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Contributory Negligence in Product Liability

S. Burns Weston

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DEFENDANTS ARE JUST THAT. They choose not their opponents. Usually the law makes them an underdog. Psychologically, they are frequently the underdog.

When a jury issue is presented in products cases, contributory negligence and assumption of risk often become vital. Moreover the courts and legislatures more often than not have whittled away the defenses and in some instances anesthetized them so that plaintiffs have acquired greater latitude in being able to reach the jury.

For example, in days past defendants in products cases relied heavily on the concept of privity, whether the action sounded in negligence or implied or express warranty. However, privity is being whittled away by statute[1] and by case law.[2] Ohio has repudiated privity in express warranty cases where reliance on advertising is alleged.[3] Michigan discarded it in implied warranty cases.[4] Wisconsin abandoned it in negligence cases, even though the product is not "inherently dangerous." In addition, there are a myriad of decisions which have followed and expanded upon the *MacPherson* case in holding that privity is not required where the product is not "imminently" dangerous.[5]

This article does not purport to be exhaustive. It does explore the extent to which classical defenses of contributory negligence, assumption of risk and their relative, "misuse of product," are available. *Caveat*: By the time this printer's ink is dry some of these applications may be available no longer.

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1 Uniform Commercial Code, Sec. 2-318; Ohio Rev. Code Sec. 1302.31.

2 Rogers vs. Toni Home Permanent Co., 167 Ohio St. 244, 147 N. E. 2d 612 (1958).

3 Spence vs. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N. W. 2d 873 (1958), as clarified in Manzoni vs. Detroit Coca-Cola Bottling Co., 363 Mich. 235, 109 N. W. 2d 918 (1962).

4 Smith vs. Atco Company, 6 Wis. 2d 371, 94 N. W. 2d 697 (1959).

5 MacPherson vs. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916).

Pure Negligence Situations

Contributory negligence generally is recognized as a defense in products negligence cases. In a leading airplane case where negligent design was claimed,[6] the Federal Court of Appeals disallowed the use of contributory negligence because of lack of evidence that plaintiff's inspection of defendant's product revealed the defect or increased the risk of harm.

On the other hand, plaintiff's failure to follow instructions provided by the manufacturer may constitute contributory negligence.[7]

Where it is claimed that a specific safety statute has been violated by a defendant, some courts hold that contributory negligence is available as a defense and some hold to the contrary. In Ohio, where a violation of the Pure Food Act[8] is negligence *per se,* the courts have recognized contributory negligence as a defense. Example: Whether the buyer cooked sausage sufficiently; [9] or as in Minnesota where the plaintiff poured kerosene on a fire, causing an explosion and the kerosene contained gasoline contrary to statute.[10] A Georgia court has taken a similar position.[11] In these instances the courts took the position that the statute was enacted for the protection of the "general public."

On the other hand, where the statute prohibited sale of guns to minors and the minor shot himself, a Florida court held that this statute was to protect a certain group of persons who were unable to protect themselves and contributory negligence was not allowed.[12] Thus, it appears that if a court feels the plaintiff is one who cannot protect himself, contributory negligence is not allowed. However, if the plaintiff is regarded as one capable of knowing the dangers of using the product, contributory negligence is available in an action based on alleged violation of a specific safety statute.

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[6] Northwest Airlines, Inc. vs. Glenn L. Martin Company, 224 F. 2d 120 (6th Cir., 1955).

[7] Young vs. Aeroil Products Company, Inc., 248 F. 2d 185 (9th Cir., 1957).

[8] Ohio Revised Code, Sec. 3715.52.

[9] The Great Atlantic & Pacific Tea Co. vs. Hughes, 131 Ohio St. 501, 3 N. E. 2d 415 (1936).

[10] Dart vs. Pure Oil Co., 223 Minn. 526, 27 N. W. 2d 555 (1947).

[11] Allen vs. Gornto, 100 Ga. App. 744, 112 S. E. 2d 368 (1959).

[12] Tamiami Gun Shop vs. Klein, 116 So. 2d 421 (Supreme Court of Florida, 1959).

Assumption of Risk

Generally speaking, assumption of risk is recognized in products actions based on negligence. By implication it is available in Ohio.[13] The *Northwest Airlines* case[14] explored application of the principle. Defendant contended that any defect in an airplane wing would be open and obvious to a competent engineer. However, the Federal Court of Appeals held that the evidence failed to establish that the danger lurking in the wing joint was so obvious to the Northwest representatives that they must be taken to have appreciated the danger. On the other hand, where a garage failed to repair brakes properly and plaintiff drove the car 150 miles knowing that the brakes pulled or grabbed, the court held that the danger was so obvious that plaintiff "voluntarily took a chance that serious injury would likely occur." [15] However, where a specific statute placed certain duties on a dealer in regard to releasing a car with defective brakes, a California court has inferred that assumption of risk may not be charged.[16]

Occasionally assumption of risk may bar recovery as a matter of law and a plaintiff, with previous experience with and full knowledge of a defect, may have no redress.[17]

Misuse of Product

The term "misuse of product" has crept into court language. Sometimes it is equated with contributory negligence.[18] Strange as it may seem, in some instances the burden has been placed upon the plaintiff to show that he did not misuse or mishandle the product,[19] or that he complied substantially with defendant's instructions as to use.[20] Lucky is the defense lawyer who has the court and the facts to support this position. In some cases it has been held to be no defense: [21] while the danger from misuse

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[13] Patterson vs. Gershow's Super Markets, Inc., 109 Ohio App. 1, 163 N. E. 2d 410 (1959).

[14] Northwest Airlines, Inc. vs. Glenn L. Martin Company, *supra*, n. 6.

[15] Robbins vs. Milner Enterprises, Inc., 278 F. 2d 492 (5th Cir., 1960).

[16] Gallegos vs. Nash, San Francisco, 137 Cal. App. 2d 14, 289 P. 2d 835 (1955).

[17] Gutelius vs. General Electric Co., 37 Cal. App. 2d 455, 99 P. 2d 682 (1940).

[18] Heise vs. J. R. Clark Company, 245 Minn. 179, 71 N. W. 2d 818 (1955).

[19] Ferrell vs. Sikeston Coca-Cola Bottling Co., 320 S. W. 2d 292 (Mo. App., 1959).

[20] Sanders vs. Kalamazoo Tank & Silo Co., 205 Mich. 339, 171 N. W. 523 (1919).

[21] DeEugenio vs. Allis-Chalmers Mfg. Co., 210 F. 2d 409 (3rd Cir., 1954).

was obvious, there was evidence that defendant's representatives stood by and seemed to approve the misuse of farm machinery. Of course, where defendant actually demonstrates the misuse the defense is not available.[22]

Application of the doctrine was not permitted in the absence of adequate warning by the defendant, where plaintiff used Dreft detergent in her eyes, causing blindness; [23] nor where the defendant could reasonably anticipate the particular misuse.[24] Query: If a defendant can anticipate a particular misuse, is it not as likely that the plaintiff understands the misuse? If defendants are charged with using common sense, are plaintiffs excluded? Apparently so.

One court held that a jury should decide whether plaintiff was negligent in altering the extractor slot on a gun; [25] and where plaintiff *ate some coffee containing glass particles* it was determined to be a jury issue.[26] The court's language is worth quoting:

> While the eating of coffee grounds is, to the minds of this court, an unusual practice, we will not assume to rule as a matter of law that such a use of ground coffee is so unusual or improbable that the coffee manufacturer may disregard it altogether, and we leave that as an issue of fact in the case, to be decided by the jury. . . .

Where a workman used a window frame as a ladder, fell and was killed the court found misuse as a matter of law.[27] It was also held to be misuse as a matter of law where a lady dipped her hands in Calgonite, although the label contained a warning against use of it for tasks involving the hands.[28] The court was not impressed with plaintiff's claim that the defendant should have spelled out the specific ingredients and should have indicated on the package an antidote.

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[22] Allis-Chalmers Manufacturing Company vs. Wichman, 220 F. 2d 426 (8th Cir., 1955).

[23] Hardy vs. Procter & Gamble Mfg. Co., 209 F. 2d 124 (5th Cir., 1954).

[24] Phillips vs. Ogle Aluminum Furniture, Inc., 106 Cal. App. 2d 650, 235 P. 2d 857 (1951).

[25] Webb vs. Olin Mathieson Chemical Corporation, 9 Utah 2d 275, 342 P. 2d 1094 (1959).

[26] Maddox Coffee Co. vs. Collins, 46 Ga. App. 220, 167 S. E. 306 (1932).

[27] McCready vs. United Iron and Steel Company, 272 F. 2d 700 (10th Cir., 1959).

[28] Shaw vs. Calgon, Inc., 35 N. J. Super. 319, 114 A. 2d 278 (1955).

Implied Warranty

I. *Contributory Negligence*

In the use of contributory negligence as a defense in implied warranty cases, the courts are split. Moreover, there appears to be some uncertainty in their opinions which suggests that effective persuasion as to applicability of the doctrine is essential. In Ohio there is dictum that the defense is permissible.[29] (A grinding wheel disintegrated). In another Ohio case[30] the trial court struck out implied warranty on the ground there was no evidence to support it. The jury was charged on contributory negligence. The Supreme Court held that implied warranty should have been left in the case and that contributory negligence was charged properly without, however, indicating whether it was referring to the cause of action in warranty or the cause of action in negligence.

A similar lack of clarity is found in an Illinois case.[31]

A leading decision holding specifically that contributory negligence is a defense in an implied warranty action is found in Mississippi,[32] where plaintiff complained of defects in bags supplied by defendant. The case involved property damage only. We quote from the opinion:

> And the law is well settled that a person seeking to recover damages caused by the breach of implied warranty of merchandise purchased cannot recover damages which are proximately caused by his own negligence in using the defective articles. Sutherland on Damages, 4th Ed., Vol. 1, p. 317. A person seeking to recover damages caused by the purchase of defective articles to be used by him 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.
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> In Sutherland on Damages, 4th Ed., Vol. 1, p. 317, Sec. 89, it is said that, "where property is sold with a warranty of fitness for a particular purpose, if it be of such a nature that its defects can be readily, and in fact are, ascertained, yet the purchaser persists in using it, whereby losses and expenses are incurred, they come of his own wrong and he can-

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[29] DiVello vs. Gardner Machine Co., 65 Ohio L. Abs. 58, 102 N. E. 2d 289 (1951).

[30] Sicard vs. Kremer, 133 Ohio St. 291, 13 N. E. 2d 250 (1938).

[31] Patargias vs. Coca-Cola Bottling Co. of Chicago, Inc., 332 Ill. App. 117, 74 N. E. 2d 162 (1947).

[32] Missouri Bag Co. vs. Chemical Delinting Co., 214 Miss. 13, 58 So. 2d 71 (1952).

> not recover damages for them as consequences of the breach of warranty."
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> If the buyer's own fault or negligence contributed to the injury, as by using the goods with knowledge of their defects, he cannot recover consequential damages, since such damages were under the circumstances not proximately due to the breach of warranty. Williston on Sales, Rev. Ed., Vol. 3, p. 379, Sec. 614b, and cases cited.

Analysis of the above quoted language reveals that the court discussed not only contributory negligence but, in effect, was referring also to misuse of product and assumption of risk, as well as lack of proximate causation, and that all of these may be proper defenses. To what extent the Mississippi court would vary its position on a different set of facts is unknown. In any case, the court's reasoning is so logical that it is difficult to understand how anyone could disagree with the elemental justice it expresses.

A New York court stated the issue succinctly[33] when it said:

> . . . Although negligence plays no part in a breach of warranty action, contributory negligence may be asserted as a defense to the breach of warranty action.

Originally implied warranty stemmed from tort. Then some writers and courts attached it to contract. Today it is used both ways but with a growing tendency to turn implied warranty to the tort field. This is probably one explanation for much of the divergency in the cases.

In Pennsylvania contributory negligence has been held not applicable in an action based on implied warranty,[34] where a king pin broke on a truck manufactured by defendant. The court said:

> The principle applicable to contracts appears thus in the Restatement, Contracts, Sec. 336:
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> (1) Damages are not recoverable for harm that plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation. Under the facts in this case the plaintiff cannot be barred in the application of that principle.

Thus the court's language seems to recognize assumption of risk or misuse of product as a defense.

Some courts take a particularly dim view of the right to use

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[33] Parish vs. The Great Altantic & Pacific Tea Co., 177 N. Y. S. 2d 7 (1958).

[34] Jarnot vs. Ford Motor Company, 191 Pa. Super. 422, 156 A. 2d 568 (1959).

contributory negligence in implied warranty cases involving deleterious food.[35]

In a Kansas case it was not only held that contributory negligence was not a defense but also that the defendant may not even introduce evidence of due care in manufacture or that contamination of the food was caused by a third person. A similar position was taken by a California court[36] involving a defective milk bottle, as well as where a plaintiff ate a candy bar covered with worms and webbing.[37]

However, where plaintiff sought recovery for injuries when her night gown burned, a Federal Court charged the jury on sole negligence of the plaintiff without commenting specifically upon contributory negligence.[38] There was evidence that plaintiff had taken a sleeping pill and dropped a match while lighting a cigarette.

In another case plaintiff sued in negligence and implied warranty for burns while wearing a hula skirt which burst into flames at a party where people were drinking and smoking.[39] The trial court charged on contributory negligence but confined it to the negligence portion of the case. The court charged assumption of risk as to both causes of action. The Federal District Court in Hawaii said:

> A further ground for the motion was a claim that, as a matter of law, the plaintiff was guilty of contributory negligence, and that this should bar recovery. The court ruled . . . that contributory negligence would not be a defense to the claim based on implied warranty, although it would be to the claim based on negligence.
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> The court now finds that any facts relied upon as constituting contributory negligence are not so clear as that as a matter of law they must be held to constitute contributory negligence. Furthermore, the court holds that contributory negligence, under the generally accepted rule is not a bar to a suit based on implied warranty. A persuasive argument was made by defendants' counsel to the effect that, historically, implied warranty originated in tort, that there is therefore a tendency to eliminate the requirement of privity,

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[35] Challis vs. Hartloff, 136 Kan. 823, 18 P. 2d 199 (1933); and Simmons vs. Wichita Coca-Cola Bottling Company, 181 Kan. 35, 309 P. 2d 633 (1957).

[36] Vassallo vs. Sabatte Land Company, Inc., 27 Cal. Rptr. 814 (1963).

[37] Kassouf vs. Lee Bros., Inc., 26 Cal. Rptr. 276 (1963).

[38] Dallison vs. Sears, Roebuck and Co., 313 F. 2d 343 (10th Cir., 1962).

[39] Chapman vs. Brown, 198 F. Supp. 78 (D. C., Hawaii, 1961), affirmed 304 F. 2d 149 (9th Cir., 1962).

> and that the action is now reverting more and more to the theory of tort rather than that of contract; therefore, it is contended, contributory negligence ought, by analogy, to be a defense to the implied warranty claim. It seems to the court, however, that, the doctrine of contributory negligence, which takes no account of the comparative negligence of the parties, often produces results far from equitable, and for that reason is not likely to be adopted by the Hawaii courts in its full strictness, if at all, as a complete defense in such cases as this based on breach of implied warranty, unless the contributory negligence practically amounts to an assumption of risk.

While the court seems to equate contributory negligence with assumption of risk, technically this is mixing oil and water.

In the hula skirt situation the court indicated that in comparative negligence jurisdictions contributory negligence may be taken into account in mitigation of damages. If contributory negligence can be used to mitigate damages, why should it be eliminated in determining whether plaintiff is entitled to a recovery?

II. *Assumption of Risk*

In the hula skirt case[40] we have noted that the court felt contributory negligence was a defense where it "practically amounts to the assumption of risk." This certainly is a tacit approval of assumption of risk in implied warranty cases. However, in affirming the trial court the Court of Appeals stated:

> One may well rely upon a warranty as protection against aggravation of the consequences of one's own carelessness.

Thus, the import of the District Court and Court of Appeals' opinions is that where reliance is carried to the point of foolhardiness, it may be regarded as an assumption of risk and, therefore, a valid defense.

The Michigan Supreme Court also gives implied approval to the defense of assumption of risk.[41]

III. *Misuse of Product*

A hoist built for carrying material was used to carry passengers.[42] The Illinois court stated that if the jury found that use of the product at the time of the accident was "outside the scope

[40] *Ibid.*

[41] Sanders vs. Kalamazoo Tank & Silo Co., *supra,* n. 35; Kassouf vs. Lee Bros., Inc., *supra*, n. 37.

[42] Nelson vs. Union Wire Rope Corporation, 39 Ill. App. 2d 73, 187 N. E. 2d 425 (1963).

of the use for which it was intended," the jury might then find no breach of implied warranty.

Connecticut has taken a similar position.[43] The court said:

> If a buyer has knowledge, either actual or constructive, that he is allergic to a particular substance and purchases a product which he knows or reasonably should know contains that substance, he cannot recover damages for breach of an implied wararnty. Nor can he recover if he suffers harm by reason of his own improper use of the article warranted.

Thus, as so often occurs, the courts speak not only of assumption of risk but also misuse of a product without making it clear whether they are talking about these principles interchangeably or as separate concepts.

Express Warranty

I. *Contributory Negligence*

Contributory negligence in express warranty cases is found less frequently. Defendant advertised that the top of its car was made with a single sheet of steel when in fact it was not. Plaintiff was driving at a high rate of speed. The car turned over and plaintiff was cut by jagged pieces where the two sections of the top were welded.[44]

The Michigan Supreme Court held that there is "no reason or authority" to support the propriety of a contributory negligence defense in an action based on breach of express warranty. It stated further that a manufacturer who makes warranties enlarges his duty beyond that of ordinary care in manufacture and may not escape the increased risk caused by such warranty.

In a vigorous dissent one justice stated:

> . . . for if plaintiff had been operating his car in a proper manner, the injuries would not have been sustained.

If in fact an accident would not occur but for the negligent action of plaintiff or misuse of product, then at least the question of proximate cause would seem to be a valid issue even though there is an express warranty. However, Michigan seemingly does not agree.

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[43] Crotty vs. Shartenberg's-New Haven, Inc., 147 Conn. 460, 162 A. 2d 513 (1960).

[44] Bahlman vs. Hudson Motor Car Co., 290 Mich. 683, 288 N. W. 309 (1939).

In a Federal Court case stemming from Michigan[45] claiming an express warranty as to the safety and performance qualities of defendant's tires, plaintiff received a verdict after having withdrawn the negligence charge. The trial court, however, granted a motion for judgment notwithstanding the verdict, stating that negligence was necessary to support a warranty action but once it was withdrawn from the case then the entire action failed. The Court of Appeals disagreed and also stated categorically that contributory negligence is not a defense in an express warranty case; that a breach of express warranty imposes absolute liability and no proof of negligence is necessary. At the same time the Court of Appeals left the door open as to assumption of risk:

> Nor is it shown that the absence of the qualities warranted was readily discoverable upon examination of the tires by a normally experienced and prudent person.

A Tennessee court by inference has approved the defense of contributory negligence in express warranty cases.[46] Other courts have declined to decide the question.[47]

II. *Assumption of Risk and Misuse of Product*

We know of no case which holds directly that assumption of risk applies in express warranty cases, although a more exhaustive review of case law might uncover some examples. However, it seems reasonable that it should apply under a fact situation where the plaintiff knows something to be dangerous but proceeds in spite of this knowledge or where the plaintiff's injuries are not the result of reliance upon the warranty. Misuse of product, however, has been held to be a defense where an express warrant exists.[48] In a case previously mentioned in another context substantial alteration of a product defeated a cause of action in express warranty. Moreover, plaintiff's failure to comply with the terms of an express warranty can defeat his action based upon alleged breach of said warranty.[49]

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[45] Hansen vs. Firestone Tire and Rubber Company, 276 F. 2d 254 (6th Cir., 1960).

[46] Dunn vs. Ralston Purina Company, 38 Tenn. App. 229, 272 S. W. 2d 479 (1954).

[47] Young vs. Aeroil Products Company, Inc., 248 F. 2d 185 (9th Cir., 1957).

[48] *Ibid.*

[49] London vs. Curlee, 336 S. W. 2d 836 (Tex. Civ. App., 1960).

The Defense

It is apparent from the foregoing there has been no consistent line of authority as to the use of contributory negligence, assumption of risk and misuse of product in warranty cases. There are a few cases wherein it is difficult to determine from the courts' language which of the various defenses is given approval.

In an action by the estate of a deceased pilot against the manufacturer and seller of an airplane both negligence and breach of implied warranty were pleaded.[50] The crash occurred in bad weather and the decedent was not checked out for instrument flying.

The trial court directed a verdict for defendants on the ground that plaintiff's evidence failed to show a defect in the plane or that any defect which it had (difficulty of control under instrument flying conditions) was not explained by defendants in their literature. The trial court said plaintiff's warranty action failed for lack of evidence that the plane was not reasonably fit for flying. The Court of Appeals held that decedent assumed the risk of flying in marginal weather and was contributorily negligent in failing to heed warnings with reference to unqualified pilots in instrument weather.

It is not clear from the decision whether the court was applying contributory negligence and assumption of risk to both causes of action. For example: As to the action by the co-plaintiff, the corporation which owned the plane, the court held that the corporation could not recover for breach of warranty of merchantability since there was no evidence that the plane was not reasonably fit for flying and since "it is clear that if the damage to the plane was proximately caused by the negligence of Choice's pilot, Choice cannot recover."

Query: Does it not mean that contributory negligence is a defense in a warranty action? Does it mean that the sole proximate cause of the accident was decedent's negligence? Or does it really mean that the plane was misused?

In another case plaintiff disregarded instructions with reference to doing a patch test before using a hair dye.[51] She sued only in implied warranty and the Supreme Court of Massachusetts said:

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[50] Prashker vs. Beech Aircraft Corporation, 258 F. 2d 602 (3rd Cir., 1958).

[51] Taylor vs. Jacobsen, 336 Mass. 709, 147 N. E. 2d 770 (1958).

She has not shown that she was within the scope of any implied warranty. . .

Query: Did the Massachusetts court mean she committed contributory negligence? Did she assume the risk? Did she misuse the product? Were her injuries due solely to her own negligence?

In still another case plaintiff sounded the action in negligence, implied and express warranty.[52] The manufacturer and retailer of a hammer were sued for damages for the loss of an eye when the plaintiff struck one hammer with the head of another, causing a chip to fly. The court did not differentiate between the three causes of action in approving the charge on contributory negligence.

Query: In approving the charge, was the court applying it to the warranty issues? If the court meant misuse of product was it being applied to all causes of action?

Conclusion

In a products liability case based on negligence alone we know of no court that does not allow contributory negligence, assumption of risk or misuse of product as a defense where the court feels that the facts of a particular case justify it.

Where implied warranty is involved there is little doubt that assumption of risk and misuse of product will be applied. There is a split of authority as to the applicability of contributory negligence.

The majority of text writers look upon contributory negligence in implied warranty cases with disfavor. Since they are steeped in the history of the law and since the doctrine had its origin in tort rather than contract, we find no logic that justifies denial of contributory negligence as a defense in implied warranty cases.

As to express warranty, the defendant has greater difficulty in finding authority supporting the use of contributory negligence as a defense, even though assumption of risk and misuse of product have been approved.

In implied and express warranty cases the question of which defense can be used may be academic. As in so many lawsuits of all kinds the facts assume vital significance. It is not difficult

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[52] Odekirk vs. Sears, Roebuck & Co., 274 F. 2d 441 (7th Cir., 1960).

to conjure a situation where logic would justify equally the use of contributory negligence, assumption of risk or misuse of product in either an implied or an express warranty situation.

Much depends upon the reasonableness of the defense argument on the facts and much depends upon the philosophy the courts are going to pursue in the years ahead. No one can quarrel with the duty placed upon defendants to exercise ordinary care or their duty to live up to their implied and express warranties. By the same token are plaintiffs to be relieved of the responsibility of exercising common sense or the judgment of a reasonable person? Is an adult who eats candy obviously covered with worms and webbing entitled to recover on the ground that the manufacturer breached an implied warranty? Should plaintiffs be permitted to take refuge from their own stupidity because of an implied or express warranty?