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Comparative Negligence and Strict Products Liability: Where Do We Stand - Where Do We Go

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I. INTRODUCTION

In the last two decades, a significant number of courts and legislatures have addressed the issue of the application of comparative negligence principles to strict products liability actions.1 The vast majority have decided to meld comparative principles with strict products liability.2 However, in 1983, the Massachusetts Supreme Judicial Court in Correia v. Firestone Tire & Manufacturing Co.3 rejected this majority view and refused to merge the two concepts. The Correia court held that comparative principles were inappropriate in strict products liability actions because their application would

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1. See Colley & Thomas, Comparative Negligence Principles and Strict Liability: Theoretical Confluence or Confusion?, 19 TRIAL 58, 58 (Nov. 1983) (clash between strict liability and comparative negligence has major ramifications of both theoretical and practical significance in almost half the states).
2. For a summary of the number of states which have decided to apply comparative principles to strict liability, see text accompanying notes 69-105 & 118-26 infra.
frustrate the policies underlying strict products liability. The comment will then analyze the rationale for extending comparative principles to strict products liability and will focus on how the states which have considered the issue have resolved it.

The comment will next analyze the Correia decision in light of the development of products liability law in Massachusetts. It will evaluate and attempt to counter the arguments that the Correia court presented against the application of comparative principles to strict products liability.

Finally, the comment will provide a short history of the development of strict products liability law in Pennsylvania and will argue that Pennsylvania courts, given the opportunity, should decide to apply comparative principles to strict products liability.

II. THE EMERGENCE OF COMPARATIVE NEGLIGENCE

Comparative negligence evolved as a means of apportioning liability between a negligent defendant and a contributorily negligent plaintiff. Under negligence theory, a person is required to act in a reasonable and prudent manner. When the person fails to act reasonably, he becomes liable to others for injuries caused by his conduct.

4. For a discussion of the Correia case and products liability law in Massachusetts, see notes 178-202 and accompanying text infra.
5. For a discussion of the development of comparative negligence, see notes 10-27 and accompanying text infra.
6. For a discussion of the development of strict products liability, see notes 28-45 and accompanying text infra.
7. For a discussion and analysis of how states have applied comparative principles to strict liability and warranty actions, see notes 46-105 & 118-37 and accompanying text infra.
8. For an analysis of the Correia decision, see notes 203-30 and accompanying text infra.
9. For a discussion of the history of products liability in Pennsylvania and a prognostication of why Pennsylvania should apply comparative principles to strict liability, see notes 231-67 and accompanying text infra.
11. W. PROSSER, LAW OF TORTS § 32 (4th ed. 1971). The conduct of the actor is compared to a reasonably prudent person standard. Seavey, Negligence—Subjective or Objective, 41 Harv. L. Rev. 1, 9 (1927). For a discussion of the qualities and characteristics of the reasonably prudent person, see id.; W. PROSSER, supra.
12. See Winfield, supra note 10, at 184. Under the negligence doctrine, liability is imposed when a person is injured by another’s “breach of a legal duty to take care by an inadvertent act or omission. . . .” A negligence cause of action consists of four elements. W. PROSSER, supra note 11, § 30. First, there is a duty of care to protect others against unreasonable risks. Second, there is a failure to conform to that
The defense of contributory negligence originated in the English case of Butterfield v. Forrester, in which the court held that a plaintiff would be absolutely barred from recovery if his own negligence contributed to the injury. The doctrine of contributory negligence was quickly adopted by American courts.

Contributory negligence came under attack, however, because of the harsh results which occurred when plaintiffs were denied recovery in cases where they were only slightly negligent. Consequently, the courts devised a number of exceptions to the doctrine, including the doctrine of the "last clear chance." However, even the exceptions were criticized because they...

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2. Chief Justice Lord Ellenborough stated: A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.
3. Prosser, Comparative Negligence, 41 Calif. L. Rev. 1, 3 (1953). Contributory negligence developed rapidly during the early industrial revolution. Contributory negligence, along with the concepts of duty and proximate cause, were used by courts to control juries so that new industries would be protected against substantial liabilities.
4. Id. at 4. The rule was criticized because of its obvious injustice "which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot free."
5. See W. Prosser, supra note 11, § 67, at 433. Dean Prosser commented that under contributory negligence, even if plaintiff's negligence was slight, while the defendant's extreme, the plaintiff would be barred from recovery. See also Turk, Comparative Negligence on the March, 28 Chi.-Kent L. Rev. 189, 199-200 (1950) (contributory negligence is a complete bar to recovery regardless of how slight a cause of the injury).
6. Prosser, supra note 15, at 5. The first exception to the contributory negligence defense was where the defendant's conduct was "willful," "wanton," or "reckless." A second exception to the applicability of the defense was where the action was founded upon a defendant's violation of a statute.
7. The "last clear chance" doctrine was developed in Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (1842). In Davies, the defendant negligently ran into the plaintiff's donkey. The plaintiff had left the donkey shackled in the highway so that it could not get out of the defendant's way. The court held the defendant liable on the grounds that, although the donkey may have been illegally on the street, the defendant could have avoided the accident through the exercise of proper care. Id. at 548-49, 152 Eng. Rep. 589. The doctrine is based on the principle that the defendant should bear the loss where he has the better opportunity to avoid the harm, even though the plaintiff is also careless. Turk, supra note 16, at 205.
too, shifted the entire loss onto one party, when in actuality two parties were responsible. 19

Comparative negligence entered American law in the early twentieth century. In 1910, it was incorporated into the Federal Employers Liability Act, which covers injuries to railroad employees. 20 and, in 1920, it was incorporated into the Jones Act, which covers injuries to seamen.21 Beginning with Mississippi, Georgia and Wisconsin, comparative negligence was gradually adopted by a majority of the states and applied to all causes of action grounded in negligence.22 Most recently, comparative negligence has been applied in apportioning liability in instances where the plaintiff's conduct goes beyond contributory negligence and constitutes assumption of the risk. 23

Presently, forty states utilize some form of comparative negligence.

19. Prosser, supra note 15, at 8. Dean Prosser notes that it is no more reasonable to charge the defendant with the plaintiff's share of the fault than to do the reverse. Id. Another commentator notes that if the doctrine of contributory negligence is arbitrary because it totally precludes recovery by the plaintiff, then so is the last clear chance exception because it permits full recovery by the plaintiff. Turk, supra, note 16, at 205.

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. . . .

Id.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right of remedy in cases of personal injury to railway employees shall apply. . . .

Id.

22. For a history of the adoption of comparative negligence by the states, see Woods, The Quickening March of Comparative Fault, 15 TRIAL 26 (Nov. 1979). For a more general history of the development of comparative negligence, see C. Heft & C.J. Heft, COMPARATIVE NEGLIGENCE MANUAL ch. 2 (1978); V. Schwartz, COMPARATIVE NEGLIGENCE (1974).


Assumption of the risk consists of the “voluntary and willing encounter of a risk of danger which is known, appreciated and understood by the plaintiff.” Clarke v. Brockway Motor Trucks, 372 F. Supp. 1342, 1347 (E.D. Pa. 1974). While contributory negligence is based on a reasonable man standard, assumption of the risk is measured by the subjective standard of the plaintiff himself. W. Prosser, supra note 11, § 68 at 456. When assumption of the risk consists of a knowingly unreasonable
Twelve states have adopted a pure form of comparative negligence. Under pure comparative negligence, a plaintiff's negligence, regardless of the degree, will not bar recovery but will only reduce the plaintiff's award accordingly. Other states utilize modified forms of comparative negligence. Thirteen states apply a "less than" modified comparative negligence approach. Under this approach, the plaintiff will not be barred from recovery so long as the plaintiff's negligence is less than that of the defendant. However, the plaintiff's award will be reduced by an amount equal to his degree of fault. Thirteen other states apply a "not greater than" modified comparative approach. Under this approach, the plaintiff will not be barred from recovery so long as the plaintiff's negligence is less or equal to that of the defendant, but again will have his award reduced. Under a third modified comparative negligence approach, applied by two states, the plaintiff recovers reduced damages so long as the plaintiff's negligence is slight in comparison to that of the defendant.

use of a product, it is a total defense in strict products liability. RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965).


III. THE DEVELOPMENT OF STRICT PRODUCTS LIABILITY

The concept of strict products liability may be traced to the concurring opinion of Justice Traynor of the California Supreme Court in *Escola v. Coca Cola Bottling Co.* His views in this 1941 decision ultimately formed the basis for the now-famed California Supreme Court decision in *Greenman v. Yuba Power Products, Inc.* In *Greenman,* the court defined the parameters of strict products liability, holding that a manufacturer would be strictly liable in tort for injuries caused by a defect in a product which it marketed, when it knew that the product would not be inspected prior to use.

The belief that a manufacturer of a product should be held liable for injuries proximately caused by its product derives in part from judicial dissatisfaction with negligence and warranty theories. In negligence ac-

28. 24 Cal. 2d 453, 150 P.2d 436 (1944). In *Escola,* the plaintiff, a waitress in a restaurant, was injured when a bottle of Coca Cola exploded in her hand. *Id.* at 456, 150 P.2d at 437. The court held that the plaintiff could invoke the doctrine of res ipsa loquitur to infer negligence on the part of the defendant. *Id.* at 461, 150 P.2d at 440.

Justice Traynor, in a concurring opinion, stated that "it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings." *Id.* (Traynor, J., concurring). He believed that public policy required the manufacturer to bear the responsibility for product defects since the manufacturer could anticipate and guard against some dangers. *Id.* at 462, 150 P.2d at 440-41 (Traynor, J., concurring). In addition, he noted that the injured party may be unable to bear the costs of the injury, and that the manufacturer was in a better position to absorb these costs since he could distribute them over the consuming public as a cost of doing business. *Id.* Justice Traynor believed it was time to openly hold a manufacturer responsible for the quality of his product, regardless of negligence. *Id.* at 463, 150 P.2d at 441 (Traynor, J., concurring). For further discussion of Justice Traynor's views on strict products liability, see *Traynor, The Ways and Meanings of Defective Products and Strict Liability,* 32 TENN. L. REV. 363 (1965).

29. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In *Greenman,* the plaintiff sued the retailer and manufacturer of a shopsmith, which was a combination power tool. *Id.* at 59, 377 P.2d at 898, 27 Cal. Rptr. at 698. The plaintiff sought recovery for injuries he incurred when a piece of wood flew out of the shopsmith when he was using it as a lathe, and struck him on the forehead. *Id.*

30. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700. The court emphasized that strict liability in tort for marketing a defective product was liability imposed by law. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701. The law of contract warranties was not applicable, and the plaintiff's remedies were not dependent on the law of sales. *Id.* at 63-64, 377 P.2d at 901, 27 Cal. Rptr. at 701. Consequently, to recover, the plaintiff only had to prove that his injury was caused by a defect in the product. *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

31. A products liability action framed in negligence lies when the manufacturer's product causes injury while used in a reasonably foreseeable way where the manufacturer's failure to exercise reasonable care created a foreseeable and unreasonable risk of harm. Note, *Torts—Strict Liability—Under Pennsylvania Law Damages Solely to a Defective Product Itself Are Recoverable Under Section 402A,* 27 VILL. L. REV. 836, 841 n.17 (1982). A manufacturer may be negligent in the manufacture, design, inspection or marketing of the product. See *Noel, Manufacturers' Liability for Negligence,* 33 TENN. L. REV. 444, 453-62 (1966); W. PROSSER, supra note 11, § 96, at 644.

32. The basis of the breach of warranty action is that the plaintiff was injured
because the defendant’s product failed to comply with the governing warranties. Note, Massachusetts Strict Products Liability Law: Alternate Route, Same Destination, 14 NEW ENG. L. REV. 237, 241-42 (1978). The applicable warranties are governed by the Uniform Commercial Code. See U.C.C. §§ 2-313, -314, -315 (1976). Breach of an express warranty is provided for in § 2-313 which states:

Express Warranties by Affirmation, Promise, Description, Sample

1. Express warranties by the seller are created as follows:
   a. Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
   b. Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
   c. Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

2. It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.


Breach of the implied warranty of merchantability is provided for in § 2-314 which states:

Implied Warranty: Merchantability; Usage of Trade

1. Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

2. Goods to be merchantable must be at least such as
   a. pass without objection in the trade under the contract description; and
   b. in the case of fungible goods, are of fair average quality within the description; and
   c. are fit for the ordinary purposes for which such goods are used; and
   d. run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
   e. are adequately contained, packaged, and labeled as the agreement may require; and
   f. conform to the promises or affirmations of fact made on the container or label if any.

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


Breach of the implied warranty of fitness for a particular purpose is provided for in § 2-315 which states:

Implied Warranty: Fitness for Particular Purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

The defendant manufacturer acted unreasonably was too heavy. Further, in warranty actions, the plaintiff's recovery was often barred by obstacles such as notice requirements and sellers' disclaimers.

The doctrine of strict liability stemmed not only from judicial frustration with prevailing theories of recovery, but also from several important policy considerations such as risk spreading and deterrence. Another leading consideration was the "deep pockets" rationale that a manufacturer, because of its resources, was more capable of bearing the costs of an accident than the injured consumer. These policy considerations played a key role in the drafting of section 402A of the Second Restatement of Torts in 1964.

33. See Keeton, The Meaning of Defect in Products Liability Law—A Review of Basic Principles, 45 Mo. L. Rev. 579, 583-85 (1980). There were two major obstacles to recovery under a negligence theory. Id. at 584. First, it was difficult to prove the negligence of a manufacturer. Id. Second, the manufacturer could satisfy his duty of care regarding latent dangers by simply warning about them. Id. at 584-85. See also Greenlee & Rochelle, Comparative Negligence and Strict Tort Liability—A Marriage of Necessity, 18 LAND & WATER L. REV. 643, 646 (1983) (plaintiff had burden of proving that "huge, well-financed, well-defended" defendant manufacturer had been negligent).

34. See Keeton, supra note 33, at 583-85. Under a warranty theory, there were two obstacles to recovery. First the seller could disclaim or limit the warranty. Id. at 583. Second, those not privy to the contract could not recover for breach of warranty. Id. at 584. See also W. Prosser, supra note 11, § 97 at 655 (injured consumer required to give seller notice within reasonable time of the breach in order to recover in warranty).

35. See Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L. J. 825 (1973). This commentator set forth the following public policy reasons in support of strict products liability: 1) the plaintiff was relieved of the difficulty of proving the manufacturer's negligence, 2) the cost of the injury was spread out over the consuming public instead of falling on one person, and 3) the potential imposition of strict liability would deter manufacturers from creating unsafe products. Id. at 826. For a critique of these and other policy reasons underlying strict products liability, see Owen, Rethinking the Policies of Strict Products Liability, 33 Vand. L. Rev. 681, 703-14 (1980).

36. See Wright, Hoelter-Skelter: Product Defect and Plaintiff Negligence—A Connecticut Commentary on Confusion, 10 Conn. L. Rev. 90, 117 (1977) (general view is that businessmen are better able to absorb accident costs since they can estimate risks, plan for them, and consider them as a cost of doing business). But cf. Plant, Comparative Negligence and Strict Tort Liability, 40 La. L. Rev. 403, 416 (1980) (although large corporations may be capable of handling products liability suits, small company is unable to bear such a cost).

37. See RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965). In a comment, the Restatement's drafters noted the policy reasons supporting the imposition of strict liability for defective products:

On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the
Section 402A provides that a seller is liable for selling a defective product which is unreasonably dangerous. Liability under section 402A is based on strict liability in tort. A seller is liable for injuries caused by the product unless it is misused or the consumer assumes the risk of injury.

Presently, a majority of states have adopted section 402A either by judicial decision or by legislative enactment. Many other states have implemented hands of someone, and the proper persons to afford it are those who market the products. Id. (emphasis added).

38. RESTATEMENT (SECOND) OF TORTS § 402A. Section 402A provides in full:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

39. Id. comment m. Section 402A liability is not governed by the law of sales or U.C.C. warranties, nor is it based on negligence. Id. Consequently, a seller is liable even though he has exercised reasonable care in the manufacture and sale of the product. Id. comment a.

40. Id. comment h. This comment provides the basis for the misuse defense; it states:

A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable.

Id.

41. Id. comment n. Contributory negligence consisting of a failure to inspect a product or guard against the possibility of a defect is not a defense. Id. However, where 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." Id.


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mented strict tort liability theories for products liability which are virtually equivalent to section 402A. Only five states have refused to adopt the the-


43. Maine has adopted § 402A by statute. See ME. REV. STAT. ANN. tit. 14, § 221 (1980). It provides:

One who sells any goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods, or to his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold. This section applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

Arkansas' statute also incorporates the language of section 402A. See ARK. STAT. ANN. § 85-2-318.2 (1983 Supp.). It provides:

A supplier of a product is subject to liability in damages for harm to a person or to property if:

(a) the supplier is engaged in the business of manufacturing, assembling, selling, leasing or otherwise distributing such product;

(b) the product was supplied by him in a defective condition which rendered it unreasonably dangerous; and

(c) the defective condition was a proximate cause of the harm to person or to property.

Id.


In addition, Georgia provides for strict liability for manufacturers in the sale of personal property. See GA. CODE ANN. § 51-1-11(b)(1) (1982). It provides:
ory of strict products liability, with those states relying instead on warranty theories as adequate remedies.45

IV. THE APPLICATION OF COMPARATIVE NEGLIGENCE PRINCIPLES TO STRICT PRODUCTS LIABILITY ACTIONS

A. Court Decisions Favoring the Application

The Wisconsin Supreme Court, in Dippel v. Sciano,46 was the first court to consider the application of comparative negligence principles to strict products liability. Initially, the court adopted strict liability under section 402A.47 The court then considered the application of the state's comparative negligence statute48 to strict liability. In addressing this question, the court analogized the doctrine of strict liability to negligence per se.49 The

The manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained.

Id. at 447, 155 N.W.2d at 56. At the time of the injury, the plaintiff and another man were moving the 750-pound table to a location in the tavern where it could be used. Id. The plaintiff sued the table manufacturer, the sales distributor, the purchaser and lessor of the table, and the tavern which leased the table and offered it for its patrons' use. Id. at 447-48, 155 N.W.2d at 56. The plaintiff's causes of action were grounded in negligence and warranty. Id. at 448, 155 N.W.2d at 57.

47. Id. at 459, 155 N.W.2d at 63. Because the court had adopted strict liability, it permitted the plaintiff to amend his complaint to include an action in strict liability. Id. at 463, 155 N.W.2d at 65.

48. Wis. STAT. ANN. § 895.045 (West 1983). The statute provides:

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

Id. at 460-62, 155 N.W.2d at 63-65. In making some general observations concerning the impact of the adoption of the strict liability rule, the court stated that contributory negligence was an available defense in strict liability. Id. at 460, 155 N.W.2d at 63. The court also determined that strict liability was similar to negligence per se because neither doctrine was based on foreseeability. Id. at 461, 155 N.W.2d at 65. The court noted that both the act of placing a defective product on the market and the violation of a safety statute created conditions of unreasonable risk of harm to others. Id. at 462, 155 N.W.2d at 64-65.
court then noted that the Wisconsin comparative negligence statute had been applied to actions grounded in negligence *per se*. 50 Based on this finding the court held that comparative negligence was likewise applicable to actions in strict liability. 51

After Dippel, the movement to apply comparative negligence principles to strict liability did not gain momentum until the California Supreme Court addressed the issue in 1978. In *Daly v. General Motors Corp.*, 52 the California Supreme Court held that its judicially-created rule of comparative negligence 53 was applicable to a strict products liability action. 54 The *Daly* court took a result-oriented approach, finding that semantic consistency between the concepts of strict liability and negligence was not as important as the attainment of an equitable result. 55 The *Daly* court noted that courts originally imposed strict liability to relieve the plaintiff of the difficult burden of proof found in negligence actions 56 and to place the burden of loss on a manufacturer rather than an innocent consumer. 57 With the application

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50. *Id.* at 462, 155 N.W.2d at 64-65. The court noted that the comparative negligence statute had been applied to actions based on negligence *per se* for violation of safety statutes. *Id.*

51. *Id.* The seller was permitted to use the comparative negligence defense when the plaintiff had been contributorily negligent or had assumed the risk of injury. *Id.* at 460, 155 N.W.2d at 63-64.

52. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). The case involved an automobile accident in which the decedent was killed when he was ejected from the automobile. *Id.* at 730, 575 P.2d at 1164, 144 Cal. Rptr. at 382. The plaintiffs, the decedent’s wife and surviving children, alleged that a defective door latch caused the decedent to be ejected from the automobile. *Id.* The defendant manufacturer alleged that the decedent’s negligence in not using the door lock or seat belt–shoulder harness contributed to his being ejected from the automobile. *Id.* at 731, 575 P.2d at 1165, 144 Cal. Rptr. at 383. For a discussion of the *Daly* decision, see Comment, *Another Citadel Has Fallen—This Time the Plaintiff’s California Applies Comparative Negligence to Strict Products Liability*, 6 PEPPERDINE L. REV. 485 (1979).

53. See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). In *Li*, the court adopted a pure form of comparative negligence for application in California. *Id.* at 827, 532 P.2d at 1242, 119 Cal. Rptr. at 874.

54. 20 Cal. 3d at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390.

55. *Id.* at 736, 575 P.2d at 1168, 144 Cal. Rptr. at 386. The court suggested that the terms comparative negligence, contributory negligence and assumption of the risk should not be defined so rigidly as to override countervailing policy considerations. *Id.* The court noted that “[t]he interweaving of concept and terminology in this area suggests a judicial posture that is flexible rather than doctrinaire.” *Id.*


of comparative principles, the court found that the plaintiff would continue to be relieved of difficult proof requirements since the manufacturer's liability remained strict. In addition, the court observed that the manufacturer, and not the defenseless plaintiff, would still bear the cost of injury caused by the product. Thus, the court found that the net effect of the application of comparative principles to strict liability actions would only be to reduce a plaintiff's recovery by that amount which is proportionate to his own fault in causing the injury. The court further reasoned that the introduction of comparative principles into a strict products liability suit would not cause a manufacturer to create less safe products, nor would it render a jury incapable of comparing the plaintiff's negligence with the defendant's strict liability. Finally, the Daly court observed that, in cases where comparative principles applied, a plaintiff's assumption of the risk would only reduce his award, whereas in cases where they did not apply, the plaintiff's assumption of the risk would be a complete bar to recovery.

Following Daly, many courts began to invoke comparative negligence principles in strict products liability actions. In Suter v. San Angelo Foundry & Machine Co., the Supreme Court of New Jersey determined that the language of its comparative negligence statute was applicable in strict liability

accompanying text supra. For a discussion of Greenman, see notes 29-30 and accompanying text supra. For a discussion of the policy of placing the burden of loss on the manufacturer, see note 36 and accompanying text supra.

58. 20 Cal. 3d at 736-737, 575 P.2d at 1168, 144 Cal. Rptr. at 386. The plaintiff would still not be required to prove negligence on the part of the manufacturer or distributor in the production, design, or dissemination of the product. Id.

59. Id., 575 P.2d at 1168-69, 144 Cal. Rptr. at 386-387.

60. Id. at 737, 575 P.2d at 1168, 144 Cal. Rptr. at 386.

61. Id. at 738, 575 P.2d at 1169, 144 Cal. Rptr. at 387. The court noted three reasons why a manufacturer would be inclined towards continuing to make a safe product. First, even if a consumer were contributorily negligent, the manufacturer would still be liable for the defective product. Id. Second, a manufacturer could not anticipate that a consumer would be contributorily negligent. Id. Third, if assumption of the risk remained a complete defense, a manufacturer would be more inclined to create patently defective products. Id. at 738, 575 P.2d at 1169, 144 Cal. Rptr. at 387.

62. Id., 575 P.2d at 1170, 144 Cal. Rptr. at 388. The court noted that in admiralty cases, under the "unseaworthiness" doctrine, a form of strict liability, jurors had no difficulties considering the plaintiff's own fault. Id. at 738-39, 575 P.2d at 1170, 144 Cal. Rptr. at 388.

63. Id. at 738, 575 P.2d at 1169, 144 Cal. Rptr. at 387. The court noted that assumption of the risk is traditionally a complete defense in strict liability. Id. See also RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965) (unreasonable assumption of risk an absolute bar). However, under a comparative approach it is only a reducing factor. 20 Cal. 3d at 738, 575 P.2d at 1169-70, 144 Cal. Rptr. at 387-88.

64. 81 N.J. 150, 406 A.2d 140 (1979). The plaintiff was injured when his hand became caught in the cylinders of an industrial sheet metal rolling machine. Id. at 154, 406 A.2d at 141. While attempting to remove a piece of slag from the cylinders, the plaintiff brushed against the machine activating the rollers which caught his hand. Id. at 157, 406 A.2d at 143. The plaintiff alleged a defective design since the machine did not have a guard to prevent the levers from being accidentally acti-
suit in a broader sense, beyond the narrow negligence concept. Consequently, the court found that the statute applied to all actions grounded in tortious fault. The court then examined the doctrine of strict liability and defined it as a fault concept, reasoning that conduct which endangers others is considered to be fault. With this reasoning, the court brought strict liability within the concept of tortious fault and held that the New Jersey comparative negligence statute was applicable to strict liability actions.

In addition to Wisconsin, California and New Jersey, eight other states have judicially applied comparative negligence principles to strict products liability. In *Busch v. Busch Construction Inc.*, the Minnesota Supreme Court, following the reasoning of the Wisconsin court in *Dippel*, applied its state's comparative negligence statute to strict liability actions.

The New Jersey comparative negligence statute provides:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, or was not greater than the combined negligence of the persons against whom recovery is sought. Any damages sustained shall be diminished by the percentage of negligence attributable to the person recovering.


The court then quoted Dean Prosser's definition of "fault":

> There is a broader sense in which "fault" means nothing more than a departure from a standard of conduct required of a man by society for the protection of his neighbors; and if the departure is an innocent one, and the defendant cannot help it, it is none the less a departure, and a social wrong. The distinction still remains between the man who has deviated from the standard, and the man who has not. The defendant may not be to blame for being out of line with what society requires of him, but he is none the less out of line.

*(quoting W. PROSSER, supra note 11, § 75 at 93)*.

The defendant countered that plaintiff had placed himself in an unsafe position by reaching into the machine without cutting off power to the machine. The court examined the language of the statute to determine the legislative intent and found that it was the legislature's purpose, in passing the statute, to ameliorate the harshness of contributory negligence when applied to any tort action. The New Jersey Supreme Court disagreed with the analysis of the Wisconsin Supreme Court in *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). The New Jersey Supreme Court believed that a comparative negligence statute was applicable to strict liability, not because strict liability was akin to negligence per se, but because the statute was meant to cover fault in a broad sense, beyond mere negligence.

The New Jersey comparative negligence statute provides:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, or was not greater than the combined negligence of the persons against whom recovery is sought. Any damages sustained shall be diminished by the percentage of negligence attributable to the person recovering.


The court said that the failure of a manufacturer to distribute a product which is fit, suitable and duly safe constitutes fault. The court then quoted Dean Prosser's definition of "fault":

> There is a broader sense in which "fault" means nothing more than a departure from a standard of conduct required of a man by society for the protection of his neighbors; and if the departure is an innocent one, and the defendant cannot help it, it is none the less a departure, and a social wrong. The distinction still remains between the man who has deviated from the standard, and the man who has not. The defendant may not be to blame for being out of line with what society requires of him, but he is none the less out of line.

*(quoting W. PROSSER, supra note 11, § 75 at 93)*.

The case involved an auto accident in which the plaintiff was driving a car owned by the defendant company and manufactured by defendant General Motors. The car drifted off the road, down an embankment, and plunged into a swamp. The plaintiff contended that a defect in the turn signal switch caused the steering wheel to lock. General Motors claimed that there was no defect and the cause of the accident was the plaintiff's
comparative negligence statute to strict liability. Similarly, the Supreme Court of Hawaii, impressed with the reasoning of the Daly court, applied comparative negligence to strict liability in Kaneko v. Hilo Coast Processing. In addition, Alaska, Florida, Mississippi, Montana, Oregon, and West Virginia extended comparative negligence principles to strict liability through judicial decision.

Courts in six states and one territory have determined that a comparative causation approach, rather than a comparative negligence or fault approach, is applicable to strict products liability. Under comparative causation, damages reflect the degree to which each party is a cause of the injuries which occur, whereas, under comparative negligence, damages are assessed in proportion to the fault of each party. In Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., an Idaho federal district court held that the state's comparative negligence statute required a comparison of all legal causes of the plaintiff's injuries. The court stated that this comparative causation theory required an apportionment of damages according to the percent that drowsiness and inattention. The jury found the plaintiff 15% negligent and General Motors 85% at fault due to the defect.

70. Id. at 393. The court upheld the jury's apportionment of fault. Id. at 394. The court stated that when Minnesota adopted the Wisconsin comparative negligence statute, it also adopted the Wisconsin Supreme Court's interpretations and applications of the statute. Id. at 393.

71. 65 Hawaii 447, 654 P.2d 343 (1982). The plaintiff had been injured while erecting a building when the beam on which he was standing collapsed, causing the plaintiff to fall 20 feet. Id. at 448-49, 654 P.2d at 345. The jury found the defendant building company strictly liable and the plaintiff negligent. Id. at 449-50, 654 P.2d at 345. Persuaded by the Daly court's arguments, the Hawaii Supreme Court merged the concepts of strict products liability and comparative negligence. Id. at 463, 654 P.2d at 354.


73. See West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976). For a discussion of West, see notes 130-34 and accompanying text infra.

74. See Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975) (interpreting Mississippi law).


78. See Sandford v. Chevrolet Div. of Gen. Motors, 292 Or. 590, 642 P.2d 624, 628-29 (1982). The court noted that causation could be scientifically apportioned, while fault could not be scientifically measured. Id., 642 P.2d at 628 (citing V. Schwartz, supra note 22, at 276).

79. 411 F. Supp. 598 (D. Idaho 1976). The case involved an airplane crash. Id. at 599. The jury found the plaintiff corporation's pilot and mechanic 90% the cause of the crash, and the defendant manufacturer of the airplane 10% of the cause. Id. at 601.

80. Id. at 603.
each party's conduct was a cause of the injury.\textsuperscript{81}

Most recently, in \textit{Coney v. J.L.G. Industries},\textsuperscript{82} the Illinois Supreme Court applied a comparative causation approach to strict liability.\textsuperscript{83} The \textit{Coney} court determined that a comparative negligence approach was both pragmatically and conceptually inappropriate in strict products liability since negligence was a fault-based concept while strict liability was not.\textsuperscript{84}

Courts in Kansas,\textsuperscript{85} New Hampshire,\textsuperscript{86} Texas,\textsuperscript{87} and Utah\textsuperscript{88} have also applied this comparative causation analysis to strict products liability actions. Likewise, in \textit{Murray v. Fairbanks Morse},\textsuperscript{89} the Third Circuit Court of Appeals held that a comparative causation approach was applicable to strict products liability suits in the Virgin Islands.

In addition, two state courts have chosen to inject pure comparative principles\textsuperscript{90} into their comparative causation analyses, rejecting the modified comparative principles\textsuperscript{91} embodied in the states' comparative negligence statutes. In \textit{General Motors Corp. v. Hopkins},\textsuperscript{92} the Texas Supreme Court held

\textsuperscript{81.} \textit{Id.} The court said that once a party was found to be culpable, blameworthy, or at fault, then the label describing the quality of that fault, such as negligent or strictly liable, became unimportant. \textit{Id.} n.5. The key issue then became a comparison of "the causal conduct of each party, regardless of its label." \textit{Id.}

\textsuperscript{82.} 97 Ill. 2d 104, 454 N.E.2d 197 (1983). The decedent died of injuries incurred while operating a hydraulic aerial work platform manufactured by the defendant. \textit{Id.} at 109, 454 N.E.2d at 199. The plaintiff, administrator of the decedent's estate, sued under strict liability. \textit{Id.} The defendant claimed that the decedent was negligent in his operation of the platform. \textit{Id.} The defendant also alleged that the decedent's employer was negligent in failing to properly instruct the decedent on proper operation of the platform. \textit{Id.}

\textsuperscript{83.} \textit{Id.} at 118, 454 N.E.2d at 203. The court stated that equity demanded that "the total damages for plaintiff's injuries be apportioned on the basis of relative degree to which the defective product and plaintiff's conduct proximately caused them." \textit{Id.}

\textsuperscript{84.} \textit{Id.} The court noted that comparing the seller's strict liability to the user's negligence was theoretically difficult. \textit{Id.} at 116, 454 N.E.2d at 202.


\textsuperscript{87.} See \textit{General Motors Corp. v. Hopkins}, 548 S.W.2d 344 (Tex. 1977), overruled on other grounds, \textit{Turner v. General Motors Corp.}, 584 S.W.2d 844 (Tex. 1979). For a discussion of \textit{Hopkins}, see notes 92-94 and accompanying text infra.


\textsuperscript{89.} 610 F.2d 149 (3d Cir. 1979). For a discussion of \textit{Murray}, see notes 99-100 and accompanying text infra.

\textsuperscript{90.} For a discussion of pure comparative negligence, and states which follow this approach, see note 24 and accompanying text supra.

\textsuperscript{91.} For a discussion of the various types of modified comparative negligence, and the states which follow each approach, see notes 25-27 and accompanying text supra.

\textsuperscript{92.} 548 S.W.2d 344 (Tex. 1977), overruled on other grounds, \textit{Turner v. General Motors Corp.}, 584 S.W.2d 844 (Tex. 1979). The plaintiff was badly hurt when his pickup truck overturned while rounding a curve. \textit{Id.} at 346. The plaintiff claimed that he lost control of the truck because of a defect in the carburetor which caused it to lock in an open position. \textit{Id.} The manufacturer argued that any malfunction in the...
that where a plaintiff's injuries were caused by both a product defect and the plaintiff's misuse of the product, the plaintiff's recovery should be reduced by an amount equal to the degree to which the plaintiff's misuse was a concurring proximate cause of his injuries. The court emphasized that this pure comparative causation approach differed from the state's statutory modified comparative negligence analysis because, under the statute, the plaintiff would be barred from recovery if his negligence was greater than the defendant's.

Furthermore, in *Mulhern v. Ingersoll-Rand Co.*, the Utah Supreme Court determined that the state's comparative negligence statute was not applicable to strict products liability since it was limited to actions in "negligence." Therefore, the court decided that it was free to determine what carburetor was due to the plaintiff's alterations in removing and reinstalling the carburetor. *Id.* at 348.

93. *Id.* at 351. The court rejected misuse as a total defense where the product was dangerous and that danger also contributed to the injuries. *Id.* However, the court also believed that a manufacturer should not reimburse a plaintiff for that portion of his injuries caused by his own fault. *Id.* The court stated that where a defect in the product and misuse of the product were found to have been the proximate causes of the injuries, then "the trier of fact must then determine the respective percentages (totalling 100%) by which these two concurring causes contributed to bring about the event." *Id.* at 352.

94. *Id.* The court said that the defense of misuse in a products liability suit where defect and misuse combine to cause the injuries will only limit the plaintiff's award to that portion of damages attributable to the defective product. *Id.* This comparative approach was not to be confused with the state's comparative negligence statute. *Id.* Under the comparative negligence statute, a plaintiff could be barred from recovering if he was more at fault than the defendant, while, in a products liability suit, the plaintiff's fault would not bar, but only reduce, his award. *Id.*

The Texas comparative negligence statute reads:

> Contributory negligence shall not bar recovery in an action by any person or party or the legal representative of any person or party to recover the damages for negligence resulting in death or injury to persons or property if such negligence is not greater than the negligence of the person or party or persons or parties against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering.


95. 628 P.2d 1301 (Utah 1981). The plaintiff was injured when a hose came in contact with the throttle-control handle of a winch on which the plaintiff was standing. *Id.* at 1302. This started the winch which then came in contact with plaintiff's leg, and severed it above the knee. *Id.* The jury found that the design of the throttle-control valve was defective and that plaintiff misused the winch by standing on it. *Id.*

96. *Id.* at 1303. The state's comparative negligence statute reads as follows:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence or gross negligence resulting in death or in injury to person or property, if such negligence is not as great as the negligence or gross negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering. As used in this act, "contributory negligence" includes "assumption of the risk."

**Utah Code Ann. § 78-27-37 (1977).**
other comparative principles would be applicable to strict liability.\textsuperscript{97} Exercising its discretion, the Utah court decided to adopt a pure comparative causation approach.\textsuperscript{98} In the Third Circuit's \textit{Murray v. Fairbanks-Morse} decision,\textsuperscript{99} the court of appeals also adopted pure comparative principles, despite the existence of a modified comparative negligence statute in the Virgin Islands.\textsuperscript{100}

In sharp contrast to these decisions, the West Virginia Supreme Court, in \textit{Star Furniture Co. v. Pulaski Furniture Co.},\textsuperscript{101} held that its judicially-created modified comparative negligence approach\textsuperscript{102} was applicable to strict products liability actions.\textsuperscript{103} The court rejected the pure comparative causation approach taken by Texas and Utah because it believed that a party who substantially contributes to his own damages should not be permitted to recover for any part of them.\textsuperscript{104} New Hampshire courts, while applying a comparative causation analysis, follow West Virginia in applying a modified comparative approach to strict products liability, rather than a pure comparative approach.\textsuperscript{105}

\textsuperscript{97} 628 P.2d at 1303. The court made this determination in the context of jury findings that the defective product and the plaintiff's misuse contributed to the accident. \textit{Id.} The court held that to relieve either party of responsibility would be inappropriate. \textit{Id.} The court reasoned that treating misuse as an absolute defense would undermine the policy behind strict liability since the manufacturer would be relieved of responsibility, while rejecting the defense completely would frustrate the policy behind the defense of misuse since the manufacturer would bear the cost of an injury caused by the user rather than the product. \textit{Id.}

\textsuperscript{98} \textit{Id.} The court held that misuse would not be a complete bar but would only limit the plaintiff's recovery to that portion of the damages caused by the product defect. \textit{Id.} at 1303-04.

\textsuperscript{99} 610 F.2d 149 (3d Cir. 1979). The plaintiff was severely injured while working on an electrical control panel when the cross member on which he was standing gave way, causing the plaintiff to fall 10 feet. \textit{Id.} at 150-51. The jury returned a two million dollar verdict for the plaintiff. \textit{Id.} at 150. The jury also found the plaintiff five percent negligent. \textit{Id.} Consequently, the trial judge reduced the award. \textit{Id.}

\textsuperscript{100} \textit{Id.} at 139. The court first determined that the Virgin Island's modified comparative negligence statute was not applicable because it was limited to negligence actions. \textit{Id.} at 157. Therefore, the court found itself free to determine whether, and what type of, comparative principles should apply to strict liability. \textit{Id.} at 157-58. The court believed that a comparative fault approach was conceptually inappropriate. \textit{Id.} at 158-59. However, it believed a division could occur along lines of causation. \textit{Id.} at 160. The court then determined that a pure system of comparative causation could apply to strict products liability actions. \textit{Id.} at 162-63.

\textsuperscript{101} 297 S.E.2d 854 (W. Va. 1982). The plaintiff's store was damaged by fire which allegedly was caused by a malfunction in a clock made by the defendant. \textit{Id.} at 856. The defendant pleaded comparative negligence and assumption of the risk. \textit{Id.}

\textsuperscript{102} The West Virginia Supreme Court had adopted a modified system of comparative negligence under which a party was not barred from recovering so long as his fault was not greater than or equal to the defendant's. Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979).

\textsuperscript{103} 297 S.E.2d at 862.

\textsuperscript{104} \textit{Id.}

B. Court Decisions Opposing the Application

Six courts have held that comparative principles are inapplicable to strict products liability actions. In *Kirkland v. General Motors Corp.*, the Supreme Court of Oklahoma adopted strict liability and then determined that the Oklahoma comparative negligence statute was not applicable to strict liability causes of action because the statute was "specifically limited to negligence actions."108

The South Dakota Supreme Court, in *Smith v. Smith*, also held that comparative negligence was not applicable to strict liability. Noting that a manufacturer's conduct is irrelevant in strict liability, the court reasoned that a plaintiff's contributory negligence should also be irrelevant. Similarly, the First Circuit Court of Appeals, interpreting Rhode Island law, ruled that comparative negligence did not apply to strict products liability. The court explained that since contributory negligence was not a defense in strict liability, comparative negligence should not be one either.

In addition, courts in Colorado, Nebraska, and Washington re-
fused to apply comparative principles to strict products liability actions. However, these decisions were nullified when these states integrated the two concepts through subsequent legislation.  

C. Statutes Applying Comparative Principles

Nine state legislatures have enacted statutes which make comparative negligence principles applicable to strict products liability. In New York, a pure comparative approach is applied "[i]n any action to recover damages for personal injury, injury to property, or wrongful death."  

In three states, Colorado, Connecticut, and Michigan, the stat-

117. For a discussion of the Colorado, Nebraska, and Washington statutes which apply comparative principles to strict products liability, see notes 119, 126 & 122, respectively, and accompanying text infra.

118. See N.Y. Civ. Prac. Laws § 1411 (McKinney 1976). The statute provides:

In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

Id. The comments to the statute note that it applies to strict liability, warranty, and negligence. Id. at 386.


In any product liability action, the fault of the person suffering the harm, as well as the fault of all others who are parties to the action for causing the harm, shall be compared by the trier of fact in accordance with this section. The fault of the person suffering the harm shall not bar such person, or a party bringing an action on behalf of such a person, or his estate, or his heirs from recovering damages, but the award of damages to such person or the party bringing the action shall be diminished in proportion to the amount of causal fault attributed to the person suffering the harm. If any party is claiming damages for a decedent's wrongful death, the fault of the decedent, if any, shall be imputed to such party.

Id.


In any claim under sections 38-370o, 52-240a, 52-240b, 52-572m to 52-572r, inclusive, or 52-577a, the comparative responsibility of, or attributed to, the claimant, shall not bar recovery but shall diminish the award of compensatory damages proportionately, according to the measure of responsibility attributed to the claimant.

Id. Section 52-572n includes under the term "product liability claims" actions in negligence, warranty, and strict liability. Id. § 52-572n.


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

Id.
utes provide that a pure comparative analysis is specifically applicable to products liability actions and claims. In Washington, the statute applies to claims based on "fault," and the term is defined to include strict liability.\(^{122}\)

Four states apply modified forms of comparative negligence to strict products liability. Both Arkansas\(^{123}\) and Maine\(^{124}\) apply comparative principles to reduce a plaintiff's award so long as the plaintiff's fault is less than that of the defendant's. Indiana will reduce an award utilizing comparative


In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

Id. Another section defines fault as including acts or omissions which subject a person to a products liability claim or strict tort liability. Id. § 4.22.015.

123. See Ark. Stat. Ann. §§ 27-1763 to -1765 (1979). As used in the act, "fault" includes any act or omission which is a breach of a legal duty. Id. § 27-1763. The statute then provides:

In all actions for damages for personal injuries or wrongful death or in injury to property in which recovery is predicated upon fault, liability shall be determined by comparing the fault chargeable to a claiming party with the fault chargeable to the party or parties from whom the claiming party seeks to recover damages.

Id. § 27-1764.

If the fault chargeable to a party claiming damages is of less degree than the fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is entitled to recover the amount of his damages after they have been diminished in proportion to the degree of his own fault. If the fault chargeable to a party claiming damages is equal to or greater in degree than any fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is not entitled to recover such damages.

Id. § 27-1765.


Where any person suffers death or damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that death or damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the jury thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Where damages are recoverable by any person by virtue of this section, subject to such reduction as is mentioned, the court shall instruct the jury to find and record the total damages which would have been recoverable if the claimant had not been at fault, and further instruct the jury to reduce the total damages by dollars and cents, and not by percentage, to the extent deemed just and equitable, having regard to the claimant's share in the responsibility for the damages, and instruct the jury to return both amounts with the knowledge that the lesser figure is the final verdict in the case.

Fault means negligence, breach of statutory duty or other act or omis-
principles so long as the plaintiff's fault is not greater than that of the defendant.\textsuperscript{125} Nebraska will invoke comparative principles to reduce damages in a strict products liability suit so long as the plaintiff's negligence is only slight.\textsuperscript{126}

In addition, comparative principles have been included in model acts and proposed legislation. The Uniform Comparative Fault Act would apply pure comparative principles to products liability cases.\textsuperscript{127} Under the Model

\textsuperscript{125} See IND. CODE ANN. §§ 34-4-33-2 to 34-4-33-4 (West Supp. 1983-84). The Indiana statute includes strict tort liability in its definition of fault. Id. § 34-4-33-2. The statute then provides:

\begin{itemize}
  \item In an action based on fault, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery except as provided in section 4 of this chapter.
  \item In an action based on fault that is brought against:
    \begin{itemize}
      \item (1) one (1) primary defendant; or
      \item (2) two (2) or more defendants who may be treated as a single party;
    \end{itemize}
  \end{itemize}

Id. § 34-4-33-3.

\textsuperscript{126} See NEB. REV. STAT. § 25-1151 (1979). The Nebraska statute states:

In all actions brought to recover damages for injuries to a person or to his property caused by the negligence or act or omission giving rise to strict liability in tort of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar recovery when the contributory negligence of the plaintiff was slight and the negligence or act or omission giving rise to strict liability in tort of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence or act or omission giving rise to strict liability in tort and contributory negligence shall be for the jury.

Id.

\textsuperscript{127} See Wade, Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act, 29 MERCER L. REV. 373, 392 (1978) (the appendix contains a copy of the Act). Section 1 of the Act provides:

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

"Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be
Uniform Product Liability Act, pure comparative principles would be applied through a comparative responsibility approach. Presently, Congress is considering a products liability bill which would also supply a pure comparative responsibility approach to products liability actions.

D. Courts Applying Comparative Principles to Warranty Actions

A limited number of courts have considered the application of comparative principles to warranty actions. For example, the Supreme Court of Florida addressed this issue in *West v. Caterpillar Tractor Co.* Although adopting the doctrine of strict tort liability, the court stated that if the plaintiff was in a contractual relationship with the manufacturer, he could be

liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Id.

128. See MODEL UNIFORM PRODUCT LIABILITY ACT, 44 Fed. Reg. 62,714 (1979). Section 111 of the Act provides:

All claims under this Act shall be governed by the principles of comparative responsibility. In any claim under this Act, the comparative responsibility of, or attributed to, the claimant shall not bar recovery but shall diminish the award of compensatory damages proportionately, according to the measure of responsibility attributed to the claimant.


All claims under this Act shall be governed by the principles of comparative responsibility. Comparative responsibility attributed to the claimant’s conduct under section 10(c) shall not bar recovery in a product liability action, but shall reduce any damages awarded to the claimant in an amount proportionate to the responsibility of the claimant.

Id. Conduct of the plaintiff constituting negligence, contributory negligence, or assumption of the risk would be considered in the comparison. Id. § 10(c).

130. 336 So. 2d 80 (Fla. 1976). The suit was brought by the deceased’s husband as administrator of the decedent’s estate. Id. at 82. The decedent died of massive internal injuries she incurred when run over by the wheel of a Caterpillar grader. Id. She unknowingly walked into the path of the grader as it was travelling in reverse. Id. at 82-83. The plaintiff alleged negligent design of the grader by failure to provide an adequate warning system for use while travelling in reverse, by failure to provide adequate rear view mirrors, and by manufacturing the grader with a blind spot while driving in reverse. Id. at 82. The plaintiff also alleged a breach of implied warranty or strict liability. Id. The defendant asserted the plaintiff's contributory negligence as a defense. Id. at 83.

131. Id. at 87. The *West* court adopted the form of strict liability as stated in Section 402A of the Restatement. Id.
still bring an action in implied warranty.\textsuperscript{132} The \textit{West} court then found that comparative negligence principles would be applicable to implied warranty actions,\textsuperscript{133} reasoning that evidence of a plaintiff's negligence would tend to show that his injuries were not caused by the breach of warranty but, rather, by his own lack of due care.\textsuperscript{134}

In addition to the \textit{West} court, the Supreme Courts of Alaska\textsuperscript{135} and Kansas\textsuperscript{136} have determined that comparative principles are applicable to warranty actions. Furthermore, many state statutes and model acts which apply comparative principles to strict products liability actions apply these principles to actions in warranty.\textsuperscript{137}

\textbf{E. An Analysis of the Application of Comparative Negligence Principles}

At present, excluding the decision of the Massachusetts Supreme Court

\textsuperscript{132} \textit{Id.} at 91. The court stated that the adoption of strict liability did not mean that implied warranty was no longer available. \textit{Id.} Rather, strict tort liability was available if a user was injured by a defective product and did not have a contractual relationship with the manufacturer. \textit{Id.} However, if the contractual relationship did exist, the court stated that an implied warranty action could still be brought. \textit{Id.}

\textsuperscript{133} \textit{Id.} at 92. The court stated that if the injured person's acts of contributory negligence were a proximate cause of the injuries, then comparative negligence would apply. \textit{Id.} The court noted that contributory negligence is generally considered a tort concept. \textit{Id.} at 91. Breach of warranty, according to the court, retained some tort concepts. \textit{Id.} The court then stated:

\begin{quote}
It would seem at first glance that there is no room for operation of any of the principles of the law of negligence in a purely contractual area. But when it is considered that liability for breach of warranty exists only where it is shown that the breach was the proximate cause of the harm for which recovery is sought, the question arises whether evidence which, in a negligence suit, might be introduced as showing the injured person's contributory negligence, may not be introduced in a breach of warranty action to show that the harm alleged to flow from a breach of warranty actually was otherwise caused.
\end{quote}

\textit{Id.} (quoting 1 R. \textsc{Hursh} \& H. \textsc{Bailey}, \textit{American Law of Products Liability} 619-21 (2d Ed. 1974)).

\textsuperscript{134} 336 So.2d at 92. The court noted, however, that due care did not require a plaintiff to make detailed, expert inspection of a product. \textit{Id.} In addition, the court noted that unreasonable exposure to a known risk would remain an absolute defense. \textit{Id.}

The court also indicated that comparative negligence was applicable to strict liability. \textit{Id.} However, failure of the user to discover a defect or guard against its existence was not to be considered contributory negligence. \textit{Id.}

\textsuperscript{135} \textit{See} Sebring \textit{v.} Colver, 649 P.2d 932, 935 (Alaska 1982).

\textsuperscript{136} \textit{See} Kennedy \textit{v.} City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980).

in Correia v. Firestone Tire & Rubber Co.,\textsuperscript{138} twenty-six states apply comparative principles to strict liability either through judicial decision\textsuperscript{139} or by statute,\textsuperscript{140} while only three states expressly refuse to make the application.\textsuperscript{141} In addition, eleven states apply comparative principles to warranty actions, while no state has explicitly refused such an application.\textsuperscript{142}

It is submitted that the California Supreme Court, in Daly v. General Motors Corp., thoroughly analyzed why comparative principles are compatible with strict products liability.\textsuperscript{143} The court correctly noted that the application of comparative principles would not undermine the policy behind strict liability of relieving the plaintiff of the burden of proof found in a negligence case.\textsuperscript{144} The defendant manufacturer would continue to be strictly liable for the defective product, while the plaintiff's conduct would only be considered in reducing the award.\textsuperscript{145}

Strict liability is also based on the policy that its imposition will serve to deter a manufacturer from placing a defective product on the market.\textsuperscript{146} As

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\item \textsuperscript{138} 388 Mass. 342, 446 N.E.2d 1033 (1983). For a discussion of Correia, see notes 188-202 and accompanying text infra.
\item \textsuperscript{139} For a discussion of the courts which have applied comparative principles to strict liability, see notes 46-105 and accompanying text supra.
\item \textsuperscript{140} For a discussion of statutes which have made comparative principles applicable to strict liability, see notes 118-29 and accompanying text supra.
\item \textsuperscript{141} For a discussion of the courts which refused to apply comparative principles to strict liability, see notes 106-17 and accompanying text supra.
\item \textsuperscript{142} For a discussion of the court decisions and statutes which have made comparative principles applicable to warranty actions, see notes 130-37 and accompanying text supra.
\item \textsuperscript{143} For a general discussion of the Daly decision, see notes 52-63 and accompanying text supra.
\item \textsuperscript{144} For a discussion of the Daly court's view of the effect of the application of comparative principles on the policy behind strict liability of relieving the plaintiff of proving a manufacturer's negligence, see notes 56 & 58 and accompanying text supra.
\item \textsuperscript{145} Butaud v. Suburban Marine & Sporting Goods, 555 P.2d 42, 45-46 (Alaska 1976) (defendant's liability remains strict, plaintiff's liability attaches as a result of his conduct in using the product). See Levine, Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty, 52 MINN. L. REV. 627, 648 (1968) (though manufacturer is held strictly liable without proof of his negligence, he should not be liable for the fault of someone else); Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 VAND. L. REV. 93, 110-11 (1972) (since contributory negligence bars or diminishes recovery under negligence per se and res ipsa loquitur theories where defendant's negligence may not be provable, contributory negligence should arguably bar or diminish recovery under strict liability); Twerski, The Use and Abuse of Comparative Negligence in Products Liability, 10 IND. L. REV. 797, 799 (1977) ("To the extent that strict liability merely reflects a belief that in a product defect case the defendant is guilty of non-provable negligence, then there is no justification for limiting the affirmative defenses of contributory negligence and assumption of the risk"). But see Comment, supra note 52, at 499, 500 (Daly effectively requires the plaintiff to prove the defendant manufacturer's negligence in order to preclude jury from being influenced by defense counsel's characterization of a "seemingly harmless" defective product).
\item \textsuperscript{146} See Wade, supra note 35, at 826 (if manufacturer knows it will be liable for injuries inflicted by its product, it is likely that product will be safer than if manufacturer knows it can escape liability by merely showing due care).
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the Daly court noted, the application of comparative principles will not seriously undermine this policy since the manufacturer will remain liable for injuries caused by the defective product. In those instances where a plaintiff's negligent conduct also contributes to the accident, the manufacturer's liability will only be lessened.147 In addition, the application of comparative principles may deter the negligent use of products by consumers.148 This policy seems desirable since a plaintiff's reasonable use of a defective product may help to avoid, or at least lessen the extent of, an injury.149 Thus, it is submitted that the application of comparative principles will continue to deter a manufacturer from manufacturing defective products and, simultaneously, will encourage due care by consumers in the use of these products.150

It is further submitted that the Daly court was correct in finding that juries will be capable of applying comparative principles to actions in strict liability.151 With the aid of proper instruction from the judge, juries can properly make such an application just as they are able to resolve other complex questions.152

147. For a discussion of the Daly court's reasons why a manufacturer would continue to be deterred from building unsafe products, see note 61 supra.

148. See Epstein, Plaintiff's Conduct in Products Liability Actions: Comparative Negligence, Automatic Division and Multiple Parties, 45 J. AIR L. & COMM. 87, 104 (1979) (recognition that their recoveries will be diminished or barred likely to deter careless conduct of consumers). But see Wright, supra note 36, at 118 (if fear of injury does not prevent carelessness, unlikely that possible reduction in jury award will).

149. See Epstein, supra note 148, at 105-06 (at time of use, plaintiff has possession and control of product and possesses information regarding the immediate environment in which the product operates); Comment, supra note 52, at 496-97 (a plaintiff who does not wear a seat belt or drives while intoxicated is not "powerless to protect himself").

150. See Pinto, Comparative Responsibility—An Idea Whose Times Has Come, 45 INS. COUNS. J. 115, 119 (1978) ("Is not society better served by encouraging due care and prudence on the part of every consumer and user, rather than absolving an individual for conduct which caused or contributed to the accident . . . .?"); Plant, supra note 36, at 416 (desirable for general social welfare to encourage due care on part of consumers as well as manufacturers); Note, Assumption of Risk and Strict Products Liability, 95 HARV. L. REV. 872, 883 (1982) (manufacturer's defenses in strict liability should be structured to provide incentives for care on part of consumers and manufacturers).

151. For a discussion of the Daly court's determination that juries are capable of applying comparative principles to strict liability, see note 62 and accompanying text supra.

152. See Daly, 20 Cal. 3d at 748, 575 P.2d at 1175-76, 144 Cal. Rptr. at 393-94 (1978) (Clark, J., concurring) (jury's comparison of a negligent act and a defective product is no more difficult than its comparison of two negligent acts); V. SchwartZ, supra note 22, at 208-09 (jury difficulty in apportioning fault is more conceptual than practical). But see Beasley & Tunstall, Jury Instructions Concerning Multiple Defendants and Strict Liability After the Pennsylvania Comparative Negligence Act, 24 VILL. L. REV. 518, 535 (1978-79) (too demanding to ask jurors not to consider defendant's conduct in imposing strict liability, but then to consider it in assessing damages); Westra, Restructuring the Defenses to Strict Products Liability—An Alternative to Comparative Negligence, 19 SANTA CLARA L. REV. 355, 379 (1979) ("[J]ury verdicts will be haphazard, unpredictable, and will of necessity bear little relationship to an equitable apportionment of damages").
Since comparative principles are compatible with strict liability, it is urged that courts reject the theory that the principles underlying comparative negligence statutes be limited in application to negligence actions.\textsuperscript{153} Rather, as numerous authorities have indicated, courts should view these statutes as inviting judicial action.\textsuperscript{154} Under this approach, the existence of a comparative negligence statute is an expression of the legislature’s intention to apportion the cost of injuries among all the responsible parties.\textsuperscript{155} Therefore, courts should extend the principles beyond negligence to strict products liability in accordance with the legislative will.\textsuperscript{156}

This judicial activist role may be supported by two lines of argument. First, the comparative negligence statute may have been drafted prior to the state’s adoption of strict liability.\textsuperscript{157} Consequently, one may argue that the legislature never considered the question of whether the statute would be applicable to strict liability.\textsuperscript{158} Based on this line of reasoning, a court may

\textsuperscript{153} See, e.g., Melia v. Ford Motor Co., 534 F.2d 795, 802 (8th Cir. 1976) (examining Nebraska comparative negligence statute) (due to its language, application of statute would be “inappropriate in a strict liability case”); Kirkland v. General Motors Corp., 521 F.2d 1353 (Okla. 1974) (comparative negligence statute specifically limited to negligence; not applicable to strict liability).


\textsuperscript{156} See Twerski, supra note 154, at 330-31. For a state with a long history of comparative negligence in which the various and sundry intricacies of the doctrine have been worked out to refuse to adopt comparative fault when faced with strict liability is almost ludicrous. The legislative will is clear. The implementation mechanism for the reduction of plaintiff’s verdict is well established. If ever a court had the right to extend by analogy without waiting for further legislation on the subject, this would appear the appropriate occasion.

\textsuperscript{157} See also Note, Comparative Negligence in a Strict Product Liability Action: Sun Valley Airlines Corp. v. Avco-Lycoming Corp., 14 IDAHO L. REV. 723, 735 (1978) (though court may feel timid about treading on the legislative domain, the court has a duty to correct injustice and inequity).


\textsuperscript{159} See Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676, 682 (D.N.H. 1972) ("I may also conjecture that the legislature never considered the problem at all, which is most likely . . ."); Westerbeke & Meltzer, supra note 154, at 41-42 (comparative negligence statute meant to solve problems related to negligence actions; legislature never considered its application to other subject matter).
be justified in expanding the statute's application to the more recently developed theory of strict liability.\footnote{159}

A second line of argument derives from the interrelated roles of the legislature and the judiciary in the development of strict liability. As one commentator has noted, the legislature, in enacting a comparative negligence statute, has promoted a general comparative analysis for determining recovery in tort.\footnote{160} The judiciary, meanwhile, as creator of the strict liability cause of action,\footnote{161} has inherent authority to shape the theory in accord with the legislative will.\footnote{162} Consequently, the courts may adopt the general comparative analysis underlying the comparative negligence statute and apply it to strict liability and, at the same time, be free to determine whether a pure form of comparative analysis or a modified form of comparative analysis will be applied.\footnote{163}

It is submitted that the Texas Supreme Court in \textit{General Motors Corp. v. Hopkins}\footnote{164} and the Utah Supreme Court in \textit{Mulherin v. Ingersoll-Rand Co.}\footnote{165} properly followed this approach in extending comparative principles to strict products liability. In each instance, the court applied a pure form of comparative analysis, even though the state had previously enacted a modified comparative negligence statute.\footnote{166} The actions taken by the Texas and Utah Supreme Courts find support among many commentators who agree

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\item \footnote{159} See Schwartz, supra note 154, at 180 (since legislature has not prohibited the use of comparative negligence in strict liability, court should apply it where reason and policy dictate).
\item \footnote{160} See Wade, supra note 127, at 380 (through comparative negligence statute, "legislature ha[s] expressed the general policy of the state, alleviation of an all-or-nothing rule").
\item \footnote{161} The vast majority of states which have adopted strict liability have done so through judicial decision. For a discussion of the states which have adopted strict liability, see notes 42-44 and accompanying text supra. Even in those states where strict liability is imposed through legislative enactment, courts develop the theory through interpretation of the statutes. Colley & Thomas, supra note 1, at 58. For a critical analysis of the judiciary's infatuation with the strict tort theory of products liability, see Shanker, \textit{A Case of Judicial Chutzpah (The Judicial Adoption of Strict Tort Products Liability Theory)}, 11 \textit{AKRON L. REV.} 697 (1978).
\item \footnote{162} See Razook, supra note 154, at 519. This commentator notes that, by passing a comparative negligence statute, the legislature has demonstrated its approval of comparative analysis, and has provided some guidance in its application. \textit{Id}
\item \footnote{163} \textit{Id}. Since strict products liability theory was created by the judiciary, the courts can refine and develop the theory consistent with the general legislative intent that a comparative analysis should apply. \textit{Id}
\item \footnote{164} 548 S.W.2d 344 (Tex. 1977), overruled on other grounds, Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979). For a discussion of Hopkins, see notes 92-94 and accompanying text supra.
\item \footnote{165} 628 P.2d 1301 (Utah 1981). For a discussion of Mulherin, see notes 95-98 and accompanying text supra.
\item \footnote{166} See Razook, supra note 154, at 521 (discussing Hopkins and Mulherin). In both instances, the courts viewed the existence of comparative negligence statutes as justifying the application of comparative analysis to strict liability. \textit{Id}. However, the courts did not feel bound to apply the modified comparative approach of the statutes since they were literally not applicable; rather, the courts preferred to implement a pure comparative approach. \textit{Id}
\end{itemize}
that pure and not modified comparative principles are most compatible with the
policies underlying strict liability.167

Courts and commentators have stated that the application of modified
comparative principles to strict products liability will create unjust results.
If a court applies the approach embodied in a modified comparative negli-
gence statute in a situation where the plaintiff is slightly more at fault than
the defendant, then the plaintiff will be completely barred from recovery.168
The Supreme Court of New Hampshire, in Thibault v. Sears, Roebuck & Co.,169
implicitly approved this result. The court first adopted a comparative causa-
tion approach for strict liability that was patterned after the state's modified
comparative negligence statute.170 The court then explained that the plain-

167. See id. at 520-23 (courts should not be constrained by comparative negli-
gence statutes which are inappropriate for strict products liability; instead, courts
should adopt pure comparative fault defense); Westerbeke & Meltzer, supra note 154,
at 45 (judicial adoption of comparative fault, rather than application of comparative
negligence statute, would provide courts with more freedom in seeking to achieve
greater flexibility between principles of comparative fault and policies underlying
strict liability). But see Greenlee & Rochelle, supra note 33, at 666-67. The authors
prefer to see judicial adoption of a modified comparative fault approach to strict
liability because (1) the legislature's modified statute expresses public policy on the
issue and (2) using the same approach as in negligence will avoid confusion in multi-
ple theory and multiple party cases. Id.

168. See, e.g., MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1984-85) (con-
tributory negligence bars recovery unless "such negligence was not greater than the
total amount of negligence attributable to the person or persons against whom recov-
ery is sought"); 42 PA. CONS. STAT. ANN. § 7102 (Purdon 1982) (contributory negli-
gence shall bar recovery by the plaintiff unless "such negligence was not greater than
the causal negligence of the defendant or defendants against whom recovery is
sought").

169. 118 N.H. 802, 395 A.2d 843 (1978). The plaintiff sued a lawnmower manu-
ufacturer to recover damages for an injury to his foot. Id. at 805, 395 A.2d at 845.
The plaintiff's foot became lodged under the housing of the mower when the plaintiff
fell while mowing a steep slope. Id. He alleged that the product lacked a guard
which would prevent a foot from slipping under the housing. Id. The defendant
manufacturer claimed the plaintiff was contributorily negligent in mowing slopes up
and down, instead of lengthwise, as was illustrated in the instructor's manual. Id. at
806, 395 A.2d at 845.

170. Id. at 813, 395 A.2d at 850. The jury was to compare the causal effect of
the defect in the product with the causal misconduct of the plaintiff. Id.
The New Hampshire comparative negligence statute provides:

Contributory negligence shall not bar recovery in an action by any plain-
tiff, or his legal representative, to recover damages for negligence resulting
in death, personal injury, or property damage, if such negligence was not
greater than the causal negligence of the defendant, but the damages
awarded shall be diminished, by general verdict, in proportion to the
amount of negligence attributed to the plaintiff; provided that where recov-
ery is allowed against more than one defendant, each such defendant shall
be liable for that proportion of the total dollar amount awarded as damages
in the ratio of the amount of his causal negligence to the amount of causal
negligence attributed to all defendants against whom recovery is allowed.
The burden of proof as to the existence or amount of causal negligence
alleged to be attributable to a party shall rest upon the party making such
allegation.

tiff would be barred from any recovery if his injuries were caused more by his own conduct than the defective product. Such a result, it is submitted, directly contradicts the purpose of imposing strict liability since a defendant manufacturer is completely absolved of liability for an injury which was caused in part by his product.

The application of modified comparative principles will also create unfair results in multiple defendant cases. For example, in *Jack Frost, Inc. v. Engineered Building Components Co.*, the Minnesota Supreme Court found that the plaintiff was more at fault than one defendant but less than another. Through application of the state's modified comparative negligence statute, the first defendant was relieved of liability while the second defendant was required to bear the burden of both defendants' liability.

It is submitted that the better approach consists of applying a pure comparative analysis to strict products liability so that each defendant, as well as the plaintiff, will be legally responsible for that portion of the injury which he or she caused.

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171. 118 N.H. at 813, 395 A.2d at 850. The court stated that the plaintiff's recovery must be reduced by the percentage that his "misconduct contributed to cause his loss or injury so long as it is not greater than fifty percent." Id. The court further explained that if the plaintiff's conduct was "the sole cause or greater than one-half the cause of the loss or injury, the verdict must be for the defendant." Id. The court held that there was sufficient evidence that the plaintiff was more than 50% responsible for the injuries to support the jury verdict in favor of the manufacturer. Id. at 814, 395 A.2d at 850.

172. For a discussion of the policy behind strict liability of placing the costs of injuries caused by a defective product on the manufacturer, see note 36 and accompanying text supra. See also Note, Products Liability—Restatement (Second) of Torts, Virgin Islands Comparative Negligence Statute Applied in Strict Products Liability Action, 25 Vill. L. Rev. 1072, 1080 (1980) (if plaintiff's "causal contribution" is more than 50% of the cause of the injury, then harsh rule of contributory negligence is revived, and plaintiff is totally barred from recovery).

173. 304 N.W.2d 346 (Minn. 1981). The plaintiff was engaged in the production and sale of chicken eggs. Id. at 348. The plaintiff's lawsuit arose when a chicken barn collapsed. Id. The plaintiff sued EBCO, the retailer and manufacturer of the barn, and EBCO impleaded Hydro-Air, the designer of the product. Id. at 348-49.

174. Id. at 352. The trial court found the plaintiff 30% negligent, EBCO 15% at fault, and Hydro-Air 55% at fault. Id.

175. Id. The court noted that the statute was applicable to claims based on strict products liability. Id. n.5. In 1981, the Minnesota comparative negligence statute provided as follows: Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

**Minn. Stat. § 604.01, subd. 1 (1976).**

176. 304 N.W.2d at 352. Since the plaintiff's negligence was greater than the fault of EBCO, EBCO was not liable to the plaintiff. Id. at 352 n.5. However, because the injury was indivisible, Hydro-Air was assessed 70% of the costs of the injury. Id. at 352.

177. *See* Daly v. General Motors Corp., 20 Cal. 3d, 725, 742, 575 P.2d 1162,
V. Massachusetts’ Refusal to Make the Application

A. Correia v. Firestone Tire & Manufacturing Co.

In 1958, the Massachusetts Legislature adopted the warranty provisions of the Uniform Commercial Code in order to alleviate the difficult burdens of proof which plaintiffs bore in negligence actions. In 1970, by amendment, the legislature made disclaimers of warranties regarding consumer goods and services unenforceable. Through subsequent legislative action, Massachusetts passed additional laws which were designed to protect

1172. 144 Cal. Rptr. 388, 390 (1978) (preferable to apportion legal responsibility so that one party does not bear a loss “for which two are, by hypothesis, responsible”) (quoting W. PROSSER, supra note 11, § 67, at 433).

178. See MASS. GEN. LAWS ANN. ch. 106, §§ 2-313 to -315 (West 1958). Massachusetts’ provisions regarding express warranty, implied warranty of merchantability, and implied warranty of fitness for a particular purpose are identical to the provisions in the Uniform Commercial Code. For the text of these provisions in the Uniform Commercial Code, see note 32 supra.

179. See Note, supra note 32, at 241-42. For a discussion of problems concerning the burden of proof in negligence actions, see note 33 and accompanying text supra.

In Massachusetts, it had long been established that a plaintiff could sue in negligence for injuries caused by a defective product. Note, supra note 32, at 241 (citing, inter alia, Burke v. Hodge, 217 Mass. 182, 104 N.E. 450 (1914) (defendant’s negligent mixing of cement proximately caused a concrete wall to fall and injure plaintiff)). The requirement of privity of contract to sue in negligence had been eliminated in Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946). However, a plaintiff still had three difficult burdens of proof. Note, supra note 32, at 240. First, the plaintiff had to prove that the product was defective when it left the manufacturer’s control. Id. (citing Coyne v. Tilley Co., 368 Mass. 230, 318 N.E.2d 623 (1974); Kenney v. Sears, Roebuck & Co., 355 Mass. 604, 246 N.E.2d 649 (1969); Farley v. Edward E. Tower & Co., 271 Mass. 230, 171 N.E. 639 (1930)). Second, the plaintiff had to prove that the defect was caused by the manufacturer’s negligence. Id. at 240 (citing Carter v. Yardley & Co., 319 Mass. 92, 96, 64 N.E.2d 693, 696 (1946)). Third, the plaintiff had to prove that the defect caused his injuries. Id. at 240 (citing Carney v. Bereault, 348 Mass. 502, 204 N.E.2d 448 (1965); Potter v. John Bean Div. of Food Mach. & Chem. Corp., 344 Mass. 420, 182 N.E.2d 834 (1962); Ruffin v. Coca Cola Bottling Co., 311 Mass. 514, 42 N.E.2d 259 (1942)).

180. MASS. GEN. LAWS ANN. ch. 106, § 2-316A (West Supp. 1984-85). That provision reads as follows:

The provisions of section 2-316 shall not apply to sales of consumer goods, services or both. Any language, oral or written, used by a seller or manufacturer of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer’s remedies for breach of those warranties, shall be unenforceable.

Any language, oral or written, used by a manufacturer of consumer goods, which attempts to limit or modify a consumer’s remedies for breach of such manufacturer’s express warranties, shall be unenforceable, unless such manufacturer maintains facilities within the commonwealth sufficient to provide reasonable and expeditious performance of the warranty obligations.

The provisions of this section may not be disclaimed or waived by agreement. Id. Section 2-316 permitted exclusion or modification of warranties in limited circumstances and with specific language. See id. § 2-316.
the consumer. Thus, the legislature extended liability to lessors and suppliers of goods, limited the defense of failure to give notice to cases where the defendant could show prejudice, and enacted a three-year statute of limitations for personal injuries which ran from the date of injury, not the date of sale of the product. As a result of these developments, the Supreme Judicial Court considered Massachusetts' warranty law to be as comprehensive a remedy for injured plaintiffs as strict tort liability. Consequently, the Massachusetts Supreme Judicial Court refused to adopt section 402A in the 1978 twin cases of Back v. Wickes Corp. and Swartz v. General Motors Corp.

In the 1824 case of Smith v. Smith, the Massachusetts Supreme Judicial Court was the first state court to adopt the contributory negligence defense. In 1969, the Massachusetts Legislature replaced contributory negligence with comparative negligence. Although the Supreme Judicial

181. Id § 2-318. Section 2-318 provides as follows:
Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods. The manufacturer, seller, lessor or supplier may not exclude or limit the operation of this section. Failure to give notice shall not bar recovery under this section unless the defendant proves that he was prejudiced thereby. All actions under this section shall be commenced within three years next after the date the injury and damage occurs.

182. 375 Mass. 633, 378 N.E.2d 964 (1978). The Back court noted that warranty liability had been transformed into a remedy as comprehensive as strict liability. Id. at 639, 378 N.E.2d at 968. It was no longer encumbered by sales and contract law. Id. at 640, 378 N.E.2d at 969. Rather, it was "congruent in nearly all respects with the principles expressed in Restatement (Second) of Torts § 402A (1965)." Id.

183. 375 Mass. 628, 378 N.E.2d 61 (1978). The Swartz court declined to adopt strict tort liability. Id. at 631, 378 N.E.2d at 64. The court noted that amendments to Massachusetts warranty law had made it "a remedy as comprehensive as that provided by § 402A of the Restatement . . . ." Id. at 630, 378 N.E.2d at 63 (footnote omitted).

184. 19 Mass. 662 (1824). The case concerned an injury to the plaintiff's horse allegedly caused by a woodpile, which the defendant had placed in the road. Id. The plaintiff had loaded a wagon with cider. Id. The wagon rammed the horse, causing the horse to gallop furiously. Id. at 663. The wagon then struck the woodpile and broke, causing injury to the horse. Id. The plaintiff claimed there would have been no accident if the wood had not been in the way. Id. The defendant countered that the plaintiff was negligent in overloading the wagon and not driving skillfully. Id.

185. Id. at 664. The court held that the plaintiff could not recover unless he showed he used ordinary care. Id. The court reasoned that where the complaining party was negligent, it could not be ascertained whether his injury was caused by himself or the fault of another. Id. As precedent, the court cited Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (1809). 19 Mass. at 665. For a discussion of Butterfield, see notes 13-14 and accompanying text supra.

186. MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1984-85). The Massachusetts modified comparative negligence statute provides as follows:
Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in
Court had not decided the issue, commentators predicted that Massachusetts would apply comparative principles to warranty actions. 187

In Correia v. Firestone Tire & Rubber Co., 188 the Massachusetts Supreme Judicial Court, in response to a question certified from the federal district court, considered whether comparative negligence principles should apply to a warranty action. At the outset, the court found that warranty law was comparable to strict liability in Massachusetts 189 and, therefore, framed the issue in terms of whether comparative principles should be applied to strict liability.

Addressing this question, the court first determined that the state's comparative negligence statute 190 did not apply because its language indicated that it was limited to negligence actions. 191 The court then refused to ex-

death or in injury to person or property, if such negligence was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made. In determining by what amount the plaintiff's damages shall be diminished in such a case, the negligence of each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought. The combined total of the plaintiff's negligence taken together with all of the negligence of all defendants shall equal one hundred percent.

The violation of a criminal statute, ordinance or regulation by a plaintiff which contributed to said injury, death or damage, shall be considered as evidence of negligence of that plaintiff, but the violation of said statute, ordinance or regulation shall not as a matter of law and for that reason alone, serve to bar a plaintiff from recovery.

The defense of assumption of risk is hereby abolished in all actions hereunder.

The burden of alleging and proving negligence which serves to diminish a plaintiff's damages or bar recovery under this section shall be upon the person who seeks to establish such negligence, and the plaintiff shall be presumed to have been in the exercise of due care.

Id.

187. See Note, supra note 32, at 258 (Massachusetts will follow national trend applying comparative principles to products liability). See also MASS. GEN. LAWS ANN. ch. 231, § 85 comment (West Supp. 1984-85) (statute will need amending so as to be made applicable to warranty actions).

188. 388 Mass. 342, 446 N.E.2d 1033 (1983). The wrongful death action was instituted by the wife of a truck driver whose husband was killed in an accident resulting from a blowout in the right front tire of his truck. Id. at 343, 446 N.E.2d at 1033-34. The defendant alleged that the deceased was contributorily negligent in not wearing a seat belt, not inspecting and maintaining the truck, and not controlling the truck after the blowout. Id. at 344, 446 N.E.2d at 1034.


190. For the text of the statute, see note 186 supra.

191. 388 Mass. at 353, 446 N.E.2d at 1039. The court noted that the comparative negligence statute was only applicable to suits "by any person or legal represen-
tend the principles underlying the Massachusetts comparative negligence statute to strict liability actions. The court based this decision upon the grounds that the policies underlying negligence liability differed radically from those underlying strict liability. Negligence presumed that people would act reasonably. Consequently, if a person's injuries were due in part to his own unreasonable conduct, his recovery should be so limited. Strict liability, on the other hand, was based on the principle that the seller is responsible for injuries caused by his product. Therefore, a user's contributory negligence is irrelevant. Due to these inconsistencies between comparative principles and strict liability, the Massachusetts Supreme Judicial Court held that comparative negligence was not applicable to a breach of warranty to recover damages for negligence resulting in death or in injury to person or property."

"Id. (quoting MASS. GEN. LAWS ANN. ch. 231, §85 (West Supp. 1984-85)). The court then stated that actions in strict liability are not actions in negligence. 388 Mass. at 353, 446 N.E.2d at 1039 (citing RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965))."

192. 388 Mass. at 354, 446 N.E.2d at 1039. The court noted that this was the course of action argued most strenuously by the defendant. Id.

193. The court declined to meld comparative negligence principles with warranty theory because it believed that such an act would undercut the policies behind warranty theory. Id.

194. Id. The court noted that the policies underlying negligence require that people take reasonable steps to protect themselves and others from harm. Id. The court stated that one whose conduct "'falls below the standard established by law for the protection of others against unreasonable risk'" could be held liable for resultant injuries. Id. (quoting RESTATEMENT (SECOND) OF TORTS § 282 (1965)).

195. 388 Mass. at 354, 446 N.E.2d at 1039.

196. Id. at 354-55, 446 N.E.2d at 1040. The court wrote:

On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products. Id. (quoting RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965)).

The court noted that the seller was in the best position to insure product safety. Id. Consequently, he had a duty not to release "'any product in a defective condition unreasonably dangerous to the user or consumer.'" Id. (quoting RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965)). The court noted that the seller's duty was unknown in the law of negligence and was not satisfied by the seller's being reasonable. Id. at 355, 446 N.E.2d at 1040. Under warranty theory, liability centers on the product, not the conduct of the seller. Id.

197. Id. at 356, 446 N.E.2d at 1040. The court noted that the seller and user are not presumed to be equally responsible for injuries caused by a defective product. Id. Consequently, contributory negligence and comparative negligence have no part in a strict liability scheme. Id.
of warranty action. In declining to apply comparative principles, however, the court noted that it would recognize a user's unreasonable assumption of the risk as a defense because the user's conduct would be the cause of his own injuries. For the same reason, the court noted that unforeseeable misuse of a product would also constitute a valid defense. In conclusion, the court stated that any application of comparative principles to warranty should be left to legislative initiative. The court did not believe that Massachusetts law was so inconsistent with other jurisdictions that judicial action was required.

B. A Critique of the Correia Decision

Initially, it is submitted that the Correia court was correct in looking to the legislature for leadership in merging comparative principles and warranty. Since warranty is a legislative creature, arguably it is the legislature which should shape and mold the theory. In addition, since warranty existed at the time the legislature adopted a comparative negligence statute, it may be argued that the legislature, by limiting the terms of

198. Id. at 353, 446 N.E.2d at 1039. Besides finding that comparative fault was inapplicable to a warranty action, the Massachusetts Supreme Judicial Court also determined that a third party tortfeasor could not seek contribution from an employer whose negligence contributed to the employee's injury, where the employee received workmen's compensation benefits. Id. at 346-52, 446 N.E.2d at 1035-38.

199. Id. at 355-56, 446 N.E.2d at 1040. The court stated that in strict liability, a user's only duty was to act reasonably when proceeding with a known defective and dangerous product. Id. at 355, 446 N.E.2d at 1040. Consequently, if a user were to proceed unreasonably, he would relinquish the law's protection and be barred from recovery. Id. The court emphasized that recovery would be denied because the user's conduct, and not the product, was the cause of his injuries, as a matter of law. Id. at 356, 446 N.E.2d at 1040.

200. Id. at 357 n.15, 446 N.E.2d at 1041 n.15. The court stated that a seller, manufacturer, or distributor would not be liable for injuries caused by a plaintiff's unforeseeable misuse of a product. Id. The court further stated that it was not the defendant's burden to prove misuse; rather, as an element of his case, the plaintiff had to prove that his injury was caused by a defect which made his product unfit for ordinary use. Id.

201. Id. at 356, 446 N.E.2d at 1040-41. The court believed it was best to keep the policies of negligence and warranty liability separate until the legislature decided to meld them. Id., 446 N.E.2d at 1040. The court noted that, even if the Massachussets law of warranty needed restructuring, the court would leave the restructuring up to the legislature since a variety of possible solutions could be implemented. Id., 446 N.E.2d at 1041.

202. Id. at 356 n.14, 446 N.E.2d at 1041 n.14. The court stated that other courts had also found comparative negligence incompatible with strict liability. Id. (citing Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976) (applying Nebraska law); Kinard v. Coats Co., 37 Colo. App. 555, 553 P.2d 835 (1976); Smith v. Smith, 278 N.W.2d 155 (S.D. 1979)).

203. For a discussion of the Correia court's reluctance to act without legislative guidance, see note 201 and accompanying text supra.

204. In Massachusetts, warranty law is governed by statute. MASS. GEN. LAWS ANN. ch. 106, §§ 2-313 to -315 (West 1958). For a discussion of Massachusetts warranty law, see notes 178-81 and accompanying text supra.
the statute to "negligence" actions, intended that it not apply to warranty actions.\textsuperscript{205}

However, as the \textit{Correia} court noted, warranty law in Massachusetts has been developed so that it is nearly identical to the strict liability theory found in most other states.\textsuperscript{206} In fact, in analyzing whether comparative principles should apply to warranty, the \textit{Correia} court couched its analysis in strict liability terminology.\textsuperscript{207} Consequently, it is submitted that if the court wished to continue to develop Massachusetts warranty law in conformity with national trends in strict liability law, it should have applied comparative principles to warranty.\textsuperscript{208}

The \textit{Correia} court, in rejecting the application of comparative principles to strict liability, reasoned that negligence principles were conceptually inappropriate in strict liability because negligence was based on a reasonableness standard, while in strict liability, reasonableness was irrelevant.\textsuperscript{209} However, it is submitted that these two theories are not as distinct as they might appear. Negligence terminology and the "reasonableness" standard are in fact used by courts\textsuperscript{210} and scholars\textsuperscript{211} when defining defectiveness for the pur-


\textsuperscript{206} For a history of the development of Massachusetts warranty laws, see notes 178-81 and accompanying text \textit{supra}.

\textsuperscript{207} For a discussion of the \textit{Correia} decision, see notes 188-202 and accompanying text \textit{supra}.

\textsuperscript{208} \textit{See Correia v. Firestone Tire & Rubber Co.}, 388 Mass. 342, 356 n.14, 446 N.E.2d 1033, 1041 n.14 (1983) (court would feel compelled to re-examine state law if "out of harmony with the overwhelming weight of authority in other States") (citation omitted). For a discussion of the national trend towards applying comparative principles to strict products liability, see notes 46-137 and accompanying text \textit{supra}.

\textsuperscript{209} 388 Mass. at 354-55, 446 N.E.2d at 1039-40 (in negligence, reasonableness standard is applied; in strict liability, reasonable conduct is irrelevant). \textit{See also} Levine, \textit{Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault}, 14 \textit{San Diego L. Rev.} 337, 338 (1977) (since strict liability cause of action is not based on fault, application of comparative negligence results in collision of fault and no-fault concepts); Comment, \textit{Comparative Fault and Strict Products Liability: Are They Compatible?}, 5 \textit{Pepperdine L. Rev.} 501, 507 (1978) (since the focus in strict products liability is on the product, and the defendant's act and omissions are irrelevant, comparative negligence is not applicable). \textit{See also} \textit{Restatement (Second) of Torts}, § 402A comment n (1965) (strict liability "is not based upon negligence of the seller").

It is also argued that because negligence and strict liability are based on different standards, there is no ground for comparison. \textit{See} Elfin, \textit{supra} note 128, at 270-71 (without a common denominator, jury forced to compare non-comparable concepts); Case Comment, \textit{Products Liability—Misconduct by the Plaintiff Will Reduce or Eliminate Damages Recoverable from a Seller or Manufacturer Under Strict Liability}. Thibault v. Sears, Roebuck & Co., 13 \textit{Suffolk U.L. Rev.} 1558, 1577 (1979) (because no correlative element between strict liability and negligence theories, juries would be speculating in comparing the two theories).

\textsuperscript{210} \textit{See}, e.g., \textit{Phillips v. Kimwood Mach. Co.}, 269 Or. 485, 525 P.2d 1033 (1974). The Oregon Supreme Court defined a dangerously defective product as:

One which a reasonable person would not put into the stream of commerce

\textsuperscript{211}
pose of determining liability under section 402A. In addition, some commentators believe that negligent conduct is inherent in the manufacture of a defective product and may be inferred from the existence of the defect; thus, the more serious the defect, the greater the implicit negligence of the manufacturer. Negligence has also been imputed from the act of placing a defective product into the stream of commerce, or from the nature of the product itself. It should also be noted that in states where strict liability is viewed as a procedural device by which the plaintiff is relieved of proving if he had knowledge of its harmful character. The test, therefore, is whether the seller would be negligent if he sold the article knowing of the risk involved. Strict liability imposes what amounts to constructive knowledge of the condition of the product. Id. at 492, 525 P.2d at 1036 (emphasis in original) (footnotes omitted). See Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 386 A.2d 816 (1978) (design defect strict liability "substantially coordinate with liability on negligence principles" except that dangerousness of the product is imputed), overruled on other grounds, Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979). For an excellent discussion of the struggle in the courts to purge strict liability of negligence concepts, see Powers, The Persistence of Fault in Products Liability, 61 Tex. L. Rev. 777 (1983).

211. See, e.g., W. PROSSER, supra note 11, § 99, at 659-60 (citations omitted). Dean Prosser stated: "The prevailing interpretation of 'defective' is that the product does not meet the reasonable expectations of the ordinary consumer as to its safety. It has been said that this amounts to saying that if the seller knew of the condition he would be negligent in marketing the product." Id. See also Keeton, Product Liability and the Meaning of Defect, 5 St. Mary's L.J. 30, 37-38 (1973) (a product is unreasonably dangerous "if a reasonable person would conclude that the magnitude of the scientifically perceivable danger as it is proved to be at the time of trial outweighed the benefits of the way the product was so designed and marketed") (emphasis in original); Wade, supra note 35, at 839-40 (defective product is one which "is so likely to be harmful to persons . . . that a reasonable prudent manufacturer . . ., who had actual knowledge of its harmful character would not place it on the market"). Cf. Birnbaum, Unmasking the Test for Design Defect: From Negligence to Warranty to Strict Liability to Negligence, 33 Vand. L. Rev. 593, 609-10, 647-49 (1980) (negligence undercurrent in risk-utility analyses).

212. See, e.g., Brewster, Comparative Negligence in Strict Liability Cases, 42 J. Air L. & Comm. 107, 110 (1976) (design defect implies fault on the part of the designer); Carestia, supra note 10, at 63-64 (a "defect" may be defined as a "deficiency," "blemish" or "fault") (emphasis in original) (citing Webster's New International Dictionary (2d ed. 1961)). See also Murray v. Fairbanks-Morse, 610 F.2d 149, 159 (3d Cir. 1979) (product may be considered "faulty" so as to bridge semantic gap between negligence and strict liability).

213. See Twerkski, supra note 154, at 329 ("the more serious the defect the more culpable is the defendant").

214. See, e.g., W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 20, at 31 (1979) (in warranty, "fault" may be equated to act of selling a product that was not of merchantable quality); Case Comment, Comparative Negligence and Strict Products Liability: Butaud v. Suburban Marine & Sporting Goods, Inc., 38 Ohio St. L.J. 883, 888 (1977) (fault inherent in manufacture and marketing of defective product).

215. See, e.g., Frumer, The Social Purpose of Tort, in UNIFORM PRODUCTS LIABILITY ACT § 1.03 (V. Walkowiak ed. 1980). Frumer concludes that "fault" in the sense of negligence is no longer required for recovery for a civil wrong; instead, "fault" in the product is sufficient. Id. (citing Traynor, The Ways and Means of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363 (1965)). See also Wade, supra note 127, at 377 (act of manufacturing a "bad" product is legal fault).
ing the manufacturer's negligence, it is assumed that the manufacturer was negligent in some way. Moreover, negligence is the standard for liability in products liability warning cases, and the negligence standard has also been proposed for products liability design defect cases. Therefore, it is submitted that negligence and strict liability are sufficiently interrelated to permit the application of comparative principles to strict liability actions.

The Correia court also reasoned that the application of comparative principles to strict liability would be inconsistent with the policy behind strict liability of placing the cost of injuries on the product manufacturer. However, the manufacturer is not an insurer of his product, and his liability does not extend to all injuries caused by the product, but is limited to those

216. For a discussion of the policy behind strict liability of relieving a plaintiff of difficult proof problems in negligence, see note 33 and accompanying text supra.

217. See, e.g., Westerbeke & Meltzer, supra note 154, at 69 (strict liability imposed to deter manufacturers from creating unsafe products implies that negligent conduct of manufacturers can be identified and eliminated); Case Comment, supra note 214, at 887 (though plaintiff relieved from proving fault under strict liability, fault elements inherent in concept of "defective" product).

218. See Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1088 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974). The Fifth Circuit concluded in Borel that a seller is under a duty to warn of only those dangers that are reasonably foreseeable. The requirement of foreseeability coincides with the standard of due care in negligence cases in that a seller must exercise reasonable care and foresight to discover a danger in his product and to warn users and consumers of that danger.

493 F.2d at 1088 (citing Davis v. Wyeth Laboratories, 399 F.2d 121 (9th Cir. 1968)) (emphasis in original). See also Woodhill v. Parke Davis & Co., 79 Ill. 2d 26, 35, 402 N.E.2d 194, 198 (1980) (plaintiff must "prove that the defendant manufacturer knew or should have known of the danger that caused the injury" and failed to warn plaintiff of the danger); Restatement (Second) of Torts § 402A comment j (1965) (manufacturer of product which contains ingredient not reasonably expected in product is required to warn against danger of which he has knowledge "or by the application of reasonable, developed human skill and foresight should have knowledge"). For articles discussing the negligence undertones in strict liability warning cases, see Jackson, The Duty to Warn and Strict Liability, 48 INS. COUNS. J. 381 (1981); Comment, The Duty to Warn Under Strict Products Liability as Limited by the Knowledge Requirement: A Regretful Retention of Negligence Concepts, 26 ST. LOUIS U.L.J. 125 (1981); Comment, Is There a Distinction Between Strict Liability and Negligence in Failure to Warn Actions?, 15 SUFFOLK U.L. REV. 983 (1981).

219. See MODEL UNIFORM PRODUCTS LIABILITY ACT § 104(B)(1), 44 Fed. Reg. 62,721 (1979). The Act provides as follows:

In order to determine that the product was unreasonably unsafe in design, the trier of fact must find that, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms outweighed the burden on the manufacturer to design a product that would have prevented those harms, and the adverse effect that alternative design would have on the usefulness of the product.

Id. For a discussion of the Act, see note 128 supra.

220. For a discussion of the Correia court's opinion that comparative principles are incompatible with the policy of strict liability, see notes 193-98 and accompanying text supra.
caused by a defect in the product. Therefore, it is submitted that a manufacturer should not be liable for that portion of a user's injuries caused by the user's contributory negligence, but only for that which is actually caused by the defect.

Furthermore, it is argued that innocent consumers will ultimately bear the cost of an individual's negligent conduct by paying higher prices for the products if courts refuse to apply a comparative analysis to strict liability. In addition, the product's price may rise to an artificially high level, causing the consuming public to switch to a cheaper, less safe product.

The application of comparative principles to strict products liability will also create more equitable results since a plaintiff's fault will only act to reduce an award, rather than bar the action. The Correia court, while refusing...

221. Daly v. General Motors Corp., 20 Cal. 3d 725, 733, 575 P.2d 1162, 1166, 144 Cal. Rptr. 380, 384 (1978) (manufacturer not liable for any injury caused by product, only those caused by a "defect"); Smith, Status of the "Unreasonably Dangerous" Element in Product Liability Actions, 15 Forum 706, 707 (1979-80) (to avoid absolute liability, manufacturer only liable for a product "in a defective condition unreasonably dangerous"). But see Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944). In a concurring opinion in Escola, Justice Traynor concluded that "it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings." Id. at 461, 150 P.2d at 440 (Traynor, J., concurring). However, no court has adopted the Traynor view by imposing absolute liability in a product liability case. See Vandall, "Design Defect" in Products Liability: Rethinking Negligence and Strict Liability, 43 Ohio St. L.J. 61, 79 (1982).

222. For a discussion of jurisdictions using a comparative causation approach, see notes 78-100 and accompanying text supra. The Correia court's acceptance of assumption of the risk and unforeseeable misuse as defenses would seem to lend support for acceptance of comparative causation principles, because the court stressed that when those defenses are asserted, the defendant is asserting that it was the plaintiff's conduct which caused the injury. For a discussion of the Correia court's analysis of assumption of the risk and unforeseeable misuse, see notes 199-200 and accompanying text supra.

223. See Wade, supra note 127, at 379 ("Why is it desirable to transfer to other users of the product—all innocent—the cost of that part of the plaintiff's injury that is attributable to his own fault?"); Comment, supra note 52, at 497 (innocent consumers have been bearing the costs of both negligent defendants' and contributorily negligent plaintiffs' actions); Note, Mulherin v. Ingersoll: Utah Adopts Comparative Principles in Strict Products Liability Cases, 1982 Utah L. Rev. 461, 473 (where there is an "accident," it is fair for seller to spread costs over consuming public; however, where plaintiff is partially responsible, it is unreasonable to place this burden on innocent consumers). See also Stueve v. American Honda Motors Co., 457 F. Supp. 740, 754 (D. Kan. 1978) ("Why is it desirable to transfer to . . . third parties the cost of that part of a plaintiff's injury which is attributable to his own culpable conduct?").

224. See Murray v. Fairbanks-Morse, 610 F.2d 149 (3d Cir. 1979). The court noted that by ignoring contributory negligence the cost of a manufacturer's product would rise to a point above the level actually attributable to the risks posed by the defective product. Id. at 161. Consequently, the court explained, "[i]f the future cost of a product does not accurately reflect the risk posed, then consumers may actually choose cheaper, less safe products because the cost of the manufacturer's product is artificially high." Id. (citing G. Calabresi, The Costs of Accidents (1970)).
ing to apply comparative principles to strict liability, maintained assumption of the risk and product misuse as absolute defenses. With the application of comparative principles, however, these two defenses, along with the "patent danger doctrine," would cease to be total bars to recovery and, instead, would only reduce the plaintiff's award. It is submitted that this is the more equitable approach since it apportions liability, rather than applying an "all or nothing" rule.

It is finally submitted that the Correia decision will not reverse the trend among the states towards applying comparative principles to strict products liability.

225. For the Correia court's discussion of assumption of the risk as a total bar to recovery, see note 199 and accompanying text supra.

226. For the Correia court's discussion of product misuse as a total bar to recovery, see note 200 and accompanying text supra.


229. See Kaneko v. Hilo Coast Processing, 65 Hawaii 447, 461, 654 P.2d 343, 352 (1982) (injection of comparative negligence principles into strict products liability actions will accomplish more equitable result since plaintiff's award will be reduced in proportion to his responsibility for injury). But see Note, Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants, 50 S. CAL. L. REV. 73, 101-02 (1976) ("all or nothing" rule preferable since any allocation of fault under comparative negligence would be arbitrary).

230. See Kroll, Comparative Fault: A New Generation in Products Liability, 1977 INS. L.J. 492 (comparative fault will continue to be applied to strict products liability as courts try to broaden defenses based on culpable conduct of product user). But see Products Liability—Comparative Negligence—Effect of Plaintiff's Alleged Misconduct in a Products Liability Case Based Upon Product Manufacturer's Strict Liability—In Landmark Decision Massachusetts Supreme Judicial Court Holds That Both State's Comparative Negligence Statute and Principle of Comparative Fault Are Inapplicable to a Strict Products Liability Action Against Tire Manufacturer for Wrongful Death of Truck Driver Caused by Blowout of Defective Tire, 26 ATLA L. REP. 153, 155 (1983) (Massachusetts decision not to apply comparative principles to strict products liability predicted to have "immediate impact" and "abiding influence" on the issue).

North Dakota has recently applied comparative principles to strict liability, becoming the 27th state to do so. See Day v. General Motors Corp., 345 N.W.2d 349 (N.D. 1984).
VI. PENNSYLVANIA: AN OPPORTUNITY TO MAKE THE APPLICATION

Strict liability originated in Pennsylvania in the 1966 decision of Webb v. Zern.231 In Webb, the Pennsylvania Supreme Court adopted the doctrine of strict liability as enunciated in section 402A of the Second Restatement of Torts.232 However, nine years later, in Berkebile v. Brantley Helicopter Corp.,233 a two-member plurality of the court determined that the “unreasonably dangerous” phrase in section 402A was not to be used when charging a jury in strict products liability actions.234 The Berkebile court stated that in order to hold the manufacturer strictly liable, a plaintiff only had to prove that the product was defective and that the defect caused the plaintiff’s injuries.235

Three years after Berkebile, the court re-examined the role of the term “unreasonably dangerous” in strict liability in Azzarello v. Black Brothers Co.236 The court noted that the term’s purpose was to limit liability so that a supplier of products would not become their insurer.237 Consequently, the
court stated that it was a judge’s duty to determine whether a defendant should be held liable under the plaintiff’s averment of the facts, taking into consideration social policy and proper placement of the risk of loss. Then, if the judge determined that liability would be justified, it was the jury’s duty to determine whether there was a defect in the product.

Federal district courts in Pennsylvania have interpreted *Azzarello* as holding that the trial judge, in a strict products liability suit, has the initial responsibility of determining whether the product is “unreasonably dangerous.” In addition, the Pennsylvania Superior Court, in *Lobianco v. Property Protection, Inc.*, held that it was the court’s responsibility to decide whether it is appropriate and just to impose strict liability in a particular case.

It is submitted that the *Azzarello* court’s reintroduction of the “unreasonably dangerous” requirement into strict products liability is a signal to the courts to assert control over the imposition of strict liability. It is submitted that it may also be read as a step by the courts to cut back on, or limit, manufacturer’s liability. Consequently, it is submitted that Pennsylvania courts will apply comparative principles to strict products liability since such action would be consistent with the courts’ retaining control over the development and application of the strict products liability theory, and would be a means of limiting a manufacturer’s liability to that portion of an injury caused by the defect in his product.

238. 480 Pa. at 558, 391 A.2d at 1026. The court stated that it was the judge’s duty to determine questions such as “When does the utility of a product outweigh the unavoidable danger it may pose?” *Id.* The court ruled that such a question was a question of law for the judge and that its resolution depended upon social policy. *Id.*

239. *Id.* It was the jury’s duty to determine whether the facts of the case supported the averments of the complaint. *Id.* The court added that a jury could find a defect “where the product left the supplier’s control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use.” *Id.* at 559, 391 A.2d at 1027.


241. 292 Pa. Super. 346, 437 A.2d 417 (1981). The plaintiff sought to hold the defendant strictly liable for the $35,815 stolen from her house when a burglar alarm installed by the defendant failed to work. *Id.* at 348, 437 A.2d at 419.

242. *Id.* at 361, 437 A.2d at 425. The court stated “that whether a case is one appropriate for the imposition of strict liability is a decision that the court must make according to what ‘social adjustment’ it believes just.” *Id.* The court determined that the defendant installer was not to be held strictly liable because it was more equitable to place the risk of loss on the plaintiff homeowner since she could have more easily insured against the loss. *Id.* at 360-61, 437 A.2d at 424-25.

243. See *Hammond v. International Harvester Co.*, 691 F.2d 646, 650 (3d Cir. 1982) (interpreting *Azzarello*) (trial court must exercise its own judgment in determining whether strict liability is justifiably imposed).

This view finds support in a dissenting opinion in *Hamme v. Dreis & Krump Manufacturing Co.* Judge Rosenn of the Third Circuit Court of Appeals predicted that Pennsylvania’s judiciary would introduce comparative principles into strict products liability. Judge Rosenn believed that Pennsylvania courts are free to follow other jurisdictions in extending comparative principles to strict products liability since the Pennsylvania doctrine of strict liability is a judicial creation.

Judge Rosenn’s view, however, is not shared by Judge Fullam of the Eastern District of Pennsylvania. In *Conti v. Ford Motor Co.*, Judge Fullam held that, under Pennsylvania law, comparative negligence principles are not to be applied in strict products liability actions. Judge Fullam based his opinion on what he perceived to be the Pennsylvania Supreme Court’s desire to keep negligence concepts divorced from strict products liability theory. While noting that the Third Circuit Court of Appeals would prefer

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245. 716 F.2d 152, 155-67 (3d Cir. 1982) (Rosenn, J., dissenting). In *Hamme*, the majority of the court held that the Pennsylvania Workmen’s Compensation Act precluded the adjudication of an employer’s comparative fault in an action brought by an employee against a manufacturer who sought to join the employer as a third-party defendant. *Id.* at 153-54.

246. *Id.* at 166-67 (Rosenn, J., dissenting). Judge Rosenn noted that the Pennsylvania comparative negligence act did not appear applicable to strict liability, since it was limited to negligence actions. *Id.* at 166 (Rosenn, J., dissenting) (interpreting 42 PA. CONS. STAT. ANN. § 7102(a) (Purdon 1982)). Judge Rosenn also noted that contributory negligence was judicially abolished as a defense in strict liability. *Id.* (citing McCown v. International Harvester Co., 463 Pa. 13, 342 A.2d 381 (1975)). The dissent further noted that strict liability did not require proof of a defendant’s negligence. *Id.* (citing Berkebile v. Brantley Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975)). However, Judge Rosenn believed that the Pennsylvania Supreme Court would bring comparative negligence principles to bear in a strict liability suit. *Id.*

247. 71 F.2d at 167 (Rosenn, J., dissenting) (citing Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966)). Judge Rosenn noted that Pennsylvania “has not been reluctant to simplify, clarify, and improve the law in light of modern conditions.” *Id.* (quoting Gilbert v. Korvette’s Inc., 457 Pa. 602, 612 n.27, 327 A.2d 94, 100 n.27 (1974)).


249. 578 F. Supp. 1429 (E.D. Pa. 1983). A husband and wife sued an automobile manufacturer for injuries received as a result of alleged defects in the automobile. *Id.* at 1430. The wife was injured when, in the process of entering the automobile on the passenger side, the vehicle moved suddenly backward, causing her to fall. *Id.* The defendant manufacturer alleged that the husband, who was in the driver’s seat at the time of the accident, was negligent. *Id.*

250. *Id.* at 1434-35. The jury had found the husband 75% the cause of the wife’s injuries, and the automobile 25% the cause. *Id.* at 1432.

to apply comparative principles to product liability cases. Judge Fullam rejected the application since he was required to follow Pennsylvania state law.

VII. CONCLUSION

Because Pennsylvania adopted strict liability by judicial decision and enacted a modified comparative negligence statute which permits some recovery as long as the plaintiff's negligence is not greater than that of the defendant, it is submitted that Pennsylvania courts should be impressed with the almost unanimous action taken towards applying comparative principles to strict liability by the twelve other states which have modified comparative negligence statutes like Pennsylvania's. Pennsylvania should

the liability of a manufacturer for a defective product is equivalent to 'causal negligence' which is to be apportioned under the [Pennsylvania comparative negligence] statute". Id at 1434. Judge Fullam noted that the Pennsylvania Supreme Court, in Rutter v. Northeastern Beaver County School Dist., 496 Pa. 590, 437 A.2d 1198 (1981), maintained assumption of the risk as a total defense in strict products liability cases, while abolishing it in negligence cases because of the enactment of the comparative negligence statute. 578 F. Supp. at 1434. He concluded that these actions indicated that Pennsylvania would not apply comparative negligence to strict products liability actions. Id.

252. 578 F. Supp. at 1434. Judge Fullam recognized that the Third Circuit Court of Appeals, in Murray v. Fairbanks-Morse, 610 F.2d 149 (3d Cir. 1979), applied the Virgin Islands comparative negligence statute to products liability cases in the Virgin Islands. 578 F. Supp. at 1433. For a discussion of Murray, see notes 99-100 and accompanying text supra.

253. 578 F. Supp. at 1434-35. Judge Fullam believed that the application of comparative negligence to strict products liability would constitute a “significant departure” from the law in Pennsylvania. Id. The judge noted that in diversity cases a federal district court is obligated to apply the law of the jurisdiction in which it sits. Id. at 1435.


255. 42 PA. CONS. STAT. ANN. § 7102(a) (Purdon 1982). The statute provides:

In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

Id.


further take note that all of these states have judicially adopted strict liability, as it has.257 Five states, by judicial decision, have applied their modified comparative negligence statutes to strict liability.258

One state's judiciary applied a pure form of comparative analysis to strict liability, even though the comparative negligence statute was of the modified type.259 Two states have made comparative principles statutorily applicable to strict liability, one applying a pure approach,260 the other, a modified approach.261 Only one state has refused to apply comparative principles to strict liability,262 while the remaining three states have yet to decide the issue.263

It is hoped that a future Pennsylvania court will determine that comparative principles are compatible with the policies underlying strict products liability theory.264 The court should then determine that pure

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259. Texas, General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977), overruled on other grounds, Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979). For a discussion of Hopkins, see notes 92-94 and accompanying text supra. For a discussion of Thibault, see notes 169-71 and accompanying text supra. For a discussion of Suter, see notes 64-68 and accompanying text supra. For a discussion of Dippel, see notes 46-51 and accompanying text supra.


262. Nevada, Ohio, and Vermont have not yet considered whether comparative principles should be applied to strict products liability actions.

263. For a discussion of the compatibility of comparative principles and strict liability theory, see notes 143-77 and 203-29 and accompanying text supra.
comparative principles will be applied to strict products liability.\textsuperscript{265} The court should not apply the state's modified comparative negligence statute since such an application may undermine the policy of strict liability by precluding some plaintiffs from any recovery.\textsuperscript{266} Therefore it is submitted, in agreement with Judge Rosenn in \textit{Hamme}, that the judicial adoption and application of comparative principles to strict products liability is appropriate since the strict liability theory was created, and has been developed and molded, by the judiciary.\textsuperscript{267}

\textit{Lawrence R. Kulig}

\textsuperscript{265} For a discussion and analysis of courts which applied pure comparative principles to strict liability, see notes 90-100 and 164-67 and accompanying text \textit{supra}.

\textsuperscript{266} For a discussion of potential problems arising from the application of a modified comparative negligence statute to strict liability, see notes 168-76 and accompanying text \textit{supra}.

\textsuperscript{267} For a discussion of judicial adoption of strict liability as justifying the application of comparative principles to strict liability, see notes 160-63 and accompanying text \textit{supra}.