TORTS—PRODUCTS LIABILITY—THE MANUFACTURER IS RESPONSIBLE FOR INSTALLING "FEASIBLE" SAFETY DEVICES ON UNREASONABLY DANGEROUS MACHINERY—*Bexiga v. Havir Manufacturing Corp.*, 60 N.J. 402, 290 A.2d 281 (1972); *Finnegan v. Havir Manufacturing Corp.*, 60 N.J. 413, 290 A.2d 286 (1972).

John Bexiga, Jr., a high school student employed part-time in a machine shop, was severely injured when he inadvertently activated a ten-ton industrial punchpress while his hand was beneath the ram.[1] The machine had been purchased by the Regina Corporation, his employer, from Havir Manufacturing Corporation, the defendant. When the machine left the control of the manufacturer, it had no safety devices incorporated within it except for a guard covering the flywheel. In particular, there was no safety device to protect the hands of the operator from the descent of the ram.[2]

In an action against the manufacturer based on negligence, strict liability, and breach of warranty, the plaintiff alleged that the exposed ram was so dangerous that the manufacturer was under a duty to equip it with some form of safety device to protect the operator.[3]

The appellate division affirmed the trial court's grant of an involuntary dismissal at the close of plaintiff's case and held that when statute[4] and industry custom place the burden of installing a safety device on the employer, the manufacturer has no duty to install such a device. Therefore, it concluded as a matter of law that the absence of the safety device cannot be regarded as a defect for which the manufacturer can be held liable.[5]

In the companion case of *Finnegan v. Havir Manufacturing Corp.*,[6] decided on the same day as *Bexiga*, an additional factor was that the purchaser of the press had modified the activating mechanism.[7] At the trial, the jury returned a verdict for the plaintiff, but the court granted the defendant's motion for judgment n.o.v.[8] The court held that the modification of the activating mechanism was "substantial"

1 Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 404, 290 A.2d 281, 282 (1972).

2 *Id.* at 404-05, 290 A.2d at 282.

3 *Id.*

4 Law of February 26, 1912, ch. 6, § 1, [1912] N.J. Laws 21.

5 Bexiga v. Havir Mfg. Corp., 114 N.J. Super. 397, 404, 276 A.2d 590, 593 (App. Div. 1971). The court further held that since the condition complained of was patent and obvious the manufacturer had no duty to warn either of the danger of the descending ram, or of the obvious absence of safety guards. *Id.* at 406, 276 A.2d at 595.

6 60 N.J. 413, 290 A.2d 286 (1972).

7 *Id.* at 417-19, 290 A.2d at 289.

8 *Id.* at 415, 290 A.2d at 288.

and that, as a matter of law, the manufacturer could not be held liable for Finnegan's injury.[9] The trial court's reasoning was substantially the same as the appellate division's in *Bexiga*.[10]

The Supreme Court of New Jersey, in reversing and remanding *Bexiga* and in reinstating the jury verdict in *Finnegan*,[11] held:

> Where a manufacturer places into the channels of trade a finished product which can be put to use and which should be provided with safety devices because without such it creates an unreasonable risk of harm, and where such safety devices can feasibly be installed by the manufacturer, the fact that he expects that someone else will install such devices should not immunize him.[12]

The court further held that the jury may infer from the lack of a safety device that the machine was defective in design, unless such a device would render the machine unusable for its intended purpose.[13] In response to defendant's argument that both statute and custom of trade placed upon the employer the duty of installing safety devices, the court held such factors as evidential only as bearing on the foreseeability that the employer would not install the device. These factors may, therefore, only create in the employer and the manufacturer an identical duty to protect the operator from injury.[14] Finally, the court held that the defense of contributory negligence could not be raised by the defendant since considerations of policy and justice otherwise dictated.[15] The cause of action alleging breach of warranty was dropped by the supreme court sub silentio.

Plaintiffs' recovery for injuries in products liability actions may be traced to *MacPherson v. Buick Motor Co.*[16] The plaintiff was in-

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9 *Id.* at 420, 290 A.2d at 291. The trial court cited with approval the RESTATEMENT (SECOND) OF TORTS § 402 A (1965) which provides in part:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if . . .
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> . . . .
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

10 *Compare Bexiga*, 114 N.J. Super. at 403-04, 276 A.2d at 593 *with Finnegan*, 60 N.J. at 420, 290 A.2d at 290.

11 *Bexiga*, 60 N.J. at 412, 290 A.2d at 286; *Finnegan*, 60 N.J. at 424, 290 A.2d at 293.

12 *Bexiga*, 60 N.J. at 410, 290 A.2d at 285; *Finnegan*, 60 N.J. at 423, 290 A.2d at 292.

13 *Bexiga*, 60 N.J. at 411, 290 A.2d at 285; *Finnegan*, 60 N.J. at 421, 290 A.2d at 292. In the *Bexiga* decision, the appellate division found that "[o]bviously, it would have been impracticable to install a safety device that would be adapted to all uses." 114 N.J. Super. at 406, 276 A.2d at 594 (App. Div. 1971). The supreme court apparently did not agree that such a finding was "obvious" based on the testimony of plaintiff's expert.

14 *Bexiga*, 60 N.J. at 411, 290 A.2d at 285; *Finnegan*, 60 N.J. at 422, 290 A.2d at 291.

15 *Bexiga*, 60 N.J. at 412, 290 A.2d at 286; *Finnegan*, 60 N.J. at 424, 290 A.2d at 292.

16 217 N.Y. 382, 111 N.E. 1050 (1916).

jured in an auto accident caused by the negligent construction of a wheel which the manufacturer installed on an automobile.[17] Recovery was permitted notwithstanding the fact that there was no privity of contract between the parties.[18] The court held that the manufacturer's duty of care extended to *all* who might foreseeably use the product, and that this duty was breached by a failure to inspect the defective wheel before installing it. Prior to *MacPherson*, the duty of care generally extended only to those in privity with the manufacturer.[19]

Following *MacPherson*, contract and tort theories still existed relatively independent of one another until Justice Francis' decision in *Henningsen v. Bloomfield Motors, Inc.*,[20] where contract and tort theories were merged, and the most appropriate principles of each were utilized to justify recovery for the injured plaintiff. The court first noted that warranty is a "curious hybrid of tort and contract" and then, relying on this historical background, had no trouble in finding the injured driver of the vehicle within the reasonable contemplation of the parties to the warranty.[21] It then based recovery on contract theories by finding a breach of implied warranties.[22]

In recognizing that liability in certain products liability cases was imposed by law and not by the express terms of the contract negotiated between the buyer and seller, courts soon found it advisable to no longer rely solely on warranty theories to justify recovery. Instead of continually stretching and contorting these older theories, they began to apply the concept of strict liability in tort to all injuries caused by defective products.[23] Strict liability was applied, regardless of whether the manufacturer was negligent, whenever he placed an unreasonably dangerous product on the market which caused injury to the ultimate user.[24]

The first reported case to impose "strict liability in tort" in a products liability case was *Greenman v. Yuba Power Products, Inc.*[25]

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17 *Id.* at 385, 111 N.E. at 1051.

18 *Id.* at 393, 111 N.E. at 1054.

19 *Id.* at 389-93, 111 N.E. at 1051-54.

20 32 N.J. 358, 161 A.2d 69 (1960).

21 *Id.* at 414, 161 A.2d at 100 (quoting from W. PROSSER, LAW OF TORTS § 83, at 493 (2d ed. 1955)).

22 *Id.* at 384, 161 A.2d at 84.

23 Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963).

24 RESTATEMENT (SECOND) OF TORTS § 402 A (1965). *See also* Lambert, *Justice Francis and Products Liability Law*, 24 RUTGERS L. REV. 426 (1970).

25 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). *See* Noel, *Strict Liability of Manufacturers*, 50 A.B.A.J. 446, 447 (1964).

In *Greenman* the plaintiff was injured while operating a combination power tool in the manner prescribed by the manufacturer. The injury occurred because the manufacturer had incorporated within the tool inadequate set screws. Because of this defect, a piece of wood was ejected from the tool and struck the plaintiff's head, injuring him severely.[26]

In affirming the trial court's decision in favor of the plaintiff, the California Supreme Court abandoned sole reliance on either contract or negligence theories and held:

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.[27]

The *Greenman* rationale was soon adopted by the New York Court of Appeals in *Goldberg v. Kollsman Instrument Corp.*[28] *Goldberg* involved the malfunctioning of an aircraft altimeter manufactured by the defendant and supplied by it to the Lockheed Aircraft Corp., which incorporated the faulty device in a commercial airliner which was subsequently sold to American Airlines. Lockheed was found liable notwithstanding the fact that it had not manufactured the defective altimeter, but had only installed it in an airplane which it assembled and sold as a finished product.[29] The lack of privity between the deceased and Lockheed also did not bar recovery. The court held:

> A breach of warranty, it is now clear, is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong suable by a noncontracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer.[30]

In *Santor v. A & M Karagheusian, Inc.*,[31] New Jersey recognized the strict liability doctrine and expanded it to include cases where the injury was entirely economic.[32] To recover, the plaintiff need not show proof of the manufacturer's negligence in making or handling the injury causing article. All that need be proved is that

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26 59 Cal. 2d at 60, 377 P.2d at 898-99, 27 Cal. Rptr. at 698-99.

27 *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

28 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963).

29 *Id.* at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595.

30 *Id.* at 436, 191 N.E.2d at 82, 240 N.Y.S.2d at 594.

31 44 N.J. 52, 207 A.2d 305 (1965).

32 *Id.* at 63, 207 A.2d at 311. For a more detailed discussion of *Santor*, see Note, *Privity Eliminated as a Requirement in Loss-of-Bargain Products Liability Cases—The Effects of Santor*, 19 RUTGERS L. REV. 715 (1965). *See generally* Noel, *supra* note 25.

> the article is defective, *i.e.*, not reasonably fit for the ordinary purposes for which such articles are sold and used, and the defect arose out of the design or manufacture or while the article was in the control of the manufacturer, and it proximately causes injury or damage to the ultimate purchaser or reasonably expected consumer . . . .[33]

As is clear from the language of Justice Francis in *Santor*, the plaintiff is obligated to prove a defect in the article causing him injury.

Product defects are generally grouped into two major categories: manufacturing defects and design defects.[34] A manufacturing defect is one which is present in a particular article due to an error in the assembling process or due to the incorporation of defective materials within the article. A design defect is one which is present in all similar items produced by the manufacturer because the "product as a whole—as distinguished from a particular item carelessly made—is so designed as to create an unreasonable danger."[35] Since proving that the product was defective before it left the control of the manufacturer is a major obstacle to recovery, many plaintiffs have elected to present their cases based on the design defect theory. If such a defect can be proven, it becomes unnecessary to offer separate proof that the product was defective when it left the manufacturer's control. Since the product was defective at conception, it had to be defective when control was relinquished to the user.

Of significance in *Bexiga* and *Finnegan* was the fact that the court reaffirmed its policy of requiring the plaintiff to prove less than the criteria established by § 402 A of the *Restatement (Second) of Torts* in order to establish a prima facie case in a products liability suit.[36]

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33 44 N.J. at 66-67, 207 A.2d at 313.

34 For a discussion of the difficulties involved in differentiating between these two concepts, see Comment, *Strict Liability in Tort Based on Defective Design*, 1970 WASH. U.L.Q. 359 n.1.

35 Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 816 (1962).

36 *Bexiga*, 60 N.J. at 410, 290 A.2d at 285; *Finnegan*, 60 N.J. at 432, 290 A.2d at 292. *Compare* criteria set by Justice Francis in his decision of Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 66-67, 207 A.2d 305, 313 (1965), discussed *supra* p. 400, *with* RESTATEMENT (SECOND) OF TORTS § 402 A (1965), *supra* note 9.

There is some conflict among the authorities as to whether a product must be found both "unreasonably dangerous" *and* "defective" to permit plaintiff's recovery in strict liability. In *Santor*, no mention of unreasonable danger was made by Justice Francis when he set forth the strict liability doctrine for the first time in New Jersey. In Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965), the court did mention "unreasonably dangerous," but only as a rebuttal to Levitt's argument that manufacturers would become virtual insurers of the general public. *Id.* at 92, 207 A.2d at 326. Newmark v. Gimbel's Inc., 54 N.J. 585, 258 A.2d 697 (1969), also involved a strict products liability action and again the

Well before the *Bexiga* and *Finnegan* decisions, failure to install a practical safety device had been held sufficient to expose a manufacturer to liability. In *Feir* v. *Wiel*[37] and *Dix* v. *Union Ice Co.*,[38] the court held that it was a jury question whether it was feasible to place a safety device on a particular machine. The court noted that such devices should be used whenever practicable.[39] The basic rule set forth in these early negligence cases is still accepted in the field of products liability. A manufacturer or vendor has a duty to avoid an unreasonable risk of harm to the user of his product when the product may be made reasonably safe by the installation of safety devices.[40]

Likewise, various attempts by manufacturers to delegate responsibility (and thereby, liability) have been struck down by the New Jersey Supreme Court. In *Schipper v. Levitt & Sons, Inc.*,[41] an infant was scalded because the builder of a home failed to install a necessary mixing valve in the water heating unit, which consequently caused excessively hot water to be discharged from the bathroom faucet.[42] York, the manufacturer of the heating unit, was held not liable in strict liability and negligence, but only because Levitt, the builder of the home, was the party who designed, assembled, and installed the system. No one relied on York's judgment or skill in connection with the overall design of the system or its installation. Had there been such reliance, the court implied that York might have been liable whether or not it had entrusted Levitt with the installation.[43]

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court only required proof of a defective article causing injury to the plaintiff. Proof of unreasonable danger was not required of plaintiff. *Id.* at 601, 258 A.2d at 705.

The RESTATEMENT (SECOND) OF TORTS § 402 A requires the product to be "in a defective condition unreasonably dangerous to the user or consumer" to justify recovery in strict liability. The New Jersey Supreme Court seems to have placed an "or" between "defective condition" and "unreasonably dangerous" where one does not exist in the original text. For a view contrary to New Jersey's, see Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965) where the author states that a design is defective "only because it made the product unreasonably dangerous." *Id.* at 15.

37 92 N.J.L. 610, 106 A. 402 (Ct. Err. & App. 1919). In finding an employer negligent for not supplying a guard on a machine which resulted in serious injury to a minor employed in violation of statute, the court left it to the jury to determine whether it was practicable to cover the whole machine and still operate it. *Id.* at 615, 106 A. at 404.

38 76 N.J.L. 178, 68 A. 1101 (Sup. Ct. 1908), where an employee fell into a hot water vat which was not guarded as required by the Law of March 24, 1904, ch. 64, § 13, [1904] N.J. Laws 156 (now N.J. STAT. ANN. § 34:6A-3 (Supp. 1972-73)). The court held it a jury question as to whether guarding the vat was practicable. 76 N.J.L. at 180, 68 A. at 1102.

39 92 N.J.L. at 615, 106 A. at 404; 76 N.J.L. at 181, 68 A. at 1102.

40 *Bexiga*, 60 N.J. at 410, 290 A.2d at 285; *Finnegan*, 60 N.J. at 423, 290 A.2d at 292.

41 44 N.J. 70, 207 A.2d 314 (1965).

42 *Id.* at 76, 207 A.2d at 317.

43 *Id.* at 98-99, 207 A.2d at 329-30.

In the recent case of *Sabloff v. Yamaha Motor Co.*,[44] the plaintiff was severely injured because of a malfunctioning of his motorcycle. The motorcycle had been shipped by Yamaha to an authorized dealer in an unassembled but presumably non-defective condition. There was expert testimony to the effect that the dealer may have improperly tightened a nut on the front axle bolt, causing excessive "side play" of the front wheel. This "side play" locked the front wheel, causing Sabloff to lose control of the motorcycle and strike a parked car.[45] The court held that Yamaha could be found liable notwithstanding the fact that the defect was caused by the independent agency of the authorized dealer. It stated:

> A manufacturer should not escape responsibility for breach of its warranty of fitness for purpose, when the breach is caused by an act of improper assembly—the assembly having been entrusted by the manufacturer to an authorized dealer, rather than to some employee of the manufacturer.[46]

Therefore, the *Bexiga* and *Finnegan* decisions were not radical changes in New Jersey law, but were part of an evolutionary process by which a manufacturer's duty to his consuming public became more clearly defined. If a manufacturer places into the channels of trade a product which may be used by the purchaser in its tendered condition, and if that article could have been feasibly and properly fitted with a safety device that would have prevented it from being unreasonably dangerous, the fact that the manufacturer expected someone else to install the device will not protect him from liability.[47]

The court found that while the conduct of a third party which actively increased the risk of danger from a potentially dangerous design might insulate the manufacturer from liability, the failure of a third party to provide additional safeguards beyond those incorporated in the product by the manufacturer will not have such an insulating effect. In contrast to the position taken by the *Restatement*,[48] the court

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44 113 N.J. Super. 279, 273 A.2d 606 (App. Div.), *aff'd*, 59 N.J. 365, 283 A.2d 321 (1971).

45 *Id.* at 283, 273 A.2d at 608.

46 *Id.* at 289, 273 A.2d at 611. This holding was based on Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964), which supports the view that a manufacturer of a dangerously defective product cannot delegate the responsibility of remedying the defect. 113 N.J. Super. at 290, 273 A.2d at 611.

47 *Bexiga*, 60 N.J. at 410, 290 A.2d at 285; *Finnegan*, 60 N.J. at 423, 290 A.2d at 292.

48 RESTATEMENT (SECOND) OF TORTS § 402 A, comment *p* at 357 (1965) provides in part:

> *Further processing or substantial change.* . . . [T]he Institute has refrained from taking any position as to the possible liability of the seller where the product is expected to, and does, undergo further processing or other substantial

held that it was immaterial that the manufacturer expected and relied upon another party to render the already usable but dangerous instrumentality safe for its intended purpose.[49] Thus, public policy dictates that the manufacturer cannot delegate such a critical phase of the manufacturing process.

On the issue of negligence, the court held that the question of whether it was reasonably forseeable that the purchaser of such a press would not install the safety device should be left to the jury.[50]

A trade custom is not dispositive of the question of duty. In *Shafer v. H.B. Thomas Co.*,[51] the plaintiff was injured by an improperly installed swinging glass door. The defendant maintained that the doors had been installed in accordance with accepted industry standards.[52] The court held that "conformance with standards of construction or custom of itself is never conclusive as to the absence of negligence; it is, at most, merely evidential."[53] The court cited with approval Justice Holmes' words in *Texas & Pacific Railway Co. v. Behymer*:[54]

> What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.[55]

In *Wellenheider v. Rader*,[56] a factory worker was injured by a fixture falling from a ceiling in the room where he was working. He sued both the contractor and a subcontractor who had been hired to resurface the ceiling.[57] At trial, the contractor contended that it was industry custom for the man who was actually to do the job, namely the subcontractor, to inspect the ceiling in order to determine whether the resurfacing could be done safely.[58] The New Jersey Supreme Court found the evidence sufficient to present a jury question as to the negligence of both defendants, holding that

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change after it leaves his hands and before it reaches those of the ultimate user or consumer.

. . . The question is essentially one of whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes. No doubt there will be some situations, and some defects, as to which the responsibility will be shifted, and others in which it will not.

49 *Bexiga*, 60 N.J. at 410, 290 A.2d at 285; *Finnegan*, 60 N.J. at 423, 290 A.2d at 292.

50 *Bexiga*, 60 N.J. at 411, 290 A.2d at 285-86; *Finnegan*, 60 N.J. at 422-23, 290 A.2d at 291-92.

51 53 N.J. Super. 19, 146 A.2d 483 (App. Div. 1958).

52 *Id.* at 22, 146 A.2d at 485.

53 *Id.* at 22-23, 146 A.2d at 485.

54 189 U.S. 468 (1903).

55 53 N.J. Super. at 23, 146 A.2d at 485 (quoting from 189 U.S. at 470).

56 49 N.J. 1, 227 A.2d 329 (1967).

57 *Id.* at 6, 227 A.2d at 331.

58 *Id.*

> proof of an industry custom is not dispositive of the question of duty. The standard of conduct is reasonable care, that care which a prudent man would take in the circumstances.[59]

The court further added:

> The jury, by using its own "common knowledge and ordinary judgment" to evaluate the circumstances, could have concluded that regardless of industry custom the exercise of reasonable care required the subcontractor . . . to make its own inspection . . . .[60]

If an industry were permitted to set its own standards as to reasonable conduct, an entire industry could subscribe to careless methods to save time, effort, or money.[61] Juries should be granted sufficient latitude in such situations to find a self-serving industry custom unsatisfactory when they find that such practice may permit an individual to become exposed to unreasonable danger.[62]

The fact that a statute requires an employer to install protective devices on machinery does not mean the manufacturer may not have a concurrent duty.[63] In *Hardman v. Ford Motor Co.*,[64] an employee of an electrical subcontractor was injured when a makeshift ladder supplied by the contractor slipped on a recently waxed floor.[65] After an adverse judgment had been rendered, the contractor appealed.[66] He urged, *inter alia*, that the trial court erred in admitting into evidence statutes pertaining to the use of ladders on construction sites.[67] One of these statutes placed the responsibility for providing such ladders upon the "person in charge" of the construction.[68] In his charge to the jury, the judge instructed that violation of the statute could be evidential as to the contractor's negligence.[69] On appeal it was held that such evidence was admissible and the charge proper. If the jury found the statute had been violated, it could consider the infraction in its

59 *Id.* at 7, 227 A.2d at 332.

60 *Id.* at 8, 227 A.2d at 332.

61 *Id.* at 7, 227 A.2d at 332 (citing W. PROSSER, LAW OF TORTS § 33, at 170 (3d ed. 1961).

62 *See* Buccafusco v. Public Serv. Elec. & Gas Co., 49 N.J. Super. 385, 394, 140 A.2d 79, 84 (App. Div. 1958) (maintenance of high tension wires); W. PROSSER, LAW OF TORTS § 33 (4th ed. 1971). *Cf.* Adams v. Atlantic City Elec. Co., 120 N.J.L. 357, 199 A. 27 (Ct. Err. & App. 1938) (use of circuit breakers).

63 *See* W. PROSSER, *supra* note 62, at § 33.

64 70 N.J. Super. 275, 175 A.2d 455 (App. Div. 1961).

65 *Id.* at 279, 175 A.2d at 458.

66 *Id.* at 280, 175 A.2d at 458.

67 Law of April 18, 1930, ch. 185, art. XVIII, §§ 1, 4 and art. XXVIII, § 3, [1930] N.J. Laws 659, 667 (repealed 1953).

68 Law of April 18, 1930, ch. 185, art. XXVIII, § 3, [1930] N.J. Laws 667 (repealed 1953).

69 70 N.J. Super. at 291, 175 A.2d at 464.

determination of the presence of negligence.[70] It is clear, therefore, that *Hardman* expresses the view that violation of a statute is only evidence of negligence which the jury may accept or reject as it sees fit.[71]

The *Bexiga* court, in applying this rule of law, found that a statute[72] placing the responsibility for providing guards on machinery upon the employer was not dispositive of the issue of negligence as applied to the manufacturer.[73]

The fact that an employer has been negligent in not furnishing a safety device does not preclude the finding that the manufacturer was concurrently negligent.[74] *Rhodes v. Service Machine Co.*[75] was factually similar to *Bexiga* and *Finnegan*, but was decided solely on the negligence theory. The federal court and the New Jersey Supreme Court were in agreement as to the law. Both left it to the jury to decide whether it was forseeable that the purchaser would not provide a protective guard for the press.[76] If it were forseeable, and if the guard's absence were a source of danger, then the manufacturer and the purchaser could be found concurrently negligent for any injuries resulting from its absence.[77]

In *Bexiga* and *Finnegan* the court held that in a products liability

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70 *Id.* at 292, 175 A.2d at 464.

71 W. PROSSER, *supra* note 62, at § 36. However, certain New Jersey statutes impose absolute liability for violations. For example, N.J. STAT. ANN. § 6:2-7 (1959) imposes absolute liability upon owners for ground damage caused by their aircraft. *See* Adler's Quality Bakery, Inc. v. Gaseteria, Inc., 32 N.J. 55, 159 A.2d 97 (1960).

72 Law of February 26, 1912, ch. 6, § 1, [1912] N.J. Laws 21 (repealed 1965), which was in effect at the time of the sale provided in part:

> The owner or person in charge of any of the places coming under the provisions of this act, where machinery is used, shall provide . . . [that] all . . . power presses . . . shall be properly guarded . . . .

The foregoing statute, a section of the New Jersey Factory Safety Act, was superseded by N.J. STAT. ANN. § 34:6A-3 (Supp. 1972-73) which unequivocally places the burden of installing protective devices where "a substantial risk of physical injury is inherent" on the employer.

73 *Bexiga*, 60 N.J. at 411, 290 A.2d at 285-86; *Finnegan*, 60 N.J. at 422-23, 290 A.2d at 291-92.

74 *See* Menth v. Breeze Corp., 4 N.J. 428, 441-42, 73 A.2d 183, 189 (1950), where the court held:

> One who negligently creates a dangerous condition cannot escape liability for the natural and probable consequences thereof although the act of a third person may have contributed to the final result.

*See also* Rappaport v. Nichols, 31 N.J. 188, 204-05, 156 A.2d 1, 10 (1959); Ristan v. Frantzen, 14 N.J. 455, 102 A.2d 614 (1954).

75 329 F. Supp. 367 (E.D. Ark. 1971).

76 *Id.* at 377; *Bexiga*, 60 N.J. at 411, 290 A.2d at 286; *Finnegan*, 60 N.J. at 422, 290 A.2d at 291.

77 *Bexiga*, 60 N.J. at 412, 290 A.2d at 286; *Finnegan*, 60 N.J. at 424, 290 A.2d at 292.

case contributory negligence is a viable defense to an action sounding in negligence or strict liability except when considerations of justice and policy otherwise dictate.[78] The contours of such policy were not discussed in either case, but the difficulty in ascertaining when such a defense will be viable lies in determining exactly what type of contributory negligence the plaintiff has committed.

In products liability cases, there are three types of plaintiff's conduct which may contribute to the injury so as to bar recovery. Each constitutes a form of contributory negligence. The first is negligent failure to discover an obviously or patently defective condition; this may be denominated "true" contributory negligence.[79] The second is use of the product after discovery of the defect; this may be called "assumption of the risk."[80] The third type is use of the product in a manner that could not reasonably have been foreseen by the manufacturer; this may be referred to as "misuse" of the product.[81] Of these three types of plaintiff's conduct, the third (misuse) and the second (assumption of the risk) are normally viable defenses to products liability suits.[82] The first type of plaintiff's conduct (true contributory negligence) is normally a defense to a products liability action sounding in negligence, but not to one sounding in strict liability.[83]

Contributory negligence has been made unavailable as a defense

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78 The RESTATEMENT definition of contributory negligence is as follows:

> Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm.

RESTATEMENT (SECOND) OF TORTS § 463 (1965).

79 *See, e.g.*, Martin v. Bengue, Inc., 25 N.J. 359, 136 A.2d 626 (1957) (vapor igniting due to smoking after applying cold ointment on chest); Brockett v. Harrell Bros., 206 Va. 457, 143 S.E.2d 897 (1965) (tooth broken due to biting in ham wherein buckshot was lodged).

80 *See, e.g.*, Barefield v. LaSalle Coca-Cola Bottling Co., 370 Mich. 1, 120 N.W.2d 786 (1963) (drinking soda after plaintiff should have discovered glass in bottle); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965) (operating truck in which driver knew brakes might be defective); Fredendall v. Abraham & Straus, Inc., 279 N.Y. 146, 18 N.E.2d 11 (1938) (use of cleaning agent in close quarters after reading label warning of such use); *cf.* Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959) (distinguishes contributory negligence from assumption of the risk).

81 *See, e.g.*, Dallison v. Sears, Roebuck & Co., 313 F.2d 343 (10th Cir. 1962) (smoking in bed); Gardner v. Coca-Cola Bottling Co., 267 Minn. 505, 127 N.W.2d 557 (1964) (improperly opening bottle); Maiorino v. Weco Products Co., 45 N.J. 570, 214 A.2d 18 (1965) (improperly opening glass container for new toothbrush).

82 Comment, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267, 270, 284. *See also* Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 105 (1972).

83 *Bexiga*, 60 N.J. 402, 290 A.2d 281 (1972); *Finnegan*, 60 N.J. 413, 290 A.2d 286 (1972); RESTATEMENT (SECOND) OF TORTS § 483, comment *c* at 539 (1965).

in products liability actions sounding both in negligence and strict liability when: (1) plaintiff's conduct was the specific eventuality against which defendant had a duty to guard;[84] (2) the plaintiff, although conscious of a danger, was unaware of its severity or the existence of a safety device to reduce or alleviate it;[85] (3) the plaintiff knowingly exposed himself to danger, but such exposure was neither voluntary nor unreasonable.[86]

*Bexiga* and *Finnegan*, therefore, have extended the responsibility of a machine manufacturer to the point where he must provide safety devices whenever practicable. He is no longer permitted to rely on another to complete such an important phase of the manufacturing process. This decision is in accord with, and advances the rationale for strict liability, *i.e.*, that of imposing upon the manufacturer an "enterprise liability." As explained by Justice Francis in *Santor*:

> The purpose of such liability is to insure that the cost of injuries or damage, either to the goods sold or to other property, resulting from defective products, is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves.[87]

Placing this burden on the manufacturer shifts the responsibility to the party with the most expertise regarding the product and its characteristics. He in turn can spread the cost of protection among all of his consumers. When the manufacturer alleges that it is not feasible to install such safety devices, the practicability of such installation will be a jury question. This decision will also permit a greater number of third-party claims by injured workmen, when previously their only recourse had been a workman's compensation claim against their employer.[88]

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[84] Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972); Finnegan v. Havir Mfg. Corp., 60 N.J. 413, 290 A.2d 286 (1972); RESTATEMENT (SECOND) OF TORTS § 483, comment *c*, at 539 (1965).

[85] Rhoads v. Service Machine Co., 329 F. Supp. 367, 374-75 (E.D. Ark. 1971) (machine operator might not be aware of available safety device).

[86] Brown v. Quick Mix Co., 75 Wash. 2d 833, 836, 454 P.2d 205, 208 (1969) (workman's job required him to operate an earth-boring drill not equipped with proper safety gear).

[87] 44 N.J. at 65, 207 A.2d at 312.

[88] N.J. STAT. ANN. § 34:15-8 (1959) limits an employee's right to recover damages from his employer for a work-related injury according to a statutory schedule. However, N.J. STAT. ANN. § 34:15-40 (1959) makes it clear that no such limits apply if a third party is found liable to the employee for the injury.