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## ***Illusory Defense of Contributory Negligence in Product Liability***

***George E. Bushnell, Jr.\****

**I**T HAS BEEN READILY and widely, albeit not universally, accepted that the contributory negligence of a plaintiff constitutes a defense for a defendant charged with negligence.<sup>1</sup> This has been true whether the defense arises at common law, by statute or by court rule. And it has been equally true whether, as in some states, plaintiff has the burden of establishing that he is free of contributory negligence, or, as in the majority of jurisdictions, contributory negligence is a so-called affirmative defense.

But to put the proposition that plaintiff's contributory negligence is a defense to defendant's negligence is to state an illusion. For contributory negligence has never been a defense. The fact that plaintiff was also negligent has never been, in fact or at law, a denial of the truth or validity of the claim that defendant was guilty of negligence.

Actually, for contributory negligence to have any effect at all upon the outcome of litigation, there is an implied assumption that defendant is guilty of the matters charged in the declaration or complaint. As a result, no self-respecting defendant today would or could rely solely and exclusively upon the defense of contributory negligence and expect anything but a diminution of plaintiff's ad damnum. For such a defense says nothing more than, "Sure, I'm guilty. But Mr. Plaintiff was so careless, that it was his carelessness that caused the damage of which he complains."

It is respectfully suggested that juries and judges in this Anno Domini 1963 just will not accept such a position—no matter how skillfully conceived and argued—as a bar to complete recovery. They will see it for what it is, a plea in extenuation and mitigation of damages. For the contributory negligence of plaintiff does not obviate or exculpate the negligence of defendant.

In the milieu in which each of us now practices, the political,

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<sup>1</sup> 38 Am. Jur. § 174, 848 *et seq.*

social, economic and legal emphasis is on personal rights rather than upon property rights. Without attempting to argue the validity or the propriety of such emphasis, the fact is that for a period marked roughly by the end of World War II this is how our law has been developing. Particularly is this true in the field of negligence. Therefore, the naked argument of contributory negligence, if given any credence at all, is equated with comparative negligence known familiarly to Proctors in Admiralty. This observation is made in spite of the overwhelming rejection of comparative negligence by the various states,<sup>2</sup> and in spite of the fact that the decided weight of authority is that contributory negligence is not susceptible of division into degrees or percentages.<sup>3</sup> However we all know that juries and trial judges without juries make every effort to do justice and that the compromise verdict is the rule rather than the exception. What better way to assure some verdict for plaintiff in the usual case than to defend on the basis of the naked defense of contributory negligence? There is no better invitation to compromise.

All of this is particularly true, of course, in the defense of product liability cases. Here we have a manufactured article, presumably made by individuals having special skills not possessed by the general public, impersonally introduced into the rivers of commerce by a "corporate giant," who obtained for its efforts an irrebuttably presumptive profit; and, lurking in the minds of all, there is the dark suspicion that the profit was inordinately, if not unconscionably, large for the article involved. The only defense suggested is that the child, or the employee, or the housewife, was so careless in his or her handling of the product that such negligence overcomes the negligence of Big Corporation, Inc., and recovery should be denied.

Assuming that contributory negligence is not a "defense," semantically, logically, or as a practical matter—assuming that contributory negligence is truly an illusory defense—what do we do? Do we abandon it entirely?

If the "defense" consists of no more than has been discussed above, then the answer is forced. It must be an unequivocal, "Yes."

However, the phrase "contributory negligence" has been

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<sup>2</sup> Annot., 114 ALR 831 (1938).

<sup>3</sup> Mack v. Precast Industries, Inc., 369 Mich. 439, 450 (May 1963).

around for a long time. The philosophy of legal positivism is predicated upon the proposition that even the client might have some sense. The customary, the traditional, the natural reactions—the clichés of life—must have merit, otherwise they could not be so widely accepted.

Unfortunately, many defendants see no more to the case than that plaintiff's fault must excuse defendant's negligence. This approach, however, begs the question. The question is rather, *why* should plaintiff's negligence logically and legally bar his recovery? Is it because the product was put to an abnormal, unintended or unforeseen use? Is it because there was a voluntary assumption of risk? Is it because plaintiff failed to exercise due care?

An examination of these true defenses may well suggest some answers.

### I. Abnormal, Unintended, or Unforeseen Use

When the defendant righteously and indignantly denies responsibility for plaintiff's injury, more often than not his argument is that the use to which the product was put was a use not intended by the manufacturer. This may be a use that was completely foreign to the original purpose of the product. Or it may be a use for which the product was not designed, but for which it was utilized due to the fiendish ingenuity frequently displayed by those who later appear as plaintiffs in personal injury actions. In the latter instance, the question then becomes whether or not the manufacturer should reasonably have foreseen the use to which the product was put. A 1960 decision out of the 7th Circuit did hold that abnormal use by plaintiff of defendant's product barred his recovery as a matter of law under the Wisconsin comparative negligence statute. In this case plaintiff, in order to drive a hammer claw under a nailhead, hit the striking face of the hammer with the striking face of another hammer. A chip from one of the striking faces was caused to dislodge, flew in the plaintiff's eye, and he lost his sight. Even though the Court was considering the case in light of a comparative negligence situation, the 7th Circuit held that plaintiff's action was 100 per cent the total cause of negligence and, therefore, any recovery was barred.<sup>4</sup>

Query: Could the Court have decided with equal force that

<sup>4</sup> Odekirk v. Sears Roebuck and Co., 274 F. 2d 441 (7th Cir. 1960).

the manufacturer of metal hammers could well have foreseen such a use as that to which plaintiff put his hammer and, therefore, the question of plaintiff's negligence was a jury question? See *Borg-Warner Corp. v. Heine*,<sup>5</sup> and the dissent therein.

A fact of life which must be recognized in any consideration of product liability cases is that, with very few exceptions (which are not expected to long endure), a product liability action brought in any jurisdiction involves at least two counts, and frequently three counts. There is the count for negligence, of course; and there is a count for breach of implied warranty; and a count for breach of express warranty. Whether or not contributory negligence in and of itself constitutes a defense to breach of warranty is subject to a conflict of authority.<sup>6</sup> However, an abnormal or unintended use has been held to be a "defense" to breach of warranty cases. Massachusetts in 1958 held that where a beer can opener which was designed to make holes in metal cans was inappropriately used as a lever to pry open a glass jar, plaintiff was barred from recovering.<sup>7</sup> An earlier case in New York involved an action for breach of warranty when the purchaser of a chaise longue was injured when folding the contraption. The Court found that the evidence established that the chaise longue functioned exactly as intended, was not inherently dangerous, and did not have hidden defects. It was held that an implied warranty of fitness for use applies only to a usual or apparent use, and not as to an injury received through "careless handling of dangerous portions of the mechanism sold." The Court went on to say that implied warranty, under the Sales Act, does not include a warranty that the article must be accident proof: "The defendants were not required to guard against hazards apparent to the plaintiff, or protect her against injuries through her own patently careless and improvident conduct."<sup>8</sup>

Another area of unforeseen or unintended use that may constitute a real defense is where defendant has clearly and intelligibly warned or instructed the potential user of the product by use of label or other device. Massachusetts has said in *Taylor v. Jacobson*<sup>9</sup> that when the product is not put to its ordinary use, or not used in accordance with reasonable instructions which

<sup>5</sup> 128 F. 2d 657 (6th Cir. 1942).

<sup>6</sup> 1 Frumer and Friedman, *Products Liability*, § 16.01[3] (1961).

<sup>7</sup> *Vincent v. Nicholas E. Tsiknas Co.*, 337 Mass. 726, 151 N. E. 2d 263 (1958).

<sup>8</sup> *Poretz v. R. H. Macy and Co.*, 119 N. Y. Supp. 2d 211 (Sup. Ct. 1953).

<sup>9</sup> 336 Mass. 709, 147 N. E. 2d 770 (1958).

were known, or should have been known, to the purchaser, there is no liability upon the manufacturer. In this case, hair dye was used without a patch test which was clearly called for by the label. Plaintiff suffered an allergic reaction.

In New York the plaintiff testified that she had read and understood the instructions on the label. Here the directions clearly stated that the product, dry-cleaning fluid, should only be used in a well ventilated room, or out of doors. In spite of such clear instructions, plaintiff cleaned the clothes in a small bathroom with no cross-ventilation. The fumes from the fluid made her ill. The Court held, as a matter of law, that plaintiff had failed to use reasonable care, i.e., had failed to follow instructions.<sup>10</sup>

The claim of one Margaret Shaw against Calgon, Inc.,<sup>11</sup> was considered by the New Jersey Supreme Court in 1955. It seems that Miss Shaw had been directed to use Calgon for cleaning purposes and mistakenly picked up a box of Calgonite. Regrettably for Miss Shaw and her counsel, the evidence established that she had failed entirely to read the instructions. Had she read the instructions, and followed them, then the injuries complained of would have been an impossibility. The Court found no negligence whatsoever on the part of defendant and an obvious unintended and unforeseen use by plaintiff.<sup>12</sup>

The other side of the coin, of course, is that failure to warn, or to adequately warn, obviates any possibility of the defense of unintended or unforeseen use.<sup>13</sup> The very best that may be said in these cases is that a jury question is presented.<sup>14</sup>

<sup>10</sup> *Fredenhall v. Abraham and Straus*, 279 N. Y. 146, 18 N. E. 2d 11 (1938).

<sup>11</sup> *Shaw v. Calgon, Inc.*, 35 N. J. Super. 319, 114 A. 2d 278 (1955).

<sup>12</sup> *Bordonaro v. Westinghouse Electric Corp.*, 287 F. 2d 954 (2d Cir. 1961); *Richardson v. DeLuca*, 53 So. 2d 199 (La. App. 1951); *Oettinger v. Norton Co.*, 160 F. Supp. 399 (D. C. E. D. Pa. 1957); *E. I. duPont deNemours & Co. v. Baridon*, 73 F. 2d 26 (8th Cir. 1934).

<sup>13</sup> *Central Steel Tube Co. v. Herzog*, 203 F. 2d 544 (8th Cir. 1953); *Tomao v. A. P. DeSanno and Son, Inc.*, 209 F. 2d 544 (3d Cir. 1954); *Martin v. Dengue, Inc.*, 25 N. J. 359, 136 A. 2d 626 (1957); *Wright v. Carter Products, Inc.*, 244 F. 2d 53 (2d Cir. 1957); *Johnson v. West Fargo Mfg. Co.*, 255 Minn. 19, 95 N. W. 2d 497 (1959); *Marigny v. De Joie*, 172 So. 808 (La. App. 1937).

<sup>14</sup> *Spruill v. Boyle-Midway, Inc.*, 308 F. 2d 79 (4th Cir. 1962); *Butler v. L. Sonneborn Sons, Inc.*, 296 F. 2d 623 (2d Cir. 1961); *Bean v. Ross Mfg. Co.*, 344 S. W. 2d 18 (Mo. 1961); *Tampa Drug Co. v. Wait*, 103 So. 2d 603 (Fla. 1958); *O'Connell v. Westinghouse X-Ray Co.*, 288 N. Y. 486, 41 N. E. 2d 177 (1942); *Panther Oil and Grease Mfg. Co. v. Segerstrom*, 224 F. 2d 216 (9th Cir. 1955); *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 41 A. 2d 850 (1945); *Karsteadt v. Philip Gross Hardware and Supply Co.*, 179 Wis. 110, 190 N. W. 844 (1922); *Standard Oil Co. v. Lyons*, 130 F. 2d 965 (8th Cir. 1942).

## II. Assumption of Risk

Further considering the type of case wherein warning or labeling, and plaintiff's alleged failure to do so is in issue, there are those situations where the risk is so great that, as a matter of law, the Courts have held, in effect, that warning or labeling would be a specious act. A classic situation in this respect is reported in *Hopkins v. E. I. du Pont de Nemours & Company*.<sup>15</sup> Here the blasting foreman had knowledge of the danger of premature explosions of dynamite where the dynamite was placed in newly drilled holes before allowing heat caused by the drilling to escape. The court held that Du Pont was not negligent in failing to warn of such danger since it was to be expected that an individual such as plaintiff's decedent would have knowledge of the danger, or should have been warned by the foreman. Consequently, the assumption of risk was the proximate cause of the accident. Another example of where plaintiff voluntarily exposed himself to danger is found in *Kaspirowitz v. Schering Corp.*<sup>16</sup> Here a plaintiff who knew of a requirement that the drug purchased must be obtained only by prescription, but who obtained the drug without prescription, was negligent.

What the Courts are saying here is that the defense of assumption of risk applies when plaintiff appreciated the danger, or should have appreciated the danger, to which he was exposing himself. That is to say, the hazard must have been obvious and avoidable.

On the other hand, it is manifest from plaintiff's own testimony that she knew from her own experiences that the shifter lever operated only with difficulty . . . The only part of the machine claimed to have failed to function properly at the time plaintiff was injured was the shifter lever. The conclusion is irresistible that she was fully informed of this condition. It follows that she, having continued to operate the machine with such knowledge, is not in position to recover from the manufacturer.<sup>17</sup>

The obvious corollary is that the defense of assumption of risk does not apply where plaintiff did not appreciate the danger,

<sup>15</sup> 212 F. 2d 623 (3rd Cir. 1954).

<sup>16</sup> 70 N. J. Super. 397, 175 A. 2d 658 (1961). See also *Pedroli v. Russell*, 157 Cal. App. 2d 281, 320 P. 2d 873 (1958), and *Sanders v. Kalamazoo Tank and Silo Co.*, 205 Mich. 339, 171 N. W. 523 (1919).

<sup>17</sup> *Gutelius v. General Electric Co.*, 37 Cal. App. 2d 455, 99 P. 2d 682, 683 (1940).

or the risk was not obvious.<sup>18</sup> A defense was denied in *Valmas Drug Co. v. Smoots*<sup>19</sup> by the 6th Circuit as early as 1920, wherein the Court said that the statement of ingredients on a home remedy eyewash was not sufficient to raise the defense of assumption of risk because plaintiff was not a physician. Thirty-four years later, the 3d Circuit held that conduct which might otherwise bar plaintiff as a matter of law must be looked at in a different light when the seller's experts have indicated that the procedures followed by plaintiff were the proper way to operate the purchased machine. In this instance it was apparently obvious, even to the Court, that plaintiff did not have a fair regard for his own safety in operating a hay-baler. However, in spite of the risk, plaintiff's voluntary exposure was due to the fact that he did just what the Allis-Chalmers demonstrators had shown him.<sup>20</sup>

While assumption of risk is a most favored contention of manufacturer-defendants, it is quite obvious that the facts must indeed be gross for the defense to be sustained. Unless and until the facts clearly establish that plaintiff knew, or should have known, of the danger and clearly appreciated, or should have appreciated, the danger, we have at most a fact question for the jury and, in all probability, a judgment for plaintiff.

### III. Failure to Exercise Due Care

Of lesser quality than assumption of risk is the defense of failure to use due care. This is perhaps what is ordinarily understood by the term "contributory negligence." And it is this type of situation that will most usually present itself to either plaintiffs or defendants in their consideration of a product liability case.

Further, we believe the plaintiff was guilty of contributory negligence as a matter of law. The question of due care on the part of the plaintiff is ordinarily one of fact for the jury, but when the facts bearing thereon rest solely upon his own testimony, and the attendant circumstances that are not in dispute, the court then had the duty of determining, as a matter of law, whether he, in fact, used ordinary caution for

<sup>18</sup> *Northwest Airlines v. Glenn L. Martin Co.*, 224 F. 2d 120 (6th Cir., 1955).

<sup>19</sup> 269 F. 356 (6th Cir. 1920).

<sup>20</sup> *De Eugenio v. Allis-Chalmers Mfg. Co.*, 210 F. 2d 409 (3rd Cir. 1954); *Miller v. New Zealand Ins. Co.*, 98 So. 2d 544 (La. App. 1957) (Effect of label warning dissipated by salesman's demonstration).



his own safety. . . . Where a plaintiff is thoroughly familiar with a possible hazard involved in the performance of his job and with the means to avoid such, the fact that at a particular time he may have been momentarily unmindful thereof, forgetful thereof, or have overlooked the same does not absolve him from the duty of observing due care for his own safety. . . . If a plaintiff has available to him two different methods or ways of doing a job, performing a task or proceeding,—one previously tried and known to be safe,—the other either unknown or unexplored or known to involve certain possible hazards,—and he chooses the method or way which is unknown and unexplored or known to involve certain possible hazards, and is injured in the process, he is contributorily negligent as a matter of law.

The plaintiff here was a licensed and experienced mechanic. He was not a novice, or a mere passer-by. He had been trained on the job. He had previously installed or helped install many other similar doors, \* \* \*.<sup>21</sup>

The rule as announced by the Illinois Court above appears to be the rule even in a comparative negligence state. The Wisconsin Court has held that plaintiff's negligent failure to air a room before relighting a gas burner system exceeded any negligence of defendant installer of the system.<sup>22</sup> Other cases of failure to exercise due care include continued operation of a motorcycle after discovery of wobble and shimmy in the front wheel;<sup>23</sup> continued use of an allegedly defective "line truck" when it was known that the cable employed on the drum of the "line truck" was oversized and would slip;<sup>24</sup> continued operation of an elevator in a customary manner even though plaintiff had been told that this was not consistent with safe operation.<sup>25</sup>

However, as a practical matter, the vast majority of situations with which counsel is presented will dictate that whether or not plaintiff failed to exercise due care is a question of fact for the jury. This state of affairs has, of course, been recognized by the courts: Removal of bottles known to be explosive in order to protect customers from possible injury (an application of the

<sup>21</sup> Day v. Barber-Colman Co., 10 Ill. App. 2d 494, 135 N. E. 2d 231, 239 (1956).

<sup>22</sup> Scalzo v. Marsh, 13 Wis. 2d 126, 108 N. W. 2d 163 (1961).

<sup>23</sup> Saeter v. Harley Davidson Motor Co., 186 Cal. App. 2d 248, 8 Cal. Rep. 747 (Cal. Ct. App. 1960).

<sup>24</sup> Boerio v. Haiss Motor Trucking Co., 7 App. Div. 2d 228, 181 N. Y. Supp. 2d 823 (Sup. Ct., 1959).

<sup>25</sup> Young v. Aeroil Products Co., 248 F. 2d 185 (9th Cir. 1957).

"rescue doctrine");<sup>26</sup> a fall from a standing position on an aluminum kitchen chair where the purchaser had not examined the chair to determine whether or not it would support this type of weight;<sup>27</sup> where plaintiff stood on the top step of a defective ladder which was perhaps known by him to be defective;<sup>28</sup> failure to leave a burning building, the fire having been occasioned by a defective oil stove;<sup>29</sup> continued operation of an automobile after plaintiff had learned, or should have learned, that the brakes were defective.<sup>30</sup>

Finally, it should be noted that the Supreme Court of New York, in the case of *Luneau v. Elmwood Gardens, Inc.*,<sup>31</sup> has suggested an economic exception to the proposition that failure to exercise due care will bar plaintiff's recovery as a matter of fact or as a matter of law. In this particular action plaintiff was a carpenter who was well experienced with wood. He pointed out to defendant that the lumber he was called upon to use was in bad condition. However, defendant's agent told him to go ahead and use it. The Court said:

While it is true, as a general rule, that a plaintiff who has equal knowledge with the defendant of a defective condition, and fails to avoid being injured by or through it, is guilty of contributory negligence as a matter of law, . . . it is but a *general* and not an *inflexible* rule for "one placed in the dilemma of abandoning the reasonable course of his work or assuming a risk will not be charged with contributory negligence as a matter of law if he adopts the latter alternative."

#### IV. Breach of Warranty

A great deal of confusion exists as to whether or not contributory negligence, however it is expressed, is a defense to an action for breach of warranty. It has been noted that there is a split of authority on this question.<sup>32</sup> The reported cases

<sup>26</sup> *Stroud v. Brands Punch Syrup Co.*, 205 S. W. 2d 618 (Tex. Civ. App. 1947).

<sup>27</sup> *Phillips v. Ogle Aluminum Furniture, Inc.*, 106 Cal. App. 2d 650, 235 P. 2d 857 (1951).

<sup>28</sup> *Heise v. J. R. Clark Co.*, 245 Minn. 179, 71 N. W. 2d 818 (1955).

<sup>29</sup> *Drinan v. A. J. Lindemann and Hoverson Co.*, 141 F. Supp. 73 (D. C. E. D. Wis. 1956).

<sup>30</sup> *Hembree v. Southard*, 339 P. 2d 771 (Okla. 1959). (In Oklahoma, interestingly, contributory negligence is a jury question, by force of Article XXIII of the Oklahoma Constitution.)

<sup>31</sup> 198 N. Y. Supp. 2d 932, 937; 22 N. Y. Misc. Rep. 2d 255 (Sup. Ct. 1960).

<sup>32</sup> *Frumer and Friedman, op. cit. supra*, note 6.

have made such judicial distinctions as assumption of risk and whether or not the product was being used abnormally or for an unintended use. (See discussions *supra*.) It is suggested, however, that the real distinction and the only valid distinction is whether the count sounds in implied warranty or in express warranty. In the case of express warranty, the nature of the warranty arises from the terms and conditions of the contract existing between the manufacturer or supplier and the plaintiff customer. This contract may be in writing or it may exist as a result of advertising.<sup>33</sup> The terms and conditions of the contract itself govern. It will also be recalled that contract, being historically an *assumpsit* action, did not, in any particular, consider the question of negligence on the part of defendant, or of contributory negligence on the part of plaintiff. Thus it is submitted that if there is recovery under a theory of express warranty, the defense of contributory negligence, whatever may be its form, is absolutely unavailable so long as plaintiff relies on the "contract." It is recognized, however, that some jurisdictions have not adopted this enlightened view.<sup>34</sup>

Implied warranty, however, is another matter. Dean Prosser writes that today's action for breach of implied warranty is "a freak hybrid born of the illicit intercourse of tort and contract."<sup>35</sup> He concludes that, "A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty. Originally sounding in tort, yet arising out of the warrantor's consent to be bound, it later ceased necessarily to be consensual, and at the same time came to lie mainly in contract."<sup>36</sup>

It may be unequivocally put that the better rule, if not the general rule, is that privity is no longer a requirement for an action sounding in breach of implied warranty. Thus, it is urged, an action for implied warranty is really no different in substance and quality from an action sounding in negligence.<sup>37</sup>

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<sup>33</sup> *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N. W. 309 (1939); *Hansen v. Firestone Tire and Rubber Co.*, 276 F. 2d 254 (6th Cir. 1960).

<sup>34</sup> Prosser, *The Assault Upon the Citadel* (Strict Liability to the Consumer), 69 *Yale L. J.* 1099, 1147 (see cases cited n. 288) (1960).

<sup>35</sup> *Id.* at 1126.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Barefield v. LaSalle Coca-Cola Co.*, 370 Mich. 1, \_\_\_\_ N. W. 2d \_\_\_\_ (1963).

If that is the case, then "contributory negligence," in whatever form, may well be interposed as a defense against a claim for breach of implied warranty. For example, continued use of defective bags after it had been discovered that the bags were defective barred plaintiff's recovery.<sup>38</sup> It was held to be error at the trial in not submitting the question of the owner's contributory negligence in continuing to use an oil burner with the knowledge that it was not functioning properly and failing to properly maintain a heating plant.<sup>39</sup> (This case also notes that historically breach of implied warranty in the sale of goods was a tort.) Additional support for this position is found in reported cases from New York, Illinois, Missouri and North Carolina, among others.<sup>40</sup> Hawaii has recognized the distinction between implied warranty and express warranty in *Brown v. Chapman*,<sup>41</sup> and stated that the "better rule is that contributory negligence is not a defense to breach of warranty where it serves simply to put the warranty to the test."<sup>42</sup>

But whether the action is for breach of implied warranty or breach of express warranty, contributory negligence, when used to mean assumption of risk, is a good defense. Plaintiff's negligent rewelding of essential parts of a defective amusement device after defendant had delivered it to plaintiff barred plaintiff's recovery, even though there was breach of warranty as well as negligent manufacture and design on the part of defendant.<sup>43</sup> Continued use of apparatus until repairs were made was fatal to plaintiff in *Cedar Rapids and I. C. Railway and Light Co. v. Sprague Electric Co.*<sup>44</sup> Here the Court drew a distinction between contributory negligence in a sense of failure to exercise due care to discover the defect and contributory negligence where there was an unreasonable exposure to a known risk:<sup>45</sup>

<sup>38</sup> *Missouri Bag Co. v. Chemical Delinting Co.*, 214 Miss. 13, 58 So. 2d 71 (1952).

<sup>39</sup> *Nelson v. Anderson*, 245 Minn. 445, 72 N. W. 2d 861 (1955).

<sup>40</sup> *Damer v. State*, 228 N. Y. Sup. 2d 997, 34 N. Y. Misc. Rep. 2d 363 (N. Y. Sup. Ct. 1962); *Fredendall v. Abraham and Straus*, 279 N. Y. 146, 18 N. E. 2d 11 (1938); *Eisenbach v. Gimbel Bros., Inc.*, 281 N. Y. 474, 24 N. E. 2d 131 (1939); *Sloan v. F. W. Woolworth Co.*, 193 Ill. App. 620 (1915); *Finks v. Viking Refrigerators, Inc.*, 235 Mo. App. 699, 147 S. W. 2d 124 (1940); *Walker v. Hickory Packing Co.*, 220 N. C. 158, 16 S. E. 2d 668 (1941).

<sup>41</sup> 304 F. 2d 149 (9th Cir. 1962).

<sup>42</sup> *Id.* at 153.

<sup>43</sup> *Siebrand v. Eyerly Aircraft Co.*, 196 F. Supp. 936 (D. C. Ore. 1961).

<sup>44</sup> 280 Ill. 386, 117 N. E. 461 (1917).

<sup>45</sup> *Id.* at 463.

A party may not recklessly use a defective instrument with full knowledge of its dangerous condition, to the injury of third persons, relying upon the guarantee of its condition for indemnity against liability for his own negligence. If the defect were not apparent, or even if it were discoverable by an inspection, but was not discovered through the negligent failure to inspect, an entirely different question would be presented from that arising here.

Other instances of assumption of risk are continued use of seeds which were known not to be the kind that had been ordered from defendant;<sup>46</sup> use of unprocessed pork which was known not to have been processed;<sup>47</sup> consumption of an allegedly tainted pie when plaintiff knew, or in the exercise of ordinary care should have known, of its unwholesome quality;<sup>48</sup> and the eating of raw pork.<sup>49</sup> Parenthetically it is noted that these last two cases indicate that under certain circumstances contributory negligence may be interposed as a defense to an action founded on violation of a pure food statute.

### V. Conclusion

As is readily apprehended, contributory negligence in the defense of a product liability action is a can of worms. But, if it is recognized that there is no such thing as "contributory negligence" and that the defense contemplated is that of abnormal, unintended, or unforeseen use, or is that of assumed risk, or that of lack of due care, then there may perhaps be order brought out of chaos. However, it is strongly suggested that even these defenses are, in the absence of uncontrovertible facts, no panacea for defendants. There are much better ways to beat a product liability claim than relying on contributory negligence, an illusory defense.

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<sup>46</sup> *Pauls Valley Milling Co. v. Gabbert*, 182 Okla. 500, 78 P. 2d 685 (1938).

<sup>47</sup> *Schneider v. Suhrmann*, 8 Utah 2d 35, 327 P. 2d 822 (1958).

<sup>48</sup> *Criswell Baking Co. v. Milligan*, 77 Ga. App. 861, 50 S. E. 2d 136 (1948).

<sup>49</sup> *Leonardi v. A. Habermann Provision Co.*, 143 Ohio St. 623, 56 N. E. 2d 232 (1944).