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Contributory Negligence in Warranty Law

William M. Barr

NOTES

CONTRIBUTORY NEGLIGENCE IN WARRANTY LAW

The emergence of the warranty action from its accustomed commercial-contractual environment of sales law into the rapidly expanding area of "products liability" is one of the major current developments in the common law. This phenomenon is one of the most voluminously discussed subjects in recent legal literature. It is a matter of intense controversy between plaintiffs' and defendants' bars, and it has inspired comment by spokesmen for the broad groups most directly affected as principals — the business community[1] and consumers.[2]

Traditionally, the concept of privity of contract has been the primary defense against use of the warranty action. The requirement of privity, or direct contractual dealing between plaintiff and defendant, restricted the action to buyers suing their immediate sellers. Within the structure of modern marketing and distribution, the practical effect of privity has been to exclude manufacturers and intermediate distributors as defendants and non-purchasing consumers as plaintiffs. In a sense, the recent tendency of many courts to reject or circumvent the privity requirement explains both the escape of warranty from its traditional sales law context and its increased use by plaintiffs' counsel.

The persisting strength of privity, especially in non-food cases, is not to be underestimated.[3] But the assault upon privity proceeds; and although it is too early for its defenders to abandon the position, it is not premature to reconnoiter secondary lines of resistance. This note investigates the effect of the plaintiff's misconduct upon his success in a warranty action; particular attention is given to the possible availability of contributory negligence as an affirmative defense.

Warranty is an area in which an investigator does well to proceed with caution. The mass of sales-law distinctions and high technicality surrounding the action exhibits many signs of stress and appears to be at a stage at which it can neither be safely relied upon nor ignored. The law in this area is in a state of change; important social and economic interests are at stake; and consistency of theory yields at many points to the overriding impulse of social policy.[4] The doctrinal

1. Keatley, *Products on Trial,* The Wall Street Journal, Aug. 31, 1960, p. 1, Col. 1.

2. 27 CONSUMER REPORTS 5 (1962).

3. For an extensive review of the status of privity, see Prosser, *The Assault upon the Citadel,* 69 YALE L.J. 1099 (1960).

4. "The remedies of injured consumers ought not to be made to depend upon

and semantic uncertainty that affects warranty law is especially evident in cases dealing with the problem of plaintiff misconduct. In their search for precedents, both plaintiffs' and defendants' counsel will find themselves forced to fish in muddy waters.

THE POLICY ISSUE

Warranty law imposes a type of strict liability on the supplier of corn flakes similar to that imposed on keepers of dangerous animals and on persons engaging in ultrahazardous activities, such as blasting operations. That is, the question of the defendant's negligence, in the sense of unreasonable conduct, is technically irrelevant in warranty.[5] When the plaintiff establishes that the defendant warranted against a defect or dangerous characteristic that the product nonetheless exhibited, that the plaintiff was damaged, and that the defect was attributable to the defendant and was factually and legally the cause of the damage, the defendant may be held liable despite his total lack of fault in the sense of negligent conduct or wrongful intent.[6]

The strict liability of warranty is similar to that normally incurred by a contracting party, since a contract breach need not be negligent or intentional to result in liability. But there is this difference: The ordinary contracting party defines the terms of his own undertaking and thus limits his potential liability. In warranty, the law may define the supplier's undertaking and corresponding liability. The bulk of recent actions involve warranties of merchantability and fitness, which are implied in law regardless of the factual intent and conduct of the supplier. In other words, implied warranty law contemplates that the supplier assumes his responsibilities not by making express promises but by merely engaging in the business of selling goods.

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the intricacies of the law of sales. . . . [E]very consideration of law and public policy requires that the consumer should have a remedy. If there are no authorities which grant one it is high time for such an authority." Ketterer v. Armour & Co., 200 Fed. 322, 323 (S.D.N.Y. 1912).

5. See, *e.g.*, Rasmus v. A. O. Smith Corp., 158 F. Supp. 70 (N.D. Iowa 1958); Simmons v. Wichita Coca-Cola Bottling Co., 181 Kan. 35, 309 P.2d 633 (1957); Lohse v. Coffey, 32 A.2d 258 (D.C. Munic. Ct. App. 1943).

6. The strict liability of warranty is admittedly difficult to distinguish from the liability that may be imposed in a negligence action in which the plaintiff successfully invokes the concept of *res ipsa loquitur*. *Res ipsa,* like warranty, relieves the plaintiff from his sometimes insurmountable difficulty of probing within the defendant's establishment for evidence of negligent conduct. A plaintiff relying on *res ipsa* in a negligence action, however, may experience acute distress when the defendant presents his unending *actual* proof of due care to judge and jury. For the views of one plaintiff's counsel, see Ashe, *So You're Going to Try a Products Liability Case,* 13 HASTINGS L. J. 66 (1961).

Underlying the expanded use of the warranty action is the stereotype of the helpless consumer in today's marketing system. Manipulated by the hard sell, the soft sell, and the subliminal sell, and dependent for the necessities of life upon remote manufacturers and distributors, the modern consumer at the automatic vending machine presents a picture in sharp contrast to negligence law's image of the self-reliant individual. If the conception of the manipulated consumer is accepted, justice appears to require that the legal responsibility of the manipulating supplier be increased.[7]

The matter of plaintiff misconduct, however, adds a clashing hue to the picture of the helpless consumer. Just how much responsibility is to be shifted to the supplier? Is the consumer-plaintiff to become a sacred cow — everyone's responsibility but his own? Or does the consumer have a responsibility to protect himself? If so, how is this responsibility to be defined and related to the supplier's strict liability in warranty?[8] The growth of warranty represents a dissatisfaction with negligence law's "reasonable man" definition of supplier duty. The problem presented by plaintiff misconduct is whether the "reasonable man" test provides a proper measure of consumer self-protective responsibility. The courts are in some doubt.

Plaintiff Misconduct

Effect on the Issue of Breach of Warranty

It is important to recognize that the problem of plaintiff misconduct may be raised and resolved in a warranty action without resort to the affirmative defense of contributory negligence. The plaintiff may find that his own misconduct, quite apart from any affirmative defense, brings unsuspected difficulties into his task of proving the

7. Concern for the welfare of the consumer is not limited to the courts. On Mar. 16, 1962, in proposing to Congress an extensive executive and legislative program for consumer protection, President Kennedy stated in part: "Many of the new products used every day in the home are highly complex. The housewife is called upon to be an amateur electrician, mechanic, chemist, toxicologist, dietitian and mathematician — but she is rarely furnished the information she needs to perform these tasks proficiently.

"Marketing is increasingly impersonal. Consumer choice is influenced by mass advertising utilizing highly developed arts of persuasion. The consumer typically cannot know whether drug preparations meet minimum standards of safety, quality and efficacy. He usually does not know . . . whether the performance of a product will in fact meet his needs . . . ." N.Y. Times, Mar. 16, 1962, p. 16, col. 2.

8. Professor Plant has defined the issue as follows: "If negligence on the part of defendant is not required to establish liability, it is only logical to conclude that contributory negligence on the part of plaintiff is irrelevant. This is the way the law has shaped itself in most other areas where strict liability prevails.

elements of a breach of warranty. Or, although a breach of warranty is established, the defendant may prevent substantial recovery by raising the matter of plaintiff's fault as an issue of damage mitigation. The effect of plaintiff misconduct on the issue of breach of warranty will be considered initially.

Proof of Defect and Causation. The plaintiff's burden of proof in warranty is not met unless he shows, by a preponderance of the evidence, that the product contained a defect attributable to the defendant and that the defect was the proximate cause of his damage. It is not enough to show that he used the product and later suffered an injury. *Rasmus v. A. O. Smith*[9] demonstrates how a plaintiff's possible misconduct becomes entangled in the question whether there was any breach of warranty. The plaintiff had purchased a large corn storage bin designed to preserve fresh, undried corn by accumulating a supply of carbon dioxide to retard bacterial action. The bin had to be thoroughly sealed to operate properly. The plaintiff, however, installed and operated his own discharge equipment at the base of the bin. When the corn spoiled he brought a warranty action, claiming that the bin was defective. The defendant prevailed because of a disclaimer in the sales contract, but the court also indicated that the plaintiff failed to establish by a preponderance of the evidence that the loss was caused by a faulty bin rather than his own faulty installation and operation of the discharge machinery. In other words, the plaintiff failed to prove a breach of warranty. Although the court denied that the principle of contributory negligence is involved in a warranty action, it felt that the buyer's conduct was "connected with the matter of proximate cause and direct and natural result."[10]

Courts are aware that in the usual warranty case the product is in the plaintiff's exclusive control and that, in obtaining evidence of the plaintiff's misconduct, the defendant consequently encounters difficulties comparable to those confronting the plaintiff in proving the defendant's fault in a negligence action. Courts are also aware of the possibility of fraudulent claims. Accordingly, although in theory the plaintiff's burden is merely to prove a breach of warranty, in fact it may include the task of virtually disproving his own misconduct. The court in *Rasmus* implied as much in observing that

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The interesting prospect thus opened up is that of a negligent user of a manufactured product successfully suing the non-negligent manufacturer thereof for an injury arising in part out of a defect which by pure accident (and not through any fault of the manufacturer) happened to be present in the product . . . ." Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 950 (1957).

9. 158 F. Supp. 70 (N.D. Iowa 1958).

10. *Id.* at 95.

"the question as to whether it was a faulty machine and the question as to whether it was faultily operated by the buyer are inextricably entwined."[11]

In *Landers v. Safeway Stores*[12] the court was more explicit. The plaintiff claimed that household bleach purchased from the defendant had injured his hands after use according to the directions on the bottle. The court stated:[13]

> "Proof that plaintiff used [the bleach] according to instructions and thereafter suffered harm is not sufficient to prove a breach of warranty under the peculiar circumstances of this case, *unless he should prove further that he did not also use it in violation of instructions.*"

The "peculiar circumstances" of the case appear to have been the plaintiff's failure to convince the court that another product, or his possible unacknowledged use of the bleach at full strength, contrary to directions, had caused his injury. The court added: "We are not concerned with contributory negligence, but rather with the requirement of logical proof of an issue as to which plaintiff has the burden."[14]

Other courts have reached similar results with less theoretical precision. In *E. B. Constantine Mfg. Co. v. Reynolds*[15] the plaintiff complained that his mechanical fish failed to operate properly after little boys in his employ threw them into the water without winding their motors or inserting their plugs to keep them afloat. The court concluded that "if because of his [plaintiff's] neglect the fish sank

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11. *Ibid.*

12. 172 Ore. 116, 139 P.2d 788 (1943).

13. *Id.* at 138, 139 P.2d at 796. (Emphasis added.)

14. *Ibid.* "Logical proof" may be a somewhat different affair when plaintiff's misconduct does not enter the picture. In Lohse v. Coffey, 32 A.2d 258 (D.C. Munic. Ct. App.), plaintiff claimed that he had suffered an attack of acute gastro-intestinal disturbance as the result of eating contaminated cream pie in defendant's restaurant. Plaintiff failed to produce any direct evidence that the pie was in fact contaminated. The court said: "Plaintiff proved the purchase and consumption of the food and that illness followed. He also proved that another person who consumed the same foods at the same time (though with a different beverage) also became ill. He did not prove by direct testimony that . . . *if there was* unwholesomeness in the food it was a competent producing cause of the injury." *Id.* at 260. (Emphasis added.) Concluding that this was sufficient proof to take the case to the jury, the court further observed: "Only the most litigious plaintiff would have had the presence of mind in the throes of intermittent attacks of vomiting and diarrhea to arrange for laboratory tests and chemical analysis of his vomitus and excreta to be brought into court to prove his case. A man can hardly be expected to prepare a lawsuit while writhing on an ambulance stretcher or a hospital bed." *Id.* at 261.

15. 123 App. Div. 555, 108 N.Y. Supp. 36 (2d Dep't 1908).

to the bottom and refused to do their work he cannot claim a breach of warranty."[16]

Occasionally the factual possibility that a faulty product may be negligently operated appears to be denied. Jury instructions may then be framed to require selection of "the cause" of the damage, excluding the possibility that both plaintiff and defendant contributed to the harm.[17] In any event, it is possible to decide the case on a basis that accounts for plaintiff's misconduct, without the help of contributory negligence as an affirmative defense.

Scope of the Warranty. Judicious definition of the supplier's warranty may also resolve the problem of plaintiff misconduct. The defendant may be pleased to learn, for example, that his warranty did not contemplate misuse, negligent use, or mismanagement of the product. The following type of proviso in the definition of warranty is not uncommon:[18]

> "[A] warranty of quality or fitness for a purpose contemplates reasonably good management in the use of the article by persons of ordinary skill and experience, and the warranty is not broken where the failure of the article to give satisfaction is due to mismanagement of the purchaser."

The trichinosis cases bring the problem of consumer self-protective responsibility sharply into focus. A defendant can produce impressive evidence that trichina parasites cannot be detected in raw pork by any commercially feasible means, thus emphasizing his own lack of fault.[19] Moreover, a plaintiff cannot deny that the parasites are instantly killed by subjection to heat of 137 degrees Fahrenheit. The issue cannot be resolved in terms of causation; it is idle to inquire whether the parasites or lack of adequate cooking caused the disease.

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16. *Id.* at 557, 108 N.Y. Supp. at 37.

17. See, *e.g.*, Wilmington Candy Co. v. Remington Mach. Co., 21 Del. 543, 65 Atl. 74 (1906).

18. Halstead v. American Magnestone Corp., 84 Ind. App. 205, 207, 149 N.E. 698, 699 (1925). The ambiguity of the quoted language should be noted. Is this a matter of the scope of the warranty, or of causation, or both?

19. See Nicketta v. National Tea Co., 338 Ill. App. 159, 87 N.E.2d 30 (1949), for an extensive discussion of technical authorities. The extreme difficulty of *detecting* trichina parasites by inspection should not be confused with the question of their possible *prevention*. A Baltimore City Health Department inspector has testified: "There are generally five ways to prevent trichinosis. The first one is to stop feeding garbage to hogs. The second is to cook the garbage. The third is to refrigerate all the pigs for a long period of time at a very cold temperature, about five degrees, for about twenty-one days. The fourth is, of course, to cook all pork products thoroughly, which every housewife should do. And the fifth is by an antigen test, which isn't such a good way." Vaccarino v. Cozzubo, 181 Md. 614, 620, 31 A.2d 316, 319 (1943).

The problem is frequently dealt with by qualifying the scope of the warranty. Courts recognize the teaching of common experience: "Fresh pork is not ordinarily intended to be eaten raw."[20] The seller thus warrants that the meat is fit for human consumption *after proper cooking*[21] or *after ordinary domestic cooking*.[22] Where proper cooking is the accepted measure of consumer self-protective responsibility, a court strongly motivated to extricate a defendant from his seeming dilemma may take judicial notice of the "factual impossibility" of contracting the disease after proper cooking.[23] The radical effect is to bar trichinosis plaintiffs generally as a matter of law.

More often, however, the jury is permitted to determine whether the plaintiff's preparations constituted "proper" or "ordinary domestic" cooking, thus making the scope of the warranty a question of fact. As stated in the leading case of *Holt v. Mann*:[24]

> "It is true, according to the evidence, that trichinae are killed by exposure to heat of one hundred thirty-seven degrees Fahrenheit. But in ordinary household cooking it is not easy to be sure that every part of a ham will be heated to so high a degree. It could have been found that the ham was cooked as thoroughly as could be expected in a family, but without killing the trichinae with which it was infested."

It might well be concluded that warranty liability ends where plaintiffs' negligence begins. The case results indicate, however, that the standard of conduct implied in warranty is more subjective than the objective "due care" of negligence law. Thus, a housewife who "knew nothing about . . . trichinae"[25] may recover, but a doctor[26] or a chef of twenty-five years' experience[27] may not.

Avoidable Consequences

Although a plaintiff establishes a breach of warranty, the defendant may show that continued use of the product after discovery of its defective or dangerous nature resulted in a portion of the injuries.

20. Cheli v. Cudahy Bros. Co., 267 Mich. 690, 697, 255 N.W. 414, 416 (1934).

21. See, *e.g.*, Feinstein v. Daniel Reeves, Inc., 14 F. Supp. 167 (S.D.N.Y. 1936); Nicketta v. National Tea Co., *supra* note 19; Vaccarino v. Cozzubo, *supra* note 19.

22. See, *e.g.*, Holt v. Mann, 294 Mass. 21, 200 N.E. 403 (1936), and cases cited therein.

23. Nicketta v. National Tea Co., 338 Ill. App. 159, 87 N.E.2d 30 (1949).

24. 294 Mass. 21, 24, 200 N.E. 403, 405 (1936). The plaintiff "boiled [the ham] for three hours or more, and then baked [it] for an hour, in accordance with approved directions . . . in a well-known cook book. . . . It appeared well cooked." *Id.* at 22, 200 N.E. at 404.

25. McSpedon v. Kunz, 271 N.Y. 131, 134, 2 N.E.2d 513, 514 (1936).

26. Silverman v. Swift & Co., 141 Conn. 450, 107 A.2d 277 (1954).

27. Eisenbach v. Gimbel Bros., 281 N.Y. 474, 24 N.E.2d 131 (1939).

By application of the doctrine of avoidable consequences,[28] a plaintiff is denied recovery for any damages incurred subsequent to his discovery of the defect if these could reasonably have been avoided.[29] He may not claim further reliance on the warranty, and later "experiments" with the product will be at his own risk.

Although the line between the concept of contributory negligence and the doctrine of avoidable consequences is admittedly obscure, certain basic distinctions exist. The burden of proof under each theory is on the defendant — either to show that the plaintiff was negligent or to show that he unreasonably incurred avoidable and unnecessary damages. Contributory negligence, however, is an affirmative defense that the defendant must plead, while avoidable consequences is a matter of damage mitigation that need not be pleaded. Perhaps the most important difference is that contributory negligence is a complete defense that destroys liability and totally bars recovery, whereas application of the avoidable consequences rule only reduces the amount of recoverable damages without affecting the ultimate issue of liability.[30]

Numerous cases recognize that although the plaintiff may not recover damages sustained after discovery of the defect, he nevertheless retains the right to recover (1) general damages, defined as the difference between the value of the product as sold and the value as warranted,[31] and (2) those special or consequential damages sustained prior to discovery of the defect.[32] When the plaintiff's right to recover these earlier damage elements is acknowledged, there is little doubt that his failure to recover damages sustained after discovery of the defect is a matter of avoidable consequences and not contributory negligence.

28. For a discussion of the avoidable consequences doctrine, see McCORMICK, DAMAGES 127-58 (1935). See also RESTATEMENT, CONTRACTS §336 (1932); RESTATEMENT, TORTS §918 (1939).

29. *E.g.*, Hitchcock v. Hunt, 28 Conn. 343 (1859); Cedar Rapids & Iowa City Ry. & L. Co. v. Sprague Elec. Co., 203 Ill. App. 424 (1917); Swift v. Redhead, 147 Iowa 94, 122 N.W. 140 (1909); Northern Supply Co. v. Wangard, 123 Wis. 1, 100 N.W. 1066 (1904).

30. McCORMICK, DAMAGES 128-30 (1935). McCormick draws the further distinction that contributory negligence consists of plaintiff's negligence occurring *before* defendant's wrongdoing is completed, while avoidable consequences contemplates plaintiff's negligence *after* defendant has committed an actionable wrong. In warranty it would seem that the defendant's wrong in this sense is generally complete at the time of sale.

31. *E.g.*, Daley v. Irwin, 56 Cal. App. 325, 205 Pac. 76 (1922). Or the plaintiff may be awarded nominal damages. Swift v. Redhead, *supra* note 29; Major v. Hefley-Coleman Co., 164 S.W. 445 (Tex. Civ. App. 1914).

32. *E.g.*, Rice v. Friend Bros. Co., 179 Iowa 355, 161 N.W. 310 (1917); Finks v. Viking Refrigerators, Inc., 235 Mo. App. 679, 147 S.W.2d 124 (1941); Pinney v. Andrus, 41 Vt. 631 (1869); *cf.* Foote v. Woodworth, 66 Vt. 216, 28 Atl. 1034 (1894), in which the jury was permitted to apportion the damages.

In other "discovered defect" cases, however, the plaintiff's right to recover these earlier damage elements is not mentioned.[33] This often happens because the court has denied a breach of warranty on another ground,[34] or because general damages are insignificant compared to the special damages claimed. For example, when the plaintiff sustains serious personal injury from an exploding pop bottle, little attention is given to his arguable right to recover the difference between the value of the bottle as warranted and as sold.[35] Moreover, he may find it difficult, as a matter of proof, to separate those elements of special damage sustained prior to his discovery of the defect from those sustained afterwards. For example, in *Finks v. Viking Refrigerators, Inc.*[36] defendant sold plaintiff a refrigerator showcase that failed to operate properly. Meat placed in the showcase spoiled, and the plaintiff claimed special damages for the spoilage and lost profits. The court acknowledged his technical right to recover for spoilage and lost profits sustained prior to his discovery that the showcase was defective, but the plaintiff was unable to show how much spoilage had occurred before discovery of the defect; his claim for these damages, therefore, failed for uncertainty and want of sufficient proof.

A few cases appear to hold broadly that plaintiff's negligence bars recovery of *all consequential* damages.[37] These cases appear to set forth a rule closely akin to the concept of contributory negligence. But a leading case in this group[38] explicitly recognizes that the plaintiff's negligence does not affect his right to recover *general* damages, thus indicating that these cases are more properly interpreted as overstated applications of the doctrine of avoidable consequences. The right to recover general damages is incompatible with a distinguishing

33. *E.g.*, Allen v. Tompkins, 136 N.C. 208, 48 S.E. 655 (1904); Pauls Valley Milling Co. v. Gabbert, 182 Okla. 500, 78 P.2d 685 (1938); Northern Supply Co. v. Wangard, 123 Wis. 1, 100 N.W. 1066 (1904).

34. *E.g.*, Topeka Mill & Elevator Co. v. Triplett, 168 Kan. 428, 213 P.2d 964 (1950).

35. *Cf.* Natale v. Pepsi Cola Co., 7 App. Div. 2d 282, 182 N.Y.S.2d 404 (1st Dep't 1959), an exploding pop bottle case in which judgment on plaintiff's $200,000 jury verdict was reversed. The accident occurred when the infant plaintiff attempted to open the bottle on the hasp of a school gate. The rationale of the case is not entirely clear, but the critical point appears to be plaintiff's failure to establish the causation element of the alleged breach of warranty.

36. 235 Mo. App. 679, 147 S.W.2d 124 (1941).

37. Nelson v. Anderson, 245 Minn. 445, 72 N.W.2d 861 (1955); Razey v. J. B. Colt Co., *infra* note 38; Bruce v. Fiss, Doerr & Carroll Horse Co., 47 App. Div. 273, 62 N.Y. Supp. 96 (2d Dep't 1900); *cf.* Eisenbach v. Gimbel Bros., 281 N.Y. 474, 24 N.E.2d 131 (1939); Ellen v. Heacock, 247 App. Div. 476, 286 N.Y. Supp. 740 (4th Dep't 1936).

38. Razey v. J. B. Colt Co., 106 App. Div. 103, 94 N.Y. Supp. 59 (2d Dep't 1905).

characteristic of contributory negligence – the total destruction of liability. In any event, the broad doctrine of these cases does not improve the usual concept of avoidable consequences. Although in most instances the plaintiff will probably fail to identify those consequential damages sustained prior to his discovery of the defect, he should be permitted to do so whenever possible. It is eminently fair to deny the plaintiff the right to enhance his damages after discovery of the defect and place responsibility upon the supplier under cover of the warranty. But it seems both unfair and illogical to attribute the plaintiff's earlier injuries to his later negligence. If the earlier injuries were fairly attributable to the breach of warranty at the time they were incurred, it is difficult to conceive how the supplier's responsibility for these injuries is extinguished by the plaintiff's subsequent conduct with the product.

Contributory Negligence

Close inspection of warranty cases in which contributory negligence superficially appears to function as an affirmative defense usually reveals that the court is in fact refusing to find a breach of warranty or is applying some form of the rule of avoidable consequences. In other opinions the language is so enigmatic that no definite explanation can be given. No warranty case has been found in which the court acknowledges a breach of warranty but clearly denies the defendant's liability by sustaining contributory negligence as an affirmative defense.[39] The dictum in *Parish v. Great Atlantic & Pacific Tea Co.*[40] that "contributory negligence may be asserted as a defense to the breach of warranty action" is not based on convincing authority.[41] *Fredendall v. Abraham & Straus*,[42] cited in *Parish* to support the quoted proposition, bears mention. The plaintiff became ill after using dry cleaning fluid in a small, unventilated room contrary to directions on the container. In a cryptically short opinion the court concluded:[43]

39. *But see* Di Vello v. Gardner Mach. Co., 65 Ohio L. Abs. 58, 102 N.E.2d 289 (C.P. 1951), in which the primary issue before the court was the lack of privity between plaintiff's deceased and the defendant supplier. The court stated that "in the absence of contributory negligence such workman could recover on the basis of a breach of warranty against the party who sold the wheel to his employer." *Id.* at 64, 102 N.E.2d at 293. In Arnaud's Restaurant, Inc. v. Cotter, 212 F.2d 883 (5th Cir. 1954), *cert. denied*, 348 U.S. 915 (1955), the court, applying Louisiana law, refused to find contributory negligence as a matter of law but indicated that the matter was a proper question for the jury, thus impliedly accepting the use of the defense in warranty.

40. 13 Misc. 2d 33, 46, 177 N.Y.S.2d 7, 21 (N.Y. Munic. Ct. 1958).

41. Only 2 of the 13 cases cited in support are clearly warranty cases.

42. 279 N.Y. 146, 18 N.E.2d 11 (1938).

43. *Id.* at 148, 18 N.E.2d at 11.

"We think the evidence conclusively shows that the plaintiff failed to use reasonable care in the use of the fluid and that this default was an essential cause of her illness. We do not pass upon any other question."

This language might be interpreted as an application of the concept of contributory negligence. It may just as easily be interpreted, however, as a finding that the warranty was not breached.

Although no case has unambiguously accepted the use of contributory negligence as an affirmative defense in warranty, several cases have clearly denied the defense.[44] At least one court, moreover, has sustained the defense in a negligence count while rejecting it in a warranty count in the same case.[45] There are several reasons underlying the courts' rejection of contributory negligence in warranty actions. In part it is a matter of distaste for the interjection of a tort concept into an action viewed as one in contract.[46] In part it may be an expression of general dissatisfaction with the defense and an unwillingness to extend its field of operation.[47] It is difficult to avoid the conclusion, however, that some role is also played by the same motivations and conceptions of social policy that in recent years have been reshaping warranty as a device for increasing consumer protection. Perhaps the courts feel that contributory negligence is too blunt and undiscriminating an instrument to be of service in their delicate operation of redefining and reaccommodating supplier duties and consumer self-protective responsibilities. The courts appear to be unwilling to deny all relief to every negligent buyer and consumer.

Justifiable Negligence

Warranty is not a consumer's license to be negligent. The plaintiff whose handling of the product noticeably deviates from the norm

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44. Hansen v. Firestone Tire & Rubber Co., 276 F.2d 254 (6th Cir. 1960); Simmons v. Wichita Coca-Cola Bottling Co., 181 Kan. 35, 309 P.2d 633 (1957); Challis v. Hartloff, 136 Kan. 823, 18 P.2d 199 (1933); Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N.E. 407 (1918); Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939); Walker v. Hickory Packing Co., *infra* note 45; Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959); Vaningan v. Mueller, 208 Wis. 527, 243 N.W. 419 (1932); *cf.* Young v. Aeroil Prod. Co., 248 F.2d 185 (9th Cir. 1957); Sapiente v. Waltuch, 127 Conn. 224, 15 A.2d 417 (1940); Wood v. General Elec. Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953).

45. Walker v. Hickory Packing Co., 220 N.C. 158, 16 S.E.2d 668 (1941).

46. This explanation is given in Friend v. Childs Dining Hall Co., *supra* note 44; Jarnot v. Ford Motor Co., *supra* note 44; Vaningan v. Mueller, *supra* note 44.

47. For a critical discussion of contributory negligence, see PROSSER, SELECTED TOPICS IN THE LAW OF TORTS 1 (1953). See also Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1 (1946).

of "due care" cannot expect the court to overlook this fact. The plaintiff whose negligence clearly constitutes misuse of the product or voluntary assumption of the risk of known defects is in most cases probably ill advised to litigate at all. The courts' rejection of contributory negligence in warranty provides little hope of recovery in such cases; they have adequate means, in terms of appropriately tailored definitions of warranty, adjustable proof requirements, and the flexible concepts of proximate causation and avoidable consequences, to shield the defendant's pocketbook from the undeserving plaintiff.

Nonetheless, there appears to be a range of plaintiff misconduct that, while predictably constituting contributory negligence in a negligence action, may not bar recovery in warranty. Several cases demonstrate that defendant's charge of plaintiff's fault, when predicated solely on plaintiff's failure to discover product defects, may not meet with judicial approval. Negligent failure to discover product defects, in other words, may in some instances be condoned. In *Boston Woven-Hose & Rubber Co. v. Kendall*[48] the plaintiff sued in warranty to recover money he had paid his employees as the result of personal injuries they sustained when a boiler purchased from the defendant exploded. To establish his case in warranty, the plaintiff was obliged to show that the payments to his employees were made under a legal obligation rather than for business reasons; he had to establish that he had been negligent vis-à-vis his employees. Justice Holmes extricated the plaintiff from this dilemma with the following analysis:[49]

> "The plaintiff's misconduct consisted in a failure to discover by inspection a defect in an article specially made for it . . . . Such a failure might make the plaintiff answerable to its men, but even if its conduct be called want of ordinary care, it was induced, as we must assume after the verdict, by the warranty of representations of the defendants. The very purpose of the warranty was that the boiler should be used in the plaintiff's works with reliance upon the defendant's judgment in a matter as to which the defendants were experts and the plaintiff presumably was not."

The reliance idea underlying the concept of warranty is thus to some extent incompatible with the idea of contributory negligence. By its very nature, reliance on the warranty justifies some lack of the self-protective prudence and caution demanded of the plaintiff in a negligence action.

48. 178 Mass. 232, 59 N.E. 657 (1901).
49. *Id.* at 237, 59 N.E. at 657.

Bahlman v. Hudson Motor Car Co.[50] shows that tolerable plaintiff misconduct in warranty may be broader than failure to discover defects. The plaintiff negligently overturned his car, which the manufacturer had advertised as a "rugged fortress of safety." A special feature was the car's seamless roof, but when the car overturned the plaintiff cut the top of his head on a jagged weld seam in the car roof. The court held the manufacturer liable on its express warranty and rejected the defense of contributory negligence. The plaintiff's negligence consisted in improper driving, not in failure to discover the weld seam.

It is instructive to compare the *Bahlman* case with *Ringstad v. I. Magnin & Co.*,[51] in which the plaintiff-housewife was injured when her cocktail robe purchased from the defendant burst explosively into flame upon coming into "casual" contact with her electric stove while she was preparing dinner. The defendant did not expressly raise the defense of contributory negligence; it relied upon the *Fredendall*[52] and *Landers*[53] cases to support its contention that the plaintiff used the robe improperly, offering the following suggestion:[54]

> "The court can take judicial notice that a housewife cooking a dinner generally wears a simple garment allowing ease in operation or at least protects herself by an apron which will prevent her dress coming into casual contact with the electric burners."

The court's impatient reaction is instructive:[55]

> "We are taking no judicial notice as to what is generally worn in a kitchen . . . . In the present day, with modern household appliances and other labor-saving devices, and with servants the exception rather than the rule, the housewife frequently appears in a dual capacity, performing household tasks while dressed for other occasions."

There may be a common element in negligent automobile driving and the arguable carelessness of wearing a loose cocktail robe in the kitchen while preparing a meal. Perhaps they are both risks "that may be regarded as typical of or broadly incidental to the enterprise"[56] of making and selling automobiles and cocktail robes.

50. 290 Mich. 683, 288 N.W. 309 (1939).
51. 39 Wash. 2d 923, 239 P.2d 848 (1952).
52. See note 42 *supra* and accompanying text.
53. See note 12 *supra* and accompanying text.
54. 39 Wash. 2d at 933, 239 P.2d at 853.
55. *Ibid.*
56. James, *Vicarious Liability*, 28 TUL. L. REV. 161, 175 (1954). See Wilson, *Products Liability*, 43 CALIF. L. REV. 809 (1955), for an extensive analysis of both negligence and warranty liability in terms of "typicality of risk."