at 821, the supreme court held that plaintiff could not recover for a manufacturer's alleged negligence in failing to warn of the sensitivity of its brick when architects employed by the plaintiff should have known of such sensitivities.

The Minnesota Court of Appeals has also recently cited and applied the general limitation on a manufacturer's duty to warn. In *Dahlbeck v. DICO Co., Inc., supra,* the court cited the rule that "a manufacturer has no duty to warn when the dangers of a product are within the professional knowledge of the user." 355 N.W.2d at 163. Applying that principle, the court sustained dismissal of a claim for failure to warn of hazards of using a particular switch when the user was aware of the potential for such hazards.

In *Peppin v. W.H. Brady Co.,* 372 N.W.2d 369 (Minn. App. 1985), the court cited the language from *Dahlbeck* quoted above, and held that the manufacturer of a trim

press could not recover contribution from a component supplier where the manufacturer claimed that the supplier had "a duty to warn that its aluminum wire markers would conduct electricity. . . . A fundamental characteristic of aluminum is that it conducts electricity. [The supplier] therefore had no duty to warn [the manufacturer] of this fact." 372 N.W.2d at 375. Both *Dahlbeck* and *Peppin* involved duty to warn claims brought by sophisticated manufacturers against component suppliers.

In *McCormick v. Custom Pools, Inc.*, 376 N.W.2d 471 (Minn. App. 1985), *pet. for rev. denied* (Minn. Dec. 30, 1985), the court of appeals sustained summary judgment against plaintiff on his claim that a swimming pool manufacturer and seller should have warned plaintiff of the risks of shallow diving. The court held that plaintiff's "awareness of the risks precludes any claim that [defendants'] failure to warn of the dangers of diving caused [plaintiff's] accident. . . . [A] warning would not have deterred [plaintiff] from diving since a warning would have merely informed him of risks of which he was already aware." 376 N.W.2d at 476. Finally, in *Willmar Poultry Co. v. Carus Chemical Co.*, No. C4-85-716 *(Finance and Commerce,* December 20, 1985), the court cited *Dahlbeck* for the general rule that "[A] manufacturer has no duty to warn when a user or operator is aware of the dangers of a product."

As noted, the *Peppin* and *Willmar Poultry* courts cited *Dahlbeck* for the principle that a manufacturer does not have a duty to warn of a product danger known by the user. Ironically, several pages after this pronouncement in the *Dahlbeck* decision, the court sustained the trial court's refusal to instruct the jury that "[t]he manufacturer has no duty to warn of dangers that are obvious to anyone, including the user of its product." 355 N.W.2d at 166. The court of appeals explained this holding as follows:

> The latent/patent danger rule has been expressly rejected in Minnesota. *Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207, 213 (Minn. 1982). In its place *Holm* approved the "reasonable care" balancing test. *Id.* The jury was instructed that the obviousness of the danger to Dahlbeck was a factor to consider which they obviously considered in finding Dahlbeck's fault at 30%.

Id.

The problem with this reasoning is that *Holm,* of course, was not a warning case. The *Holm* court held that it was for the jury to decide in a particular case whether the manufacturer should have designed the product to protect against an open and obvious danger; the court did not impose any duty to warn against such danger. While a jury may reasonably conclude that a manufacturer should have provided safety devices to protect against an open and obvious danger, there is no reason to impose a duty to warn against that danger. Thus, the *Dahlbeck* court's second duty to warn decision is not supported by the *Holm* case, is contrary to each of the Minnesota appellate courts' other pronouncements of the last two years on the issue, and must be viewed as an aberration.

Unfortunately, the decisions of the Minnesota appellate courts limiting a manufacturer's duty to warn have not been reflected in JIG III's failure to warn instruction. JIG III 119 states that a product is defective and unreasonably dangerous, or a manufacturer negligent, "if the (manufacturer) (seller) knew or reasonably could have discovered the danger involved in the use of the product, and if the product is not accompanied by adequate (warnings) (instructions)." The new instructions do not provide any qualification of this rule, even if the danger involved in the use of the product is open and obvious. Lacking any express limitation on a manufacturer's duty, a jury could reasonably find, under JIG III 119, that any product which involves any danger in its use, regardless of how well known the danger is, is defective if the product is not accompanied by a warning of that danger.

The drafters of the jury instructions, in the commentary to JIG III 119, cite *Westerberg, Parker-Klein, Peppin* and *Dahlbeck,* but explain the lack of any limitation on a manufacturer's duty to warn in the instruction as follows:

> The authorities are divided on the issue of whether the knowledge of a sophisticated user goes to the duty or proximate cause issues. . . . The Minnesota Supreme Court has not clearly taken a position as to how the issue is to be handled.

In the decisions discussed above, however, the Minnesota appellate courts have clearly stated that a manufacturer has *no duty* to warn of product related dangers when such dangers are open and obvious. The courts have also held that, when dangers are known, or should be known, by sophisticated product users, the product manufacturer has no duty to warn. The general principle guiding these appellate court decisions is that a manufacturer or seller has no duty to warn of a danger involved in the use of a product if the danger is known, or should be known, by the reasonably foreseeable users of the product. When there is evidence supporting this defense to a failure to warn claim, a manufacturer or seller should be entitled to an instruction embodying these principles.

There may also be instances in which, even though reasonably foreseeable users of a product may not be expected to discern a product danger, a particular user actually knew of the danger before an accident. A jury could conclude in this instance that the manufacturer had a duty to warn, but the lack of warning was not a *cause* of the accident. In such cases, it would be appropriate to instruct the jury that the lack of a warning is not a cause of an accident or injury if the injured person actually knew of the danger.

VI. Limitations on the Recovery of Economic Losses Under Tort Theories

In *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159 (Minn. 1981), the Minnesota Supreme Court ruled that economic losses which arise out of commercial transactions are not recoverable under tort theories of negli-

gence or strict products liability unless they involve personal injury or damage to other property. The court reasoned that the Uniform Commercial Code was intended to be a comprehensive statutory scheme setting forth the rights and remedies available to parties to commercial transactions.

> The recognition of tort theories in the instant case would create a theory of redress not envisioned by the legislature when it enacted the U.C.C. Furthermore, tort theories of recovery would be totally unrestrained by legislative liability limitations, warranty disclaimers and notice provisions. To allow tort liability in commercial transactions would totally emasculate these provisions of the U.C.C. Clearly, the legislature did not intend for tort law to circumvent the statutory scheme of the U.C.C.

311 N.W.2d at 162.

Where no injury is involved, it is more appropriate to consider failure of an allegedly defective product as a loss to the purchaser of the benefit of its bargain with the seller than as a tort. Under such circumstances, where the consumer protection needs upon which strict liability is based are not strong, the U.C.C. provides the exclusive remedy available to the buyer. *See Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*, 572 S.W.2d 308, 313 (Tex. 1978), *citing* Keeton, *Private Law – Torts,* 32 S.W.L.J. 1, 5 (1978).

Once the court ruled that "economic losses" were not recoverable in tort, it was faced with determining what is included in the phrase "economic losses." In *Superwood,* plaintiff sought damages for the value of the allegedly defective product itself and for lost profits, labor, clean-up costs, and other consequential damages. The court denied recovery of all of these losses, ruling that "economic losses" includes damage to the product as well as consequential losses arising from loss of use.

Later the court answered a question left open by *Superwood:* When, because a component part fails, an entire product is damaged or unuseable, is the value of the larger unit recoverable as damaged "other property"? In *Minneapolis Society of Fine Arts v. Parker-Klein Associates Architects, Inc.* [*MSFA*], 354 N.W.2d 816 (Minn. 1984), plaintiff alleged that brick used in the construction of buildings was defective. Plaintiff contended that the brick caused damage to "other property" such as the mortar and cement blocks of the buildings in which the brick was incorporated. In denying plaintiff's claim, the court stated:

> To hold that buildings constitute "other property" would effectively overrule *Superwood* as to every seller of basic building materials such as concrete, brick or steel because the "other property" exception would always apply. The U.C.C. provisions as applicable to component suppliers would be totally emasculated.

354 N.W.2d at 820. Thus, a component part which causes damage to the whole has not damaged "other property."

Even when there is damage to "other property," however, that damage may not bootstrap the whole loss into one for which an action in tort may be maintained where the damage to "other property" is minor in comparison to the damage to the product and the consequential damages. In *Northern States Power Co. v. International Telephone and Telegraph Corp.*, 550 F. Supp. 108 (D. Minn. 1982), the district court applied the *Superwood* rule to a case where allegedly defective screw anchors caused damage to four aluminum power line towers. Plaintiff claimed total damages of $2,404,016, of which approximately $100,000 represented damage to the towers. While the court agreed that the damage to the towers was damage to "other property," it declined to allow plaintiff to circumvent the intent of *Superwood* simply because a relatively minor amount of "other property" happened to be damaged. Plaintiff, the court ruled, could maintain an action in tort only for the amount of damage to the "other property."

State court decisions since *Northern States Power* have borne out its validity. *See MSFA,* 354 N.W.2d at 820, n.4, and *S. J. Groves and Sons Co. v. Aerospatiale Helicopter Corp.*, 374 N.W.2d 431 (Minn. 1985). In *S. J. Groves,* the court ruled that the loss of other property was "insufficient to bootstrap [plaintiff's] claims for tort recovery of all of its damages" where the allegedly defective product was of significantly greater value than the other property. 374 N.W.2d at 434, n.2. Minor damage to "other property" does not bring economic losses into the sphere of damages recoverable under tort theories.

In recent cases, claimants have attempted to distinguish their claims from *Superwood* by arguing that the *Superwood* result should not stand where the damage to the product itself resulted from a defect which rendered the product unreasonably dangerous. The court of appeals rejected this argument in *St. Paul Fire and Marine Ins. Co. v. Steeple Jac, Inc.*, 352 N.W.2d 107 (Minn. App. 1984), concluding that such an exception would swallow up the rule:

> [W]e cannot distinguish this case from *Superwood.* . . .
>
> A cause of action for strict products liability necessarily entails an allegation that the product defect created an unreasonable danger. . . . Since a strict products liability cause of action was pled in *Superwood,* we must assume the Supreme Court viewed the defect as unreasonably dangerous when it decided the case.

352 N.W.2d at 109-10. The court of appeals reached the same result in *Tri-State Insurance Co. v. Lindsay Brothers Co.*, 364 N.W.2d 894 (Minn. App. 1985).

In *MSFA,* the supreme court stated in *dictum* that it might not apply the *Superwood* rule in cases where, unlike the case it was then deciding, damage to an allegedly defective product resulted "from hazardous conditions or a sudden and calamitous occurrence," rather than gradual deterioration. 354 N.W.2d at 821. The court stated the rationale for this possible distinction:

> [T]ort law imposes a duty on manufacturers to produce safe products, regardless of whether the ultimate impact of the hazard is on people, other property, or the product itself. . . . Contract or warranty law, on the other hand, has been traditionally concerned with redress of a purchaser's disappointed expectations.

Id. (citations omitted). Since this language was merely *dictum,* the court did not elaborate on such a distinction's attendant questions: most obviously, the question of where to draw the line between deterioration and

a sudden and calamitous event.

In *S. J. Groves,* plaintiff argued that *Superwood* should not bar its causes of action in tort because the damage occurred in a sudden and calamitous event, a helicopter crash. The court, despite its *dictum* in *MSFA,* rejected plaintiff's argument, ruling that the damages plaintiff sought represented "recovery for the product's failure to live up to [plaintiff's] expectations as to its suitability, quality, and performance." The court stated that "damage - to the defective product itself - is not ordinarily recoverable in tort because a product's unsatisfactory performance is the type of problem that warranty law and the U.C.C. were designed to remedy." 374 N.W.2d at 434.

The court rejected plaintiff's proffered distinction between sudden and calamitous occurrences and damage resulting from deterioration or gradual breakdown because:

> "Calamitous" is a nebulous word, incapable of precise definition. Determining whether damage resulted from a "sudden and calamitous occurrence" as opposed to a "qualitative" defect is certain to present numerous problems. Use of such a distinction, moreover, is arbitrary. Almost every "calamitous" occurrence resulted from the type of internal breakage or gradual deterioration that could just as well have become a "qualitative" defect; often all that distinguishes the two is the time of occurrence, not the type of defect. For example, a serious defect in the engine of a plane is merely "qualitative" if it matures while the plane is on the ground but "catastrophic" if it matures while the plane is in the air. Nonetheless, the defect is the same and the losses stemming from it may be identical.

374 N.W.2d at 435. While *S.J. Groves* appeared to lay to rest the idea that whether recovery lies in tort or contract should depend on whether the occurrence was sudden and calamitous or gradual, the court appeared to revive it in the last paragraph of the decision:

> We do not by this decision, or the foregoing observations, wholly foreclose future consideration of the proposed distinction if presented in other, more compelling circumstances than presented in this case. It is sufficient for today's decision that [plaintiff] is a commercial entity possessing bargaining power substantially equal to that of the seller, clearly capable of negotiating a warranty against the damage the defective product caused to itself, whether or not considered as sudden and calamitous.

Id.

After *S.J. Groves,* whether a purchaser of a product may recover in tort for economic losses may depend on the relative bargaining power of the purchaser and the seller. Despite determining that the *Superwood* rule should be applied because recovery was sought "for the product's failure to live up to [plaintiff's] expectations," 374 N.W.2d at 434, the court examined the relative bargaining power of the plaintiff and the defendant:

> . . . [T]here are no policy reasons compelling us to allow additional recovery in tort. It is clear that this certified question comes to us in the context of a commercial plaintiff with economic bargaining power substantially equivalent to that of the seller.

374 N.W.2d at 434. Given this reasoning, recovery in tort may be allowed to a plaintiff who seems more deserving than the defendant – regardless of the logical reasons for limiting remedies to those prescribed by the U.C.C.

The result of *S.J. Groves* may be that economic loss cases will be decided on a case-by-case basis, rather than by a single rule which is capable of easy application. A determination of relative bargaining power is difficult, and the court has given no guidelines to be used in making such a determination.

Given the rationale for the *Superwood* rule – that tort law and the U.C.C. serve distinct purposes, and should not be permitted to pre-empt each other – there seems little reason why the rule should not be applied to all U.C.C. transactions, consumer as well as commercial. Before the advent of consumer protection legislation, there may have been a need for the application of tort theories to consumer economic losses. Now, however, in addition to the U.C.C. provisions which protect consumers, including those governing unconscionability, Minn. Stat. § 336.2-302, rescission, §§ 336.2-601 *et seq,* and warranties, §§ 336.2-313-318, the Minnesota legislature has enacted a plethora of consumer protection legislation. *See generally,* Minn. Stat. ch. 325F, 325G; Minn. Stat. §§ 325F.68 *et seq.* (Consumer Fraud Act); § 325F.665 ("Lemon Law"); §§ 325D.43 *et seq.* (Deceptive Trade Practices Act); §§ 325G.17 *et seq.* (Consumer Warranties). Where there is personal injury or damage to other property, consumers should be able to seek recovery in tort, but where the only damage is to the product itself, the same logic that requires the *Superwood* rule in commercial settings now extends to consumers.

VII. Creation of a Private Cause of Action Under the Consumer Product Safety Act

In 1972, Congress enacted the Consumer Product Safety Act, 15 U.S.C. §§ 2051 *et seq,* which authorized the formation of the Consumer Product Safety Commission. The Act requires importers, manufacturers and distributors of consumer products to report instances in which a product fails to comply with a safety rule or has a defect that could create a substantial product hazard. The Commission has issued interpretive rules setting forth the method for making such reports and its interpretation of when such reports are required. 16 C.F.R. part 1115. Civil or criminal penalties for violation of any provision of the Act may be assessed by the CPSC. Congress provided no private right of action for a violation of the CPSA.

There is, however, a private right of action for the violation of a *rule* promulgated by the CPSC. 15 U.S.C. § 2072(a). In *Swenson v. Emerson Electric Co.,* 374 N.W.2d 690 (Minn. 1985), the Minnesota Supreme Court held that Section 2072(a) allows a private plaintiff to sue even for violation of interpretive, rather than substantive, regulations of the CPSC. *See also Drake v. Lochinvar Water*

Heater, Inc., No. 3-83 CIV 663 (D. Minn., March 21, 1985), *pet. for rev. granted,* 85-8024 (8th Cir. May 24, 1985). While Congress did not provide a private right of action for failure to report to the CPSC, under the *Swenson* decision the CPSC's promulgation of interpretive rules explaining how to report does create such a right.

Swenson also held that state and federal courts have concurrent jurisdiction over private causes of action under the CPSA. Such a cause of action, said the court, is "simply another source of liability in addition to the typical claims which arise from injuries caused by consumer products: negligence, breach of warranty, and strict liability." 374 N.W.2d at 695. Under the language of the CPSA, a successful plaintiff can recover not only compensatory damages, but also attorney fees, expert witness fees, and, if state law allows, punitive damages. 15 U.S.C. § 2072(a); *Swenson,* 374 N.W.2d at 694.

A CPSA claim requires a plaintiff to prove that a possible product hazard existed, that the defendant knew of the possible hazard, that the defendant knowingly violated the CPSC rule requiring it to notify the CPSC, and that such violation caused plaintiff harm. As several courts have recognized, the last factor may be difficult to prove. In *Morris v. Coleco Industries,* 587 F. Supp. 8 (N.D. Va. 1984), in summarizing its reasons for finding that no private right of action existed for failure to report to the CPSC, the court stated that "it appears illogical . . . that Congress would have supposed that a failure to disclose a mishap to the Commission might proximately cause an injury." 587 F. Supp. at 9-10. The *Drake* court also recognized the causation problem:

> The court agrees with [defendant] that plaintiffs will have a difficult time proving that any failure to report was the proximate cause of plaintiffs' injury. Nevertheless, the court views the causation question as one that must be resolved on a full record.

Drake, slip op. at 8-9.

A plaintiff's burden of proving causation is made more difficult by the statutory framework under which the CPSC operates. In extreme cases, the CPSC can take immediate action. In normal cases, however, it is a long road between an initial report and a determination that a product does present a substantial hazard, and longer still until corrective action is taken. A plaintiff alleging that he or she was injured by a failure to report must prove not only that the defendant had a duty to report, but also that all intervening hurdles would have been cleared, that the CPSC would have found a defect, that the CPSC would have required corrective action, and that, if the corrective action had been taken, it would have been taken in time to prevent plaintiff's injury and would, in fact, have prevented it.

Even so, recognition of a private right of action under the CPSA will burden products liability defendants. The problem is not that plaintiffs will win many CPSA claims, but that the assertion of such claims provides a vehicle for a great amount of mischief. As noted above, assertion of a CPSA claim may allow a plaintiff access to federal court when he or she deems it to his or her advantage. A CPSA claim may also give a plaintiff an excuse to discover and introduce into evidence material which might otherwise be irrelevant and inadmissible. △

Background on Arbitrator's Affidavit

by Jerome R. Klukas
CASTOR, DITZLER, KLUKAS & SCHERER

Since about 1975, the Minnesota Legislature and the Minnesota courts have greatly expanded the scope and availability of uninsured (UM) and underinsured (UIM) automobile insurance benefits. Minn. Stat. Sec. 65B, which provides for and/or mandates these coverages, does not specify the manner in which disputes between the insured and insurer are to be resolved. Perceiving arbitration as an attractive alternative to litigation, the insurance industry began incorporating various forms of arbitration provisions as the exclusive method for resolving disputes. Because arbitration facilitates the resolution of disputes by speedy,

JEROME R. KLUKAS has recently resigned as Chairman of the Arbitration Committee for MDLA. He is a 1967 graduate of the University of Minnesota Law School and a partner in the firm of Castor, Ditzler, Klukas and Scherer.