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Sales--The Defense of Contributory Negligence in Warranty Actions

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SALES—THE DEFENSE OF CONTRIBUTORY NEGLIGENCE IN WARRANTY ACTIONS

You are the attorney for a plaintiff who has been seriously injured in an automobile collision which was witnessed by one elderly gentleman who is to testify on behalf of your client. Fearing that he will not live long enough to testify in court, you take his deposition on a machine purchased from X corporation, manufacturer of the product. Your witness dies a week later. At the trial, with permission of the court, you attempt to play back his testimony, only to discover that his voice was not recorded because of a defect in the machine. Without your eyewitness's testimony you lose the case and bring an action against the manufacturer predicated on breach of warranty. The defense is contributory negligence. Recovery? Should contributory negligence bar recovery in an action based on warranty? The purpose of this paper is to examine this question in light of the case law and applicable sections of the Uniform Commercial Code.

I. The Nature of a Warranty Action

Historically, warranties have been viewed as contractual in nature, an agreement between the manufacturer and the consumer. Recently, however, courts have begun to impose liability upon manufacturers for injuries caused by their defective products as a matter of law;[1] this development seems to have created some confusion as to the nature of a warranty action.

The leading case and the first to adopt the concept of strict tort liability in the area of product liability was *Greenman v. Yuba Power Products, Inc.*[2] In affirming a lower court judgment against the manufacturer of a defective power tool, the court stated:

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury . . . .[3]

1. "As a matter of law" is here used in the sense that the courts are imposing strict liability upon the manufacturers, but, of course, it is a jury question whether the alleged breach was in fact the cause of the injury.
2. 27 Cal. Rptr. 697, 377 P.2d 897 (1963).
3. Id. at 700, 377 P.2d at 900. The plaintiff was injured while using a machine manufactured by the defendant when a piece of wood flew up striking

With liability imposed as a matter of law, apart from any agreement between the manufacturer and the consumer, it would appear that *Greenman* marked a radical departure from the traditional basis of product liability. Prior to *Greenman*, however, the courts were headed towards strict liability within the framework of warranty.[4]

As evidenced by the abandonment of the privity requirement[5] and a reluctance to allow manufacturers to limit their liability for defective products,[6] it is quite obvious that the warranty action is no longer simply a contractual matter. It is said that the action sounds in tort but retains as its substance the characteristics of a contract,[7] which partially explains the conflicting views on whether contributory negligence should bar recovery. If the warranty action is a matter of contract, then contributory negligence logically should not bar recovery, since negligence on the part of manufacturer is not in issue. If, on the other

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him on the forehead. *See also* Vandermark v. Ford Motor Co., 37 Cal. Rptr. 896, 391 P.2d 168 (1964). The Restatement of Torts has also adopted the strict tort liability rule. RESTATEMENT (SECOND) OF TORTS § 402A (1965), provides:

> (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.

4. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[3] (1968).

5. Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960). The wife of a purchaser of an automobile sustained injuries because of a defective steering system. The court, affirming a lower court judgment for the plaintiff, said that a new automobile carries with it an implied warranty that it is suitable for the intended use, and that such warranty accrues to the benefit of the ultimate purchaser.

6. *Id.* S.C. CODE ANN. § 10.2-316 Subsection (1) (1966) provides:

> If the agreement creates an express warranty words disclaiming it are inoperative.
>
> Subsection (2) provides:
>
> Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude the implied warranty of merchantability or of fitness for a particular purpose must be specific, and if the inclusion of such language creates an ambiguity in the contract as a whole it shall be resolved against the seller.

This is the language of the 1954 version of the Code.

hand, the action is a matter of tort principles, then contributory negligence should operate as a defense. If, however, its basis is a combination of contract and tort, confusion results.

II. FURTHER CONFUSION—CONTRIBUTORY NEGLIGENCE V. ASSUMPTION OF RISK

Although there are other defenses[8] that the courts tend to confuse with contributory negligence, the distinction between contributory negligence and assumption of risk seems to cause the most trouble. Assumption of risk is often confused with the defense of contributory negligence. In most instances the distinction is unimportant, for both will bar recovery in the ordinary negligence action where they most frequently appear.

In an action based upon breach of warranty, however, assumption of risk is almost always available as a defense,[9] while there are conflicting views as to whether contributory negligence should be so available. The two defenses are undeniably related, since with both the plaintiff is barred from recovery because of his own conduct. The distinction between contributory negligence and assumption of risk was summarized in *Pritchard v. Liggett & Meyers Tobacco, Co.* as follows:

> In working out the distinction, the courts have arrived at the conclusion that assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of reasonable conduct, however unwilling or protesting the plaintiff may be. The two may co-exist, or either may exist without the other. The difference is frequently one between risks which were in fact known to the plaintiff, or so obvious that he must be taken to have known them, and

7. Pritchard v. Liggett & Meyers Tobacco Co., 350 F.2d 479, 484 (3rd Cir. 1965). The plaintiff brought an action for personal injury, alleging that he contracted cancer as a result of smoking Chesterfield cigarettes; the action was predicated on negligence and breach of warranty. The defense was assumption of risk.

8. Often, courts speak in terms of contributory negligence when the plaintiff misuses the product, where the plaintiff's negligence was the sole cause of the injury, and where there was actually no breach of warranty. For a discussion of these basic distinctions, *see* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.01[3] (1968).

9. Pritchard v. Liggett & Meyers Tobacco Co., 350 F.2d 479, 485 (3rd Cir. 1965); 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[5] (1968).

> risks which he merely might have discovered by the exercise of ordinary care.[10]

Often when a court speaks of contributory negligence barring recovery, it is or should be speaking of assumption of risk.[11] Thus, in *Missouri Bag Co. v. Chemical Deliniting Co.*[12] where a buyer used bags manufactured by the seller with knowledge of their defects, the court spoke of the buyer's own negligence as barring recovery. If the distinction drawn in *Pritchard* is accurate, then the *Missouri Bag Co.* court actually denied recovery because the buyer assumed the risk when he used the bags notwithstanding his actual knowledge of the defects.

The *Pritchard* court, holding that contributory negligence should not be a defense to a warranty action, recognized a need to distinguish assumption of risk as is ordinarily applied in a negligence action from assumption of risk as a defense to a warranty action. The court spoke of "assumption of risk in its primary sense" as a voluntary exposure to a known risk which is a defense to a breach of warranty action, and "assumption of risk in its secondary sense" as synonomous with contributory negligence and not a defense to a breach of warranty action. Approaching the distinction in this manner would seem to reduce the possibility of confusion. Apparently, the *Pritchard* court viewed the warranty action as contractual in nature since it held that mere deviation from a standard of reasonable conduct, whether classified as contributory negligence or "assumption of risk in its secondary sense," is inapposite as a defense.

III. For the Defense—Mariorino v. Weco Products

In *Mariorino*[13] the plaintiff, injured while opening a glass toothbrush container manufactured by defendant, brought an action based upon negligence and breach of warranty. While recognizing that there was considerable conflict and confusion on the subject of the availability of contributory negligence as a defense to warranty actions, the court stated its position without equivocation as follows:

> Simply stated, we are of the view that where a plaintiff acts or fails to act as a reasonably prudent man in

10. Pritchard v. Liggett & Meyers Tobacco Co., 350 F.2d 479, 484-85 (3rd Cir. 1965).
11. 2 L. Frumer & M. Friedman, Products Liability § 16.01[3] (1968).
12. 214 Miss. 13, 58 So. 2d 71 (1952).
13. Mariorino v. Weco Products, 45 N.J. 570, 214 A.2d 18 (1965).

> connection with use of a warranted product . . . and such conduct proximately contributes to his injury, he cannot recover. In short, in our judgment the well known principle of contributory negligence in its broad sense is sufficiently comprehensive to encompass all the variant notions expressed in the cited cases as a basis for refusing plaintiff a recovery when his own lack of reasonable care joined or concurred with the defect in the defendant's product as a proximate cause of the mishap and his injury.[14]

The *Mariorino* decision contains no minced language. The court does not attempt to explain the availability of the defense by discussing the nature of the warranty action,[15] but rather states its position as a matter of policy.

According to the *Mariorino* decision, the consumer is only protected when using a warranted product in a reasonably prudent manner. It seems that such an approach to products liability loses sight of situations where one of the primary purposes of the product is to protect the negligent consumer. An example of such a product is the water skiing safety belt, the purpose of which is to hold the water skier above the water when he falls. If a skier carelessly comes too close to a dock, hits it, and is knocked unconscious, should his negligence bar recovery when the ski belt fails to hold him up because of some defect? According to *Mariorino*, since his own negligence proximately caused or contributed to the injury, he is barred from recovery.

Another situation where the *Mariorino* approach could produce an unjust result is that of the automobile warranty. The court in *Bahlman v. Hudson Motor Car Co.*[16] summed up the fallacy of allowing contributory negligence as a defense to automobile warranty actions when it stated:

> 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

14. *Id.* at 574, 214 A.2d at 20.
15. Indeed, the court does not even distinguish between express and implied warranty. It is therefore assumed that contributory negligence would bar recovery with either.
16. 290 Mich. 683, 288 N.W. 309 (1939).

> protection against the consequences of just such careless driving as actually took place. Once the anticipated over-turning of the car did occur, it would be illogical to excuse defendant from responsibility for these very consequences.[17]

While *Bahlman* involved an automobile warranty, certainly the reasoning would apply to other similar situations, such as the example of the water skier above.

Another objection to the *Mariorino* approach to products liability is that it fails to appreciate fully the policy argument for expanding the concept of consumer protection. As stated in *Greenman*:

> The purpose of such [strict tort] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.[18]

The courts often resort to this type of policy argument when dealing with a solvent defendant. Obviously, the consumers are not always "powerless to protect themselves" for often the defect would cause little, if any, damage without the concurrence of the consumer's own negligence.

IV. The Uniform Commercial Code

The Uniform Commercial Code[19] provides no clear answer to the question of whether contributory negligence should be apposite as a defense to a breach of warranty action, but examination of the applicable sections does shed some light on the problem. Under the Code, an express warranty is created by any affirmation of fact or promise which relates to the goods and becomes part of the "basis of the bargain" or by any description of the goods which is made part of the "basis of the bargain," or by any sample or model which is made part of the "basis of the bargain."[20] It is generally agreed[21] that "basis of the bargain" is the Code's equivalent to the traditional concept of consumer reliance on the representations of the seller, which is

17. *Id.* at 692-93, 288 N.W. at 312.
18. Greenman v. Yuba Power Products, Inc., 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901 (1963).
19. Hereinafter referred to as the Code.
20. Uniform Commercial Code § 2-313(1).
21. 1 W. Hawkland, A Transactional Guide to the Uniform Commercial Code 1.19101 at 58 (1964).

retained as the crux of the express warranty. With the express warranty it is arguably the better view that contributory negligence should not bar recovery, for the consumer should be afforded protection when he relies on the representations.[22] It has also been suggested that the consumer's negligent use of the product might well be viewed as a manifestation of his reliance upon the warranted quality of the product and the integrity of the manufacturer.[23] Regardless of how one might view the problem, however, the basic distinction between express and implied warranties should make it easier to understand a policy disallowing contributory negligence as a defense to an express warranty action.

Under the Code's treatment of implied warranties, the buyer is offered a warranty of merchantability[24] and one of fitness for a particular purpose.[25] Although the seller might disclaim these warranties,[26] the Code does not preclude recovery where the buyer deviates from some standard of conduct in using the product. It would thus seem that the *Mariorino* decision is at odds with the Code, since that case, in effect, held that the product is warranted to be safe for use with ordinary care. In a comment to the section on implied warranty of merchantability, however, the following language is found:

> In such an action [breach of warranty] an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense.[27]

Does this language indicate that contributory negligence might be a defense, or is it simply stating the obvious proposition that, if the buyer's actions are the *sole* cause of his injury, this will operate as a defense? Probably the latter is a correct con-

22. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.01[3] (1968).
23. Note, *Contributory Negligence as a Defense to Warranty Actions,* 39 TEMP. L.Q. 361, 363 (1966).
24. UNIFORM COMMERCIAL CODE § 2-314. Subsection (1) provides in part:
> Unless excluded or modified (section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . . .

25. *Id.* at § 2-315. This section provides:
> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

26. *Id.* at § 2-316.
27. *Id.* at § 2-314, Comment 13.

struction of this language. The same comment also indicates that "an examination of the goods which ought to have indicated the defect" may be shown as a matter bearing on causation. Although this statement might cause the reader to pause, it does not mean that a duty to inspect is imposed upon the buyer but rather indicates that if he does inspect, then his negligent failure to discover the defect might operate to bar recovery.

The extent to which the consumer's own conduct affects his chances of recovery in a warranty action under the Code is perhaps best illustrated by an examination of the section providing for the buyer's consequential damages.[28] The buyer is entitled to such damages for "injury to person or property proximately resulting from any breach of warranty."[29] Arguably, if the buyer's own negligence substantially contributes to his injury, it would therefore not proximately result from the breach. In deciding proximate cause, however, courts usually make many policy determinations en route to arriving at a legal conclusion, and it appears that the Code allows the court to use its own discretion in determining whether the buyer's conduct should operate as a defense and therefore bar recovery.

Assume, for example, that *A* sells *B* a pump; *A* knows that it is to be used for the purpose of draining *B*'s basement. The pump is defective in that there is no ground wire. *B*, however, installs the pump while standing ankle-deep in water and is electrocuted. At the trial there is conflicting testimony on whether the ground wire could have prevented the accident. Under the Code would the death be considered as proximately resulting from the defective product?[30] Probably it would be a policy decision. Following the *Greenman* rationale for imposing strict tort liability, the court would look to the "deepest pocket"

28. *Id.* at § 2-715(2).

29. *Id.* at § 2-715(2)(b). One commentor, speaking of the effect of this section, has said:

> Thus, if the buyer's own fault or negligence contributes to the injury, as might be the case where he used the goods with knowledge of their defects, he cannot recover consequential damages. These damages are not proximately related to the breach of warranty.

1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 1.510102 at 268 (1964). It appears that Mr. Hawkland's example of the buyer's own negligence could be more accurately described as assumption of risk.

30. A similar factual situation presented itself before the Missouri Supreme Court recently and that court chose to adopt the Restatement of Torts strict liability rule. Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969).

and attach liability upon *A*. Another court, however, might decide that the death was not proximately caused by the lack of a ground wire and deny recovery.

V. CONCLUSION

There appears to be no clear-cut answer to the question of whether contributory negligence should bar recovery in a warranty action.[31] As pointed out, some courts, adopting a strict liability approach, have reasoned that the manufacturer is in a better position to avoid the injury and thus should pay the price for its defective products. Other courts have recognized the relatively new tort theory in warranty actions and allow the defense in all products liability litigation. Still other courts have become entangled in the confusion surrounding the nature of a warranty action, the distinction between contributory negligence and assumption of risk, and the distinction between contributory negligence and misuse of the product. Of course, in situations where the injury was caused solely by the plaintiff's own negligence or where there was actually no breach, the courts are obviously confused when they deny recovery by saying that the plaintiff was contributorily negligent. With these latter courts one cannot ascertain whether contributory negligence is a defense or not.

The coin is not one-sided. There are persuasive arguments for both positions. Admittedly the average, unsuspecting consumer deserves protection and should be afforded the assurance that the product he purchases will be as warranted. On the other hand, there are situations where an otherwise insignificant defect in a product contributes to an injury almost totally caused by the consumer's own negligence, and with these cases it would seem that a strict liability approach would place an undue burden on the manufacturer.

It has been suggested that a comparative negligence approach is the best solution to the problem.[32] In view of the myriad of situations with varying degrees of fault on the part of the

31. Contributory negligence is a defense: *e.g.*, Dallison v. Sears, Roebuck & Co., 313 F.2d 343 (10th Cir. 1962); Pepsi Cola Bottling Co. v. Superior Burner Serv. Co., 427 P.2d 833 (Alas. 1967); Douglas v. W.C. Mallison & Son, 265 N.C. 362, 144 S.E.2d 138 (1965). Contributory negligence is not a defense: *e.g.*, Brown v. Chapman, 304 F.2d 149 (9th Cir. 1962); Hansen v. Firestone Tire & Rubber Co., 276 F.2d 254 (6th Cir. 1960); Jacobs Pharmacy Co. v. Gipson, 116 Ga. App. 760, 159 S.E.2d 171 (1967).

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

manufacturer and the consumer, perhaps this is the best answer. The courts could determine each case on its own facts and thus reduce the possibility of an unjust result. An inflexible rule of strict liability, or equally, one allowing contributory negligence as a defense, leaves much to be desired.

The reach of any rule, whether it favor the manufacturer or the consumer, should not be extended so far that it cannot yield when the facts and justice so demand.

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