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Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk

*Dix W. Noel**

I. INTRODUCTION

In one of the most influential articles dealing with the legal responsibility for defective products, Dean Wade predicted that the strict liability in tort doctrine adopted by the American Law Institute in the *Restatement (Second) of Torts*¹ would "soon become the established rule."² He added that some courts doubtless "will continue to speak the language of warranty, but they will usually recognize that liability sounds in tort, and they will seldom be led into applying contractual restrictions."³ The prediction has been amply borne out, since at least 36 jurisdictions⁴ have expressed their general approval of the

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1. RESTATEMENT (SECOND) OF TORTS § 402A (1965).
2. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 25 (1965).
3. *Id.* at 25.
4. Wasik v. Borg, 423 F.2d 44, 47 (2d Cir. 1970) (applying Vermont law); Parsons v. Amerada Hess Corp., 422 F.2d 610 (10th Cir. 1970) (applying New Mexico law); Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968) (applying Idaho law); Schenfeld v. Norton Co., 391 F.2d 420, 425 (10th Cir. 1968) (applying Colorado law); Soileau v. Nicklos Drilling Co., 302 F. Supp. 119 (W.D. La. 1969) (applying Louisiana law); Klimas v. International Tel. & Tel. Corp., 297 F. Supp. 937 (D.R.I. 1969) (applying Rhode Island law); Bronson v. Club Comanche, Inc., 286 F. Supp. 21 (D.V.I. 1968) (applying Virgin Islands law); Yarrow v. Sterling Drug, Inc., 263 F. Supp. 159, 161 (D.S.D. 1967) (applying South Dakota law); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965) (applying Indiana law); Clary v. Fifth Ave. Chrysler Center, Inc., 454 P.2d 244, 248 (Alas. 1969); O.S. Stapley Co. v. Miller, 103 Ariz. 556, 559, 447 P.2d 248, 251 (1968); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Rossignol v. Danbury School of Aeronautics, Inc., 154 Conn. 549, 560, 227 A.2d 418, 423 (1967); Cottom v. McGuire Funeral Serv., Inc., 262 A.2d 807 (D.C. Ct. App. 1970); Royal v. Black & Decker Mfg. Co., 205 So. 2d 307 (Fla. Dist. Ct. App. 1967); Stewart v. Budget Rent-a-Car Corp., 470 P.2d 240, 243 (Hawaii 1970); Suvada v. White Motor Co., 32 Ill. 2d 612, 621, 210 N.E.2d 182, 187 (1965); Cornette v. Searjeant Metal Prods., Inc., 258 N.E.2d 652 (Ind. 1970); Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970); Bereman v. Burdolski, 204 Kan. 162, 460 P.2d 567 (1969); Dealers Transp. Co. Inc. v. Battery Distrib. Co., 402 S.W.2d 441, 446 (Ky. 1965); Piercefield v. Remington Arms Co., Inc., 375 Mich. 85, 133 N.W.2d 129 (1965); McCormack v. Hankscraft Co., 278 Minn. 322, 338-40, 154 N.W.2d 488, 500-01 (1967); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 118 (Miss. 1966); Williams v. Ford Motor Co., 411 S.W.2d 443, 448 (Mo. Ct. App. 1966); Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439,

Restatement provision concerning strict liability in tort.⁵

Despite this general acceptance, some questions have arisen concerning the meaning and application of the *Restatement's* strict tort liability provisions. One of the more significant problems is the definition of the kind of conduct by the plaintiff that should defeat recovery, particularly the effect of abnormal use of the product, contributory negligence, and voluntary assumption of risk.

This article will attempt to analyze these three general kinds of conduct on the part of the plaintiff, giving attention to basic tort principles and to traditional distinctions. Special emphasis will be placed on the functions of court and jury in resolving questions posed by situations in which injury is caused both by a defective product and by the plaintiff's handling of that product. It will be shown that a court's choice of policy factors as a basis for strict liability may affect considerably its final decision.

More specifically, in the area of abnormal use questions arise about what uses of a product by the plaintiff should be regarded as sufficiently abnormal to defeat his recovery. Should a distinction be made between use for an abnormal purpose and use for a proper purpose but in a careless manner, as is the case when the plaintiff fails to follow instructions? Should abnormal use be differentiated from contributory negligence?

Turning to contributory negligence, if plaintiff fails to discover the existence of a dangerous defect in a product when a man of ordinary

420 P.2d 855 (1966); *Buttrick v. Arthur Lessard & Sons Inc.*, 110 N.H. 36, 260 A.2d 111 (1969); *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 64-66, 207 A.2d 305, 311-12 (1965); *Schrib v. Seidenberg*, 80 N.M. 573, 458 P.2d 825 (1969) (court applied RESTATEMENT (SECOND) OF TORTS § 402A (1965) in the circumstances of this case, but declined to embrace the *Restatement* view as the law in the state); *Lonzrick v. Republic Steel Corp.*, 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965); *Marathon Battery Co. v. Kilpatrick*, 418 P.2d 900, 914-15 (Okla. 1965); *Heaton v. Ford Motor Co.*, 248 Ore. 467, 470-71, 435 P.2d 806, 808 (1967); *Webb v. Zern*, 422 Pa. 424, 427, 220 A.2d 853, 854 (1966); *Olney v. Beaman Bottling Co.*, 220 Tenn. 459, 462, 418 S.W.2d 430, 431 (1967); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 788-89 (Tex. 1967); *Ulmer v. Ford Motor Co.*, 75 Wash. 2d 522, 530-32, 452 P.2d 729, 734 (1969); *Dippel v. Sciano*, 37 Wis. 2d 443, 459, 155 N.W.2d 55, 63 (1967).

5. See RESTATEMENT (SECOND) OF TORTS, § 402A (1965), that provides as follows: "§ 402 A. Special Liability of Seller of Product for Physical Harm to User or Consumer (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

prudence would make this discovery, should this failure bar an action based on strict liability in tort, as it does when the plaintiff's claim is based on the negligent supplying of a defective product? Suppose that the plaintiff simply has failed to guard against the possibility of a defect, as when he drives at excessive speed, knowing that some proportion of all tires may fail when driven too fast. Since this conduct bars recovery completely in a case based on negligence, should it have any effect on the plaintiff's recovery in a strict liability case?

The third kind of conduct to be considered is voluntary assumption of risk—the plaintiff actually discovers the defect and realizes the danger, but nevertheless voluntarily continues to use the product. The plaintiff, for example, continues to use a car after discovering that the brakes are more or less defective. To what extent should the “obviousness” of the defect, or of the danger, suffice to establish as a matter of law that the plaintiff knew and appreciated the risk? Should the rule be any different when the plaintiff is injured while using the defective product in the course of his employment?

In attempting to answer these questions, attention will be focused on the plaintiff's conduct in strict tort and warranty cases, but products liability cases based on negligence will be considered incidentally.

II. ABNORMAL USE

It is generally agreed that a manufacturer or supplier is not liable when the plaintiff's injury results from an abnormal use of the product. In negligence cases, assuming the use is unforeseeable, recovery is denied on the ground that the result is not within the risk, or, as many courts state the matter, the result is not proximately caused by the defendant's conduct.⁶ If a defective roller skate is left at the top of a dark flight of stairs and the plaintiff falls as a result, no court would hold that the maker of the skate is obliged to guard against this sort of harm; the only proximate cause of the accident is the leaving of the skate at a dangerous place.⁷ As the *Restatement* illustrates, if a man buys an automobile tire designed for ordinary use and installs it on his racing car, he cannot complain when it blows out only because used for racing.⁸ Likewise, when the action is based on strict liability, the supplier's responsibility

6. W. PROSSER, *THE LAW OF TORTS* § 102, at 668 (4th ed. 1971). *See also* *Williams v. Brown Mfg. Co.*, 45 Ill. 2d 418, 431, 261 N.E.2d 305, 312 (1970) (stating that the issue of misuse “may arise in connection with the plaintiff's proof of an unreasonably dangerous condition or in proximate causation or both”).

7. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 28.6, at 1546 (1956).

8. *RESTATEMENT (SECOND) OF TORTS* § 295, comment *j* at 331 (1965).

does not extend to abnormal uses. A product is not regarded as defective and unreasonably dangerous when "the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap"⁹ or when an adequate warning is given against a particular use of the product.¹⁰

Since a product is not considered defective when the injury results from abnormal handling, it follows that abnormal use is not an affirmative defense; rather the plaintiff must show as an essential element of his case that the product was characterized by a defect that caused the accident. The appropriate test for distinguishing "normal" from "abnormal" use is whether the use is one that the supplier of the product anticipates or should anticipate.¹¹ In some cases the foreseeability of the use is quite clear. So it has been said that "automobiles will surely be driven, sometimes at high speed, and often where other vehicles and pedestrians are present"; and that hair dye "will be applied to hair and will touch the skin; cosmetics will be applied to faces; underclothes will be worn next to the skin; tractors will get mired; food will be eaten. . . ."¹² Although the test is easily stated, distinguishing normal from abnormal use in the individual case is often difficult.

A. *Tests of Normal and Abnormal Use*

The duty of a supplier to foresee certain uses of his product often has been imposed in negligence cases, even though the use was unintended by the maker of the product. Recovery was allowed, for example, when a woman stood on a chair designed in such a way that it tipped forward when weight was placed near the front, since a jury could find that the supplier should have anticipated that chairs would be used not only for sitting but standing.¹³ Likewise, when a woman wore a highly

9. *Id.* § 402A, comment *h* at 351. See also *Williams v. Brown Mfg. Co.*, 45 Ill. 2d 418, 431, 261 N.E.2d 305, 312 (1970).

10. RESTATEMENT (SECOND) OF TORTS § 402A, comment *j* at 353 (1965), states that with a warning, the product "is not in defective condition, nor is it unreasonably dangerous." Recent strict liability decisions supporting this position are *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121 (9th Cir. 1968) (applying Idaho law); *LaGorga v. Kroger Co.*, 275 F. Supp. 373 (W.D. Pa. 1967), *aff'd*, 407 F.2d 671 (3d Cir. 1969); *Magee v. Wyeth Laboratories, Inc.*, 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (1963). See also W. PROSSER, *supra* note 6, § 102, at 668; Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 Sw. L.J. 256, 267 (1969).

11. See text accompanying notes 24-31 *infra*. In *Williams v. Brown Mfg. Co.*, 45 Ill. 2d 418, 425, 261 N.E.2d 305, 310 (1970), misuse is defined as "use for a purpose neither intended nor 'foreseeable' (objectively reasonable) by the defendant."

12. 2 F. HARPER & F. JAMES, *supra* note 7.

13. *Phillips v. Ogle Aluminum Furniture, Inc.*, 106 Cal. App. 2d 650, 654, 235 P.2d 857, 859-60 (1951).

inflammable dress near a kitchen stove, a jury could find that this use was foreseeable.¹⁴

In strict liability cases the same duty to foresee certain unintended uses has been recognized, and ordinarily the factual issue of the foreseeability of a particular use has been left to the jury. A jury has been allowed to find it foreseeable that a child of six might use an inflammable hair spray on her dress and hair,¹⁵ and that a child of five might be wearing a highly inflammable jacket while playing near a fire.¹⁶

In some cases, however, the courts have ruled as a matter of law that a particular use of the product is not foreseeable. It has been held that a supplier could not foresee that a woman would continue to wear shoes that were two sizes too small,¹⁷ or employ defendant's alkaline product "Calgonite," designed for automatic dishwashers, rather than the defendant's water softener, "Calgon," in water used to wash venetian blinds.¹⁸

1. *Unintended Uses.*—These decisions seem reasonable, but other decisions that find particular uses unforeseeable as a matter of law are questionable, chiefly because the court placed too much emphasis on the fact that the product was not being used for the intended purpose. A housewife who splashed cleaning fluid into her eye was unable to recover for permanent injury because "the cleaning preparation was not intended for use in the eye."¹⁹ Another court referred to that decision as "wrong," and permitted a jury to find that a manufacturer of paint should have anticipated that the product might in some way be splashed into the eye of a painter's helper.²⁰

A more recent example of the way in which the intended use doctrine may be used questionably is the current controversy over whether a manufacturer must design a car with adequate attention to its "crash-worthiness," to prevent the occupants of a car from being injured by a "second collision." Until recently most courts have denied the existence of a duty to protect passengers from this risk, stating that "the intended

14. *Ringstad v. I. Magnin & Co.*, 39 Wash. 2d 923, 239 P.2d 848 (1952). This action was against the retailer for negligence and breach of warranty. The negligence count was dismissed because the retailer, unlike the manufacturer, had no reason to know that the dress was almost explosively inflammable.

15. *Hardman v. Helene Curtis Indus., Inc.*, 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964).

16. *LaGorga v. Kroger Co.*, 275 F. Supp. 373 (W.D. Pa. 1967) (applying Pennsylvania law).

17. *Dubbs v. Zak Bros. Co.*, 38 Ohio App. 299, 175 N.E. 626 (1931). This suit was against the retailer; the nonliability of the manufacturer is more evident.

18. *Shaw v. Calgon, Inc.*, 35 N.J. Super. 319, 332, 114 A.2d 278, 285 (Super. Ct. App. Div. 1955).

19. *Sawyer v. Pine Oil Sales Co.*, 155 F.2d 855, 856 (5th Cir. 1946) (applying Louisiana law).

20. *Haberly v. Reardon Co.*, 319 S.W.2d 859 (Mo. 1958).

purpose of an automobile does not include participation in collisions with other objects.”²¹ Recent decisions, however, have recognized that a jury may define the foreseeable use of an automobile to include involvement in a collision; consequently, there would be a duty to assure reasonable protection when a collision occurs.²² This new trend does not mean that courts always will allow the question to go to the jury—administrative regulation, with the advantages of prospective operation, uniformity, and extensive research may have a significant bearing on the decision.²³

2. *Actual Foreseeability of Use.*—Other questionable cases have ruled as a matter of law that a particular use was not foreseeable because

21. See *General Motors Corp. v. Muncy*, 367 F.2d 493 (5th Cir. 1966), *cert. denied*, 386 U.S. 1037 (1967) (no duty to avoid designing ignition system so key could be removed without turning off motor and taking unbraked car out of gear). This case was decided in the same way in state court. *Muncy v. General Motors Corp.*, 357 S.W.2d 430 (Tex. Civ. App. 1962); *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966) (no duty to equip all automobiles with side rail perimeter frames); *Gossett v. Chrysler Corp.*, 359 F.2d 84 (6th Cir. 1966) (no duty to design a safer hood latch); *Shumard v. General Motors Corp.*, 270 F. Supp. 311 (S.D. Ohio 1967) (Corvaire burst into flames after collision; no duty under Ohio law to make car safe when involved in collisions); *Willis v. Chrysler Corp.*, 264 F. Supp. 1010 (S.D. Tex. 1967) (no duty under Texas law to avoid making car that would break into 2 sections on impact); *Schemel v. General Motors Corp.*, 261 F. Supp. 134 (S.D. Ind. 1966), *aff'd*, 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968) (no duty under Indiana law to refrain from making cars with unnecessary horsepower and capable of excessive speed); *Kahn v. Chrysler Corp.*, 221 F. Supp. 677 (S.D. Tex. 1963) (bicycle rider collided with sharp fin of parked car; case applied Texas law); *Drummond v. General Motors Corp.*, CCH PRODS. LIAB. REP. ¶ 5611 (Los Angeles Super. Ct. 1966) (design of Corvaire suspension system); *General Motors Corp. v. Howard*, 244 So. 2d 726 (Miss. 1971) (steering wheel and column assembly failed to telescope for the driver's protection); *Ford Motor Co. v. Simpson*, 233 So. 2d 797 (Miss. 1970) (no liability when heater not so designed as to prevent injury to passenger after collision); *Walton v. Chrysler Motor Corp.*, 229 So. 2d 568 (Miss. 1969) (no liability when defective seat only enhanced injury and did not cause accident itself); *Biavaschi v. Frost*, CCH PRODS. LIAB. REP. ¶ 6547 (N.J. Super. Ct. 1970) (no liability when design of steering wheel only enhanced injury but did not cause primary accident); *Burkhard v. Short*, CCH PRODS. LIAB. REP. ¶ 6549 (Williams County, Ohio C.P.), *aff'd*, 28 Ohio App. 2d 141 (1971) (dashboard only aggravated injury, it did not cause accident); *Seattle First Nat'l Bank v. Talbert*, CCH PRODS. LIAB. REP. ¶ 6550 (Wash. Super. Ct. 1970) (no liability when front-end design of Volkswagen micro-bus allowed aggravation of passenger's injuries but did not cause the collision itself).

22. *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) (duty to use due care to design steering shaft to avoid rearward displacement of column, or to warn of the danger under Minnesota law); *Grundmanis v. British Motor Corp.*, 308 F. Supp. 303 (E.D. Wis. 1970) (duty to design fuel tank of automobile to avoid unreasonable risk under Wisconsin law); *Dyson v. General Motors Corp.*, 298 F. Supp. 1064 (E.D. Pa. 1969) (duty under Pennsylvania law to design roof of 2-door model hardtop to provide same reasonable protection for passengers as do other versions of that model); *Friend v. General Motors Corp.*, 118 Ga. App. 763, 165 S.E.2d 734 (1968), *cert. dismissed*, 225 Ga. 290, 167 S.E.2d 926 (1969) (duty to design seats of truck to prevent collapse from impact of shifting cargo); *Mickle v. Blackmon*, 252 S.C. 202, 166 S.E.2d 173 (1969) (duty to design gearshift knob to act as protective device against steel gearshift lever). See also *Nader & Page, Automobile Design and the Judicial Process*, 55 CALIF. L. REV. 645, 655 (1967).

23. See 80 HARV. L. REV. 688 (1967); 42 NOTRE DAME LAW. 111 (1966).

the supplier of the product did not actually foresee the use involved. In one of these cases defendants supplied window casements with steel crossbars designed to support glass. While using the crossbars either as a handrest or as a ladder, a workman fell to his death because the crossbar was not firmly enough secured for such use. There was testimony, however, that it was common practice for iron and steel workers to climb up and down the casements. The court ruled that the supplier could not be charged with notice of this practice, but would be liable only in case of actual knowledge.²⁴

The requirement of actual knowledge is not supported by torts writers;²⁵ furthermore this requirement was clearly rejected in the leading recent case on abnormal use, *Simpson Timber Co. v. Parks*.²⁶ In that case the defendant manufactured and packaged doors for overseas shipment. The doors had openings for glass, and when they were packaged in bundles the openings formed a well, covered only by cardboard. When the doors were stowed for shipment, the longshoremen used bundles already laid down as a floor in stowing the next layer. A stevedore stepped on the cardboard, fell through the well, and was injured. There was testimony that it was a general practice of stevedores to walk on cargo and it further was stated that many shippers of doors knew of this custom and packaged their products accordingly; they would either cut holes in the packaging to expose the cavity, or place a warning notice on bundles that falsely appeared to be solid.

The trial judge told the jury they could find liability if the shipper "knew, or in the exercise of reasonable care should have known" that persons might walk on the packaged doors. Judgment for the plaintiff was affirmed on initial appeal.²⁷ The case was then heard en banc and in that opinion the judgment for the plaintiff was reversed,²⁸ with four of the nine judges dissenting. On certiorari to the Supreme Court, the en banc judgment was reversed in a single sentence opinion, citing an earlier case that held actual knowledge of the peril is not essential when a dangerous situation is foreseeable.²⁹

24. *McCready v. United Iron & Steel Co.*, 272 F.2d 700 (10th Cir. 1959) (applying Oklahoma law).

25. 2 F. HARPER & F. JAMES, *supra* note 7, at 218 (noting criticism of the *McCready* decision in Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 857 (1962)); W. PROSSER, *supra* note 6, § 102, at 669.

26. 369 F.2d 324 (9th Cir. 1966), *vacated and remanded*, 388 U.S. 459 (1967), *affirming district court and remanding* 390 F.2d 353, *cert. denied*, 393 U.S. 858 (1968).

27. *Simpson Timber Co. v. Parks*, 34 U.S.L. W. 2339 (9th Cir. 1965) (unreported).

28. *Simpson Timber Co. v. Parks*, 369 F.2d 324 (9th Cir. 1966).

29. 388 U.S. 459 (1967), *citing* *Albanese v. N.V. Nederle, Amerik. Stoomv. Maats.*, 346 F.2d 481, *rev'd*, 382 U.S. 283 (1965).

This final decision by the Supreme Court seems clearly in accord with general negligence principles. As a standard treatise remarked, the instruction sought by the defendant in the *Simpson* case would require that the "plaintiff's injury occur in the course of an intended or an *actually foreseen* use of the product," and would be contrary to "the weight of modern authority."³⁰

A quite recent case on this point involved a fifteen-year-old boy who dove into a vinyl-lined swimming pool thirty inches deep. In permitting this case to go to the jury, the court stated: "[A] proper test to be applied in determining the matter of 'abnormal use' is the reasonable foreseeability on the part of a manufacturer of the use to which his product would be put. Both 'reasonableness' and 'foreseeability,' where reasonable minds may differ, are typical jury questions."³¹ The jury found for the plaintiff on this issue, and also found he did not assume the risk.³²

B. Careless Handling As Abnormal Use

Sometimes the plaintiff is using the product for its intended purpose, or at least for a foreseeable purpose, but his manner of handling it is careless. Often this careless manner of use involves contributory negligence; would this also be classified as abnormal use? Although this distinction may seem overly refined, it becomes quite significant because in a strict liability case contributory negligence alone ordinarily does not defeat recovery, whereas abnormal use and assumption of risk will bar plaintiff's recovery.³³ The point may be illustrated by *Proctor & Gamble Manufacturing Co. v. Langley*.³⁴ Plaintiff used a home permanent solution for the normal purpose of waving her hair, but failed to follow instructions for making a test curl and using liquid neutralizer. She also disregarded a warning to discontinue use of the product if the test curls broke easily or showed other signs of damage. Should this failure to follow instructions and heed warnings be classed as an abnormal use, or should the plaintiff's conduct be regarded as contributory negligence, or perhaps as voluntary assumption of risk? When the plaintiff's failure to read and comply with instructions or warnings is found to involve simple objective contributory negligence, the plaintiff's negligent conduct ordinarily is not a bar in a strict liability case.³⁵ The court in

30. 2 F. HARPER & F. JAMES, *supra* note 7, at 219.

31. *Colosimo v. May Dep't Store Co.*, 325 F. Supp. 609, 612 (W.D. Pa. 1971).

32. *Id.* The damage to the plaintiff was assessed at \$100,000.

33. See notes 55-63 *infra* and accompanying text.

34. 422 S.W.2d 773 (Tex. Civ. App. 1967).

35. See notes 64-67 *infra* and accompanying text.

Langley upset a finding for plaintiff, stating that strict liability does not mean that "a consumer may knowingly violate the plain unambiguous instructions and ignore the warnings, then hold the makers, distributors and sellers of a product liable in the face of the obvious misuse of the product."³⁶ By equating misuse of the product with voluntary assumption of risk rather than with contributory negligence, the court overcame plaintiff's argument that defectiveness had been proved and only contributory negligence was involved. It should be noted that the case was an unusually strong one for assumption of risk, since it appeared that the plaintiff had read the directions and warnings and had understood them to mean just what they said.

Suppose, as is usually the case, that there is no clear evidence that the plaintiff has read and understood the instructions or warnings. Should this conduct be classed as misuse, barring recovery, rather than as contributory negligence? A leading text writer regards the failure to follow instructions as a form of misuse.³⁷ Once defectiveness has been established, however, a careless failure to read and observe inadequate instructions or warnings may involve only contributory negligence, rather than unforeseeable misuse or conscious assumption of risk.³⁸ In that situation a broad assimilation of the plaintiff's failure to observe instructions with the defense of abnormal use seems questionable.³⁹

A Texas case decided shortly before *Langley*, for example, found only contributory negligence when plaintiff, a beauty parlor owner, failed to follow instructions in using a permanent wave solution, and permitted use of the solution on her own bleached hair. The employee disregarded a warning on the package that may not have indicated adequately that bleached hair is not normal, and the court classified this careless manner of use as contributory negligence.⁴⁰ A subsequent Texas decision, however, *McDevitt v. Standard Oil Co.*,⁴¹ held that failure to follow clear instructions concerning the proper size and air pressure of automobile tires constituted misuse rather than contributory negligence,

36. 422 S.W.2d at 780.

37. See W. PROSSER, *supra* note 6, § 102, at 669; *cf. Helene Curtis Indus., Inc. v. Pruitt*, 385 F.2d 841, 856 (5th Cir. 1967) (applying Texas law) (plaintiff's disregard of instructions included an "unintended and unforeseen" mixture of 2 products, and was therefore classed as "abnormal handling").

38. The subjective nature of assumption of risk is indicated in the text accompanying notes 149-51 *infra*.

39. See Noel, *supra* note 10, at 280-89.

40. *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 792 (Tex. 1967). For a discussion of contributory negligence as a defense to strict liability see text accompanying notes 68-116 *infra*.

41. 391 F.2d 364 (5th Cir. 1968).

assuming, of course, that the misuse was a proximate cause of the accident.

There are other cases not involving a failure to heed instructions and warnings, that turn on whether plaintiff's conduct is classified as contributory negligence or as abnormal use of the product. In a case involving careless use of a fragile grinding wheel, the court upheld a directed verdict for defendant, stating that plaintiff was barred from recovery if his use of the wheel was "in a manner or for a purpose for which it was not designed."⁴² This decision, like the one in *Langley*, demonstrates the way in which the defendant may be protected from liability by the classification of plaintiff's conduct as abnormal use rather than as contributory negligence. This kind of decision in substance indicates reluctance by a court to exclude completely the defense of objective contributory negligence. The developing difference of opinion concerning contributory negligence as a bar in strict liability cases will be considered further in a subsequent section.⁴³

The parties' burden of pleading and proof may be significantly affected if the court distinguishes abnormal use from contributory negligence. In *Swain v. Boeing Airplane Co.*,⁴⁴ a case in which five airline employees were killed during a test flight of defendant's airplane, the decedents' representatives asserted strict liability of the manufacturer on grounds of negligence of design and warnings, and also on grounds of strict liability for supplying a defective product. Initially, defendant alleged contributory negligence; however, at the trial this defense was withdrawn.⁴⁵ Defendant did assert that the plane had been put into a maneuver too violent for even a training flight, or that it had been flown unskillfully by one of the occupants. Plaintiff responded that defendant's concession that there was no evidence of contributory negligence in the use of the plane by any particular decedent precluded further consideration by the jury of the issue of misuse. In rejecting this contention the court said:

[E]ven under the principle of strict liability the manufacturer is liable only if the plaintiff proves the accident was caused by delivery of the article in a "defective condition". . . . The inference of the existence and the causality of a defect would indeed be bolstered if the manufacturer admitted that improper use played no part in the accident. But Boeing's withdrawal of the contributory negligence defense for lack of affirmative proof as to who was misusing the plane in no way conceded that the plane was not being misused; it remained for the jury to decide whether the

42. *Zesch v. Abrasive Co.*, 354 Mo. 1147, 1150, 193 S.W.2d 581, 584 (1946).

43. See text accompanying notes 68-116 *infra*.

44. 337 F.2d 940 (2d Cir. 1964), *cert. denied*, 380 U.S. 951 (1965).

45. 337 F.2d at 942.

plaintiffs had sustained their burden of showing that the crash was due to a defect rather than to negligent operation or some other cause for which the manufacturer would not be responsible.⁴⁶

As the above quotation indicates, proof of misuse in an action based either on negligence or strict liability is a means of establishing that the product was not characterized by a defect that caused the accident.

The case of *Preston v. Up-Right Inc.*,⁴⁷ illustrates the difficulty of separating abnormal use from contributory negligence. An aluminum scaffold with legs mounted on locking caster wheels was being used by the plaintiff. Although the wheels were locked, the scaffold moved, causing plaintiff to fall from a ladder placed against or near the scaffold. The trial judge instructed the jury, with reference to the abnormal use of a scaffold, that they could consider "those uses of the article which would be foreseeable by the manufacturer at the time the article was placed on the market."⁴⁸ He also instructed, however, that the article must have been "used reasonably for the purpose for which it was designed and intended to be used,"⁴⁹ but declined to instruct that contributory negligence was not a defense in an action based on strict liability in tort. The jury found for defendant, and the appellate court affirmed, holding that the refusal to instruct that contributory negligence was not a defense constituted harmless error because no contributory negligence was found to be present. No attempt was made to distinguish between use for an abnormal purpose and use for an appropriate purpose in a careless manner. If no distinction between these matters is to be made, then the instructions do seem sufficiently favorable to the plaintiff.

C. *The Abnormal User*

Consideration of the abnormal use doctrine would not be complete without some discussion of the abnormal user—a user allergic to the defendant's product. There has been much discussion of the extent to which allergic, or abnormally sensitive users of products should be protected by warnings or other means.⁵⁰ Today courts are quite unlikely to dismiss a case on the ground that the plaintiff's sensitivity, rather than the product, was the only proximate cause of the accident; actually both the product and the sensitivity are immediate causes of the injury. Con-

46. *Id.*

47. 243 Cal. App. 2d 636, 52 Cal. Rptr. 679 (1966).

48. *Id.* at 640, 52 Cal. Rptr. at 683.

49. *Id.*

50. See 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY §§ 28-31A[20] (1970); Noel, *The Duty to Warn Allergic Users of Products*, 12 VAND. L. REV. 331 (1959).

sequently, while there still is no duty to alter the product to make it safe for the abnormal user, an increasing number of cases impose a duty to warn of the presence of "strong sensitizers."⁵¹

The duty to warn allergic users may arise in breach of warranty, on negligence grounds, or under strict tort liability. The duty does not arise with reference to the common allergies such as those to milk or citrus fruits, for which the harm is trivial, and the risk ordinarily is known to the susceptible person. Even for serious allergic reactions from chemical sensitizers about which the plaintiff has never heard, the duty to warn does not extend to isolated users, but only to a plaintiff who is found to be a member of an appreciable group. The problem is to determine when the court will regard the plaintiff as a member of an appreciable, substantial, or significant group. In making that determination, the more recent decisions consider not only the percentage of users affected, but also the gravity of foreseeable injuries and the difficulty of embodying effective protection in labels or the like.⁵² The size of the class needed before a duty to warn arises, assuming an injury of given seriousness, is declining, but there still are many recent cases in which a duty to warn has not been established because the plaintiff is regarded as a more or less isolated user.⁵³ When the defendant states expressly that his product contains only noninjurious materials, however, this representation will protect even an isolated allergic user.⁵⁴

By way of summary, it appears that abnormal use of a product is generally accepted as preventing recovery because the harm is regarded as caused by the abnormal use rather than by a defect in the product. Ordinarily whether a particular use is to be regarded as abnormal is left to the jury, but occasionally the court will find an abnormal use as a

51. An up-to-date definition of a "strong sensitizer" is contained in the Federal Hazardous Substance Labeling Act, 15 U.S.C. §§ 1261-73 (1964), *as amended*, Child Protection Act of 1966, 15 U.S.C. §§ 1261-65, 1273 (Supp. V, 1970), providing: "The term 'strong sensitizer' means a substance which will cause on normal living tissue through an allergic or photodynamic process a hypersensitivity which becomes evident on reapplication of the same substance and which is designated as such by the Secretary. Before designating any substance as a strong sensitizer, the Secretary, upon consideration of the frequency of occurrence and severity of the reaction, shall find that the substance has a significant potential for causing hypersensitivity." A more complete definition of a "strong allergic sensitizer" can be found in 21 C.F.R. § 191.1(i) (1971).

52. *See, e.g.*, *Wright v. Carter Prods., Inc.*, 244 F.2d 53 (2d Cir. 1957) (applying Massachusetts law).

53. *See Noel, supra* note 10, at 293 (negligence cases); *id.* at 294 (warranty and strict tort cases).

54. *McLachlan v. Wilmington Dry Goods Co.*, 41 Del. 378, 22 A.2d 851 (1941). Furthermore, a plaintiff has recovered on an express warranty that an insecticide was "not poisonous to human beings" by showing the product was poisonous to him, although it may not have been to other users. *Simpson v. American Oil Co.*, 219 N.C. 595, 14 S.E.2d 638 (1941).

matter of law if a contrary finding would be manifestly unreasonable. The older decisions sometimes gave a directed verdict for the defendant on the ground that a particular use is unintended or not actually known, but the more recent cases recognize that the test is whether the particular use is foreseeable. It has become increasingly clear that if the supplier, as an expert in his field, could by exercising due care have foreseen a particular use of his product, he is not protected when he in fact did not foresee such a use. Furthermore, the supplier is not protected when the consumer is unusually sensitive, if he should have foreseen harm from the product to an appreciable class of allergic users.

III. CONTRIBUTORY NEGLIGENCE

As the preceding section indicates, it is an essential part of the plaintiff's case to show that the defendant's product is defective, and that plaintiff's harm resulted from the defective product. Furthermore, the plaintiff must show that his use of the product was normal or at least foreseeable; otherwise the plaintiff's abnormal use of the product will be regarded as the sole proximate cause of the accident, and the plaintiff will not be able to establish defectiveness and causation.

When the defense of contributory negligence is alleged, however, the burden of pleading and proving the negligence ordinarily rests on the defendant.⁵⁵ If the defendant can show that the plaintiff's own negligence is the sole proximate cause of the accident, it is then clear that the defendant supplier is not liable for the accident. In a case involving a combustible night gown, for example, plaintiff was injured by her own carelessness while smoking in bed, and the court denied recovery. It found that plaintiff's injuries were caused solely by her own negligence in smoking in bed, late at night, and while in a semi-conscious state induced by the taking of a sleeping pill.⁵⁶

55. W. PROSSER, *supra* note 6, § 65, at 416.

56. *Dallison v. Sears, Roebuck & Co.*, 313 F.2d 343 (10th Cir. 1962) (applying Colorado law). There is, however, an unusual rule in Tennessee that "remote" contributory negligence is to be considered in mitigating damages. See Comment, *Remote Contributory Negligence: A Tennessee Concept*, 22 TENN. L. REV. 1030 (1953). See also *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969) (application of proximate cause principles to defendant's strict liability). It is beyond the scope of this article to analyze the factors used in determining the issue of proximate causation. It seems likely, however, that if contributory negligence is to be given effect in a strict liability or warranty case, the usual rules will be applied in determining whether the plaintiff's contributory negligence is "proximate." See *Rasmus v. A. O. Smith Corp.*, 158 F. Supp. 70 (N.D. Iowa 1958); *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).

A. *Distinction Between Contributory Negligence and Assumption of Risk*

Because of the differing effects that the plaintiff's conduct may have on his recovery, it is necessary to distinguish contributory negligence from voluntary assumption of risk as well as from abnormal use. As discussed above, abnormal use is use of the product in a way not reasonably foreseeable by the supplier,⁵⁷ while voluntary assumption of risk is a willingness or consent by the plaintiff to use a product he actually knows is defective and dangerous.⁵⁸ When the acceptance of the possibility of danger is unreasonable, voluntary assumption of risk also constitutes one kind of contributory negligence. The kind of contributory negligence most commonly involved in products liability cases, however, consists simply of the plaintiff's failure to discover the defect or the danger in the product, or of a failure to take precautions against the possibility that a dangerous defect may exist. The comments to section 402A of the *Restatement* set forth the difference between this kind of contributory negligence and voluntary assumption of risk, and conclude that only the latter is a valid defense in a strict liability case:

Contributory negligence. Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases . . . applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name assumption of risk, is a defense under this Section as in other cases of strict liability.⁵⁹

Perhaps the most considered decision in support of the *Restatement* view is that of the Supreme Court of Illinois in *Williams v. Brown Manufacturing Co.*⁶⁰ Plaintiff was standing at the rear of a trenching machine when it struck an underground obstruction, lurched backward, and injured the plaintiff. It was claimed that certain safety devices would have prevented the lurch, and that there should have been a warning to operate the machine only from the side. The complaint included two counts, one based on strict liability in tort, the other on negligence. As required in Illinois, the negligence count contained allegations that the plaintiff had exercised due care, but the strict liability count contained no such allegation. After a verdict for plaintiff, defendant asserted on

57. See text accompanying notes 11, 24-32 *supra*.

58. See text accompanying notes 149-51 *infra*.

59. RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* at 356 (1965).

60. 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

appeal that the plaintiff's strict liability count should have been stricken because of failure to allege freedom from contributory negligence. The supreme court in its initial opinion reversed the trial court and held that the plaintiff must plead the absence of contributory negligence in a strict liability case as well as in a negligence case.⁶¹ The court reasoned that a product is not "unreasonably dangerous," as required by the *Restatement*,⁶² if a plaintiff exercising reasonable care for his own safety, in an objective sense, could have discovered the defect. A rehearing, however, was granted, and in its final opinion the court adopted the *Restatement* view as "a more appropriate and workable framework for treatment of plaintiffs' recovery-barring conduct in strict product liability cases."⁶³ Accordingly it was held that failure to meet the objective standard of due care would not defeat the plaintiff's recovery; therefore, there was no need to plead exercise of due care in a count based on strict tort liability.

The opinion goes on to hold that assumption of risk by the plaintiff is a defense, with defendant having the burden of proof on that matter. Recognizing that it is often difficult for a defendant to prove conscious assumption of risk, the court remanded the case for a new trial, stating that the defense of voluntary assumption of risk is not necessarily obviated by the plaintiff's own uncontradicted statement that he did not subjectively realize the risk.

B. Rationale and Judicial Authority Concerning Contributory Negligence As a Bar

In its holding that contributory negligence is not an automatic bar, the Illinois court observed that all other jurisdictions which have adopted the theory of strict liability in substance have decided to follow the *Restatement* distinction⁶⁴ between objective contributory negligence in failing to discover the defect in the product or to guard against the possibility of its existence, and subjective voluntary assumption of risk. At the time of the decision, the court's conclusion about the state of the authorities was substantially correct.⁶⁵ There have been a number of

61. *Id.* at 424, 261 N.E.2d at 309; see *People ex rel. General Motors Corp. v. Bua*, 37 Ill. 2d 180, 196, 226 N.E.2d 6, 16 (1967).

62. For text of RESTATEMENT (SECOND) OF TORTS § 402A see note 5 *supra*.

63. 45 Ill. 2d at 425, 261 N.E.2d at 309.

64. See RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* at 356 (1965).

65. *Bronson v. Club Comanche, Inc.*, 286 F. Supp. 21 (D.V.I. 1968); *Estabrook v. J.C. Penney Co.*, 105 Ariz. 302, 464 P.2d 325 (1970); *Martinez v. Nichols Conveyor & Eng'r Co.*, 243 Cal. App. 2d 795, 52 Cal. Rptr. 842 (1966); *DeFelice v. Ford Motor Co.*, 28 Conn. Supp. 164, 255 A.2d 636 (Super. Ct. 1969); *Baker v. Rosemurgy*, 4 Mich. App. 195, 144 N.W.2d 660 (1966);

additional decisions to the same effect,⁶⁶ but at least two courts apparently have rejected the *Restatement* view.⁶⁷ To understand why various courts have accepted or rejected the *Restatement* conclusion that contributory negligence is not a bar to an action based on strict liability, it is necessary to analyze the reasons underlying the strict liability doctrine and the way in which contributory negligence bears on these issues.

1. *Administration of the Risk*.—A major factor that led the Illinois court to find that objective contributory negligence was not a bar was its earlier recognition that the basis of strict liability is “the justice of imposing the loss on the one creating the risk and reaping the profit.”⁶⁸ In the *Brown Manufacturing Co.* case, the court concluded that “the policy considerations which led us to adopt strict liability in tort compel the elimination of ‘contributory negligence’ as a bar to recovery.”⁶⁹ Although strict liability requires the product to be “unreasonably dangerous” as well as defective under section 402A of the *Restatement*, this does not compel a conclusion that no unreasonable danger is present when the harm can be avoided by ordinary prudence, because many safety devices and warnings are needed and provided mainly because people do not always act reasonably. Consequently, when strict liability is based primarily on concepts of administration of the risk, contributory negligence seems inappropriate as a bar to recovery.

2. *Express Warranty or Representation*.—Likewise, when emphasis is placed on concepts of misrepresentation⁷⁰ or warranty⁷¹ in arriving at a basis for strict liability, there is much to be said for finding that contributory negligence is not a bar to the plaintiff’s action. The defendant who has warranted or represented that his product is free from

Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969); Eitin v. Ava Truck Leasing, Inc., 53 N.J. 463, 251 A.2d 278 (1969); Ferraro v. Ford Motor Co., 423 Pa. 324, 223 A.2d 746 (1966); Richard v. H.P. Hood & Sons, 104 R.I. 267, 243 A.2d 910 (1968); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. 1967). *But see* Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

66. Benson v. Beloit Corp., 443 F.2d 839, 840 (9th Cir. 1971) (applying Oregon law); Moomey v. Massey Ferguson, Inc., 429 F.2d 1184, 1189 (9th Cir. 1970) (applying New Mexico law); Bachner v. Pearson, 479 P.2d 319, 329-30 (Alas. 1970); Perfection Paint & Color Co. v. Konduris, 258 N.E.2d 681, 689 (Ind. 1970); Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 43, 171 N.W.2d 201, 211 (1969); Brown v. Quick Mix Co., 75 Wash. 2d 833, 836, 454 P.2d 205, 208 (1969).

67. Stephan v. Sears, Roebuck & Co., 266 A.2d 855 (N.H. 1970); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). The cases are discussed in text at notes 99-103 *infra*.

68. Suvada v. White Motor Co., 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186 (1965).

69. 45 Ill. 2d at 426, 261 N.E.2d at 310.

70. Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966).

71. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

dangerous defects should not be able to say that the injured plaintiff was foolish to rely on the warranties or representations. This is particularly true when the warranties or representations relied on by the plaintiff are express, whether stated privately or made to the general public.⁷²

The point may be illustrated by one of the first strict liability cases involving express representations, *Bahlman v. Hudson Motor Co.*⁷³ The manufacturer's advertising emphasized that the car was "a rugged fortress of safety," improved with a seamless steel roof making it a solid unit with the body shell. Actually the roof was made of two separate parts welded together, with jagged metal drippings all along the seam. Plaintiff became interested in defendant's car because of its "safety top." After he purchased one of the cars it overturned as a result of his own negligent driving, and his head was injured when it came into contact with the jagged seam. In rejecting the defense of contributory negligence, the court said:

It is undoubtedly true that the negligence of the driver caused the car to overturn, but defendant's representations were not for the purpose of avoiding an accident, but in order to avoid or lessen the serious damages that might result therefrom. . . . The particular construction of the roof of defendant's car was represented as protection against the consequences of just such careless driving as actually took place. Once the anticipated overturning of the car did occur, it would be illogical to excuse defendant from responsibility for these very consequences.⁷⁴

The court referred to defendant's conduct as involving falsity and deliberate misrepresentation, implying that scienter or intent to deceive was present. This might mean only that the supplier of the product made an express warranty, and that it was established that the particular item sold to the plaintiff did not conform to the representation. A finding of scienter in this situation would be in accord with the general law of misrepresentation, under which a person who asserts a fact as being within his own knowledge, when he does not actually know whether what he says is true, may be found to possess the intent to deceive.⁷⁵ It is not clear that the court would have held the same way if the case had involved a breach of an implied rather than an express warranty or representation.⁷⁶ When express representations are present, it seems clear that the defense of contributory negligence would be anomalous under

72. 2 L. FRUMER & M. FRIEDMAN, *supra* note 50, § 16.01(3), at 3-30.

73. 290 Mich. 683, 689, 288 N.W. 309, 310 (1939).

74. *Id.* at 692, 288 N.W. at 312.

75. W. PROSSER, *supra* note 6, § 107, at 701.

76. See text accompanying notes 83-100 *infra* (concerning the effect of contributory negligence in an implied warranty situation).

the modern law of misrepresentation,⁷⁷ at least when scienter is found.

3. *Strict Liability Based on Problems of Proof.*—When attention is turned to other bases for strict liability, the reasons for rejecting objective contributory negligence as a defense may be less convincing. One policy that underlies strict liability relates to the difficulty of proving negligence in a products liability case.⁷⁸ Assuming the plaintiff can meet the substantial burden of proving that the product is defective, it may be even more difficult to show that the defect arose through negligence. This proof would involve showing a failure of due care on the part of one or more of a series of persons who worked on, inspected, or controlled the production of the particular product during a complicated manufacturing process. None of the persons suspected can be expected to cooperate with efforts to show himself or his employer at fault. In many products liability cases the doctrine of *res ipsa loquitur*, or other comparable doctrines that permit extensive use of circumstantial evidence, may be unavailable, and the plaintiff may be faced with insurmountable problems of proof. As Dean Wade has pointed out, the difference between strict liability and negligence is less than is generally supposed.⁷⁹ Referring to the need to establish both defectiveness and unreasonable danger, he states:

In essence, strict liability in this sense is not different from negligence per se. Selling a dangerously unsafe product is the equivalent of negligence regardless of the defendant's conduct in letting it become unsafe. This is exactly the situation when a pure-food statute is construed to make its violation negligence per se; if the food is not wholesome, the statute is violated and the defendant is negligent. . . . Thus, a court which appears to be taking the radical step of changing from negligence to strict liability for products is really doing nothing more than adopting a rule that selling a dangerously unsafe chattel is negligence within itself.⁸⁰

Assuming that a principal policy underlying the development of strict liability is that negligence may often be present even though it cannot be proved, how does this relate to contributory negligence on the part of the plaintiff in a products liability case? When the doctrines of negligence per se or *res ipsa loquitur* are applied, it is clear that objective contributory negligence ordinarily bars plaintiff's recovery, or, in a comparative negligence jurisdiction, that this negligence diminishes dam-

77. See W. PROSSER, *supra* note 6, § 108, at 717. See also *Kassouf v. Lee Bros.*, 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (1962), discussed in text accompanying notes 96-97 *infra*.

78. See *Cushing v. Rodman*, 82 F.2d 864 (D.C. Cir. 1936) (imposing liability without proof of fault in a defective food case); *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 422, 398 S.W.2d 240, 250 (1966).

79. Wade, *supra* note 2, at 14.

80. *Id.* (citations omitted).

ages. It is arguable that contributory negligence likewise should bar, or at least diminish, recovery in strict liability cases. So it has been said, "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."⁸¹ The same writer then urges that in strict liability cases based on warranty a comparative negligence rule should be adopted.⁸²

4. *Implied Warranty.*—Although the authors of the leading treatise on products liability do not adopt contributory negligence as a defense in express warranty cases, they take a different view when implied warranty is involved:

Turning to implied warranty, it is unreasonable to require the non-commercial consumer to make any sort of detailed or expert inspection. However, with this in mind but accepting the view that products liability in warranty is basically liability in tort, contributory negligence should be a defense to breach of implied warranty just as in the negligence cases. Otherwise, we impose the same strict liability for products as presently exists . . . with respect to wild animals and other ultrahazardous activities. It is one thing to say that there is strict liability in the sense that proof of negligence should not be required; it is quite another to say that contributory negligence . . . should not be a defense. This, in substance, is what the cases actually may be saying.⁸³

While the above passage is concerned primarily with the failure to inspect, the reference to problems of proof of negligence as a principal basis for strict liability suggests that the defense of contributory negligence should be available not only when the plaintiff negligently fails to discover a defect, but also when he fails to guard against the possibility of its existence. Examples of failure to guard against possible defects are furnished by high-speed driving on a tire not actually known to be defective or the conduct of the plaintiff who carelessly overturned his car in the *Bahlman* case.⁸⁴ When the *Restatement* view⁸⁵ is followed, however, plaintiff's negligence in failing to guard against the possibility of a defect would not bar the claim of the negligent driver, unless this was the sole proximate cause of the injury, any more than this negligence would bar a plaintiff who fails to inspect the defective product.

It has been said that it is irrational to hold that contributory negli-

81. Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627, 648 (1968).

82. *Id.* at 652.

83. 2 L. FRUMER & M. FRIEDMAN, *supra* note 50, § 16.01(3), at 3-30 to -31 (citations omitted).

84. See *Bahlman v. Hudson Motor Co.*, 290 Mich. 683, 288 N.W. 309 (1939); W. PROSSER, *supra* note 6, § 102, at 670.

85. RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* at 356 (1965).

gence "is a defense in a products case when the plaintiff alleges negligence but that the same conduct does not constitute a defense when the plaintiff pleads breach of implied warranty or strict liability in tort."⁸⁶ The writer goes on to observe, however, that a failure to discover may be considerably more excusable when the purchaser has been led into reliance without inspection by advertising that misrepresents the quality of the goods.⁸⁷ It is well established that contributory negligence is a bar in a products liability case based on negligence even though the plaintiff's negligence consists of a careless failure to discover a defect in the product or to guard against the possibility of its existence.⁸⁸

It is clear that the official comments to the Uniform Commercial Code regard objective contributory negligence as well as assumption of risk as a significant factor in assessing defendant's liability, particularly with regard to failure to inspect. The comments state that "if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, [the] injuries may be found to result from his own action rather than proximately from a breach of warranty."⁸⁹ The code section to which the above comment refers deals only with failure to inspect before the sales,⁹⁰ but the above quoted comment discusses failure to discover defects at any time before use.⁹¹ Furthermore, another comment, which relates to consequential damages, states: "Where the injury involved follows the use of goods without discovery of the defect causing the damage, the question of proximate cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defects. If it was not reasonable for him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty."⁹² It is clear that the section to which the comment above quoted has reference does not apply simply to the buyer's conduct before the contract. So in substance the official comments to the Code

86. Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267, 284.

87. *Id.*

88. *MacKay v. Crown Drug Co.*, 420 P.2d 883 (Okla. 1966); 1 R. HURSH, *AMERICAN LAW OF PRODUCTS LIABILITY* § 2:121, at 382 (1961); W. PROSSER, *supra* note 6, § 107, at 670.

89. UNIFORM COMMERCIAL CODE § 2-316(3)(b), Comment 8.

90. Epstein, *supra* note 86, at 276.

91. See Comment, *Strict Products Liability—Its Application and Meaning*, 21 SW. L.J. 629, 645 (1967). The section involved, 2-316(3)(b), states: "[W]hen the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him."

92. UNIFORM COMMERCIAL CODE § 2-715, Comment 5.

have taken the position, at least in the case of a buyer, that recovery should be barred by failure to make a reasonable inspection of the product for defects, whenever the failure is a "proximate cause" of the injury.⁹³

Turning to the judicial decisions, it undoubtedly is true, as asserted by Prosser, that actual holdings of courts tend to support the view that where "the negligence of the plaintiff consists only in failure to discover the danger in the product, or to take precautions against its possible existence, it has uniformly been held that it is not a bar to an action for breach of warranty."⁹⁴ This conclusion is supported by a subsequent writer who says that no reported case has actually held that objective contributory negligence is a defense to a warranty action.⁹⁵ As will be shown, however, there is a considerable tendency in more recent cases to find that a careless failure to discover the danger, or to take precautions against its possible existence, is a bar to recovery.

Perhaps the leading implied warranty decision that clearly rejects the defense of contributory negligence in failing to inspect for defects is *Kassouf v. Lee Bros.*⁹⁶ Plaintiff was eating a candy bar made by the defendant. Without looking at the bar, she unwrapped it with one hand, broke off pieces, and started eating them. She noticed from the outset that the bar had a peculiar taste, but thought this was because she had not eaten all day. After consuming about a third of the bar, she discovered that it was covered with webbing, eggs, and crawling worms, into which she had bitten. In appealing from a verdict for plaintiff, defendant urged that the trial court had refused erroneously to instruct that the plaintiff was barred if she failed to take reasonable precautions for her own safety in handling, inspection, and consumption of the candy. In rejecting the defendant's contention the court stated:

It is our decision that contributory negligence would not be a defense. . . . Contributory negligence, in general, is a defense only to actions grounded on negligence. . . .

Appellants make the point that the law for breach of implied warranty sounds in tort rather than in contract. From the fact that the action sounds in tort . . . it does not follow that contributory negligence is a defense. We cite two examples of tort cases where contributory negligence is no defense. Where defendant has an absolute liability because of an ultrahazardous activity, an instruction on contribu-

93. See also *id.* § 2-314. Comment 13, which states: "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."

94. See Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 838 (1966).

95. Epstein, *supra* note 86, at 275.

96. 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (1962).

tory negligence, phrased in the language used in an ordinary negligence case, is improper Fraud and deceit is a tort but contributory negligence is no defense thereto.⁹⁷

This case seems to be in accord with the current weight of authority.⁹⁸

One recent products liability case, however, clearly found that contributory negligence is a defense to an action based on both warranty and strict tort grounds. In *Stephan v. Sears, Roebuck & Co.*,⁹⁹ plaintiff was injured while using a radial-arm power saw. He alleged that the saw was defective because the blade would extend over the edge of the table. Rejecting plaintiff's contention that contributory negligence was not a bar, the New Hampshire court said, speaking first about strict tort liability and then about warranty:

The record before us does not reveal what knowledge the plaintiff in this case had of the alleged defect or danger. However, we reaffirm the doctrine that failure to discover or foresee dangers which the ordinary person would have discovered or foreseen as well as negligent conduct after discovery of the danger and in use of the product will constitute a defense to an action based on strict liability. . . .

Contrary to the contention of the plaintiff, we hold that contributory negligence is a defense to an action for breach of warranty . . . in the same manner as in actions based on strict liability as above described.¹⁰⁰

If the plaintiff had been using the saw for only a short period, he could have failed to discover the defective design and to become aware of the danger; in fact, there was no evidence of subjective appreciation of risk. This decision still bars recovery under the *Restatement* section 402A concept of strict liability if by ordinary prudence the plaintiff could have discovered the danger, and likewise places a duty on the plaintiff to make a reasonable inspection when the action is based on breach of implied warranty under the Uniform Commercial Code. The court's views are in harmony with the comments to the Code discussed above, but out of harmony with the *Restatement* section 402A, comment *n*.

5. *Comparative Negligence and Contributory Negligence.*—The only other decision known to specifically give effect to objective contributory negligence in an action based on strict tort liability is *Dippel v. Sciano*,¹⁰¹ decided in Wisconsin, a comparative negligence jurisdic-

97. *Id.* at 572, 26 Cal. Rptr. at 278.

98. Epstein, *supra* note 86, at 274 (states that *Kassouf* represents the majority view). See also 1 R. HURSH, *supra* note 88, § 3:9, at 416 (Supp. 1971) ("The weight—which is hardly a great weight—of authority appears to be on the side of the view that negligence on the part of a user of a product is no defense in a breach of warranty action against the manufacturer or seller of the product"); Comment, *Products Liability: For the Defense—Contributory Fault*, 33 TENN. L. REV. 464, 465-66 (1966).

99. 266 A.2d 855 (N.H. 1970).

100. *Id.* at 857-58 (citations omitted).

101. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

tion. Plaintiff was a patron in a tavern, and while helping to move a pool table, was injured when the front leg assembly of the table collapsed, and the slate top fell on the plaintiff's foot. Although the suit was brought on a warranty theory, the court treated the case as based on strict tort liability and concluded that "[t]he defense of contributory negligence is available to the seller," stating:

It might be contended that the strict liability of the seller of a defective product is not negligence and therefore cannot be compared with the contributory negligence of the plaintiff. The liability imposed is not grounded upon a failure to exercise ordinary care with its necessary element of foreseeability; it is much more akin to negligence per se. . . .

Strict liability in tort . . . now arises in this state by virtue of a decision of this court. If this same liability were imposed for violation of a statute it is difficult to perceive why we would not consider it negligence per se for the purpose of applying the comparative negligence statute just as we have done so many times in other cases involving the so-called "safety statutes."¹⁰²

Thus the Wisconsin court, like the one in New Hampshire,¹⁰³ indicated that contributory negligence is a defense and did not limit the defense to cases of assumption of risk.¹⁰⁴ As a concurring opinion in the *Dippel* case suggested, it is arguable that the court in fact regarded the conduct of the defendant supplier as negligence, rather than as conduct involving strict liability under *Restatement* section 402A. The majority of the court, however, placed its reliance on section 402 of the *Restatement*. That section is based to a considerable extent on concepts of representation and ability to administer the risk, with no special reference to problems of proof or negligence per se.¹⁰⁵ The *Restatement* notwithstanding, the *Dippel* decision supplies a precedent for giving a limited effect to contributory negligence in a strict liability case.

6. *Comparison with Abnormally Dangerous or Ultrahazardous Activities.*—It is apparent from the cases considered that while the *Restatement* view of contributory negligence has in general been followed, a few decisions, and several writers, are unwilling to conclude that objective contributory negligence is immaterial in products liability cases based on strict tort or warranty. The only reason given in *Restatement* comment *n* for disregarding contributory negligence is that since "the liability with which this section [402A] is concerned is not

102. *Id.* at 461-62, 155 N.W.2d at 63-65.

103. *Stephan v. Sears, Roebuck & Co.*, 266 A.2d 855 (N.H. 1970).

104. There was no indication that plaintiff assumed a risk that the front leg assembly of the pool table might collapse, and it is puzzling to see the *Dippel* case cited for the proposition that only voluntary assumption of risk will relieve the defendant of liability. See W. PROSSER, *supra* note 6, § 103, at 671 n.85.

105. See RESTATEMENT (SECOND) OF TORTS § 402A, comment *c* at 349 (1965).

based on negligence of the seller, but is strict liability, the rule applied to strict liability cases [section 524] applies." The section of the *Restatement* referred to—section 524—deals with contributory fault in abnormally dangerous activities. It is there said that the only contributory negligence that bars the plaintiff's recovery is "knowingly and unreasonably subjecting himself to the risk" from the dangerous activity.¹⁰⁶ The matter is made more specific by an illustration involving a driver harmed while trying to pass a truck carrying explosives and plainly marked "Danger, Dynamite." The driver, intent on passing the truck, negligently fails to observe the sign, and causes a collision and an explosion by negligently trying to pass the truck through too narrow a space. The illustration concludes that the plaintiff is not barred from recovery by his negligent failure to see the sign, or by his negligent driving past the truck, but is barred if he has read the sign and negligently drives past in the same way, because he has then knowingly and unreasonably subjected himself to risk of harm from an explosion.

It is not entirely clear why negligence in failing to see the sign before negligently colliding with the truck should not affect the plaintiff's recovery. In his discussion of the general problem, Prosser states:

It frequently is said that the contributory negligence of the plaintiff is not a defense in cases of strict liability. This involves the seemingly illogical position that the fault of the plaintiff will relieve the defendant of liability when he is negligent, but not when he is innocent. The explanation must lie in part in the element of wilful creation of an unreasonable risk to others by abnormal conduct which is inherent in most of the strict liability cases; and in part in the policy which places 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.¹⁰⁷

The considerations above mentioned emphasize "wilful creation of an unreasonable risk to others by abnormal conduct" and ability to distribute the loss as the principal grounds for the rule of strict liability for abnormally dangerous activities. When the grounds for strict liability for defective products are examined, emphasis often is placed on the difficulties of proof or on warranty concepts, as well as on ability to control risks and administer losses. There is no thought that the manufacture and supply of consumer goods is abnormal or unusually dangerous conduct. It is not at all clear, therefore, that the policies behind strict liability for abnormally dangerous activities are the same as those relied on by courts moving to strict products liability. In view of the differences in policy grounds, it may be that objective contributory negligence

106. *See id.* § 524 (Tent. Draft No. 10, 1964).

107. W. PROSSER, *supra* note 6, § 79, at 522.

should not be excluded in strict products liability cases in the same manner as under the rule dealing with abnormally dangerous activities, which are carried on by a comparatively few persons and involve comparatively few mishaps. The great expansion of claims and suits for injury from defective products suggests that something more than the theoretical analogy to ultrahazardous activities should be considered in determining the effect of contributory negligence. If the plaintiff could have discovered the defect in a dangerous product with little effort, it may be that his failure to inspect should be a defense in this new and expanding area of liability.

7. *Dislike of Contributory Negligence As a Complete Bar.*—The defense of contributory fault as a complete bar to actions based on negligence has long been under attack,¹⁰⁸ and this factor may well have influenced the courts that have rejected contributory negligence as a defense to strict products liability. When the doctrine of comparative negligence is available,¹⁰⁹ however, a court that wishes to give some effect to plaintiff's negligence may be able to use it to reduce damages. In *Chapman v. Brown*,¹¹⁰ for example, a federal court held that Hawaii would consider contributory negligence as mitigating damages in a strict liability case.¹¹¹ Strict products liability has been developed mainly to provide more protection for the consumer than is available under negligence principles. That protection is not seriously impaired by reducing the damages of a plaintiff who has at hand the means to protect himself, and nevertheless negligently contributes to his own injury. Consumer protection is intended, according to some of the strict liability opinions, for those unable to protect themselves from the hazards of modern mechanical and chemical products.¹¹² As a logical extension of this principle, a leading case in the area of strict liability protection for bystand-

108. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROB. 476, 483 (1936); see F. HARPER & F. JAMES, *supra* note 7, § 22.3, at 1207; W. PROSSER, *supra* note 6, § 67, at 433.

109. The use of comparative negligence is increasing. W. PROSSER, *supra* note 6, § 67, at 436; see Special Committee on Automobile Reparations, *Recommendations*, 94 A.B.A. REP. 559 (1969) (favoring a limited sort of comparative negligence rule).

110. 198 F. Supp. 78 (D.C. Hawaii), *aff'd*, 304 F.2d 149 (9th Cir. 1962).

111. Since the date of the *Chapman* decision, Hawaii has adopted a comparative negligence rule. W. PROSSER, *supra* note 6, § 6, at 436.

112. See *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 441 (1944) (Traynor, J., concurring). See also RESTATEMENT (SECOND) OF TORTS § 402A, comment *c* at 349 (1965) (observing that the buying public is "forced to rely on the seller"); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1122 (1960) (referring to defects in "products which consumers must buy, and against which they are helpless to protect themselves").

ers, *Elmore v. American Motors Corp.*,¹¹³ found that the "public policy" that protects users of a defective car should also protect occupants of an oncoming vehicle who are injured "without any fault of their own."¹¹⁴ This language suggests that if the driver of the oncoming vehicle had negligently contributed to the collision with the defective car, some account might have been taken of the plaintiff's own negligence.

If in fact a plaintiff, whether a bystander or a product user, can protect himself by due care in a particular situation, it would seem that the supplier should at least have the benefit of some reduction of the damages when a jury finds contributory negligence—something the jury is not likely to do except when the evidence establishing the plaintiff's negligence is quite clear. The Wisconsin case, *Dippel v. Sciano*,¹¹⁵ shows that while it may be difficult theoretically to balance the plaintiff's contributory negligence against the defendant's strict liability, a comparative negligence jurisdiction can accomplish this without practical difficulty. Since both defectiveness and unreasonable danger must be established for liability, the jury ordinarily will infer a certain amount of "fault" on the part of the defendant, and this "fault" can be balanced against the plaintiff's contributory negligence in assessing damages. As a practical matter, even when told that contributory negligence is not a bar in a strict products liability case, a jury may diminish damages if they believe that the accident was due partly to the plaintiff's carelessness.

To summarize, it is clear that in contributory negligence situations, as in those involving abnormal use, causation factors are significant. If it is found that the plaintiff's negligence is the sole proximate cause of the accident, this conduct quite evidently will bar recovery. When the plaintiff's contributory negligence, along with a defect in the product, is found to be one of the proximate causes of the accident, it is the prevailing view that the plaintiff still can recover in a strict liability case as distinguished from one based on negligence. This prevailing view is more uniformly applied in strict tort decisions than it is in cases based on warranty, and in the warranty cases a few decisions and a great deal of dicta refer to contributory negligence as a bar. Even under the strict tort theory, however, there are a few decisions that dissent from the generally accepted rule.¹¹⁶ It may be that more courts will become more dissatisfied with the *Restatement* view. Arguments that objective contributory

113. 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

114. *Id.* at 586, 451 P.2d at 89, 75 Cal. Rptr. at 657.

115. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

116. See text accompanying notes 99-105 *supra*.

negligence should be considered have weight, particularly when strict liability is based primarily on problems of proof, in jurisdictions in which contributory negligence is used simply to diminish recovery, or when a court is seeking to smooth out conflicts between tort law and the Uniform Commercial Code.

The majority rule that contributory negligence should be disregarded in a strict products liability case has apparent simplicity, but it becomes much less clear cut when the doctrines of abnormal use or assumption of risk are applied to reasonably foreseeable uses or to risks not actually realized. Courts that are definitely attached, however, to strict liability based on administration of risk or express representation concepts, or that are impressed with the doctrinal analogy to strict liability for ultrahazardous activities, are likely to adhere to the *Restatement* view.

IV. ASSUMPTION OF RISK

While rejecting contributory negligence as a bar to recovery, it is clear that many courts have recognized that assumption of risk is a defense in products liability cases.¹¹⁷ Perhaps the best description of the doctrine is contained in the section of the tentative draft of the *Restatement* that deals with assumption of risk as a defense to negligent conduct.¹¹⁸ The *Restatement* takes the position that assumption of risk is a matter of defense with the burden of proof on the defendant,¹¹⁹ but Dean Wade has urged that assumption of risk is inappropriate as a separate defense.¹²⁰ The *Restatement* further indicates that assumption of risk may be express or implied; that it involves knowledge and appreciation of the risk; and that the assumption of risk must be voluntary with no reasonable alternative action available to the plaintiff. It also points out that the defense bars recovery for defendant's violation of a statute unless a policy of the statute to place the entire responsibility on the defendant would be defeated.

117. See notes 64-67 *supra*.

118. RESTATEMENT (SECOND) OF TORTS §§ 496A-G (Tent. Draft No. 9, 1963). The provisions of this section are equally applicable as a defense to strict liability as shown by the cross reference in the strict liability section to conduct that passes under the name of assumption of risk. See *id.* § 402A, comment *n* at 356 (1965).

119. *Id.* §§ 496A-G (Tent. Draft No. 9, 1963).

120. See *id.*, Explanatory Notes § 893, at 70. See also Memoranda of L. Eldredge & W. Malone, in RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 893, at 72, 76 (Tent. Draft No. 9, 1963).

A. Express Disclaimers

Assumption of risk means basically that the plaintiff has consented in advance to relieve the defendant of an obligation of conduct toward him, and has agreed to take his chances of injury from a known risk.¹²¹ Occasionally in a products case the parties explicitly agree that the defendant shall not be liable for conduct that would otherwise constitute negligence or grounds for some form of strict liability. The express agreement is usually accomplished by the use of disclaimers, for example, a product sold "as is," or with a statement that a warranty is given in lieu of all other warranties, express or implied. Express disclaimers of this kind may be described as involving assumption of risk.¹²²

The validity of these disclaimers has become increasingly subject to question in products liability cases. Perhaps the leading decision is *Henningsen v. Bloomfield Motors, Inc.*,¹²³ holding unenforceable the exculpatory provisions of the uniform warranty of the Automobile Manufacturer's Association.¹²⁴ Many courts have followed *Henningsen*, which has been described as dealing "a lethal blow not only to the privity rule of the common law, but also to the effectiveness of warranty disclaimers in products cases."¹²⁵ The validity of exculpatory clauses is affected not only by decisions like *Henningsen*, but also by various provisions of the Uniform Commercial Code such as section 2-719, which states: "[A] limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."¹²⁶

As early as 1960 a leading scholar predicted: "Increasing recognition of the doctrine of unenforceability of exculpatory agreements appears to be in prospect, particularly in relation to personal injuries caused by defects in products sold under contracts of adhesion such as are commonly used in mass marketing."¹²⁷ This prediction has been amply fulfilled when personal injury is present. In cases involving prop-

121. W. PROSSER, *supra* note 6, § 68, at 440.

122. See *Moss v. Fortune*, 207 Tenn. 426, 340 S.W.2d 902 (1960).

123. 32 N.J. 358, 161 A.2d 69 (1960).

124. *Id.* at 366-67, 385-89, 161 A.2d 73-74, 84-86. See also *General Motors Corp. v. Dodson*, 47 Tenn. App. 438, 338 S.W.2d 655 (1960). The Tennessee court, in the same year as the *Henningsen* decision, held that an action for damages for breach of warranty could be sustained without regard to exculpatory provisions in the warranty. The *Dodson* opinion is not authoritative on this point, however, because the disclaimer provisions were not discussed.

125. L. FRUMER & M. FRIEDMAN, *supra* note 50, § 16.04(2), at 3-143 to -146.

126. UNIFORM COMMERCIAL CODE § 2-719; L. FRUMER & M. FRIEDMAN, *supra* note 50, § 16.04(2), at 3-145 to -146.

127. R. Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 138 (1961).

erty damage or commercial loss, however, exculpatory clauses are more likely to be enforced. In *Delta Air Lines, Inc. v. Douglas Aircraft Co.*¹²⁸ plaintiff had purchased a DC-7 plane from defendant. The contract, defendant's standard form, included elaborate warranties, followed by a provision that the warranties were in lieu of all warranties whether or not occasioned by the seller's negligence. The clause also excluded any liability for consequential damages. Shortly after the plane was purchased, the nose wheel malfunctioned, the plane veered off the runway, and 200,000 dollars worth of damage was sustained. In a suit by Delta the trial judge invalidated the exculpatory clause and entered judgment on plaintiff's verdict. On appeal, the court found the exculpatory clause valid and ordered judgment for Douglas. Distinguishing other cases, including *Tunkl v. Regents of The University of California*,¹²⁹ as involving personal injuries the court said:

[T]he case at bench involves none of the elements of inequality of bargaining on which the cited cases . . . have laid their stress. Delta, bargaining for the purchase and delivery of an airplane yet to be built, is hardly the pain-wracked sufferer seeking emergency admission to the hospital whose plight secured relief in *Tunkl*; it was not faced, as were *Henningsen* and *Vandermark*, with an industry-wide stock contract not open to negotiation; it is not now faced with a "fine print" clause not known to it when it signed the contract; and it did not stand as a single inexperienced individual purchaser vis-a-vis a large seller relatively indifferent to the making or not making of a single purchase. . . .

It is suggested that the contract took on an element of a "contract of adhesion" in that the clause was part of Douglas' standard form. But the clause clearly was open to negotiation, and Delta was free to seek another airplane from another manufacturer on terms which (so far as this record shows) would not have included such a clause.¹³⁰

Express disclaimers, therefore, may be quite effective in the area of property damage, at least when no contract of adhesion is involved.

B. Implied Assumption of Risk

In products liability cases, assumption of risk by express agreement is infrequent; ordinarily consent to the involved risk is simply implied from conduct of the plaintiff. The principal requirements for using the defense of assumption of risk are that the plaintiff know, understand, and voluntarily incur the risk. With reference to knowledge, the plaintiff must not only know the facts that create the danger, but must comprehend the danger itself. The standard is mainly subjective, with the plain-

128. 238 Cal. App. 2d 95, 47 Cal. Rptr. 518 (1965).

129. 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).

130. 238 Cal. App. 2d at 102-03, 47 Cal. Rptr. at 523.

tiff's age and experience taken into account.¹³¹ The issue of the plaintiff's subjective knowledge and appreciation of the risk usually is a question of fact to be determined by the jury, but as evidenced by the very few products liability cases in which defendant has been successful in showing assumption of risk, juries are quite unlikely to decide this issue for the defense.¹³² It therefore becomes vital to determine when a verdict should be directed.

In the unusual situation when the plaintiff is seeking a directed verdict,¹³³ most courts are reluctant to direct a verdict for the plaintiff even though he has testified that he did not know or understand the risk, particularly if proof that the plaintiff should have appreciated the risk suggests that he in fact did appreciate it.¹³⁴ When the defendant is seeking a directed verdict, many cases have held as a matter of law that the plaintiff did in fact appreciate the risk. In attempting to determine when a court should direct a verdict for the defendant on the ground that plaintiff must have appreciated the risk, it will be helpful to look at some recent decisions.¹³⁵ The evidence in several of these cases indicated plaintiff had some degree of knowledge of trouble with the brakes on his automobile. In *Sperling v. Hatch*,¹³⁶ a husband and wife purchased a used car after they were assured that the car had received a complete brake job. About two weeks later the wife complained that the brakes "pulled" or "grabbed." Defendant's service department worked several times on the brakes. When the wife still complained that the trouble was not corrected and returned the car for further servicing, it was delivered back to her, with the statement that the problem was "all in her head." Thereupon she told her husband about her continued difficulties. He drove the car, noticed that the brakes "pulled" to the right, and warned his wife that they would "grab" if applied suddenly at a speed of 40 to 45 miles per hour. He had taken a four-year course in auto mechanics and another course in the service, and did brake work on his own cars.

Later on the same day, while driving at 45 to 55 miles per hour, the wife applied the brakes. The brakes grabbed, and the car went out of control and crashed, with resulting injuries to both husband and wife.

131. R. Keeton, *supra* note 127, at 141. See also W. PROSSER, *supra* note 6, § 68, at 447.

132. W. PROSSER, *supra* note 6, § 68, at 447; R. Keeton, *supra* note 127, at 139.

133. *E.g.*, Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970); see text accompanying note 60 *supra*.

134. *E.g.*, Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970); R. Keeton, *supra* note 127, at 142.

135. Earlier decisions involving a directed verdict on grounds of actual or presumed appreciation of the risk are carefully analyzed in R. Keeton, *supra* note 127, at 138-44.

136. 10 Cal. App. 3d 54, 88 Cal. Rptr. 704 (1970).

The plaintiffs both sued the defendant dealer. The trial judge dismissed the suits holding that the plaintiffs had assumed the risk as a matter of law. The appellate court affirmed the dismissal as to the husband, but reversed the decision against the wife, stating:

The issue of assumption of the risk is a question of fact for jury determination in all but the clearest cases. . . . Actual knowledge of the risk and appreciation of its magnitude are subjective requisites, rarely susceptible of proof by direct evidence. Ordinarily, these elements of the defense can only be established by circumstantial evidence Where, however, a plaintiff admits in his own testimony he had knowledge of the danger and appreciated the risk involved, the elements of the defense are established by direct testimony; there is no room for conflicting inferences and no fact question is presented for jury determination. . . .

Mr. Sperling's testimony clearly and unequivocally demonstrates he voluntarily assumed the risk The testimony reveals: He was knowledgeable about and experienced with automobile brakes. He had tested the car's brakes on the day of the accident. He knew the brakes were defective, that the right front wheel "grabbed," causing the car to veer to the right. He was concerned about the defect. . . . Nevertheless, he willingly rode in the car with his wife

As to Mrs. Sperling, however, evidence relating to her knowledge of the risk and appreciation of its magnitude was neither direct nor unequivocal Moreover, respondent's employees had assured her the brake problem was a figment of her imagination. Mrs. Sperling's assumption of the risk presented a question of fact for the jury.¹³⁷

It does not appear from the report in *Sperling* whether the complaint was based on negligence, strict liability in tort, or breach of warranty, and the decision suggests that the defense of voluntary assumption of risk, and the amount of evidence needed for a directed verdict on that issue, will be regarded in about the same way regardless of the plaintiff's theory of recovery. As to the issue of actual appreciation of the risk, it is not clear whether Mrs. Sperling, after hearing what her husband had to say and after her own earlier experience with the brakes, appreciated the risk of driving at 45 miles per hour as much or as little as did Mr. Sperling. It may be that neither of the Sperlings would have ridden in the car if they in fact had realized the risk of as serious a malfunction of the brakes as in fact occurred. Mrs. Sperling undoubtedly had passed on to her husband the defendant's assurance that the brakes were in order, but the court did not seem to give enough weight to the factor that if the plaintiff "surrenders his better judgment upon an assurance that the situation is safe, he does not assume the risk."¹³⁸ So in *General Motors v. Dodson*,¹³⁹ the court approved the plaintiffs' claims based on defective brakes, even though it appeared that they had "used the auto-

137. *Id.* at 62, 88 Cal. Rptr. at 709.

138. W. PROSSER, *supra* note 6, § 68, at 450.

139. 47 Tenn. App. 438, 338 S.W.2d 655 (1960).

mobile when they knew the brakes were defective," because "each time the plaintiffs would take the car to an authorized dealer, such dealer would assure plaintiffs that the brakes were in good condition."¹⁴⁰

In *Vandermark v. Ford Motor Co.*,¹⁴¹ the brakes locked on a new car after 1,500 miles of use. Earlier, the plaintiff had found that the brakes locked and pulled the car to the right. The plaintiff said he told the dealer of this incident at the time of the 1,000 mile servicing, but the records did not indicate any complaint. The court held that both the dealer and manufacturer could be held strictly liable for a defect that may have arisen only after the dealer received the car for servicing. There is no discussion in the opinion of whether plaintiff's conduct would constitute voluntary assumption of risk in the event that he did not report the first brake-locking incident. Perhaps even with a failure to report, the plaintiff could have assumed that brake deficiencies would be corrected by the dealer in connection with the 1,000 mile check, and therefore he could not have been found as a matter of law to have appreciated the risk of the subsequent accident. Likewise, in *Bereman v. Burdolski*,¹⁴² the jury was allowed to determine if plaintiff was aware of the danger from brakes earlier found to be "grabbing" and "spongy," after assurance that the brakes were "all right."

Finally, in *Robbins v. Milner Enterprises*,¹⁴³ plaintiff's affidavit indicated he had discovered his brakes were "pulling" or "grabbing." In reversing a summary judgment for defendant, the court referred to the vast actual differences, both in degree and in kind, in the extent to which brakes may be "pulling" or "grabbing," and found that the severity or intensity of this mechanical action, as developed at a trial, would have appreciable bearing on whether the danger was in fact "obvious" to the plaintiff.

1. *Age, Intelligence, and Experience—Effect on Recognizing Obvious Dangers.*—The above decisions illustrate the need for caution in directing a verdict on the assumption of risk issue, and the need for

140. *Id.* at 452, 338 S.W.2d at 662. The *Sperling* decision is weakened by the fact that 3 of 7 judges of the supreme court thought the case should have been heard on a further appeal. The defective brake case on which the majority relied, *Gallegos v. Nash*, San Francisco, 137 Cal. App. 2d 14, 289 P.2d 835 (1955), is not closely in point, for there the plaintiff's claim was not dismissed, but the court simply let the jury decide. The jury responded with a verdict for the defendant on the ground that the plaintiff knew at the time of the accident the brakes were "spongy" and "very sensitive" even though assured by defendant's salesman on the morning of the accident that "the brakes had been inspected and checked, and were O.K." *Id.* at 16, 289 P.2d at 837.

141. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

142. 204 Kan. 162, 460 P.2d 567 (1969).

143. 278 F.2d 492 (5th Cir. 1960) (applying Mississippi law).

consideration of all the circumstances. Undoubtedly, some dangers are so clear that in the absence of some satisfactory explanation, plaintiff's denial of his appreciation of the risk is simply not to be believed.¹⁴⁴ Furthermore, if the obviousness of the danger is clear to the plaintiff because of his "age, experience, and capacity," the court will consider these special factors in directing a verdict for the defendant. In *Saeter v. Harley-Davidson Motor Co.*,¹⁴⁵ for example, plaintiff discovered that the front end of his motorcycle would wobble at high speeds. In holding that a verdict should have been directed for the defendant on the ground that plaintiff actually knew of the danger, the court emphasized that the plaintiff was 28 years old, and had used and owned various motorcycles over a period of five or six years.¹⁴⁶ On the other hand, a plaintiff's lack of age and similar characteristics can be weighed in his favor. According to the *Restatement*, "The standard to be applied is a subjective one, of what the particular plaintiff in fact sees, knows, understands, and appreciates If by reason of age, or lack of information, experience, intelligence, or judgment, the plaintiff does not understand the risk involved in a known situation, he will not be taken to assume the risk" ¹⁴⁷

The point may be further illustrated by *Sweeney v. Matthews*.¹⁴⁸ Plaintiff, a carpenter, was hammering concrete nails. After the heads of three or four of them broke off, the nail he was hammering shattered, and a piece struck him in the eye. In declining to direct a verdict for the defendant on the issue of assumption of risk, the court noted that plaintiff was nineteen years old, had worked as a carpenter only a short time, and in earlier work with concrete nails had found them strong enough to resist shattering.

2. *Subjective Realization of Risk.*—In products liability cases, courts ordinarily require plaintiff to have actually realized the danger before he is held to have assumed the risk. So in the *Saeter* decision the court stated the plaintiff's knowledge of the danger "must be actual."¹⁴⁹ In *Bereman v. Burdolski*,¹⁵⁰ however, the court approved an

144. W. PROSSER, *supra* note 6, § 68, at 448.

145. 186 Cal. App. 2d 248, 8 Cal. Rptr. 747 (1960).

146. See also *Spradlin v. Klump*, 244 Ark. 841, 427 S.W.2d 542 (1968) (the court emphasized that the user of a defective farm machine, against whom a verdict was directed, possessed 20 years experience with farm machinery).

147. RESTATEMENT (SECOND) OF TORTS § 496D, comment *c* at 575 (1965). See also *id.* §§ 496A, comment *d* at 562, 496C, comment *e* at 571.

148. 94 Ill. App. 2d 6, 236 N.E.2d 439 (Ct. App. 1968).

149. 186 Cal. App. 2d at 255, 8 Cal. Rptr. at 752. See also *Morrow v. Trailmobile, Inc.*, 12 Ariz. App. 578, 473 P.2d 780 (1970) (requiring subjective appreciation of the danger). Earlier cases to this effect are cited in R. Keeton, *supra* note 127, at 141-42.

150. 204 Kan. 162, 164, 460 P.2d 567, 569 (1969).

instruction that the plaintiff was barred if he was aware of the defect in the brakes or "should have been aware of it, and thereafter continued to use the vehicle." Other decisions have used similar language.¹⁵¹ Perhaps this language means only that a jury could conclude after finding that he should have appreciated it, that in view of the circumstances plaintiff actually did appreciate the risk. This is particularly true if the instructions as a whole indicate that the jury must find consent to an actually realized risk.

3. *Voluntary Acceptance of Risk.*—Although the risk is realized, no sufficient consent is present unless the plaintiff's choice is free and voluntary.¹⁵² This point has not been developed extensively in products liability cases, but in the *Saeter* decision it was emphasized that the motorcyclist continued his pleasure trip after discovery of a defect in his cycle, without the "slightest compulsion of business or otherwise."¹⁵³

It is possible that even in connection with his employment a person who fully appreciates the danger from a defective machine may not have consented to the risk. This problem arose in a recent case, *Eidler v. Crawley Book Machinery Co.*¹⁵⁴ An employee was using a machine that involved some sharp blades designed to put creases in sheets of paper being pressed for binding. Plaintiff allowed two of her fingers to protrude slightly into a dangerous opening where they were severed by the blades. The court held that "if the plaintiff's fingers became placed in a dangerous position in the machine by reason of inadvertance, momentary inattention or diversion of attention," this did not necessarily amount to assumption of risk.¹⁵⁵ The court distinguished *Bartkewich v. Billinger*,¹⁵⁶ in which a plaintiff had deliberately inserted his hand into a glass-breaking machine. The result in *Bartkewich* probably would have been different if inadvertance were involved as distinguished from the risk of deliberately reaching into a dangerous part of the machine.

The principal interest of the *Eidler* case, however, is its statement about assumption of risk and whether it is relevant to an employee who is working with a machine found to be dangerous. The court stated: "This [*Restatement*] theory of concern for the user, however, is not

151. See *Downey v. Moore's Time-Saving Equip., Inc.*, 432 F.2d 1088, 1093 (7th Cir. 1970) (applying Indiana law); *McCormick v. Lowe & Campbell Athletic Goods Co.*, 235 Mo. App. 612, 626, 144 S.W.2d 866, 872 (1940); *Wood v. Kane Boiler Works, Inc.*, 150 Tex. 191, 201, 238 S.W.2d 172, 178 (1951).

152. W. PROSSER, *supra* note 6, § 68, at 450.

153. 186 Cal. App. 2d at 257, 8 Cal. Rptr. at 753.

154. 441 F.2d 771 (3d Cir. 1971) (applying Pennsylvania law).

155. *Id.* at 774.

156. 432 Pa. 351, 247 A.2d 603 (1968).

unfairly frustrated by sanctioning a defense against the claim of a person who knows of the defect but chooses to use the product nevertheless. It is fair to state in such a situation that the manufacturer's obligation to furnish a safe product has been waived by the [employee's] considered choice to chance the danger involved in the defect."¹⁵⁷ Application of this dictum to an employee seems questionable. When an employee consents to work under dangerous conditions, this consent ordinarily is not regarded as effective in a suit against the employer because of the economic pressure involved.¹⁵⁸ It would seem that when a manufacturer supplies a dangerous machine for use by employees, the workman injured because of the unsafe design is subject to comparable economic pressure and that his consent to use the dangerous machine, perhaps in order to retain his job, is likewise not free and voluntary.¹⁵⁹ The economic pressure imposed on an employee assigned to a dangerous machine was specifically recognized in a recent case.¹⁶⁰ While activating a foot pedal that operated a large punch press, plaintiff lost her balance and her hand and arm slipped into the machine. In upholding a jury finding that there was no voluntary assumption of risk, even though plaintiff knew that the machine was unguarded, the court observed that plaintiff may not have realized the risk of falling in this manner, and added. "The 'voluntariness' with which a worker assigned to a dangerous machine in a factory 'assumes the risk of injury' from the machine is illusory."¹⁶¹

By way of summary, the general tendency of the recent cases is to let the jury determine the issue of voluntary assumption of risk. The instructions ordinarily will indicate that circumstances showing the plaintiff realized the danger, even though he says he did not, may be considered. The crucial fact to be determined, however, is whether the plaintiff fully appreciated the risk and with this appreciation was willing to encounter it, or at least externally manifested such a willingness. The current trend away from directing a verdict on the ground that the plaintiff's assumption of risk is "obvious" is in accord with the related trend in defective design cases to permit the jury to find that a design is unreasonably dangerous, even though the absence of a needed safety

157. 441 F.2d at 774.

158. W. PROSSER, *supra* note 6, § 68, at 452.

159. *Cf.* Wood v. Kane Boiler Works, Inc., 150 Tex. 191, 201, 238 S.W.2d 172, 178 (1951) (observing that a workman would not of his own free will have placed himself near a product with possible dangerous defects "and put himself in a position to be killed by it").

160. Rhoads v. Service Mach. Co., 329 F. Supp. 367 (E.D. Ark. 1971) (applying Arkansas law).

161. *Id.* at 381.

device is apparent.¹⁶² The occasional willingness of a court to direct a verdict on the assumption of risk issue, in strict liability cases, will depend considerably on the court's attitude toward strict liability. If not firmly convinced of the wisdom of this doctrine, or if not convinced that objective contributory negligence of the plaintiff should be disregarded in strict liability cases, the court will be more inclined to find voluntary assumption of risk as a matter of law, just as it will be more inclined to rule against the plaintiff as a matter of law on the issue of abnormal use. On the other hand, if a court firmly accepts strict liability, with reliance on such considerations as ability to administer the risk or the presence of extensive representations to users and consumers about the safety of the dangerous products, the result may well be different. These courts will be much more willing to leave the issue of voluntary assumption of risk to the jury.

V. CONCLUSION

It is generally accepted that abnormal use and assumption of risk are available as defenses in products liability cases, and if the abnormal use is clear, or if the risk is so obvious that it must have been realized, a verdict occasionally will be directed for the defendant on these issues. The current trend, however, is to leave both of these issues to the jury. This seems wise, particularly since the distinctions between abnormal use, contributory negligence, and voluntary assumption of risk are not clear.

The courts that take the issues of abnormal use or assumption of risk from the jury are apt to be influenced, either consciously or subconsciously, by their basic attitude toward strict liability. If in a given case a court thinks that the strict liability principle should be strengthened, it is apt to leave questions of abnormal use and assumption of risk to the jury, or may even direct a verdict for the plaintiff. If the court has doubts about strict liability, it is likely to find that abnormal use, or assumption of a more or less obvious risk, has been established as a matter of law.

With reference to contributory negligence, almost all of the courts adopting the strict tort principle as set forth in the *Restatement* have also adopted the view expressed in the comment that an objectively negligent

162. See, e.g., *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 474, 467 P.2d 229, 235, 85 Cal. Rptr. 629, 635 (1970) (finding that "[u]nder the modern rule, even though the absence of a particular safety precaution is obvious, there ordinarily would be a question for the jury as to whether or not failure to install the device creates an unreasonable risk"). The language thus used is quoted from Noel, *supra* note 25, at 838.

failure to discover the defect in a product, or to guard against the possibility of its existence, is not a defense.¹⁶³ A noticeable amount of judicial and academic dissent from this view has developed, however, with the dissenters urging that contributory negligence of this kind should at least serve to diminish the amount of the plaintiff's recovery. Here again courts are influenced by their views about strict liability, and more particularly by the grounds on which they arrive at these views. If a court adheres to strict liability primarily on the ground that once a product is shown to be defective and dangerous, negligence probably was present, even though it cannot be proved, such a court may be inclined to regard contributory negligence as a defense, just as it is in cases based on provable negligence. Conversely, if a court arrives at strict liability primarily through acceptance of administration of risk doctrines, or acceptance of the concept that serious misrepresentation is found in the advertising and sale of a dangerous product, it will be less inclined to give any weight to contributory negligence.

In view of the reluctance in some quarters to leave basic policy factors to appellate court judges, and a distrust of the complexities and uncertainties of products liability law, it probably will be advocated by some that recovery from harm caused by a defective product, as well as harm caused by motor vehicle accidents, should be placed on a limited recovery, no-fault basis. As to motor vehicles, it appears that no-fault automobile accident law covering all except fairly serious accidents is likely to prevail within the next few years, although most trial lawyers, an articulate and influential group, are opposed to any substantial no-fault developments.¹⁶⁴ Most scholars, editorial writers, and "consumer advocates," on the other hand, are so concerned with the inadequacies of the present automobile accident reparations system and the impracticality of relating fault to the present insurance situation, that they support various no-fault plans. If the prophesied development of no-fault reparations in the automobile accident area takes place, then products law may well be the next target for limited recovery, no-fault compensation, although the prospect of this development for accident claims of

163. RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* at 356 (1965).

164. See R. KEETON, *VENTURING TO DO JUSTICE* 149 (1969); Noel, *Strict Tort Liability Compared with No-Fault Automobile Accident Reparations*, 38 TENN. L. REV. 297, 303, 307, 319 (1971). Trial lawyers believe that tort law should remain closely allied to fault, and that fault concepts are deeply rooted in human nature and have been closely related to the regulation of human affairs from the time when law began. The trial lawyers are further influenced by other factors. They like their work and the adequate compensation attached to it; they distrust the fairness of administrative handling of the enormous accident reparations field. Furthermore, they dislike serious limitations on the amount of recovery by the victim of a careless driver.

all kinds, as recommended by one leading scholar,¹⁶⁵ seems remote.

At the present time courts and lawyers are faced with handling products liability cases in accord with the principles laid down in the decisions, with such additional help as may be secured from the *Restatement* and legal writers. Hopefully the present article may assist this process in the significant areas of abnormal use, contributory negligence, and assumption of risk.

165. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).