1980

Products Liability - Restatement (Second) of Torts - Virgin Islands Comparative Negligence Statute Applied in Strict Products Liability Action

Clifford H. Lange

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Legal Remedies Commons, and the Torts Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol25/iss6/13

This Issues in the Third Circuit is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
PRODUCTS LIABILITY—RESTATEMENT (SECOND) OF TORTS—VIRGIN ISLANDS COMPARATIVE NEGLIGENCE STATUTE APPLIED IN STRICT PRODUCTS LIABILITY ACTION

Murray v. Fairbanks Morse (1979)

Norwilton Murray was injured while he was installing an electrical control panel which had been manufactured by Beloit Power Systems (Beloit). Murray brought a products liability action against Beloit, alleging alternative theories of strict liability and negligence. Beloit defended on the grounds that the plaintiff’s method of installation was highly dangerous and that he had assumed the risk posed by this method of installation. A jury verdict was returned in favor of the plaintiff, but, upon a finding that the plaintiff was at fault to the extent of five percent, the verdict was reduced by that amount. On appeal, the United States Court of Appeals for the Third Circuit affirmed, holding that the Virgin Islands’ statutory comparative fault...

1. Murray v. Beloit Power Sys. Inc., 450 F. Supp. 1145, 1146 (D.V.I. 1978), aff’d sub nom. Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979). The plaintiff, an experienced instrument fitter, was assigned the task of aligning the base of the control panel with a platform and securing the unit with mounting bolts. 610 F.2d at 150. The platform was over an open space approximately 10 feet above a concrete floor. Id. In order to protect the delicate instrumentation inside the panel during shipping, Beloit had attached two iron cross bars to the open bottom of the unit. Id. The plaintiff fell when a protective cross bar gave way as he was attempting to align the unit. Id. at 151. It was determined at trial that the cross bar collapsed because it had been only temporarily “tack-welded” to the unit, as opposed to a more permanent “butt-weld.” Id.

2. 450 F. Supp. at 1146. The basis of the plaintiff’s complaint was that the support had been improperly welded, thus giving rise to a cause of action under both strict products liability and negligence principles. 610 F.2d at 151.

3. 450 F. Supp. at 1146. The Plaintiff had placed his weight on one of the cross bars while leaning over the open space at the bottom of the unit. 610 F.2d at 151. Beloit presented expert evidence that the plaintiff’s technique was highly dangerous and, therefore, negligent. Id.

4. 450 F. Supp. at 1147. Beloit’s expert testified that Murray could have avoided the accident by employing widely used methods for safely installing similar units, such as erecting a movable scaffold or cover below him to break his fall. 610 F.2d at 163. In reply, Murray introduced testimony from his supervisor showing that Murray had installed approximately 400 units over an 18-year period without incident while following the same procedures he had used on the day of his accident. Id.

5. 610 F.2d at 150. The jury, in response to special interrogatories, found that the plaintiff’s method of installation was a proximate cause of his injuries and that he contributed to his own injuries to the extent of five percent. Id. The judgment was reduced accordingly. Id. On appeal, the plaintiff contended that the trial court had erred in accepting contributory negligence as a defense to a products liability action grounded upon section 402A of the Restatement (Second) of Torts, and that the trial court should not have reduced his recovery in proportion to his own contributory negligence. Id.

6. Judge Rosenn wrote for a panel which included Judges Maris and Hunter.

(1072)
principles were applicable to strict products liability actions brought under section 402A of the Restatement (Second) of Torts (Restatement). Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979).

The states that have adopted comparative negligence statutes are divided as to whether such statutes may be applied in section 402A products

7. The Virgin Islands had recently enacted a comparative negligence statute of the "modified" variety, which reduces a plaintiff's recovery in proportion to his fault, but bars recovery if it is determined that the plaintiff's fault was greater than the defendant's. V.I. Code Ann. tit. 5, § 1451 (Equity Cum. Supp. 1978). The statute states in pertinent part:
   (a) In any action based upon negligence to recover for injury to person or property, the contributory negligence of the plaintiff shall not bar a recovery, but the damages shall be diminished by the trier of fact in proportion to the amount of negligence attributable to the plaintiff. The burden of proving contributory negligence shall be on the defendant. If such claimant is found by the trier of fact to be more at fault than the defendant, or, in the case of multiple defendants, more at fault than the combined fault of the defendants, the claimant may not recover.
   (b) This section does not apply to any action based upon a statute the violation of which imposes absolute liability, whether or not such statute comprehends negligent conduct.

Id. (emphasis added). For a discussion of the distinction between the various forms of comparative negligence statutes, see note 9 infra.

8. 610 F.2d at 164. See Restatement (Second) of Torts § 402A (1965). Section 402A provides:
   (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or 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.


The drafters of the Restatement, however, have provided for two defenses which prevent actions under section 402A from being tantamount to absolute liability. The Restatement provides that the risk will bar recovery, "[i]f 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." Restatement (Second) of Torts § 402A, Comment n.

Moreover, product misuse unforeseeable to the defendant is a defense, "[i]f the injury results from abnormal handling . . . abnormal preparation for use . . . or from abnormal consumption." Id., Comment h. See Dale & Hilton, Use of the Product—When is it Abnormal?, 4 Willamette L. J. 350, 352 (1967); Noel, Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk, 25 Vand. L. Rev. 93, 119-28 (1972). Courts have differed on whether these defenses are themselves subject to the application of comparative fault principles. Compare Keegan v. Anchor Inns, Inc., 606 F.2d 35, 39 (3d Cir. 1979) with General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977). See note 62 infra.

Neither the assumption of the risk defense nor the product misuse defense was applicable under the facts of Murray. See 610 F.2d at 162.

9. Since the advent of comparative negligence, three distinct forms of such statutes have evolved. See generally Shrager & Shepherd, History, Development and Analysis of the Pennsylvania Comparative Negligence Act: An Overview, 24 Vill. L. Rev. 422, 435 n.92 (1979) (part of a symposium on comparative negligence in Pennsylvania). A minority of the jurisdictions that have adopted comparative negligence statutes have chosen the so-called "pure" form of comparative negligence, whereby a plaintiff's recovery is reduced directly in proportion to his own fault, regardless of the relative extent of the plaintiff's fault as compared to that of the defen-
liability cases. This division of authority is a reflection of the conflict between the strict liability policy underlying section 402A and the traditional negligence notion that manufacturers should not be forced to pay for losses attributable to a plaintiff's conduct rather than to any product defect.

Several courts have applied comparative fault principles in strict products liability actions in an effort to achieve an equitable distribution of losses. Frequently citing considerations of "fairness," and often noting that


Most of the states which have enacted comparative negligence laws have adopted what has been called its "modified" form. Shrager & Shepherd, supra, at 435 n.92. Under the "modified" form, a plaintiff's recovery is reduced in proportion to his fault up to a statutorily prescribed cutoff, generally 50%, beyond which such fault operates as a total bar to recovery. See id., citing ARK. STAT. ANN. §§ 27-1763 to -1765 (Supp. 1977); COLO. REV. STAT. § 13-21-111 (1973 & Supp. 1976); CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1978); HAWAI'I REV. STAT. § 663-31 (Supp. 1975); IDAHO CODE §§ 6-801 to -806 (Supp. 1979); KAN. STAT. ANN. §§ 60-258a to -258b (1976); ME. REV. STAT. tit. 14, § 156 (Supp. 1978-1979); MASS. GEN. LAWS ANN. ch. 231 § 85 (West Supp. 1979); MINN. STAT. ANN. § 604.01 (West Supp. 1979); MONT. REV. CODES ANN. § 58-607.1 (Supp. 1977); NEV. REV. STAT. § 41.141 (1977); N.H. REV. STAT. ANN. § 307-7a (Supp. 1977); N.J. STAT. ANN. §§ 2A:15-5.1 to -5.3 (West Supp. 1979); N.D. CENT. CODE § 9-10-07 (1975); OKLA. STAT. ANN. tit. 23, § 11 (West Supp. 1976-1979); OR. REV. STAT. § 18.470-490 (1979); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1979-1979); UTAH CODE ANN. § 78-27-37 to -43 (1977); VT. STAT. ANN. tit. 12, § 1036 (1973); WIS. STAT. ANN. § 895.045 (West Supp. 1978-1979); WYO. STAT. ANN. § 1-1-109 (1977).

A relatively small number of jurisdictions have adopted a third approach, applying comparative negligence principles only where the plaintiff's negligence may be characterized as "slight" and the defendant's as "gross." See Shrager & Shepherd, supra, at 435 n.92, citing NEB. REV. STAT. § 25-1151 (Supp. 1978); S.D. COMPIL. LAWS ANN. § 20-9-2 (1967).

10. See notes 13-22 and accompanying text infra.

11. See RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965). Essentially, the drafters of the Restatement determined that the burden of accidental injuries caused by products intended for use by consumers should be borne by the manufacturer and be treated as a cost of production against which protection can be obtained by the purchase of liability insurance. Id. Traditionally, this has been referred to as a "deep pockets" approach. See Murray v. Fairbanks Morse, 610 F.2d at 161. Such an approach "has the desirable effect of deterring manufacturers and sellers from introducing unsafe products into the stream of commerce." Id. at 158.

12. The rationale for this argument is based upon the theory that, by forcing manufacturers to pay judgments without reducing them by the proportion attributable to the plaintiff's fault, the future cost of the product to the public will be artificially inflated and unrepresentative of the actual risk posed by the defective product. See 610 F.2d at 161. Although individual plaintiffs may benefit from not having their recoveries reduced by the amount of their negligence, consumers in general may be adversely affected by the artificially high costs. See id.; Owen, Rethinking the Policies of Strict Liability, 33 VAND. L. REV. 681, 703-07 (1980) (criticizing the policy of "spreading the loss" to compensate persons injured by defective products).

13. See, e.g., Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976) (comparative negligence statute applied to reduce plaintiff's recovery in strict liability suit where plaintiff's racing of snow machine and/or lack of maintenance contributed to his injuries); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (application of comparative negligence to strict products liability is consistent with policy leading to a comparative negligence statute); West v. Caterpillar Tractor Co., 536 So. 2d 80 (Fla. 1976) (consumer, user, or bystander required to exercise ordinary due care, therefore contributory or comparative negligence is a valid defense in a strict liability action if the defense is based upon grounds other than the failure of the user to discover the defect or to guard against the possibility of its existence).

14. See Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). The Daly court noted that it was "persuaded by logic, justice, and fundamental fairness"
manufacturers would still be liable for any harm attributable to a defective product.\textsuperscript{15} These courts have been unwilling to immunize products liability plaintiffs against their own negligence.\textsuperscript{16} A contrary view is taken by courts which reason that the focus of section 402A is on the product and the consumer's reasonable expectations with regard to that product, rather than on the conduct of the manufacturer or the injured user.\textsuperscript{17} These courts feel that it is improper to inject negligence concepts into strict products liability analysis, an approach which rests on entirely different policy considerations.\textsuperscript{18}

Other jurisdictions treat the issue as a matter of statutory interpretation.\textsuperscript{19} Some courts have interpreted comparative negligence statutes literally, thereby limiting their scope, in accordance with the usual statutory language which confines their applicability to "actions based on negligence."\textsuperscript{20} Others have applied such statutes in the strict products liability context, reasoning either that a section 402A action is akin to "negligence per se" and therefore within the scope of the statute,\textsuperscript{21} or that the absence of legislative direction affords courts the leeway for an interpretation that comparative principles should apply.\textsuperscript{22}
It was against this background that the Third Circuit in Murray faced the issue of whether to extend the Virgin Islands' comparative negligence statute to section 402A actions.23 Noting that the legislature had expressed no opinion on the matter24 and that the statute does not expressly prohibit its applicability in strict liability suits,25 the court concluded that passage of the statute had not been designed to preclude a comparison of fault in actions brought under the strict liability theory.26 Based upon this assumption, the Third Circuit deemed it permissible to apply "helpful and fair" comparative principles as part of the common law in the products liability area.27

The Murray court then turned its attention to the task of determining how comparative principles should operate in strict products liability cases.28 To the extent that it foreclosed any actual comparison of degrees of fault, the court rejected the literal "comparative fault" approach.29 The court stated that the proper conceptual basis for comparison of the product defect and the plaintiff's misconduct is an examination of the "causative contribution of each to the particular loss or injury."30 Under this approach, following a determination that both the plaintiff and the defendant were indeed at "fault," the inquiry focuses upon the relative extent to which the product defect and the plaintiff's conduct "caused-in-fact" all or part of the injury.32 The court found this approach to be consistent with the policy

23. 610 F.2d at 156-57.
24. Id. at 157. It is apparent that the court was following the approach of those courts which deem themselves fit to fill the voids perceived to have been left the legislature. Id. at 156. See note 22 and accompanying text supra.
25. 610 F.2d at 157. The court noted that the comparative negligence statute is made expressly inapplicable only to tortiously based absolute liability actions. Id. See V.I. CODE ANN. tit. 5, § 1451(b) ( Equity Cum. Supp. 1978); note 7 supra. The court reasoned, however, that strict products liability actions under the Restatement involve neither statutorily based liability nor absolute liability. 610 F.2d at 157. But see note 8 supra. The Third Circuit explicitly rejected the plaintiff's contention that the court's authority was restricted by the fact that the Virgin Islands has adopted the Restatement as authoritative. 610 F.2d at 157 n.11.
26. 610 F.2d at 157.
28. 610 F.2d at 157-58.
29. Id. at 158-61. Judge Rosenn indicated that a comparison of fault was inappropriate in a strict liability case because the focus in such a suit is on the product, rather than the conduct, of the manufacturer. Id. at 158-60. Citing the underlying policy considerations and conceptual distinctions between strict liability and negligence, Judge Rosenn concluded that a comparison of fault provides neither a conceptual nor a pragmatic basis for apportioning a loss. Id. at 159.
30. Id. at 159.
31. Id. Judge Rosenn clarified the court's position by stating that, "[o]nly when [plaintiff's] conduct fails to meet a societal standard of reasonable care should the causal link between conduct and injury be examined." Id. at 159 n.12.
32. Id. at 160. Once the jury has determined that the product defect caused the injury, the defendant is strictly liable for the harm attributable to the defective product. Id. The jury is then required to reduce damages "in proportion to the plaintiff's contribution to his own loss or
goal of strict products liability—i.e., relieving plaintiffs from the complex burdens of proof attendant to theories of negligence and warranty. Although noting that its "causative contribution" approach was inconsistent with the policy goal of placing the burden of loss on the "deep pockets" of manufacturers who are best suited to insure against such loss, the court went on to criticize that policy. Judge Rosenn argued that, by forcing the manufacturer to pay for a portion of the loss attributable, not to a product defect, but to consumer conduct, the price of the product becomes artificially inflated, does not accurately reflect the risk posed, and encourages consumers to purchase cheaper, less safe products.

It is submitted that the court in Murray was primarily concerned with reaching a result conforming with its perception of an equitable means of ascertaining ultimate tort liability and, hence, failed to give proper attention in its analysis to the legitimate methods of statutory interpretation, judicial restraint, and the advancement of public policy. It is further submitted that the court struggled to construct an interpretation of the Virgin Islands' statute—which on its face directs that it be applied to actions "based upon negligence"—that would permit it to apply comparative fault principles in a strict products liability context. The court attempted to justify such an interpretation by citing the absence of contrary legislative direction. Notwithstanding this rationalization, it is suggested that the court effectively overstepped, and even ignored, the well-established goal of comparative

---

33. 610 F.2d at 161. For a discussion of this policy, see notes 11 & 29 supra.
34. 610 F.2d at 161. The goal of easing the plaintiff's burden of proof was not impaired, the court suggested, because he still need only prove the existence of a defect causally linked to the injury. Id. The burden lay with the defendant to prove the plaintiff's contributory fault. Id.
35. Id.
36. Id. For a critical discussion of this argument, see notes 55-56 and accompanying text infra.
37. 610 F.2d at 158. The court stated that "the use of comparative principles in section 402A actions can achieve a more equitable allocation of the loss from product related injuries." Id.
38. See notes 40-56 and accompanying text infra.
39. For the text of the statute, see note 7 supra.
40. 610 F.2d at 157. See notes 24-26 and accompanying text supra.
41. Justice Frankfurter has noted that statutory construction is based upon a search for the purpose of the words. See Frankfurter, Some Reflection on the Reading of Statutes, 47 Colum. L. Rev. 527, 538-44 (1947). As Justice Frankfurter observed: "Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government." Id. at 538-39. The purpose and aim of a comparative negligence statute is to avoid the harsh result of the contributory negligence defense which may be a complete bar to recovery. See note 43 and accompanying text infra. In considering the applicability of the statute to a strict products liability case in which contributory negligence is of no concern, it is submitted that the court has moved beyond an examination of the statute's purpose. Words, at least initially, must be assumed to be in accord with their common meaning. Frankfurter, supra, at 536. Statutory construction is "[n]ot . . . an opportunity for a judge to use words as 'empty vessels into which he can pour anything he will'—his caprices, fixed notions, even statesmanlike beliefs in a particular policy." Id. at 529. It is therefore submitted that Judge Rosenn

---

https://digitalcommons.law.villanova.edu/vlr/vol25/iss6/13
negligence legislation. In light of the legislative purpose of mitigating the harshness of contributory negligence defenses and in light of the Restatement's recognition that contributory negligence is not a defense in a strict products liability action, it is submitted that the court's attempt to apply "helpful and fair" common law principles to expand the express scope of the pertinent statute was tantamount to usurpation of the legislature's function.

should have adhered to the plain meaning of the statute's directive that it apply to actions "based on negligence," rather than incorporating his own notions of equitable distribution of loss into language not addressed to the strict products liability suit.

For a discussion of the purpose and aim of comparative negligence legislation, see note 43 and accompanying text infra.

The court recognized the wide acceptance and approval of the comparative concept, noting that it had been "adopted by the majority of American jurisdictions in ordinary negligence actions to replace the harsh rule of contributory negligence which absolutely bars a plaintiff from recovery, even if his negligence is slight when compared with the defendant's" 610 F.2d at 155-56. For a discussion of the history and development of the doctrines of contributory and comparative negligence, see Shragor & Shepherd, supra note 9, at 423-36.

See RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). While recognizing assumption of the risk as a valid defense, Comment n explicitly states that contributory negligence is not a defense in a strict liability action "when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence," reasoning that § 402A actions are concerned with strict liability, not with the negligence of the parties. Id.

The court exhibited a misplaced reliance on the case of Stueve v. American Honda Motors Co., 457 F. Supp. 740 (D. Kan. 1978). See notes 22 & 27 and accompanying text supra. In Stueve, the district court felt free to apply the Kansas comparative negligence statute to a strict products liability case, in large part because the statute was enacted prior to the state supreme court's endorsement of § 402A. 457 F. Supp. at 751. The Stueve court noted the significance of this fact by pointing out that, "typically, a state's adoption of strict liability (and consequent ruling that mere contributory negligence is no defense thereto) predates the adoption of comparative negligence." Id. (citation omitted). Thus, the Stueve court did not feel bound by a legislative determination which was not constrained by a prior judicial determination that contributory negligence was no defense. Id. at 751-52. It was therefore possible to derive a legislative interpretation which did not conflict with an obvious legislative purpose of mitigating the harshness of the contributory negligence defense. Id.

It is submitted that a similar determination is not proper with respect to the Virgin Islands statute, since adoption of § 402A in that jurisdiction predates the adoption of comparative negligence and since the legislature was therefore unconcerned with its effect on strict liability, having already banned contributory negligence as a defense. See V.I. CODE ANN. tit. 1, § 4 (Equity Cum. Supp. 1978). Passed in 1967, § 4 provides that Restatement law is authoritative in the Virgin Islands in the absence of local law to the contrary. Id. See notes 8 & 9 supra. In light of this analysis, it is suggested that the Third Circuit would do well to consider the words of the late Justice Harlan regarding the respective roles of the legislature and the judiciary:

Today's decision, it seems to me, reflects an unusual degree the current notion that this Court possesses a peculiar wisdom all its own whose capacity to lead this Nation out of its present troubles is contained only by the limits of judicial ingenuity . . . . For anyone who, like myself, believes that it is an essential function of this Court to maintain the constitutional divisions . . . among the three branches of the Federal Government, today's decision is a step in the wrong direction.

Shapiro v. Thompson, 394 U.S. 615, 677 (1969) (Harlan, J., dissenting). It is submitted that the Third Circuit in Murray has assumed the role of a "super-legislature," and, thus, struggled to create statutory ambiguities which provided it with a pretense for enunciating its own views on a particular topic about which the legislature has spoken recently and clearly.
In attempting to distinguish "causative contribution" from "comparative fault" as a valid means of determining how comparative principles should operate,\(^46\) it is submitted that the court has created a distinction which exists only as a matter of semantics. The court's rationale for rejecting "comparative fault" in favor of "causative contribution" was that strict products liability focuses on the product rather than on the conduct of the parties.\(^47\) Under the "causative contribution" analysis, however, following a finding of product defect, the court inquires into the "fault" of the plaintiff as a causative comparison is to be made "[only when [plaintiff's] conduct fails to meet a societal standard of reasonable care]."\(^48\) Clearly this inquiry is not focused on the product. Furthermore, the ensuing causation inquiry proposed by the court focuses squarely on the conduct of the parties, comparing the role of both the product defect and the plaintiff's conduct in causing the injury.\(^49\) The court's "causative contribution" analysis is thus thoroughly reminiscent of the very negligence principles that section 402A was designed to eliminate in a strict products liability case.\(^50\)

Although the court deemed its holding to be consistent with the policy goals of strict products liability,\(^51\) it is submitted that, under the court's "comparative causation" analysis, the plaintiff's burden is not limited to proof of the "existence of a defect causally linked to the injury."\(^52\) While it is true that, under the court's approach, the defendant would bear the burden of proving the plaintiff's contributory fault,\(^53\) as a practical matter it would be incumbent upon the plaintiff to produce evidence to rebut the inference of his own negligence, thereby defeating one of the purposes of strict liability.\(^54\) Furthermore, the court's desire to relieve the manufacturer from the portion of a loss attributable to the plaintiff's fault\(^55\) is inconsistent with the "deep pockets" policy of section 402A, under which the manufacturer is to bear the burden of the loss, insure against it, and spread the cost among all consumers through the price of the product.\(^56\)

---

\(^{46}\) See notes 29-32 and accompanying text supra.

\(^{47}\) 610 F.2d at 158-60. See note 29 and accompanying text supra.

\(^{48}\) 610 F.2d at 159 n.12 (emphasis added). See note 31 and accompanying text supra.

\(^{49}\) See notes 30-32 and accompanying text supra.

\(^{50}\) It is submitted that the court's requirement of a violation of some standard of care in its determination of fault, coupled with its examination of causation and loss (damages), is equivalent to a requirement of a prima facie case of negligence, a concept that has no place in a strict liability action. See RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). See also notes 43-44 and accompanying text supra.

\(^{51}\) 610 F.2d at 161. See notes 33-35 and accompanying text supra.

\(^{52}\) See 610 F.2d at 161.

\(^{53}\) Id.

\(^{54}\) See notes 33-35 and accompanying text supra.

\(^{55}\) See 610 F.2d at 161.

\(^{56}\) See notes 11-12 & 35 and accompanying text supra. It is submitted that Judge Rosenn's argument that the cost of insuring against injury due to consumer conduct and not product defect artificially inflates prices and encourages purchase of less safe products is purely speculative and lacks empirical support. See 610 F.2d at 161. Judge Rosenn presented no data indicative of a rise in cost to the consumer resulting from higher manufacturers' insurance premiums...
It is submitted that the Third Circuit's decision to apply comparative principles in strict products liability cases will have the practical effect of reducing, and even eliminating, plaintiff's verdicts in jurisdictions following this approach. Section 402A plaintiffs will have their verdicts reduced by up to fifty percent in cases where their "causative contribution" is not deemed to be more causative of the injury than the defective product. In cases where the plaintiff's "causative contribution" is greater than fifty percent, the "harsh rule" of contributory negligence is effectively revived, totally barring recovery.

Additionally, the implicit reinstatement of the contributory negligence defense, under the guise of the comparative negligence statute, in strict products liability cases raises questions as to the continued viability of assumption of the risk and product misuse as absolute defenses in section 402A actions. In order to be consistent with its desire to secure "a proper allocation of the loss in strict products liability cases," the Third Circuit, it is submitted, must stand ready to apply comparative principles in cases where these defenses are properly asserted. Thus, while Murray may be per-

and any corresponding decrease in quantity demanded. Moreover, no evidence of any correlation between product price and safety was presented. See id. Even if Judge Rosenn's economic rationale is conceded to be accurate, it still fails to reflect 1) the impracticability and prohibitive cost of requiring the consumer to insure against the risk of injury by product defect, and 2) the policy choice of placing the burden of insuring against such injury on those best able to bear it.

57. See notes 58-59 and accompanying text infra.

58. This is the result of applying the terms of a comparative negligence statute such as the one in force in the Virgin Islands, which provides that "damages shall be diminished by the trier of fact in proportion to the amount of negligence attributable to the plaintiff." See V.I. Code Ann. tit. 5, § 1451(a) (Equity Cum. Supp. 1978). For the text of the Virgin Islands comparative negligence statute, see note 7 supra.

59. This result follows from the statutory language which provides that "[i]f [a] claimant is found by the trier of fact to be more at fault than the defendant, . . . the claimant may not recover." See V.I. Code Ann. tit. 5, § 1451(a) (Equity Cum. Supp. 1978). For the complete text of the comparative negligence statute in force in the Virgin Islands, see note 7 supra.

60. For a discussion of these defenses in § 402A cases, see note 8 supra.

61. 610 F.2d at 162.

62. Whereas assumption of the risk and product misuse presently serve as an absolute bar to recovery, application of comparative principles would enable plaintiffs to obtain judgments previously unavailable. The district court opinion in Murray indicated that assumption of the risk would no longer be a complete bar to recovery when comparative principles are applied, but would instead only diminish the plaintiff's recovery proportionately. See 450 F. Supp. at 1147 (dictum).

Some jurisdictions which have comparative negligence statutes have already applied comparative principles to these defenses. See, e.g., Daly v. General Motors Corp., 20 Cal. 3d 725, 736-37, 575 P.2d 1162, 1169-70, 144 Cal. Rptr. 380, 386-87 (1978) (negligent assumption of risk merged with contributory negligence when comparative principles are applied in strict products liability cases); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977) ("pure" comparative causation approach applied to product misuse case).

The Third Circuit has recently held that, in negligence cases, the "assumption of the risk" defense applies only to non-negligent conduct constituting waiver or consent. See Keegan v. Anchor Inns, Inc., 606 F.2d 35, 39 (3d Cir. 1979) (interpreting comparative negligence statute of the Virgin Islands). Judge Rosenn has indicated, however, that such conduct, not amounting
ceived as a pro-manufacturer decision in its present posture, it may, despite its conceptual difficulties, ultimately be viewed as a decision beneficial to the consumer.

Clifford H. Lange

...to waiver or consent, now constitutes contributory negligence within the scope of the Virgin Islands comparative negligence statute. See 610 F.2d at 162 n.15 (dictum). It remains to be seen whether the Third Circuit is willing to take the next step and apply comparative negligence principles uniformly to all types of plaintiffs' fault by treating assumption of risk on the same footing as other causative factors attributable to the tort victim.

63. See notes 57-59 and accompanying text supra.
64. See notes 37-56 and accompanying text supra.
65. See notes 61-62 and accompanying text supra.