Products Liability: Strict Liability and the Defenses

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as that of its opponent doctrine, and its logic seems more cogent. Nor is comparative negligence a quixotic-dash at the windmills while the barons wait in the wings to tear down the already atrophied citadel of fault. Comparative negligence comprehends fault and compensation, and substantial case law has already interpreted the many facets of this paralleled dichotomy. It represents a sensible compromise precipitated by a change in conditions, particularly the carnage that takes place on our highways each year. There seems to be no reason why, if the courts forget their regenerative function, lawyers should feel compelled into meek compliance. There is nothing sacrosanct about the doctrine of contributory negligence and the long line of precedent which have found it controlling, nor is there anything sagacious in the "logic" or the historical "motives" from which it emerged.

Seymour Mansfield

PRODUCTS LIABILITY: STRICT LIABILITY AND THE DEFENSES

One area of the law which probably was not a part of the reader's law school curriculum and still has not been incorporated in any meaningful way into most programs of legal study is the theory of strict products liability which emerged just a little over five years ago. The purpose of this writing is to provide an insight and orientation into the elements of the plaintiff's proof as well as the defenses available, with particular emphasis on the defense of contributory fault (or, if you prefer, "assumption of risk"). In order to better understand some of the distinctions between the theory of strict liability and the traditional remedies of "warranty" and "negligence," the historical approach is used to draw comparison.

THE DEVELOPMENT OF STRICT PRODUCTS LIABILITY

Prior to the birth of the doctrine of strict liability, the chief avenues to recovery for products liability were actions based either on breach of warranty, or negligence. Actions for breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty for particular purpose and for negligence could co-exist in a single complaint. All of these remedies shared at least one thing in common: their inadequacy.

In the 'ex contractu' actions (grounded in breach of warranty) recovery might be precluded by defenses that there had been no "reliance" on the
warranty, that the plaintiff failed to comply with certain “notice” requirements, that the defendant had “disclaimed” responsibility for such injuries as the plaintiff sustained, or that the parties were not in “privity” with each other. The defense of “privity” proved to be the most obnoxious of these obstacles and gave legal writers their foothold for attack. Too often, the injured plaintiff was not privity privileged and went uncompensated. Of this privity wall Professor Prosser said:

It is true that against the retailer, the consumer who buys for himself and is injured can rely, in all but a few states, (citations omitted) upon the old sales warranties of merchantable quality and fitness for the purpose. But so long as the privity wall stands firm, these warranties are of no avail against the wholesaler; nor do they protect the buyer's wife or child, his employee, his guest, his donee, or his sub-purchaser. The result has been such utterly preposterous decisions as those holding that the wife who buys the sausage, handles it, cooks it, eats it, and is poisoned by it, cannot recover because she was merely buying as the agent of her husband, who was to pay the bill and so is regarded as the contracting party; whereas the husband, who never saw the food, can recover on a warranty for the loss of her services.

This chronic preoccupation with privity eventually led to some specific provisions in the Uniform Commercial Code which extended the retailer's warranty to the members of the buyer's household, but even this extension did not include the most likely users in the case of a multitude of products.

So enamoured with the rule of privity were the courts that they extended it to actions of negligence somewhat obtrusely in the famous (or infamous) Winterbottom rationale. At the time of this decision, modern industrialism was virtually unknown, and the holding in Winterbottom seemed consistent with the times. Then came the industrial revolution, and in 1916 Judge Cardozo rejected the application of the Winterbottom rationale in tort actions noting:

The dealer was indeed the one person of whom it might be said with some approach to certainty, that by him the car would not be used. Yet the defendant


2 See generally, 6 A.L.R.3d 1371, as to the requirement of giving notice to the defendant with respect to a personal injury claim based on the theory of breach of warranty.


5 Prosser, The Assault upon the Citadel, 69 YALE L.J. 1099, 1117 (1960).


7 Supra note 4, Lord Abinger laid down his dicta concerning the non-liability of a manufacturer for negligence in a breach of contract case.
would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion.\(^8\)

The decision was immediately accepted\(^9\) and after some 42 years is the universal law of the land.\(^10\)

With the duty of care elevated to normal and extending to anyone who may reasonably be expected to be in the probable use of the chattel,\(^11\) the plaintiff's task was reduced to showing that the injury was proximately caused by the defendant's "defective" product and that the defendant was negligent.\(^12\) Although the plaintiff will seldom, if ever, have any direct evidence of the defendant's negligence, he is aided in most jurisdictions by the doctrine of res ipsa loquitur,\(^13\) and in the few remaining jurisdictions by theories of misrepresentation\(^14\) or theories equivalent to res ipsa loquitur.\(^15\) In all jurisdictions then, the plaintiff has some means of reaching the jury. Add to this, the factor of human nature and in all probability the plaintiff will carry the day.

Well then, if negligence is such a good remedy, why all the clamor about strict liability? In response to this query, Dean Prosser submits:

There are other sellers than the manufacturer of the product. It will pass through the hands of a whole line of other dealers, and the plaintiff may have good reason to sue any or all of them. The manufacturer is often beyond the jurisdiction. He may even, in some cases, be unknown. If he is identified and can be sued, it is very often impossible to pin the liability upon him. Even where there is a proved defect which speaks of obvious negligence on the part of someone, it is very often impossible to prove that it was on the part of the maker. The cracked Coca-Cola bottle may have been cracked long after it left his plant. And even when the cause can be fixed upon the manufacturer, he may turn out, in these days of chain stores and large supply houses, to be a small concern, operating on a shoestring, and financially the least responsible person in the whole chain of distribution. If the plaintiff is to recover at all, he must often look to the wholesaler, the jobber, and the retailer.

\(^9\)Bohlen, \textit{Liability of Manufacturers to Persons Other than Their Immediate Vendees}, 45 L.Q. Rev. 343 (1929).
\(^11\)Restatement, Torts § 395.
\(^12\)See Hursh, \textit{American Law of Products Liability} § 2 (1961).
It is here that negligence liability breaks down. The wholesaler, the jobber, and
the retailer normally are simply not negligent. They are under no duty to test or
inspect the chattel, and they do not do so; and when, as is usually the case today,
it comes to them in a sealed container, examination becomes impossible without
destroying marketability. No inference of negligence can arise against these sellers,
and res ipsa loquitur is of no use at all.\textsuperscript{16}

And Chief Justice Traynor submits:

The injury from a defective product does not become a matter of indifference
because the defect arises from causes other than the negligence of the manufac-
turer, such as negligence of a submanufacturer of a component part whose defects
could not be revealed by inspections . . . or unknown causes that even by the
device of res ipsa loquitur cannot be classified as negligence of the manufacturer.
The inference of negligence may be dispelled by an affirmative showing of proper
care.\textsuperscript{17}

Throughout the period while the plaintiffs were wrestling with the
problems inherent in the warranty and negligence actions, there developed
a rather distinct body of case law commonly known as the "food cases." The
American decisions can be traced to the year 1815 when a New York court
imposed strict liability on the seller of food running to the purchaser via
a special "warranty" peculiar to food.\textsuperscript{18} But the requirement of privity still
remained and the line of decisions which followed did little to lift this
scourge.\textsuperscript{19} Then in 1913, as a result of national agitation over defective
food,\textsuperscript{20} the concept of strict liability in food cases was extended to the
"ultimate consumer" and the wall of privity was breached at last.\textsuperscript{21}

By applying the device of strict liability in the food cases (which were
grounded in the remedy of "warranty" and therefor within the family of ex contractu actions) the courts actually created a hybrid remedy which had some characteristics of tort and others of contract. For a long time thereafter it appeared as though no one really minded the confusion, and the label of

\textsuperscript{16} \textit{Supra} note 5, at 1116.

\textsuperscript{17} Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944).


Ark. 500, 207 S.W. 62 (1918); Hoover v. Peters, 18 Mich. 51 (1869); Bark v. Dixon,
115 Minn. 172, 131 N.W. 1078 (1911).

\textsuperscript{20} Narrated in Regier, \textit{The Struggle for Federal Food and Drugs Legislation, 1 LAW & CONTEMP. PROB. 3} (1933).

\textsuperscript{21} Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1933). The majority, including
Illinois, followed: Tiffin v. Great Atlantic & Pacific Tea Co., 18 Ill. 2d 48, 162 N.E.2d
406 (1913); Welter v. Bowman Dairy Co., 318 Ill. App. 305, 47 N.E.2d 739 (1943);
Blarjeske v. Thompson's Restaurant Co., 325 Ill. App. 189, 59 N.E.2d 320 (1945); Pa-
tagias v. Coca-Cola Bottling Co., 332 Ill. App. 117, 74 N.E.2d 162 (1947); Heimsoth v.
"warranty" lingered on until the year 1955 when Professôr Prosser suggested throwing the limitation to food onto the ash pile and to "impose strict liability outright in tort, as a pure matter of public policy."\(^{22}\) (emphasis supplied)

Aside from the somewhat academic question of whether the liability was one of tort or one of contract, there existed the problem of extending the concept of strict liability to products other than food. Some courts quickly applied the logic of the "food cases" to situations involving articles for intimate bodily use such as hair dye\(^{24}\) and soap.\(^{24}\) Then in 1960 the landmark case of Henningsen v. Bloomfield Motors\(^{25}\) extended that special hybrid of strict liability to other products generally. The case involved a runaway Chrysler automobile which, because of a defective steering gear, crashed at a right angle into a wall. The action, sounding in warranty, was brought against the retailer and the manufacturer in the theory of strict liability and the court held:

[T]he burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur.\(\ldots\)^{28}

We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile. The unwholesome beverage may bring ill- ness to one person, the defective car, with its great potentiality for harm to the driver, occupants, and others, demands even less adherence to the narrow barrier of privity.\(^{27}\)

Accordingly, we hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial.\(^{28}\)

\(^{22}\) Prosser, Torts § 84, (2d ed. 1955). The only judicial authority expressly supporting such a position was the concurring opinion of Chief Justice Traynor in the celebrated case, Escola v. Coca-Cola Bottling Co. Chief Justice Traynor therein stated: "In my opinion it 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.\(\ldots\) Even if there is no negligence\(\ldots\) public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." Supra note 17 at 440, 461.


\(^{24}\) Kruper v. Procter & Gamble Co., 113 N.E.2d 605 (Ohio App. 1953); rev'd on other grounds, 160 Ohio St. 489, 117 N.E.2d 7 (1954).


\(^{28}\) Id. at 379, 161 A.2d at 81.

\(^{27}\) Id. at 383, 161 A.2d at 83.

\(^{28}\) Id. at 384, 161 A.2d at 84.
Although *Henningsen* served to carry over the concept of strict liability to products other than food, it did not deal with the problem of the peculiar characteristics of tort, but rather of contract under the guise of "implied warranty." No one doubted that in the absence of privity the liability was, in substance, tort and not contract.

The transition from this point was rapid. Chief Justice Traynor, one of the most noteworthy and convincing advocates of strict liability, transformed the doctrine into one of pure tort just two years after *Henningsen* in the celebrated *Greenman v. Yuba Power Products, Inc.* decision.\(^29\) That case involved a defective power tool which let fly a piece of wood. The defendant manufacturer defended upon the ground that "notice" of the breach, as required by the Uniform Sales Act, had not been given. In his majority opinion, Chief Justice Traynor reiterated his reasons for favoring a doctrine of strict liability in tort, and his opinion received the unanimous concurrence of the other members of the court. The purpose of imposing strict liability in the *Greenman* case was to insure that the burdens of injury resulting from defective products are shouldered by the parties who put the product on the market rather than upon the injured consumer who can ill afford such a risk.

Within months the doctrine received approval in the *Restatement (Second)* of *Torts*, Section 402A, (of which Professor Prosser was the reporter and chief justice Traynor one of the advisors) approved by the American Law Institute in 1964, adopted 1965;

\(1\) 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

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

\(2\) The 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 relation with the seller.\(^30\) (emphasis added).


\(^{30}\) *Restatement (Second)* of *Torts* § 402A. Comment *m*, makes it clear that the nature of the liability is one of tort: "The rule stated in this Section does not require any reliance on the part of the consumer upon the reputation, skill, or judgment of the seller who is to be held liable, nor any representation or undertaking on the part of that seller. . . . The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and is not affected by limitations on the scope and content of warranties. . . . Nor is a consumer required to give notice to the seller of his injury within a reasonable time.
The Illinois landmark case, *Suvada v. White Motor Co.*, was decided in 1965 and involved a set of faulty brakes which unleashed the plaintiff’s vehicle into a bus and provided the opportunity for the Illinois Supreme Court to adopt the Greenman-Restatement approach. In a voice which sounded not unlike the echo of Chief Justice Traynor, Justice House said:

"Public interest in human life and health, the invitation and solicitations to purchase the product and the justice of imposing the loss on the one creating the risk and reaping the profit are present and as compelling in cases involving motor vehicles and other products, where the defective condition makes them unreasonably dangerous to the user, as they are in food cases."

Then the court expressly and significantly noted that its views "coincide with the position taken in Section 402A American Law Institute’s revised Restatement of Torts approved in May, 1964." At the time of this writing the principles enunciated in the Greenman case and in section 402A have been followed or expanded in seventeen jurisdictions. No other field of law has witnessed such a rapid progression. Truly, Professor Prosser and Chief Justice Traynor have had a profound impact on social change.

The arguments advanced to support strict liability in its present form emphasize that there is something wrong, if not in the manufacturer’s manner of production, or the retailer’s manner of selling, at least in their product. It is argued that the injured user is the least able to bear the loss and that, conversely, the manufacturer or retailer is able to bear the loss or shift the risk, by means of insurance, the cost of which will be passed on to the consumer (maybe). Furthermore, it is posited that the "fault principle" is primitive and out of step in this generation and simply that "the public interest in human life, health and safety demands the maximum possible protection that the law can give against dangerous products which consumers must buy, and against which they are helpless to protect themselves." In Comment (c) following 402A, the justifications for imposing strict liability are said to be:

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after it occurs. . . . The consumer’s cause of action . . . is not affected by any disclaimer or other agreement. . . . In short, "warranty" must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort."

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81 *32 Ill. 2d 612, 210 N.E.2d 182 (1965).*

82 *Id. at 619, 210 N.E.2d at 186.*

83 *Id. at 621, 210 N.E.2d at 187.*

84 For citations refer to *AMERICAN LAW OF PRODUCTS LIABILITY, and PRODUCTS LIABILITY REPORTER* (C.C.H. 1965).

85 *PROSSER, supra note 10; and, 69 Yale L.J. 1099, 1122 (1960).*
[T]hat the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

In short, the advocacy on behalf of strict liability boils down to an attempt to comply with the moral judgment of society, that a small loss to many is better and more just than a catastrophic loss to a very few. Some writers argue that the doctrine amounts to nothing more than “enterprise liability” or “products compensation” and is just another step down the road to collectivism and socialism. A careful analysis would indicate that the change is one only of theory rather than results. Instead of abortively circumventing the “warranty” and “negligence” structures, (e.g., by the use of such devices as res ipsa loquitur, ultrahazardous activity giving rise to absolute liability, negligence per se, misrepresentation, deceit, implied warranty, nuisance, and absurd agency inventions) the court can reach the same result in a much more direct way. The simplicity of the theory may well make products litigation less complicated, less costly, and certainly more realistic. The plaintiff still has the burden of showing that the product is defective and unreasonably dangerous, that it was in this condition when it left the control of the defendant, and that it proximately caused the plaintiff's injury. Thus the defendant is not the insurer against any injury caused by any of his products.

In enunciating the concept of strict liability, the courts have served at least two venerable and traditional ends. They have stripped away the vestigial remnants which rendered the warranty action so cumbersome and inadequate and restored simplicity and attention to substance (rather than form) in the field of products liability. They have also reminded American industry of its traditional quest for excellence and workmanship, and of its inescapable responsibility for providing


37 Note that injury plus causality will not equal liability in the absence of a “defect,” even though the product by its very nature might be inherently dangerous. Thus while the bottling company would be liable for the decomposing mouse found in the bottle, it would not be liable for the harm to the consumer’s teeth which might result from the sugar contained in the beverage. A dart manufacturer would not be liable when the user put out another’s eye in the use of the product in the absence of some particular defect of the dart to which the injury was attributable.
thése. Despite the alarms, a manufacturer or merchandiser still has a complete defense to an action in strict liability: a product free from defects.88

THE DEFENSES

PROXIMATE CAUSE

The plaintiff in a strict products liability case is required to prove that the defective, unreasonably dangerous condition in the defendant's product was the "proximate cause" of his injury. This requirement of proof has been recognized in 402A of the Restatement and almost universally in decisions to date.39 While proximate cause is not, strictly speaking, an affirmative defense, courts have confused it with the various affirmative defenses. For example, in those cases where misuse or contributory negligence is a defense, the court might say that the defendant's conduct is not the proximate cause of the harm suffered because the plaintiff's act has intervened.40 The courts may couch their decision in terms of proximate cause rather than the particular affirmative defense available in order to avoid a determination on the issue of whether that particular affirmative defense is in fact available to the defendant. This evasion is especially attractive in deciding cases under the theory of strict products liability which is still young in terms of definitive case law and where the question of which defenses are in fact available is still undecided in most jurisdictions. In short:

Having no integrated meaning of its own, its chameleon quality permits it to be substituted for any one of the elements of a negligence case when decision on that element becomes difficult. . . . No other formula . . . so nearly does the work of Aladdin's lamp.41

PRIVITY

While lack of privity still remains a valid defense in cases based upon breach of warranty except in the food cases,42 it is no longer an issue in actions based upon negligence and has never been a defense in a case

39 See, e.g., People ex rel. General Motors Corp. v. Bua, 37 Ill. 2d 180, 226 N.E.2d 6 (1967).
41 Green, Proximate Cause in Texas Negligence Law, 28 Texas L. Rev. 471 (1950).
42 One author has listed twenty-nine different theories advanced to justify an action for breach of warranty in the sale of food by a party not in privity with the seller or manufacturer. Gillam, Products Liability in a Nutshell, 37 Ore. L. Rev. 119, 153-55 (1957).
based on strict liability. The liability of the manufacturer extends to the ultimate purchaser. The Restatement 402A extends the liability to the "ultimate user or consumer." And in Comment 1 following the section it is said that the "consumer" need not have purchased the product at all, but may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser. In addition, the term "user" is defined to include those who are passively enjoying the benefit of the product, as in the case of a passenger in an automobile. Although the mere "bystander" does not fall within the Restatement definition of "user or consumer" there is authority that in some circumstances he too is protected.

As to the question of who may be held liable, which looks up, rather than down, the privity road, the Restatement 402A view permits the plaintiff to sue any seller who is engaged in the business of selling products, including manufacturers, wholesale or retail dealers or distributors, and operators of restaurants. This would not include, however, the occasional seller or merchants who sell stock which is not a part of their usual course of business such as the execution or bankruptcy sale. Judicial decisions have included the lessor and a real estate contractor who sold the house with a defective product in it. But, the courts have refused to apply the doctrine to a dentist stressing the service aspect of the business, and there

43 See Suvada v. White Motor Co., 32 Ill. 2d 612, 617, 210 N.E.2d 182, 185 (1965), where it is said that: "Lack of privity is not a defense in a tort action against the manufacturer."


45 Mitchell v. Miller, 26 Conn. Sup. 142, 214 A.2d 694 (1965); O. S. Stapley Co. v. Miller, 6 Ariz. App. 122, 430 P.2d 701 (1945) to the effect that strict liability applies whenever the product causes injury to any "human being."

46 Restatement (Second) of Torts § 402A, Comment f.


is still some question as to whether it is applicable to a non-profit organization.\footnote{50}

**NOTICE**

The Uniform Commercial Code\footnote{51} carried over the requirement of “notice” from the Uniform Sales Act.\footnote{52} The provisions of both imposed a duty on the injured consumer to give notice to the seller of any breach of warranty within a “reasonable time.” The rule was designed to protect the seller from delayed claims which made his investigation and defense of the claim more difficult. In actions between the immediate parties the requirement was not unreasonable but with the advent of strict liability and the demise of privity the parties became more remote, and until suit is filed and discovery procedures have begun the plaintiff may not know the identity of the most probable defendant. Gradual inroads were made to scrap the requirement by defining the term “reasonable notice” quite liberally.\footnote{53} With the recognition that the liability was tort and not contract and the conclusion that no “warranty” was actually involved under the doctrine of strict liability,\footnote{54} the Uniform Sales Act and Uniform Commercial Code lost their influence and the requirement of notice went the way of privity.\footnote{55}

**RELIANCE**

It is well settled that reliance upon the warranty is an essential element in actions for breach of warranty,\footnote{56} but in states which have adopted the doctrine of strict liability, reliance is simply not an element of recovery.

\footnote{50} Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965).

\footnote{51} Uniform Commercial Code § 2-607 (3).

\footnote{52} Uniform Sales Act § 49.

\footnote{53} See, Hampton v. Gebhardt’s Chili Powder Co., 294 F.2d 172 (9th Cir. 1961), where the court held that notice given after the commencement of the suit was “reasonable” in the circumstances.

\footnote{54} Greenman v. Yuba Power Products, Inc., supra note 44; Vandermark v. Ford Motor Co., supra note 44.

\footnote{55} Crane v. Sears, Roebuck & Co., 218 Cal. App. 2d 855, 32 Cal. Rptr. 754 (1963); Bennett v. Richardson-Merrell, Inc., 231 F. Supp. 150 (E.D. Ill. 1964); Restatement (Second) of Torts § 402A, Comment m states that the rule is not governed by the provisions of the Uniform Sales Act or those of the Uniform Commercial Code and, further, that the consumer is not required to give notice to the seller of his injury within a reasonable time after it occurs.

DISCLAIMER

At common law the manufacturer could limit his liability for breach of warrant by disclaimers taking the form of either a particular exclusion or an integration clause, as an exercise of the "freedom of contract." The Uniform Sales Act did not contain any specific provisions dealing with disclaimers but did sanction the use of them. In the case of commercial contracts it was thought that the experienced buyer could well protect himself against such limitations in the use of his bargaining power; and, the injustice of disclaimer was seldom questioned. Some courts, however, did not take such a favorable view toward such devices and even in the case of commercial contracts found either that the disclaimer was not brought home to the buyer or that it was not applicable under the facts. The Uniform Commercial Code attempted to deal with the blanket disclaimer or integration clause, such as, "Not Warranted in Any Way," by providing that certain implied warranties must be disclaimed by particular language. If strict liability were to take the contractual form of warranty, the problem of disclaimers would present a thorny path; but, as already pointed out, once privity was overcome, the tort character was obvious and provided the way out. Even prior to the advent of strict liability it was held that a manufacturer could not disclaim his liability for negligence on the logic that since the liability was not in the nature of contract, the contractual disclaimer should have no effect. With this kind of groundwork already laid, it was

White Motor Co., supra note 43; Restatement (Second) of Torts § 402A, comment m states that the strict liability in tort rule does not require any reliance on the part of the consumer upon the reputation, skill or judgment of the seller.


69 See Prosser, The Fall of the Citadel, 50 Minn. L. Rev. 791, 831-32, where Dean Prosser has collected decisions which refuse to permit disclaimer in the case of "breach of contract," "failure of consideration," "implied warranty," "property damage only," and where goods are sold "by description."

60 Uniform Commercial Code § 2-316 provides that in order to disclaim the implied warranty of merchantability, the seller must mention the word "merchantability" in the context of the disclaimer. But the Code tempers this provision by adding that: "expressions like 'as is,' 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty . . . are exceptions to the rule." For discussion and excellent analysis see Cudahy, Limitation of Warranty Under the Uniform Commercial Code, 47 Marq. L. Rev. 127 (1963).

not surprising to see the early decisions interpret strict liability as being inconsistent with the idea of disclaimer.\(^6\) An Illinois court illustrated rather astute perspective when it observed that "[t]he liability imposed . . . upon the sellers of defective products is a strict liability in tort and is not based upon the theory of breach of warranty. A seller, therefore, cannot protect himself from the liability . . . by expressly negating the existence of any implied warranties."\(^6\) The application of the disclaimer to products liability has apparently run out.

**MISUSET**

One qualification to strict products liability which traces its history to the very beginning of the idea is that of misuse. Chief Justice Traynor in his concurring opinion in the *Escola* case\(^6\) indicated that the manufacturer's strict liability in tort should be defined in terms of the safety of the product in normal and proper use only. Twenty years later, the landmark decision of strict liability, *Greenman v. Yuba Power Products, Inc.*,\(^6\) noted expressly that the plaintiff had used the defendant's product in a way in which it was "intended to be used," and that the product was unsafe for its "intended use."\(^6\) Within the framework of the defense "misuse," courts have included ideas of "abnormal" and "unusual" use, and in discussing the latter term, some courts have added the question of forseeability as a test of the manufacturer's "intended use." Where the forseeability element is applied to a situation of mere "unusual use," courts are less likely to find that the affirmative defense is presented.\(^6\) In either case, the directions or instructions which may or may not accompany the product to the ultimate consumer take on enormous importance in this area. And where the plaintiff departs from explicit directions or instructions, even the mere "unusual use" which may fall within the forseeability circle would probably constitute a bar to recovery under the strict liability theory.\(^6\) Where the use is totally abnormal

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\(^6\) Vandermark v. Ford Motor Co., *supra* note 44. *But see*, Greeno v. Clark Equipment Co., 237 F. Supp. 427, 431 (N.D. Ind. 1965), where the court indicates that an exception may lie where "the total circumstances of the transaction indicate the buyer's awareness of defects or acceptance of risk."


\(^6\) *Supra* note 17.

\(^6\) *Supra* note 29.


under the circumstances, the plaintiff will be defeated even in the absence of any explicit directions or instructions, such as where aspirin is taken in excessive quantities over a period of years.69

Another group of cases which tend to be listed under the heading of “misuse” are those involving some “alteration” in the product’s design, either by the plaintiff himself, or someone in the chain of distribution. The idea that the manufacturer’s liability is limited to situations which involve the product in its intended use must necessarily encompass situations of alteration which constitute the most flagrant misuse. When the product has been altered, the plaintiff has the burden of proving that the alteration or change had no substantial effect on the accident or injury in terms of proximate cause.70 One such case, involving a defective ladder which the plaintiff attempted to stabilize while on an unstable surface by nailing strips of wood to the bottom of the legs (in the face of instructions not to use the product on unstable surfaces), held that the plaintiff had not established his prima facie case in strict liability because he failed to show that the defect rather than the alteration was the proximate cause of his injury.71 The cases involving “alteration” tend to attack the problem of the manufacturer’s liability in terms of proximate causation rather than in terms of the affirmative defense, “misuse.” Whatever their approach, courts are reluctant to allow relief to plaintiffs who do not show proper regard for the manufacturer’s “intended use” of his product. The social policies which deny relief to those who contribute to their injury are beginning to emerge.

CONTRIBUTORY FAULT

In the products liability case based on the theory of “negligence,” the defendant is ordinarily given the opportunity to show that on the basis of the plaintiff’s own conduct, the right of recovery is precluded by contributory negligence.72 In some cases the plaintiff had the burden of pleading “freedom from contributory negligence” in order to state a cause of action.73 On the other hand, there was some confusion as to whether the defense of contributory negligence was available under the “warranty” theory. Some cases held that it was always a defense while others said that it was never

73 See, e.g., Cada v. The Fair, 187 Ill. App. 111 (1914).
a defense, and there were an equal number on both sides. Professor Prosser reconciled the apparent contradictions when he discovered that the cases, in their substance, fell into a consistent pattern.

Where the negligence of the plaintiff consists only in failure to discover the danger in the product, or to take precautions against its possible existence, it has uniformly been held that it is not a bar to an action for breach of warranty. [citations omitted] . . . . But if he discovers the defect, or knows the danger arising from it, and proceeds nevertheless deliberately to encounter it by making use of the product, his conduct is the kind of contributory negligence which overlaps assumption of risk; and on either theory his recovery is barred.\footnote{74}{Prosser, \textit{The Fall of the Citadel}, supra note 59 at 838-39.}

This little reconciliation soon found its way into one of the early authorities on the theory of strict liability: the \textit{Restatement}. Following section 402A of the \textit{Restatement (Second) of Torts}, it is stated in Comment \textit{n} that:

\begin{quote}
Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.
\end{quote}

The comment specifically noted that its position corresponds with the established law in other strict liability fields, such as “abnormally dangerous activities” and “animals.”\footnote{75}{See \textit{Prosser, Torts § 78}, at 538-40 (3d ed. 1964).} And thus the circle of logic, although something less than syllogistic is complete (i.e., this is the existing law in non-product strict liability cases as well as in products “warranty” cases, and, therefore, it should be applied to strict products liability by analogy). Adding strong support to the idea, the leading case, \textit{Greenman v. Yuba Power Products Inc.},\footnote{76}{\textit{Supra} note 29.} qualified the application of strict liability to situations in which the plaintiff “was not aware” of the defect that made the product unsafe for its intended use.\footnote{77}{See also, Preston \textit{v. Up-Right Inc.}, 243 Cal. App. 2d 636, 52 Cal. Rptr. 679 (1966); \textit{Gherna v. Ford Motor Co.}, \textit{supra} note 66.} The great majority of cases which have since been decided have adopted the \textit{Restatement} approach almost on all fours.\footnote{78}{\textit{But see}, Maiorino \textit{v. Weco Products Co.}, 45 N.J. 570, 214 A.2d 18 (1965); O. S. Stapley Co. \textit{v. Miller}, \textit{supra} note 70; Woodrick \textit{v. Smith Gas Service Inc.}, 87 Ill. App. 2d 88, 230 N.E.2d 508 (1967), where the court \textit{assumed} that contributory negligence was a defense to strict products liability but decided the case on procedural grounds.}
The Illinois landmark case, *Suvada v. White Motor Co.*, did not specifically discuss any of the affirmative defenses available but did expressly note that their views coincided with *Restatement 402A*. And while it is true that the *Restatement*'s approach is not enunciated in the section proper but rather in the comment which follows, the language of the Illinois court, liberally construed, implicitly includes the comment. To make matters more complex, in actions based on theories of "negligence" or "warranty," Illinois was one of the states which required the plaintiff to plead "freedom from contributory negligence" or "exercise of due care." And in construing *Suvada*, the questions centered around the sufficiency of the plaintiff's complaint rather than the "nature of" the contributory fault which would lie as a defense (i.e., the procedural rather than the substantive questions). The *Bua* case (the second supreme court decision handed down in Illinois) centered on a question of discovery procedure in a strict products liability case and did little to decide either of the questions, though some have construed it to decide that the plaintiff still has the burden of pleading "freedom from contributory negligence."

Probably the first Illinois case to address itself squarely to the question of whether the plaintiff still has the burden of pleading "due care" was *Dunham v. Vaughan & Bushnell*, which held (interpreting *Bua*) that the plaintiff does have the burden of pleading and proving freedom from contributory negligence. *Dunham* then went on to define "contributory negligence" in terms of assumption of risk by distinguishing between the failure to discover a defect, or guard against the possibility of its existence, and

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79 **Restatement (Second) of Torts** § 402A.

80 *Supra* note 73.

81 *Supra* note 73.

82 General Motors v. Bua, *supra* note 81.

83 Headnote 7 of the Northeastern Reporter interprets the case as holding that in a strict liability case, the plaintiff must prove that he was in the exercise of due care for his own safety from the following language: "This is a products liability case pleaded in two counts, one alleging negligence, and the other alleging breach of warranty. In *Suvada v. White* [citation omitted] this court adopted the theory which imposes strict tort liability on the 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, under both counts it is necessary to prove that the plaintiff was in the exercise of due care for his own safety." (emphasis supplied). 37 Ill. 2d 180, 187, 226 N.E.2d 6, 13 (1965). It is difficult (understatement) to understand how this language could have been so interpreted. Dunham v. Vaughan & Bushnell Mfg. Co., 86 Ill. App. 2d 315, 229 N.E.2d 684 (1967).

84 *Supra* note 83.
the actual use of the product after the defect or danger is known. It is not surprising that the court couched their decision in the label of "contributory negligence" rather than "assumption of risk," since Illinois had traditionally confined the doctrine of assumption of risk to master-servant and contractual relationships, and instant change is seldom ever favored.

The following year two appellate courts, in separate districts, attacked the problem courageously and rendered similar decisions within the same month, apparently without the benefit of each other's opinion.

The Sweeney case arose out of the defective nails which, when hit properly, broke off and flew like bullets, one into the plaintiff's eye. In deciding that "assumption of risk" is a defense to strict products liability, the court distinguished the case at bar from established precedent on the issue by noting that the existing case law, which restricted the application of the defense, was grounded in negligence whereas strict liability is a tort action not based on negligence. As to whether the plaintiff had the burden to plead and prove "due care," the court hedged its decision around the confusion flowing from the Bua decision, saying in effect that if the supreme court has decided that the plaintiff has the duty of pleading "due care" they meant only that he must not have voluntarily exposed himself to a recognized risk. The court did not decide whether the defense of assumption of risk was an affirmative one or not.

Less than two weeks after Sweeney, another appellate court handed down its decision in the Williams case, which arose out of a "defective" trenching machine which bucked like a bronco and ran over the plaintiff. The question addressed by the court was whether the plaintiff was required to plead and prove "due care" and what was the nature of the due care which would bar the action. In clearing the brush, the court construed the Bua decision to have decided only that contributory negligence is a proper issue in a strict liability case. Then the court decided that contributory negligence was in fact an affirmative defense (i.e., the burdens of pleading and proof are on the defendant) and defined "contributory negligence" saying:

For purposes of this opinion contributory negligence is defined as voluntarily and unreasonably proceeding to encounter a known danger or proceeding unreasonably to make use of a product after discovery of a defect and becoming aware of the danger.  

87 General Motors v. Bua, supra note 81.
89 Id. at 133, 236 N.E.2d 125 at 133.
As the opinion continued, the court dropped the use of the words "contributory negligence" and spoke in terms of "contributory fault," which seems to be a more appropriate phrase especially when one stops to consider that negligence is the antithesis of strict liability and that negligence law has no place in the field of strict liability.

The Sweeney and Williams decisions finally established some definite authority on the issue of pleading and proof of contributory fault, and, for a little over one week, things were tranquil. And then, the United States Court of Appeals for the Seventh Circuit, sitting in a diversity case and applying Illinois law, interpreted the Bua case quite another way, saying: "The Supreme Court of Illinois has now made it clear, in People v. Bua that plaintiff must prove in a products liability case that he "was in the exercise of due care for his own safety." Moreover, the court did not distinguish between the standard of "due care" in negligence cases and the standard of "due care" in strict liability cases but seemed to lump them together, thereby implying that they are the same. It is apparent that the court was not operating under the insight of the Sweeney and Brown cases; and it is reasonable to assume that in applying Illinois law the federal courts will most probably treat the Dasenko case as little precedent.

It is almost clear at this point that the courts intend to distinguish between the standards applicable to negligence law and those which are applicable in cases of strict products liability. In defining the nature of the particular contributory fault which will lie as an affirmative defense to the latter, courts have somewhat loosely referred to the doctrine of assumption of risk, when in fact they meant a particular type of contributory fault which also lies as a defense to a negligence action (i.e., contributory negligence). While contributory negligence per se is not a defense to strict products liability, the particular contributory fault which would constitute such a defense overlaps the doctrine of contributory negligence and is a narrow form of it. In substance, the courts have all defined the nature of the defense as "voluntarily and unreasonably encountering a known danger," which conduct would certainly comprise a form of contributory negligence. The difference between the two doctrines is simply one of breadth. The idea of comparative fault is much more narrow than the doctrine of contributory negligence. The former is concerned with the subjective standard of conduct, (requiring that the plaintiff have actual knowledge of the risk or danger), and the latter

Suvada v. White Motor Co., supra note 44.

The only clarity is the headnote contained in the regional reporter which doesn't seem to be supported by the substance of the case. See note 83.

Dazenko v. James Hunter Machine Co., 393 F.2d 287 (7th Cir. 1968).

Supra notes 86, 88.
is concerned with an objective standard (requiring only the knowledge that a reasonably prudent man would have). This is as far as the courts have gone in defining the particular characteristics of the affirmative defense, contributory fault, and perhaps marks the high waterline of definition.\(^9\) In either case, there appears to be good reasons not to adopt the term "assumption of risk" which would necessarily confuse and unduly restrict the development of the concept of strict liability,\(^9\) which should have the freedom to develop in the environment which created it.

While disclaimers may not have a place in the field of strict products liability, perhaps the "warning" will replace them. Manufacturers, many of whom are either self-insured, or retrospectively rated, will doubtlessly attempt to insulate themselves from products claims by placing comprehensive warnings on their products in an effort to come within the ambit of contributory fault. Almost all of the decisions which have dealt with the question of the sufficiency of the warnings decided before the defense of contributory fault was judiciously established and were concerned with the problem of "defect" rather than the affirmative defense under discussion. In those cases, the failure to warn comprised the unreasonably dangerous condition or "defect"\(^9\) because the courts found that in certain circumstances the defendant had a "duty to warn." These cases are little help in analyzing the sufficiency of warnings in their relationship to contributory fault and within the standard of the subjective test. This, however, does not leave us without some precedent.

The Brown case\(^9\) involved an instruction manual which, if read and heeded, probably could have prevented the plaintiff's injury. Though the plaintiff admitted reading the instructions (although they were contained in a booklet not attached to the product), the court held that, because they did not contain a specific warning of the particular danger which would result from a failure to heed the instructions (the evidence could not support a finding that the plaintiff unreasonably proceeded to encounter a known danger. Further, the court suggested that the warning should have been placed on the machine itself.\(^9\) It might be concluded that the warning

\(^9\) Supra notes 86, 88.

\(^9\) Professor Prosser recognizes three senses of the term "assumption of risk," Prosser, Torts § 67 (3d ed. 1964). The Restatement adds a fourth sense of interpretation or usage, Restatement (Second) of Torts § 496A (1964). Professor Keeton recognizes not less than six senses in which the term may be properly used, Keeton, Assumption of Risk in Products Liability Cases, 22 La. L. Rev. 122 (1961).


\(^9\) Supra note 88.

\(^9\) See, McKay v. Upson-Walton Co., 317 F.2d 826 (7th Cir. 1963).
necessary to impute some contributory fault to the plaintiff is one which is calculated to reach the ultimate user and which includes specifically the particular danger involved. As a caveat, the warning should not be so all inclusive so as to preclude the user from reading it.\(^9\)

As to the standard of subjectivity, the plaintiff in the *Sweeney* case\(^10\) testified, in effect, that the thought entered his mind that either he was doing something wrong or that something was wrong with the nails themselves, but this evidence was insufficient to justify a directed verdict against him. The court pointed out the inexperience of the plaintiff, stressed the total circumstances of the transaction, and submitted the question of contributory fault to the jury. While it is true that the experience or expertise of the plaintiff should be considered in determining the plaintiff’s state of mind in a subjective sense, one questions whether it is a proper determinant where the plaintiff has, in effect, admitted having knowledge.

How much knowledge is required? Is the issue of whether the plaintiff appreciates the risk related to the degree of obviousness of the danger or are there no objective standards? Doesn’t the plaintiff already have the best of all possible worlds? The answers to these questions lie in tomorrow’s development.

**CONCLUSION**

We have traveled a long way from the day of the *Winterbottom* rationale when people felt that there was some justification for liability based upon principles of fault. The scales of justice are being balanced in favor of the injured and many times crippled plaintiff. At the same time the manufacturer and his insurer are looking down both barrels. Perhaps the courts are really laying the groundwork for ‘products compensation’ which may or may not surprise you. For a long time in the field of personal injury the formula for liability has been: injury + insurance = liability. How did the manufacturers escape this for such a long time? Was it ever fashionable to be illiberal?

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\(^9\) *See*, Crane v. Sears Roebuck & Co., *supra* note 96 at 858, 32 Cal. Rptr. 754 at 757.

\(^10\) *Supra* note 86.