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# Products Liability: Defenses Based on Plaintiff's Conduct

By David G. Epstein\*

## I. INTRODUCTION

The past decade has seen dramatic developments in the law of products liability.<sup>1</sup> There has been liberalization of the exclusive control requirement of *res ipsa loquitur*,<sup>2</sup> legislative<sup>3</sup> and judicial<sup>4</sup> relaxation of the privity require-

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<sup>1</sup> There is no reason for believing other than that the revolutionary developments in the area of products liability will continue to "proceed apace." Accordingly, it should be noted that the research for this paper was completed on April 12, 1968.

<sup>2</sup> The doctrine of *res ipsa loquitur* has three universally recognized requisites:

- (1) The accident must be of a kind that does not ordinarily occur in the absence of negligence;
- (2) the accident must be caused by an agency or instrumentality within the exclusive control of the defendant;
- (3) the accident must not have been due to any voluntary action or contribution of the plaintiff.

See generally Note, *Res Ipsa Loquitur: The Extent To Which Plaintiff May Establish Negligence*, 42 ST. JOHNS L. REV. 410 (1968).

If the requirement of exclusive control were to be strictly applied, *res ipsa loquitur* would rarely be available in a products liability case; for in most such cases at the time of the accident the product is entirely within the plaintiff's control. Accordingly, "exclusive control" has been liberally construed. In cases involving products coming in sealed containers, the condition is satisfied by showing that there has been no change in the product from the time the defendant relinquished control to the time of the accident. See, e.g., *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436, 438 (1944); *Coca Cola Bottling Co. v. Hobart*, 423 S.W.2d 118, 125 (Tex. Civ. App. 1967) (dictum). In Illinois, possession or control of the injuring instrumentality intervening between that of the manufacturer and the occurrence of the injury does not preclude the application of *res ipsa loquitur* unless the length or character of the intervening control indicates that the defect probably did not exist when the manufacturer parted with control. *May v. Columbian Rope Co.*, 40 Ill. App. 2d 264, 271-73, 189 N.E.2d 394, 397 (1963) (dictum).

<sup>3</sup> Section 2-318 of the Uniform Commercial Code dispenses with the privity requirement to a limited extent. The section extends the seller's liability to persons in the buyer's family or household and to guests in his home who are injured because of breach of a warranty. See also Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965); Comment, *UCC Section 2-318: Effect on Washington Requirements of Privity in Products Liability Suits*, 42 WASH. L. REV. 253 (1966). There is considerable controversy as to whether the privity reform effected by the Code is sufficient. See, e.g., *Dippel v. Sciano*, 155 N.W.2d 55, 60 (Wis. 1967); FACT FINDING COMM. ON JUDICIARY, SENATE OF THE STATE OF CALIF., SIXTH PROGRESS REPORT TO THE LEGISLATURE, PART 1: THE UNIFORM COMMERCIAL CODE 457 (1961). But cf. Bailey, *Sales Warranties, Products Liability and the UCC: A Lab Analysis of the Cases*, 4 WILLAMETTE L.J. 291, 315-23 (1967). Accordingly, a number of states have altered the language of section 2-318 or enacted additional statutory provisions to eliminate further the privity requirement. See generally Emroch, *Statutory Elimination of Privity Requirement in Products Liability Cases*, 48 VA. L. REV. 982 (1962); Note, *Caveat Venditor—Strict Products Liability Under the Uniform Commercial Code*, 16 KAN. L. REV. 285 (1968).

<sup>4</sup> *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), eliminated the privity requirement in a negligence action involving an instrumentality known to be dangerous if defective. Today, in every jurisdiction, the privity requirement has been abolished for all negligence actions. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100-03 (1960). At the time of Prosser's article, Mississippi still required privity in negligence actions; this was

ment, and creation of a new theory of recovery — strict liability in tort.<sup>5</sup> Consequently, many jurisdictions now offer three theories of recovery to persons injured through use of a defective product: negligence, breach of warranty, and strict liability in tort. Although the recent products liability developments have been extensively treated both by courts and by commentators, numerous problems remain.<sup>6</sup> One of the most pressing problems is the availability of defenses based on the conduct of the plaintiff.

## II. POSSIBLE DEFENSES

In a products liability context, three basic categories of plaintiff conduct might constitute defenses to an action for personal injuries sustained through use of a defective product:

- (1) negligent failure to discover the defective condition;
- (2) use of the product after discovery of the defect;
- (3) use of the product in a manner that could not reasonably have been foreseen by the manufacturer.

Contributory negligence, as it is generally defined,<sup>7</sup> is sufficiently broad to encompass all three categories. Accordingly, there are products liability cases that speak of failure to discover the product's defective condition as constituting contributory negligence;<sup>8</sup> others that so categorize use of the product

changed in *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967).

In warranty, the privity requirement was first abolished in cases where the product involved was either a food stuff or a drug. *See, e.g.*, *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913). It was not until 1960, in *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), that the requirement was abolished in a non-food or drug case. After *Henningsen*, other courts took similar action in what Dean Prosser has described as the "most spectacular overturn of an established rule in the entire history of torts." Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 794 (1966).

For a more detailed treatment of the history of the abolition of the privity requirement see Lambert, *Storming of the Citadel: Waning of the Privity Rule in Implied Warranty Cases*, 1963 PERSONAL INJURY ANNUAL 533.

<sup>5</sup> There is some controversy as to whether strict liability in tort is a "new theory of recovery." Recently, in *Dunham v. Vaughn & Bushnell Mfg. Co.*, 229 N.E.2d 684 (Ill. Ct. App. 1967), the court said: "We have . . . discovered scholarly authority that the strict liability theory is essentially the liability of implied warranty divested of the contract doctrines of privity, disclaimer and notice." 229 N.E.2d at 693. There is also "scholarly authority" to the contrary. *See Webb v. Zern*, 422 Pa. 424, 220 A.2d 853, 855-56 (1966) (dissenting opinion); Smyser, *Products Liability and the American Law Institute: A Petition for Rehearing*, 42 U. DET. L.J. 343 (1965). Strict liability in tort has been described as "the most radical and spectacular development in tort law during this century." *American Law Institute Meeting*, 32 U.S.L.W. 2623, 2627 (1964).

<sup>6</sup> *See Percy, Products Liability — Tort or Contract or What?*, 40 TUL. L. REV. 715 (1966).

<sup>7</sup> 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).

<sup>8</sup> *See, e.g.*, *Kassouf v. Lee Bros., Inc.*, 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (1962); *Brockett v. Harrell Bros., Inc.*, 206 Va. 457, 143 S.E.2d 897 (1965).

after discovery of the defect;<sup>9</sup> and still others that use "contributory negligence" to mean that plaintiff's negligence was the sole proximate cause of the injuries.<sup>10</sup> These disparate definitions of "contributory negligence" are largely responsible for the confusion that exists in products liability cases concerning the availability of defenses based on the plaintiff's conduct.

For example, in *Kassouf v. Lee Brothers, Incorporated*,<sup>11</sup> plaintiff brought a breach of implied warranty action against the seller and manufacturer of a chocolate bar. While reading one evening, the plaintiff took a candy bar from her dinner table and, without looking, opened the wrapper and extracted the bar. She immediately noticed that the candy didn't taste "just right," but she thought that it was because she had not eaten all day. About one-third of the way through the candy bar, she bit into a "mushy" worm. Needless to say, plaintiff became extremely ill. Defendant argued that she was guilty of contributory negligence. Using the term "contributory negligence" to mean failure to discover the danger in the product or to take precaution against its possible existence, the court held that contributory negligence is no defense in a breach of implied warranty suit, saying: "Contributory negligence, in general, is a defense only to actions grounded on negligence."<sup>12</sup> The case of *Nelson v. Anderson*<sup>13</sup> similarly involved an alleged breach of implied warranty. The plaintiff had continued to use an oil burner that he knew was not functioning properly and was injured when the burner exploded. The court, using the term "contributory negligence" to mean use after discovery of the defect, held: "The weight of authority and sound reason support the view that, in an action based on breach of implied warranty, contributory negligence of the buyer is a good defense . . ."<sup>14</sup> From the language of the holdings in these two cases a casual reader would probably conclude that the two cases are irreconcilable. Yet this is not necessarily true. The *Kassouf* court might hold that use after discovery of a defect is a defense; the *Nelson* court might find that negligent failure to discover a defective condition is not a defense. These two cases clearly illustrate that a distinct and more definite terminology is needed to describe the plaintiff's conduct in a products liability action.

There is a bit of Lewis G. Carroll's Humpty Dumpty<sup>15</sup> in each of us. Everyone — especially appellate court judges and contributors to legal periodicals — has the tendency to arbitrarily define terms. Succumbing to the

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<sup>9</sup> See, e.g., *Barefield v. La Salle Coca-Cola Bottling Co.*, 370 Mich. 1, 120 N.W.2d 786 (1963) (drinking coke after should have discovered broken glass in bottle); cf. *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 against such use).

<sup>10</sup> See, e.g., *Dallison v. Sears, Roebuck & Co.*, 313 F.2d 343 (10th Cir. 1962) (wearing nightgown to smoke); *Gardner v. Coca-Cola Bottling Co.*, 267 Minn. 505, 127 N.W.2d 557 (1964) (improperly opening bottle).

<sup>11</sup> 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (1962).

<sup>12</sup> 26 Cal. Rptr. at 278.

<sup>13</sup> 245 Minn. 445, 72 N.W.2d 861 (1955).

<sup>14</sup> 72 N.W.2d at 865.

<sup>15</sup> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I want it to mean — neither more nor less." L. CARROLL, *THROUGH THE LOOKING GLASS*, ch. 6.

"Humpty-Dumpty Syndrome," I propose the following labeling system for use in this article:

- (1) Negligent failure to discover the defect will be referred to as "contributory negligence";
- (2) use of the product after discovery will be called "assumption of the risk";<sup>16</sup> and
- (3) use of the product in a manner that could not have been reasonably foreseen by the manufacturer will be termed "misuse."

This terminology is not in itself significant; the labels merely reflect the language most widely used by the courts and legal writers. The use of three separate terms is significant, however, since in products liability cases it is necessary to distinguish the term "contributory negligence."

### III. NEGLIGENCE

The basic elements of negligence in a products liability case are the same as those in any tort litigation: duty, breach of duty, cause in fact, proximate or legal cause, and damages.<sup>17</sup> It is only logical that the same defenses are available; as a matter of legal theory, therefore, both contributory negligence<sup>18</sup> and assumption of the risk<sup>19</sup> are defenses to a products liability claim based on negligence.

As a practical matter, however, contributory negligence is rarely a complete defense in any negligence matter.<sup>20</sup> Generally, the issue of contributory negligence is factual<sup>21</sup> and one for jury determination. Jurors, however, are likely to be sympathetic to the plaintiff — especially in the usual products liability situation in which an individual who has suffered personal injuries attempts to recover from a major manufacturing concern.<sup>22</sup>

<sup>16</sup> In a number of jurisdictions, the term "assumption of risk" has been used to designate a specific doctrine applicable to definite contractual relationships such as master and servant. See generally Greenhill, *Assumption of Risk*, 16 BAYLOR L. REV. 111 (1964). Here "assumption of risk" is being used to describe a person's actions.

<sup>17</sup> See generally P. Keeton, *Products Liability—Problems Pertaining to Proof of Negligence*, 19 SW. L.J. 26 (1965); Witherspoon, *Manufacturer's Negligence in Products Liability Cases*, 5 B.C. IND. & COM. L. REV. 585 (1964).

<sup>18</sup> "[T]here is little if anything truly distinctive to products liability cases in so far as the issue of contributory negligence is concerned . . ." 1 R. HURSH, *AMERICAN LAW OF PRODUCTS LIABILITY* § 2:121 (1961).

<sup>19</sup> *Id.* at 2:124.

<sup>20</sup> See Bushnell, *Illusory Defense of Contributory Negligence in Product Liability*, 12 CLEV.-MAR. L. REV. 412 (1963).

<sup>21</sup> There are, of course, instances even in a products liability case where the plaintiff is found to be contributorily negligent as a matter of law. See 1 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 13.01, at 346.1 (1967).

<sup>22</sup> For example, in *Independent Nail and Packing Co. v. Mitchell*, 343 F.2d 819 (1st Cir. 1965), the plaintiff was injured when a portion of a pole barn nail he struck with a hammer broke off and hit him in the eye, destroying all vision in that eye. Plaintiff had been using pole barn nails for the five or six days prior to the injury. When he was hammering the nails into the softer wood of the poles, about three per cent would break off an inch from the head. The free part of the nail would then "zing" through the air. When hammering the nails into the harder green oak siding, about five per cent would break. Despite the high incidence of "flying nails," plaintiff did not wear safety glasses. Plaintiff sued the manufacturer, alleging negligence. Defendant asserted the defense of contributory negligence, but the jury found for the plaintiff, in the sum of \$40,209.75.

In a products liability case, the manufacturer's negligence may take such forms as improper design,<sup>23</sup> negligent construction or assembly,<sup>24</sup> or failure to adequately warn the users of all attendant dangers.<sup>25</sup> With regard to this last category there has been considerable conflict concerning the applicability of contributory negligence and assumption of risk. In a widely cited law review article, Dean Hardy Dillard of the University of Virginia School of Law and Harris Hart of the Virginia Bar state:

To allow these defenses — contributory negligence and assumption of the risk — is to indulge in circular reasoning, since usually the plaintiff cannot be said to have assumed a risk of which he was ignorant or to have contributed to his own injury when he had no way of reasonably ascertaining that the danger of injury existed.<sup>26</sup>

Several reported cases take this position.<sup>27</sup> However, the authors of the two leading treatises in the area of products liability espouse the view that contributory negligence may be a defense in some cases.<sup>28</sup> As even Dillard and Hart concede,<sup>29</sup> supporting cases can be found.<sup>30</sup> In most of this latter group of cases, however, while the courts speak in terms of contributory negligence, recovery was actually denied because (1) the warning was adequate, or (2) inadequacy of the warning was not the cause in fact of the injury complained of. *Swift & Company v. Phillips*<sup>31</sup> is a notable example.<sup>32</sup>

The plaintiff in *Swift & Company* had on numerous occasions used the "amine type" weed killer manufactured by defendant; he was sold the "ester type" manufactured by defendant and told that it was the same type weed killer he had been purchasing. Without reading any of the printing on the

<sup>23</sup> See, e.g., *Varas v. Barco Mfg. Co.*, 205 Cal. App. 2d 246, 22 Cal. Rptr. 737 (1962). See also Nader & Page, *Automobile Design and the Judicial Process*, 55 CALIF. L. REV. 645 (1967).

<sup>24</sup> See, e.g., *Phillips v. Ogle Aluminum Furniture, Inc.*, 106 Cal. App. 2d 650, 235 P.2d 857 (1951); 1 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 6 (1967).

<sup>25</sup> See, e.g., *Gall v. Union Ice Co.*, 108 Cal. App. 2d 303, 239 P.2d 48 (1951); *Bine v. Sterling Drug, Inc.*, 68 PRODS. LIABILITY RPTR. para. 5890 (Mo. 1968); Noel, *Recent Trends in Manufacturers' Negligence as to Design, Instructions or Warnings*, 19 SW. L.J. 43 (1965); Note, *The Manufacturer's Duty To Warn of Dangers Involved in Use of a Product*, 1967 WASH. U.L.Q. 206.

<sup>26</sup> Dillard & Hart, *Product Liability: Directions for Use and the Duty To Warn*, 41 VA. L. REV. 145, 163 (1955).

<sup>27</sup> E.g., *McClanahan v. California Spray-Chem. Corp.*, 194 Va. 842, 75 S.E.2d 712, 725 (1953).

<sup>28</sup> See 1 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 8.06, at 169 (1967); 1 R. HURSH, *AMERICAN LAW OF PRODUCTS LIABILITY* § 2.52, at 231 (1961).

<sup>29</sup> See Dillard & Hart, *supra* note 26.

<sup>30</sup> See, e.g., *Weekes v. Michigan Chrome & Chem. Co.*, 352 F.2d 603 (6th Cir. 1965); Annot., 76 A.L.R.2d 9, 72-74 (1961).

<sup>31</sup> 314 S.W.2d 326 (Tex. Civ. App. 1958).

<sup>32</sup> The question in *Swift* was whether the trial court properly declared a mistrial on the ground that the jury's answers to the special issues were in irreconcilable conflict. The jury found (1) the manufacturer was negligent in failing to have adequate information on the container of the product in question; (2) this was a proximate cause of the injuries complained of; (3) the plaintiff was contributorily negligent in failing to read all of the printed material on the can; (4) this was also a proximate cause of the plaintiff's injuries. The court held that the jury's findings were not in conflict and the defendant had a right to have the trial court render a judgment on the verdict.

For a thorough and understandable explanation of the special issue submission practice in Texas, see G. HODGES, *SPECIAL ISSUE SUBMISSION IN TEXAS* (1959).

can, plaintiff used the weed killer and his crops were damaged. The court reasoned that the directions on the can might have been inadequate, but that had the plaintiff read them he would not have used the weed killer because he would have discovered that it was not the same type that he had been using. In a situation such as this — where the plaintiff has special knowledge such that even a warning that fails to satisfy the manufacturer's duty to warn causes him to exercise "caution commensurate with the danger" — it cannot be said that the inadequacy of the warning was the cause in fact of the injury. Cause in fact requires a "but for" relationship. This relationship does not exist in cases like *Swift & Company*. In such cases recovery should be denied because there is no causal relationship between the negligent failure to warn and the injury alleged — not because the plaintiff was contributorily negligent or assumed the risk.

Although numerous opinions<sup>33</sup> and law review writings<sup>34</sup> have considered contributory negligence in a products liability context, relatively little has appeared in print about assumption of the risk in a products case.<sup>35</sup> The reported cases that do discuss the doctrine adhere to the recent trend in all negligence cases to limit its availability to cases of subjective appreciation — *i.e.*, the plaintiff in fact realized the nature of the hazard created by the defendant's negligence. While there has been some discussion of whether the standard should be objective or subjective, this question is of limited practical significance. Where it is not possible to establish that the plaintiff actually realized the nature of the risk involved, but it can be shown that he should have appreciated the danger, contributory negligence will bar recovery.<sup>36</sup>

Although there is general agreement that in a negligence-based products liability claim use of the product in a manner that could not have been reasonably foreseen by the manufacturer precludes recovery,<sup>37</sup> there is widespread disagreement about the basis of the defense. The prevalent practice is to treat misuse as an element of foreseeability<sup>38</sup> — *i.e.*, a seller is liable for all injuries which an ordinary prudent man so situated could have reasonably foreseen. While some courts have taken a narrow view as to what constitutes a normal use,<sup>39</sup> most jurisdictions have held sellers to a duty to anticipate

<sup>33</sup> See, *e.g.*, *Maiorino v. Weco Prods. Co.*, 45 N.J. 570, 214 A.2d 18 (1965); *Shamrock Fuel & Oil Sales, Co. v. Tunks*, 416 S.W.2d 779 (Tex. 1967).

<sup>34</sup> See, *e.g.*, *Weston, Contributory Negligence in Product Liability*, 12 CLEV.-MAR. L. REV. 424 (1963); Comment, *Products Liability: For the Defense — Contributory Fault*, 33 TENN. L. REV. 464 (1966).

<sup>35</sup> Perhaps the dearth of secondary material is due to the excellent article by Professor Robert Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961). Writers (and, more important, law review editors) might well feel that this pre-empts the area.

<sup>36</sup> See RESTATEMENT (SECOND) OF TORTS § 496A (Tent. Draft No. 9, 1963).

<sup>37</sup> See, *e.g.*, *Neusus v. B.D. Sponholtz*, 369 F.2d 259 (7th Cir. 1966) (by implication); *Westerberg v. School Dist.*, 148 N.W.2d 312 (Minn. 1967).

<sup>38</sup> See 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 15 (1967).

<sup>39</sup> See, *e.g.*, *Borg-Warner Corp. v. Heine*, 128 F.2d 657 (6th Cir. 1942); *Schneider v. Chrysler Motors Corp.*, 266 F. Supp. 115 (D. Neb. 1967) (by implication). See also *Dale & Hilton, Use of the Product — When Is It Abnormal?*, 4 WILLAMETTE L.J. 350, 361-63 (1967).

some relatively unusual uses.<sup>40</sup> For example, standing on a dressing table stool which collapsed<sup>41</sup> has been held to be a foreseeable use, and the foreseeability of eating coffee has been held a question for the jury.<sup>42</sup>

Misuse has also been recognized in some jurisdictions as a separate affirmative defense.<sup>43</sup> This theoretical dispute raises a problem of considerable practical significance. If misuse is a separate affirmative defense, the burden of proof is on the defendant; if misuse is an element of foreseeability, the burden of proof is on the plaintiff. In the usual negligence action the burden of proving foreseeability is on the plaintiff. There is no reason for a contrary rule in a products liability action.

Inherent in all areas of the law is the policy of discouraging persons against whom wrongs have been committed from passively suffering avoidable losses or from increasing the loss by continuing in their conduct.<sup>44</sup> This basic concept, commonly referred to as the avoidable consequences limitation on damages, operates to deny a plaintiff recovery for damages he could have reasonably avoided<sup>45</sup> that are incurred subsequent to his discovery of the defect. Thus, in *Missouri Bag Company v. Chemical Delinting Company*,<sup>46</sup> the court denied a claim for losses caused by holes in seed bags where the plaintiff had discovered the defects before he used the bags. In applying the doctrine of avoidable consequences, the court stated:

A person seeking to recover damages caused by the purchase of defective articles . . . can only recover such damages as he could not have avoided by the exercise of reasonable diligence; and he is required to make reasonable effort to protect himself from loss.<sup>47</sup>

Although they do resemble one another, two basic distinctions belie the similarities of the avoidable consequences doctrine and assumption of risk. Assumption of risk negates liability and bars recovery in most jurisdictions, whereas avoidable consequences does not affect the issue of liability and only reduces the amount of recovery. Moreover, since assumption of risk is an affirmative defense, it must be pleaded by the defendant; avoidable consequences goes to mitigation of damages and thus need not be pleaded.

#### IV. WARRANTY

##### A. Common Law Warranty

Common law warranty has been variously described as "having its commencement in contract and its termination in tort"<sup>48</sup> and as "a curious

<sup>40</sup> See, e.g., *Hardman v. Helene Curtis Indus., Inc.*, 48 Ill. App. 2d 42, 198 N.E.2d 681, 691 (1964); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 825 (1966).

<sup>41</sup> See *Nettles v. Forbes Motel, Inc.*, 182 So. 2d 572 (La. Ct. App. 1966).

<sup>42</sup> See *Maddox Coffee Co. v. Collins*, 46 Ga. App. 220, 167 S.E. 306 (1932).

<sup>43</sup> See *Lawson v. Benjamin Anshel Co.*, 180 S.W.2d 751, 754 (Mo. Ct. App. 1944); cf. *Farley v. Edward E. Tower & Co.*, 271 Mass. 230, 171 N.E. 639 (1930).

<sup>44</sup> See, e.g., RESTATEMENT OF CONTRACTS § 336 (1932); RESTATEMENT OF TORTS § 918 (1939).

<sup>45</sup> See generally C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES §§ 33-42 (1935).

<sup>46</sup> 214 Miss. 13, 58 So. 2d 71 (1952).

<sup>47</sup> *Id.* at 76-77.

<sup>48</sup> *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305, 311 (1965).



hybrid, born of the illicit intercourse of tort and contract, unique in the law."<sup>49</sup> Suffice it to say, although today warranty is regarded as contractual in nature,<sup>50</sup> it was originally an action sounding in tort and has not yet entirely lost its original tort character.<sup>51</sup> Because of the historical development of warranty,<sup>52</sup> contractual defenses such as disclaimer and notice may be properly urged in an action based on breach of warranty.<sup>53</sup>

As the excerpts from *Kassouf* and *Nelson*<sup>54</sup> indicate, the availability of defenses emanating from plaintiff's conduct in an implied warranty action is a most confused matter. Although a number of cases espouse the *Nelson* court's view that contributory negligence is a defense,<sup>55</sup> the majority of the cases seem to be in agreement with *Kassouf* that it is not a defense.<sup>56</sup> Several leading authorities in the products liability area have attempted to formulate a classification by analyzing the broad assertions of law. They have concluded that contributory negligence does not constitute a defense to breach of an implied warranty and that assumption of the risk and misuse do bar recovery.<sup>57</sup> The authorities have recognized several different grounds upon which courts might consider misuse to be a defense: (1) failure to prove the use was within the scope of the warranty;<sup>58</sup> (2) failure to prove defective con-

<sup>49</sup> W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 95, at 651 (3d ed. 1964).

<sup>50</sup> See Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 147 (1958).

<sup>51</sup> W. PROSSER, *supra* note 49, at 651-52.

<sup>52</sup> For a history of warranty, see Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 118-22 (1943).

<sup>53</sup> As Professor Gilmore observed, "Lawyers have a professionally inbred passion for speculating on the 'true nature' of things." 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 37.2 (1965). Accordingly, it must be acknowledged that contractual defenses such as disclaimer and notice are not actually "defenses based on plaintiff's conduct." More accurately, they are defenses based on the *lack* of conduct by the plaintiff. It is submitted, however, that the benefits of a complete discussion of available defenses outweighs any logical inconsistency.

Because today in 49 states the availability of these defenses is governed by specific Uniform Commercial Code provisions, discussion of them will be reserved for the subsection of the article by that title.

<sup>54</sup> Notes 11-14 *supra* and accompanying text.

<sup>55</sup> *E.g.*, *Dallison v. Sears, Roebuck & Co.*, 313 F.2d 343 (10th Cir. 1962) (adopting merely the trial court's determination that negligence is a defense) (Colorado law); *Gardner v. Coca-Cola Bottling Co.*, 267 Minn. 505, 127 N.W.2d 557, 562 (1964).

<sup>56</sup> See, *e.g.*, *Vassallo v. Sabatte Land Co.*, 212 Cal. App. 2d 11, 27 Cal. Rptr. 814 (1963); *Shamrock Fuel & Oil Sales Co. v. Tunks*, 416 S.W.2d 779 (Tex. 1967). Hursh states: "The weight — which is hardly a great weight — of authority appears to be on the side of the view that negligence on the part of a user of a product is no defense in a breach of warranty action..." 1 R. HURSH, *AMERICAN LAW OF PRODUCTS LIABILITY* § 3.9, at 416 (1961). See 2 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 16.01(3) (1967). The authors equate the general duty of due care with the inadvisability of requiring the consumer "to make any sort of detailed or expert examination." Therefore, they conclude that *only* negligence, as "the equivalent of unreasonable exposure to a known and appreciated risk," should be a defense to breach of implied warranty. See notes 57 and 121 *infra*.

<sup>57</sup> See Lascher, *Strict Liability in Tort for Defective Products: The Road to and Past Vandermark*, 38 So. CAL. L. REV. 30 (1965); Noel, *Products Liability of Retailers and Manufacturers in Tennessee*, 32 TENN. L. REV. 207, 247-51 (1965); Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 21-22 (1965) (no discussion of misuse); *cf.* W. PROSSER, *supra* note 49, at 656-57.

<sup>58</sup> See, *e.g.*, *Magee v. Wyeth Labs. Inc.*, 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (1963); *Proctor & Gamble Mfg. Co. v. Langley*, 422 S.W.2d 773, 780 (Tex. Civ. App. 1967).

dition;<sup>59</sup> and (3) failure to prove causation.<sup>60</sup> Under any one of the three, however, misuse is not a defense; rather, proper use is an essential element of the plaintiff's case. This categorization accurately reflects the *holdings* of the cases that have been reported to present date. The relevant cases fully support the view that assumption of risk is a defense in an action based on breach of warranty.<sup>61</sup> No reported case has *held* that contributory negligence, as the term is defined in this article,<sup>62</sup> is a defense in a warranty action.<sup>63</sup>

The rationale generally advanced for rejecting the defense of contributory negligence in warranty cases is that it is a tort defense, while warranty actions are contractual in nature. Realistically, however, such an argument cannot be the true reason for the rule. Assumption of risk is also a tort defense, yet it operates to prevent recovery in a warranty action.<sup>65</sup>

### B. Uniform Commercial Code Warranty

At present, the Uniform Commercial Code has been adopted in forty-nine states. As the Code has grown in popularity, numerous legal writers have suggested that products liability litigation based on contract be governed by the Uniform Commercial Code instead of section 402A of the *Restatement (Second) of Torts*.<sup>66</sup>

<sup>59</sup> See, e.g., *Swain v. Boeing Airplane Co.*, 337 F.2d 940 (2d Cir. 1964); *Preston v. Up-Right, Inc.*, 242 Cal. App. 2d 594, 52 Cal. Rptr. 679 (1966).

<sup>60</sup> *Martinez v. Nichols Conveyor & Eng'r Co.*, 243 Cal. App. 2d 795, 52 Cal. Rptr. 842, 845 (1966); *Hays v. Western Auto Supply Co.*, 405 S.W.2d 877 (Mo. 1966).

<sup>61</sup> See, e.g., *Barefield v. La Salle Coca-Cola Bottling Co.*, 370 Mich. 1, 120 N.W.2d 786 (1963) (allowing the substantive defense, but disapproving a strict tort law application); *Ferraro v. Ford Motor Co.*, 423 Pa. 324, 223 A.2d 746 (1966).

<sup>62</sup> See note 16 *supra* and accompanying text.

<sup>63</sup> In cases similar to *Nelson*, it is not possible to ascertain what the courts mean by the term "contributory negligence." However, in *Pepsi Cola Bottling Co. v. Superior Burner Serv. Co.*, 427 P.2d 833 (Alas. 1967), the court stated: "We think that the defense of contributory negligence, or the related defense of assumption of risk, would be applicable." *Id.* at 842 (emphasis added). The court went so far as to say that the defense of causation "merges with the defense of contributory negligence and assumption of risk . . ." *Id.* at 843. Prosser has found that a number of cases following *Nelson* can be distinguished as actually being assumption of risk cases. W. PROSSER, *supra* note 49; see note 126 *infra*.

<sup>64</sup> See, e.g., *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1959). One writer distinguished the applicable defenses on the basis of whether an express or an implied warranty is in issue. Express warranty would obviously sound only in contract, whereas implied warranty emanates from tort principles, although it originally required contractual consent and privity. Therefore, contributory negligence would only be an appropriate defense under the latter theory of recovery in tort. Bushnell, *Illusory Defense of Contributory Negligence in Product Liability*, 12 CLEV.-MAR. L. REV. 412, 421-22 (1963).

<sup>65</sup> The theoretical inconsistency in disallowing the defense of assumption of risk in a breach of warranty action was clearly brought out in the recent case of *Pritchard v. Liggett & Meyers Tobacco Co.*, 350 F.2d 479 (3d Cir. 1965), where the court stated: "[A]ssumption of risk . . . is available as a defense in an action for personal injuries based on negligence. It follows as a matter of logic that the same defense is apposite in an action based on breach of express warranty." *Id.* at 485. Yet on the very same page the *Pritchard* court held that contributory negligence was not a defense in an action for personal injuries based on breach of warranty.

<sup>66</sup> See, e.g., Kessler, *Products Liability*, 76 YALE L.J. 887, 905 (1967); Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes, and Communication Barriers*, 17 W. RES. L. REV. 5 (1965); cf. Weaver, *Allocation of Risk in Products Liability Cases: The Need for a Revised Third-Party-Beneficiary Theory in U.C.C. Warranty Actions*, 52 VA. L. REV. 1028 (1966).

The general products liability provision of the Code, section 2-314, imposes liability on the seller of an unmerchantable product, under the theory of breach of an implied warranty of merchantability, for damages incurred because of the product's defective condition. Subsection 2(c) of section 2-314 seemingly establishes that misuse of a product will bar recovery: "Goods to be merchantable must be at least such as are fit for the ordinary purposes for which such goods are used . . ." This language indicates that under the Code, as in negligence and in common law warranty, it is the plaintiff's burden to prove that he made an "ordinary use" of the product, and a Pennsylvania district court has ruled accordingly.<sup>67</sup>

The Code affords an alternate theory of recovery — implied warranty of fitness — that is applicable in a more limited number of cases.<sup>68</sup> To prevail under this theory, the plaintiff must establish that (1) the seller knew the particular purpose for which the goods were required, (2) the buyer relied on the seller's skill or judgment to select or furnish goods suitable for this purpose, and (3) the goods were not in fact suitable for this purpose.<sup>69</sup> By the very nature of this remedy, plaintiff has a cause of action only where he has used the product in the manner indicated to the seller; in other words, misuse, as defined herein, is a defense.

There is also language in section 2-316 of the Code that bears on the question of the availability of the defense of contributory negligence, as the term is herein defined, in an action under the Code for breach of implied warranty of merchantability or fitness:

[W]hen the buyer before entering into the contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him . . . .

This seems to indicate that under the Code, negligent failure to discover a defect from a presale inspection bars recovery; however, there is no reported case so holding. A student writer in the *Southwestern Law Journal* seems to take the position that under this provision failure to inspect or discover before *use* gives rise to the defense of contributory negligence.<sup>70</sup> This is not what the section provides; at most, it applies only to failure to inspect or discover before the *sale*. There is no Code language relating to contributory negligence arising from an inspection taking place *after* the sale. Therefore, the availability of contributory negligence in an action under the Uniform Commercial Code depends upon when the contributory negligence occurred; in cases in which the buyer has examined or has refused to examine the goods, assumption of risk is a defense.

<sup>67</sup> Robert H. Carr & Sons, Inc. v. Yearsley, 31 Pa. D. & C.2d 262 (1963).

<sup>68</sup> UNIFORM COMMERCIAL CODE § 2-315.

<sup>69</sup> See generally DEFENSE RESEARCH INSTITUTE, PRODUCTS LIABILITY: IMPLIED WARRANTIES 7-8 (1964).

<sup>70</sup> Comment, *Strict Products Liability — Its Application and Meaning*, 21 Sw. L.J. 629, 645 (1967).

Disclaimer has been considered as a contractual form of assumption of the risk.<sup>71</sup> Since all warranties are subject to a disclaimer,<sup>72</sup> a manufacturer or seller might, by means of a judiciously worded disclaimer, avoid liability for injuries caused by negligent use or misuse of a product. Recently, however, the enforcement of certain limitations on warranty have come under attack.<sup>73</sup> In *Henningsen v. Bloomfield Motors, Incorporated*,<sup>74</sup> the buyer's wife sustained personal injuries when the steering mechanism of their new car failed. In allowing a cause of action based on breach of implied warranty, the New Jersey Supreme Court held the standard warranty disclaimer of the Automobile Manufacturers' Association unenforceable as contrary to public policy. Speaking to the warranty limitation, the court stressed the "gross inequality of bargaining position"<sup>75</sup> between a car buyer and a major automobile manufacturer. While the *Henningsen* decision has been well received by the commentators,<sup>76</sup> judicial reaction has been mixed. *Marshall v. Murray Oldsmobile Company*<sup>77</sup> enforced the very same warranty disclaimer involved in *Henningsen*, and numerous other recent cases have upheld similar disclaimer provisions.<sup>78</sup>

Clearly some warranty disclaimers should be unenforceable as a matter of public policy. The average consumer is helpless when confronted with a warranty disclaimer. Disclaimers often appear in small print on the back of a standard form. Since the seller is usually without authority to vary the terms of these clauses, the consumer who happens to notice the disclaimer will be in no better position than one who did not. This is not to say that the courts should nullify all disclaimers. To the contrary, reasonable guidelines for determining the enforceability of disclaimers are provided in relevant Uniform Commercial Code sections.<sup>79</sup> Under the Code, a disclaimer of implied war-

<sup>71</sup> See Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 120, 136 (1961).

<sup>72</sup> See, e.g., 77 C.J.S. Sales § 317 (1952). See generally Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 157-67 (1943).

<sup>73</sup> See, e.g., Keeton, *supra* note 71, at 135 & n.26; Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318 (1963).

<sup>74</sup> 32 N.J. 358, 161 A.2d 69 (1960).

<sup>75</sup> 161 A.2d at 87.

<sup>76</sup> See, e.g., 1 A. CORBIN, CONTRACTS § 128 (1963); Philo, *Automobile Products Liability Litigation*, 4 DUQUESNE U.L. REV. 181, 185-87 (1966); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 832-33 (1966). But cf. Boshkoff, *Some Thoughts About Physical Harm, Disclaimers and Warranties*, 4 B.C. IND. & COM. L. REV. 285, 305-06 (1963) (rejecting disparity of bargaining power as a basis for the decision).

<sup>77</sup> 207 Va. 972, 154 S.E.2d 140, 144 (1967). The *Marshall* court refused to follow the New Jersey precedent on the ground that rejection of the disclaimer would run counter to established freedom of contract principles in automotive dealings. Moreover, since the Uniform Commercial Code, adopted by Virginia in 1964, provided specifically for exclusion of an implied warranty of fitness in § 2-316, the court reasoned that the legislature did not endorse the considerations of public policy underlying *Henningsen*. *Id.* at 144-45.

<sup>78</sup> See, e.g., *Brown v. Chrysler Corp.*, 112 Ga. App. 22, 143 S.E.2d 575 (1965) (defect did not cause personal injury); *DeGrendele Motors, Inc. v. Reeder*, 382 S.W.2d 431 (Mo. Ct. App. 1964) (opinion expressly limited to cases not involving personal injury); *Williams v. Chrysler Corp.*, 137 S.E.2d 225 (W. Va. 1964).

<sup>79</sup> See generally 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 1.190303-04, at 75-85 (1964).

ranty must be conspicuous<sup>80</sup> and must not be unconscionable.<sup>81</sup> While it is difficult to predict what disclaimers the courts will hold unconscionable, it seems unlikely that unconscionability will attach to a disclaimer absolving the manufacturer from responsibility for losses incurred through the user's lack of care or bizarre use of a product.

Section 2-607(3) (a) of the Code provides that where "a tender has been accepted . . . the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."<sup>82</sup> On its face, this section does not require that notice be given by parties who are not buyers, but who are entitled to recover under section 2-318; the comments accompanying the section, however, make it clear that notice must be given by such parties.<sup>83</sup> Since the Code is neutral as to whether warranty extends beyond the buyer, his family, household, and guests, these official comments are of limited importance. The question remains whether persons not within the scope of section 2-318 must give notice in order to recover under a breach of warranty theory. No Code cases consider this question. There is, however, a line of Sales Act cases which indicate that such persons will not be required to give notice.<sup>84</sup> For example, in *Ruderman v. Warner Lambert Pharmaceutical Company*,<sup>85</sup> the court reasoned that since Uniform Sales Act warranty coverage was limited to instances in which the parties were in privity, the Sales Act notice provision<sup>86</sup> had no application to an action between the buyer and a manufacturer who was not the seller.

## V. STRICT LIABILITY IN TORT

Recognition of strict liability in tort as a theory supporting recovery for personal injuries sustained through use of a defective product is a recent development in the law of products liability. Until 1962, the only judicial authority encouraging such a position was the concurring opinion of Justice Traynor in *Escola v. Coca Cola Bottling Company*.<sup>87</sup> In 1963, Traynor reit-

<sup>80</sup> UNIFORM COMMERCIAL CODE § 2-316. "Conspicuous" is defined as: "'Conspicuous': A term . . . is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it." UNIFORM COMMERCIAL CODE § 1-201(10). See generally *Hunt v. Perkins Mach. Co.*, 226 N.E.2d 228 (Mass. 1967).

<sup>81</sup> "Unconscionable" is not among the words defined in the Uniform Commercial Code. There is, however, an excellent recent law review article that considers the scope of the term. See *Leff, Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

<sup>82</sup> No particular form of notice is required by the statutory language of the Code; nor does the Code contain any concrete guidelines as to what constitutes a reasonable time within which to give such notice. Comment 4 to section 2-607 indicates that less stringent standards are to be used where the plaintiff is a retail consumer.

<sup>83</sup> UNIFORM COMMERCIAL CODE § 2-607, Comment 5.

<sup>84</sup> See *Prosser, The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 829-31 (1966).

<sup>85</sup> 23 Conn. Supp. 416, 184 A.2d 63 (C.P. 1962).

<sup>86</sup> UNIFORM SALES ACT § 49. See generally *L. VOLD, HANDBOOK OF THE LAW OF SALES* § 95, at 460-62 (2d ed. 1959).

<sup>87</sup> 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944). Justice Traynor proposed: "[I]t should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings." *Id.*

erated his views in *Greenman v. Yuba Power Products, Incorporated*,<sup>88</sup> and his opinion received the unanimous approval of his fellow justices on the court. In *Greenman*, the plaintiff was injured when a piece of wood he was turning on a retail-purchased lathe came loose and struck him on the head. He brought an action in negligence and breach of warranty against both the manufacturer and the seller of the machine. The plaintiff's expert witness testified that the use of inadequately set screws to hold the parts of the machine together caused the wood to fly out of the lathe. The manufacturer appealed from the jury's judgment for the plaintiff, contending that the plaintiff's failure to give timely notice of the alleged breach of warranty to the manufacturer barred his recovery.<sup>89</sup> The California Supreme Court rejected this contention:

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that liability is not assumed by agreement but imposed by law . . . and the refusal to permit the manufacturer to define the scope of its own responsibility . . . make clear that the liability is not one governed by the law of contract warranties, but by the law of strict liability in tort. Accordingly, rules defining and governing warranties . . . cannot properly be invoked to govern the manufacturer's liability to those injured by their [*sic*] defective products . . . ."<sup>90</sup>

In the six years since *Greenman*, the decision has been praised by casenote writers<sup>91</sup> and legal commentators,<sup>92</sup> numerous cases have taken a similar position,<sup>93</sup> and the American Law Institute has adopted strict liability in tort in the *Restatement (Second) of Torts*.<sup>94</sup> These developments prompted Dean Wade to say:

The trend for the future is clear. . . . It will soon become the established rule in the United States that the manufacturer is subject to strict tort liability without regard to the requirement of privity. . . . Gradually a majority of the courts will slough off the warranty language and will be ready to follow the lead of the Restatement and the California court in frankly and accurately describing the liability as strict tort liability.<sup>95</sup>

<sup>88</sup> 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

<sup>89</sup> The Code provides: "[T]he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy. . . ." UNIFORM COMMERCIAL CODE § 2-607(3)(a). See generally *Dailey v. Holiday Distrib. Corp.*, 151 N.W.2d 477 (Iowa 1967).

<sup>90</sup> 377 P.2d at 901.

<sup>91</sup> See, e.g., 36 COLO. L. REV. 303 (1964); 15 STAN. L. REV. 381 (1963); 16 VAND. L. REV. 445 (1963).

<sup>92</sup> See, e.g., Lascher, *supra* note 57; Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9 (1966).

<sup>93</sup> See, e.g., *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 420 P.2d 855 (Nev. 1966); *Marathon Battery Co. v. Kilpatrick*, 418 P.2d 900 (Okla. 1966). See generally Wade, *supra* note 57, at 11-12.

<sup>94</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965). The *Restatement* position, however, is limited to "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property. . . ." *Id.* at § 402A (1).

<sup>95</sup> Wade, *supra* note 57, at 25.

Since most states that have adopted strict liability in tort have done so by expressly adopting section 402A of *Restatement (Second) of Torts*,<sup>96</sup> section 402A presents a logical starting point for determining the applicability in strict liability tort cases of defenses based on the plaintiff's conduct.<sup>97</sup> While the section itself does not speak to the question, the accompanying comments are pertinent. Comment *n* provides in part:

Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence, which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of the risk, is a defense under this Section . . . .<sup>98</sup>

In addition, comment *h* provides:

A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling . . . or from abnormal preparation for use . . . the seller is not liable.<sup>99</sup>

There are only four reported cases imposing strict liability in tort with express *holdings* as to the availability of defenses based on the plaintiff's conduct. Three are clearly consistent with the *Restatement* views. In *Shamrock Fuel & Oil Sales Company v. Tunks*,<sup>100</sup> the plaintiff's minor son had placed a stick with a glowing coal on its end in the bed of a toy truck and then asked a playmate to pour some kerosene upon the stick. The playmate did and an explosion ensued. The explosion occurred because the kerosene had been adulterated by the addition of gasoline after the product left the refinery and while it was in the delivery process.<sup>101</sup> In rendering a plaintiff's verdict, the jury found that the minor son was contributorily negligent and that such negligence was the proximate cause of his inquiries.<sup>102</sup> On their application for mandamus, defendants urged that absent a showing of privity of contract, a cause of action could not lie and that the finding of contributory negligence barred recovery under a theory of strict liability. The Texas Supreme Court

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<sup>96</sup> See, e.g., *Dealers Transp. Co. v. Battery Distrib. Co.*, 402 S.W.2d 441 (Ky. 1965); *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966), cert. denied, 386 U.S. 912 (1967). The Appendix to *Restatement (Second) of Torts* lists all but the most recent of cases adopting strict liability in tort. Note, however, the *Restatement* takes the position that cases eliminating the privity requirement in breach of warranty actions are strict liability in tort cases.

<sup>97</sup> The section is perhaps the most controversial in the *Restatement*. One attack is that § 402A is a "radical change" from existing case law. See DEFENSE RESEARCH INSTITUTE, BRIEF OPPOSING STRICT LIABILITY IN TORT; Smyser, *Products Liability and the American Law Institute: A Petition for Rehearing*, 42 U. DET. L.J. 343 (1965). Another criticism is that, by excepting the manufacturer who does not market an "unreasonably dangerous product," the section has, in fact, "adopted a rule very similar to negligence." Note, *Product Liability and Section 402A of the Restatement of Torts*, 55 GEO. L.J. 286, 322-23 (1966); see note 94, *supra*.

<sup>98</sup> RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* at 356 (1965).

<sup>99</sup> *Id.*, comment *h* at 551.

<sup>100</sup> 416 S.W.2d 779 (Tex. 1967).

<sup>101</sup> *Id.* at 780 n.1.

<sup>102</sup> *Id.* at 781.

acknowledged the definitional problems inherent in classifying a party's duties under doctrines of contributory negligence and assumption of risk and held that "contributory negligence," when defined as "the failure to use ordinary care,"<sup>103</sup> was not a defense.<sup>104</sup> The court seemed to indicate, by way of dictum, that misuse, submitted under a proper formulation and not as a catch-all theory of contributory negligence, might well have been argued in the case at bar.<sup>105</sup>

Under the *Restatement* rule which the *Tunks* court adopted,<sup>106</sup> a plea of "contributory negligence," as such, is insufficient. A finding of contributory negligence might reflect only that the plaintiff failed to exercise proper care in discovering the defect at issue and the *Restatement* disallows mere lack of reasonable care as a defense. Thus, under the *Restatement*, the defense attorney must particularize the plaintiff's conduct on which he relies to establish contributory negligence.

In *Martinez v. Nichols Conveyor & Engineering Company*<sup>107</sup> the plaintiff was injured when the machine he was operating had a bolt shear off, causing an 800-pound weight to fall on his arm. Evidence was introduced at trial that the plaintiff's employee altered the machine in a manner contrary to the use sanctioned by the manufacturer and that the plaintiff knew of a recent failure of a bolt and the falling of a weight. The California District Court of Appeal held, *inter alia*, that plaintiff had failed to show that he was injured while using the product consistently with its intended use.<sup>108</sup> Moreover, had the plaintiff's proposed instruction on strict liability been accepted, his knowledge of the defect and failure to exercise reasonable care for his safety was a defense to a recovery in strict liability.<sup>109</sup> Similarly, in *Ferraro v. Ford Motor Company*<sup>110</sup> the Pennsylvania Supreme Court recognized that the defense of assumption of risk was available in an action based on strict liability in tort. The plaintiff in *Ferraro* was injured when the left front wheel of his new dump truck locked while he was making a left-hand turn. Conduct from which the jury might find that plaintiff knowingly assumed the risk was his prior experience with similar failures of the truck.

The fourth case, *Maiorino v. Weco Products Company*,<sup>111</sup> might violate the *Restatement* classification scheme. In *Maiorino*, the plaintiff cut his wrist while attempting to open a glass container holding a new toothbrush. He proceeded against both the manufacturer and the retailer who raised the defense of contributory negligence, and the jury adopted the defense theory.

<sup>103</sup> *Id.* at 782.

<sup>104</sup> *Id.* at 784.

<sup>105</sup> *Id.* at 785.

<sup>106</sup> *Id.* at 783-84 (by implication).

<sup>107</sup> 243 Cal. App. 2d 795, 52 Cal. Rptr. 842 (1966).

<sup>108</sup> 52 Cal. Rptr. at 845. The critical issue in *Martinez* was whether the employer's unsanctioned use was, in fact, the proximate cause of the plaintiff's injuries, and defendant manufacturer and bailor ultimately prevailed on the plaintiff's failure to prove proximate causation "attributable to them."

<sup>109</sup> *Id.*

<sup>110</sup> 423 Pa. 324, 223 A.2d 746 (1966).

<sup>111</sup> 45 N.J. 570, 214 A.2d 18 (1965).



In affirming a judgment for the defendants, the New Jersey Supreme Court said:

[W]e are of the view that where a plaintiff acts or fails to act as a reasonably prudent man in connection with use of a warranted product or one which comes into his hands under circumstances imposing strict liability on the maker or vendor or lessor, and such conduct proximately contributes to his injury, he cannot recover. . . . [T]he well known principle of contributory negligence in its broad sense is sufficiently comprehensive to encompass all the variant notions expressed in the cited cases . . . . A manufacturer or seller is entitled to expect a normal use of his product. The reach of the doctrine of strict liability in tort in favor of the consumer should not be extended so as to negate that expectation.<sup>112</sup>

While the first two quoted sentences of the above excerpt are extremely broad, the last two indicate that the *Maiorino* court regards contributory negligence as importing misuse (more than assumption of risk) and not a general standard of due care.<sup>113</sup> Several legal commentators have so interpreted *Maiorino*,<sup>114</sup> although Dean Prosser concludes that the case involves assumption of risk.<sup>115</sup> Unfortunately, inadequate recitation of facts in *Maiorino* does not permit any determination of which view is correct.

By way of dictum, four other courts have expressed opinions on the subject of defenses. In *Greeno v. Clark Equipment Company*<sup>116</sup> an Indiana federal district court approved of the *Restatement* position. The Arizona Court of Appeals in *O.S. Stapley Company v. Miller*<sup>117</sup> stated: “[W]e have no difficulty in determining that contributory negligence is a defense in a strict tort liability action.”<sup>118</sup> Difficulty, however, does arise in determining what the Arizona court meant by “contributory negligence.” Was the court using contributory negligence in its general sense or as the term is used in this article — more restrictively to designate conduct amounting to misuse or assumption of risk? Indeed, the plaintiff’s conduct in *Miller* — riding on the front deck of a motor boat rather than in the passenger compartment — clearly established assumption of risk; there was, moreover, substantial evidence of misuse. Even more confusing is the dictum of the Illinois Supreme Court in *People ex rel. General Motors Corporation v. Bua*:<sup>119</sup>

In *Suvada v. White Motor Co.*, 32 Ill. 2d 617, 210 N.E.2d 182, this court adopted the theory which imposes strict tort liability on the

<sup>112</sup> 214 A.2d at 20.

<sup>113</sup> See 2 L. FRUMER & M. FRIEDMAN, *supra* note 56, at § 16A[5][f].

<sup>114</sup> See Comment, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability*, 64 MICH. L. REV. 1350, 1385 & n.198 (1966).

<sup>115</sup> See Prosser, *supra* note 76, at 839 & n.254.

<sup>116</sup> 237 F. Supp. 427, 429 (N.D. Ind. 1965).

<sup>117</sup> 6 Ariz. App. 122, 430 P.2d 701 (1967).

<sup>118</sup> 430 P.2d at 709. Interestingly enough, in a dissenting opinion, which opposed the adoption of strict liability in tort by the other intermediate appellate court in Arizona, the judge assigned as a reason for not adopting strict liability in tort the unavailability of the defense of contributory negligence. *Bailey v. Montgomery Ward & Co.*, 6 Ariz. App. 213, 431 P.2d 108, 119 (1967).

<sup>119</sup> 37 Ill. 2d 180, 226 N.E.2d 6 (1967).

manufacturer. Under that theory, negligence need not be proved and a plaintiff has only to prove that his injury or damages resulted from a condition of the product, that the condition was an unusually dangerous one, and that the condition existed at the time the product left the manufacturer's control. However . . . it is necessary to prove that the plaintiff was in the exercise of due care for his own safety.<sup>120</sup>

The quoted language from *Bua* indicates that in order to recover for personal injuries resulting from his using a defective product, the Illinois plaintiff must affirmatively show lack of negligent failure to discover the defect; in other words, the plaintiff, not the defendant, has the burden of proof on contributory negligence.

A recent Illinois Court of Appeals decision gives the following explanation of *Bua*:

Contributory negligence in a products liability case may be properly an issue, for while it is said that the plaintiff is not required to discover a defect . . . on the other hand, if he discovers a defect, or if the danger in the use is known to him and he proceeds to use it he may be guilty of contributory negligence.<sup>121</sup>

Arguably, then, *Bua* differs from the *Restatement* view only in terminology. Both *Bua* and the *Restatement* say, in substance, that failure to discover a defect is not a defense, but that use after discovery of a defect is. The *Restatement* labels this latter form of conduct "assumption of the risk," while *Bua* treats use after discovery of a defect as contributory negligence.

Most recently, in *Dippel v. Sciano*,<sup>122</sup> the Wisconsin Supreme Court, after adopting 402A strict liability in tort,<sup>123</sup> added by way of dictum: "The defense of contributory negligence is available to the seller. The plaintiff has the duty to use ordinary care to protect himself from known or readily apparent danger."<sup>124</sup> Language subsequent to this excerpt indicates that perhaps this court uses the term "contributory negligence" to include what is herein referred to as "misuse."<sup>125</sup>

## VI. EVALUATION OF DEFENSES

Negligence, breach of warranty, and strict liability in tort have basically the same elements in a products liability context. None of the three theories allows recovery against the manufacturer or seller unless:

- (1) the product was defective;
- (2) the defect existed at the time the manufacturer or seller relinquished control; and
- (3) the defect caused the injury.

<sup>120</sup> 226 N.E.2d at 15-16.

<sup>121</sup> *Dunham v. Vaughn & Bushnell Mfg. Co.*, 86 Ill. App. 2d 315, 229 N.E.2d 684, 692 (1967). See generally 1 R. HURST, *supra* note 56, ch. 1.

<sup>122</sup> 155 N.W.2d 55 (Wis. 1967).

<sup>123</sup> *Id.* at 63.

<sup>124</sup> *Id.*

<sup>125</sup> "Defenses among others that suggest themselves are that the product must be reasonably used for the purpose for which it was intended; abuse or alteration of the product may relieve or limit liability . . ." *Id.* at 63-64.

It is, therefore, difficult to see any logic in holding that *X* conduct is a defense to an action brought by a plaintiff when he alleges negligence, but the same conduct does not constitute a defense when the plaintiff pleads breach of implied warranty or strict liability in tort.<sup>126</sup> Law governing assumption of risk and misuse is the same regardless of the theory of recovery: the former is an affirmative defense; the latter is an essential element of the plaintiff's case. Negligent failure to discover the defect or danger, however, is treated differently: in a negligence action such conduct establishes a defense; where the plaintiff proceeds under warranty or strict liability in tort, it does not.

Realistically, the determinative factor should not be the form of action under which the plaintiff elects to proceed. The courts should, rather, consider the central issue — allocation of the risk.<sup>127</sup> The layman's probable inclination to hold the manufacturer liable for all losses on the theory that he is better able to pay is simply not practical. Such reasoning ignores the "economic facts of life." It is not the "deep-pocketed manufacturer" who will bear the losses imposed upon him — rather, it is the public who will have to pay as consumers. Thus, the real question is, in effect, What losses should the public pay for and what losses should the injured party have to bear. With this focus, it seems clear that both assumption of risk and misuse should bar recovery. Negligent failure to discover the defect is more tenuous. A large portion of mass-produced items is manufactured with quality as poor as the market will support and yet is advertised by conscious misrepresentations as to their known quality. Misrepresentation of high quality about a low-quality product lulls the consumer into unwarranted security in his purchase; and his failure to exercise caution in using a product is merely a manifestation of the consumer's reliance upon advertising. Justifiable reliance should not bar a plaintiff from recovering for his personal injuries. The de facto victimization of the consumer requires that contributory negligence should not constitute a defense in an action for personal injuries incurred through use of a defective product regardless of the theory under which the plaintiff proceeds.

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<sup>126</sup> Prosser equates implied warranty with strict liability in reconciling applicable tort defenses; and, for this limited purpose, they are arguably indistinguishable. W. PROSSER, *supra* note 49; see note 56 *supra*.

<sup>127</sup> See Keeton, *Recent Decisions and Developments in the Law of Products Liability*, 32 INS. COUNSEL J. 620 (1965); cf. Calabresi, *Some Thoughts On Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965); P. Keeton, *Products Liability — Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1334 (1966); Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959); Morris, *Enterprise Liability and the Actuarial Process — The Insignificance of Foresight*, 70 YALE L.J. 554 (1961); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products — An Opposing View*, 24 TENN. L. REV. 938, 945 (1957); Weaver, *Allocation of Risk in Products Liability Cases: The Need for a Revised Third-Party-Beneficiary Theory in UCC Warranty Actions*, 52 VA. L. REV. 1028, 1037-47 (1966).

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