Notes

PLAINTIFF MISCONDUCT AS A DEFENSE IN PRODUCTS LIABILITY

The adoption of strict liability in tort has been called an "explosion" in products liability,[1] and it may certainly be that, in view of the proliferation of suits and new reaches of liability. The most recent expansion[2] of *Restatement (Second) of Torts* section 402A reinforces the need for effective means of limiting a defendant's potential liability, but unfortunately, what defenses are available remains to some extent unclear. There seems to be a compelling need to attach labels to varying forms of wrongful conduct on the part of the plaintiff, even though some defy clear categorization, and the result has been conflict and confusion in the case law.

The purpose of this Note is to isolate recurring forms of plaintiff misconduct which may constitute a defense in a products liability suit. Although there is authority to the effect that section 402A may supersede suit under the implied warranties of the Uniform Commercial Code,[3] most jurisdictions allow submission of both theories. Therefore, defenses to actions brought under implied warranty are discussed, as well as those which might arise in a suit under section 402A.

I. Breach of Warranty

To recover damages under breach of implied warranty, it is necessary that the plaintiff prove the product was defective, and that such defect was the proximate cause of the injury. Whether or not the product complied with the warranty, that is, whether it was defective, is to be determined by the specific provisions of sections 2-314 and 2-315 of the Uniform Commercial Code.[4]

1. Carmichael, *Strict Liability In Tort—An Explosion In Products Liability Law*, 20 DRAKE L. REV. 528 (1971). *See also* Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

2. Some jurisdictions have held that a product need not be unreasonably dangerous to be defective. *See, e.g.*, Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Glass v. Ford Motor Co., 123 N.J. Super. 599, 304 A.2d 562 (1973). One jurisdiction has held the plaintiff need not prove the defect was the proximate cause of the injury, but only a "producing" cause. *See* Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. 1967); Helicoid Gage Div. of Am. Chain Cable Co. v. Howell, 511 S.W.2d 573 (Tex. Civ. App. 1974).

3. *See* Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Ford Motor Co. v. Lonon, 398 S.W.2d 240 (Tenn. 1966). *See also* Hawkeye Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 383 (Iowa 1972).

4. UNIFORM COMMERCIAL CODE § 2-314:

> (1) 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. Under this section the serving for value

A. *Contributory Negligence*

There is currently a split of authority as to whether contributory negligence is a valid defense to an action for breach of warranty. The cases specifically approaching the issue appear unnecessarily confusing, and a close analysis of the case law makes it apparent that the problem is largely one of semantics.[5] Although it must be recognized that each individual fact situation requires evaluation, the availability of the defense of contributory negligence is determined largely by the kind of plaintiff misconduct which has occurred. Where the misconduct consists only of a failure to guard against the possible existence of a defect, such conduct will generally not constitute a defense.[6] However, at the other extreme, proceeding to use a product after discovery of a defect will preclude recovery.[7] A middle range of conduct including mishandling, failure to follow directions, and misuse of the product may or may not constitute a defense, depending on the effect of such conduct upon the elements of defectiveness and causation.[8]

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of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

UNIFORM COMMERCIAL CODE § 2-315:

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.

5. *See* Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 95, at 656-57 (3d ed. 1964). *Compare* Kassouf v. Lee Bros., 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (Dist. Ct. App. 1962) (contributory negligence held to be no defense to breach of warranty claim), *with* Dallison v. Sears, Roebuck & Co., 313 F.2d 343 (10th Cir. 1962) (contributory negligence held to bar recovery).

6. *See, e.g.*, Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3d Cir. 1965); Brown v. Chapman, 304 F.2d 149 (9th Cir. 1962); Crane v. Sears, Roebuck & Co., 218 Cal. App. 2d 855, 32 Cal. Rptr. 754 (Dist. Ct. App. 1963); Dailey v. Holiday Distrib. Corp., 260 Iowa 859, 151 N.W.2d 477 (1967); Morris Plan Leasing Co. v. Bingham Feed & Grain Co., 259 Iowa 404, 143 N.W.2d 404 (1966); Richard v. H.P. Hood & Sons, Inc., 104 R.I. 1267, 243 A.2d 910 (1968).

7. *See, e.g.*, Palmer v. Ford Motor Co., 498 F.2d 952 (10th Cir. 1974); Murphy v. Eaton, Yale & Towne, Inc., 444 F.2d 317 (6th Cir. 1971); Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3d Cir. 1965); Brown v. Chapman, 304 F.2d 149 (9th Cir. 1962); Hensley v. Sherman Car Wash Equip. Co., 520 P.2d 146 (Colo. 1974); Erdman v. Johnson Bros. Radio & Television Co., 260 Md. 190, 271 A.2d 744 (1970).

8. *See* cases cited note 13, *infra*.

There is a significant minority of jurisdictions which claims to recognize contributory negligence as a defense to breach of warranty,[9] but the decisions seem to indicate that the actual defense recognized is not contributory negligence in the traditional sense. Rather, recovery is barred for the reason that the plaintiff proceeded to use the product with knowledge of the defect, or because the plaintiff's conduct precluded a finding that the product was defective, or for the reason that the plaintiff's conduct, and not a product defect, was the proximate cause of the injury. The anomalous result is that although the concept of contributory negligence may theoretically be out of place in a warranty action, a court may nevertheless admit evidence of a plaintiff's negligence to show that the harm alleged to flow from the breach of warranty was actually otherwise caused.[10] Such a stituation presents an interesting exercise in semantics, but has little effect on the outcome of the litigation.[11]

The representative decisions of those jurisdictions which recognize the defense of contributory negligence generally reflect conduct by the plaintiff whereby either a defect once perceived was ignored and use of the product continued,[12] or misuse or mishandling occurred which proximately caused the injury, or prevented a finding of defectiveness in the product.[13]

The majority of jurisdictions do not recognize contributory negligence as a defense to breach of warranty.[14] The Iowa position is not completely settled, but tends toward the majority position rejecting the defense. It is clear that under Iowa law one who fails to discover concealed or latent defects will not lose the protection of an implied warranty.[15] As to more severe forms of

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9. *See, e.g.*, Dallison v. Sears, Roebuck & Co., 313 F.2d 343 (10th Cir. 1962); Erdman v. Johnson Bros. Radio & Television Co., 260 Md. 190, 271 A.2d 744 (1970); Natale v. Pepsi-Cola Co., 7 App. Div. 2d 282, 182 N.Y.S.2d 404 (1959). In *Nelson v. Anderson*, 245 Minn. 445, 72 N.W.2d 861 (1955), the court held that a plaintiff-apartment owner's continuing use of a defective oil burner with the knowledge it was not working properly could bar the recovery of consequential damages based on the theory of contributory negligence. In a subsequent decision, *Gardner v. Coca-Cola Bottling Co.*, 267 Minn. 505, 127 N.W.2d 557 (1964), the same court stated that contributory negligence "may be a misnomer" when denying recovery to a plaintiff on the basis that his own conduct, rather than product defect, caused the injury. Most recently, in *Lee v. Crookston Coca-Cola Bottling Co.*, 290 Minn. 321, 188 N.W.2d 426 (1971), the Minnesota court appears to have determined that the appropriate defense to a breach of warranty is not contributory negligence, but rather assumption of the risk or misuse amounting to a superseding cause.

10. *See* 1 R. Hursh & H. Bailey, American Law of Products Liability 2d § 3:81, at 620 (1974) [hereinafter cited as Hursh & Bailey]. *See also* Rasmus v. A.O. Smith Corp., 158 F. Supp. 70 (N.D. Iowa 1958).

11. Annot., 4 A.L.R.3d 501, 503 (1965).

12. *See, e.g.*, Nelson v. Anderson, 245 Minn. 445, 72 N.W.2d 861 (1955).

13. *See, e.g.*, Natale v. Pepsi-Cola Co., 7 App. Div. 2d 282, 182 N.Y.S.2d 404 (1959). See also *Chutich v. Samuelson*, 518 P.2d 1363 (Colo. 1973), a breach of warranty action by a homeowner against a gas company following an explosion of propane gas. Evidence of contributory negligence was admitted to bar recovery where the injuries resulted from "an independent cause which would relieve the defendants of liability." *Id.* at 1367.

14. *See, e.g.*, Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3d Cir. 1965) (applying Pennsylvania law); Brown v. Chapman, 304 F.2d 149 (9th Cir. 1962) (applying Hawaii law); Rasmus v. A.O. Smith Corp., 158 F. Supp. 70 (N.D. Iowa 1958); Kassouf v. Lee Bros., 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (Dist. Ct. App. 1962); Williams v. Ford Motor Co., 454 S.W.2d 611 (Mo. Ct. App. 1970).

15. Dailey v. Holiday Distrib. Corp., 260 Iowa 859, 151 N.W.2d 477 (1967); Morris Plan Leasing Co. v. Bingham Feed & Grain Co., 259 Iowa 404, 143 N.W.2d 404 (1966). *See also* Cooley v. Quick Supply Co., 221 N.W.2d 763 (Iowa 1974).

contributory negligence, the Iowa supreme court has not specifically decided the issue, although dicta in two major cases touch on the question.[16] The most persuasive decision in this jurisdiction therefore appears to be that of a federal district court, *Rasmus v. A.O. Smith Corp.*,[17] where the court, applying Iowa law, concluded that negligence is not involved in an action for breach of warranty, and "[n]either is contributory negligence."[18] The court nevertheless found that the plaintiff's improper operation of a farm storage bin prevented a conclusive finding in his favor on the issue of proximate cause and barred recovery.[19]

The forms of misconduct illustrated by the cases with respect to the issue of contributory negligence suggest a number of conclusions. Jurisdictions which have allowed the defense of contributory negligence have done so in fact situations where the conduct should more appropriately be regarded as assumption of the risk or misconduct severe enough to constitute a superseding cause of the harm.[20] Those jurisdictions which have not recognized the defense have declined to do so in fact situations involving either a failure by the plaintiff to discover or guard against the product defect, or carelessness or inattention which did not constitute a superseding cause of the injury.[21] It is also clear that conduct which bars recovery in jurisdictions recognizing contributory negligence as a defense has also precluded recovery in other "conflicting" jurisdictions, although usually under the label of assumption of risk or misuse of the product.

Where the issue of contributory negligence is raised in a breach of warranty action the decisions suggest three possible approaches for the defense. First, it may be argued that the plaintiff's conduct was actually not negligence, but a more severe form of misconduct, such as assumption of risk. Such an argument avoids the involvement of negligence concepts in warranty law, thus there is no theoretical preclusion of the defense. Second, even where the misconduct amounts to no more than traditional negligence, such evidence may be introduced to rebut plaintiff's allegations of defectiveness. If, in the absence of the plaintiff's act, the product would have performed properly, the jury may be persuaded that the product is not defective. Finally, even assuming the product is found to be defective, it may be argued that the plaintiff's act was a superseding and therefore proximate cause of the harm, barring recovery.

B. *Assumption of Risk*

In view of the theoretical considerations which have caused many courts to reject the defense of contributory negligence in warranty actions, it might logically follow that the defense of assumption of risk, also a tort concept, is

16. *See* Bengford v. Carlem Corp., 156 N.W.2d 855 (Iowa 1968); Wagner v. Larson, 257 Iowa 1202, 136 N.W.2d 312 (1965).
17. 158 F. Supp. 70 (N.D. Iowa 1958).
18. Rasmus v. A.O. Smith Corp., 158 F. Supp. 70, 79 (N.D. Iowa 1958).
19. The conduct of the plaintiff arguably amounted to misuse of the product. *See* note 61 *infra* and accompanying text.
20. *See* note 9 *supra* and accompanying text.
21. *See* note 14 *supra* and accompanying text.

likewise improper.[22] It is clear from the relevant cases, however, that assumption of risk, used in the sense of a plaintiff voluntarily proceeding to make use of a product with knowledge of the dangerous condition, is an available defense.[23] The requisite awareness exists only where the plaintiff has actual, not merely constructive, knowledge of the danger, and therefore the test is subjective and a question for the jury.[24] Some courts, reluctant to use the term "assumption of risk," nevertheless consider such evidence as going to the element of reliance, and hold that where a plaintiff, in disregard of a known danger, proceeds to make use of a product, he can no longer be said to be relying on the warranty.[25]

In *Barefield v. La Salle Coca-Cola Bottling Co.*,[26] plaintiff continued drinking a beverage bottled by defendant after noticing it contained an irritating substance. The plaintiff testified she thought the irritant was ice or tobacco from the cigarette she was smoking, but the irritant later proved to be pieces of glass. The issue on appeal concerned an instruction that the plaintiff would be barred from recovery if her conduct "was unreasonable in continuing to drink the product after knowledge that something irritated her throat as she drank." Although disapproving of the use of the term "assumption of risk" in the instruction, the court held that when the plaintiff proceeded in disregard of a known danger, she was no longer relying on defendant's warranty of fitness, and therefore, the instruction "was essentially a correct statement of an available defense."[27]

A more definitive example of the operation of this defense may be found

22. *See* 1 HURSH & BAILEY, *supra* note 10, § 3:84, at 630-31; Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267, 275 [hereinafter cited as Epstein].

23. *See, e.g.*, Murphy v. Eaton, Yale & Towne, Inc., 444 F.2d 317 (6th Cir. 1971); Reed v. AMF W. Tool, Inc., 431 F.2d 345 (9th Cir. 1970); Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3d Cir. 1965); Brown v. Chapman, 304 F.2d 149 (9th Cir. 1962); Hensley v. Sherman Car Wash Equip. Co., 520 P.2d 146 (Colo. App. 1974); Bereman v. Burdolski, 204 Kan. 162, 460 P.2d 567 (1969); Erdman v. Johnson Bros. Radio & Television Co., 260 Md. 190, 271 A.2d 744 (1970); Barefield v. La Salle Coca-Cola Bottling Co., 370 Mich. 1, 120 N.W.2d 786 (1963); Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973); Maiorino v. Weco Products Co., 45 N.J. 570, 214 A.2d 18 (1965); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965); Walk v. J.I. Case Co., 36 App. Div. 2d 60, 318 N.Y.S.2d 598 (Sup. Ct. App. Div. 1971).

24. Olsen v. Royal Metals Corp., 392 F.2d 116, 119 (5th Cir. 1968); Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 430, 261 N.E.2d 305, 312 (1970).

25. For example, in *Barefield v. La Salle Coca-Cola Bottling Co.*, 370 Mich. 1, 120 N.W.2d 786 (1963), the court stated that "[u]se of the technical term 'assumption of risk' in the instruction may better have been avoided," but concluded that its use did not distort what was essentially a correct statement of an available defense. *Id.* at 5, 120 N.W.2d at 789. See also *Hensley v. Sherman Car Wash Equipment Co.*, 520 P.2d 146 (Colo. App. 1974), where the court recognized that "unreasonable use of the product . . . with knowledge of the defective condition" is an available defense, but noted that such conduct only "bears a resemblance to the negligence doctrine of assumption of risk." *Id.* at 148.

26. 370 Mich. 1, 120 N.W.2d 786 (1963).

27. Barefield v. La Salle Coca-Cola Bottling Co., 370 Mich. 1, 5, 120 N.W.2d 786, 789 (1963). In view of the requirement that the plaintiff have actual knowledge of the danger, this case must be viewed as stating a very close case on assumption of risk, since it is arguable that the plaintiff's reasonable belief that the irritating substance was tobacco or ice suggests the defect was not apparent.

in *Pritchard v. Liggett & Myers Tobacco Co.*[28] In *Pritchard,* a cigarette smoker brought an action for personal injury against a cigarette manufacturer under breach of warranty, alleging he had contracted lung cancer as a result of smoking defendant's cigarettes for a number of years. Assessing the availability of the defense, the court distinguished two forms of assumption of risk, primary and secondary. Secondary assumption of risk was described as "ordinarily synonymous with contributory negligence" and involved a failure to exercise reasonable care for one's own safety.[29] The court concluded this form of assumption of risk was not available as a defense in the contractual area of warranties. Assumption of risk in the primary sense, however, was said to involve a "voluntary exposure to an obvious or known danger which negates liability."[30] The crucial distinction is therefore one between risks that are in fact known to the plaintiff, or so obvious that he must be held to have recognized them, and risks which the plaintiff merely might have discovered by the exercise of reasonable care.[31] The majority of jurisdictions are in accord with the view espoused in *Pritchard* that a person who voluntarily exposes himself to a defect of which he has notice assumes the attendant risk.[32] The effective defense is therefore primary assumption of risk, while the secondary form may be equated with contributory negligence which will not bar recovery.

Other instances of plaintiff misconduct which have been held to constitute primary assumption of risk include proceeding to operate a car with knowledge of the defective condition of the brakes,[33] improperly opening a glass container in which a toothbrush has been packaged,[34] and operating a machine contrary to instructions.[35]

The Iowa position on assumption of risk, although again not definitely stated, appears in agreement with the majority.[36] The rationale of *Rasmus v. A.O. Smith Corp.*,[37] discussed previously, has not been disapproved by the Iowa supreme court; rather, discussion of assumption of risk by the court seems to leave little doubt but that the defense is available in an action for breach of warranty.[38]

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28. 350 F.2d 479 (3d Cir. 1965).
29. Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479, 484 (3d Cir. 1965).
30. *Id.*
31. *Id.* at 485. *See also* Potter v. Brittan, 286 F.2d 521, 523 (3d Cir. 1961); Sullivan v. Shell Oil Co., 234 F.2d 733, 739 (9th Cir.), *cert. denied*, 352 U.S. 925 (1956).
32. The rationale of the court in *Pritchard* emphasized, however, that such misconduct negates reliance upon the warranty, and noted that the tort concept of assumption of risk was "apposite in an action based on warranty." Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479, 485 (3d Cir. 1965).
33. Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965).
34. Maiorino v. Weco Products Co., 45 N.J. 570, 214 A.2d 18 (1965).
35. Walk v. J.I. Case Co., 36 App. Div. 2d 60, 318 N.Y.S.2d 598 (Sup. Ct. App. Div. 1971). Cases involving failure to read warning labels or directions are considered under the subject of misuse of the product. *See* Part I, § C *infra*.
36. *See* Bengford v. Carlem Corp., 156 N.W.2d 855 (Iowa 1968); Wagner v. Larson, 257 Iowa 1202, 136 N.W.2d 312 (1965).
37. 158 F. Supp. 70 (N.D. Iowa 1958).
38. In *Hawkeye Security Insurance Co. v. Ford Motor Co.*, 199 N.W.2d 373 (Iowa

C. *Misuse of the Product*

Misuse of the product is generally considered a third form of plaintiff misconduct which may constitute a defense to breach of implied warranty. The definition of contributory negligence put forth by some courts is sufficiently broad to encompass misuse,[39] but more precise descriptions have been formulated in decisions dealing specifically with this defense. Misuse has been interposed as a successful defense where the warranted product was being used at the time of the injury for a purpose different from that for which the manufacturer intended it to be used,[40] or where the product was used in an "abnormal manner" not contemplated by the manufacturer.[41] Whichever terminology is employed, misuse of the product may include misconduct ranging from serious mishandling[42] to mere failure to read directions[43] or a warning label.[44] As distinguished from assumption of risk, misuse may bar recovery whether there is discovery of the defect or not.[45]

Misuse of the product cannot properly be regarded as an affirmative defense; rather, it is introduced by the defense to negate one or more of the essential elements of plaintiff's case.[46] For example, where defendant establishes misuse, it has been held that the plaintiff may not recover for the reason that

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1972), the court stated that the defense of assumption of risk is a valid defense when properly raised by the pleadings and proven. *Id.* at 381. With respect to assumption of risk, it is crucial to recognize the procedural requirements relating to presentation of the defense. Assumption of risk is not a valid defense unless pleaded affirmatively, and unfortunate defendants have lost the benefit of the defense where they failed to do so. *See, e.g.*, Kassouf v. Lee Bros., Inc., 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (Dist. Ct. App. 1962). Equally necessary is a jury instruction which adequately and correctly states the defense. In *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir. 1965), a remand and new trial were held necessary because of a confusing and inadequate defense instruction, even though assumption of risk was specifically held available to the defendant on the facts. An example of an inadequate instruction was noted in *Richard v. H.P. Hood & Sons, Inc.*, 104 R.I. 267, 270-71, 243 A.2d 910, 914 (1968).

39. *See, e.g.*, Dallison v. Sears, Roebuck & Co., 313 F.2d 343 (10th Cir. 1962); Nelson v. Anderson, 245 Minn. 445, 72 N.W.2d 861 (1955).

40. *See* Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946); Ross v. Diamond Match Co., 149 Me. 360, 102 A.2d 858 (1953); 1 HURSH & BAILEY, *supra* note 10, § 3:85, at 633.

41. *See* Brickman-Joy Corp. v. National Annealing Box Co., 459 F.2d 133 (2d Cir. 1972); Brown v. General Motors Corp., 355 F.2d 814 (4th Cir. 1966); Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3d Cir. 1965); Swain v. Boeing Airplane Co., 337 F.2d 940 (2d Cir. 1964); Green v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1963); Rasmus v. A.O. Smith Corp., 158 F. Supp. 70 (N.D. Iowa 1958); Southern Pine Extracts Co. v. Bailey, 75 So. 2d 774 (Fla. 1954); Speyer, Inc. v. Goodyear Tire & Rubber Co., 222 Pa. Super. 261, 295 A.2d 143 (1972); Preston v. Up-Right, Inc., 243 Cal. App. 2d 636, 52 Cal. Rptr. 679 (Dist. Ct. App. 1966); Walk v. J.I. Case Co., 36 App. Div. 2d 60, 318 N.Y.S.2d 598 (1971); Natale v. Pepsi-Cola Co., 7 App. Div. 2d 282, 182 N.Y.S.2d 404 (1959).

42. *See, e.g.*, Brown v. General Motors Corp., 355 F.2d 814 (4th Cir. 1966); Natale v. Pepsi-Cola Co., 7 App. Div. 2d 282, 182 N.Y.S.2d 404 (1959).

43. *See, e.g.*, Southern Pine Extracts Co. v. Bailey, 75 So. 2d 774 (Fla. 1954); Mathias v. Lehn & Fink Products Corp., 70 Wash. 2d 541, 424 P.2d 284 (1967).

44. *See, e.g.*, McCleskey v. Olin Mathieson Chem. Corp., 127 Ga. App. 178, 193 S.E. 2d 16 (1972).

45. Richard v. H.P. Hood & Sons, Inc., 104 R.I. 267, 272, 243 A.2d 910, 912 (1968).

46. *See* Epstein, *supra* note 22, at 274-75.

such conduct is beyond the scope of the warranty, and therefore there has been no breach.[47]

In *Brown v. General Motors Corp.*,[48] plaintiff brought an action under breach of warranty in connection with defendant's manufacture and sale of a bulldozer. Plaintiff, an employee of the purchaser, was working with a fellow mechanic, preparing the machine for the next day's work. In attempting to lubricate the universal joints, plaintiff requested his co-worker to momentarily touch the starter button in order to rotate the drive shaft and facilitate the lubrication. It was dark, however, and the co-employee could not see that the bulldozer was in gear. When the engine started, the machine, then in gear, moved backwards and crushed the plaintiff.[49] The court found that when the plaintiff's co-worker started the machine "he was groping in the dark," and that the manufacturer "did not warrant the safety of the machine against a blind operation of it."[50] Because it was not "reasonably foreseeable that the machine would be activated by one fumbling in the dark," the court concluded that the product had not been used in the manner intended, and recovery was precluded because such misuse was beyond the scope of the warranty.[51] Other decisions adhere to this result by holding that an implied warranty encompasses only the ordinary use or purposes for which the article is sold.[52]

Evidence of misuse may also serve to provide an available defense by negating plaintiff's allegation that the product was defective. The defendant may successfully argue that the product is warranted only insofar as it is used in the manner intended, and if so used, it is indeed merchantable or fit for the purpose intended. *Preston v. Up-Right, Inc.*,[53] is an example of where defendant's evidence of misuse prevented the plaintiff from establishing a product defect. The case involved a breach of warranty claim against the manufacturer of scaffolding, alleging defective wheel brakes which resulted in injury to an employee. In refusing to impose liability on the defendant, the court approved the following instruction:

> Any warranty of the goods involved in this case was based on the assumption that they would be used in a reasonable manner appropriate to the purpose for which they were intended. If you should find that whatever injury or damage the plaintiff suffered in this case resulted solely from his improper use of the goods involved, then plaintiff cannot recover. . . .[54]

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47. Brown v. General Motors Corp., 355 F.2d 814, 820 (4th Cir. 1966); Green v. American Tobacco Co., 325 F.2d 673, 679 (5th Cir. 1963); Procter & Gamble Mfg. Co. v. Langley, 422 S.W.2d 773, 780 (Tex. Civ. App. 1967).

48. 355 F.2d 814 (4th Cir. 1966).

49. The defendant had provided proper instructions for starting the machine in the operator's handbook, which directions were not followed by the workers. Brown v. General Motors Corp., 355 F.2d 814, 817-18 (4th Cir. 1966).

50. *Id.* at 820.

51. *Id.* By its determination of what was "within the scope of the warranty" the court therefore injected the element of foreseeability, a recurring consideration in cases involving misuse. *See* note 64 *infra* with accompanying text.

52. *See* Green v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1963); Grant v. National Acme Co., 351 F. Supp. 972 (W.D. Mich. 1972).

53. 243 Cal. App. 2d 636, 52 Cal. Rptr. 679 (1966).

54. Preston v. Up-Right, Inc., 243 Cal. App. 2d 636, 641, 52 Cal. Rptr. 679,

It is essential to the proving of a defect that the plaintiff negate improper handling or use,[55] and therefore evidence of abnormal use may rebut the allegations of a product defect.

Misuse of the product may also relieve a defendant of liability under a third argument. Where the plaintiff fails to establish that a product defect, rather than his own misuse of the product, was the proximate cause of the harm, recovery is barred.[56] Therefore, even where the evidence establishes the existence of a product defect, unforeseeable acts of third persons, including the plaintiff, may constitute a superseding cause of the injury and remove liability.[57]

In *Hays v. Western Auto Supply Co.*,[58] plaintiff, a young child, was injured when his eight-year-old brother backed a riding mower over him. Plaintiff alleged breach of warranty on the basis that the rotary blade underneath the mower extended beyond the back of the protective deck housing. The court held that operation of the mower in reverse by an eight-year-old was not a normal or intended use of the product, and found that the child's action in operating the mower, not the alleged defect, was the proximate cause of the accident.[59]

Failure to establish proximate cause as a result of misuse also barred recovery in *Rasmus v. A.O. Smith Corp.*,[60] currently the leading statement of Iowa law on product misuse. Plaintiff in *Rasmus* was the purchaser of a farm storage bin which he alleged was defective and resulted in the spoilage of his corn crop. In an action under implied warranty of fitness, defendant manufacturer introduced evidence that the spoilage was due to plaintiff's faulty operation of the bin, rather than a product defect.[61] The court stated that the claimed improper operation of the bin on the part of the plaintiff was "inextricably entwined" with the issue of proximate cause, and found that the evidence taken as a whole was "inconclusive" on the question of cause.[62] Therefore, the court held that the plaintiff had failed to establish by a preponderance of the evidence that the spoilage was due to a defect in the bin,

684 (1966). See also *Natale v. Pepsi-Cola Co.*, 7 App. Div. 2d 282, 182 N.Y.S.2d 404 (1959), where plaintiff, a school child, alleged injury resulting from the explosion of one of defendant's soft drink bottles. The warranty claim failed when defendant proved the plaintiff had attempted to open the bottle on the metal hasp of a schoolgate, an improper use which prevented a finding that the bottle was defective.

55. *See* Jagmin v. Simonds Abrasive Co., 61 Wis. 2d 60, 211 N.W.2d 810 (1973).

56. *Id. See also* Antilles Shipping Co. v. Texaco, Inc., 321 F. Supp. 166 (S.D.N.Y. 1970); Procter & Gamble Mfg. Co. v. Langley, 422 S.W.2d 773 (Tex. Civ. App. 1967).

57. 2 L. Frumer & M. Friedman, Products Liability § 18:07 (1975).

58. 405 S.W.2d 877 (Mo. 1966).

59. Hays v. Western Auto Supply Co., 405 S.W.2d 877, 884 (Mo. 1966).

60. 158 F. Supp. 70 (N.D. Iowa 1958). *See also* Cooley v. Quick Supply Co., 221 N.W.2d 763 (Iowa 1974).

61. The alleged misuse consisted of the buyer installing his own auger and discharge equipment, rather than having the seller furnish and install such equipment, and of the buyer uncovering a sealed opening in the bin which allowed oxygen to seep in and cause the spoilage. *See also* Annot., 4 A.L.R.3d 501, 513 (1965).

62. Rasmus v. A.O. Smith Corp., 158 F. Supp. 70, 95 (N.D. Iowa 1958).

precluding a finding that the warranty had been breached, and entered judgment for the defendant.

It is apparent from the cases that not every use of a product in a manner or for a purpose somewhat different from that intended will remove liability from a defendant.[63] In determining whether a plaintiff's mishandling of the product is severe enough to exceed the scope of the warranty, the courts have resorted to the test of foreseeability. Thus, it is necessary that a product perform properly only in reasonably foreseeable situations, and if the product is used for a purpose or in a manner other than that which the manufacturer intends, or can *reasonably foresee*, the warranty will no longer apply.[64]

The scope of foreseeability of plaintiff misuse is perhaps best illustrated by those situations where the plaintiff has failed to read directions accompanying the product. Recovery has been denied in many cases where a failure to follow directions has been held to constitute misuse beyond the scope of the warranty.[65] It can be persuasively argued by the plaintiff, however, that it is foreseeable that the buyer of a product may not read the directions, or that even though the directions were not followed, the plaintiff used the product in a manner generally employed by a sufficient number of people so as to make the use foreseeable. In *Brickman-Joy Corp. v. National Annealing Box Co.*,[66] plaintiff, a galvanizer, brought a breach of warranty action against a kettle manufacturer for damages resulting when a galvanizing kettle cracked and molten zinc leaked out. Defendant contended that plaintiff's admitted failure to brace the kettle with adequate side supports constituted a misuse of the product. Plaintiff introduced evidence that other galvanizers followed the same procedure and obtained an instruction to the effect that if the manner in which the plaintiff used the kettle "was in accord with practices employed by an appreciable number of galvanizers," this constituted a foreseeable use of the product.[67]

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63. *See, e.g.*, Brickman-Joy Corp. v. National Annealing Box Co., 459 F.2d 133 (2d Cir. 1972); Brown v. Chapman, 304 F.2d 149 (9th Cir. 1962). *See also* 1 HURSH & BAILEY, *supra* note 10, § 3:85, at 633.

64. *See* Grant v. National Acme Co., 351 F. Supp. 972 (W.D. Mich. 1972); Hays v. Western Auto Supply Co., 405 S.W.2d 877 (Mo. 1966). Testing the misconduct with respect to foreseeability makes the question of misuse one for the jury. Raman v. Carborundum Co., 31 App. Div. 2d 552, 295 N.Y.S.2d 534 (1968); Matthias v. Lehn & Fink Products Corp., 70 Wash. 2d 541, 424 P.2d 284 (1967); 1 HURSH & BAILEY, *supra* note 10, § 3:85, at 634.

65. See, for example, *Matthias v. Lehn & Fink Products Corp.*, 70 Wash. 2d 541, 424 P.2d 284 (1967), where it was held that the trial court properly submitted to the jury the question of plaintiff's misapplication of a home permanent set as a result of her failing to follow directions, and affirmed a judgment for the defendant. *See also* Southern Pine Extracts Co. v. Bailey, 75 So. 2d 774 (Fla. 1954); McCleskey v. Olin Mathieson Chem. Corp., 127 Ga. App. 178, 193 S.E.2d 16 (1972); Procter & Gamble Mfg. Co. v. Langley, 422 S.W. 2d 773 (Tex. Civ. App. 1967). *Contra*, W.G. Tufts & Son v. Herider Farms, Inc., 485 S.W.2d 300 (Tex. 1972); Crane v. Sears, Roebuck & Co., 218 Cal. App. 2d 855, 32 Cal. Rptr. 754 (1963) (failure to follow directions is no bar to recovery where the label is inadequate to give the plaintiff actual notice of the danger).

66. 459 F.2d 133 (2d Cir. 1972).

67. Brickman-Joy Corp. v. National Annealing Box Co., 459 F.2d 133, 136 (2d Cir. 1972). Defendant unsuccessfully argued that "commonly used precautions" should be substituted for the "appreciable number" standard in the instruction. *Id.*

While recognizing a split of authority on the issue, it is submitted that the decisions holding that a failure to follow directions is a form of misuse barring recovery represent the better-reasoned view. At least where the directions for use are conspicuous and accompany the product, it seems logically consistent for the defendant to argue that the implied warranties of merchantability and fitness represent only that the product is not defective when used in accordance with the directions and, if so used, is indeed merchantable or fit for the intended purpose.

II. STRICT LIABILITY IN TORT

A. *Rebutting Plaintiff's Case*

To recover damages under section 402A, a plaintiff must establish (1) that the defendant's product was defective, and in most jurisdictions, unreasonably dangerous, and (2) a causal relation between such defect and the damage incurred.[68] From an analytical standpoint, the doctrine of strict liability removes the warranty concepts of privity, notice and disclaimer, but it does not prove the plaintiff's case. The burden of proof which plaintiff must carry is therefore onerous enough that defendant, by introducing evidence of plaintiff's misconduct to rebut the elements of defectiveness and causation, may prevail without raising an affirmative defense.

Presenting evidence to rebut plaintiff's allegations of defect and cause, rather than using such evidence in support of an affirmative defense, may be of tactical advantage to the defense. In the latter situation, the defendant will have the burden of proof in establishing the affirmative defense, whereas by presenting evidence of misconduct to rebut plaintiff's case, the burden of proof is left on the plaintiff.[69]

Assuming the defendant has the proper connection with the product, it is first necessary that the plaintiff establish that the product was defective. In most jurisdictions, this necessitates a showing that the product was unreasonably dangerous, or as stated in the *Restatement*, "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics."[70]

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68. *Restatement (Second) of Torts* § 402A states: "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 . . . ." *See* Greenman v. Yuba Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Kleve v. General Motors Corp., 210 N.W.2d 568 (Iowa 1973).

69. R. HURSH, AMERICAN LAW OF PRODUCTS LIABILITY § 5A:26, at 425-26 n.2 (Cum. Supp. 1973) [hereinafter cited as HURSH].

70. RESTATEMENT (SECOND) OF TORTS § 402A, comment *i* (1965). See also *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1362-63 (Okla. 1974), specifically rejecting the standard put forth in *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972), abandoning the "unreasonably dangerous" requirement. Under Iowa law the plaintiff must prove that the product was in a "defective condition unreasonably dangerous." Kleve v. General Motors Corp., 210 N.W.2d 568, 571 (Iowa 1973).

Beetler v. Sales Affiliates, Inc.,[71] represents an example of a failure to establish a product defect which resulted in a directed verdict for the defendant. The action was one for indemnification brought by the operators of a beauty salon against the manufacturer of a permanent wave solution. The operators had been held liable in a prior action to a patron who had received injuries to her hair and scalp while receiving a permanent wave. Defendant introduced evidence of misapplication on the part of the beauty operator in rebuttal to plaintiff's allegation of a product defect. The court found that there was no evidence pointing to the presence of any foreign substance in the solution, and "lacking any such positive evidence," held that no reasonable influence of a product defect could be legitimately drawn.[72]

It is essential to plaintiff's case that plaintiff also establish that the defect was the proximate cause of the injury.[73] Therefore, the defendant may introduce evidence of plaintiff misconduct which rebuts this element. In *Bradford v. Bendix-Westinghouse Automotive Air Brake Co.*,[74] an action by a motorist against the manufacturer of a truck brake pedal which malfunctioned, the court emphasized that the question of plaintiff's conduct with respect to cause was for the jury. The court held that since establishing proximate cause was a pre-requisite to recovery under strict liability, a manufacturer cannot be held liable "simply because of the existence of the defect when the real cause of the accident was the conduct of the user of the product."[75]

An additional factor, also regarded as an element of plaintiff's case, may develop to the defendant's advantage in rebutting a strict liability claim. It is necessary that the plaintiff prove that the product was being used at the time of the injury for the purpose and in the manner intended.[76] The allegation of proper use essentially goes to both the questions of defectiveness and causation, which are often inseparable, and therefore defendant's evidence of misuse may negate either or both.[77]

There are then two situations in which a defendant may introduce evidence of plaintiff misconduct to rebut plaintiff's case, both of which involve misuse of the product: (1) defendant may introduce evidence of misuse to show the plaintiff's conduct rather than a product defect led to the harm; and, (2) even if defendant's product is found to be defective and a concurring cause

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71. 431 F.2d 651 (7th Cir. 1970).
72. Beetler v. Sales Affiliates, Inc., 431 F.2d 651, 654 (7th Cir. 1970).
73. Kleve v. General Motors Corp., 210 N.W.2d 568 (Iowa 1973); Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974); Bradford v. Bendix-Westinghouse Automotive Air Brake Co., 517 P.2d 406 (Colo. Ct. App. 1973).
74. 517 P.2d 406 (Colo. Ct. App. 1973).
75. Bradford v. Bendix-Westinghouse Automotive Air Brake Co., 517 P.2d 406, 413 (Colo. Ct. App. 1973). *See also* Parzini v. Center Chem. Co., 129 Ga. App. 868, 201 S.E.2d 808 (1973).
76. Sweeney v. Matthews, 94 Ill. App. 2d 6, 236 N.E.2d 439 (1968); Olson v. Babbitt, 189 N.W.2d 701 (Minn. 1971); Preston v. Up-Right, Inc., 243 Cal. App. 2d 636, 52 Cal. Rptr. 679 (Dist. Ct. App. 1966); RESTATEMENT (SECOND) OF TORTS § 402A, comment *h* (1965).
77. *See* HURSH, *supra* note 69, § 5A:11, at 383-84. *See also* Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 425, 261 N.E.2d 305, 310 (1970).

of the injury, evidence of misuse may establish that the plaintiff's conduct amounted to a superseding cause, and hence bar recovery.

When additional consideration is given to the common law defenses of contributory negligence and assumption of risk, four possible situations exist where the defendant may raise the issue of plaintiff misconduct. As will be shown, only contributory negligence in the traditional sense will not constitute a defense; in the other three situations liability may be avoided.[78]

B. *Contributory Negligence*

Comment *n* to section 402A of the *Restatement (Second) of Torts* provides that:

> 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 of assumption of risk, is a defense under this section as in other cases of strict liability.[79]

The *Restatement* view is therefore in accord with the decisions reached by the courts that contributory negligence, at least as defined in section 402A, is not a defense to strict liability in tort.[80] While more culpable conduct of a plaintiff may justifiably preclude recovery, the policy considerations of strict liability make the defense of contributory negligence unavailable.

In *Shamrock Fuel & Oil Sales Co. v. Tunks*,[81] the court held that the contributory negligence of a minor in failing to discover that kerosene sold by defendant had a dangerously low flashpoint was not a bar to recovery. Under strict liability, said the court, the standard of care of a reasonably prudent man has no applicability where use of a defective product results in injury.[82] Though a few decisions appear to hold otherwise,[83] it is generally recognized that where a successful defense is interposed under the label "contributory negligence," the actual conduct barring recovery is more appropriately classified as misuse of the product or assumption of risk.[84]

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78. *See* HURSH, *supra* note 69, § 5A:26, at 420-21.
79. RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* (1965).
80. Contributory negligence is not a defense to strict liability in tort in Iowa. *See* Hawkeye Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 380 (Iowa 1972). *See also* Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 425, 261 N.E.2d 305, 310 (1970).
81. 416 S.W.2d 779 (Tex. 1967).
82. Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779, 783-84 (Tex. 1967).
83. A few decisions suggest a "reasonable care" standard may be applied. For example, in *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967), it was held that a consumer who fails to exercise reasonable care for his own safety may be barred from recovery under the label of "contributory negligence." *Id.* at 460-61, 155 N.W.2d at 63-64. *See also* Maiorino v. Weco Products Co., 45 N.J. 570, 214 A.2d 18 (1965); Epstein, *supra* note 22, at 281-82.
84. *See* Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 425-26, 261 N.E.2d 305, 310 (1970); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969).

C. *Assumption of Risk*

There is general agreement among the courts, and it is the position of the *Restatement*, that a plaintiff, who after actual discovery of the dangerous propensities of a product proceeds to use that product in disregard of the known danger, may not recover under the theory of strict liability.[85] The test for whether the user has assumed the risk of using a product known to be dangerously defective is a subjective one, for the reason that it is the user's personal knowledge and appreciation of the danger that is being assessed, and not that of a reasonably prudent person.[86] It must be recognized that assumption of risk—as with any affirmative defense—is a valid defense only where properly raised by the pleadings and proven.[87]

The degree of culpability and proof necessary for a defendant to prevail on the theory of assumption of risk was discussed in *Sweeney v. Max A.R. Matthews & Co.*[88] In *Sweeney*, the plaintiff-carpenter brought an action based on strict liability in tort against the seller of special purpose concrete nails for injuries suffered when one of the nails shattered and a fragment struck plaintiff in the eye. It was shown at trial that, prior to the injury, plaintiff had struck several nails, the heads of which had broken off and traveled across the room where he was working. Defendant contended that in view of this fact, plaintiff had knowledge of the danger but proceeded to voluntarily assume the risk.

In its treatment of the defense, the court acknowledged that proof of assumption of risk is usually determined largely by subjective evidence, and that a jury "is not required to accept a plaintiff's account of the incident . . . ."[89] Factors to be considered by a jury, said the court, include "the user's age, experience, knowledge and understanding, as well as the obviousness of the defect and the danger it poses."[90] In *Sweeny*, while there was substantial evidence that plaintiff continued to use the nails even though one after the other shattered upon impact, as well as evidence that plaintiff failed to wear safety glasses, although they were at hand, the court held that there was counter-balancing factors which the jury could consider, such as the fact that the plaintiff was only nineteen years old and had worked as a carpenter for only a short time. On this basis, the court found that the evidence did not clearly show assumption of risk, and affirmed a plaintiff's judgment.[91] A con-

85. RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* (1965). *See also* Clarke v. Brockway Motor Trucks, 372 F. Supp. 1342 (E.D. Pa. 1974); Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970); Hawkeye Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373 (Iowa 1972); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969); Hawkins Constr. Co. v. Matthews Co., 209 N.W.2d 643 (Neb. 1973); Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974).

86. Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 430, 261 N.E.2d 305, 312 (1970). The determination of whether the plaintiff knowingly encountered the risk is therefore a jury question. *Id.*

87. Hawkeye Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 381 (Iowa 1972).

88. 46 Ill. 2d 64, 264 N.E.2d 170 (1970).

89. Sweeney v. Max A.R. Matthews & Co., 46 Ill. 2d 64, 66, 264 N.E.2d 170, 171 (1970).

90. *Id. See also* Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

91. The defendants requested an instruction relating to "ordinary dangers" in the use

trary result was reached in *Bennett v. International Shoe Co.*,[92] where it was held that the plaintiff, a purchaser of a pair of shoes manufactured by the defendant, was aware that the soles were smooth and slick and was therefore barred from recovery for injuries received in a fall while wearing the shoes.

The issue of assumption of risk often arises in the context of an employee's exposure to dangerous conditions related to his employment. In *Ralston v. Illinois Power Co.*,[93] an employee brought an action under strict liability against the manufacturer of trenching equipment for injuries received when his foot became entangled in a rotating auger. The evidence presented at trial showed that the plaintiff had previously worked with such equipment and knew the dangers involved in its usage.

Defendant raised assumption of risk, and the plaintiff attempted to rebut the defense by submitting that he had acted at the direction of his foreman. The court, in barring recovery, held that an employee cannot exculpate himself from the legal consequences of his acts on the grounds that he acted at the command of a superior, reasoning that such an order "does not make his exposure to the risk involuntary."[94] Although assumption of risk may therefore be available in such a fact situation, there is considerable contrary authority to the effect that where the nature of one's employment requires exposure to certain hazards, recovery under strict liability should be allowed on the basis that the plaintiff's conduct was not unreasonable or was not "voluntary."[95]

D. *Misuse of the Product*

As previously discussed,[96] the requirement that the person injured be using the product in a way in which it was intended to be used is one element of plaintiff's cause of action. Evidence of misuse is therefore admissible to rebut plaintiff's allegations of defectiveness and proximate cause, and may be raised even in situations where defectiveness is established as a concurring cause of the injury.[97] The defense of misuse is incorporated in the *Restatement*

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of the nails which the plaintiff should have recognized, and which would have served as the basis for the defense of assumption of risk. The court rejected the instruction, stating that in an action based on strict liability in tort, the defect involved had to be of an "unreasonably dangerous" nature, and that the defense instruction was therefore misleading and incorrect. Sweeney v. Max A.R. Matthews & Co., 46 Ill. 2d 64, 69, 264 N.E.2d 170, 173 (1970).

92. 275 Cal. App. 2d 797, 80 Cal. Rptr. 318 (1969). *See also* Henrich v. Cutler Hammer Co., 460 F.2d 1325 (3d Cir. 1972).

93. 13 Ill. App. 3d 95, 299 N.E.2d 497 (1973).

94. Ralston v. Illinois Power Co., 13 Ill. App. 3d 95, 98, 299 N.E.2d 497, 499 (1973).

95. *See, e.g.*, Brown v. Quick Mix Co., 75 Wash. 2d 833, 454 P.2d 205 (1969). In cases involving dangerous industrial machinery, it has been held that acts of a plaintiff will not bar recovery where the misconduct was an act which a safety device would have prevented. Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972). *See also* 1 Hursh & Bailey, *supra* note 10, § 4:36, at 741-42.

96. *See* note 76 *supra* and accompanying text. *See also* Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969).

97. See *Maiorino v. Weco Products Co.*, 45 N.J. 570, 214 A.2d 18 (1965), where the court held there was nothing under the concept of strict liability to justify holding the defendant responsible for the plaintiff's own proximately contributory carelessness. *See also* Hursh, *supra* note 69, § 5A:26, at 426.

as section 402A, comment *h*, which provides: "A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling . . . or from abnormal preparation for use . . . the seller is not liable."[98]

The test under section 402A as to whether misuse will bar recovery is that of foreseeability, measured by what may be "objectively and reasonably" foreseen by the defendant.[99] Alternatively, it is defined as "the kinds of risks which the enterprise is likely to create . . . or . . . which are inherent in the proper use of the products for the purposes for which they were intended."[100] What uses of a product will be held foreseeable are well illustrated by cases involving a plaintiff's mishandling of a product by not following directions. In *Anderson v. Klix Chemical Co.*,[101] the plaintiff brought an action under strict liability against the manufacturer of a cleansing solution. Defendant alleged plaintiff had misused the product by applying the product with a sprayer instead of a mop or brush as required in the directions. The container as manufactured did not include a sprayer, but the distributor, who had sold the product to the plaintiff, had attached one. Therefore, although the plaintiff admittedly used the solution contrary to directions, the issue was whether the defendant, as a reasonably prudent manufacturer, could foresee that a distributor might attach a sprayer to the container before selling it to a user. The court held that the presence of a sprayer on the container would permit the jury to find that the plaintiff acted reasonably in spraying the solution instead of applying it as directed. Further, the court found that the label inadequately warned the plaintiff of the consequences of misuse: "It is clear from the better-reasoned cases that directions for use, which merely tell how to use the product, and which do not say anything about the danger of foreseeable misuse, do not . . . satisfy the duty to warn."[102] The misuse was therefore held foreseeable, and the defendant found liable.[103]

Less foreseeable forms of misuse which have precluded recovery include the "hot-wiring" of a tractor to by-pass a safety device,[104] the overloading of an airplane which was found to be the cause of a subsequent crash,[105] and the use of an automobile jack not suited for use on another make of car.[106] A

98. RESTATEMENT (SECOND) OF TORTS § 402A, comment *h* (1965).
99. Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 424, 261 N.E.2d 305, 309 (1970). *See also* Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965).
100. Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 859 (5th Cir. 1967).
101. 256 Ore. 199, 472 P.2d 806 (1970).
102. Anderson v. Klix Chem. Co., 256 Ore. 199, 209, 472 P.2d 806, 810 (1970).
103. In finding the use foreseeable, the court noted that the aperture of the container was suitable for the attachment of a sprayer, that application of liquids by spraying is "very popular," and that many other liquids are marketed with sprayer attachments. *Id.* at 210, 472 P.2d at 811.
104. Ford Motor Co. v. Eads, 224 Tenn. 473, 457 S.W.2d 28 (1970).
105. O'Keefe v. Boeing Co., 335 F. Supp. 1104 (S.D.N.Y. 1971).
106. Brandenburg v. Weaver Mfg. Co., 77 Ill. App. 2d 374, 222 N.E.2d 348 (1966). See also *Keener v. Dayton Electric Manufacturing Co.*, 445 S.W.2d 362 (Mo. 1969), where the defendant obtained an instruction that plaintiff's operation of an electric pump while standing ankle deep in water, with no rubber gloves or rubber boots, was an abnormal use of the product in a manner not "reasonably anticipated."

change in the design of a product so that it is not in the same condition as it was when manufactured may also constitute a successful defense.[107]

III. CONCLUSION

With the elimination of the fault concept under modern enterprise liability, it is necessary that the courts fashion other doctrines which will limit a defendant's liablity. The evolvement of defenses to products liability has produced much confusion, a great deal of which is attributable to semantical conflicts. It is therefore submitted that a major step toward clearing the murky waters would be achieved by application of universal definitions. Adoption of the *Restatement* definitions of contributory negligence and assumption of risk by all jurisdictions appears possible without disturbing the reasoning of prior decisions. Misuse of the product when defined as "use of the product in a manner that could not have been reasonably foreseen,"[108] and applied to test the elements of defectiveness and causation, can be interposed as an additional defense consistent with the policy of strict liability. Until the concept of comprehensive social insurance becomes acceptable, the courts must balance consumer protection with the need for viable enterprise in allocating the risk of loss.[109] The defenses herein described represent a degree of enterprise protection against strict liability to which the courts should give wide deference in assuring that the balance achieved is an equitable one.

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107. *See* Erickson v. Sears, Roebuck & Co., 240 Cal. App. 2d 793, 50 Cal. Rptr. 143 (Dist. Ct. App. 1966); 1 HURSH & BAILEY, *supra* note 10, § 4:40, at 756-57; Epstein, *supra* note 22, at 280-82.

108. Epstein, *supra* note 22, at 270.

109. Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 862 (5th Cir. 1967). One writer has suggested that balancing contributory negligence with strict liability in tort should be achieved by applying a pure system of comparative fault; that is, where a plaintiff's contributory fault serves as a contributing cause of the harm, recovery should be allowed but damages should be reduced in proportion to the plaintiff's negligence. Wade, *Strict Tort Liability*, 44 MISS. L.J. 825, 850 (1973). For an application of this theory, see *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 290 (5th Cir. 1975). It is submitted that once again injecting the fault concept into strict liability litigation is regressive and contrary to the policy bases of enterprise liability.

UNIFORM RECIPROCAL LEGISLATION TO ENFORCE FAMILIAL DUTIES OF SUPPORT

The family is still the unit of American society. Its solidarity is built on ties of mutual affection growing out of a common intellectual, moral and physical inheritance. But when these ties fail the law must lend its aid. Its most tangible way of preserving the family is by the creation and enforcement of duties of support.[1]

I. Introduction

By 1949 the problem of interstate enforcement of duties of support had become acute. "[T]he Social Security Administration announced that the total bill for aid to dependents where the father was absent and not supporting was approximately $205,000,000 a year for the nation and the states."[2] Efforts by dependents seeking support from transient obligors were seriously hampered by costly, self-defeating criminal laws and ineffective civil remedies. Destitute families, unable to afford the expense of following the fleeing obligor from state to state, increasingly sought state aid through welfare departments for support. Distraught by this situation, lawmakers promulgated and adopted the "Runaway Pappy Act"[3] and similar legislation.

Despite these legislative attempts, the issue of enforcement of duties of support remains the object of much concern today.[4] The purpose of this Note is

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1. Brockelbank, *The Problem of Family Support: A New Uniform Act Offers a Solution*, 37 A.B.A.J. 93 (1951) [hereinafter cited as Brockelbank, *The Problem of Family Support*].

2. Handbook of the National Conference of Commissioners on Uniform State Laws 172 (1950) [hereinafter cited as Handbook (1950)]. The 1952, 1958, and 1968 *Handbooks* will be cited in a similar fashion.

3. *See* W. Brockelbank, Interstate Enforcement of Family Support (2d ed. F. Infausto 1971). The phrase is the subtitle of Professor Brockelbank's superlative, in-depth study of the Uniform Reciprocal Enforcement of Support Act (URESA). Professor Brockelbank was chairman of the Special Committee on Review of Uniform Desertion and Non-Support Act (later called the Special Committee on URESA) of the National Conference of Commissioners on Uniform State Laws which promulgated the URESA. The volume cites numerous articles by the press, law review commentaries and court decisions concerning the uniform Acts. *Id.* at 5, 6 nn.11-12. Almost one hundred pages are devoted to suggested forms, and comments thereon, to be used by courts and attorneys. *Id.* at 177-272.

4. In response to the growing concern over child support payments, Congress enacted, on January 4, 1975, federal legislation to enforce support obligations owed by absent parents to their children. *See* discussion at Part IV, *infra*. The Friend of the Court in Polk County, Iowa, is enforcing court-ordered child support by having obligors cited for contempt if their state and federal income tax refunds and rebates are not turned over to be applied to past due and owing payments. About 550 tax refunds were collected between January and April of 1975 with the largest being almost $1,100. Nearly 9,000 divorced fathers and some mothers were under court order to pay child support, and approximately 35 percent of these payments were overdue in April, 1975. Failure to pay the ordered support results in a contempt hearing and possible jail confinement. Interview with Alan A. Anderson, Chief Attorney of the Polk County, Iowa, Friend of the Court, June 11, 1975.