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quences, whereby the plaintiff's financial resources were decreased and his costs of living were increased. Other lesser courts have moved in the same direction. For instance, on very similar facts when dehydrating pills were negligently substituted for birth control pills, a Washington superior court allowed the jury to consider the mother's medical expenses and the aggravation of a pre-existing varicose veins condition. However, the court refused to consider the pain and suffering of a normal pregnancy as compensable. Also, a recent decision in Los Angeles County Superior Court concerning the substitution of sleeping pills for birth control pills by the negligent pharmacist resulted in a 42,000 dollar recovery for the parents.

As the number of women who use chemical contraceptives increases, more courts will be faced with reconsidering the strict benefits rule. The flexible rule of Troppi—allowing the jury to weigh all of the claimed benefits against the economic burdens of an unwanted child in each case—is the better reasoned approach in reconciling traditional concepts of tort liability and the changing ethos of the American family. Decisions like Troppi provide the courts with an opportunity to narrow the gap between dated judicial standards and modern sociological trends.

THOMAS JOSEPH FARRIS

Torts—Product Liability—Circumstantial Evidence and Proof of Defect

Since the landmark decision of Henningsen v. Bloomfield Motors, Inc., the doctrine of strict liability in tort as a protection for consumers injured by a defective product has met with wide acceptance. The courts have re-examined their traditional rationale for product liability and have decided that the consumer is entitled to maximum protection at the expense of those who market the products. Relying on this premise,

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3RESTATEMENT (SECOND) OF TORTS § 402A, comment e at 350 (1964).
many courts have abandoned a negligence analysis and have imposed liability without fault on those who place a defective product in the hands of a consumer who is injured because of the defect.\footnote{Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967).}

The doctrine of strict liability for a seller of a defective product is set out in Restatement (Second) of Torts section 402A\footnote{Restatement (Second) of Torts § 402A (1964).} as follows:

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 his property, if
   a. the seller is engaged in the business of selling such a product, and
   b. it is expected to and does reach the consumer without substantial change in the condition in which it is sold.

2. This rule stated in Subsection (1) applies although
   a. the seller has exercised all possible care in the preparation and sale of his product, and
   b. the user or consumer has not bought the product from or entered into any contractual relationship with the seller.

Pennsylvania has adopted section 402A\footnote{Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966).} and in a recent case, \textit{McCann v. Atlas Supply Co.}\footnote{325 F. Supp. 701 (W.D. Pa. 1971).} a United States District Court sitting in that state imposed strict liability upon a distributor of automobile tires. In anticipation of a vacation trip, the plaintiff had purchased two new tires from the defendant distributor and at the time of the accident had driven on them less than two thousand miles.\footnote{\textit{Id.} at 702.} The plaintiff was pulling a trailer at a speed of fifty to fifty-five miles per hour when he heard a hissing sound like “air escaping.” The car fishtailed, the trailer jacknifed, and the car overturned. The plaintiff jumped from his car and noticed that the left rear tire of the automobile was badly mutilated and was smoking. Shortly thereafter the tire burst into flames; the fire destroyed the tire and, after spreading, severely damaged the car and its contents.\footnote{\textit{Id.} at 703.} At the trial the plaintiff testified that before the fire had started, he had heard a hissing sound from butane storage tanks on the trailer and had immediately turned them off.\footnote{\textit{Id.} at 702-03.} He did not believe that
enough gas had escaped to cause the fire. The testimony disclosed nothing unusual that might have caused damage to the tire. The trip was on paved roads, the trailer was handled properly, and the brakes were operated in approved fashion.

The plaintiff sought recovery under section 402A, contending that the sudden loss of air from the tire was a malfunction of the product and thus evidence of a defect. Because the tire was totally destroyed, the plaintiff relied solely on circumstantial evidence to meet the proof-of-defect requirement of section 402A.

The court, sitting without a jury, found for the plaintiff. It based its decision on a number of Pennsylvania cases which had held that the occurrence of a malfunction alone may be circumstantial evidence of a defect and hence, under section 402A, sufficient to carry the case to a jury. The defendant argued that the tire could have been damaged as a result of striking objects in the road. The court admitted this possibility but stated that the plaintiff was not required to exclude every possible source of sudden deflation other than a defect in the tire itself.11

The plaintiff in McCann relied upon circumstantial evidence just as plaintiffs have usually done to prove fault in negligence cases.12 Negligence like any other fact may be proved by circumstantial evidence.13 In a negligence action against a manufacturer or distributor of a defective product, direct evidence of negligence will often be absent because the plaintiff lacks access to the manufacturing or inspection processes. In such a case the plaintiff must use circumstantial evidence to raise the inference of the defendant's lack of due care and to prove various ingredients of his prima facie case.14 The plaintiff may also depend upon circumstantial evidence to prove proximate cause,15 freedom from con-

11Id.
13Forrester v. Fischbach-Moore, Inc., 178 N.W.2d 258 (N.D. 1970); Consalvo v. Grosso, 35 App. Div. 2d 791, 315 N.Y.S.2d 195 (1970). PROSSER § 39, at 212 states, "Circumstantial evidence consists of one fact, or set of facts, from which the fact to be determined may reasonably be inferred. It involves . . . a process of reasoning, or inference, by which a conclusion is drawn." Examples of a plaintiff's circumstantial evidence are the physical results of an automobile collision to raise the inference that the defendant was negligent and the fact that defendant's train passed moments before a prairie fire broke out to raise the inference that defendant's train started the fire. St. Joseph's Bank & Trust Co. v. Putman, ____ Ind. App. _____, 252 N.E.2d 601 (1969); St. Louis & S.F.R.R. v. Shannon, 25 Okla. 754, 108 P.401 (1910).
tributory negligence. and other important facts of the case.

Though under section 402A a plaintiff does not have to prove negligence, he must still prove that the manufacturer, seller, or distributor placed a defective product in his hands and that he was injured by that product. When direct proof is lacking, the plaintiff must rely upon circumstantial evidence to prove the existence of a defect in the product. During the fairly short life of strict product liability, plaintiffs have established distinct patterns in their use of circumstantial evidence to prove their prima facie case of a defective product. There have emerged from the cases five distinct categories of circumstantial evidence that, used in combination with each other or in combination with direct evidence, can raise the necessary inferences required by section 402A to get the plaintiff to the jury.

The first of these types of evidence is expert opinion that the product was defective. Such an opinion may raise an inference that a product was defective despite the absence of any direct proof of a specific defect. In Elmore v. American Motors Corp., the plaintiff introduced no direct evidence of a defective drive shaft on an American Motors automobile but relied instead on the opinion of an expert who had examined the automobile and who testified that the cause of the drive shaft's falling was "either loose fastenings or metal failure and [was not] anything the driver did or normal wear and tear." The court felt that this opinion

16Id.
20Bollmeier v. Ford Motor Co., Ill. App. 265 N.E.2d 212 (1971) (difficult to determine if damage to steering mechanism existed before accident); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (damage to car so great impossible to determine if parts defective). These cases and McCamn illustrate a frequent problem in products liability cases. Often, the product is so damaged by the accident that direct evidence of a defect through examination of the product is impossible to produce. This is analagous to the problem of proving a manufacturer's negligence because the plaintiff rarely has access to the manufacturing process to obtain direct evidence.
21Henningsen was decided in 1960.
24Id. at 582, 451 P.2d at 86; 75 Cal. Rptr. at 654.
was sufficient to raise the inference that a defect existed prior to the sale of the automobile to the plaintiff.\textsuperscript{25}

The plaintiff may also raise the inference of a defect in a product by an expert's answer to a hypothetical question. In \textit{Bollmeier v. Ford Motor Co.}\textsuperscript{26} the court stated "it is well established that an expert, if qualified, may give an opinion based on a hypothetical question and without personal knowledge of the facts . . . and that his opinion is a matter of credibility for the jury and may be rebutted by defendant's proof."\textsuperscript{27} It has also been held that an expert's testimony as to the existence of a defect does not have to be completely positive or unequivocal in order to support a jury finding of the defect.\textsuperscript{28}

A second category of circumstantial evidence by which a plaintiff may prove the existence of a defect is the past history of the product. A plaintiff will frequently rely upon evidence that prior to the event in issue the product in question had shown signs of a defective condition.\textsuperscript{29} In \textit{Bollmeier}, the plaintiffs, in attempting to prove a defect in the steering wheel of the car, testified that from the day the car was delivered they had observed a "vibration which could be seen and felt in the steering column and the steering wheel"\textsuperscript{30} and that they had returned the car to the dealer several times to have the irregularity corrected. The court sent the case to the jury on circumstantial evidence of past irregularities which, coupled with the occurrence of the accident, raised the inference that the steering column was defective when it left the manufacturer.

It should be noted that the past history of a product may support an inference not only that the product was defective when the event that caused the plaintiff's injury occurred but also that the product was defective when it left the manufacturer. If the product involved was received by the consumer in a sealed container, a trier of fact may infer that the product reached the consumer without substantial change in the condition in which it was sold.\textsuperscript{31} However, the history of a product may also destroy an inference that there had been no substantial change in

\textsuperscript{26}Id. at 265 N.E.2d 212 (1970).
\textsuperscript{27}Id. at 265 N.E.2d at 215.
\textsuperscript{30}Id. at 265 N.E.2d at 215.
\textsuperscript{31}Darryl v. Ford Motor Co., 440 S.W.2d 630, 632 (Tex. 1969) (dictum).}
the product since it left the manufacturer. In Sundet v. Olin Mathieson Chemical Corp., for example, the court held that a product liability action was properly dismissed when a cartridge that had exploded came from an unsealed box that contained earmarks of reloaded casings. There was no evidence that the defendant was engaged in the business of reloading casings, and the court therefore felt that the jury could not without additional evidence reasonably infer that the cartridge was defective when it left the defendant's plant.

A third type of circumstantial evidence used to prove a defect involves evidence concerning the circumstances of the accident itself. Even though this testimony does not pinpoint the specific defect, the description of events surrounding an accident which involves a product may raise the inference of a defect. For example, the Pennsylvania Supreme Court, in reversing a verdict against a plaintiff who had been injured when the defendant manufacturer's bottles exploded, said, "Both plaintiff and Leon Dorsey testified that the bottle exploded spontaneously. Their testimony alone, given the fact that an explosion was not a physical impossibility, was sufficient to make the issue a jury question." In Henningsen the plaintiff had been injured when her automobile suddenly veered off the road. She alleged that the steering mechanism was defective and that the defendant retailer was therefore liable for injuries caused by the defect. The plaintiff testified that she had heard a loud noise "from the bottom, by the hood." She stated that it had "felt as if something cracked" and the steering wheel had spun in her hands as the car veered off the road. The plaintiff's description of the automobile accident coupled with expert testimony was considered sufficient to make out a prima facie case.

Another type of circumstantial evidence used to raise the inference of a defect is evidence that negates possible causes of the accident aside

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3179 Neb. 587, 139 N.W.2d 368 (1966).
3Id. at 588, 139 N.W.2d at 369.
3Id. at 184-85, 242 A.2d at 235; accord, Lee v. Crookston Coca-Cola Bottling Co., Minn. 188 N.W.2d 426 (1971).
32 N.J. at 369, 161 A.2d at 75.
from the existence of a defect. However, courts vary in their opinions as to what kinds of circumstantial evidence are required to exclude other causes, and thus the importance of evidence of this type varies from jurisdiction to jurisdiction. In addition, the amount of evidence required to negate other causes will often depend on the type of accident which occurred. For example, in *Franks v. National Dairy Products Corp.*, the court stated that "[w]hen circumstantial evidence is the only proof, courts have infrequently inferred negligence (here a defect) simply from the accident and proof of careful conduct by the plaintiff, and then only in instances where the accident is the type which, standing alone, points an accusing finger at the maker." In *Franks* the spontaneous explosion of a can of margarine had injured the plaintiff. The plaintiff proved the accident and introduced expert testimony to the effect that there were only three possible causes of the explosion other than a defect. Plaintiff then introduced evidence that negated the other three causes and thus raised the inference of the existence of a defect.

A fifth type of circumstantial evidence which plaintiffs use to prove a defect is the occurrence of the accident itself. The fact that an accident occurred will always be part of plaintiff's case and will usually be joined with at least one of the foregoing types of circumstantial evidence or, if possible, with direct evidence. Some jurisdictions, however, have flatly stated that evidence only of the occurrence of an accident in connection with the use of a product will never support an inference of the existence of a defect. However, in *McCann* and other cases the Pennsylvania courts have held that in some situations such evidence alone may raise the inference of a defect. The court in *McCann* stated, "A number of

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41Id. at 531, quoting Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 854 (5th Cir. 1968).

42Id. The court felt that it was essential in proving a defect when the product is in the hands of the consumer that the plaintiff negative other possible causes.


44E.g., Greco v. Buccioni Eng'r Co., 407 F.2d 87 (3d Cir. 1969).
Pennsylvania cases hold that the occurrence of a malfunction may be circumstantial evidence of a defect in a product and hence sufficient to carry the case to a jury on plaintiff's contention that a manufacturer is liable under section 402A.\(^4\)

The types and problems of proof are essentially the same in both strict and negligent product liability cases. The quantum of evidence, whether direct or circumstantial, necessary to sustain a plaintiff's burden of proof in both is also essentially the same: there must be evidence from which reasonable men could conclude that more likely than not the fact to be determined is true.\(^5\) These similarities raise the question of whether an injured plaintiff has benefited from the adoption of section 402A. The plaintiff in McCann could as easily have recovered against the manufacturer in a negligence action. Once the plaintiff proved that the product was defective when it left the manufacturer, the inference could be drawn under the doctrine of res ipsa loquitur that the defect was due to the manufacturer's negligence.\(^6\) However, McCann brought his action against a distributor, and in a negligence action it is doubtful that negligence on the part of distributor could be inferred from the defective product.\(^7\) Without evidence of a specific defect that could have been detected by the distributor no inference can be drawn that the distributor was negligent.

In a negligence action against a distributor, a plaintiff must have more than circumstantial evidence of a defective product to raise the inference of negligence under res ipsa loquitur. The plaintiff must prove not only that the product was defective but also that the distributor was negligent in passing the product to the consumer. Under section 402A a plaintiff need not prove fault and therefore can rely solely upon circumstantial evidence to raise inference of a defect and get his case to the jury. Therefore, a consumer who brings a strict liability action against a

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\(^4\) 325 F. Supp. at 703.
\(^5\) PROSSER § 103, at 673.
\(^6\) PROSSER § 39, at 214 lists the following conditions as necessary for the application of res ipsa loquitur:

1. The event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
2. It must have been caused by an agency or instrumentality within the exclusive control of the defendant;
3. It must not have been due to any voluntary action or contribution on the part of the plaintiff.


\(^7\) PROSSER § 103, at 672 n.3.
distributor of a defective product has an easier burden of proof than one who must sue in negligence. One of the main objectives of section 402A is to provide increased protection for consumers who are injured by defective products. By basing liability on proof of defect and thus making recovery against a distributor of a defective product much more likely than in a negligence action, section 402A has given the consumer increased protection.

Charles H. Cranford

Torts—Rejection of the Voluntariness Test in Assumption of Risk

The doctrine of assumption of risk in the law of negligence, while still relatively quite young, has for some time been roundly condemned by courts and commentators alike as a judicially created device affording legal insulation to defendants who have concededly breached their duty toward injured plaintiffs. Dissatisfaction with the doctrine has led some jurisdictions to restrict severely the application of assumption of risk and in some areas to wipe it out altogether. As a result of Hoar v. Sherburne Corp., it is arguable that as a practical matter assumption of risk is no longer available as a separate defense to a landowner in a negligence action in Vermont.

In Hoar, plaintiff sustained injuries while crossing an access road cutting through property which defendant owned and maintained as a ski resort. At the time of the mishap, plaintiff was returning from defen-