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EXAMINING THE PLAINTIFF'S CONDUCT UNDER THE MODEL UNIFORM PRODUCT LIABILITY ACT

MARK A. MITCHELL

ON OCTOBER 31, 1979, the Department of Commerce Task Force on Product Liability and Accident Compensation promulgated its Model Uniform Product Liability Act (UPLA or Model Act).¹ Sections 111 and 112 announce virtually across-the-board application of comparative fault principles, reducing the manufacturer's liability when the plaintiff's conduct or that of a third party contributes to the harm. This comment will explain and evaluate the application of comparative responsibility principles and the Model Act's impact on the existing state law in this area.

I. LACK OF UNIFORMITY

The concepts of products liability and comparative negligence both originated in relatively recent times and their existence, as well as their application, has varied throughout the states. Originally, a consumer who sought to assert liability against the manufacturer for injuries resulting from a defective product had to be in privity of contract in addition to having to prove negligence.² This "citadel of privity"³ began to crumble in 1916 with Justice Cardozo's opinion in *McPherson v. Buick Motor Co.*⁴ Cardozo reasoned that the manufacturer "of a thing . . . that is reasonably certain to place life and limb in peril when negligently made . . . is under a duty to make it carefully."⁵ Although the creation of a negligence action removed the requirement of contractual privity, the consumer was still required to prove that the defendant ex-

¹ MODEL UNIFORM PRODUCT LIABILITY ACT, 44 Fed. Reg. 62,714 (1979) [hereinafter cited as UPLA, MODEL ACT]. The Act is published as a model law for use by the states at their election. *Id.* at 62,714.

² See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96 at 641 (4th ed. 1971) [hereinafter cited as W. PROSSER].

³ *Ultramares Corp. v. Touche*, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).

⁴ 217 N.Y. 382, 111 N.E. 1050 (1916).

⁵ *Id.* at 389, 111 N.E. at 1053.

posed the consumer to an unreasonable risk of harm and that the defendant's actions produced the actual damage or loss.⁶

Initial attempts to avoid the burden of proving negligence⁷ were made under a warranty theory.⁸ If the express warranty of safety was breached, the consumer had a cause of action.⁹ Although the efficiency of the warranty theory was originally hindered through the use of contractual disclaimers,¹⁰ the New Jersey Supreme Court in *Henningsen v. Bloomfield Motors Inc.*¹¹ recognized the existence of implied warranties and refused to enforce the contractual disclaimers, thereby accelerating the trend toward strict products liability.¹²

Since the substance of the products liability cause of action following *Henningsen* was in fact based upon strict liability, the drafters of the Second Restatement of Torts decided to discard the warranty label¹³ and recognized an independent strict products liability cause of action in tort under section 402A.¹⁴ Section 402A was first applied in 1963 by the California Supreme Court in

⁶ W. PROSSER, *supra* note 2, § 30 at 143.

⁷ See, e.g., Ashe, *So You're Going to Try a Products Liability Case*, 13 HAST. L.J. 66 (1961).

⁸ See *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932) (statement in literature distributed by manufacturer of automobile that windshield was shatterproof made manufacturer liable for injuries received when windshield shattered, without any showing of negligence).

⁹ W. PROSSER, *supra* note 2, § 97 at 651.

¹⁰ *Id.* at 656.

¹¹ 32 N.J. 358, 161 A.2d 69 (1960).

¹² See 2 M. FRIEDMAN & L. FRUMER, *PRODUCTS LIABILITY* 3A—143 (1979) [hereinafter cited as FRIEDMAN & FRUMER].

¹³ See RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1965).

¹⁴ RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as RESTATEMENT] reads:

(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 bought the product from or entered into any contractual relation with the seller.

*Greenman v. Yuba Power Products, Inc.*¹⁵ The doctrine of strict products liability in tort now is accepted and applied by a substantial majority of the courts.¹⁶ A few states, however, have not recognized a strict tort liability cause of action in products liability, adhering instead to earlier negligence or warranty theories.¹⁷

One reason for the recent trend toward adoption of a strict products liability action in tort may be related to the expanding scope of the area of products liability.¹⁸ As our "highly industrialized" society continues to advance, both the quantity and complexity of products increases,¹⁹ and the courts' role in adhering to the policies behind products liability theory becomes increasingly important.²⁰ The courts' role is especially important where the manufacturer's decision to continue production is made with knowledge of the possible defect and is based largely upon economics.²¹

Similar to the development of the theories supporting strict prod-

¹⁵ 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (manufacturer held liable despite plaintiff's inability to prove negligence). See 2 FRIEDMAN & FRUMER, *supra* note 12, at 383.

¹⁶ See FRIEDMAN & FRUMER, *supra* note 12, at 3B-13.

¹⁷ For a thorough survey on the abandonment of the privity requirement and the adoption of strict tort liability throughout jurisdictions in the United States, see generally FRIEDMAN & FRUMER, *supra* note 12, at 3-7.

¹⁸ *Id.* at 1-1.

¹⁹ *Id.* The aviation industry is a perfect example. Today's aircraft is a highly complex product made up of highly complex components and the consequences of a defective product in this industry are often grave. See generally S. J. Levy, *The Rights of Passengers—A View From the United States*, in DIE PRODUKTHAFTUNG IN DER LUFTUND RAUMFAHRT (PRODUCT LIABILITY IN AIR SPACE TRANSP.) 83-89 (1978) (Proceedings of an International Colloquium in Cologne, Germany, 1977).

²⁰ There are basically three different theories for imposing strict liability on the seller of a defective product. The first is known as enterprise liability, the notion that industry should pay for the injuries it causes. Since the enterprise can pass the loss on to consumers through an increase in price, the risks are spread throughout society. See generally Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172, 1173 (1952). Another theory, known as the "spreading of losses" justification, is based upon the premise that losses are least harmful if they are broadly spread, taking a series of small sums from many people. See generally Freezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. PA. L. REV. 805, 809-10 (1930). Finally, there is the deep pocket theory, "that a dollar removed from a rich man caused the rich man less pain than a dollar removed from a poor man, and that, therefore, shifting losses from the poor to the rich was in itself a good thing." Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 527 (1961).

²¹ See note 188 *infra*.

ucts liability, the use of comparative negligence principles and their application to strict products liability actions has varied substantially among the states. The concept of comparative negligence originated under the common law as a part of the law of admiralty.²³ It was first extended to other negligence actions by Congress in a 1908 statute²³ which was designed to prevent the often harsh application of the common law defenses to claims arising from injuries sustained by railroad employees.²⁴ The concept's popularity quickly increased, until today a majority of the states have adopted comparative negligence in one form or another.²⁵ The "pure" form of comparative negligence, which allows the plaintiff to recover the proportion of his damages equivalent to the defendant's negligence even if the plaintiff's negligence exceeds that of the defendant, has been adopted by eight states, four by statute,²⁶ four judicially.²⁷ Twenty-three states have adopted one of two versions of a "modified" comparative negligence system which limits the plaintiff's right of recovery to cases in which the plaintiff's negligence either is *not as great* as the defendant's

²³ See H. WOODS, *THE NEGLIGENCE CASE: COMPARATIVE FAULT* 18 (1978).

²³ 45 U.S.C. § 53 (1976):

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, . . . the fact that the employee may have been guilty of contributory negligence shall not bar any recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; . . .

²⁴ H. WOODS, *supra* note 22, at 24.

²⁵ See V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 3 (1974) [hereinafter cited as SCHWARTZ].

²⁶ MISS. CODE ANN. § 11-7-15 (1972); N.Y. [CIV. PRAC.] LAW § 1411 (McKinney 1976); R.I. GEN. LAWS § 9-20-4 (Supp. 1979); WASH. REV. CODE ANN. § 4.22.010 (Supp. 1979). See generally H. WOODS, *supra* note 22, at 79.

²⁷ *Katz v. State*, 540 P.2d 1037 (Alaska 1975); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979). See generally H. WOODS, *supra* note 22, at 79.

negligence,²⁸ or is *not greater* than that of the defendant.²⁹ A limited number of jurisdictions apply comparative negligence principles only when the plaintiff's negligence is slight, compared to the defendant's gross negligence,³⁰ or when the plaintiff's negligence is remote compared to the defendant's more direct negligence.³¹

There is also substantial disagreement among the states as to the application of comparative negligence principles to a strict products liability action. The decision has often turned upon the state law's analysis of the products liability cause of action³² or the language of its comparative negligence statute.³³ The traditional criticism directed against a comparison of the two concepts was simply that the fact-finder cannot compare "the 'apples' of negligence with the 'oranges' of strict liability."³⁴ A majority of the commentators, however, submit that the two concepts can be com-

²⁸ ARK. STAT. ANN. § 27-1764 (1979) (couched in terms of fault rather than negligence); COLO. REV. STAT. § 13-21-111 (1973); IDAHO CODE § 6-801 (1979); KAN. STAT. ANN. § 60-258(a) (1975); ME. REV. STAT. ANN. tit. 14, § 156 (1980); MINN. STAT. ANN. § 604.01 (West Supp. 1980) (couched in terms of fault); N.D. CENT. CODE § 9-10-07 (1975); OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1979-1980); UTAH CODE ANN. § 78-27-37 (1977); WYO. STAT. § 1-1-109 (1977). West Virginia recently adopted this version judicially in *Bradley v. Appalachian Power Co.*, ___ W.Va. ___, 256 S.E.2d 879 (1979). See generally SCHWARTZ, *supra* note 25, at 73.

²⁹ CONN. GEN. STAT. § 52-572 (1979); HAWAII REV. STAT. § 663-31 (1976); MASS. ANN. LAWS ch. 231, § 85 (Michie/Law. Co-op Supp. 1979); MONT. REV. CODE ANN. § 27-1-702 (1979); NEV. REV. STAT. § 41.141 (1977); N.H. REV. STAT. ANN. § 507:7-a (1969); N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1979-1980); OR. REV. STAT. § 18,470 (1977); S.C. CODE § 15-1-300 (1977); TEX. REV. CIV. STAT. ANN. tit. 42, § 2212a (Vernon Supp. 1980); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1979); WIS. STAT. ANN. § 895.045 (West Supp. 1979-1980). See generally SCHWARTZ, *supra* note 25, at 73.

³⁰ NEB. REV. STAT. § 25-1151 (1975); S.D. CODIFIED LAWS ANN. § 20-9-2 (1979) (plaintiff's negligence slight in comparison with defendant's).

³¹ See *Bejach v. Colby*, 141 Tenn. 686, 214 S.W. 869 (1919) (Tennessee Supreme Court held that plaintiff's contributory negligence, if only remotely connected with cause of injury, will not bar plaintiff's recovery but will be considered only in mitigation of damages).

³² One of the first cases to apply comparative negligence to strict products liability was *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). The court reasoned that strict liability was analogous to negligence *per se*, which can be compared with the plaintiff's negligent conduct. *Id.* at 461, 155 N.W.2d at 64.

³³ See *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974) (court held that Oklahoma's comparative negligence statute, which is expressly limited to negligence actions, does not extend to strict product liability actions).

³⁴ 44 Fed. Reg. at 62,735. See Robinson, *Square Pegs (Products Liability) in Round Holes (Comparative Negligence)*, 52 CAL. ST. B.J. 16 (1977).

pared,³⁵ and it appears that most of the states which have adopted comparative negligence provisions are willing to apply them to products liability actions.³⁶

The courts have differed as to the grounds upon which a basis for comparison may be found. The Wisconsin Supreme Court, one of the pioneers in comparing the two concepts, reasoned in *Dipple v. Sciano*,³⁷ that strict products liability was analogous to negligence per se; when viewed in this light, the defendant's liability could be compared with the plaintiff's negligent conduct.³⁸ This "negligence per se" theory subsequently was used to justify the inclusion of the concept of strict liability in the Uniform Comparative Fault Act,³⁹ an act heavily relied upon in creating section 111 of the UPLA.⁴⁰ The theory, however, is not without its critics. At least one commentator has found fault with the use of the "negligence per se" theory as a means of comparison because the

³⁵ See generally Brewster, *Comparative Negligence in Strict Liability Cases*, 42 J. AIR L. & COM. 107 (1976) [hereinafter cited as Brewster]; Fleming, *The Supreme Court of California 1974-1975, Foreward: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239, 268-71 (1976) [hereinafter cited as Fleming]; Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974) [hereinafter cited as Schwartz]; Vetri, *Products Liability: The Developing Framework for Analysis*, 54 OR. L. REV. 292 (1975); Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373 (1978) [hereinafter cited as Wade].

³⁶ See *Brown v. Link Belt Corp.*, 565 F.2d 1107 (9th Cir. 1977) (applying Oregon law); *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975) (applying Mississippi law); *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F. Supp. 598 (D. Idaho 1976) (applying Idaho law); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80 (Fla. 1976); *Kennedy v. City of Sawyer*, 4 Kan. App. 2d 545, 608 P.2d 1379 (1980); *Busch v. Busch Constr., Inc.*, ___ Minn. ___, 262 N.W.2d 377 (1977); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140 (1979); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977); *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

Contra Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976) (applying Nebraska law); *Parzini v. Center Chemical Co.*, 134 Ga. App. 414, 214 S.E.2d 700 (1975); *Kinard v. Coats Co., Inc.*, 553 P.2d 835 (Colo. App. 1976); *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974); *Seay v. Chrysler Corp.*, 93 Wash. 2d 319, 609 P.2d 1382 (1980).

³⁷ 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

³⁸ *Id.* at 461, 155 N.W.2d at 64.

³⁹ The Act is set out in an appendix to Professor Wade's analysis of its provisions. Wade, *supra* note 35, at 392.

⁴⁰ See UPLA, 44 Fed. Reg. 62,735.

standard for determining "negligence per se" is inconsistent with the "reasonable person" negligence standard.⁴¹

The Texas Supreme Court has found a common ground for the comparison of negligence and strict liability through the issue of causation. In *General Motors Corp v. Hopkins*,⁴² the court indicated that the plaintiff's recovery would be limited "to that portion of his damages equal to the percentage of the cause contributed by the product defect."⁴³ Similarly, a concurrence to the Alaska Supreme Court opinion in *Butaud v. Suburban Marine & Sporting Goods, Inc.*,⁴⁴ has approved of the use of causation, explaining that the "[a]doption of a comparative causation approach would avoid the theoretical problems inherent in any attempt to compare relative degrees of fault where the defendant's negligence, or fault is determined by the principles of strict liability."⁴⁵ Professor Twerski advocates the inclusion of the concept of cause in fact into the comparative fault doctrine as a step away from the unrealistic "all-or-nothing" rule of causation.⁴⁶ He concludes that "[j]uries should be allowed to consider the likelihood at a percentage basis that a party's activities caused harm."⁴⁷

The use of comparative causation as a *replacement* for com-

⁴¹ Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 Mo. L. Rev. 431, 439-41 (1978) [hereinafter cited as Fischer]. According to Professor Fischer, the two standards differ when viewed with regard to the role of the trier of fact. "In negligence per se cases the court determines that a legislatively established specific standard of conduct shall constitute the standard of conduct of a reasonable person . . ." The role of the jury is merely to determine the facts, *i.e.*, whether the statute was violated. *Id.* He reasons that, in contrast, section 402A contains no specific standard of conduct; therefore, "the jury could conclude that no reasonable precaution on behalf of the manufacturer would have prevented the creation of the defect." This, he argues, would yield the conclusion that the defendant was not at fault, barring the plaintiff from any recovery. *Id.* at 441. Professor Fischer concludes that the most satisfactory way to consider the plaintiff's conduct is to compare it to that of a hypothetical reasonable person under similar circumstances. *Id.* at 449.

⁴² 548 S.W.2d 344 (Tex. 1977) (plaintiff was seriously injured when his automobile went out of control, allegedly due to defective carburetor which plaintiff had attempted to fix prior to accident).

⁴³ *Id.* at 352.

⁴⁴ 555 P.2d 42 (Alaska 1976).

⁴⁵ *Id.* at 47 (Rabinowitz, J., concurring).

⁴⁶ Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 413 (1978) [hereinafter cited as Twerski].

⁴⁷ *Id.* at 413.

paring fault, however, would often produce harsh results and would defeat the rationale behind both products liability and comparative negligence.⁴⁸ The lack of a "functional relationship between physical causation and personal culpability"⁴⁹ is clearly illustrated by Professor Schwartz's example⁵⁰ of an intoxicated motorcyclist who, speeding at eighty miles per hour, loses control of his cycle, crosses into another lane of traffic and collides with a large truck.⁵¹ "In terms of pure physical causation, perhaps an expert could testify that the truck supplied 95% of the force that killed the motorcyclist . . . Nevertheless, the jury's line of inquiry under comparative negligence does not focus on physical causation; rather, it considers and weighs culpability."⁵²

A third theory used to justify the comparison of strict products liability and comparative negligence is based upon a comparison of the respective fault of the parties. In *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*,⁵³ a federal district court, applying Idaho law, reasoned that "[t]he manufacturer is under a duty to produce a product which is free from unreasonably dangerous conditions. A violation of that duty constitutes blameworthiness or culpability or sense of legal fault."⁵⁴ The manufacturer's inherent fault, in marketing a defective product, can therefore be balanced against the plaintiff's fault pertaining to the particular misconduct.⁵⁵ The most persuasive argument supporting a comparison of fault between the parties is the concept's inherent fairness. In *Daly v. General Motors Corp.*,⁵⁶ the California Supreme Court explained:

[O]ur reason for extending a full system of comparative fault to strict products liability is because it is fair to do so. The law consistently seeks to elevate justice and equity above the exact contours of a mathematical equation. We are convinced

⁴⁸ See Comment, *Comparative Negligence and Strict Products Liability: Butaud v. Suburban Marine & Sporting Goods, Inc.*, 38 OHIO ST. L.J. 883, 890 (1977).

⁴⁹ Fischer, *supra* note 41, at 446.

⁵⁰ SCHWARTZ, *supra* note 25, at 276.

⁵¹ *Id.* at 276.

⁵² *Id.*

⁵³ 411 F. Supp. 598 (D. Idaho 1976).

⁵⁴ *Id.* at 602.

⁵⁵ See Brewster, *supra* note 35, at 118; Fleming, *supra* note 35, at 270.

⁵⁶ 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

that in merging the two principles what may be lost in symmetry is more than gained in fundamental fairness.⁵⁷

Daly, which was a 4-3 decision, reflects the conflict among authorities throughout the states over the application of both comparative negligence and strict products liability in tort, and over their application to each other. As one commentator concluded, "the split on the *Daly* court clearly indicates that the debate on the relationship of comparative negligence to strict products liability is far from over."⁵⁸

II. THE PROPOSED SOLUTION

A. Section 111—Administration of Comparative Responsibility

In an effort to facilitate the unification of products liability principles and to determine what effect a plaintiff's negligent conduct will have upon his cause of action, the Model Act announces the application of comparative responsibility principles to all claims brought under it.⁵⁹ Under section 111(A), the claimant's damages are reduced proportionately according to the measure of responsibility attributed to him.⁶⁰

The Act requires the fact finder, unless all the parties agree otherwise, to answer special interrogatories which indicate the amount of damages to which each claimant would be entitled if comparative responsibility principles were not considered.⁶¹ The special interrogatories also require the fact finder to indicate each party's percentage of the total responsibility for each claim, which is then allocated to each claimant, defendant or to any other person or entity who could be responsible for the injury.⁶² If the fault of an employer or co-employee is considered, the claimant's damages are reduced by the amount of the worker compensation bene-

⁵⁷ *Id.* at 742, 575 F.2d at 1172, 144 Cal. Rptr. at 390.

⁵⁸ FRISHMAN, 1978 ANN. SURVEY AM. L. 577, 591.

⁵⁹ 44 Fed. Reg. at 62,734. (UPLA § 111(A)).

⁶⁰ *Id.*

⁶¹ *Id.* (UPLA § 111(B)(1)(a)).

⁶² *Id.* at 62,734-35. (UPLA § 111(B)(1)(b)). For example, the trier of fact may determine that the plaintiff himself is responsible for ten percent of his damages, that the manufacturer is responsible for sixty percent of the plaintiff's damages and that some other party whose conduct falls within one of the provisions of Section 112 is responsible for thirty percent of the plaintiff's damages.

fits received by the claimant or by the percentage of responsibility apportioned to that employer or co-employee, whichever is greater.⁶³ The claimant's damages are also reduced by the percentages of responsibility apportioned to a party who has been released from liability.⁶⁴ In determining the percentage of responsibility of each party, the fact finder is to consider both the nature of each party's conduct and the extent of the proximate causal relation between the conduct and the damages claimed.⁶⁵

The court, in addition to entering judgment against each party who is liable, is to determine each party's equitable share of the obligation for purposes of contribution.⁶⁶ The rules of joint and several liability apply unless a party is responsible for a distinct harm or unless there is some other reasonable basis for apportioning that party's responsibility, in which case that party will be severally liable.⁶⁷

If a motion is made within one year from the date of judgment, the court will determine whether all or part of a joint tortfeasor's share of the obligation is uncollectible.⁶⁸ If it is, the uncollectible amount is reallocated among the other joint tortfeasors according to their respective percentages of responsibility.⁶⁹

B. Section 112—Conduct Affecting Comparative Responsibility

The Model Act, in section 112,⁷⁰ sets out four types of conduct which may affect the claimant's comparative responsibility, reducing his damages.⁷¹ First, the claimant is not required to inspect the product for a defective condition.⁷² If the seller of the product, however, can prove that the injury resulted from a defective condition which was apparent to an ordinary, reasonably prudent person without inspection, the claimant's damages are

⁶³ *Id.* at 62,735. (UPLA § 111(B)(2)).

⁶⁴ *Id.*

⁶⁵ *Id.* (UPLA § 111(B)(3)).

⁶⁶ *Id.* (UPLA § 111(B)(4)).

⁶⁷ *Id.* (UPLA § 111(B)(5)).

⁶⁸ *Id.* (UPLA § 111(B)(6)).

⁶⁹ *Id.*

⁷⁰ *Id.* at 62,736.

⁷¹ *Id.*

⁷² *Id.* (UPLA § 112(A)(1)).

subject to reduction to the extent that the claimant thus was responsible for his injury.⁷³ A non-claimant's failure to observe a defective condition which would be apparent to an ordinary prudent person will not reduce the plaintiff's recovery.⁷⁴

Another type of conduct, commonly known as an assumption of the risk, also may affect the claimant's recovery. The Act states that if a product seller can prove that the claimant knew about the defective condition and voluntarily used the product or voluntarily assumed the risk of the harm, and if in doing so the claimant did not act as an ordinary prudent person, his damages will be subject to reduction.⁷⁵ This provision expressly allows the fact finder to place sole responsibility on the claimant.⁷⁶ An optional provision subjects the claimant's damages to apportionment if a product user other than the claimant knew about the defective condition and voluntarily and unreasonably used or stored the product, causing the claimant's harm.⁷⁷

Misuse, the third category of conduct, is defined as action by the product user in a manner that would not be expected of an ordinary prudent person who would be likely to use the product under similar circumstances.⁷⁸ If the product seller can prove that misuse of the product by the claimant or some third party has caused the harm, the claimant's damages are subject to reduction or apportionment to the extent that the misuse was a cause of the harm.⁷⁹ This provision also allows the trier of fact to find that the harm arose solely from misuse of the product, in which case the plaintiff would be denied recovery.⁸⁰ The trier of fact also may find that a third party who had misused a product and who is not immune under state or federal law may be subject to liability to the claimant.⁸¹

The fourth type of conduct which may affect the claimant's re-

⁷³ *Id.* (UPLA § 112(A)(2)).

⁷⁴ *Id.* (UPLA § 112(A)(3)).

⁷⁵ *Id.* (UPLA § 112(B)(1)).

⁷⁶ *Id.* at 62,736-37.

⁷⁷ *Id.* at 62,737. (UPLA § 112(B)(2)).

⁷⁸ *Id.* (UPLA § 112(C)(1)).

⁷⁹ *Id.* (UPLA § 112(C)(2)).

⁸⁰ *Id.*

⁸¹ *Id.* (UPLA § 112(C)(3)).

covery deals with a product's alteration or modification.⁸² The Act defines "alteration or modification" as a change of the design, construction or formulation of the product, or a change or removal of warnings or instructions which accompanied or were displayed on the product.⁸³ The definition also includes the failure to observe the requirements of routine care and maintenance, excepting ordinary wear and tear.⁸⁴ If the product seller can prove that the alteration or modification by the claimant or some third party caused the claimant's harm, the claimant's damages are subject to reduction or apportionment to the extent that the alteration or modification was a cause of the harm.⁸⁵ This provision also allows the trier of fact to find that the harm arose solely because of the product's alteration or modification.⁸⁶ This provision is not applicable if the alteration or modification was in accordance with the product seller's instructions or specifications;⁸⁷ if it was made with the express or implied consent of the product seller;⁸⁸ or if it was conduct that was reasonably anticipated, and the product lacked instructions or adequate warnings pertaining to the alteration or modification.⁸⁹ The trier of fact also is allowed to determine that a third party who has altered or modified the product and who is not immune under state or federal law may be subject to liability to the claimant.⁹⁰

III. IMPACT OF THE UPLA UPON THE EXISTING RULES PERTAINING TO THE CONDUCT OF THE PLAINTIFF

A. *Failure to Discover a Defective Condition*

Section 112(A) provides:

(1) Claimant's Failure to Inspect. A claimant is not required to have inspected the product for a defective condition. Failure

⁸² *Id.*

⁸³ *Id.* (UPLA § 112(D)(1)).

⁸⁴ *Id.*

⁸⁵ *Id.* (UPLA § 112(D)(2)).

⁸⁶ *Id.*

⁸⁷ *Id.* (UPLA § 112(D)(2)(a)).

⁸⁸ *Id.* (UPLA § 112(D)(2)(b)).

⁸⁹ *Id.* (UPLA § 112(D)(2)(c)).

⁹⁰ *Id.* (UPLA § 112(D)(3)).

to have done so does not render the claimant responsible for the harm caused or reduce the claimant's damages.

(2) Claimant's Failure to Observe an Apparent Defective Condition. When the product seller proves by a preponderance of the evidence that the claimant, while using the product, was injured by a defective condition that would have been apparent, without inspection, to an ordinary, reasonably prudent person, the claimant's damages shall be subject to reduction. . . .

(3) A Non-Claimant's Failure to Inspect for Defects or to Observe an Apparent Defective Condition. A non-claimant's failure to inspect for a defective condition or to observe an apparent defective condition that would have been obvious, without inspection, to an ordinary reasonably prudent person, shall not reduce claimant's damages.⁹¹

Although the Model Act purports to require no inspection of the defective product,⁹² the claimant is required "to observe an apparent defective condition."⁹³ The courts are in general agreement that the buyer's failure to inspect the goods and to discover any defect will not relieve the seller of liability.⁹⁴ Support for this position has been reinforced by Comment n⁹⁵ to section 402A of the Restatement.⁹⁶ A few states have reached a different conclusion when the hazard was obvious⁹⁷ or was foreseeable by a reasonable person.⁹⁸

⁹¹ UPLA, 44 Fed. Reg. at 62,736.

⁹² See text accompanying note 72 *supra*.

⁹³ See text accompanying note 73 *supra*.

⁹⁴ See 1 FRIEDMAN & FRUMER, *supra* note 12, at 395.

⁹⁵ RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965):

Since the liability with which this section deals is not based upon negligence of the seller, but is strict liability, . . . [c]ontributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. . . .

⁹⁶ See note 13 *supra*. See *De Pree v. Nutone, Inc.*, 422 F.2d 534 (6th Cir. 1970).

⁹⁷ *Auburn Mach. Works Co., Inc. v. Jones*, 366 So. 2d 1167 (Fla. 1979) (Florida Supreme Court rejected patent danger doctrine, but held that obviousness of hazard is defense to manufacturer's liability, and also is applicable to comparative negligence principles). The patent danger rule prevents recovery based upon a negligent design theory where the danger is patent or obvious. The defense was often asserted when the injury was caused by moving parts of machinery not protected by safety devices. See generally 1 FRIEDMAN & FRUMER, *supra* note 12, at § 118.8(8).

⁹⁸ See *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978) (New Hampshire Supreme Court held that plaintiff's misconduct could be com-

The drafters of the Model Act justified the distinction between ordinary defects and those "defects . . . apparent, without inspection, to an ordinary reasonably prudent person" as a means to reduce the "considerable litigation and expense" pertaining to the issue of the plaintiff's knowledge of the defect.⁹⁹ Although the justification may seem convincing at first glance, it is submitted that the drafters' distinction will not appreciably reduce litigation and expense but will only shift the key issue from the question of knowledge of the defect to the question of whether the defect was apparent. The latter question was vividly illustrated by the drafters' example of a plaintiff with good eyesight who eats a candy bar which has bright green worms crawling on it.¹⁰⁰ The drafters' position is that the above example illustrates a defective condition that can be discovered without inspection of the product.¹⁰¹ Professors Twerski and Weinstein, in an article¹⁰² evaluating a draft of the Model Act,¹⁰³ turned the argument around to support their contention that requiring the claimant to notice the apparent defective condition is, in substance, requiring the claimant to inspect the product.¹⁰⁴

pared causally in products liability action). New Hampshire traditionally had recognized that the plaintiff's failure to discover or to foresee dangers which an ordinary person would have discovered or foreseen was a defense to claims based upon strict products liability. *Stephen v. Sears, Roebuck & Co.*, 110 N.H. 248, 266 A.2d 855 (1970); *Cadling v. Paslia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973) (contributory fault includes failure to exercise such reasonable care as would have disclosed defect).

⁹⁹ 44 Fed. Reg. at 62,737. Since the existence of the product seller's defense in most jurisdictions has turned upon whether the plaintiff had knowledge of the defect, the issue has been an important one. *See Fincher v. Surrette*, 365 So. 2d 860 (La. Ct. App. 1978) (no defense for manufacturer where plaintiff testified she was not aware that machinery was moving).

¹⁰⁰ 44 Fed. Reg. at 62,737.

¹⁰¹ *Id.*

¹⁰² Twerski & Weinstein, *A Critique of the Uniform Products Liability Law—A Rush to Judgment*, 28 DRAKE L. REV. 220 (1978-1979) [hereinafter cited as Twerski & Weinstein].

¹⁰³ DRAFT UNIFORM PRODUCT LIABILITY ACT, 44 Fed. Reg. 2996 (1979).

¹⁰⁴ Twerski & Weinstein, *supra* note 102, at 249. Professors Twerski and Weinstein reasoned that obviously the plaintiff would not have eaten the candy bar if he had noticed the worms. He did not notice the worms because he reasonably did not expect the candy bar to have worms. Therefore, his recovery is diminished because he did not look before he ate—clearly imposing a duty to inspect for defects. *Id.*

B. Claimant's Assumption of the Risk

Section 112(B) provides:

(B) Use of a Product With a Known Defective Condition.

(1) By a Claimant. When the product seller proves by a preponderance of the evidence, that the claimant knew about the product's defective condition, and voluntarily used the product or voluntarily assumed the risk of harm from the product, the claimant's damages shall be subject to reduction to the extent that the claimant did not act as an ordinary reasonably prudent person under the circumstances. Under this Subsection, the trier of fact may determine that the claimant should bear sole responsibility for harm caused by a defective product. . . .¹⁰⁵

Originally, the drafters drew a distinction between a claimant's assumption of the risk which was clearly unreasonable and that assumption of the risk where the reasonableness was uncertain.¹⁰⁶ In the former situation the claimant was to be barred from recovery, but in the latter instance the claimant's damages were only to be subject to reduction.¹⁰⁷ Professors Twerski and Weinstein, in discovering this "jurisprudential anomaly," pointed out that a determination of unreasonableness by a *judge* would bar recovery; however, if a *jury* made the same determination, the claimant would not be barred.¹⁰⁸ The drafters responded by eliminating the distinction, and section 112(B) is now in substantial agreement with the commentators¹⁰⁹ as well as with most of the states which recognize the application of comparative negligence to strict products liability.¹¹⁰

Even in the early days of the acceptance of strict products lia-

¹⁰⁵ UPLA, 44 Fed. Reg. at 62,737.

¹⁰⁶ DRAFT UNIFORM PRODUCT LIABILITY ACT, *supra* note 103, at 3000.

¹⁰⁷ *Id.*

¹⁰⁸ Twerski & Weinstein, *supra* note 102, at 250.

¹⁰⁹ See Fischer, *Products Liability—Applicability of Comparative Negligence To Misuse And Assumption of the Risk*, 43 Mo. L. REV. 643, 662 (1978); Schwartz, *supra* note 35, at 181; Vetri, *Products Liability: The Developing Framework for Analysis*, 54 OR. L. REV. 293, 313 (1975). But see Twerski & Weinstein, *supra* note 102, at 253 (claimant's assumption of risk, even though voluntary and unreasonable, should not diminish recovery if harm that took place was foreseeable); Walkowiak, *Reconsidering Plaintiff's Fault in Product Liability Litigation: The Proposed Conscious Design Choice Exception*, 33 VAND. L. REV. 651, 679 (1980) [hereinafter cited as Walkowiak] (when product's defect is result of conscious design, plaintiff's conduct should not be considered).

¹¹⁰ See note 36 *supra* and accompanying text.

bility, a substantial portion of the states recognized the plaintiff's "assumption of risk" as a complete defense.¹¹¹ One reason for this broad recognition of the defense was Comment n to section 402A of the Second Restatement of Torts,¹¹² which explained that "the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section"¹¹³ One area of confusion in this context is the requirement of unreasonableness in an assumption of risk defense. Although the drafters of the Restatement and most of the courts that have recognized the defense have included unreasonableness as an ingredient of an assumption of risk defense,¹¹⁴ other courts have applied the defense where the plaintiff had full knowledge of the product's defects and continued to use it, regardless of whether his conduct was reasonable in doing so.¹¹⁵ At least one court has discounted this difference in application as "more theoretical than real, since in many instances a plaintiff who has full knowledge of the defective condition, and yet proceeds to use the product, will be acting unreasonably."¹¹⁶ The Model Act's clarification of this problem, reducing the claimant's damages only when he fails to act as an "ordinary reasonably prudent person,"¹¹⁷ should help to unify the application of the condition of unreasonableness in an assumption of risk defense. The Model Act's position is also favorable in its amelioration of the often harsh result which accompanies a defense based solely on the plaintiff's knowl-

¹¹¹ See generally Annot., 46 A.L.R.3d 240, 253-56 (1972).

¹¹² See note 95 *supra*.

¹¹³ *Id.* See note 111 *supra*.

¹¹⁴ See, e.g., *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 543 P.2d 209 (Alaska 1975); *O. S. Stapley Co. v. Miller*, 103 Ariz. 556, 447 P.2d 248 (1968); *Luque v. McLean*, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972); *Hügel v. General Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1975); *Brooks v. Dietz*, 218 Kan. 698, 545 P.2d 1104 (1976); *Johnson v. Clark Equip. Co.*, 274 Or. 403, 547 P.2d 132 (1976); *Haugen v. Minnesota Mining & Mfg. Co.*, 15 Wash. App. 379, 550 P.2d 71 (1976).

¹¹⁵ See, e.g., *Williams v. Brown Mfg. Co.*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970); *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974); *Rourke v. Garza*, 530 S.W.2d 794 (Tex. 1975).

¹¹⁶ *Morningstar v. Black & Decker Mfg. Co.*, ___ W. Va. ___, 253 S.E.2d 666, 684 (1979).

¹¹⁷ See text accompanying note 105 *supra*.

edge of the product's dangerous condition. For example, an employee, severely injured while operating a defective machine, may be held to have assumed the risk, thus barring or substantially reducing his recovery, solely because of his knowledge of the dangerous condition.¹¹⁸ The New Jersey Supreme Court has realized the potential unfairness of such a result, reasoning, in *Suter v. San Angelo Foundry & Machinery Co.*,¹¹⁹ that "an employee engaged at his assigned task on a plant machine . . . has no meaningful choice. Irrespective of the rationale that the employee may have unreasonably and voluntarily encountered a known risk, we hold as a matter of policy that such an employee is not guilty of contributory negligence."¹²⁰ The result in *Suter* finds support in the article written by Professors Twerski and Weinstein which questions the voluntariness of such an act and also suggests its foreseeability by the manufacturer.¹²¹

In sharp contrast to the persuasive arguments supporting greater protection for an employee who is responsible for operating a dangerous machine, the Model Act offers an optional section which could reduce the manufacturer's liability even though the claimant was in no way responsible for the injuries he has suffered. Section 112(B)(2) provides:

If the product seller proves by a preponderance of the evidence

¹¹⁸ *E.g.*, *Williams v. Brown Mfg. Co.*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

¹¹⁹ 81 N.J. 150, 406 A.2d 140 (1979).

¹²⁰ *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 158, 406 A.2d 140, 148 (1979).

¹²¹ Twerski & Weinstein, *supra* note 102, at 251. The authors question the voluntariness of a plaintiff's "conscious choice to utilize a piece of dangerous machinery in an employment setting." *Id.* Citing *Barkewich v. Billinger*, 432 Pa. 351, 247 A.2d 603 (1968), the authors argue that an employee who was seriously injured while attempting to remove an object which was jamming a machine should not have his damages reduced. Although the plaintiff's actions were neither involuntary nor reasonable, his decision was made in a split second. In contrast, the manufacturer's decision is made with great deliberation and with cost and marketing factors in mind. Finding the plaintiff's actions to be foreseeable, Twerski and Weinstein conclude that the product should be manufactured to protect a "Barkewich-type plaintiff from his own foolish decision making." Twerski and Weinstein, *supra* note 102, at 253.

The above argument is especially appealing in an "employee-dangerous machine" setting; however, it is submitted that the same result can be accomplished without specifically carving out an exception to the rule. The plaintiff's conduct could arguably be considered reasonable given the split second requirement for making the decision and the duties related to his employment.

that a product user, other than the claimant, knew about a product's defective condition, but voluntarily and unreasonably used or stored the product and thereby caused claimant's harm, the claimant's damages shall be subject to apportionment. . . .¹²²

The drafter's rationale for this section is that if some third party voluntarily and unreasonably exposes the claimant to the product's risks, that person should be liable for the damages which result.¹²³ The drafters cite two cases, *Aetna Insurance Co. v. Loveland Gas & Electric Co.*¹²⁴ and *Drazen v. Otis Elevator Co.*,¹²⁵ as analogous support for shifting liability when a third party's actions are an intervening cause.¹²⁶ Those cases, however, were negligence actions under which liability was not based upon a policy of primary loss reduction.¹²⁷ Moreover, the harsh result which is possible when an otherwise responsible employer is immune under a workmens compensation law is acknowledged.¹²⁸ Professor Phillips has also found fault in replacing the manufacturer's liability with that of the third party when the latter had actual knowledge of the danger.¹²⁹ He advocates a different result, however, if the third party's conduct involves a failure to pass on a warning from the manufacturer or a misuse which negates the defectiveness of the product.¹³⁰

On the other hand, notions of fairness reinforce the idea that the third party should be liable for the damages for which he is responsible. A suggested compromise is to hold the manufacturer

¹²² 44 Fed. Reg. at 62,737.

¹²³ *Id.* at 62,738.

¹²⁴ 369 F.2d 648 (6th Cir. 1966) (gas company not negligent in supplying tank from which gas seeped into building since plaintiff's knowledge of dangers and opening of valve were intervening causes).

¹²⁵ 96 R.I. 114, 189 A.2d 693 (1963) (manufacturer of escalator handrail not negligent or liable for injuries sustained by guests where store owner knew of similar accidents but did not notify manufacturer).

¹²⁶ 44 Fed. Reg. at 62,738.

¹²⁷ See generally Walkowiak, *supra* note 109.

¹²⁸ 44 Fed. Reg. at 62,738.

¹²⁹ Phillips, *A Synopsis of the Developing Law Of Products Liability*, 28 *DRAKE L. REV.* 317, 372 (1978-1979). Professor Phillips argues that a distinction should not be drawn between a third party's failure to observe an apparent defective condition and that third party's knowledge of the dangerous condition since "[t]he third party rarely intends to cause the plaintiff injury. Where there is no such intent, the third party's failure to prevent the injury is attributable to his inadvertence, regardless of whether he actually knew or merely should have known of the danger." *Id.*

¹³⁰ *Id.* at 372-73.

jointly liable to the claimant for the third party's misconduct, allowing the manufacturer to recover the third party's portion of the damages from that party in a later suit. The burden of collecting this sum, as well as the risk of encountering an immune defendant, is therefore on the manufacturer, not the claimant.¹³¹ This is entirely appropriate since it is the manufacturer, not the claimant, who placed the defective product on the market.

C. *Misuse of a Product*

Section 112(C) provides:

(1) "Misuse" occurs when the product user does not act in a manner that would be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances.

(2) When the product seller proves, by a preponderance of the evidence, that product misuse by a claimant, or by a party other than the claimant or the product seller, has caused the claimant's harm, the claimant's damages shall be subject to reduction or apportionment to the extent that the misuse was a cause of the harm. Under this subsection, the trier of fact may determine that the harm arose solely because of product misuse. . . .

(3) Under this Subsection, subject to state and federal law regarding immunity in tort, the trier may determine that a party or parties who misused the product and thereby caused claimant's harm should bear partial or sole responsibility for harm caused by the product and are subject to liability to the claimant.¹³²

In the vast majority of jurisdictions, the existence of the manufacturer's defense of misuse has turned upon the foreseeability of

¹³¹ The Model Act, in the absence of this suggestion, is not clear as to when joint and several liability will be imposed. Section 111(B)(5) states that joint and several liability should not apply "when there is some other reasonable basis for apportioning that party's responsibility for the harm." 44 Fed. Reg. at 62,735. This language should not be construed as authorization for limiting the product seller's liability to the percentage of damages for which he is found responsible. In their analysis, the drafters indicated that the common law rules of joint and several liability continue to apply. *Id.* at 62,736. They cited as support for this view the comment to section four of the Uniform Comparative Fault Act which explained that "[j]oint-and-several liability under the common law means that each defendant contributing to the same harm is liable to him for the whole amount of the recoverable damages." Wade, *supra* note 35, at 398.

Even if the drafters intended that the product seller should not be jointly and severally liable for the third party's portion of liability, it is submitted that such a provision places a potentially heavy burden on the wrong party.

¹³² UPLA, 44 Fed. Reg. at 62,737.

the misuse.¹³³ If the plaintiff's misuse of the product was foreseeable, his conduct would not affect his recovery.¹³⁴ As might be expected, the cases do not follow any rational pattern.¹³⁵ For example, striking the face of a hammer against the face of another hammer in order to wedge its claws under a nail head was held to be unforeseeable misuse.¹³⁶ The use of a fourteen ounce geologist's hammer "guaranteed unbreakable in all normal use"¹³⁷ to break open a large rock was held to be foreseeable conduct.¹³⁸ Also held to be foreseeable conduct were factual situations involving a child's drinking furniture polish¹³⁹ and the possibility of ground coffee being eaten.¹⁴⁰

The commentators, although generally agreeing that foreseeability alone should not be the controlling factor,¹⁴¹ are in substantial disagreement as to the application of the defense of product misuse. Professor Schwartz, who played an active role in the UPLA's creation¹⁴² and who has been in agreement with most of its provisions, has advocated that the plaintiff's claim be dismissed when his conduct was unforeseeable, if he thus was responsible for a portion of the damages.¹⁴³ In contrast, Professor Twerski has argued that the assertion of product misuse as a defense should only be upheld on a case by case basis and that foreseeability is not such an important factor.¹⁴⁴ According to Twerski, more important factors include "whether the basic purposes of product liability law will be furthered by permitting the affirmative defense"

¹³³ See 1 FRIEDMAN & FRUMER, *supra* note 12, at 404.

¹³⁴ *Id.*

¹³⁵ See Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk*, 25 VAND. L. REV. 93, 96 (1972).

¹³⁶ *Odekirk v. Sears, Roebuck & Co.*, 274 F.2d 441 (7th Cir. 1960), *cert. denied*, 362 U.S. 174 (1960) (applying Illinois law).

¹³⁷ *Singer v. Walker*, 39 A.D.2d 90, 92, 331 N.Y.S.2d 823, 825 (1972).

¹³⁸ *Id.* at 94, 99, 331 N.Y.S.2d at 827, 832.

¹³⁹ *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962) (applying Virginia law).

¹⁴⁰ *Maddox Coffee Co. v. Collins*, 46 Ga. App. 220, 167 S.E. 306 (1932).

¹⁴¹ See Fischer, *Products Liability—Applicability of Risk*, 43 MO. L. REV. 643 (1978); Twerski, *supra* note 46, at 428; Wade, *supra* note 35, at 384.

¹⁴² Professor Schwartz was chairman of the Task Force which drafted the Model Act. 44 Fed. Reg. 2996 (1979).

¹⁴³ Schwartz, *supra* note 35, at 172-73.

¹⁴⁴ Twerski, *supra* note 46, at 430.

and whether the type of misuse concerns product maintenance or product integrity.¹⁴⁵ Professor Wade also fails to see any meaningful difference between foreseeable and unforeseeable conduct, but in a different context.¹⁴⁶ According to Professor Wade, if the manufacturer produces a defective product "and the buyer misuses the product in a way that makes it dangerous to him," comparative fault principles should apply regardless of whether the misuse was foreseeable.¹⁴⁷

One of the reasons for these conflicting theories may be the substantially different effects that different forms of misuse may have on a products liability lawsuit. For example, a plaintiff's misuse of the product may negate the existence of a defect, preventing the plaintiff from having a valid cause of action.¹⁴⁸ Misuse may also negate an essential portion of the plaintiff's cause of action through its effect on principles of causation. Despite the existence of a defect, misuse of the product by the plaintiff or by some other party may be found to be the sole proximate cause of the accident.¹⁴⁹ Even where the misuse has been found to be a proximate cause of the injury, a few courts have discarded the all-or-nothing principles of causation if the product has been determined to be defective and have only reduced the plaintiff's damages by the percentage of the cause contributed by the misuse.¹⁵⁰ Professor Twerski has found merit in apportioning proximate cause.¹⁵¹ He reasons that it is possible to apportion cause since the concept is a legal fiction, very similar to fault, designed to "help us decide whether

¹⁴⁵ *Id.*

¹⁴⁶ Wade, *supra* note 35, at 384.

¹⁴⁷ *Id.*

¹⁴⁸ Comment h provides that "[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, . . . the seller is not liable." RESTATEMENT (SECOND) OF TORTS § 402A, comment h (1965).

¹⁴⁹ See *Hays v. Western Auto Supply Co.*, 405 S.W.2d 877 (Mo. 1966) (plaintiff injured when his eight-year-old brother backed over him with a riding lawnmower).

¹⁵⁰ See *Sun Valley Airlines Corp. v. Avco-LyComing Corp.*, 411 F. Supp. 598 (D. Idaho 1976) (plaintiff not barred from recovery following jury's determination that 90% of cause of crash could be attributed to plaintiff's misuse); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977).

¹⁵¹ Twerski, *supra* note 46, at 432.

the harm is to be placed at the defendant's doorstep."¹⁵²

The Model Act has incorporated most of these principles into section 112(C). Since subsection (1) limits misuse to conduct not "expected of an ordinary reasonably prudent person who is likely to use the product,"¹⁵³ what has traditionally been known as foreseeable misuse apparently has no application whatsoever. In regard to the types of misuse which negate the causation portion of the plaintiff's case, subsection (2) expressly provides that "the trier of fact may determine that the harm arose solely because of product misuse."¹⁵⁴ Section 112 is also consistent with the notion of apportioning proximate cause because the trier of fact is to consider "both the nature of the conduct of each person or entity responsible and the extent of the proximate causal relation between the conduct and the damages claimed."¹⁵⁵

Section 112(C), however, is not void of problems. The potential reduction of the manufacturer's liability when a third party's misuse has caused a portion or all of the harm is equitable only when the misuse has rendered the product non-defective¹⁵⁶ or when the misuse is the sole cause of the accident.¹⁵⁷ When the product is in fact defective and the third party's misuse is also a cause of the injury, it is suggested that the manufacturer of the defective product should be jointly liable to the claimant for the third party's portion of responsibility. Since the manufacturer has released a defective product, the burden of collecting the third party's portion of liability should be upon it, not upon the injured party.¹⁵⁸

D. *Alteration or Modification of a Product*

Section 112(D) provides:

(1) "Alteration or modification" occurs when a person or entity other than the product seller changes the design, construction,

¹⁵² *Id.*

¹⁵³ 44 Fed. Reg. at 62,737.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 62,735.

¹⁵⁶ For example, if a plaintiff is injured while using a soda bottle as a hammer the manufacturer will not be held responsible. This nonliability results not because of a valid defense but because, in this instance, the product simply was not defective. Schwartz, *supra* note 35, at 172.

¹⁵⁷ See note 149 *supra* and accompanying text.

¹⁵⁸ See note 131 *supra*.

or formula of the product, or changes or removes warnings or instructions that accompanied or were displayed on the product. "Alteration or modification" of a product includes the failure to observe routine care and maintenance, but does not include ordinary wear and tear.

(2) When the product seller proves, by a preponderance of the evidence, that an alteration or modification of the product by the claimant, or by a party other than the claimant, or the product seller, has caused the claimant's harm, the claimant's damages shall be subject to reduction or apportionment to the extent that the alteration or modification was a cause of the harm. Under this Subsection, the trier of fact may determine that the harm arose solely because of the product alteration or modification.¹⁵⁹

The above section is not applicable if the alteration or modification was made pursuant to the seller's instructions¹⁶⁰ or after receipt of his express or implied consent¹⁶¹ or if it was reasonably anticipated conduct and the product was defective because of a failure to provide adequate warning.¹⁶² The trier of fact may determine that a third party who is not immune under state or federal law and who has altered or modified the product may be subject to liability to the claimant.¹⁶³

Under the Draft version of the UPLA, the provisions pertaining to product alteration or modification were placed in a different section which was applicable to third parties only.¹⁶⁴ Any modification or alteration by the claimant was considered equivalent to misuse and therefore was covered by the section pertaining to misuse.¹⁶⁵ It is submitted that the two forms of conduct are not equivalent and that their differences are important since the Model Act now distinguishes between a claimant's misconduct and a claimant's modification or alteration of the product, with different rules pertaining to each action.¹⁶⁶ Their differences can be illustrated by an examination of the facts in *General Motors Corp. v. Hop-*

¹⁵⁹ 44 Fed. Reg. at 62,737. (UPLA § 112(D)).

¹⁶⁰ 44 Fed. Reg. at 62,739. (UPLA § 112(D)(2)(a)).

¹⁶¹ *Id.* (UPLA § 112(D)(2)(b)).

¹⁶² *Id.* (UPLA § 112(D)(2)(c)).

¹⁶³ *Id.* (UPLA § 112(D)(3)).

¹⁶⁴ Draft UPLA, *supra* note 103, at 3000.

¹⁶⁵ *Id.* at 3012.

¹⁶⁶ Compare UPLA § 112(C), *supra* note 132, with UPLA § 112(D) and text accompanying notes 159-63 *supra*.

kings.¹⁶⁷ In *Hopkins*, the plaintiff driver was severely injured in an automobile accident due to his truck's continued acceleration despite his release of the accelerator pedal.¹⁶⁸ The jury found that the truck's carburetor was defectively designed and was a producing cause of the accident.¹⁶⁹ The jury also found that the plaintiff had made changes in the carburetor during the course of its removal and reinstallation and that this "misuse" was also a producing cause of the accident.¹⁷⁰ The conduct in *Hopkins* was not a misuse but an alteration of the product. The carburetor was used on the correct model of the truck for which it had been designed; the problem was that it had been altered.

One of the traditional problems with regard to product alteration or modification pertained to language in the Restatement which placed liability on the manufacturer if the product was "expected to and does reach the user or consumer without *substantial change* in the condition it is sold."¹⁷¹ Whether the product had been changed substantially, thereby exonerating the manufacturer, became an important issue and a number of theories were developed to facilitate its determination.¹⁷² For example, a manufacturer's liability has been held to be discharged when the product experiences change in identity¹⁷³ or a change which is unforeseeable.¹⁷⁴ The main theory, however, involves principles of causation. Since the plaintiff in strict products liability cases is required to prove that the defect caused his injury,¹⁷⁵ the courts

¹⁶⁷ 548 S.W.2d 344 (Tex. 1977).

¹⁶⁸ *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 346 (Tex. 1977).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* The court held that if a defective product is a producing cause of the injury, and if the plaintiff's misuse is a proximate cause, the trier of fact must determine the percentages contributed to the event by the two causes (totaling 100%) and must award damages accordingly. *Id.* at 352.

¹⁷¹ RESTATEMENT (SECOND) OF TORTS § 402A (1965) (emphasis added).

¹⁷² See generally Comment, *Substantial Change: Alteration of a Product as a Bar to a Manufacturer's Strict Liability*, 80 DICK. L. REV. 245 (1976).

¹⁷³ See *Young v. Aeroil Prods. Co.*, 248 F.2d 185 (9th Cir. 1957) (employer's alteration of portable conveyor by increasing its height, modifying its center of gravity, and making extensive repairs rendered a far different product than that purchased).

¹⁷⁴ See *Schreffler v. Birdsboro Corp.*, 490 F.2d 1148 (3d Cir. 1974) (use of steel mill transfer table with elevated rails five feet apart as work platform not foreseeable).

¹⁷⁵ See W. PROSSER, *supra* note 2, § 30 at 143.

have often held the manufacturer not liable if the defect was created by an alteration which amounts to an intervening or superseding cause.¹⁷⁶ Even if the product contained a pre-existing defect, a showing that an alteration was the sole cause of the injury has exonerated the manufacturer.¹⁷⁷ Conversely, if the injury was caused by the manufacturer's defect an alteration of the product does not prevent the imposition of strict liability.¹⁷⁸

A potential area of conflict exists concerning the Model Act's application to situations where neither the manufacturer's defect nor the alteration was the *sole* cause of the injury. In such a situation, the manufacturer has released a defective product which is partially responsible for the plaintiff's injury and the courts may justifiably be reluctant to reduce the manufacturer's liability. For example, in *Wells v. Web Machinery Co.*¹⁷⁹ the plaintiff was injured by a defectively designed punch press. His employer had also installed a defective unit switch and the injury would not have occurred without the presence of the defective switch.¹⁸⁰ The court refused to release the manufacturer from liability, pointing out that the "press was unsafe and harmful at delivery because of its design irrespective of any defective component part."¹⁸¹

Although comparative principles were not available in *Wells*, it is arguable that the same reasoning would apply to prevent the application of those principles. The argument is especially persuasive in a situation like that in *Wells* where the claimant is innocent and the alteration or modification was made by some third party. In this situation, the Model Act provides that the claimant's damages shall be reduced or apportioned "to the extent that the alteration or modification was a cause of the harm."¹⁸² Therefore, in a setting similar to that of *Wells* where the employer is re-

¹⁷⁶ See generally Annot., 41 A.L.R.3d 1251, 1253 (1972).

¹⁷⁷ See generally *Texas Metal Fab. Co. v. Northern Gas Prods. Corp.*, 404 F.2d 921 (10th Cir. 1968) (owner's actions in bracing loose tubes of heat exchanger caused explosion).

¹⁷⁸ See *Dennis v. Ford Motor Co.*, 471 F.2d 733 (3d Cir. 1973) (installation by plaintiff of fifth wheel did not affect tractor manufacturer's liability for defective steering mechanism).

¹⁷⁹ 20 Ill. App. 3d 545, 315 N.E.2d 301 (1974).

¹⁸⁰ *Id.* at 553, 315 N.E.2d at 309.

¹⁸¹ *Id.*

¹⁸² 44 Fed. Reg. at 62,737.

sponsible for the alteration or modification, the manufacturer's liability to the employee would be reduced, possibly by a very large percentage, and the employee's recovery against the employer would be barred by workmen's compensation laws.¹⁸³ Such a result would substantially erode traditional sanctions concerning a manufacturer's strict liability for distributing a defective product.¹⁸⁴ A better result would be to continue to impose strict liability on the manufacturer, rendering him liable for a third party's alteration or modification, and to allow the manufacturer to obtain reimbursement from the third party in accordance with the percentages of fault which are determined by the trier of fact.¹⁸⁵

IV. CONCLUSION

Although it appears that a substantial number of commentators and jurisdictions are willing to compare the plaintiff's and defendant's respective misconduct in a products liability setting, it is quite possible that they may have made the decision to do so without proper consideration of the rationale behind products liability. The principle of comparative negligence is a giant leap toward fairness and reality in a *negligence* setting, the question is whether it should apply in a *products liability* setting. To make that application is tempting, for the adoption of comparative principles has become increasingly popular in recent years¹⁸⁶ as a method of equitable apportionment, requiring the negligent party to compensate the plaintiff for only those damages for which he is, in fact, responsible. Moreover, the application of comparative principles could greatly simplify many difficult product liability issues. Assume, for example, that the manufacturer has produced a defective product which has been tampered with by the plaintiff, and that the jury has concluded that both parties caused the injury; it is tempting and more practical to hand the problem to the jury, requesting that they determine each party's percentage of

¹⁸³ *Id.* at 62,738.

¹⁸⁴ Professor Walkowiak has stressed the importance of "concentration upon elimination of primary losses through the imposition of liability upon those parties who can best bear the burden of compensating for losses . . ." Walkowiak, *supra* note 109, at 697. See note 20 *supra*.

¹⁸⁵ See note 131 *supra* and accompanying text.

¹⁸⁶ See Schwartz, *supra* note 25, at 1.

fault, and simply split the damages accordingly.¹⁸⁷

The true problem is not whether the two concepts *can* be compared, but whether the two *should* be compared. All other things being equal, if the aggregate result of applying comparative negligence principles to products liability litigation is a reduction of the amount of damages the manufacturer will have to pay, a by-product of that result may very well be an increase in the number of defective products. If the manufacturer's decision to change the position of an automobile's gas tank is based upon economics, *i.e.*, a comparison of the costs involved in making the change with the costs involved in potential lawsuits should the change be rejected, marketing the product without any change may be worth the risk incurred and the smaller amount of predicted costs.¹⁸⁸

A more difficult solution to this question is advocated by at least

¹⁸⁷ See *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977). One response to this contention may be that the function of the jury is not one of an inadequate problem-solver, but that it is an appropriate method for spreading the costs of the injury over society as a whole. If so, the argument follows, the jury should also determine how much of the burden a claimant should bear because of his own conduct.

It is submitted, however, that before the jury begins such a determination the court should closely examine the litigation's impact on the policies supporting products liability. Professor Walkowiak concludes that if the acts of the plaintiff are those which the manufacturer was expected to consider and protect against, the jury should not even consider such acts in its determination of liability. Walkowiak, *supra* note 109, at 679.

¹⁸⁸ During the reckless homicide trial of the Ford Motor Company which pertained to its design of the 1973 Pinto, Harley Copp, a former Ford executive, testified that a plan to modify the design which would have required an expense of \$6.65 per car was rejected because of "cost and the effect it would have on profitability." Wall St. J., Feb. 8, 1980, at 2, col. 4.

The Model Act's punitive damage section would offer little deterrence to a manufacturer in this situation. A large manufacturer could arguably conceal evidence of any damaging conduct, preventing the plaintiff from meeting his already sizable burden of proving "by clear and convincing evidence" that the manufacturer acted in "reckless disregard for the safety of product users." 44 Fed. Reg. at 62,748. Although the Ford Motor Company has been held liable, at least at the trial level, for millions of dollars of damages in regard to the design of the Pinto, see *Ford Motor Co. v. Havlick*, [1975-1977 Transfer Binder] PROD. LIAB. REP. (CCH) ¶ 7927 (Fla. Dist. Ct. App. 1977) (plaintiff awarded \$1,740,000 in damages resulting from manufacturer's failure to warn of potential danger in gas tank design); Wall St. J., April 7, 1978, at 10, col. 4 (California state court awarded plaintiff \$3.5 million in punitive damages due to auto maker's knowledge of hazardous design), important evidence in the Pinto litigation was obtained from a former Ford executive. In the average product liability setting, an individual who has knowledge of the manufacturer's wrongful conduct and is willing to testify against that manufacturer will probably not be available.

two commentators. Professor Twerski has warned that the application of the principles of comparative fault must not "negate basic duties that have been placed on manufacturers."¹⁸⁹ Accordingly, he advocates the use of comparative fault only in cases "in which the role of the plaintiff's conduct with regard to maintaining product integrity is significant or those in which the plaintiff has pushed the product beyond the limits of its capacities."¹⁹⁰ Similarly, Professor Walkowiak has suggested that the plaintiff's conduct should not be taken into consideration when the defect is one of design, consciously made by the manufacturer.¹⁹¹

Even if the risk of shrinking the manufacturer's basic duties is not considered persuasive evidence against the application of across-the-board comparative fault principles, certain provisions of the UPLA can be improved. First, the determination that a claimant should not be required to inspect the product should not turn upon the obviousness of the defective condition. Requiring that the claimant observe an apparent defective condition is in substance requiring that he inspect the product, a requirement which this act has professed to have decided against.¹⁹² Such a provision will not alleviate the considerable litigation and expense which is associated with determining the issue of knowledge of the defect, but will merely redirect them to the issue of whether the defective condition was apparent.¹⁹³

Second, the manufacturer's liability to the claimant should not be reduced because of some third party's misconduct if the product is found to be defective and has contributed to the claimant's injuries. A better result is to hold the manufacturer jointly and severally liable for an amount which includes the liability attributable

¹⁸⁹ Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797, 829 (1977).

¹⁹⁰ Twerski, *supra* note 46, at 434.

¹⁹¹ Professor Walkowiak concludes:

If the acts which constitute a defense in conscious design choice litigation are acts of a claimant that the manufacturer was expected to consider and protect against in the selection of design choice, it is not in the interests of the goal of primary loss limitation to permit foreseeable user conduct to constitute a defense to the action.

Walkowiak, *supra* note 109, at 679. See note 184 *supra*.

¹⁹² *Id.*

¹⁹³ See text accompanying note 72 *supra*.

to the third party's misconduct and to allow the manufacturer to seek contribution from the third party in accordance with that party's percentage of responsibility as determined by the trier of fact. To do so would simply place the burden of collecting the third party's portion of the liability as well as the risk of non-collection, on the manufacturer, an equitable result since the manufacturer did in fact produce and sell a defective product.

