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Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty

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Based on the premises that manufacturers should be held responsible for the goods they produce and that they can best bear the cost of injuries from these goods, courts have been compensating plaintiffs for product-caused injuries at an ever-increasing rate. Under the rubric of "warranty," the doctrine of strict liability has been relentlessly applied. Frequently, however, sufficient inquiry has not been made into the conduct of the person claiming damages. This Article will examine several notable cases in which the courts have failed to examine carefully the buyer's conduct in order to illustrate the problem; discuss the types of buyer conduct which have been held to be defenses in warranty; consider the arguments against the use of contributory negligence as a defense in warranty; discuss those cases which utilize the buyer's contributory negligence in some manner as a defense in warranty; and suggest a comparative fault standard for considering the buyer's conduct in products liability cases.

I. THE BASIS OF RECOVERY IN PRODUCTS LIABILITY

In most products liability cases the plaintiff alleges two grounds of action: negligence and breach of warranty. *MacPherson v. Buick Motor Company*[1] firmly established manufacturer's liability for negligence in making a product, even to remote consumers with whom he had no direct contractual relationship. Products liability law has evolved considerably beyond *MacPherson*, and the current tendency in negligence is simply to require reasonable care by manufacturers for all their products.[2] Proof of negligence has been made easier by an increasing use of res ipsa loquitur.[3]

1. 217 N.Y. 382, 111 N.E. 1050 (1916) (Cardozo, J.).

2. Smith v. Acto Co., 6 Wis. 2d 371, 383, 94 N.W.2d 697, 704 (1959) (test of liability is not whether the particular product is inherently dangerous but whether the manufacturer employed the care which would be exercised by a reasonably prudent person in the shoes of the manufacturer).

3. Ryan v. Zweck-Wallenberg Co., 266 Wis. 630, 64 N.W.2d 226 (1954); *cf.* Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81 (1963) (warranty) (dissent speaks of the ease "with which lack of due care can be brought to light through devices such as res ipsa loquitur." 12 N.Y.2d at 440 n.2, 181 N.E. at 85 n.2).

Most products liability cases, however, have been decided on a breach of warranty theory. Since breach of warranty is a form of absolute liability obviating the necessity of proving negligence,[4] it occupies a preferred position as a basis for establishing liability for product-caused injury.[5] A warranty may be defined as a representation by a seller concerning the character and quality of his goods by which he undertakes to be responsible for resulting damages if the goods are in a condition other than that represented.[6] In an action for breach of warranty[7] the buyer must prove existence of the warranty,[8] breach of the warranty,[9] reliance on the warranty,[10] loss or injury resulting from the breach, and breach of the warranty as the proximate cause of the loss sustained.[11]

Warranties may be express[12] or implied.[13] While an ex-

4. Bailey v. Montgomery Ward & Co., 431 P.2d 108 (Ariz. 1967); Vaccarezza v. Sanguinetti, 71 Cal. App. 2d 687, 163 P.2d 470 (1945); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 372, 400, 161 A.2d 69, 77, 92 (1960); Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. 1966).

5. 1 R. HURSH, AMERICAN LAW OF PRODUCTS LIABILITY § 3:1 (1961) [hereinafter cited as HURSH].

6. *Cf.* Mitchell v. Rudasill, 332 S.W.2d 91 (Mo. Ct. App. 1960).

7. Freedman, *A Brief For Products Liability Today*, 15 BUS. LAW. 672, 680 (1960).

8. UNIFORM COMMERCIAL CODE § 2-314, Comment 13.

9. *Id.*; Kepling v. Schlueter Mfg. Co., 378 F.2d 5 (6th Cir. 1967); Jacobsen v. Ford Motor Co., 427 P.2d 621 (Kan. 1967).

10. Ingalls v. Meissner, 11 Wis. 2d 371, 105 N.W.2d 748 (1960). However, recently this requirement has been held satisfied by bare proof of reliance: Transamerica Leasing Corp. v. Van's Realty Co., 427 P.2d 284 (Idaho 1967); Sams v. Ezy-Way Foodliner Co., 157 Me. 10, 170 A.2d 160 (1961); Venie v. South Cent. Enterprises, Inc., 401 S.W.2d 495 (Mo. 1966); Kasey v. Surburban Gas Heat, 60 Wash. 2d 468, 374 P.2d 549 (1962) (act of purchase and proper use of product sufficient). *See* 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.03 [2] (1965 Supp.) [hereinafter cited as FRUMER & FRIEDMAN].

11. Borowicz v. Chicago Mastic Co., 367 F.2d 751 (7th Cir. 1966); Natale v. Pepsi-Cola Co., 7 App. Div. 2d 282, 182 N.Y.S.2d 404 (1959); *cf.* Gonzalez v. Derrington, 56 Cal. 2d 130, 363 P.2d 1, 14 Cal. Rptr. 1 (1961).

12. Express warranties by the seller are created as follows:
(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
UNIFORM COMMERCIAL CODE § 2-313(1). *See also* UNIFORM SALES ACT § 12.

13. The implied warranty of quality embraces both the warranty of merchantability and the warranty of fitness for a particular purpose. Merchantability has been defined as "fair average quality." UNIFORM COMMERCIAL CODE § 2-314(2). The implied warranty of fitness for a particular purpose presupposes that the seller knows the particular pur-

press warranty requires some affirmative representation relating to the goods sold,[14] implied warranties arise under certain circumstances by operation of law irrespective of any intention by the seller to create them.[15]

The traditional doctrine that the plaintiff had to be in privity of contract with the manufacturer to maintain an action for breach of warranty[16] has been eroded. Dean Prosser states that the "citadel of privity" fell in 1960 when the decision in *Henningsen v. Bloomfield Motors, Inc.* was announced.[17] The court in *Henningsen* pointed out that the concept of limiting liability for product-caused injuries to those in privity of contract with the manufacturer developed at a time when marketing conditions were uncomplicated and products could be inspected by the buyer. The court argued that privity concepts were not properly applicable in a modern economy of mass marketing where demand is created by advertising media directed at the general public and where manufacturers are rarely in privity of contract with the ultimate consumer.[18] Finally, the court concluded that since manufacturers could best control the danger or distribute the risk of loss when injury did occur, they should be liable to all consumers regardless of whether privity was present.[19]

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pose for which the purchaser bought the product and that the purchaser relies on the seller's skill and judgment to supply him with that very product. UNIFORM COMMERCIAL CODE § 2-315. The seller is required to supply the purchaser with a product reasonably fit for the purpose made known to him. Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).

14. HURSH §§ 3:3, 3:36-:40.

15. Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953); Mitchell v. Rudasill, 332 S.W.2d 91 (Mo. Ct. App. 1960); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 372, 161 A.2d 69, 77 (1960); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

16. For an enumeration of cases requiring privity of contract between plaintiff and manufacturer under the Uniform Sales Act see cases collected in Annot., 75 A.L.R.2d 39, 46 (1961).

17. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) [hereinafter cited as Prosser, *The Fall of the Citadel*].

18. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 379, 161 A.2d 69, 80-81 (1960).

19. *Id.* While the *Henningsen* court's rejection of the privity rule may merely have been dicta, most jurisdictions have followed the court's reasoning and held that privity of contract is no longer a sine qua non for a manufacturer's liability in warranty. *See* Prosser, *The Fall of the Citadel* 794-98. *But see, e.g.*, Blum v. Richardson-Merrell, Inc., 268 F. Supp. 906 (D. Md. 1965); Cruz v. Ansul Chemical Co., 399 S.W.2d 944 (Tex. Civ. App. 1966).

In products liability cases, it is usually an implied warranty which has allegedly been breached. When a manufacturer puts his product on the market, he arguably represents that it is safe. The consumer should be entitled to rely on this implied representation. The manufacturer, by advertising his product in various modern communications media, creates a demand for it and further induces a belief that it is suitable for safe human use. This amounts to an implied warranty which is breached if the product is in fact defective and causes injury.

The imposition of strict liability on the manufacturer has also been justified on other grounds not directly related to warranty. The manufacturer is the one who creates the risk and puts it on the market where the consumer can come into contact with it.[20] He reaps the profits from the product's sale. Therefore, arguably, he should be liable for any losses suffered because of the risk he created. In addition, the manufacturer is best able to improve the safety of his product.[21] Thus, it is argued that he should be held liable to encourage him to do so.[22] Finally, the manufacturer has been thought of as the one best able to either bear the risk of loss from product-caused injuries or to transfer any loss to society as a whole. He can spread the risk of loss by raising the prices on all of his goods to cover the cost of his liability for injuries caused by them.[23] While each of these argu-

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20. The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.

Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901 (1962).

21. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1122 (1960) [hereinafter cited as Prosser, *Strict Liability*]; Note, *The Cutler Polio Vaccine Incident: A Case Study of Manufacturers' Liability Without Fault in Tort & Warranty*, 65 YALE L.J. 262, 272 (1955) (criticizing this position); 13 STAN. L. REV. 645 (1961) (criticizing this position).

22. However, a significant increase in care is likely to result only if present remedies do not demand the highest practicable standards. 13 STAN. L. REV. 645, 646 (1961). If our aim is increasingly safer products, we do not want to force the manufacturer into a choice of paying exorbitant premiums for all-inclusive liability insurance rather than using his resources for research for improved safety. His choice may well be the former if we hold him liable regardless of commendable progress or compliance with a reasonable level of safety approved in the industry, and if the standard to which we hold him is technologically impossible to attain.

23. *See* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J.

ments is subject to criticism, many courts have uncritically accepted them and applied them to justify the imposition of strict liability in warranty cases.

Several courts, based on some or all of the above arguments and based on the public interest in human safety which requires that the supposedly helpless consumer be protected against defective products, have held that a manufacturer or seller is an insurer of his product.[24] A majority of the courts, however, hold that neither a manufacturer nor a seller is an insurer of the product in which he deals.[24a]

II. BUYER'S CONDUCT CONTRIBUTING TO INJURY AS A DEFENSE IN WARRANTY

A. Failure to Consider the Buyer's Conduct in Warranty: Case Illustrations

In many jurisdictions the buyer's contributory negligence is not a defense to an action for breach of warranty.[25] According

554, 583-87 (1961). Repetitive assertion of the manufacturer's risk absorbing ability is no help to the small manufacturer with increasing costs, few assets, keen competition, and high elasticity of demand for his product. Indeed, it is merely fortuitous when a small manufacturer is better able to shift losses than an individual plaintiff. Most people can obtain low cost medical insurance, which is an effective means of allocating losses over a large segment of society.

24. *E.g.*, Great Atl. & Pac. Tea Co. v. Eisman, 259 Ky. 103, 81 S.W. 2d 900 (1935); Gilbert v. John Gendusa Bakery, Inc., 144 So. 2d 760 (La. App. 1962); Holt v. Mann, 294 Mass. 21, 200 N.E. 403 (1936).

24a. *E.g.*, Arkansas Baking Co. v. Aaron, 204 Ark. 900, 166 S.W.2d 14 (1942); Ulwelling v. Crown Coach Corp., 206 Cal. App. 2d 96, 23 Cal. Rptr. 631 (1962); Bryer v. Rath Packing Co., 221 Md. 105, 156 A.2d 442 (1959). A manufacturer or seller has no duty to deal in a "perfect" product. Standard Conveyer Co. v. Scott, 221 F.2d 460 (8th Cir.), *cert. denied*, 350 U.S. 830 (1955). These cases involved hazards which the buyer might easily have discovered, while the insurer cases usually involved hazards which were extremely difficult for the buyer to discover in advance. It has also been held that a manufacturer is an insurer of his product only if it proves defective and causes injury under normal use. Tamburello v. Traveler's Indem. Co., 206 F. Supp. 920 (D. La. 1962). Inquiry into the ease of discoverability of the risk or the abnormality of use of the product requires an evaluation of the buyer's conduct which should be undertaken consciously by the trier of fact and not obscured by a preconceived insurer concept.

25. In any event, superior risk-spreading capacity should not in itself be a basis for liability. Keeton, *Conditional Fault in the Law of Torts*, 72 Harv. L. Rev. 401, 405-09, 436-43 (1959).

> The influence of risk-spreading capacity in tort decisions is primarily in the role of what might be called an enabling or rebuttal factor. It removes a barrier which might have prevented the imposition of liability based primarily on other grounds.

Id. at 441. Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*,

to this view, lack of due care by the plaintiff-buyer is immaterial, and the defendant's evidence bearing on this issue is excluded. Analysis of the cases in which the buyer's lack of due care contributed to his injury reveals the deficiency of such an approach.

Simmons v. Wichita Coca-Cola Bottling Company[26] illustrates the effect of the rule that contributory negligence is no defense to an action in warranty. The plaintiff consumed part of a bottle of Coke purchased from a coin-operated machine. She became sick soon afterwards and claimed that her illness was caused by a book of matches contained in the bottle. Defendant, Coca-Cola, was not permitted to introduce evidence concerning its care in producing and distributing its product in order to prove that it was not at fault.[27] The court reasoned that in an action on an implied warranty, evidence showing the defendant's fault or lack of fault is unnecessary, such fault being conclusively presumed by virtue of the defendant's position as an insurer.

It would be nearly impossible for Coca-Cola to prove that Mrs. Simmons or anyone else introduced the matches into the bottle, yet the court required the defendant positively to affix the blame on another to exculpate itself.[28] The court considered

304 F.2d 149 (9th Cir. 1962); Hansen v. Firestone Tire & Rubber Co., 276 F.2d 254 (6th Cir. 1960); Rasmus v. A.O. Smith Corp., 158 F. Supp. 70 (N.D. Iowa 1958); Crane v. Sears Roebuck & Co., 218 Cal. App. 2d 855, 32 Cal. Rptr. 754 (1963); Vassalo v. Sabatte Land Co., 212 Cal. App. 2d 11, 27 Cal. Rptr. 814 (1963); Kassouf v. Lee Bros., 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (1962); Simmons v. Wichita Coca-Cola Bottling Co., 181 Kan. 35, 309 P.2d 633 (1957); Challis v. Hartloff, 136 Kan. 823, 18 P.2d 199 (1933); Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N.E. 407 (1918); Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939); Wood v. General Elec. Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953); Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959); cf. Boston Woven-Hose & Rubber Co. v. Kendall, 178 Mass. 232, 59 N.E. 657 (1901); 2 FRUMER & FRIEDMAN § 16.01 [3]; 1 HURSH § 3:9.

26. 181 Kan. 35, 309 P.2d 633 (1957).

27. It appears that Coca-Cola was attempting to fix the blame on one of three classes of people: the plaintiff, the machine owner who regularly handled the bottles, or the world at large excluding Coca-Cola.

28. In Pulley v. Pacific Coca-Cola Bottling Co., 415 P.2d 635 (Wash. 1966), the plaintiff uncapped a sealed bottle and took a swallow of the beverage. She then took a second swallow, even though she had noticed an "odd taste" the first time. She became violently ill after discovering a cigarette and bits of loose tobacco floating in the bottle. The court held that the defendant could escape liability only by showing who contaminated that particular bottle and that "indirect and circumstantial evidence that it was improbable *or even impossible* that

it immaterial that the bottle left Coca-Cola's plant free of any foreign substance, thus precluding any inference that someone else may have been responsible for the matches in the bottle. In addition, the court stated that "allegations of contributory negligence [or] those negativing any possible carelessness on the part of the defendants are . . . [not a] defense to an action to recover on a breach of an implied warranty."[29] This clearly precluded consideration of any evidence that Mrs. Simmons reasonably should have looked at the bottle. Under the rubric of strict liability, the court completely foreclosed a showing that someone other than the defendant was responsible for the plaintiff's injuries.

If *Simmons* merely stands for the proposition that the defendant's proof of care does not as a matter of law exculpate him from liability in warranty actions, it is a reasonable decision.[30] However, if the opinion stands for the exclusion of *all* evidence of defendant's care[31] and precludes consideration of possible fault on the part of other persons, it clearly goes too far. For example, what if the defendant's chemical test indicates, contrary to the evidence offered by the plaintiff, that the foreign substance was added to the bottle about the time of purchase and not earlier? What if there were nine matchbooks in the bottle which any reasonable person would have noticed, instead of just one? Such evidence would probably be excluded! This approach may place ultimate liability on one who is surely innocent and compensate one who is surely not.

The Uniform Commercial Code, purportedly drafted in conformity with "the steadily developing case law,"[32] permits consideration of "evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods . . . relevant to the issue of whether the warranty was in fact broken."[33]

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the defendants were responsible for the presence of the harmful object" was inadmissible. *Id.* at 640 (emphasis added). Thus, *Simmons* is certainly not a unique case.

29. 181 Kan. at 38, 309 P.2d at 635.

30. Manufacturers have no trouble showing care and preventative measures by scientific and expert testimony. It is questionable, however, whether such proof should be omitted entirely rather than weighed against plaintiff's proof.

31. 181 Kan. at 38, 309 P.2d at 636.

32. UNIFORM COMMERCIAL CODE § 2-314 ("Purpose of Changes").

33. UNIFORM COMMERCIAL CODE § 2-314, Comment 13. The reader may then ask what becomes of the doctrine of strict liability under which it is unnecessary to prove negligence. This provision, although affecting the negligence principle to some extent, does not negate it.

Several cases have indicated that a manufacturer's implied or express warranty has reference only to the product's condition at the time it left the possession or control of the warrantor.[34] A product defective at the time of injury may not have been defective while under the manufacturer's control.[35] Indeed, at the time of injury the product's condition may reflect material alterations by the purchaser.[36] Nonetheless, many courts, as in *Simmons*, steadfastly refuse to inquire into certain types of purchaser conduct in breach of warranty cases.

In *Kassouf v. Lee Brothers*,[37] the plaintiff purchased a Hershey bar at Lee Brothers' Market. Shortly after arriving home, she sat down and began to read a newspaper in her lighted dining room. While reading, she took the candy bar from a table. Without looking at it, she opened one end of the wrapper and slid the bar partially out from it. Using one hand she broke off pieces and ate them. From the outset Mrs. Kassouf noticed that the candy did not taste right, but she assumed this was because she had not eaten all day. She had consumed

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The Code carefully confines such proof to the issue of whether the warranty is in fact broken. In *Simmons* the warranty should have been that Coca-Cola would bottle an uncontaminated beverage and deliver the same free from impurities to the machine operator. Coca-Cola could not guarantee the condition of the soda as it is consumed because of what might happen after it is delivered. Coca-Cola should be permitted to show that the defect lay not in its product as warranted but arose in the subsequent handling of the goods. Unfortunately the idea of strict liability serves to obliterate this distinction, and as *Simmons* illustrates, the courts frequently do not attempt to ascertain the precise limit of the warranty. *Compare Simmons with* Sharpe v. Danville Coca-Cola Bottling Co., 9 Ill. App. 2d 175, 132 N.E.2d 442 (1956), *and* Williams v. Paducah Coca-Cola Bottling Co., 343 Ill. App. 1, 98 N.E.2d 164 (1951).

34. American Radiator & Standard Sanitary Corp. v. Fix, 200 F.2d 529 (8th Cir. 1952); O'Donnell v. Geneva Metal Wheel Co., 183 F.2d 733 (6th Cir. 1950), *cert. denied*, 341 U.S. 903 (1951); Tiffin v. Great Atl. & Pac. Tea Co., 20 Ill. App. 2d 421, 156 N.E.2d 249, *aff'd*, 18 Ill. 2d 48, 162 N.E.2d 406 (1959); Sharpe v. Danville Coca-Cola Bottling Co., 9 Ill. App. 2d 175, 132 N.E.2d 442 (1956); Williams v. Puducah Coca-Cola Bottling Co., 343 Ill. App. 1, 98 N.E.2d 164 (1951); Jacobson v. Ford Motor Co., 427 P.2d 621 (Kan. 1967); *cf.* Darling v. Caterpillar Tractor Co., 171 Cal. App. 2d 713, 341 P.2d 23 (1959).

35. Young v. Aeroil Prods. Co., 248 F.2d 185 (9th Cir. 1957); *cf.* Maryland Cas. Co. v. Independent Metal Prods. Co., 203 F.2d 838 (8th Cir. 1953); Lynch v. International Harvester Co., 60 F.2d 223 (10th Cir. 1932); Smolen v. Grandview Dairy, Inc., 301 N.Y. 265, 93 N.E.2d 839 (1950).

36. Young v. Aeroil Prods. Co., 248 F.2d 185, 190-91 (9th Cir. 1957).

37. 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (1962). *See* Comment, *Products Liability: For the Defense—Contributory Fault*, 33 TENN. L. REV. 464, 470-73 (1966).

about one-third of the candy bar before she bit into a mushy worm. When she looked at the bar, she saw that it was covered with worms and webbing with eggs hanging on. The condition of the bar was corroborated by two witnesses. Mrs. Kassouf became ill and developed chronic ulcerative colitis.

The court held that contributory negligence was not a defense to a warranty action and that the jury need not consider whether Mrs. Kassouf was using due care. The buyer need not inspect food before purchasing or eating it because of the modern processes of manufacturing, packaging, and merchandising food products which make it reasonable for the buyer to assume that it is not defective.[38] The court added that the defendant was held to a standard of strict liability and that it would detract from the warranty to require plaintiff to exercise ordinary care for her protection.[39] The jury was not permitted to conclude that any reasonable person would look at what he eats[40] or would stop eating a foul tasting candy bar immediately after sampling the vile taste of worms and larvae.

Strict liability makes it unnecessary for the plaintiff to establish negligence on the part of the defendant. It should not mean that the plaintiff's fault is immaterial. Some courts simply state that contributory negligence is not a defense to breach of warranty. Such a formalistic use of labels should not preclude an examination of the buyer's behavior.[41] The buyer's conduct in contributing to and aggravating the injury militated against complete recovery in *Kassouf*. Careful appraisal of the plaintiff's fault might well have completely barred her recovery. Perhaps a jury would find it reasonable to eat a worm ridden candy bar, but foreclosing such inquiry carries the day for plaintiff without giving the defendant a chance. An approach similar to comparative negligence would ameliorate the all-or-nothing effect of contributory negligence, while still giving the manufacturer some measure of protection from the less than careful buyer. In any event, closing out light because we fear that we

38. 209 Cal. App. 2d at 571, 26 Cal. Rptr. at 278.

39. *Id.* at 573, 26 Cal. Rptr. at 279.

40. "Of course if the buyer . . . unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty." UNIFORM COMMERCIAL CODE § 2-316, Comment 8.

41. [T]he question arises whether evidence which, in a negligence suit, might be adduced as showing the injured person's contributory negligence may not be adduced to show that harm alleged to flow from a breach of warranty actually was otherwise caused.

1 HURSH § 3:9 (implicitly answering in the affirmative).

will not be able to resolve what may be illuminated, as the court did here, is certainly not the solution.

About three months after purchasing an electric blanket the plaintiff in *Wood v. General Electric Company*[42] detected an odor coming from his bedroom. Finding a smoldering blanket but no flame, he "yanked" the blanket from the bed, pulled out the electric connection, carried the blanket out of the bedroom, and closed the door. Fifteen minutes after disposing of the blanket he returned to his bedroom where he found the mattress on the bed in flames. After futile attempts to extinguish the blaze, he called the fire department which put out the fire but only after extensive damage had been done to the residence and furnishings.

The plaintiff alleged breach of an implied warranty of merchantability and fitness and negligence in the manufacture of the blanket. The court held that as a matter of law contributory negligence was not a defense to the warranty count. The jury verdict for defendant, however, was sustained even though there was some ambiguity concerning the trial court's instruction.[43]

This case is most unsatisfactory. If the instruction was clear and the jury did not consider contributory negligence on the warranty count, it could not have found for General Electric unless the vital elements of warranty were missing. If they had found the warranty elements, negligence, and contributory negligence, the plaintiff would have recovered full damages under the rule that contributory negligence is not a defense in warranty.

Dissatisfaction with this case, however, goes beyond the inadequacy of the opinion to the more fundamental inequities of an all-or-nothing contributory negligence rule. No doubt both Wood and General Electric were partially responsible for the injury. It is probable that the jury actually considered Wood's foolish conduct, although it was done in an unreviewable manner. If the jury is going to consider the plaintiff's conduct in any case, it is far more desirable for the court to instruct them on how to consider it properly than to allow them to make these judgments without judicial guidance.

In *Parkersburg Rig & Reel Company v. Freed Oil & Gas Company*,[44] an oil company, contrary to trade practice, failed to

42. 159 Ohio St. 273, 112 N.E.2d 8 (1953).

43. The court's instruction appears at 159 Ohio St. 273, 277, 112 N.E.2d 8, 11.

44. 111 Kan. 37, 205 P. 1020 (1922).

build a saving dike around newly constructed oil tanks. When one of the tanks collapsed the company lost a great deal of oil which could easily have been captured by a dike. The oil company was not required to use reasonable care in guarding against this contingency, and the defendant builder was held liable in warranty for the entire loss.

In one respect this result is even more unreasonable than the results in the cases previously considered. Both plaintiff and defendant were commercially knowledgeable business men, possessed of equal information and comparable experience. The builder should not have been held responsible for the loss which plaintiff could have reasonably avoided. The reasonableness of the plaintiff's conduct should have been a question for the jury. The possibility of injury was substantial, and the likelihood of damage could have been retarded *ab initio* had plaintiff used the care expected from anyone in his trade. When the parties stand on an equal commercial footing it is unjust to impose liability on one when the other could have avoided all consequential damages by acting reasonably.[45]

Defendants should not have to bear losses which plaintiffs could have avoided by the exercise of reasonable care. A comparative negligence approach would relieve many of the pressures which foreclose consideration of such conduct. However, even if the contributory negligence rule is not replaced by a comparative negligence approach, we should not ignore the buyer's fault in deciding warranty cases.

B. Situations in Which Buyer's Conduct Is Commonly Considered

Most courts do recognize that some types of buyer conduct are relevant to a manufacturer's liability for damages in warranty, even though they do not recognize contributory negligence as a defense. These types of buyer conduct have been described as assumption of risk, use with knowledge of a defect, use in violation of a warning, failure to inspect, and abnormal use.

45. The Uniform Commercial Code implicitly makes this distinction in some areas. The commercial experience of the buyer goes to the issues of the buyer's duty to inspect the goods, *see* Uniform Commercial Code § 2-316, Comment 8, and the time in which inspection should be made. *See* Uniform Commercial Code § 2-606. *See also* 2 Frumer & Friedman § 16.01 [3], distinguishing the warranty action where the injured person is a noncommercial consumer and stating, *inter alia*, that it is unreasonable to require the noncommercial buyer to make an expert inspection.

1. Assumption of Risk

In *Kassouf* the court distinguished assumption of risk from contributory negligence by stating that the former involves actual, as opposed to constructive, knowledge of the danger and voluntary acceptance of the risk.[46] The fine distinction between contributory negligence and assumption of risk frequently turns on whether the buyer took the time to consider certain possibilities. There are several situations where the two defenses overlap, resulting in a great deal of confusion.[47] It has been said that except in cases of express agreement, assumption of risk adds nothing to contributory negligence principles.[48] Generally, where assumption of risk is found it is implied from the surrounding circumstances.[49] Although at the extremes it is not difficult to distinguish the two doctrines on the grounds of actual knowledge of the danger, an objective standard is applied in both areas, and in assumption of risk cases the plaintiff cannot say that he did not comprehend a risk which should have been obvious to him.[50] It is even possible for the plaintiff to assume risks of whose specific existence he is not aware.[51]

It is, therefore, impracticable and confusing to attempt to categorize buyer conduct as assumption of risk or contributory negligence. The comparative negligence jurisdictions generally blend these forms of buyer conduct into one category of contributory fault, and the jury or court weighs the contribution of the specific behavior.[52] On the other hand, the jurisdictions precluding the defense of contributory negligence unrealistically attempt to dissect this behavior, dismissing that amounting to contributory negligence and accepting as a defense that constituting assumption of risk. The impracticability of this distinction demonstrates not only the superiority of the comparative negligence approach but also the weakness of the position that certain types of buyer conduct should not be considered at all.

2. Use with Knowledge of Defect

The buyer's conduct in warranty cases bars recovery when

46. Kassouf v. Lee Bros., 209 Cal. App. 2d 568, 572, 26 Cal. Rptr. 276, 278 (1962).

47. W. PROSSER, THE LAW OF TORTS 304 (2d ed. 1955) [hereinafter cited as PROSSER, TORTS].

48. James, *Assumption of Risk*, 61 YALE L.J. 141 (1952).

49. PROSSER, TORTS 307.

50. *Id.* at 310.

51. *Id.* *See* Comment, *Products Liability: For the Defense—Contributory Fault*, 33 TENN. L. REV. 464, 473 (1966).

52. *Cf.* authorities cited notes 160 & 161 *infra.*

it amounts to unreasonable exposure to a known and appreciated risk.[53] The right to recover for breach of warranty is lost where the person to whom the warranty was made uses the product with knowledge that the warranty has been broken and suffers injury as a result of such use.[54]

The line between "use of a product with knowledge of its defective condition" and "contributory negligence" is also a difficult one to draw. At some point the defect is so obvious that a buyer cannot be heard to deny knowing about it. Perhaps this would be a question for the court, or more likely for the jury if reasonable men could differ. In any event, inquiry into the buyer's conduct should not be precluded.

The cases which do speak in terms of the buyer's use of the product with knowledge of its defect uniformly hold that such use is a defense or mitigating factor to the manufacturer's liability. The purchaser has no right to continue using the defective article after he has learned of the defect, if the result of such use is to *increase* the damage resulting from the defect.[55]

The court in *Pauls Valley Milling Company v. Gabbert*[56] stated that where a seller delivers the wrong article and the buyer discovers this error in ample time to avoid injury but fails to do so, then the buyer himself "is, in effect, voluntarily producing his own injury," and the consequences of such conduct are not properly to be inflicted upon the seller.[57] This causation rationale is almost identical to that set forth in a number of contributory negligence cases.

In *Missouri Bag Company v. Chemical Delinting Company*[58] the court spoke in terms of buyer's negligence when perhaps it would have been more accurate to speak of the buyer's knowledge of the defect. When a plaintiff used seed bags knowing

53. Chapman v. Brown, 198 F. Supp. 78, 86 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962) (dictum); Barefield v. LaSalle Coca-Cola Bottling Co., 370 Mich. 1, 120 N.W.2d 786 (1963); RESTATEMENT (SECOND) OF TORTS § 402A(n) (contributory negligence); 2 FRUMER & FRIEDMAN § 16.01 [3].

54. Cedar Rapids & I.C. Ry. & Light Co. v. Sprague Elec. Co., 203 Ill. App. 424, *aff'd*, 280 Ill. 386, 117 N.E. 461 (1917); Topeka Mill & Elevator Co. v. Triplett, 168 Kan. 428, 213 P.2d 964 (1950) (disallowing damages for period after buyer acquired knowledge of alleged breach); Pauls Valley Milling Co. v. Gabbert, 182 Okla. 500, 78 P.2d 685 (1938); 2 FRUMER & FRIEDMAN § 16.01 [3].

55. Annot., 33 A.L.R.2d 514 (1954) (citing over 100 cases for this proposition).

56. 182 Okla. 500, 78 P.2d 685 (1938).

57. *Id.* at 503, 78 P.2d at 688.

58. 214 Miss. 13, 58 So. 2d 71 (1952).

that there were holes in them the court held 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."[59]

The court further stated that

> 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.[60]

Thus, the court introduced the doctrine known alternatively as "aggravation of damages," "duty to mitigate damages," "avoidable consequences," or "damages which the buyer could have avoided." The distinction between this doctrine and the doctrine of contributory fault is that the behavioral focus of the latter is on the conduct of the plaintiff up to the point of injury, while the rule of avoidable damages comes into play only after a legal wrong has occurred, but while some damage may still be averted.[61] As one author suggests, the underlying basis for the distinction is merely the practical feasibility of assigning a part of the damages to each of the parties at fault and, in reality, the doctrines are the same.[62]

The plaintiff must take reasonable steps to prevent loss from a breach of contract by the defendant and, *a fortiori*, must not by his own negligence enhance the damages.[63] Similarly, in tort cases, the rule of avoidable consequences denies recovery for any damage which could have been avoided by reasonable conduct on the part of the plaintiff.[64] In the absence of special circumstances,[65] therefore, the purchaser has no right to continue using a defective article after he has learned of the defect if the

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59. *Id.* at 29, 58 So. 2d at 76.

60. *Id.* at 30, 58 So. 2d at 76-77. *Accord*, Finks v. Viking Refrigerators, Inc., 235 Mo. App. 679, 147 S.W.2d 124 (1941) (plaintiff used a commercial refrigerator after discovering it to be unfit and was precluded from recovering special damages for loss of profits from and after such discovery).

61. Armfield v. Nash, 31 Miss. 361 (1856); Bailey v. J.L. Roebuck Co., 135 Okla. 216, 275 P. 329 (1929); Dippold v. Cathlamet Timber Co., 111 Ore. 199, 225 P. 202 (1924); C. McCORMICK, DAMAGES § 33 (1935).

62. PROSSER, TORTS 288.

63. *See generally* 5 A. CORBIN, CONTRACTS 241-54 (1964); see note 85 *infra* and accompanying text.

64. PROSSER, TORTS 287.

65. *E.g.*, the seller's insistence on continued use of the article or his denial that it is defective accompanied by the likelihood of greater damage to the buyer from discontinuance of use than from continued use.

result of such use is to increase the damage resulting from the defect.[66] The plaintiff in breach of warranty actions may not recover damages for losses which he might reasonably have avoided.[67]

Courts have also held that added damages may not be collected on a breach of warranty claim where the use of an article known to be defective necessitated the employment of extra help, created additional expenses for the buyer, or compelled the buyer to make rebates to customers who had been damaged.[68] When the buyer knowingly uses faulty equipment, he himself is voluntarily producing his own injury. Thus, the seller should not be held responsible for the consequences.[69]

3. Use in Violation of Warning

The buyer may contribute to, or cause, his own injury by using a product under conditions specifically warned against.[70] These situations require consideration of the adequacy, reasonableness, and timeliness of the warning as well as of the buyer's actions after receiving it. The notice-of-danger cases demonstrate the difficulties of classifying buyer's conduct as negligent or knowledgeable. If the notice is clear and communicated directly to the buyer his failure to take heed would be reckless. However, problems arise when notice is not precise or is indirectly communicated to the buyer. Sometimes the use of a product contrary to instructions presents the court with an easy case.[71] However, in some jurisdictions, no inquiry may be made

66. Wilkinson v. Rich's, Inc., 77 Ga. App. 239, 48 S.E.2d 552 (1948); Fuller v. Curtis, 100 Ind. 237, 50 Am. Rep. 786 (1884); Davis v. Fish, 1 Greene 406, 48 Am. Dec. 387 (Iowa 1848); notes 58-60 *supra* and accompanying text; authorities cited note 54 *supra*; 1 HURSH 3:10.

67. George v. Crowder, 287 F. 53 (4th Cir. 1923); Cedar Rapids & I.C. Ry. & Light Co. v. Sprague Elec. Co., 203 Ill. App. 429, *aff'd*, 280 Ill. 386, 117 N.E. 461 (1917); Frier v. Proctor & Gamble Distrib. Co., 173 Kan. 733, 252 P.2d 850 (1953); Sapp v. Bradfield, 137 Ky. 308, 125 S.W. 721 (1910); Missouri Bag Co. v. Chemical Delinting Co., 214 Miss. 13, 58 So. 2d 71 (1952); Razey v. J.B. Colt Co., 106 App. Div. 103, 94 N.Y.S. 59 (1905); Northern Supply Co. v. Wangard, 123 Wis. 1, 100 N.W. 1066 (1904); 46 AM. JUR. *Sales* § 756 (1943).

68. *E.g.*, Cooper v. National Fertilizer Co., 132 Ga. 529, 64 S.E. 650 (1909); 46 AM. JUR. *Sales* § 756 (1965 Supp. nn.13.5-.53).

69. *See* note 57 *supra*.

70. Fredendall v. Abraham & Straus, Inc., 279 N.Y. 146, 18 N.E.2d 11 (1938). *Cf.* Maize v. Atlantic Ref. Co., 352 Pa. 51, 41 A.2d 850 (1945). *Compare* McClaren v. G.S. Robins & Co., 349 Mo. 653, 162 S.W.2d 856 (1942) (involving sufficiency of the warning against the danger of inhaling carbon tetrachloride fumes).

71. *E.g.*, Fredendall v. Abraham & Straus, Inc., 279 N.Y. 146, 18

into such seemingly improper conduct.[72] Surely in these situations it is wise to have the trier of fact consider all aspects of the buyer's conduct rather than to have an exclusionary rule based on attenuated notions of negligence or recklessness.

4. Failure To Inspect

Problems concerning buyer's appreciation of defects in products are also raised by the buyer's responsibility to inspect his purchases.[73] After delivery the buyer must, where possible, inspect the goods and determine whether they meet the requirements of the contract. Inspection must be made within a reasonable time.[74] Consequential damages are not recoverable where the buyer should have discovered the defect before incurring the damages.[75] Questions involving the timeliness and sufficiency of inspection are usually jury questions typically involving the buyer's notice of defects and the reasonableness of his actions thereafter.

N.E.2d 11 (1938) (using highly inflammable fluid in a manner clearly contrary to instructions).

72. *E.g.*, Young v. Aeroil Prods. Co., 248 F.2d 185 (9th Cir. 1957) (handling of elevator contrary to instructions no defense).

In McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967), the court held the defendant-distributor liable on the basis of strict liability, even though the plaintiff's wife contributed to her own injury by using a permanent wave solution on her bleached hair despite the warning on the package that it was for use on "normal or resistant hair." The court stated that "this species of contributory negligence is not a defense to strict liability." *Id.* at 792.

73. The buyer's failure to inspect his equipment may directly contribute to his injury. Other doctrines which are less directly connected to buyer's appreciation of defects, such as buyer's failure to notify seller of the defect within a reasonable time, are omitted from this discussion. *See, e.g.*, UNIFORM COMMERCIAL CODE § 2-607; UNIFORM SALES ACT § 49. *Compare* Texas Motorcoaches v. A.C.F. Motors Co., 154 F.2d 91 (3d Cir. 1946), *and* Pauls Valley Milling Co. v. Gabbert, 182 Okla. 500, 78 P.2d 685 (1938), *and* National Container Corp. v. Regal Corrugated Box Co., 383 Pa. 499, 119 A.2d 270 (1956), *with* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (notice not required in warranty tort action).

74. Pratt-Gilbert Co. v. Hildreth, 24 Ariz. 141, 207 P. 364 (1922); Jackson v. Porter Land & Water Co., 151 Cal. 32, 39, 90 P. 122, 125 (1907); Johnston v. Lanter, 87 Kan. 32, 123 P. 719 (1912); *cf.* Square Deal Mach. Co. v. Garrett Corp., 128 Cal. App. 2d 286, 275 P.2d 46 (1954). *See* UNIFORM COMMERCIAL CODE § 2-316(3)(b), Comment; *id.* § 2-607; UNIFORM SALES ACT §§ 47, 49.

75. Tomita v. Johnson, 49 Idaho 643, 290 P. 395 (1930); Turner v. Bruner, 263 P.2d 191 (Okla. 1953); Pauls Valley Milling Co. v. Gabbert, 182 Okla. 500, 78 P.2d 655 (1938).

5. Abnormal Use

Where there is no specific knowledge of the danger but the buyer uses the product in a manner contrary to its normal use, he may be deemed to be on notice of the danger.[76] The considerations here are similar to those in the sufficiency of the warning to the buyer cases. Breach of warranty is shown by proof of the failure of a product when the product is being put to its normal intended use.[77] Liability for breach of warranty does not exist where the warranted product was being used for a purpose different from that intended by the manufacturer.[78]

In jurisdictions where contributory negligence is not a defense to breach of warranty the outcome of the case may thus depend on the formulation of the issue. General aims of uniformity and predictability of results in similar fact situations, as well as fairness to individual litigants, are thereby frustrated. The questions cannot properly be phrased in terms of contributory negligence, assumption of risk, use with knowledge of defects, use after specific warning, failure to inspect, or unintended, improper, or reckless use. The verbalization of these categories implies well defined boundaries, yet neither the judiciary nor the commentators have been able to identify the circumstances to which any of the categories have exclusive application. Moreover, based on the very nature of man and commerce we cannot expect to draw distinctions accurately based on knowledge, negligence, recklessness, or notice. In many areas of the law such distinctions must necessarily be made, but the decision based on them is left to the jury.[79] However, too much is made to turn on these admittedly difficult conceptual distinctions when the choice of labels completely forecloses consideration of certain issues. There are two available, viable alternatives to such a procedure: 1) The courts, recognizing the difficulties inherent in the present system of classification and ex-

76. Neusus v. De-Lux Neon Mfg., 369 F.2d 259 (7th Cir. 1966); Natale v. Pepsi-Cola Co., 7 App. Div. 2d 282, 182 N.Y.S.2d 404 (1959); Prosser, *The Fall of the Citadel* 824-26.

77. Tremeroli v. Austin Trailer Equip. Co., 102 Cal. App. 2d 464, 227 P.2d 923 (1951).

78. Mannsz v. MacWhyte Co., 155 F.2d 445 (3d Cir. 1946); Silverman v. Swift & Co., 141 Conn. 450, 107 A.2d 277 (1954); Ross v. Diamond Match Co., 149 Me. 360, 102 A.2d 858 (1953); Cheli v. Cudahy Bros. Co., 267 Mich. 690, 255 N.W. 414 (1934); Lawson v. Benjamin Ansehl Co., 180 S.W.2d 751 (Mo. App. Ct. 1944); *cf.* Foster v. Ford Motor Co., 139 Wash. 341, 246 P. 945 (1926).

79. Ordinarily the question whether the buyer has been negligent in using the article for the purpose intended is one for the determination of the jury. Poland v. Miller, 95 Ind. 387, 48 Am. Rep. 730 (1883).

clusion, could allow the jury to consider all elements of the buyer's conduct in determining the extent of manufacturer liability. 2) Under the present system, operative in a majority of jurisdictions, the buyer's contributory fault could go only to the measure of damages and not to the manufacturer's liability. This would ameliorate the all-or-nothing effect of contributory negligence and assumption of risk, while taking into account the manufacturer's responsibility for his product. A well drafted comparative negligence statute, unfettered by notions of stare decisis, could thus provide an immediate mechanism for analysis of all facets of buyer's conduct.[80]

C. Excluding Consideration of Contributory Negligence

The earliest cases holding that contributory negligence, as such, is not a defense to breach of warrranty actions most often involved food, abnormal or inherently dangerous products, or actual foreseeable physical injury.[80a] The manufacturer's strict liability was based on his creation of and profit from a product which presented a potentially great risk to those purchasing or using it. However, the view that contributory negligence is no defense in warranty has not been confined to these areas.

Negligence, in the sense of lack of due care, is not the basis for strict liability in warranty. One may be liable in warranty even if he has exercised the greatest degree of care. The plaintiff need not prove that the manufacturer was negligent, nor is the manufacturer permitted to prove that he exercised due care. One may be held to strict liability even though he is entirely free from moral blame and innocent of mind, if he unavoidably violates an artificial standard. Strict liability attaches liability by reason of the defendant's creation of the risk, profit-seeking motive, and risk-bearing capacity. Thus, it may be argued that contributory *negligence* should not be a defense to strict liability. Nevertheless, all courts consider certain types of buyer's conduct in determining what the plaintiff should recover in strict liability cases. Thus, the courts do not categorically exclude the buyer's contribution to his own injury in assessing his proper recovery. It cannot therefore be said that there is no relative fault in warranty nor that the courts have so decided.

Many courts reason that contributory negligence cannot be a defense in warranty, since warranty was historically an as-

80. See notes 149-57 *supra* and accompanying text.

80a. *E.g.*, Challis v. Hartloff, 136 Kan. 823, 18 P.2d 199 (1933).

sumpsit action.[80b] While it might be proper to consider the buyer's contributory negligence when product-caused personal injury occurs in the traditional tort setting, these courts argue that such a theory is foreign to the nature of a contract action, and that consideration of it is thus foreclosed. They then go on to emphasize the policy of protecting consumers from injury due to defectively manufactured products regardless of the buyer's fault in contributing to his injury.

The doctrine of mitigation of damages, however, is used to prevent the buyer from benefiting from aggravation of his injury caused by his reckless behavior. When, in effect, the action is the traditional tort action, plaintiff's use of the warranty rubric should not prevent consideration of the buyer's conduct. Perhaps such conduct is irrelevant to the issue of replacement of defective equipment since such a defect itself is a breach of warranty for which the buyer is seldom responsible.[81] However, it is unjust to ignore buyer conduct beyond that point. Consequential damages resulting from the defective product should not be awarded without scrutiny of the contributory fault of the parties.

The refusal to allow the contributory negligence defense in warranty because the cause of action is contractual in nature has little firm basis. Warranty is "a freak hybrid born of the illicit intercourse of tort and contract."[82]

> A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty. Originally sounding in tort, yet arising out of the warrantor's consent to be bound, it later ceased necessarily to be consensual, and at the same time came to lie mainly in contract.[83]

If we refuse to look at buyer's negligence because of the contractual nature of warranty, then clearly we should refuse to

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80b. *See, e.g.*, Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3d Cir. 1959); Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959).

81. Of course the manufacturer should still be permitted to prove that the buyer and not the manufacturer caused the defect as well as further damage.

82. Prosser, *Strict Liability* 1126. Because of the problems caused by viewing warranty as contractual, Dean Prosser has suggested that strict liability in tort rather than breach of warranty be employed as the theory of recovery in products liability cases. He contends that this analysis explains the courts' treatment of buyer conduct, since assumption of risk, use in violation of warning, abnormal use, etc. are defenses to strict liability in tort, but contributory negligence is not. Prosser, *The Fall of the Citadel* 838-39.

83. Book Note, 42 HARV. L. REV. 414-15 (1929).

look at the same conduct when the action is purely contractual. However, this is exactly contrary to what actually happens. The buyer's conduct is indeed considered in ascertaining the proper measure of damages in breach of contract.[84] The courts refuse to award the buyer damages which he reasonably could have avoided. They speak in terms of knowledge or negligence and preclude recovery if the buyer was culpable under either heading. Further support for this general proposition is found both in the Restatement of Contracts[85] and the Uniform Commercial Code.[86]

The courts also uniformly hold there can be no recovery of damages in contract from the resale of goods known by the buyer to be defective.[87] Similarly, it is not an excuse for the continued use and consumption of the product that it was required by the exigencies of the buyer's business. It is also immaterial that the buyer, while continuing to use and consume the property, made objections to the quality.[88]

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84. See text accompanying note 63 *supra*.

85. "Damages are not recoverable for harm that the plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation." RESTATEMENT OF CONTRACTS § 336 (1932).

86. The Uniform Commercial Code, now adopted in forty-nine states, perhaps provides a ready mechanism for the courts to analyze thoroughly buyers' conduct. A jurisdiction which formerly held lack of buyers' care no defense in warranty could now adopt such a defense with little embarrassment, reasoning that the new result is dictated by the recently adopted Code, despite case law to the contrary. However, since these "dictates" of the Code have long been in the common law or Uniform Sales Act, this suggestion is born out of judicial gracefulness rather than candidness.

> In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense . . . . Action by the buyer following an examination of the goods, which ought to have indicated the defect complained of can be shown as a matter bearing on whether the breach itself was the cause of the injury.

UNIFORM COMMERCIAL CODE § 2-314, Comment 13.

> [I]f the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty.

Id. § 2-316(3)(b), Comment 8.

87. Regal Motor Prods., Inc. v. Bender, 102 Ohio App. 447, 139 N.E.2d 463 (1956) (such action held to be full acceptance of goods in defective condition). *See also* authorities cited note 68 *supra*.

88. *See generally* 46 AM. JUR. *Sales* § 765 (1943).

Not every such use precludes recovery as where one who discovers defects in the trial drive of a horse must use the horse to return

The courts' views concerning the proper measure of damages in contract or nonpersonal injury warranty actions are indicative of their reluctance to award damages for injuries removed from the initial transaction. Thus, the application of the rule of *Hadley v. Baxendale* in warranty[89] readily allows recovery for a defective article, but beyond that, consequential damage must have been expected as a probable consequence of the defect.[90] At the extreme, prospective profits must be proved with reasonable certainty,[91] and unless they plainly would have been made, they are not allowable.[92] In addition, the plaintiff must satisfy a heavy burden of persuasion before his damages include alienation of customers.[93] These rules which require unequivocal proof of remote damages are rooted in the belief that the further we get from the original transaction the more opportunity there is for the buyer negligently to allow damages to pyramid, and the less responsible the seller should be for these consequences.

Thus, the general refusal to recognize contributory negligence as a defense in warranty is clearly unjustified, since it is based on the misclassification of warranty as an essentially contractual concept and a misinterpretation of the effects of that misclassification.

D. Contributory Negligence as a Defense

No satisfactory justification has been offered for holding that contributory negligence is not a defense in actions for breach of warranty. The courts cry out against the willful creation of an unreasonable risk to others by the abnormal conduct in-

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to the starting point. Fox v. Wilkinson, 133 Wis. 337, 339, 113 N.W. 669, 671 (1907) (dictum). Although this fact situation is practically archaic, several modern situations are imaginable where it is impossible, impracticable, or inordinately costly to cease using goods known to be defective.

89. *See* authorities cited note 108 *supra*; Uniform Commercial Code §§ 2-714(2), -715(2). *See generally* Annot., 32 A.L.R. 120 (1924) (excellent discussion of the rule).

90. Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903); 3 S. Williston, Sales § 614(b) (rev. ed. 1948).

91. Superwood Corp. v. Larson-Stang, Inc., 311 F.2d 735 (8th Cir. 1963); Isenberg v. Lemon, 84 Ariz. 364, 329 P.2d 882 (1958); Henningsen v. Mayfair Packing Co., 41 Cal. 2d 558, 261 P.2d 521 (1953); Moran v. Standard Oil Co., 211 N.Y. 87, 105 N.E. 217 (1914) (Cardozo, J.); Buob v. Feenaughty Mach. Co., 4 Wash. 2d 276, 103 P.2d 325 (1940); Restatement of Contracts § 331 (1932).

92. 4 S. Williston, Sales § 614(b) (rev. ed. 1948).

93. Moran v. Standard Oil Co., 211 N.Y. 187, 105 N.E. 217 (1914) (Cardozo, J.), cited with approval in Armstrong Rubber Co. v. Griffith, 43 F.2d 689, 691 (2d Cir. 1930).

herent in most warranty cases. They seek to fix "the absolute responsibility for preventing the harm upon the defendant whether his conduct is regarded as fundamentally anti-social, or he is considered merely to be in a better position to transfer the loss to the community."[94] However, it is one thing to hold the manufacturer presumptively liable without inquiry into the realities of these premises and regardless of his proof of negligence and quite another to use the same arguments to hold him liable for the fault of someone else. The fact that there is such a concept as strict liability, in the sense that proof of negligence is not required, in no way requires that contributory negligence not be a defense.[95]

Thus, several courts which continue to hold that contributory negligence is not a defense in warranty have mitigated the rigidity of the rule by tactics which actually focus on the buyer's conduct. In *Chapman v. Brown*,[96] the court analyzed the problem of a young lady injured when a hula skirt she was wearing caught fire. The court held that the plaintiff's contributory negligence was not a bar to a suit based on implied warranty. The court saw a form of comparative negligence as the solution to the problem but nevertheless decided the case along more traditional lines. It reasoned 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 . . . as a complete defense in cases . . . based on . . . warranty. . . .[97]

The jury, however, was allowed to take the plaintiff's contributory negligence into account in fixing the amount of damages, even though the defendant's counsel did not ask for a rule of comparative negligence or instructions permitting the jury to consider the plaintiff's negligence in mitigation of damages.[98]

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94. PROSSER, TORTS 341. *See* Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 689-97 (1934).

95. *See* 2 FRUMER & FRIEDMAN § 16.01 [3].

96. 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962).

97. *Id.* at 85-86.

98. *Id.* at 86. This view produces a result identical to the Mississippi comparative negligence statute. MISS. CODE ANN. § 1454 (1942). That is, even if the plaintiff is 99% at fault he may maintain his action, the degree of fault going to the issue of damages and not liability. Note that the effect of such language is to have the buyer's conduct affect the extent of the manufacturer's liability and tacitly put in operation a form of comparative negligence. It would be preferable for the court to be more candid since such an opinion obscures its purpose and will be misleading in different circumstances.

The court in *Rasmus v. A. O. Smith Corp.*[99] summarily ruled out plaintiff's conduct as contributory negligence but found for the manufacturer by application of a causation requirement.

> In actions involving claimed breaches of warranty in connection with the sale of a machine the question as to whether it was a faulty machine and the question as to whether it was faultily operated by the buyer are inextricably entwined . . . . Claimed fault on the part of the buyer in the operation of a machine purchased by him is sometimes referred to as negligence. However, as heretofore noted, negligence is not involved in actions for breach of warranty. Claimed fault on the part of the buyer in connection with the operation of a machine is connected with the matter of proximate cause and direct and natural result.[100]

In *Natale v. Pepsi Cola Company*[101] an exploding Pepsi bottle injured the plaintiff. The court refused to preclude defendant from fixing the fault on someone other than himself, and the jury was permitted to consider the effect of the handling of the bottle between the time or purchase and the time of the explosion.

> If the essential cause of the occurrence was something other than the breach of the implied warranty, no matter what, the defendant is not liable . . . . [D]efendant would not be liable if the accident essentially occurred by reason of mishandling whether by plaintiff or any other person between the time of purchase and the time of the occurrence . . . . [T]he breach of the implied warranty . . . which gives rise to the liability . . . must [be] causally related to the alleged injuries . . . . A party cannot recover for a loss that he could have averted by the exercise of reasonable care.[102]

The reasoning in *Natale* and *Rasmus* is consistent with the principle of causation as a sine qua non to the recovery of consequential damages in an action in warranty or in negligence.[103]

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99. 158 F. Supp. 70 (N.D. Iowa 1958). Plaintiff-buyer independently installed removal equipment in an hermetic storage bin built by defendant for plaintiff to keep corn at a particular moisture level. Much testimony went to the issue of whether plaintiff's installation was without care thereby altering the moisture level fixed by defendant and thus causing the spoilage of plaintiff's corn.

100. *Id.* at 95.

> [W]hen it is considered that liability for breach of warranty exists only where it is shown that the breach was the proximate cause of the harm for which recovery is sought, the question arises whether evidence, which, in a negligence suit, might be adduced as showing the injured person's contributory negligence may not be adduced to show that the harm alleged to flow from a breach of warranty actually was otherwise caused.

1 HURSH § 3:9.

101. 7 App. Div. 2d 282, 182 N.Y.S.2d 404 (1959) (infant's eye injured when soda bottle he was attempting to open on a school gate exploded).

102. 7 App. Div. 2d at 284, 182 N.Y.S.2d at 407.

103. *Accord,* Dallison v. Sears, Roebuck & Co., 313 F.2d 343 (10th

A number of jurisdictions do formally recognize contributory negligence as a defense to breach of warranty.[104] In *Razey v. J. B. Colt Company*,[105] Colt sold Razey an acetylene generator for use in Razey's photographic business. A lighted gas jet in Razey's living room ignited the gas from the generator and caused an explosion resulting in personal injury and property damage. Granting that a warranty of fitness existed, the court observed that Razey's use of the generator in a room with a lighted gas jet was in violation of a local safety ordinance and was a negligent use of the machine. Notwithstanding the fact that this case involved personal injury, which often calls into operation stricter standards,[106] the court said:

> Where the plaintiff seeks to recover damages for a breach of a general warranty, which are usually the difference between the value of the thing as it is in fact and as it was warranted to be, the question of negligence does not enter; but, where he seeks to recover consequential damages, he should not be permitted to recover for his own negligence . . . . Warranty is not insurance, and there is nothing in this contract to indicate that either party supposed the defendant was to answer for the plaintiff's carelessness. If it is impossible to separate the conse-

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Cir. 1962) (woman set afire when match ignited her nightgown). The court permitted the jury to find that the nightgown plaintiff wore was not unusual or dangerously combustible and plaintiff's injuries were solely and proximately caused by her own negligence in smoking and handling matches in bed while in a semiconscious state induced by a potent sleeping pill.

104. Dallison v. Sears, Roebuck & Co., 313 F.2d 343 (10th Cir. 1962); Posey v. Pensacola Tractor & Equip. Co., 138 So. 2d 777 (Fla. App. 1962); Nelson v. Anderson, 245 Minn. 445, 72 N.W.2d 861 (1955); Missouri Bag Co. v. Chemical Delinting Co., 214 Miss. 13, 58 So. 2d 71 (1952); Finks v. Viking Refrigerators, Inc., 235 Mo. App. 679, 147 S.W.2d 124 (1941); Eisenbach v. Gimbel Bros., Inc., 281 N.Y. 474, 24 N.E.2d 131 (1939); Fredendall v. Abraham & Straus, Inc., 279 N.Y. 146, 18 N.E.2d 11 (1938); Natale v. Pepsi-Cola Co., 7 App. Div. 2d 282, 182 N.Y.S.2d 404 (1959); Razey v. J.B. Colt Co., 106 App. Div. 103, 94 N.Y.S. 59 (1905); *cf.* Damer v. State, 34 Misc. 2d 363, 228 N.Y.S.2d 997 (Sup. Ct. 1962); Walker v. Hickory Packing Co., 220 N.C. 158, 16 S.E.2d 668 (1941).

For further support of this proposition consider those products liability cases based on breach of warranty which have simply ruled on the question of contributory negligence without discussing its availability as a defense. *E.g.*, Arnaud's Restaurant, Inc. v. Cotter, 212 F.2d 883 (5th Cir. 1954), *cert. denied*, 348 U.S. 915 (1955); Sapiente v. Waltuch, 127 Conn. 224, 15 A.2d 417 (1940); Rinaldi v. Mohican Co., 225 N.Y. 70, 121 N.E. 471 (1918).

105. 106 App. Div. 103, 94 N.Y.S. 59 (1905).

106. There is a distinction between the case involving personal injury due to a defect in the product and the situation where loss of goodwill or profits result from the inability to properly fulfill contractual commitments. It is in personal injury cases that the courts are more inclined to overlook buyer's fault and apply stricter standards to the manufacturer.

> quences of the plaintiff's negligence from the consequences of the defendant's breach of warranty, then the plaintiff must be limited to general damages, for otherwise he is permitted to recover for his own fault. We can discover no reason why he should be permitted to recover any damages, which his own negligence has contributed to produce . . . .[107]

If there is a defect in the equipment, the manufacturer would be liable for the difference between the value of the generator sold and the value if it was as warranted.[108] Consideration of the buyer's fault would be limited to the issue of consequential damages.[109] The court also stated that the buyer could not recover for his own fault. These two propositions, however, run head long into each other where the product is defective and the buyer improperly uses it causing damage only to the product itself. If the buyer's use was despite knowledge of the danger, issues of assumption of risk and use of product with knowledge of its defects are raised. When injury to only the article itself occurs from the combination of the defect and the buyer's negligence the case for strict liability plus disallowing inquiry into contributory fault is most strongly presented. It is not unreasonable in such a case to foreclose consideration of the buyer's conduct if the manufacturer's absolute liability is judiciously limited to the article sold. Beyond this, however, there is little justification for ignoring the buyer's conduct.

The more troublesome cases are those in which the manufacturer must pay not only for the equipment, but also for personal injury, property damage, loss of profits, goodwill, prospective profits, and other consequential damages. The recovery sought should definitely be a factor which the courts consider in deciding what weight to give to buyer's conduct in these cases. A manufacturer should be absolutely liable to replace any de-

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107. 106 App. Div. at 106, 94 N.Y.S. at 61.

108. The Uniform Sales Act and the Uniform Commercial Code employ the rule of Hadley v. Baxendale, 9 Ex. 341 (1854), as the general measure of damages in warranty cases, viz., the difference between the value of the article actually furnished the buyer and the value the article would have had if the article conformed to the warranty. United States v. Goodman, 111 F. Supp. 32 (W.D.N.C. 1953); Bracher v. American Nat'l Food, Inc., 133 Cal. App. 2d 338, 284 P.2d 163 (1955); Mills v. Meyer, 40 Wash. 2d 369, 243 P.2d 491 (1952); 3 S. WILLISTON, SALES § 366 (rev. ed. 1948); *cf.* Tuttle v. Bootes Hatcheries & Packing Co., 112 F. Supp. 705 (D. Minn. 1953); Zachry v. McKown, 326 S.W.2d 227 (Tex. Civ. App. 1959).

Proof of special circumstances is required for a greater amount of damages and consequential damages may be recovered in a proper case. UNIFORM COMMERCIAL CODE § 2-715, Comment 2.

109. *See* Note, *The Role of Contributory Negligence in Warranty Actions*, 36 S. CAL. L. REV. 490, 492 (1963).

fective product he produces, regardless of how negligently it is handled, but this should not be confused with imposition of the same liability for other injuries caused by the buyer's negligence.[110]

III. COMPARATIVE FAULT

A. In Warranty

The primary justification for the rule of contributory negligence is the feeling that if one man is to be held liable because of his fault, then the fault of the party seeking to enforce that liability should also be considered.[111] A comparative negligence approach applied to the parties' conduct in warranty actions is consistent with this principle and will give more equitable and less oppressive results than the all-or-nothing contributory negligence rule.

In the United States the concept of comparative negligence means the apportionment of liability doctrine embodied in statutes, partially or entirely abrogating the common law rule under which contributory negligence is an absolute bar to recovery. These statutes provide that contributory negligence is relevant only to mitigation of damages.[112] The suggestion that comparative negligence be applied in warranty actions is apparently a novel one,[113] yet the principles of that doctrine mesh perfectly with the concepts of buyer's conduct discussed above.

110. The concession that inquiry into buyer's conduct is unnecessary when recovery is limited to the article itself is made with qualification and only against the background of strict liability for manufactured products. The argument that the buyer should bear some of the loss whenever his conduct contributes to his injury, whether it be product-centered or consequential, is a weighty one.

111. F. Harper & F. James, The Law of Torts 1207 (1956).

112. *See generally* Annot., 59 A.L.R.2d 1261 (1958) (cases cited therein); 38 Am. Jur. *Negligence* § 233 (1941).

113. In fact, after checking the warranty cases in the comparative negligence jurisdictions and the authorities in the field, it appears that this suggestion has not previously been advanced. I believe this is merely a reflection on the current status of comparative negligence in the negligence area and should not be taken to indicate its inapplicability in the warranty field. There is no doubt in this writer's mind that comparative negligence will eventually replace the outmoded doctrine of contributory negligence in the negligence area. At that time commentators will question whether the warranty field is next. It should be. Throughout this Article I have pointed to areas where analysis of buyer's contributory negligence would be appropriate. Occasionally I have stated that comparative negligence would be even more preferable. Below I will first demonstrate that comparative negligence can well be applied in warranty and then compare that doctrine with contributory negligence.

Since the doctrine of comparative negligence is basically a rule for the apportionment of damages,[114] one major argument against consideration of the buyer's conduct is obviated. It has been argued that the manufacturer should be held absolutely liable for the difference between the actual value of the product and its value as warranted. The comparative negligence approach assumes that full compensation for the product as warranted will be given in breach of warranty cases, but provides for further inquiry into the buyer's conduct in dealing with the product on the issue of consequential damages. On this issue the jury should clearly be permitted to weigh the contribution of the plaintiff against the contribution of the defendant.

Such a comparative negligence concept is appropriate in warranty. Both components of warranty, tort and contract, have a doctrine involving apportionment of damages. The rubric "warranty" should not, therefore, prevent application of a method of allocating damages. If objections are proferred on the basis of negligence versus warranty distinctions, we might use the term "comparative fault" rather than "comparative negligence." Although the terms may be used synonymously, "comparative fault" more accurately emphasizes the proper focus.

Several methods of apportioning damages are possible. At first glance, the process of apportionment in warranty may seem to be a process of subtraction, beginning with the defendant one hundred per cent to blame and deducting the plaintiff's contribution. This process is certainly preferable to the total barring effect of the contributory negligence rule or to a categorical refusal to consider such negligence. Some states perhaps will not tolerate any award to a plaintiff who is grossly negligent, while the fault of the defendant was only slight. If a defect is apparent, or could have been discovered with a reasonable inspection, or if the plaintiff imprudently used the article, the jury might find him eighty per cent blameworthy. A legislature could set a cutoff providing, for example, that a plaintiff who is more than seventy-five per cent negligent is precluded from

114. 38 AM. JUR. *Negligence* § 231 (1941). The plaintiff's negligence operates, not to relieve the defendant entirely from liability, but merely to diminish the damages recoverable.

The term apportionment is used in its broadest sense. Thus, subtracting from the plaintiff's damages will be considered as much an apportionment as if damages were allocated between each of two injured parties. Actually, the apportionment doctrine is an apportionment (or allocation) of fault realized through an adjustment in the damages. It should be clear that we are using the degree of buyer's contributory fault to offset the amount of his recovery.

recovering anything, or it might simply preclude recovery by a plaintiff whose negligence was "gross." This would prevent unjustified and harassing claims brought by reckless buyers on the chance of getting some compensation.

Such cutoffs are no more difficult for the jury to apply than the present criteria for contributory negligence vel non.[115] They will provide fairer results in the majority of cases falling within the cutoff points. When compared with the thought process required to mitigate damages in the misuse of product or avoidable damages situations, the problems are indistinguishable.

However, merely because some degree of the fault will initially be attributed to defendant does not ineluctably lead to the subtraction-from-the-manufacturer thesis. The natural tendency is to fix on the party most noticeably blameworthy and subtract the other's fault from that. Admittedly there is the possibility that a few extra percentage points of fault will sympathetically be attributed to one of the parties, but in the end the balancing will be accomplished as if the jury had independently appraised the contribution of each party. Careful instruction could probably provide that the jury subtract the buyer's fault from one hundred per cent and not vice versa. The question remains whether this will produce results different from a more general instruction allowing freer balancing. There should be no difficulty with limiting the manufacturer's presumed negligence to the issue of liability and allowing the jury to consider the actual degree of culpability in the issue of damages. No *a priori* logic dictates a starting point of one hundred per cent culpability attributed to the manufacturer. On the contrary, after relegating the presumed negligence to the issue of liability, it would seem most just to allow the jury to balance degrees of fault as they see fit, limited perhaps by some cutoff standard.

B. The Arguments Against Comparative Fault

The comparative fault approach seems ideally suited to solving the problem of the role of the buyer's conduct in products liability cases. The criticism directed at the comparative negligence statutes, however, may also be applicable to the comparative fault approach in products liability.

115. When a juror finds a plaintiff contributorily negligent he is, in fact, using a 1% (or thereabouts) cutoff.

Although the doctrine of comparative negligence has met with some criticism,[116] judging from the support it has received, its eventual acceptance throughout the United States seems inevitable.[117] Most courts, however, still reject it,[118] "not because it's unsound as a matter of logic or technical theory . . . but because experience has shown, as a practical matter that it is not workable, there being no usable yardstick to measure the relative fault of the parties."[119]

The comparative negligence doctrine is not, however, substantially weakened by the law's inability to measure precisely how much of the damage suffered is attributable to the plaintiff's own fault. It would be preferable to grant seventy per cent erroneously, instead of an ideal sixty-three per cent, than to grant one hundred per cent or nothing. Civil law jurisdictions regularly apportion damages[120] and appear to have no difficulty administering the system. Except for the United States all major English-speaking countries apportion damages.[121] American common law courts will make apportionments in conflicts cases where the law of a comparative negligence jurisdiction is applicable, as well as in the obvious cases of avoidable damages. Division of damages according to fault is found in cases where plaintiff and defendant both pollute the same stream[122] or

116. *E.g.*, Body, *Comparative Negligence: The Views of a Trial Lawyer*, 44 A.B.A.J. 346 (1958); Harkavy, *Comparative Negligence: The Reflections of a Skeptic*, 43 A.B.A.J. 1115 (1957); McKinnon, *The Case Against Comparative Negligence*, 28 S.B. CAL. J. 23 (1953); Palmer, *Let Us Be Frank About Comparative Negligence*, 28 LOS ANGELES B. BULL. 37 (1952); Powell, *Contributory Negligence: A Necessary Check on The American Jury*, 43 A.B.A.J. 1005 (1957).

117. Bress, *Comparative Negligence: Let Us Hearken To The Call of Progress*, 43 A.B.A.J. 127 (1957); Duniway, *California Should Adopt A "Comparative Negligence" Law*, 28 S.B. CAL. J. 22 (1953); Gregory, *Loss Distribution in Torts*, 45 VA. L. REV. 63 (1959); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); authorities cited notes 121, 136, 141 *infra*.

118. Annot., 114 A.L.R. 836-37 (1938) (citing cases).

119. Wittstruck v. Lee, 62 S.D. 290, 296, 252 N.W. 874, 877 (1934). *See* Heil v. Glanding, 42 Pa. 493, 499, 82 Am. Dec. 537 (1862); Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 708 (1934).

120. PROSSER, TORTS 297 n.18.

121. Sun Oil Co. v. Seamon, 349 Mich. 387, 400, 84 N.W.2d 840, 844 (1957) (dictum); Shroeder, *The Courts and Comparative Negligence*, A.B.A. INSURANCE SECTION, PROCEEDINGS 41-54 (1950); Turk, *Comparative Negligence on the March*, (pts. 1 & 2), 28 CHI.-KENT L. REV. 189, 304 (1950).

122. Bowman v. Humphrey, 132 Iowa 324, 109 N.W. 714 (1906); Randolf v. Town of Bloomfield, 77 Iowa 50, 41 N.W. 562 (1889); *cf.* Walters v. Prairie Oil & Gas Co., 85 Okla. 77, 204 P. 906 (1922).

flood the plaintiff's property,[123] where two or more defendants pollute a stream,[124] where two defendants inflict personal injury on separable areas of the plaintiff,[125] where defendants' animals together cause injury,[126] and in cases involving nuisance due to noise[127] or air pollution.[128] By the same token, apportionment is made in cases of separate repetitions of the same defamatory statements[129] or separate acts resulting in alienation of affections.[130]

The difficulty of making a division of damages is greatly overstated and in no event is it sufficient justification for all or nothing liability.[131] The task is no more difficult than placing a price tag on reputation in defamation or pain and suffering in personal injury cases.

Several statutes have abolished the all-or-nothing effect of contributory negligence and provide for the apportionment of damages.[132] Juries have experienced little difficulty in following the apportionment of damage rules. Juries of other states, at least where they must state the basis of their apportionment, have not been confounded when compelled to apply such a rule under the principles of conflict of laws.[133]

It has been argued that satisfactory results are achieved even under the contributory negligence rule by jurors who ignore the letter of the court's instruction and render a verdict conforming to their general notions of justice and fair play.[134]

123. Philadelphia & R.R.R. v. Smith, 64 F. 679 (3d Cir. 1894).

124. Johnson v. City of Fairmont, 188 Minn. 451, 247 N.W. 572 (1933); Snavely v. City of Goldendale, 10 Wash. 2d 453, 117 P.2d 221 (1941).

125. Albrecht v. St. Hedwig's Roman Catholic Benevolent Soc'y, 205 Mich. 395, 171 N.W. 461 (1919); McAllister v. Pennsylvania R.R., 324 Pa. 65, 187 A. 415 (1936).

126. Hill v. Chappel Bros., 93 Mont. 92, 18 P.2d 106 (1933); Wood v. Snider, 187 N.Y. 28, 79 N.E. 858 (1907).

127. Sherman Gas & Elec. Co. v. Belden, 103 Tex. 59, 123 S.W. 119 (1909).

128. O'Neal v. Southern Carbon Co., 216 La. 96, 43 So. 2d 230 (1949).

129. PROSSER, TORTS 228 n.80.

130. *Id.* at 228 n.81.

131. *Cf. id.* at 229.

132. Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1964); Merchant Marine Act, 1920, 46 U.S.C. § 766 (1964). Many state labor acts consider the workmen's contributory fault in the award of damages. *Cf.* cases cited note 150 *infra*. *See generally* Mole & Wilson, *A Study of Comparative Negligence* (pts. 1 & 2), 17 CORNELL L.Q. 333, 604 (1932).

133. INSTITUTE OF JUDICIAL ADMINISTRATION OF NEW YORK, COMPARATIVE NEGLIGENCE 13 (1955).

134. Haeg v. Sprague Warner & Co., 202 Minn. 425, 530, 281 N.W. 261, 263 (1938); PROSSER, TORTS 298; James, *Accident Liability: Some Wartime Developments*, 55 YALE LJ.. 365 (1946).

A system which succeeds only by utter disregard of its basic rules is clearly unsatisfactory. Adherence to fundamental rules, ease of application, and, perhaps, predictability[135] would be furthered if we used a rule which allows the jury to decide in accordance with the court's instructions rather than the jurors' individually centered emotions. In any event, a jury can ignore the contributory negligence rules only if the judge lets the case reach it. Where the plaintiff's negligence is slight but irrefutable the judge must direct a verdict for defendant. There are, no doubt, some dutiful jurors who apply the contributory negligence instruction to the letter. If the comparative negligence approach is just and feasible, its application should be required, rather than left to the conscience of the jury.

The fears that have been expressed that a comparative negligence rule would remove the deterrent effect of the contributory negligence rule on suits by potential plaintiffs who have also been negligent, thus burdening the court calendar, seem highly unwarranted.[136] Proponents of comparative negligence have tried to assuage such fears by suggesting that presently, in many areas, personal injury cases are tried by a handful of specialists, and court calendars must be accommodated to the schedule of such counsel. The contention is that comparative negligence will not require such precision in proof and argument. Thus, more attorneys will handle such cases, since a less skillful practitioner could emerge scathed yet not completely defeated. With comparative negligence, however, it is argued, will come a reluctance on the part of the plaintiff to settle, since in most cases he is likely to collect something. Many cases are prosecuted with the hope that jurors will ignore the strict mandate of the law and reach a compromise verdict. The comparative negligence proponents point out that settlements are now prevented where an insurer believes that he has a chance of completely avoiding payment by proving that the plaintiff was contributorily negligent. In addition, a greater waiver of jury trials may result if attorneys believe the court would make an impartial apportionment. Thus, the proponents conclude that comparative negligence will, in fact, induce early settlement of the claims and alleviate calendar congestion. In practice, the change to comparative negligence has not, in fact, resulted

135. Although precise dollar amounts can never be estimated with precision there would probably be more predictability within certain ranges as opposed to an all or nothing "guesstimate."

136. *See generally* Eldredge, *Contributory Negligence: An Outmoded Defense That Should Be Abolished*, 43 A.B.A.J. 52, 54 (1957).

in increased litigation.[137]

A corollary to the argument that comparative negligence will result in increased litigation is the fear of skyrocketing insurance rates with the ultimate consequences falling on the public. This presupposes that the total recovery under comparative negligence will, by virtue of increased litigation, exceed the total amounts presently awarded. It is quite probable that the assumed frequency of plaintiffs' verdicts will be offset by the diminished amount of the awards. Furthermore, since the expected increase in litigation has not occurred, the total recovery may, in fact, decrease. There has been no change in total recoveries with respect to federal employers' liability insurance, insuring employers of longshoremen, or insurance in states which have given up the doctrine of contributory negligence.[138] In any event, the overwhelming majority of claims are settled without court intervention and frequently on a less crystalized fault basis.

Contributory negligence was conceived primarily to protect the growth of essential industries and was weaned on nineteenth century notions of individualism.[139] This need no longer justifies the retention of that defense as evidenced by its rejection in Great Britain, the jurisdiction of its inception.[140] Experience indicates that even under contributory negligence manufacturers have lost that extra measure of insulation by virtue of the compromise verdict. If some residuum of need to protect infant industries remains, it does not appear that one doctrine is more suited than the other. Comparative negligence will, however, produce a more just and socially desirable distribution of loss than that achieved by its outmoded predecessor.[141]

Justice Black has observed that the contributory negligence rule is "a discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries . . . however slight."[142] There appears to be no

137. INSTITUTE OF JUDICIAL ADMINISTRATION OF NEW YORK, COMPARATIVE NEGLIGENCE 13 (1955); Eldredge, *supra* note 136.

138. INSTITUTE OF JUDICIAL ADMINISTRATION OF NEW YORK, COMPARATIVE NEGLIGENCE 13 (1955).

139. Malone, *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125 (1945).

140. *See* Law Revision Comm., *Contributory Negligence*, CMD. 6032 (1939) (led to the 1945 Act); Pound, *Comparative Negligence*, 13 NACCA L.J. 195 (1954).

141. *See generally* Bress, *Comparative Negligence: Let Us Hearken To The Call of Progress*, 43 A.B.A.J. 127 (1957); Hayes, *New York Should Adopt a Comparative Negligence Rule*, 27 N.Y.S.B. BULL. 288 (1955).

142. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953) (dictum).

legitimate quarrel with this thought. In fact one prominent scholar, commenting on discussions he had with experts at a conference of the Committee on Torts of the American Law Institute explains that they "were unanimously opposed to the rule of contributory negligence as a complete defense, and . . . unanimously favored an apportionment of damages."[143]

Notwithstanding the general preference for comparative negligence the view persists that abolition of contributory negligence as a complete defense must come from the legislature.[144] This is unfortunate since the doctrine of contributory negligence is a court-made rule and hence can be modified or repudiated by any court which is convinced it is unfair.[145] Virtually all American courts have overruled earlier cases involving the analogous doctrine of imputed contributory negligence.[146]

If judicial extirpation of contributory negligence is impossible, the legislature is certainly free to substitute comparative negligence in its stead.[147] Several courts have attempted to nudge their legislatures without success.[148]

Comparative negligence statutes are in force in at least six jurisdictions,[149] and in special circumstances additional states have repudiated the common law concept in favor of some form

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143. Eldredge, *supra* note 136, at 53.

144. *E.g.*, Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROB. 476, 483 (1936).

145. *See* Sun Oil Co. v. Seamon, 349 Mich. 387, 84 N.W.2d 840 (1957) (searching discussion of contributory negligence in concurring opinion). *See generally* Lambert, *The Case for Comparative Negligence*, HARV. L. RECORD, Dec. 11, 1958, at 3.

146. Imputed negligence: automobile passenger in close relation to driver is denied recovery against third party for contributory negligence of driver. Last clear chance will likely be dealt a similar fate in the near future. *See generally* PROSSER, TORTS 299-302, 295-96; Lambert, *supra* note 145.

147. "The common-law rules respecting . . . contributory negligence . . . may be altered by state legislation, and even set aside entirely—at least if some reasonably just substitute is provided." New York Cent. R.R. v. White, 243 U.S. 188, 189 (1917) (syllabus); *accord*, Middleton v. Texas Power & Light Co., 249 U.S. 152 (1919).

148. No one can appreciate more than we the hardship of depriving plaintiff of his verdict . . . but the rule of contributory negligence, through no fault of ours, remains in our law and gives us no alternative . . . . [I]n operation, the rule of comparative negligence would serve justice more faithfully. . . .

Haeg v. Sprague, Warner & Co., 202 Minn. 425, 429-30, 281 N.W. 261, 263 (1938).

149. ARK. STAT. ANN. § 27-1730 (1962); GA. CODE ANN. § 105-603 (1937); MISS. CODE ANN. §§ 1454, 1455 (1942); NEB. REV. STAT. § 25-1151 (1943); S.D. CODE § 47.0304-1 (Supp. I, 1960); WIS. STAT. § 331.045 (1961).

of apportionment.[150] One jurisdiction judicially employs the novel procedure of applying the contributory negligence rule but permits the plaintiff to recover if he is only remotely negligent.[151] Another approach, suggested above,[152] is to use the terms "gross" and "slight" to indicate the degree of a party's negligence.[153]

Comparative negligence legislation may assume many forms. The Wisconsin Statute[154] is a good illustration of such legislation:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

Thus a plaintiff guilty of forty-nine per cent of the total negligence may recover fifty-one per cent of his damages. If his negligence equals or exceeds that of the defendant no recovery whatsoever is permitted.[155] Comparative negligence is

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150. Heskett v. Pennsylvania Co., 245 F. 326 (6th Cir. 1917) (Ohio law); Robinet v. Hawk, 200 Cal. 265, 252 P. 1045 (1927); Lassen v. Southern Pac. Co., 173 Cal. 71, 159 P. 143 (1916); Florida Ry. v. Dorsey, 59 Fla. 260, 52 So. 963 (1910); Tide Water Oil Co. v. American S.S. Owners Mut. Protection & Indem. Ass'n, 156 Misc. 367, 281 N.Y.S. 729 (1935) (under 45 U.S.C. § 53); Peterson v. Fargo-Moorhead St. Ry., 37 N.D. 440, 164 N.W. 42 (1917).

151. *E.g.*, McCullough v. Johnson Freight Lines, 202 Tenn. 596, 308 S.W.2d 387 (1957); McClard v. Reid, 190 Tenn. 337, 229 S.W.2d 505 (1950); Bejach v. Colby, 141 Tenn. 686, 214 S.W. 869 (1919).

152. *See* text accompanying note 115 *supra.*

153. Generally, the more gross the negligence manifested by the defendant the less care is required by plaintiff to enable him to recover. *E.g.*, Hickman v. Parks Constr. Co., 162 Neb. 461, 76 N.W.2d 403 (1956) (under Nebraska statute; *see also* GA. CODE ANN. §§ 105-603 & 94-703 (1937); S.D. CODE § 47.0304-1 (Supp. I, 1960).

154. WIS. STAT. § 331.045 (1961).

155. It is beyond the scope of this Article to discuss the several possible configurations of apportioning the damages. One might consider foreclosing recovery if plaintiff is, for example, more than 25% negligent, or awarding only 2% in the 49-51 example. This latter method has been used in Nebraska, Grupp & Roper, *Comparative Negligence*, 32 NEB. L. REV. 234 (1952), and has been proposed as a revision of the Wisconsin method. McKinnon, *The Case Against Comparative Negligence*, 28 S.B. CAL. J. 23 (1953). The Nebraska method might have the advantage of discouraging prospective suitors who will recover only 2% of their damages.

In Mississippi, unlike Wisconsin where plaintiff is precluded if more than 49% negligent, a plaintiff found to have been 90% negligent may nevertheless recover 10% of his total damages. MISS. CODE § 1454 (1942) provides:

> In all actions . . . for personal injuries . . . death . . . [or]

also workable in the multi-defendant situation. In a case where plaintiff *A* sues defendants *B*, *C*, and *D*, and the respective degrees of negligence were fifteen, fifty, twenty-five, and ten per cent, the plaintiff may recover against any defendant whose negligence was greater than his own.[156] The application of such an apportionment to multi-party products liability cases may relieve the pressure to affix blame on the deep pocket and sharpen focus on the behavior of all the parties. The exploding soda bottle, manufactured by Coca-Cola, distributed by a middleman to the supermarket, and juggled by the plaintiff, illustrates a recurrent multi-party transaction where several individuals may be blameworthy. The comparative negligence approach would avoid forcing the entire liability on one party when several are responsible.

Comparative negligence will encourage consideration of relevant factors by the court and jury and reduce emotionally based conclusions. By means of special verdicts and interrogatories[157]

> injury to property, the fact that the person injured . . . may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured. . . .

This formulation is inferior to the Wisconsin statute. Jurors will be told that plaintiff can maintain his action regardless of his comparative fault. Jurors may adjust their award upward reasoning that if the law allows the action, it does not seem fair to award the plaintiff only a piddling sum. In Mississippi, the plaintiff is not barred even if grossly negligent. Confusion and injustice are inevitable. Assuming a three car collision with each driver at fault to the extent of 33% and suffering $99,000 worth of damages, does the jury follow the letter of the statute and award each $66,000? To complicate matters Mississippi does not use the special verdict. This accentuates the obscurity which results from telling the jury to disregard plaintiff's fault for one purpose, but precisely apply it for another.

We are told that the biggest lobbyists against comparative negligence are insurance companies who especially criticize the use of this doctrine without special verdicts. Gilmore, *Comparative Negligence From a Viewpoint of Casualty Insurance*, 10 ARK. L. REV. 82 (1955). This, coupled with clogging the courts with unjustified claims, would turn a prospective legislator cold. Dissatisfaction with the so-called "pure form" of comparative negligence which allows recovery even to a claimant more negligent than the party against whom the claim was made led to the 1957 re-enactment of the Arkansas comparative negligence statute only two years after it was first passed. These errors ought to be avoided if comparative negligence is to be successful.

156. *Cf.* Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934); Campbell, *Ten Years of Comparative Negligence*, 1941 WIS. L. REV. 289. Several possible configurations are also available in the multi-defendant situations.

157. FED. R. CIV. P. 49(a) & (b). Although not necessary for the success of comparative negligence, the special verdict focuses on the relevant conduct more distinctly than the general verdict.

the jury may answer several questions dealing with mutual negligence. It may indicate what percentage of the total negligence was attributable to each party and the amount of damage plaintiff sustained. This would facilitate a court's determination of the bases of apportionment of the negligence, obviate the former need for intricate instruction, facilitate review on appeal, and inform the insurance companies how much of the recovery is attributable to their insured.

Replacing contributory negligence, where it has existed as a defense, with the curative doctrine of comparative negligence would no doubt require modification of the principles of last clear chance,[158] assumption of risk,[159] and contribution between tortfeasors.[160] Generally speaking, however, the transition could be effected with relative ease, facilitating the administration of claims while ameliorating the harshness of the prior rule.

IV. CONCLUSION

It is clear that products liability law would benefit greatly in fairness and justice if the jury were permitted to consider fully the buyer's conduct before making an award of consequential damages based on breach of warranty. This is true even in jurisdictions which have considered the buyer's conduct in warranty. In *Barefield v. LaSalle Coca-Cola Bottling Company*,[161] the plaintiff had consumed about one-half of a bottle of Coke when she gagged on what she thought was either loose tobacco from her cigarette or a small bit of ice. She took another swallow and suffered a cut in her throat from a piece of glass from the bottle. She was denied recovery on the ground

158. The last clear chance doctrine serves only as a means of escape, by way of comparative fault, from contributory negligence as an absolute bar and serves no useful purpose in jurisdictions which have enacted apportionment statutes. Garner, *Comparative Negligence and Discovered Peril*, 10 ARK. L. REV. 72 (1955); Johnson, *Comparative Negligence—The Nebraska View*, 36 NEB. L. REV. 240 (1957); MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940); Pound, *Comparative Negligence*, 13 NACCA L.J. 195 (1954); Comment, *Effect of a Comparative Negligence Statute on The Humanitarian Doctrine*, 9 Mo. L. REV. 264 (1944).

159. Whelan, *Comparative Negligence*, 1938 WIS. L. REV. 465; Note, *Assumption of Risk As a Defense in Nebraska Negligence Actions Under The Comparative Negligence Statute*, 30 NEB. L. REV. 608 (1951).

160. C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS: A STUDY IN ADMINISTRATIVE ASPECTS OF COMPARATIVE NEGLIGENCE AND CONTRIBUTION IN TORT LITIGATION (1936); Whelan, *supra* note 159; INSTITUTE OF JUDICIAL ADMINISTRATION OF NEW YORK, COMPARATIVE NEGLIGENCE (1955).

161. 370 Mich. 1, 120 N.W.2d 786 (1963).

that she assumed the risk. It is certainly not unreasonable to argue that the jury should have been allowed to apportion damages based on comparative fault, especially since part of the injury had occurred before the plaintiff "assumed the risk."[162]

Many courts have refused to consider the buyer's negligence at all, resulting in cases like *Simmons* and *Kassouf*. These jurisdictions would undoubtedly benefit from the comparative negligence approach. The all-or-nothing doctrine of contributory negligence makes it difficult to take buyer's conduct into account and still achieve approximate justice. Comparative negligence, while not a panacea, can serve to substantially ameliorate the harshness of the contributory negligence doctrine while balancing the manufacturer's responsibility to society with the buyer's action in contributing to his injury.

162. *See* Comment, *Products Liability: For the Defense—Contributory Fault*, 33 TENN. L. REV. 464, 484 (1966).