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Products Liability - Assumption of Risk Is an Affirmative Defense to a Products Liability Suit Based upon Strict Liability in Tort - Mere Contributory Negligence Will Not Bar Plaintiff's Relief

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PRODUCTS LIABILITY—Assumption of Risk Is an Affirmative Defense To a Products Liability Suit Based upon Strict Liability in Tort. Mere Contributory Negligence Will Not Bar Plaintiff's Relief.

While in the course of his employment on May 19, 1961, James Williams, Jr., was operating a "Bus Brown" 468R Trencher. This trenching machine, with which Williams had had two and one-half hours of operating experience, was a gasoline driven device designed and manufactured by the defendant, Brown Manufacturing Company. It was one of several delivered to Williams' employer earlier in that month.

While the machine was purportedly designed to be operated from the side, it was equipped with a set of handlebars and operating levers which could be manipulated from the rear. In addition, there were operating instructions printed on the trencher which were more easily read from a position behind the machine. Williams was operating the trencher from behind these handlebars when the teeth on a boom which actually dug the trench struck a 3/4-inch gas service pipe buried in the ground. The resulting force pulled the machine downward, compressing its tires. When the teeth suddenly slipped free from the pipe, the machine jumped or "bucked", knocking Williams to the ground. The device repeated this action, again striking and injuring Williams, before a fellow worker was able to shut it off.

The machine was operated by an arrangement of Vee belts which served to convert the power from the engine into the movement of the trenching teeth around the boom. As a safety precaution, these Vee belts were designed to slip when subjected to this great a force; however, on this occasion they failed to do so.

An instruction booklet shipped with each trencher stated under the section entitled "Adjustments and Maintenance" that the Vee belts were adjustable, and that they should be tightened if they became loose enough to slip during normal operation. This notice was followed by a caution against adjusting the belts too tightly, since it would prevent them from slipping under shock load. Under "Service and Maintenance Tips" the manual stated that an overly tight adjustment of the belts might cause "short belt life" and "shearing [of] Woodruff Keys." However, the only statement relating to adjustment of the drive belt in the "Suggestions for Safety" section of the instruction manual

was that the machine had to be stopped before any such adjustment was made. Williams subsequently admitted having read portions of the instruction manual on the evening preceding his injury.

In May of 1963, more than two years after the trencher was sold, but within two years of the date of injury, Williams brought a negligence action against both Brown Manufacturing Company and Illinois Power Company, his employer. A fourth amended complaint adding an allegation of strict liability against Brown Manufacturing Company was later filed, following the adoption of the theory of strict liability in tort in products liability cases by the Illinois Supreme Court in 1965.[1] The primary basis for this allegation was that the belt slippage safety arrangement was defectively designed. At the close of his case, however, Williams was permitted to allege as an additional dangerous condition that the machine had no warning against operation from behind and between the handlebars. The plaintiff at no time alleged his exercise of due care for his own safety as would be required in an ordinary negligence case in Illinois.[2] On defendants' motions, the trial court struck the allegation of negligence against Brown, and gave a directed verdict for Illinois Power Company. With respect to Brown Manufacturing Company, the only remaining defendant, the trial court struck its affirmative defenses of the statute of limitations and assumption of risk. In its opinion, the proof was insufficient to support either defense. A jury verdict was reached for the plaintiff in the amount of $40,000.00 based on the theory of strict liability in tort.

Before the hearing of its appeal in the Appellate Court of Illinois, Fifth District, the defendant moved for disqualification of the entire panel of judges of the appellate court on the grounds that it was prejudiced or interested. The defendant theorized that the entire panel of judges was tainted by the close political association with the single judge who previously disqualified himself because he had participated in the initial proceedings as a member of the plaintiff's law firm. After the appellate court denied the motion and affirmed the verdict for the plaintiff, the defendant appealed on eight grounds to the Supreme Court of Illinois. That court ruled on three of them, accepting the appellate court's treatment of the other questions as raised.

HELD: REVERSED AND REMANDED

1. The close political association of the members of the appellate

1. Suvada v. White Motor Company, 32 Ill. 2d 612, 210 N.E.2d 182 (1965).
2. Swenson v. City of Rockford, 9 Ill. 2d 122, 127, 136 N.E.2d 777 (1956); Austin v. Public Service Co. of Northern Illinois, 299 Ill. 112, 120, 132 N.E. 458 (1921).

court did not require disqualification of the entire panel of judges merely because one of its members had participated in the initial proceedings at trial as a member of plaintiff's law firm and was himself disqualified.[3]

2. In a suit for personal injury resulting from a defective product under the theory of strict liability in tort, the statute of limitations begins to run from the date on which the plaintiff first knows of his right to sue, which necessarily occurs on the date of the injury, rather than from the date upon which the product left the control of the defendant.

3. In a products liability case based upon strict liability in tort, a plaintiff need not plead and prove his exercise of due care for his own safety, and mere contributory negligence as it is known in Illinois, will not bar recovery. Assumption of risk, however, is an affirmative defense, and will constitute such a bar.[4] Since there was evidence which when viewed in a light most favorable to the defendant, could permit a jury verdict for the defendant on this issue to stand, the defense of assumption of risk should not have been stricken, and a new trial was ordered.

The decision of the Illinois Supreme Court in *Williams v. Brown Manufacturing Company* is primarily significant for its consideration of the concept of contributory negligence as applied to a products liability case based on strict liability in tort, and its apparent resolution of the conflict in Illinois law[5] as to what plaintiff conduct will bar his

3. Defendant's motion was not for a change of venue, but for a change of judges, on the grounds that this panel could not give him an impartial trial. As evidence of this, defendant pointed out that the court's opinion in a relevant case, Wright v. Massey-Harris, Inc., 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966), written by the disqualified judge, had been used by the plaintiff's attorneys at the trial of this case before it had been officially published in reporters.

Generally a motion of this nature requires proof of a more direct or extensive relationship or interest than that stated here before it will be granted. *See* 48 C.J.S. *Judges* §§ 72-97 (1947); 19 Ill. Dig. *Judges* 455-460 (1955); 23 Call. Ill. Dig., *Judges* 166 (1957).

4. The defense of assumption of risk was held to be available to the defendant despite the lack of any master-servant or contractual relationship between he and the plaintiff. The master-servant relationship is required for a valid defense in negligence cases. Conrad v. Springfield Consol. R. Co., 240 Ill. 12, 88 N.E. 180 (1909); Sweeney v. Matthews, 94 Ill. App. 2d 6 (1968), an appellate court decision, had previously taken the same position as the supreme court in this case.

5. This conflict (in Illinois law) is exemplified by the following cases decided after Suvada v. White, 32 Ill. 2d 612, 210 N.E.2d 182 (1965):

> Adams v. Ford Motor Co., 103 Ill. App. 2d 365 (1968). A plea of lack of contributory negligence was surplusage and need not be proven; Sweeney v. Matthews, 94 Ill. App. 2d 6 (1968), assumption of risk is the only bar to recovery and is an affirmative defense; Dunham v. Vaughn & Bushnell Mfg. Co., 86 Ill. App. 2d 315 (1968), exercise of due care for own safety means assumption of risk; Vlahovich v. Betts Machine Co., 101 Ill. App. 2d 123 (1968), contributory negligence cannot be an issue where no negligence by the defendant is involved.

recovery in such a case. It should also resolve any doubt as to which party must bear the burden of pleading and proving such conduct or freedom from it. Unlike the rule applied in ordinary negligence cases in Illinois,[6] a plaintiff in a strict tort liability case need not bear the burden of pleading and proving his freedom from contributory negligence.

The conflict in the law resulted largely because of the statement made by the Illinois Supreme Court in *General Motors v. Bua*[7] that in strict tort liability cases as well as negligence cases "It is necessary to prove that the plaintiff was in the exercise of due care for his own safety."[8] This statement appears to indicate that contributory negligence is properly at issue in a strict liability case; however, prior to the decision in *Bua*, the Illinois courts had not gone beyond assumption of risk to allow contributory negligence measured by the objective standard to bar recovery. The court in *Williams v. Brown Manufacturing Company* specifically rejected the implication in *Bua* that pure contributory negligence is at issue in a products liability case.

Of secondary importance is the court's holding that the statute of limitations will not begin to run until the injury resulting from the defectively manufactured product occurs. The court viewed this result as necessary in order to avoid emasculating much of the consumer protection afforded by application of the theory of strict liability in tort to products liability cases.

While not previously settled, this application of the statute of limitations to strict tort liability cases was predictable for at least two reasons. First, in *Gray v. American Radiator and Standard Sanitary Corp.*,[9] relied upon by the *Williams* court, the Illinois Supreme Court concluded that for purposes of the "long arm" statute,[10] a tortious act is committed in the state in which the injury occurs. The court supported this conclusion by stating in dictum that: "In applying statutes of limitations our court has computed the period from the time when the injury is done."[11] Secondly, because Illinois has, since *Suvada v. White*,[12]

6. Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).
7. 37 Ill. 2d 180, 226 N.E.2d 6 (1967).
8. *Id.* at 196.
9. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
10. ILL. REV. STATS. Ch. 110 § 17(1) (1969): "Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts: . . . (b) The commission of a tortious act within this State . . . ."
11. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d at 435, 176 N.E.2d 761 (1961).
12. *See* note 1, *supra.*

treated suits of this nature as falling within the category of strict liability in *tort* (not contract or warranty), no cause of action arises until the injury occurs. Therefore, the statute of limitations cannot begin to run until this time. Illinois thus avoids the problem which arises in those states which characterize strict liability as a breach of implied warranty. Such jurisdictions have difficulty reconciling the policy of consumer protection through strict liability with the fact that the contract or warranty was breached as of the date of sale.[13]

The defendant had argued that the breach of warranty rationale should be used in order to avoid compelling it to prove elements of a defense to a stale claim which arose over two years from the time the trencher left its control. In support of this contention, an elaborate case was hypothesized in which Ford Motor Company could be sued today for defects in the design of a Model-T automobile. This, stated the defendant, would be the extreme state of affairs which would result if the statute were deemed to begin running at the date of injury.[14] The court answered this contention convincingly by recognizing the presence of inherent safeguards against such injustice. One element of plaintiff's case is proof of the existence of the defective condition at the time the product left the seller's control. This determination of whether the product was defectively designed must be made on the basis of the standards and knowledge prevailing at the time the product left the defendant's control and not when the injury occurred. This requirement, in addition to the difficulty of sustaining the burden of proof in a case such as that hypothesized by the defendant, provides adequate safeguards for manufacturers against injustices arising from the passage of time.

While *Williams v. Brown Manufacturing Company* decided the manner of the application of the statute of limitations in strict liability in tort actions, its most important aspect is its analysis of the issue of the applicability of contributory negligence in such cases. The Illinois Supreme Court, in its opinion on rehearing, rejected simple contributory negligence as a bar to plaintiff's recovery. In its earlier opinion in this case, the court had held that a plaintiff's failure to exercise due care for his own safety, at least to the extent that he unreasonably failed to discover a defective condition or guard against its existence, would bar his recovery. The burden of pleading and proving freedom from such conduct was, as in negligence cases, placed upon the plaintiff. Illinois, had this earlier position not been revised, would have stood as the only

13. Wright, *Defective Products and Strict Liability*, A.B.A. LAW NOTES, April, 1969.
14. Defendant's Appellate Brief pp. 58-60.

jurisdiction among those which have examined the relationship of contributory negligence to strict liability in tort,[15] to place such a burden on plaintiffs or to allow this type of conduct to bar recovery.

The entire field of strict liability in tort is a hybrid of the law developed in the two fields of negligence and breach of warranty. It has developed from *MacPherson v. Buick Motor Co.*[16] which did away with any privity requirement in a suit for negligent manufacture, and *Greenman v. Yuba Power Co.*,[17] which first did away with the requirement of negligence, and, finally, to *Suvada v. White*,[18] which adopted strict liability for defective products in Illinois. Since it is a hybrid, concepts of law from both breach of warranty cases and negligence cases have been applied to different aspects of strict liability in tort.[19] The authorities which have refused to recognize contributory negligence as a bar to plaintiff's recovery have relied upon breach of warranty cases, and elected to apply the law developed in that type of action to this aspect of strict liability.[20] The Illinois court agreed with this position, rather than, as in its first opinion, viewing the relationship between contributory negligence and strict tort liability as best defined by traditional concepts of negligence law.

The issue of contributory negligence arose in this case when evidence was introduced that the "bucking" may have been caused by improper adjustment of the drive belts. The defendant had argued that, since plaintiff had failed to plead and prove his exercise of due care for his own safety, his complaint, as in a negligence case, failed to state a cause of action. Because the plaintiff had partially read the instruction manual which explained this hazard and still failed to discover the defect, the court, in its first opinion, stated that there was conceivably some evidence of contributory negligence. Thus, it was first held that the

15. One questionable case holds that failure to use due care is a bar to plaintiff's recovery. Maiorino v. Weco Products Co., 45 N.J. 570, 214 A.2d 18 (1965); but the issue involved there was really misuse.

16. 217 N.Y. 382, 111 N.E. 1050 (1916).

17. 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

18. *See* note 1, *supra*. For a historic discussion of the development of the field, *see* W. PROSSER, LAW OF TORTS, Ch. 4 (3d Ed. 1964); Prosser, *Assault upon the Citadel*, 69 YALE L.J. 1099 (1960); Prosser, *Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

19. *E.g.*, Prosser, *Fall of the Citadel, supra* note 18, at 824. "There appears no reason to doubt that strict liability has made no changes in the rule, well settled in the *negligence* cases that the seller of a product is not to be held liable where the consumer makes abnormal use of it." (emphasis supplied).

Prosser also states that strict liability carries over the *negligence* theory that intervening dealers' failure to discover a defect does not relieve manufacturers. *Id.* at 827, then says: "There has been as yet no case involving strict liability in tort which discards *warranty*, but it appears quite certain that the same rules will apply." *Id.* at 840 (emphasis supplied).

20. Prosser, *supra* note 18. Traynor, J. in Greenman v. Yuba Power Co., *supra* note 17.

trial court's assumption that a plaintiff need not plead and prove his exercise of due care for his own safety was erroneous, because the effect of this assumption was to remove from the plaintiff the burden of pleading and proving that his injuries were proximately caused by the defective condition, rather than his own failure to exercise due care. On rehearing, however, the court viewed this evidence as possibly constituting the generally recognized defense of assumption of risk. The court also viewed evidence that the plaintiff may have understood that the trencher was to be operated from the side rather than from behind as giving possible grounds for this same defense. Since the trial court had stricken the defendant's affirmative defense of assumption of risk, the supreme court reversed, stating, "It would not be unreasonable for a jury to conclude that plaintiff's decision to operate the machine from this admittedly inconvenient position might have been prompted more by the sloping terrain than by any characteristic of the trencher itself."[21] The court then applied the standard Illinois test[22] for striking such defenses as defendant's, and decided that, viewing the totality of the evidence in its aspect most favorable to defendant, "[W]e cannot say that the evidence as a whole so overwhelmingly favors plaintiff that a jury finding for defendant on this issue could never stand."[23]

The court's first opinion in this case, which had held contributory negligence to be a bar to plaintiff's relief, was intricately drafted, but raised as many questions as it answered. In that opinion, the supreme court had begun its analysis by examining the types of conduct by the plaintiff which might bar a recovery in strict liability in tort cases, and had classified this conduct into three categories: (1) contributory negligence based on the objective standard,[24] (2) assumption of risk,[25] and (3) use of the product in a manner which could not reasonably have been foreseen by the manufacturer, commonly called "misuse". The court had stated that the first category is broad enough to include the latter two, and is contributory negligence as defined in this state;[26] then it had explained that the fact that assumption of risk is judged by a subjective standard and the other two by the objective standard is of little significance because there are few instances in which a plaintiff

21. Williams v. Brown Manufacturing Company, — Ill. 2d —, — (1970).
22. Pedrick v. Peoria & Eastern R.R. Co., 37 Ill. 2d 494, 232 N.E.2d 700 (1967).
23. Williams v. Brown Manufacturing Company, — Ill. 2d —, — (1970).
24. "Failure to exercise due care for one's own safety, which would include failure to discover the defect in the product, or to guard against the possibility of its existence, as determined by application of the objective reasonable-man standard . . . ." Unpublished opinion, William v. Brown Manufacturing Company.
25. "Use of the product after discovery of the defect." *See also* note 30, *infra*.
26. "The first category is contributory negligence as defined in this State and is broad enough to encompass all three categories."

has recovered in the face of proof indicating a reasonable man would not have acted as the plaintiff did.

While it is generally agreed that use of the product in an unreasonable manner, for a purpose neither intended nor foreseeable by the defendant ("misuse"), will bar recovery, it is not clear who has the burden of pleading and proof on this issue. The Illinois Supreme Court in *Suvada v. White*[27] cited *Greenman v. Yuba Power Co.*,[28] which required as an element of the plaintiff's proof a showing that the product was used in a normal fashion. However, in *Suvada*, itself, the court made no such requirement and the issue never arose. The *Williams* court, however, stated: "[P]laintiff's misuse of the product may bar recovery. This issue may arise in connection with *plaintiff's proof* of an unreasonably dangerous condition of proximate causation or both." (emphasis added).

Assumption of risk has also been generally recognized as a bar to the plaintiff's recovery. With reference to this category of plaintiff conduct, the appellate court in *Williams*[29] interpreted the Illinois Supreme Court's decision in *Suvada*, which adopted § 402A of the Restatement (Second) of Torts, as also having adopted Comment (n) to that section. That comment recognizes assumption of risk as an affirmative defense in strict liability cases,[30] but also states: "Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence."[31] Because the appellate court felt that this was the current state of the law in Illinois, it believed that the only issue of contributory negligence to be allowed was that of assumption of risk, and since this was an affirmative defense, the burden of pleading and proving it fell upon the defendant.

In those jurisdictions which have adopted strict liability in tort, it is also necessary in order for the plaintiff to recover that he show that the product was unreasonably dangerous when it left the seller's control. This requirement is often felt to be an element of proof of the product's defectiveness;[32] however, it is stated as a separate element

27. See note 1, *supra.*
28. See note 17, *supra.*
29. 93 Ill. App. 2d 334, 236 N.E.2d 125 (1968).
30. "On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."
31. RESTATEMENT (SECOND) OF TORTS § 402A, Comment (n) (1965).
32. *Id.*

of proof in *Suvada v. White*.[33] The proof needed to establish this condition requires an application of the reasonable man objective standard, *i.e.*, "The article sold must be dangerous to the extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[34] It is this application of the objective standard in determining whether or not the product is "unreasonably dangerous" which first led the Illinois Supreme Court to apply the same standard to determine what conduct of the plaintiff would bar relief. In its original opinion "the court had reasoned that a necessary element of plaintiff's case is a showing that the defective condition renders the product unreasonably dangerous" which "necessarily implies that a plaintiff exercising due care for his own safety would not have discovered the defect."[35]

It may appear that this language taken from the first opinion, not adopted in its final opinion, requires the plaintiff to plead and prove the same facts twice. This apparent redundency would arise because, under *Suvada*, a reasonable man would not be aware of the defect in order to establish its unreasonably dangerous condition, and, in negating contributory negligence, that a reasonable man in his position would not have learned of the defect or guarded against its existence. However, there is a clear distinction between these two requirements. Proof of an unreasonably dangerous condition relates only to the time the product left the control of the manufacturer. Proof of freedom from contributory negligence, on the other hand, would require that the plaintiff prove, based on all facts which come to his knowledge, that he was not negligent during the entire period beginning with the sale of the product and ending with his injury. This distinction between the two requirements should indicate that the latter cannot necessarily be inferred from the former. On reexamination, however, the court, perhaps realizing this distinction, explained that the implication of a duty to inspect all products for potential defects, with the consequent effect on the policy of consumer protection, was not intended. In view of its goal on rehearing, to "adopt a more appropriate and workable framework for treatment of plaintiff's recovery—barring conduct in strict product liability cases," the court adopted the Restatement and appel-

33. "The plaintiffs must prove that their injury or damage resulted from a condition of the product, that the condition was an unreasonably dangerous one and that the condition existed at the time it left the manufacturer's control." Suvada v. White, *supra* note 1, at 623.
34. *See* note 31, *supra*, at Comment (i).
35. Unpublished opinion, Williams v. Brown Manufacturing Company.

late court's position by recognizing only misuse and assumption of risk as types of conduct which bar recovery. It also affirmed the position that assumption of risk is an affirmative defense, with the burden of proof resting on the defendant.

Another problem inhering in the first supreme court decision in *Williams*, which has been avoided, was the matters which might be considered in determining if the plaintiff did in fact act as a reasonable man during the interim period between purchase and injury. The court had stated in its first opinion that the sole basis for its reversal of the *Williams* case lay in the possibility that the plaintiff failed to use due care to discover the defect or guard against its existence. However, it defined the conduct with which it was dealing as:

> Failure to exercise due care for one's safety, which would *include* failure to discover the defect in the product, or to guard against the possibility of its existence, as determined by application of the objective reasonable-man standard.[36] (emphasis added).

This statement seems to indicate that contributory negligence may consist of more than a mere failure to discover the defect or guard against its existence. This conclusion is further supported by the following statement from the court's first opinion:

> The first category is contributory negligence as defined in this state and is broad enough to encompass all three categories. 'The question is whether traditional concepts of Illinois contributory negligence law are to be applied here or whether the strict liability theory necessitates adoption of a new standard.[37]

This quotation can be read as indicating that all traditional concepts of contributory negligence were to be applicable in a strict liability in tort case, however, the first sentence may also have answered the question raised by the earlier quotation, that is, the other defenses "included" are misuse and assumption of risk. Finally, on this point, the court had originally said:

> The conflict in the cases, if any exists, revolves about the question whether plaintiff's failure to discover a defective condition in a product, or to realize the possibility of its existence and guard against it, should preclude his recovery. Should in other words, the conduct described in the first category, *i.e.* contributory negligence as measured by an objective standard, bar recovery?[38]

The first opinion of the court, as evidenced by the above quotations, left open the question of whether any failure to exercise due care for

36. *Id.*
37. *Id.*
38. *Id.*

one's own safety would bar recovery, or whether the concept of contributory negligence as it applied to strict liability was limited to a failure to find the defect or guard against its existence. While the case was clear on its own facts, further explication of what plaintiffs in future products liability cases must plead and prove seemed necessary.

In both opinions, the appellate court's decision was reversed because the plaintiff had partially read the instruction manual regarding adjustment of the drive belts. In the first opinion, this was viewed as constituting possible evidence of contributory negligence,[39] while in the revised opinion it was looked upon as possible evidence of an assumption of risk. Either interpretation would potentially bar recovery. Although the court made no express finding of the adequacy of the notice in the manual, if the plaintiff did, in fact, learn of the possible danger, this would constitute assumption of risk, and the court would be justified in reversing on this ground. If, however, the manual or its warnings were not sufficient to put him on notice of the danger, the issue becomes failure to warn, and the plaintiff could not have assumed the risk in failing to find the defect. The court also relies, as possible grounds for the assertion of the defense of assumption of risk, upon some evidence that the plaintiff knew that the trencher should not be operated from behind. This it did despite the fact that one of the alleged defects was a failure to warn him against operation from that position. To allow the defenses of contributory negligence or assumption of risk under these circumstances:

> is to indulge in circular reasoning, since usually the plaintiff cannot be said to have assumed a risk of which he was ignorant, or to have contributed to his own injury when he had no way of reasonably ascertaining that the danger of injury existed. On the other hand, if the plaintiff knew of the danger from an independent source, the manufacturer's failure to warn would not be the proximate cause of the injury.[40]

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39. [D]efendant's argument that the machine was designed to be operated from the side, and that the purpose of the handlebars was to facilitate guiding the trencher when moving in a forward direction from one work area to another, is singularly unpersuasive in the absence of any instructions or warnings to this effect either on the machine or in the manual. . . . The fact that the evidence indicates plaintiff had partially read the instruction manual which explained this hazard (bucking from improper adjustment of drive belts) could, conceivably, constitute some evidence of contributory negligence. . . .

This case was tried on the assumption that plaintiff need not plead and prove his exercise of due care for his own safety. That assumption was incorrect and the trial court rulings were erroneous insofar as their effect was to remove from plaintiff the burden of pleading and proving that the injuries were proximately caused by the defective condition and not by his failure to use due care for his own safety." Unpublished opinion, Williams v. Brown Manufacturing Company.

40. Dillard & Hart, *Product Liability: Directions for Use and Duty to Warn*, 41 VA. L. REV. 145, 164 (1955).

A third factual possibility is that the manual was sufficient as to its warning, but plaintiff was negligent in failing to read or understand it. It is this type of conduct which the court originally held should bar recovery; however, this could hardly be described as "voluntarily and unreasonably proceeding to encounter a known danger," which is generally the definition of assumption of risk. It would seem that the only means of establishing that defense would be findings that the manual contained an adequate warning and that the plaintiff had read it. The court felt that there was some evidence of both.

In its revised opinion, the court implies a distaste for the subjective test used in determining assumption of risk, and states:

> [W]hile the test to be applied in determining whether a user has assumed the risk of using a product known to be dangerously defective is fundamentally a subjective test, in the sense that it is *his* knowledge, understanding and appreciation of the danger which must be assessed, rather than that of the reasonably prudent person (Restatement (Second) of Torts, § 496D, comment (c)), it must also be remembered that this is ordinarily a question to be determined by the jury. That determination is not to be made solely on the basis of the user's own statements but rather upon the jury's assessment of all of the facts established by the evidence. No juror is compelled by the subjective nature of this test to accept a user's testimony that he was unaware of the danger, if, in the light of all of the evidence, he could not have been unaware of the hazard (Restatement (Second) of Torts, § 469D, comments (d) and (e). . . .[41]

Since the court found some evidence that the manual was adequate in its warning, and that the plaintiff had read and understood it, its decision to reverse on the ground that the defense of assumption of risk should not have been struck is sound. The court's other basis, that there was evidence that the plaintiff knew of the danger from operating the machine from behind by obtaining this information from an outside source or through experience is, however, questionable. Since the plaintiff had proven at the trial level that the defect was in failing to warn him of this danger, and that this defect caused his injury, it is impossible for him to have assumed the risk. If he knew of the danger, the failure to warn could not have caused his injury.

The decision to alter its position as regards the concept of contributory negligence was a sound policy decision by the court. Strict liability in tort is imposed for the protection of the consumer. It is liability without negligence and not liability without fault. There are

41. Williams v. Brown Manufacturing Company, — Ill. 2d —, — (1970).

many ways of being negligent even while exercising due care to discover the defect or guard against its existence. The policy reasons for adopting strict liability as stated in *Suvada* militate against precluding recovery for some unrelated negligent act by a plaintiff. The court states in its revised opinion that it intended no implication of a "duty to inspect" to be placed on all plaintiffs in like suits. It follows that they also intended no other duties which might have been implied by a broad definition of contributory negligence. Of course, if the original opinion could be interpreted as having adopted all aspects of contributory negligence applicable to a negligence case to a products liability case, it could have led to a situation where the manufacturer of a defective product would fortuitously benefit from the user's failure to exercise due care for his own safety when all the user may have done is put the product to the test.[42]

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42. *See* Bahlman v. Hudson Motor Company, 290 Mich. 683, 288 N.W. 309 (1939), where a car, designed to be safer in an accident than others due to a certain safety feature, was, in fact, not. The driver, who negligently involved himself in a crash, was allowed to recover under breach of warranty because the accident merely put the warranty "to the test."