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James Joseph Gettel

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Comparative Fault as a Defense to Breach of Warranty Under the Uniform Commercial Code

In practice it may be quite difficult, given a set of facts, to distinguish liability for breach of warranty from the various tort theories of products liability. A plaintiff can often bring an action for injuries caused by a defective product based on theories of negligence, strict products liability, and breach of warranty.¹ The reasoning behind each cause of action is that the seller should be responsible for the damages caused by his product,² but each theory sets forth a somewhat different standard for liability.

Originally, warranty developed under the common law as a tort cause of action.³ Gradually, buyers began to bring warranty actions based on contract, and courts began to recognize warranty as a term to a sales contract.⁴ Thus, when states enacted the Uniform Commercial Code (hereinafter U.C.C.) to reform commercial law, the statute included warranty provisions.⁵ The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act⁶ further increased consumer protection in warranty law.

The U.C.C. provisions for warranty are included in § 2-313, dealing with express warranties, and §§ 2-314 and 2-315, dealing with implied warranties of merchantability and fitness for a particular purpose. For a plaintiff to bring a successful action for breach of warranty, he must first prove that the defendant made a warranty under § 2-313, § 2-314, or § 2-315. He must then prove that the goods were defective at the time of sale in that they did not conform to the warranty. Next, he must show that the defect in the product was the proximate cause of his injury. Finally, he must prove his damages.⁷

1. See I L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 3 (1978); I R. HURSH & H. BAILEY, *AMERICAN LAW OF PRODUCTS LIABILITY* §§ 1:2, 1:3 (2d ed. 1974); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §§ 96-98 (4th ed. 1971).

2. W. PROSSER, *supra* note 1, § 96.

3. *Id.* § 97.

4. See *Rasmus v. A.O. Smith Corp.*, 158 F. Supp. 70, 78-81 (D. Iowa 1958); W. PROSSER, *supra* note 1, § 95.

5. For a history of the U.C.C., see Malcom, *The Uniform Commercial Code in the United States*, 12 INT'L & COMP. L.Q. 226 (1963).

6. 15 U.S.C. §§ 2301-2312 (1979). The Act is limited to consumer buyers and consumer products. It sets forth minimum disclosure requirements for written warranties and provides certain remedies to consumers for nondisclosure or nonconformity. The Act does not affect the provisions of the U.C.C. discussed in this note except to limit the kinds of disclaimers that one may use with respect to implied warranties.

7. U.C.C. § 2-314 comment 13 (1978). See *infra* note 19.

The plaintiff proceeding on a negligence theory must meet several of the same requirements as required for breach of warranty. In both warranty and negligence, for example, the plaintiff must prove cause in fact⁸ and proximate causation⁹ on the part of the defendant. In a negligence suit, however, the plaintiff must show that the defendant was negligent by failing to exercise due, ordinary, or reasonable care in the manufacture or sale of the product. The U.C.C. is not the basis for negligence liability.

The concept of strict tort liability is also distinct from warranty liability arising under the U.C.C. The Second Restatement of the Law of Torts, § 402A¹⁰ indicates that strict tort liability applies without regard to whether there was a warranty, express or implied, or whether privity, notice, or disclaimer limited the warranty. The plaintiff must show that the product that the defendant manufactured or sold was in a defective condition, that it was unreasonably dangerous to the user or consumer or to his property, and that the product, in a defective condition, caused harm to the consumer or user or to his property. Additionally, the plaintiff must show that the defendant engaged in the business of selling the product and that the product reached the user or consumer without substantial change in the condition in which it left the seller.¹¹

Once the plaintiff has established a case in strict tort liability, negligence or breach of warranty, he could encounter a variety of defenses. Among these are defenses based upon the plaintiff's own improper behavior, such as contributory negligence, assumption of the risk, or misuse. In actions based upon breach of warranty, however, courts widely disagree over the availability of defenses based upon the actions of the

8. Cause in fact is the particular cause that produces an event and without which the event would not have occurred. Thus, in a products liability suit the plaintiff must demonstrate that the defective product brought about the resultant injury.

9. Proximate cause is the dominant, moving or producing cause. The proximate cause of an injury is the primary cause which produces the injury without which the injury could not happen. A defective product was the proximate cause of the injury if it played a substantial part in bringing about or causing the injury and the injury resulted from the defective product.

10. RESTATEMENT (SECOND) OF TORTS § 402A (1965) states:

- (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.

11. For sources on strict products liability, see generally L. FRUMER & M. FRIEDMAN, *supra* note 1; R. HURSH & H. BAILEY, *supra* note 1.

injured party.¹² The problem of classifying warranty as either a contract or tort cause of action leads to a question of whether contributory negligence is a proper defense.¹³ Additionally, principles of contributory negligence, assumption of the risk, misuse, proximate cause, duty to mitigate damages, duty of a buyer to inspect goods, and failure of a buyer to rely on a warranty often overlap and courts use these defenses interchangeably. The rules are quite unsettled concerning proper defenses to warranty actions. The resulting uncertain state of the law presents problems for the defendant seeking to base his defense on the plaintiff's actions.¹⁴

Much of this confusion no longer exists with regard to defenses to negligence or strict products liability actions. Several jurisdictions have adopted comparative negligence in negligence actions¹⁵ and comparative responsibility in strict products liability actions¹⁶ to replace the traditional defenses based upon a plaintiff's contributory behavior. Under comparative principles, courts decide the relative amounts that the plaintiff's actions and the defendant's defective product contributed to the injury and apportion the damages accordingly.

In addition to eliminating the confusion over various defenses, application of comparative principles often produces a more equitable result than the use of traditional defenses. The policy behind defenses such as contributory negligence is that if a court is to hold one person liable for his fault then the court should also consider the fault of the person seeking to enforce that liability.¹⁷ Yet, while this reasoning is based on fairness, the problem has been that courts apply the defenses as harsh all-or-nothing rules.¹⁸ Jurisdictions adopt comparative fault to produce a more equitable result by apportioning the fault between the responsible parties, rather than having the claimant's contributory fault totally bar recovery.

In breach of warranty actions, however, only a few jurisdictions apply comparative fault. Thus, warranty trails behind the increasing trend of courts to use comparative principles in products liability actions. This note discusses the current problems with the use of traditional defenses based upon a plaintiff's contributory behavior in warranty actions under the U.C.C. and examines the various methods of comparative fault which might solve these problems. Finally, this

12. See 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.01[3] (1978); 1 R. HURSH & H. BAILEY, *supra* note 1, § 3:81; J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 11-8 (2d ed. 1980); Annot. 4 A.L.R.3d 501 (1965).

13. See *infra* text accompanying notes 31-34.

14. See *infra* notes 53-54 and accompanying text.

15. See *infra* note 64.

16. See *infra* note 65.

17. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 22.3, at 1207 (1956).

18. See *infra* notes 55-58 and accompanying text.

note urges adoption of the new Uniform Comparative Fault Act as the best scheme of comparative fault for breach of warranty actions under the U.C.C.

I. DEFENSES TO A BREACH OF WARRANTY ACTION UNDER THE U.C.C.

The warranty provisions of the U.C.C. do not explicitly provide for defenses to warranty actions based upon a plaintiff's contributory behavior. But demonstration by a seller that the loss the plaintiff seeks to recover resulted from some event following delivery can work as a defense.¹⁹ The U.C.C., in comment 5 to § 2-715, gives only two examples of defenses based upon a plaintiff's contributory behavior: unreasonable failure to inspect goods and discovery of a defect in the goods prior to use. These actions by the plaintiff demonstrate that the injury did not proximately result from the breach.²⁰

Other U.C.C. provisions also speak in terms of proximate cause and suggest that a plaintiff may not be able to recover for damages that he caused. Section 2-714(2) provides recovery to the plaintiff for the loss of value in a good because of breach of warranty "unless special circumstances show proximate damages of a different amount."²¹ Section 2-715(2)(b) grants consequential damages for injury to person or property proximately resulting from the breach of warranty.²²

According to comment 13 to § 2-314, the plaintiff-buyer must demonstrate that the breach of warranty is the proximate cause of the

19. Comment 13 to U.C.C. § 2-314 (1978) states:

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

20. Comment 5 to U.C.C. § 2-715 (1978) states:

Subsection (2)(b) states the usual rule as to breach of warranty, allowing recovery for injuries "proximately" resulting from the breach. Where the injury involved follows the use of goods without discovery of the defect causing the damage, the question of "proximate" cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defects. If it was not reasonable for him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty.

21. U.C.C. § 2-714(2)(1978) states: "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

22. U.C.C. § 2-715(2)(b)(1978) states: "Consequential damages resulting from the seller's breach include . . . injury to person or property proximately resulting from any breach of warranty."

injury. If the buyer's actions alone cause the injury, the breach of warranty is not the proximate cause of the injury and the buyer cannot recover. However, the U.C.C. does not explicitly prevent the buyer from recovering damages when he is only partially at fault. Thus, the U.C.C. leaves a great deal of uncertainty concerning the proper defenses to breach of warranty actions. Therefore, courts apply a wide variety of traditional defenses based upon a plaintiff's contributory behavior to warranty actions.²³

II. TRADITIONAL DEFENSES TO AN ACTION FOR BREACH OF WARRANTY

Among the defenses applied to breach of warranty actions are contributory negligence, assumption of the risk, misuse, proximate cause, duty to mitigate damages, duty of a buyer to inspect goods, and failure of a buyer to rely on a warranty. These defenses, based on the improper behavior of the plaintiff, are not mutually exclusive, and a court can combine them.²⁴

A. *Contributory Negligence*

A number of states²⁵ permit contributory negligence as a defense to warranty actions.²⁶ In these jurisdictions, if the plaintiff does not exercise due, ordinary, or reasonable care in his use of the product, he may not recover damages for breach of warranty. The plaintiff's failure to discover the dangerous product and to guard against it is no defense; there must be some fault on the plaintiff's part in his use of the prod-

23. These problems exist in warranty law whether or not governed by the U.C.C. Because the U.C.C. does not make specific provisions for defenses to warranty actions, courts will also follow pre-Code law. See U.C.C. § 1-103 (1978). Accordingly, this note presents cases not governed by the U.C.C., as well as those where the U.C.C. was applied.

24. See *infra* notes 42-44 and accompanying text.

25. The exact number of states permitting any one of the defenses discussed *infra* can only be guessed. This is partly because of the conflicting case law within single jurisdictions. See *infra* note 35. Additionally, several jurisdictions have recently enacted comparative fault statutes that may be applied instead of existing case law. See *infra* notes 96-106.

26. See, e.g., *Pepsi Cola Bottling Co. v. Superior Burner Serv. Co.*, 427 P.2d 836 (Alaska 1967); *Coleman v. American Universal*, 264 So. 2d 451, 454 (Fla. Dist. Ct. App. 1972); *Gardner v. Coca-Cola Bottling Co.*, 267 Minn. 505, 511, 127 N.W.2d 557, 562 (1964); *Stephan v. Sears, Roebuck & Co.*, 110 N.H. 248, 266 A.2d 855 (1970); *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 212 A.2d 769 (1965); *Ettin v. Ava Truck Leasing*, 100 N.J. Super. 515, 522, 242 A.2d 663, 666-67 (1968); *Uribe v. Armstrong Rubber & Tire Co.*, 55 A.D.2d 869, 390 N.Y.S.2d 419 (1977); *Vernon v. Lake Motors*, 26 Utah 2d 269, 488 P.2d 302 (1971). Note that each of the above cases is from a jurisdiction that has instituted comparative fault in strict products liability cases. See *infra* note 65. Several jurisdictions have comparative fault statutes that purport to be applicable to warranty actions but have not yet been applied. See *infra* notes 96-106 and accompanying text. See also *Reed v. AMF Western Tool, Inc.*, 431 F.2d 345 (9th Cir. 1970); *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); *Murphy v. Petrolane-Wyoming Gas Serv.*, 468 P.2d 969 (Wyo. 1970).

uct.²⁷ Likewise, contributory negligence does not bar a plaintiff's recovery when his negligence was foreseeable and he was merely testing the warranty.²⁸ The plaintiff is not contributorily negligent if his actions are simply in reliance on the warranty.

*Hansen v. Firestone Rubber Co.*²⁹ is an example of this limitation in the application of contributory negligence to warranty actions. In *Hansen*, the plaintiff-buyer sued the defendant-manufacturer for personal injuries caused when his new tires failed to perform as expressly warranted. The manufacturer sought to demonstrate that the buyer was negligent in using the tires within the warranted limits because the buyer was driving through a dangerous curve when the tires failed. However, the court refused to consider actions of the buyer that merely brought about circumstances in which he tested the warranty. The court disallowed the use of contributory negligence because the defendant failed to prove that the plaintiff was unjustified in his reliance on the warranty.³⁰

Some courts allow the defense of contributory negligence when the facts can support either negligence or breach of warranty theories because the label should not make a difference.³¹ Other courts emphasize that breach of warranty historically sounded in tort³² and, therefore, contributory negligence is a proper defense. Conversely, several jurisdictions do not allow contributory negligence as a defense in an action for breach of warranty,³³ sometimes holding that contributory negligence is a proper defense only to negligence actions.³⁴ These courts reason that breach of warranty is a contract, rather than tort, cause of action and refuse to apply the tort concept of contributory negligence.

The rules of whether to apply contributory negligence to breach of

27. *McCabe v. L.K. Liggett Drug Co.*, 330 Mass. 177, 112 N.E.2d 254 (1953); *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 212 A.2d 769 (1965); W. PROSSER, *supra* note 1, § 102.

28. *Brown v. Chapman*, 304 F.2d 149 (9th Cir. 1962); *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N.W. 309 (1939); *Imperial Die Casting Co. v. Covil Insulation Co.*, 264 S.C. 604, 216 S.E.2d 532 (1975).

29. 276 F.2d 254 (6th Cir. 1960).

30. *Id.* at 259.

31. *Arnaud's Restaurant, Inc. v. Cotter*, 212 F.2d 883 (5th Cir. 1954), *cert. denied*, 348 U.S. 915 (1955).

32. *See Gardner v. Coca-Cola Bottling Co.*, 267 Minn. 505, 127 N.W.2d 557 (1964); *Nelson v. Anderson*, 245 Minn. 445, 72 N.W.2d 861 (1955); *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612, 614-15 (1958).

33. *See, e.g., Mathews v. Ford Motor Co.*, 479 F.2d 399 (4th Cir. 1973); *Brown v. Chapman*, 304 F.2d 149 (9th Cir. 1962); *Holt v. Stihl*, 449 F. Supp. 693 (E.D. Tenn. 1977); *Rasmus v. A.O. Smith Corp.*, 158 F. Supp. 70 (N.D. Iowa 1958); *Preston v. Upright, Inc.*, 243 Cal. App. 2d 636, 52 Cal. Rptr. 679 (1966); *Williams v. Brown Mfg. Co.*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970); *Jarnot v. Ford Motor Co.*, 198 Pa. Super. 422, 156 A.2d 568 (1959).

34. *See, e.g., Rasmus v. A.O. Smith Corp.*, 158 F. Supp. 70, 78 (N.D. Iowa 1958); *Kassouf v. Lee Bros.*, 209 Cal. App. 2d 568, 26 Cal. Rptr. 276, 279 (1962); *Shields v. Morton Chem. Co.*, 95 Idaho 674, 518 P.2d 857, 859 (1974).

warranty actions are unsettled even within single jurisdictions.³⁵ Moreover, courts compound the problems of delineating defenses by using other defenses similar to contributory negligence under different labels. For example, in some jurisdictions where contributory negligence is not a defense to liability, courts may consider a plaintiff's negligence in the mitigation of damages.³⁶ Taking a different approach, at least one court has set forth the Restatement of Contracts § 336³⁷ as the better alternative to applying contributory negligence, finding that a plaintiff who should have foreseen or could have reasonably avoided harm cannot recover damages.³⁸

B. *Assumption of the Risk*

Another defense used in place of, and often confused with, contributory negligence is assumption of the risk. While the defenses of contributory negligence and assumption of the risk often overlap, they are separate defenses applicable in different situations. Contributory negligence refers to a plaintiff's conduct that is below the standard required to protect himself, whereas assumption of the risk refers to a plaintiff's voluntary action in the face of a known risk.³⁹ Assumption of the risk can include situations where a party is unreasonable in voluntarily proceeding in the face of known danger⁴⁰ or where a buyer continues to

35. See, e.g., *Colorado*: *Dallison v. Sears, Roebuck & Co.*, 313 F.2d 343, 345-47 (10th Cir. 1962) (allowing contributory negligence); *Hensley v. Sherman Car Wash Equip. Co.*, 33 Colo. App. 279, 520 P.2d 146, 148 (1974) (disallowing contributory negligence). *Idaho*: *Reed v. AMF Western Tool, Inc.*, 431 F.2d 345, 347-48 (9th Cir. 1970) (defense); *Henderson v. Comico Am. Inc.*, 95 Idaho 690, 518 P.2d 873, 877-78 (1974) (no defense). *Indiana*: *Scotco, Inc. v. Dormeyer Indus.*, 402 F.2d 336, 338 (7th Cir. 1968) (allowing); *Dagley v. Armstrong Rubber Co.*, 344 F.2d 245, 250 (7th Cir. 1965) (dictum stating that contributory negligence is no defense); *Gregory v. White Truck & Equip. Co.*, 163 Ind. App. 240, 323 N.E.2d 280, 285 (1975) (no defense). *Kansas*: *Frier v. Proctor & Gamble Distrib. Co.*, 173 Kan. 733, 252 P.2d 850, 852 (1953), as explained in *Graham v. Bottenfield's Inc.*, 176 Kan. 68, 269 P.2d 413, 418 (1954) (defense); *Bereman v. Burdolski*, 204 Kan. 162, 460 P.2d 567, 573 (1969) (defense); *Challis v. Hartloff*, 136 Kan. 823, 18 P.2d 199, 203 (1933) (no defense); *Simmons v. Wichita Coca-Cola Bottling Co.*, 181 Kan. 35, 309 P.2d 633, 635 (1957) (no defense). *Missouri*: *Bullock v. Benjamin Moore & Co.*, 392 S.W.2d 10, 13-14 (Mo. App. 1965) (defense); *Williams v. Ford Motor Co.*, 454 S.W.2d 611, 617-18 (Mo. App. 1970) (no defense). *Ohio*: *Di Vello v. Gardner Mach. Co.*, 46 Ohio Op. 161, 102 N.E.2d 289, 292-93 (1951) (defense); *Wood v. Gen. Elec. Co.*, 159 Ohio St. 273, 112 N.E.2d 8, 11 (1953) (no defense). *Washington*: *Matthias v. Lehn & Fink Prods. Corp.*, 70 Wash. 2d 541, 424 P.2d 284, 289-90 (1967) (defense); *Stark v. Allis Chalmers & Northwest Roads, Inc.*, 2 Wash. App. 399, 467 P.2d 854, 858 (1970) (no defense).

36. *Hinderer v. Ryan*, 7 Wash. App. 434, 499 P.2d 252 (1972). See also Annot., 33 A.L.R.2d 511 (1954).

37. RESTATEMENT OF CONTRACTS § 336 (1962) states: "(1) Damages are not recoverable for harm that the plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation."

38. *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1959).

39. See W. PROSSER, *supra* note 1, §§ 65, 68; J. WHITE & R. SUMMERS, *supra* note 12, § 11-8.

40. See, e.g., *Murphy v. Eaton, Yale & Towne, Inc.*, 444 F.2d 317 (6th Cir. 1971); *Reed v. AMF Western Tool, Inc.*, 431 F.2d 345 (9th Cir. 1970); *Brown v. Chapman*, 304 F.2d 149 (9th Cir.

use a product knowing that the seller has breached a warranty.⁴¹

The facts of *Erdman v. Johnson Brothers Radio & Television Co.*⁴² illustrate assumption of the risk. Erdman purchased a television from Johnson Brothers Radio & Television Company. A few months later he noticed smoke and sparks emanating from the back of the set and called Johnson Brothers to complain. Johnson Brothers was to send out a serviceman within three days to repair the set. Meanwhile, Erdman continued to use the television despite the smoke and sparks. The television set started a fire that completely destroyed Erdman's house, and Erdman filed suit against Johnson Brothers for breach of implied warranty. The trial court found that Erdman was contributorily negligent and rendered judgment for Johnson Brothers. The appellate court affirmed the judgment, holding that although the seller breached the warranty, the breach was not the proximate cause of the fire that destroyed Erdman's home. Erdman's continued use of the television in spite of the emission of sparks and smoke amounted either to an abandonment of his reliance on the seller's implied warranty or contributory negligence.⁴³ Erdman assumed the risk because he was aware of the danger and continued to use the television set. The court held that a buyer cannot rely on a warranty when he is aware of the danger involved or when the danger is obvious enough that an ordinarily prudent person would not rely on the warranty.⁴⁴

C. *Proximate Cause, Misuse and Lack of Reliance on a Warranty*

In *Erdman*, the court recognized that any attempt to label the defenses available for breach of warranty actions based upon a plaintiff's contributory behavior is merely "an exercise in semantics."⁴⁵ The court spoke in terms of contributory negligence and lack of reliance on the warranty but emphasized that whatever label a court uses, "the im-

1962); *Phillips v. Allen*, 427 F. Supp. 876, 879-80 (W.D. Pa. 1977); *Bronson v. Club Comanche, Inc.*, 286 F. Supp. 21 (D.V.I. 1968); *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965); *Jacobs Pharmacy Co. v. Gipson*, 116 Ga. App. 760, 159 S.E.2d 171 (1967); *Williams v. Brown Mfg. Co.*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970); *Gregory v. White Truck & Equip. Co.*, 163 Ind. App. 240, 323 N.E.2d 280, 286-88 (1975); *Bereman v. Burdolski*, 204 Kan. 162, 460 P.2d 567 (1969); *Barefield v. LaSalle Coca-Cola Bottling Co.*, 370 Mich. 1, 120 N.W.2d 786 (1963); *Goblirsch v. Western Land Roller Co.*, 310 Minn. 471, 246 N.W.2d 687, 691 (1976); *Bullock v. Benjamin Moore & Co.*, 392 S.W.2d 10 (Mo. App. 1965); *Walk v. J.I. Case Co.*, 36 A.D.2d 60, 318 N.Y.S.2d 598 (1971); *Stark v. Allis Chalmers & Northwest Roads, Inc.*, 2 Wash. App. 399, 467 P.2d 854 (1970); *Murphy v. Petrolane-Wyoming Gas Serv.*, 468 P.2d 969 (Wyo. 1970).

41. *Cedar Rapids & I.C.R. & L. Co. v. Sprague Elec. Co.*, 280 Ill. 386, 117 N.E. 461 (1917); *Topeka Mill & Elevator Co. v. Triplett*, 168 Kan. 428, 213 P.2d 964 (1950). See U.C.C. § 2-607(3)(a)(1978), which requires a buyer to notify a seller of breach of warranty. See also *infra* note 51.

42. 260 Md. 190, 271 A.2d 744 (1970).

43. *Id.* at 747.

44. *Id.* at 751.

45. *Id.* at 749.

portant factor" is that the breach of warranty is not the proximate cause of the loss. The *Erdman* court recognized that the U.C.C. speaks in terms of causation and that actions by the plaintiff may break the causal chain between breach of warranty and injury, thus barring the plaintiff's recovery.⁴⁶

Other courts have also decided warranty cases involving defenses based upon a plaintiff's contributory behavior using a proximate cause analysis.⁴⁷ *Caldwell v. Lord & Taylor*⁴⁸ illustrates the use of proximate cause. Caldwell purchased false eyelashes in a Lord & Taylor store. A manufacturer's representative who applied the eyelashes warned Caldwell of possible irritation if the eyelash adhesive came in contact with the plaintiff's skin or eyes. In the process of application the representative introduced some of the adhesive into Caldwell's eye, causing injury, and Caldwell sued Lord & Taylor for breach of warranty. The trial court granted summary judgment for the defendant and the appellate court affirmed, holding that the injury was caused by misuse of the product rather than by breach of warranty. When properly applied, the eyelashes did function for the ordinary purpose for which they were intended, and misapplication, rather than a defect in the product itself, caused the injury.

While the *Caldwell* court dealt with misuse of the product by the plaintiff as showing a lack of proximate cause, other courts recognize misuse alone as a defense to liability.⁴⁹ Thus, where pork eaten raw caused the plaintiff's injury, courts have not held the meat packer liable because the warranty would only apply to food prepared in the usual and proper manner.⁵⁰ Similarly, some decisions hold that a buyer's

46. *Id.*

47. See, e.g., *Aldon Indus., Inc. v. Don Meyers & Assoc.*, 517 F.2d 188, 191-92 (5th Cir. 1975); *Dallison v. Sears, Roebuck & Co.*, 313 F.2d 343 (10th Cir. 1962); *General Instrument Corp. v. Pennsylvania Pressed Metals, Inc.*, 366 F. Supp. 139, 150 (M.D. Pa. 1973); *Rasmus v. A.O. Smith Corp.*, 158 F. Supp. 70 (N.D. Iowa 1958); *Ford Motor Co. v. Lee*, 137 Ga. App. 486, 224 S.E.2d 168, 170 (1976); *McCleskey v. Olin Mathieson Chem. Corp.*, 127 Ga. App. 178, 193 S.E.2d 16 (1972); *Jacobs Pharmacy Co. v. Gipson*, 116 Ga. App. 760, 159 S.E.2d 171 (1967); *Chisolm v. J.R. Simplot Co.*, 94 Idaho 628, 495 P.2d 1113, 1116-17 (1972); *Haralampopoulos v. Capital News Agency, Inc.*, 70 Ill. App. 2d 17, 217 N.E.2d 366 (1966); *Michigan Sugar Co. v. Jebavy Sorenson Orchard Co.*, 66 Mich. App. 642, 239 N.W.2d 693, 695 (1976); *Missouri Bag Co. v. Chemical Delinting Co.*, 214 Miss. 13, 58 So. 2d 71 (1952); *Maiorino v. Weco Prods. Co.*, 45 N.J. 570, 214 A.2d 18 (1965).

48. 142 Ga. App. 137, 235 S.E.2d 546 (1977).

49. See *Brown v. General Motors Corp.*, 355 F.2d 815 (4th Cir. 1966) (applying Ohio law); *Goodman v. Stalford, Inc.*, 411 F. Supp. 889 (D.N.J. 1976); *Rasmus v. A.O. Smith Corp.*, 158 F. Supp. 70 (D. Iowa 1958); *Preston v. Upright, Inc.*, 243 Cal. App. 2d 636, 52 Cal. Rptr. 679 (1966); *Avoyelles Country Club, Inc. v. Walter Kidde & Co.*, 338 So. 2d 379 (La. App. 1976); *Crews v. General Motors Corp.*, 400 Mich. 208, 253 N.W.2d 617 (1977); *Speyer, Inc. v. Goodyear Tire & Rubber Co.*, 222 Pa. Super. 261, 295 A.2d 143 (1972).

50. *Silverman v. Swift & Co.*, 141 Conn. 450, 107 A.2d 277, 280 (1954); *Cheli v. Cudahy Bros.* 267 Mich. 690, 255 N.W. 414, 416 (1934).

conduct demonstrates that he did not rely on the warranty.⁵¹ Therefore, if the unsafe condition of the product is visible or obvious to the plaintiff the defendant is not liable for an implied warranty because the plaintiff contracted to buy the product in its known or obvious condition.⁵²

III. PROBLEMS WITH CURRENT DEFENSES AVAILABLE FOR BREACH OF WARRANTY

Generally, every jurisdiction recognizes some defense based upon the contributory fault of the plaintiff. As recognized in *Erdman v. Johnson Brothers Radio & Television Co.*,⁵³ the inconsistency between jurisdictions in the law of warranty is the fault of the language. Because conflicting labels identify the plaintiff's contributory behavior, the true amount of agreement among different jurisdictions is difficult to determine. The attorney for the defendant must carefully study the rules of his jurisdiction concerning proper defenses to U.C.C. warranty actions, and even then he may find the law unsettled.

A problem exists because parties cannot be sure which traditional defense based upon the behavior of an injured party will apply to a warranty action. It makes little sense that courts will allow the introduction of evidence of a plaintiff's contributory fault only so long as the defendant properly labels the behavior. The result of a trial may then hinge on a semantic disagreement over defenses that a court will allow.

Some courts have circumvented the semantic problem by allowing a defendant to introduce any evidence demonstrating that a lack of proximate cause, rather than the breach of warranty, actually caused the injury.⁵⁴ The traditional defenses, however, present other problems as well. Demonstration of contributory negligence, assumption of the risk, misuse, and lack of proximate cause acts as a complete bar to a plaintiff's recovery. Application of these traditional all-or-nothing defenses can often produce inequitable results because they put the burden of loss entirely on one party and do not distribute responsibility in proportion to each party's fault.⁵⁵ Courts applying traditional defenses give no reason why the manufacturer should bear the loss attributable to the plaintiff's actions or why the plaintiff should bear the burden of injuries caused by a manufacturer's product.

51. See *Driver v. Snow*, 245 N.C. 223, 95 S.E.2d 519, 521 (1956); *Marko v. Sears, Roebuck & Co.*, 24 N.J. Super. 295, 94 A.2d 348, 350 (1953); 1 L. FRUMER & M. FRIEDMAN, *supra* note 1, § 19.01[3]; 77 C.J.S. *Sales* § 315 (1981).

52. *Brockett v. Harrel Bros.*, 206 Va. 457, 143 S.E.2d 897, 902 (1965).

53. 260 Md. 190, 271 A.2d 744, 751 (1970).

54. See *supra* notes 46-48 and accompanying text.

55. See *Pan-Alaska Fisheries, Inc. v. Maine Constr. & Design Co.*, 565 F.2d 1129, 1139-40 (9th Cir. 1977); *Stueve v. American Honda Motors Co.*, 457 F. Supp. 740, 754 (D. Kan. 1978).

*Barefield v. LaSalle Coca-Cola Bottling Co.*⁵⁶ illustrates the inequitable result brought about by application of such all-or-nothing defenses. In *Barefield*, the plaintiff had consumed about half a bottle of Coca-Cola when she gagged on something. Thinking it was either a small piece of ice or loose tobacco from her cigarette, she took another swallow. She again gagged and this time discovered a piece of glass from the bottle. Although she suffered a cut in her throat, when she sued Coca-Cola for breach of implied warranty, the court denied her recovery on the ground that she had assumed the risk. The plaintiff's fault in continuing to drink the product after she discovered or should have discovered that it contained particles of glass completely barred her recovery.⁵⁷ Thus, when a court applies one of the traditional defenses a plaintiff who is only marginally responsible for the injury is not able to recover at all.

The harsh application of the traditional all-or-nothing defenses has led to the application of comparative principles in strict products liability and negligence actions to apportion damages between the buyer and manufacturer according to their respective responsibilities for the injury.⁵⁸ This use of comparative principles in negligence and strict tort products liability actions further complicates the application of traditional defenses in breach of warranty actions. Courts may have procedural problems in applying one rule of recovery for actions brought in negligence or strict liability and another rule for breach of warranty. The three theories of recovery overlap, and particularly under fact pleading⁵⁹ plaintiffs frequently plead all three products liability theories in the alternative. It would be incongruous in a products liability case to have damages mitigated if the plaintiff sues in negligence or strict tort but allow him full damages if he sues in warranty,⁶⁰ particularly where the complaint contains alternative counts of recovery in negligence, strict products liability, and breach of warranty.⁶¹ In a jurisdiction that has comparative negligence for negligence actions but not comparative fault for breach of warranty actions, a bizarre result

56. 370 Mich. 1, 120 N.W.2d 786, 788 (1963).

57. *Id.* at 788-89.

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

59. Under fact pleading, a complaint must contain a plain and concise statement of the facts constituting a cause of action. The cause of action consists of the facts alleged rather than the conclusions of the pleader. When the complaint merely alleges theories or conclusions and not facts, it fails to state a cause of action and is demurrable. However, if it presents any facts sufficient to constitute a cause of action, the pleading will stand. See *Gillispie v. Goodyear Serv. Stores*, 258 N.C. 487, 128 S.E.2d 762 (1963). Therefore, a complaint may contain facts sufficient to constitute causes of action in negligence, strict products liability and breach of warranty.

60. Note that the opposite result may occur if a court applies one of the traditional defenses. Plaintiff's recovery will be totally barred rather than partly reduced.

61. *Butuad v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 46 (Alaska 1976).

may occur. Proceeding on a warranty theory developed to protect the consumer and to make a seller more responsible for his product may result in a court completely barring a plaintiff from recovery, whereas the same court would only diminish the recovery of a plaintiff who proceeded on a negligence theory.⁶²

Currently, the law concerning defenses to breach of warranty actions based upon the contributory behavior of the injured party is complicated and non-uniform. There is a large gap in the provisions of the U.C.C. enacted by jurisdictions to simplify, clarify, modernize and make uniform commercial law, including warranty.⁶³ The use of comparative principles integrated within the U.C.C. warranty provisions is necessary to make products liability law uniform and more equitable.

IV. THE USE OF COMPARATIVE PRINCIPLES

In negligence actions, nearly three-quarters of the states have replaced the doctrine of contributory negligence with comparative negligence.⁶⁴ The trend toward the use of comparative principles has continued into strict products liability cases where courts have replaced traditional defenses such as contributory negligence and assumption of the risk with comparative responsibility.⁶⁵ In eight states a move to

62. *Daley v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380 (1978).

63. See U.C.C. § 1-102(2) (1978).

64. At least 33 states and Puerto Rico have comparative negligence. Only eight of these jurisdictions (Arkansas, Georgia, Maine, Mississippi, Nebraska, Puerto Rico, South Dakota and Wisconsin) adopted comparative negligence prior to 1965. See *Alaska*: Kaatz v. State, 540 P.2d 1037 (Alaska 1975); *Arkansas*: ARK. STAT. ANN. §§ 27-1763 to -1765 (1979); *California*: *Nga Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Colorado*: COLO. REV. STAT. ANN. § 41-2-14 (1963); *Connecticut*: CONN. GEN. STAT. ANN. § 52-572 (West Supp. 1984); *Florida*: *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Georgia*: GA. CODE ANN. § 105-603 (1968); *Hawaii*: HAWAII REV. STAT. § 663-31 (1968); *Idaho*: IDAHO CODE ANN., §§ 6-801, 802 (1971); *Illinois*: *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886, (1981); *Kansas*: KAN. STAT. ANN. § 60-258a (1963); *Maine*: ME. REV. STAT. ANN. tit. 14, § 156 (1964); *Massachusetts*: MASS. GEN. LAWS ANN. ch. 231, § 85 (West 1969); *Minnesota*: MINN. STAT. ANN. § 604 (West 1969); *Mississippi*: MISS. CODE § 11-7-15 (1972); *Montana*: MONT. CODE ANN. § 58-607.1 (1975); *Nebraska*: NEB. REV. STAT. § 25-1151 (Supp. 1982); *Nevada*: NEV. REV. STAT. § 41.141 (1979); *New Hampshire*: N.H. REV. STAT. ANN. § 507:7-2 (Supp. 1981); *New Jersey*: N.J. STAT. ANN., §§ 2A:15-5.1 to .3 (West Supp. 1983); *New York*: N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); *North Dakota*: N.D. CENT. CODE § 9-10-07 (1975); *Oklahoma*: OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1982); *Oregon*: OR. REV. STAT. § 18.470 (1981); *Pennsylvania*: PA. STAT. ANN. tit. 17, § 2101, repealed by 1978 Pa. Laws 202; *Puerto Rico*: P.R. LAWS ANN. tit. 31, § 5141 (1968); *Rhode Island*: R.I. GEN. LAWS ANN. § 9-20-4 (Supp. 1982); *South Dakota*: S.D. COMP. LAWS § 20-9-2 (1979); *Texas*: TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1982); *Utah*: UTAH CODE ANN. §§ 78-27-37 to -43 (1973); *Vermont*: VT. STAT. ANN. tit. 12, § 1036 (Supp. 1983); *Washington*: WASH. REV. CODE ANN. § 4.22.010 (Supp. 1983); *Wisconsin*: WIS. STAT. ANN. § 895.045 (West 1983); *Wyoming*: WYO. STAT. ANN. § 1-109 (1977).

65. Jurisdictions applying comparative principles in strict products liability actions are Alaska, Arkansas, California, Connecticut, Florida, Idaho, Kansas, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, Oregon, Texas, Utah, Washington and Wisconsin. See *Pan-Alaska Fisheries, Inc. v. Maine Constr. & Design Co.*, 565 F.2d 1129 (9th Cir. 1977);

comparative responsibility in strict products liability has meant a move in the same direction to comparative fault⁶⁶ for breach of warranty actions.⁶⁷ While there seems to be a trend toward the use of comparative principles in products liability cases, the issue of whether courts should apply comparative principles to warranty actions is still unsettled. Opponents have advanced several arguments against instituting comparative fault, but courts have rejected most of these in cases involving strict products liability.⁶⁸

The primary argument against application of comparative fault is that the nature of the liability of the parties is different and therefore incomparable. Because the primary focus in products liability cases is

Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975); Murray v. Beloit Power Sys., Inc., 450 F. Supp. 1145 (D.V.I. 1978); Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976); Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676 (D.N.H. 1972); Butuad v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Daley v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); Safeway Stores Inc. v. Nest-Kart, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 340 (1978); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Busch v. Busch Constr., Inc., 262 N.W.2d (Minn. 1977); Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843 (1978); Cartel Capital Corp. v. Fireco of N.J., 81 N.J. 548, 410 A.2d 674 (1980); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 140, 402 A.2d 140 (1979); Baccalleri v. Hyster Co., 287 Or. 3, 597 P.2d 351 (1978); Hamilton v. Motor Coach Indus., Inc., 569 S.W.2d 571 (Tex. 1978); Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981); Berry v. Coleman Sys. Co., 23 Wash. App. 622, 596 P.2d 1365 (1979); Austin v. Ford Motor Co., 86 Wis. 2d 628, 273 N.W.2d 233 (1979); Dipple v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

66. The terms comparative fault and comparative responsibility are used interchangeably. In both cases, courts compare the respective behavior of the parties.

67. The states applying comparative fault to warranty actions are Arkansas, Connecticut, Idaho, Michigan, Minnesota, New York, Texas and Washington. See *infra* notes 82-106.

68. For commentary, see Brewster, *Comparative Negligence in Strict Liability Cases*, 42 J. AIR L. 107, 117-18 (1976); Buchanan, *Products Liability Defenses Under the Model Uniform Product Liability Act and State Legislation*, 15 FORUM 813 (1980); Carestia, *The Interaction of Comparative Negligence and Strict Liability—Where Are We?*, 47 INS. COUNSEL J. 53 (1980); Dworkin, *Product Liability Reform and the Model Uniform Product Liability Act*, 60 NEB. L. REV. 50 (1980); Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 68 UTAH L. REV. 267, 284 (1968); Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Liability Suit Based on Section 402A of the Restatement of Torts*, 2d, 42 INS. COUNSEL J. 39, 52 (1975); Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 MO. L. REV. 431, 433 (1978); Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 674 (1974); Fleming, *The Supreme Court of California 1974-1975—Forward: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239, 268-71 (1976); Freedman, *The Comparative Negligence Doctrine Under Strict Liability: Defendant's Conduct Becomes Another "Proximate Cause" of Injury, Damage or Loss*, 975 INS. L. REV. 468, 479; Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627, 656-63 (1968); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 115-19 (1972); Pinto, *Comparative Responsibility—An Idea Whose Time Has Come*, 45 INS. COUNSEL J. 115, 127 (1978); Robinson, *Square Pegs (Products Liability) in Round Holes (Comparative Negligence)*, 52 CAL. ST. B.J. 16 (1977); Schwartz, *Pure Comparative Negligence in Action*, 34 AM. TRIAL LAW. J. 117, 128-31 (1972); Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 436 (1978); Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 391 (1978); Note, *Sales Assumption of the Risk and Misuse in Strict Tort Liability—Prelude to Comparative Fault*, 11 TEX. TECH. L. REV. 729 (1980).

on whether a defective product caused the injury rather than on the defendant's conduct, some courts have found comparison of the plaintiff's conduct inappropriate.⁶⁹ Yet, courts already apply comparative principles in some sense.⁷⁰ Courts have been unwilling to make a manufacturer's liability for damages absolute and convert him into an insurer of his product with respect to any harm generated by use of the product. As a result, courts apply various defenses based upon the contributory conduct of the plaintiff.⁷¹ This result may be caused by a recognition that strict liability, including breach of warranty, is not really liability without fault.⁷² Products liability actions developed so that the seller would bear the responsibility for injuries or damages caused by his product.⁷³ The seller is at fault because his product is bad since it causes injury. The fault is in the unreasonably dangerous or, in the case of warranty, unmerchantable condition of the product. Thus, courts can at least compare the seller's fault with the buyer's fault in terms of causation by deciding the relative amounts that the plaintiff's actions and the defendant's defective product contributed to the injury.⁷⁴

Opponents of comparative fault argue, moreover, that courts that apply the doctrine will have a great deal of difficulty in apportioning damages because of the inexactitude in measuring fault.⁷⁵ In practice, however, there should be no more difficulty in comparing fault in a breach of warranty suit than in a negligence suit.⁷⁶ Even difficulty in

69. See, e.g., *Kinard v. Coats Co.*, 37 Colo. App. 555, 553 P.2d 835 (1976).

70. *Butuad v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976).

71. *Id.* at 45.

72. Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 377 (1978).

73. See, e.g., *Liberty Mutual Ins. Co. v. Hercules Powder Co.*, 224 F.2d 293, 295 (3d Cir. 1955); *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 900, 27 Cal. Rptr. 697 (1963); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, 1052 (1916).

74. See *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F. Supp. 598, 603 (D. Idaho 1976); *Butuad v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 46 (Alaska 1976); *Daley v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 1167-68, 144 Cal. Rptr. 380 (1978); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978); *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320 (Tex. 1978).

Under comparative principles in strict products liability actions courts decide the relative amounts that the plaintiff's actions and the defendant's defective product contributed to the injury. This is not a comparison of apples and oranges. The defendant is still strictly liable for his product without regard to whether he was negligent or not. He is only liable, however, to the extent the product caused the injury. The plaintiff is liable for his own misuse of the product. This produces a more equitable result because strict liability is not absolute liability for the product however it is used. The comparison is not between the defendant's fault and the plaintiff's fault but between the inherent danger in the product and the plaintiff's misuse of it. There is no reason why the manufacturer should bear the loss attributable to the plaintiff's actions or the plaintiff should bear the burden of injuries caused by a manufacturer's product.

75. See *Daley v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 1177, 144 Cal. Rptr. 380 (1978) (Jefferson, J., dissenting).

76. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 208 (1974); *Butuad v. Suburban Marine &*

properly awarding damages is not sufficient justification for the all-or-nothing liability that results from the use of traditional defenses. A slightly inexact apportionment is certainly better than allowing the total barring effect of contributory negligence or completely refusing to consider a plaintiff's fault.

Finally, opponents of comparative fault argue that application of the doctrine will frustrate the purposes of warranty: to place the responsibility on the manufacturer, who can best bear the loss and pass it on to society, rather than on injured consumers, and to give manufacturers an incentive to make products safe. This is not so. While comparative fault reduces a seller's exposure to liability to the extent that the plaintiff's actions contributed to the injury, the same principles may increase a seller's exposure by allowing a normally barred plaintiff some recovery as a consequence of the defendant's sale of an unmerchantable product.⁷⁷ The seller would still be liable for all of the damages caused by his product. Thus, the motivation to make a safe product will not disappear.

Opponents of comparative fault give no compelling social or practical reason why a party should bear more than its fair share of the loss in a warranty action. The arguments against comparative fault cannot outweigh the advantages because comparative principles are preferable to the inequitable and confusing traditional defenses. Various methods of adopting comparative fault are available, however, and the key to making the doctrine work effectively is in choosing the best alternative method.

Jurisdictions can enact comparative fault in breach of warranty cases by adoption of the judicial doctrine of comparative causation⁷⁸ or by adoption of the judicial doctrine of comparative fault,⁷⁹ by application of the state's comparative negligence statute,⁸⁰ or by legislative adoption of a comparative fault statute such as the Uniform Comparative Fault Act.⁸¹ Under each method, the plaintiff will not recover damages to the extent he is at fault. The seller will only be liable for damages caused by the defective product. When the buyer's actions contribute to the injury, a court will apportion the damages according to each party's respective fault.

Sporting Goods, Inc., 555 P.2d 42, 45 (Alaska 1976); Daley v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 1175, 144 Cal. Rptr. 380 (1978) (Clark, J., concurring).

77. Stueve v. American Honda Motors Co., 457 F. Supp. 740, 754 (D. Kan. 1978); Daley v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 1169, 144 Cal. Rptr. 380 (1978).

78. See *infra* notes 82-88 and accompanying text.

79. See *infra* notes 89-90 and accompanying text.

80. See *infra* notes 91-94 and accompanying text.

81. See *infra* notes 96-120 and accompanying text.

A. *Judicial Doctrine of Comparative Causation*

Courts have not yet applied most methods of comparative fault to breach of warranty cases, although they have used each method in strict products liability cases. One jurisdiction, Texas, applies comparative causation to warranty cases. Under comparative causation a court divides the loss according to the relative degrees the plaintiff's fault and the defendant's defective product proximately caused the injury. Thus, in a breach of warranty action the buyer cannot recover damages to the extent that his fault was a concurring proximate cause of the injury.

The leading case in the area of comparative causation is *Signal Oil & Gas Co. v. Universal Oil Products*.⁸² In this case, Signal Oil and Gas Company (Signal) contracted with Universal Oil Products for the licensing of an isomax processing unit and with Procon, Inc., a subsidiary of Universal Oil Products, for the construction of the unit and a hydrogen plant at Signal's refinery. Procon purchased a reactor charge heater for the isomax unit from Alcorn Combustion Company and completed the construction. A month after operation of the hydrogen plant began, Procon discovered a defect in the design of the reactor charge heater and warned Signal of the hazard, but Signal disregarded the warning. Two months later the isomax unit exploded, causing a fire that damaged Signal's plant. Signal sued Universal Oil Products, Procon, and Alcorn in negligence, strict liability and breach of implied warranty.

The trial court denied Signal relief on each of the theories. The jury found that Signal's actions in not shutting down the heater when Procon discovered the defect constituted contributory negligence. The court then held that this negligence barred recovery under negligence and breach of warranty theories. Signal was denied recovery under strict liability because the jury failed to find that the defective condition constituted a producing cause of the explosion.

Signal appealed on the theory that contributory negligence is not a defense to breach of implied warranty. Relying heavily on the language in U.C.C. §§ 2-714(2), 2-715(2)(b) and comment 5 to § 2-715⁸³ as well as case law,⁸⁴ the court found that the U.C.C. indicates that the buyer's negligence or fault is central to the issue of proximate causation in awarding consequential damages.⁸⁵ The court recognized breach of

82. 572 S.W.2d 320 (Tex. 1978); See Note, *Product Liability—Implied Warranty—Recovery of Consequential Damages in Breach of Implied Warranty Action Disallowed to Extent Buyer's Negligence Was Concurring Proximate Cause*, 10 ST. MARY'S L.J. 675 (1979).

83. See *supra* notes 20-22 and accompanying text.

84. See *Dallison v. Sears, Roebuck & Co.*, 313 F.2d 343 (10th Cir. 1962); *Rasmus v. A.O. Smith Corp.*, 158 F. Supp. 70 (N.D. Iowa 1958).

85. *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 328 (Tex. 1978).

warranty as a contract, rather than tort, cause of action and pointed out that the U.C.C. does not state that a buyer's fault will completely bar recovery. Thus, the court in *Signal* held that the buyer could recover only those consequential damages proximately caused by the breach of warranty, that the buyer could not recover damages proximately caused by his own negligence or fault, and that the buyer's negligence or fault, unless it was the sole cause of the damages, did not automatically bar recovery but only diminished or mitigated the damages that the buyer could recover. Courts must institute comparative causation by determining the relative percentage of the damages proximately caused by the plaintiff's actions and by reducing his recovery to that extent.

A number of states have comparative causation in actions based upon strict products liability but have not extended the doctrine to breach of warranty.⁸⁶ Generally, courts have had no opportunity to consider the issue. However, those states that eventually decide to apply comparative causation will discover problems with it. These problems arise because causation alone is a difficult concept to apply.⁸⁷ Courts must consider the nature of the causes of injury in order to determine fault. A court cannot simply identify the causal relation of the actor's conduct to the injury. Many causes concur in producing a given event, and without each one the event would not occur. This imprecise combination makes it difficult to measure the contribution of a given cause. In determining causation, a court must also consider the nature of the actor's conduct, the personal culpability of the actor, as well as physical causation. Comparative causation therefore requires consideration of fault and is thus a less developed form of comparative fault masked in the confusing terms of causation.⁸⁸

B. *Judicial Adoption of Comparative Fault*

While there has been legislative adoption of comparative fault in breach of warranty cases, no court has judicially adopted comparative fault. Here warranty trails behind strict products liability, for under the latter theory there are several decisions judicially adopting comparative fault.⁸⁹ These decisions demonstrate that it would be possible to

86. See *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F. Supp. 598 (D. Idaho 1976); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978).

87. See W. PROSSER, *supra* note 1, § 42; *Carestia, supra* note 68, at 64-68.

88. Fischer, *supra* note 68, at 445.

89. Courts may prefer to consider strict products liability cases rather than breach of warranty cases. See *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676, 680 (D.N.H. 1972). "Strict liability in tort is a more appropriate remedy for the consumer who has received personal injuries and . . . U.C.C. warranties are best suited to commercial settings." *Nelson v. Volkswagen of America, Inc.*, 315 F. Supp. 1120, 1123 (D.N.H. 1970); *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

judicially adopt comparative fault in actions for breach of warranty.⁹⁰

The problem is that judicial adoption of comparative fault does not offer a complete and uniform system. Where there is no legislative framework, the courts must define fault, determine apportionment of damages, decide whether to adopt a pure or modified system of comparative fault, and analyze the effects of joint and several liability, counterclaims and contribution. A judicially adopted system of comparative fault leaves courts to debate these issues as they arise. Meanwhile, the law remains in a state of flux.

C. *Comparative Negligence*

The drawbacks of judicially adopting comparative fault may cause courts to apply the comparative negligence statutes of their jurisdictions to breach of warranty actions rather than to adopt a new system without legislative guidance.⁹¹ But application of a comparative negligence statute to a breach of warranty action presents problems. In warranty, the seller is strictly liable; he need not be negligent to be responsible for defects in his product. Comparative negligence statutes compare negligence. When the statutes deal only with negligence liability, they do not affect strict liability and courts cannot compare the fault of the parties. In order to apply a comparative negligence statute to a strict liability cause of action, a court must interpret the statute to say something it does not and read it as a comparative fault statute. In many cases, such liberal interpretation of a comparative fault statute exceeds the intent of the legislature.

Some jurisdictions apply comparative negligence in all cases to which contributory negligence was once applicable. Courts that in the past have applied contributory negligence to breach of warranty actions might extend their reasoning⁹² and apply comparative negligence statutes instead. Different jurisdictions would then disagree about the proper application of a comparative negligence statute to breach of warranty. The New Hampshire Supreme Court has already determined that the New Hampshire comparative negligence statute does not apply to strict liability actions because the statute by its terms is

90. See *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975); *Stueve v. American Honda Motors Co.*, 457 F. Supp. 740 (D. Kan. 1978); *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972); *Buttad v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976); *Daley v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 92 (Fla. 1976); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150 406 A.2d 140 (1979); *Baccaleri v. Hyster Co.*, 287 Or. 3, 597 P.2d 351 (1979).

91. See, e.g., *Stannard v. Harris*, 135 Vt. 544, 380 A.2d 101 (1977) (impliedly applying comparative negligence statute to breach of warranty); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976) (applying the state's comparative negligence statute to a strict products liability action).

92. See *supra* notes 31-35 and accompanying text.

limited to actions for negligence.⁹³

A specific problem exists in the application of modified comparative negligence⁹⁴ statutes to breach of warranty actions. Under modified comparative negligence, the plaintiff's recovery is barred if he is found to be more negligent than the defendant. In a breach of warranty case, the defendant may not be negligent at all even though his product caused the injury; warranty liability is strict liability, not negligence liability. Therefore, even a plaintiff who is slightly negligent could be more negligent than the defendant. Under modified comparative negligence, the plaintiff's recovery would be barred. Thus, application of comparative negligence statutes does not present a satisfactory scheme of comparative fault for warranty actions.

D. *Comparative Fault Statutes: The Uniform Comparative Fault Act*

The best alternative to applying comparative negligence statutes, judicially adopting comparative fault, or adopting comparative causation is legislative adoption of comparative fault. A well constructed legislative system of comparative fault avoids the confusing terms of comparative causation by comparing fault according to outlined standards rather than measuring causes.⁹⁵ Whereas judicial adoption of comparative fault leaves the law in a state of flux because issues remain to be decided, legislation can provide a complete and uniform system. Moreover, courts need not improperly apply comparative negligence to strictly liable parties when comparative fault is available. Legislation, such as the Uniform Comparative Fault Act, offers all the advantages of comparative fault without the disadvantages resulting from other methods of adoption.

Seven states have enacted statutes that adopt comparative fault in breach of warranty actions, although courts have not yet had an opportunity to apply the statutes in such cases.⁹⁶ In Arkansas, the comparative fault statute and the products liability act work together to provide comparative fault in breach of warranty actions. Fault is defined as

93. *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978).

94. Under pure comparative negligence the claimant receives judgment for his damages reduced by the percentage of his negligence, whether or not his negligence equals or exceeds that of the defendant. Modified comparative negligence provides that a contributorily negligent plaintiff can recover diminished damages only so long as his negligence does not exceed the negligence of the defendant. Some modified comparative negligence jurisdictions also bar a plaintiff's recovery if his negligence equals the defendant's negligence. A growing number of jurisdictions, including the federal government, nine states and most common law jurisdictions outside of the United States, use pure comparative principles.

95. See *supra* notes 87-88 and accompanying text and *infra* notes 109-111 and accompanying text.

96. These states are Arkansas, Connecticut, Idaho, Michigan, Minnesota, New York and Washington.

"any act, omission, conduct, risk assumed, breach of warranty or breach of any legal duty which is the proximate cause of any damages sustained by any party."⁹⁷ A defendant may demonstrate the plaintiff's fault with evidence of use of the product beyond the anticipated life,⁹⁸ subsequent unforeseeable alterations of the product, or improper maintenance or abnormal use of the product.⁹⁹

Michigan has adopted a pure comparative negligence standard¹⁰⁰ in actions for breach of warranty.¹⁰¹ Both New York and Washington have adopted pure comparative fault, rather than comparative negligence, statutes.¹⁰² Idaho has instituted a pure comparative responsibility statute for products liability which identifies conduct by the plaintiff that can affect comparative responsibility. Such conduct includes failure to discover a defective condition, failure to inspect, failure to observe an obvious defect, use of a product with a known defective condition, or misuse, alteration or modification of a product.¹⁰³ In Minnesota, a modified type of comparative fault permits recovery if the plaintiff's fault is less than the defendant's fault.¹⁰⁴

No jurisdiction has yet enacted the new Uniform Comparative Fault Act,¹⁰⁵ although Connecticut's comparative fault standard in products liability actions incorporates a section of the Act.¹⁰⁶ This lack of acceptance is surprising in view of the complete, uniform, and logical nature of the Uniform Comparative Fault Act. The statute adopts fault as the basis for apportioning responsibility in any action based on fault, including negligence, strict products liability, and breach of warranty. Thus, comparative negligence statutes need not be misapplied to non-negligence actions. A plaintiff's fault includes all forms of fault chargeable to him. Specifically included are negligence in any measure, recklessness, misuse of a product, assumption of the risk, and unreasonable

97. ARK. STAT. ANN. §§ 27-1763 to -1765 (1979).

98. *Id.* § 34-2804 (Supp. 1981).

99. *Id.* § 34-2807.

100. MICH. STAT. ANN. § 27A.2949 (Supp. 1983-84):

(1) In all products liability actions brought to recover damages resulting from death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or the plaintiff's legal representatives, but damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

101. *Id.* § 27A.2945. (Products liability has been interpreted to include breach of warranty). See *Jorae v. Clinton Crop Serv.*, 465 F. Supp. 952, 954 (E.D. Mich. 1979).

102. See N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); WASH. REV. CODE ANN. § 4.22.015 (Supp. 1984-85).

103. IDAHO CODE §§ 6-1304-1305 (Supp. 1983).

104. MINN. STAT. ANN. § 604.01 (West Supp. 1983).

105. For a more complete discussion of the Uniform Comparative Fault Act, see Wade, *supra* note 68.

106. CONN. GEN. STAT. ANN. § 52-572o (West Supp. 1983-84) is based on § 2 of the UNIF. COMPARATIVE FAULT ACT.

failure to avoid injury or to mitigate damages.¹⁰⁷ The Act does not limit plaintiff's fault to conduct which under prior law constituted a defense.¹⁰⁸

Unlike comparative causation, courts that compare fault must consider the nature of the fault as well as the relative extent to which the fault caused the injury.¹⁰⁹ The Uniform Comparative Fault Act identifies factors relating to the nature and percentage of a party's fault. Important considerations are whether the conduct was knowing or inadvertent and the magnitude of the risk created, including the number of people involved and the potential seriousness of the injury. Other factors that a court should consider are the purpose and significance of the actor's conduct, the actor's natural capacities, and other particular circumstances such as emergency.¹¹⁰ Thus, the Act is less confusing to apply than comparative causation because a court has guidelines to measure the nature of the conduct of the party at fault as well as the causal relation between the conduct and the damages.¹¹¹

Application of the Uniform Comparative Fault Act to breach of warranty actions is superior to application of either comparative causation or comparative negligence statutes. Legislative adoption of the Uniform Comparative Fault Act is also better than judicial adoption of comparative fault because the former alternative offers a complete and logical system while the latter leaves issues for the court to decide *ad hoc*. The Uniform Comparative Fault Act provides for joint and several liability, extending the common law rule so that a plaintiff can recover the total amount of his judgment from any defendant who is liable.¹¹² Each party should, however, eventually have to bear the responsibility for his own fault because of the rules of contribution.¹¹³ Additionally, the Uniform Comparative Fault Act specifically provides for reallocation of an uncollectible share among all parties at fault to spread the risk of uncollectability among all of the parties.¹¹⁴ Set-off of counterclaims is permitted by agreement of the parties.¹¹⁵ Thus, the Uniform Comparative Fault Act offers detailed provisions for issues that judicial adoption of comparative fault leaves unsettled. The spe-

107. UNIF. COMPARATIVE FAULT ACT § 1(b) (1977); 5 L. FRUMER & M. FRIEDMAN, *supra* note 1, Appendix K (1979).

108. *Id.* § 1(a).

109. *Id.* § 2(b). A court should consider "both the nature of the conduct of each party at fault and the content of the causal relation between the conduct and the damages claimed."

110. *Id.* § 2 comments.

111. See *supra* notes 86-88 and accompanying text.

112. UNIF. COMPARATIVE FAULT ACT § 2(c)(1977).

113. *Id.* §§ 4, 5.

114. *Id.* § 2(d).

115. *Id.* § 3. A set-off of counterclaims is permitted *only* by agreement of both parties.

cific provisions of the Uniform Comparative Fault Act furnish a complete system with which to work.

A major advantage of this system is that the Uniform Comparative Fault Act adopts the pure type of comparative fault.¹¹⁶ The trier of fact must determine the total amount of the claimant's damages and the percentage of fault of each party who contributed to the injury. The claimant receives a judgment for his damages reduced by the percentage of his fault, whether or not his fault exceeds that of the defendant.¹¹⁷ Use of a pure comparative system assures that each party will remain responsible for his own fault.¹¹⁸

Finally, the Uniform Comparative Fault Act meshes well with the U.C.C. The Uniform Comparative Fault Act does not require any changes in the U.C.C. itself.¹¹⁹ The Act gives greater clarity to the comments to U.C.C. §§ 2-314 to 2-316 and 2-715, which speak of proximate cause by requiring a court to consider the nature of a party's conduct as well as the causal relation between the conduct and the injury. The use of comparative fault eradicates the confusion over proper defenses based upon a plaintiff's contributory behavior to breach of warranty actions. The Uniform Comparative Fault Act therefore helps to "simplify, clarify, modernize and make uniform the law governing commercial transactions,"¹²⁰ thus promoting the underlying purposes and policies of the U.C.C.¹²¹

CONCLUSION

Courts have applied traditional defenses to achieve a more equitable result in breach of warranty cases, but this has presented problems. Comparative fault is the only logical solution to these problems. The Uniform Comparative Fault Act provides a complete and uniform system to measure pure comparative fault as opposed to comparing either the parties' negligence or the extent to which each party's actions proximately caused the injury. The use of the Uniform Comparative Fault Act with the warranty provisions of the U.C.C. is far better than appli-

116. For a discussion of the pros and cons of "pure" comparative fault, see the prefatory comments to the Uniform Comparative Fault Act. *Id.* For the distinction between pure and modified comparative systems, see *supra* note 94.

117. UNIF. COMPARATIVE FAULT ACT § 2 (1977).

118. Adoption of the Uniform Comparative Fault Act would, however, require states that now have modified comparative negligence to switch to pure comparative negligence because the statute applies to all negligence cases as well as to products liability cases.

119. The final comment to the Uniform Comparative Fault Act § 11 (1977) explains: "This Act does not necessitate any changes in the statutory language of Article 2 of the Uniform Commercial Code, but it may have the effect of slightly modifying some of the comments to §§ 2-314 to 2-316 and 2-715 on proximate cause and the effect of contributory fault."

120. U.C.C. § 1-102(2)(a) (1978).

121. *Id.* § 1-102(1).

cation of either the traditional defenses based upon the contributory behavior of the injured party or the other methods of comparative fault.

JAMES JOSEPH GETTEL*

* Class of 1984, University of Illinois College of Law. The author practices with the Milwaukee firm of Minahan & Peterson, S.C..