Marquette Law Review

Volume 49
Issue 2 *November 1965*

Article 9

Products Liability: Strict Liability in Tort: Defenses: Indemnity: Contribution

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the same offenses and the effects of enforcement are the same, why should the defendant in the state prosecution be afforded the presumption of innocence, requiring him to be proved guilty beyond a reasonable doubt, while the defendant in the municipal prosecution is not presumed innocent?

In view of the strong argument for affording the presumption of innocence to defendants in ordinance violation cases, which has been recognized by many other states, partial departure from the mere preponderance rule by our court in the *Geier* case could be an indication of a more complete departure in the future should the court be confronted with the proper case.

TERRY R. GRAY

Products Liability: Strict Liability in Tort—Defenses—Indemnity—Contribution: In 1957, plaintiffs Suvada and Konecnik, partners, purchased a used reconditioned tractor unit from defendant White Motor Company, for use in their milk distributing business. The brake system for the tractor was manufactured by defendant Bendix-Westinghouse Automotive Air Brake Company and installed by White. Three years later, the brake system failed and the truck collided with a Chicago Transit Authority bus, causing injuries to a number of the bus passengers and considerable damage to the bus and plaintiff's tractor-trailer milk truck. In *Suvada v. White Motor Co.*,[1] the plaintiffs sued to recover the costs they incurred in (1) repairing their tractor-trailer unit, (2) repairing the bus, and (3) settling the personal injury claims of the bus passengers, including the costs of legal services and investigation.

The complaint alleged that both Bendix and White were liable for the stated damages because of a breach of implied warranty and negligence. The trial court, in response to the defendants' motion, ruled plaintiffs had stated causes of action for damages to their tractor-trailer unit against White on the warranty and negligence theories, and against Bendix on the basis of negligence but dismissed the counts for damage to the bus, personal injury claims, and expenses. Plaintiffs appealed from this order to an intermediate appellate court, which ruled that plaintiffs had stated causes of action for all elements of damage pleaded against White and Bendix, on the basis of breach of an implied warranty.[2]

Only Bendix sought review of this holding, giving rise to the decision herein discussed. Bendix argued that any warranty as to its products ran only to White, since the plaintiffs were not in privity with Bendix. The Illinois Supreme Court, however, ruled that Bendix's

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[1] —— Ill. 2d. ——, 210 N.E. 2d 182 (1965).
[2] Suvada v. White Motor Co., 51 Ill. App. 2d 318, 201 N.E. 2d 313 (1964).

liability rested in *strict liability in tort,* rather than in implied warranty; and, therefore, that lack of privity was no defense. This rule was based upon *Lindroth v. Walgreen Co.,*[3] which held that a manufacturer may be liable in tort (negligence) for injuries to a person not in privity with him. Other Illinois cases before *Suvada* had abrogated the privity defense in negligence actions against a supplier,[4] an assembler of parts,[5] and a manufacturer of component parts.[6]

By adopting the theory of strict tort liability in a products liability case, the court created a new cause of action in Illinois, and cast its lot with the increasing number of states which recognize that theory. As of 1964, one writer[7] listed nearly twenty jurisdictions which had gone beyond food products and products intended for intimate bodily use in holding the manufacturer strictly liable for the user's injury and damage. This trend in state and federal courts has been bolstered by such authority as the *Restatement of Torts, Second,*[8] and by writings of prominent commentators in this field.[9]

In imposing strict tort liability upon the defendants, the Illinois court depended mainly on the strict liability theory generally used in implied warranty cases in the sale of food. In *Wiedeman v. Keller,*[10] the court held that the manufacturer and seller of food are strictly liable for the unwholesome condition of the food they sell, and that this strict liability is imposed as a matter of public policy by operation of law. Later cases provided that privity of contract is not essential to recovery in a food case, even though the action is, in form, a warranty

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[3] 407 Ill. 121, 94 N.E. 2d 847 (1950).

[4] Watts v. Bacon and Van Buskirk, 18 Ill. 2d 226, 163 N.E. 2d 425 (1960).

[5] Rotche v. Buick Motor Co., 358 Ill. 507, 193 N.E. 529 (1934). Rotche closely followed MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[6] Rotche v. Buick Motor Co., *supra* note 4; Gray v. American Radiator and Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E. 2d 761 (1961).

[7] Noel, *Strict Liability of Manufacturers,* 50 A.B.A.J. 446, at 449 (1964). See also Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P. 2d 897 (1963); Vandermark v. Ford Motor Co., 37 Cal. Rptr. 896, 391 P. 2d 168 (1964); HURSCH, AMERICAN LAW OF PRODUCTS LIABILITY, §6.62 (1965); FRUMER AND FRIEDMAN, PRODUCTS LIABILITY, §§16, 16A (1965).

[8] RESTATEMENT (SECOND), TORTS, §402A (1965):

> "(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
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

[9] James, *Products Liability,* 34 TEXAS L. REV. 44 (1955); Keeton, *Products Liability—The Nature and Extent of Strict Liability,* 1964 ILL. L. FORUM 693 (1964); Prosser, *Assault Upon the Citadel,* 69 YALE L. J. 1099 (1960).

[10] 171 Ill. 93, 49 N.E. 210 (1897).

action.[11] On this basis, the court posed what it considered to be the crucial question in this case: whether there is any reason for restricting the strict liability concept to food cases only, leaving cases involving products other than food to be decided on warranty or negligence principles. The court found no justifying reason for the distinction, holding that policy considerations and arguments which support the imposition of strict liability in food cases apply to other products as well:

> Without extended discussion, it seems obvious that public interest in human life and health, the invitations and solicitations to purchase the product, and the justice of imposing the loss on the one creating the risk and reaping the profit are present and as compelling in cases involving motor vehicles and other products, where the defective condition makes them unreasonably dangerous to the user, as they are in food cases.[12]

Following Dean Prosser's suggestion that, "If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask,"[13] the court gave its approval to the similar reasoning in *Greenman v. Yuba Power Products, Inc.*, where the California Supreme Court stated:

> Although in these cases strict liability has usually been based on the theory of an expressed or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products makes clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.[14]

Thereby the court freed itself from the superfluous requirements and language of warranty actions, and obviated the necessity of passing upon the applicability of the Uniform Commercial Code,[15] namely, its definitions of buyer and seller, provisions as to scope of warranty and privity, and requirements of notice of breach.

Bendix further contended that the imposition of strict liability in tort would require it to guarantee the use made of its brake system by

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[11] Tiffin v. Great Atlantic and Pacific Tea Co., 18 Ill. 2d 48, 162 N.E. 2d 406 (1959); Patargias v. Coca-Cola Bottling Co., 332 Ill. App. 117, 74 N.E. 2d 162 (1947); Decker and Sons v. Capps, 139 Tex. 609, 164 S.W. 2d 828 (1942), cited with approval in Suvada v. White Motor Co., —— Ill. 2d ——, 210 N.E. 2d 182, 185 (1965).

[12] —— Ill. 2d at ——, 210 N.E. 2d at 186. See also Keeton, *supra* note 9, at 695; Goldberg v. Kollsman Instrument Corp., 12 N.Y. 2d 432, 440, 191 N.E. 2d 81, 85 (1963).

[13] Prosser, *supra* note 9, at 1134. See also Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A. 2d 69 (1960); Goldberg, *supra* note 12.

[14] Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 377 P. 2d 897, 901 (1963).

[15] S.H.A. Ch. 26 (1962).

all those in the manufacturing and distributive process, and by the product's consumers as well. The court replied:

> The plaintiffs must prove that their injury or damage resulted from a condition of the product, that the condition was an unreasonably dangerous one, and that the condition existed at the time it left the manufacturer's control.[16]

This conclusion conforms with the generally accepted limitation of strict liability in tort, i.e., that the liability of the producer or seller is not that of an insurer, so as to be absolute in the literal sense of the word. The liability is "strict" because there is no need to prove that the manufacturer or other defendant was negligent. If the article left the defendant's control in an unreasonbaly dangerous or unsafe condition, the defendant is liable whether or not he was at fault in creating that condition, or in failing to discover and eliminate it.[17]

Finally, Bendix challenged the plaintiff's right to indemnification, on the basis that, in settling the claims of the Chicago Transit Authority and the injured bus passengers, the plaintiffs were either volunteers or joint tort feasors, and in either case not entitled to indemnity. This argument produced a somewhat cryptic reply:

> Plaintiff's liability for damage to the bus and injuries to the passengers must, of course, be based on their negligence, as Bendix suggests. It does not follow, however, that plaintiff's negligence will, as a matter of law, . . . prevent them from seeking indemnity from Bendix.[18]

The Suvada case affords an excellent illustration of some of the problems which tend to arise as subordinate incidents of the newly-emerging doctrine of strict liability. Although the opinion disposes of problems of indemnification, contribution, assumption of risk, and contributory negligence in rather abrupt fashion, it is evident that the court's espousal of the doctrine of strict liability has compelled a substantial recasting of conventional rules in these areas.

Indemnification, contribution, assumption of risk, and contributory negligence have in common the fact that all are doctrines by which the ultimate burden of a given loss or injury may (or may not) be shifted between two parties having a measure of common responsibility for the occurrence.[19] Indemnification shifts the entire burden;[20] contribution shifts a portion of the burden;[21] assumption of risk and contributory negligence prohibit or limit the right of an injured person to shift his loss to one who, but for the assumption of risk or contributory negli-

[16] —— Ill. 2d at ——, 210 N.E. 2d at 188. See also Tiffin v. Great Atlantic and Pacific Tea Co., 18 Ill. 2d 48, 162 N.E. 2d 406 (1959).
[17] Wade, *Strict Tort Liability of Manufacturers,* 19 Sw. L. J .5, 13 (1964).
[18] —— Ill. 2d at——, 210 N.E. 2d at 188.
[19] See text accompanying notes 26 to 63, *infra.*
[20] See text accompanying notes 45 to 57, *infra.*
[21] See text accompanying notes 58 to 63, *infra.*

gence, would be responsible for the injury. All four doctrines have developed, however, as overlays of conventional principles of negligence liability. All four, therefore, are conventionally grounded upon fault-based liability, and adopt, in conventional statement, much of the language of the fault principle.[22]

Strict liability, by contrast, asserts responsibility for conduct which is neither intentionally nor negligently harmful, and which is wrongful only in the sense that, de facto, a legally protected interest has been invaded. Strict liability in tort rests on principles of public policy which, unlike intentional conduct and negligence, are not individualistic, but socially and economically mechanistic.[23] Its objective is to shift the burden of personal injury to those who are deemed best able to bear the loss.[24]

It is the purpose of this analysis to examine each of these doctrines in their conventional uses, and to determine, in the light of the *Suvada* decision, each doctrine's applicability in an action brought upon a theory of strict liability. In each instance, the standard use, as well as the Illinois and Wisconsin applications will be examined, in order to determine whether or not these subsidiary doctrines must be recast in terms of the same policy considerations upon which strict liability in tort is based.[25]

I. Contributory Negligence and Assumption of Risk

Contributory negligence is generally defined as negligent conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection, barring his right to recovery.[26] The use and effect of the contributory negligence doctrine varies widely from one jurisdiction to another, and the completeness of the bar depends upon local case law or statutes which have modified the doctrine.

In Illinois, it is beyond dispute that any contributory negligence in an action based upon negligence is a complete defense, which relieves the defendant of all liability for the plaintiff's injuries.[27] Wisconsin law, in comparison, has modified the contributory negligence doctrine by statute and judicial decision. Wisconsin's Comparative Negligence Statute[28] provides:

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[22] Keeton, *supra* note 9, at 698.
[23] Goldberg v. Kollsman Instrument Corp., 12 N.Y. 2d 432, 191 N.E. 2d 81 (1963).
[24] *Ibid.*; See also Keeton, *supra* note 9, at 694.
[25] Keeton, *supra* note 9, at 701; Noel, *supra* note 7, at 449; Wade, *supra* note 17, at 12.
[26] Prosser, Law of Torts, §64 (3rd ed. 1964); 36 Am. Jur. *Negligence* §174 (1942).
[27] Illinois Central Railroad Co. v. Oswald, 338 Ill. 270, 170 N.E. 247 (1930); Pantlen v. Gottschalk, 21 Ill. App. 2d 163, 157 N.E. 2d 548 (1959); Ferrell v. Chicago Transit Authority, 33 Ill. App. 2d 321, 179 N.E. 2d 410 (1961).
[28] Wis. Stat. §331.045 (1963).

> 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.

Accordingly, contributory negligence is not a complete bar in Wisconsin, but, through the doctrine of comparative negligence, the contributorily negligent plaintiff may recover an amount reduced in proportion to his negligence, so long as his negligence is not more than 50 per cent causual. [29] Illinois, on the other hand, has expressly repudiated the comparative negligence doctrine.[30]

Assumption of risk is defined as a voluntary exposure to a known and appreciated danger, which danger or risk of harm was created by another's conduct.[31] The doctrine has been greatly criticized, and has been abolished, or severly limited, in several states, including Wisconsin.[32] In those states which recognize the doctrine, including Illinois, the plaintiff is barred from recovery where he voluntarily acted in the presence of a known and appreciated danger, even though his actions were not negligent, and were performed with the greatest care possible.[33]

In determining the availability of either contributory negligence or assumption of risk as defenses to a products liability action, the nature of the action, whether in warranty, misrepresentation, or negligence, will be of strong significance.

In an action to recover for damages or injury resulting from a breach of an implied or express warranty, a serious legal problem is encountered when a court is asked to consider contributory negligence as a defense to the claim. A proper respect for nomenclature alone seems to indicate that contributory negligence is available as a defense only in cases resting on negligence. Most courts have agreed, holding that contributory negligence will not defeat a warranty action,[34] because either (1) breach of warranty is solely an action *ex contractu,* or (2)

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[29] Grana v. Summerford, 12 Wis. 2d 517, 107 N.W. 2d 463 (1961); Millsap v. Central Wisconsin Motor Transport Co., 28 Ill. 2d 122 (1963).

[30] Smith v. Ohio Oil Co., 10 Ill. App. 2d 67, 134 N.E. 2d 526 (1956).

[31] RESTATEMENT (SECOND), TORTS §496D (1965). 65 C.J.S. *Negligence* §174 (1950).

[32] McConville v. State Farm Mutual Auto Ins. Co., 15 Wis. 2d 374, 113 N.W. 2d 14 (1961).

[33] Ferguson v. Lounsberry, 58 Ill. App. 2d 456, 207 N.E. 2d 309 (1965); Kelly v. Fletcher-Merna Co-op Grain Co., 29 Ill. App. 2d 419, 173 N.E. 2d 855 (1961); Stahl v. Dow, 332 Ill. App. 233, 74 N.E. 2d 907 (1947).

[34] Kassouf v. Lee Bros. Inc., 209 Cal. App. 2d 568, 26 Cal. Rptr. 276, (1963); Vassallo v. Sabatte Land Co., 212 Cal. App. 2d 11, 27 Cal. Rptr. 814 (1963); Cedar Rapids & I. C. Ry. & Light Co. v. Sprague Electric Co., 280 Ill. 386, 117 N.E. 460 (1917); FRUMER AND FRIEDMAN, *op. cit. supra* note 7, at §16.01(3). *But cf.* Maiorino v. Weco Products Co., 34 U.S.L. WEEK 2244 (N.J. October 25, 1965).

warranty imposes strict liability. Either reason is sufficient to render the defense inapplicable.[35]

While no case has unambiguously accepted contributory negligence as an affirmative defense in a warranty action, a number of cases seem to have tended toward this result.[36] However, these cases, seemingly permitting contributory negligence as a defense, have actually involved defenses based upon some form of misuse of the product, coupled with *an actual knowledge of the risk.* Referring to the deflnitional distinction between contributory negligence and assumption of risk, supra, it is obvious that these cases actually permit assumption of risk, and not contributory negligence, as a defense to the alleged breach of warranty. As assumption of risk is generally recognized as a defense to the strict liability of a warranty action,[37] these cases may be reconciled with the general rule that *contributory negligence* is not a defense to the strict liability imposed in a warranty action.

Products liability actions may occasionally be brought on a theory of misrepresentation, when the consumer is injured because of his reliance upon the manufacturer's implied or express representation of fact,[38] given by advertising, labels, or otherwise. These cases generally hold that:

> One engaged in the business of selling chattels who by advertising, labels or otherwise makes to the public a material misrepresentation of fact concerning the character or equality of a product sold by him is subject to liability for physical harm or pecuniary loss to a consumer or user of the product when caused by the user's justifiable reliance on the misrepresentation even though the misrepresenation is made without knowledge of its falsity and without negligence.[39]

Whether brought on a tort-deceit or a contract-warranty theory, a misrepresenation case seeks to impose strict liability on public policy grounds. It seems clear from the discussion of strict liability in warranty, supra, that the defense of contributory negligence is precluded here as well.

Finally, it is evident that contributory negligence is a defense to a products liability action brought in negligence. However, its impact as a defense will be modified according to (1) the effect given to the doctrine in each jurisdiction, and (2) the presence of statutory modifications, such as comparative negligence.

[35] Note, 36 So. CAL. L. REV. 490 (1963).
[36] FRUMER AND FRIEDMAN, *op. cit.* supra note 34.
[37] Prosser, *supra* note 9, at 1147; FRUMER AND FRIEDMAN, *op. cit. supra* note 7, at §16.01(3); Nelson v. Anderson, 245 Minn. 445, 72 N.W. 2d 861 (1955); Eisenbach v. Gimbel Bros., 281 N.Y. 474, 24 N.E. 2d 131 (1939).
[38] Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E. 2d 612 (1958). See also Ruud, *Manufacturers Liability for Representations Made by Their Sales Engineers to Subpurchasers,* 8 U.C.L.A. L. REV. 193, at 204 (1961).
[39] RESTATEMENT (SECOND), TORTS §402A, Comment *n* (1965).

We next consider whether or not contributory negligence is a defense under the doctrine of strict liability in tort. There is some diversity of opinion on this matter, with the *Restatement of Torts, Second,* holding that contributory negligence, as opposed to assumption of risk, is not a defense to strict tort liability.[40]

On the other hand, there is authority holding that, since the imposition of strict liability in tort is based on public policy and the doctrine of allocating risk, exempting the consumer from the burden of proving the seller's fault, the same policy should insist on limiting strict liability in face of consumer-fault, where the producer successfully establishes it.[41] It is one thing to exempt the consumer from a traditional burden of proof which he has found onerous. It is quite another to exempt him from the traditional consequences of his own fault. This reasoning would especially apply in a jurisdiction like Wisconsin, where the principle (if not the letter) or comparative negligence seeks to distribute the burden of injury proportionately to its causes.

By semantically changing contributory negligence into assumption of risk, recognized as a defense to strict liability, the result can be achieved without untoward violence to traditional rules. It is generally conceded, under strict liability principles, that if the plaintiff continued to use the product after learning of its dangerous condition, his recovery will be barred, as he voluntarily assumed the risk of a known danger. Why should this be so, unless such continued use constituted want of care for his own safety, and therefore negligence? Logically, there is no reason why assumption of risk should bar recovery, except as that conduct amounts to contributory negligence; and, as above noted, Wisconsin has directly so held.[42]

Strict liability doctrines purport, however, to exempt a plaintiff from negligence in failing to discover the unsafe condition of a product, unless a prominent warning of its latent dangers is given. In the latter case, a "seller may reasonably assume that the warning will be read and heeded."[43] In any case, a plaintiff is required to use the product in a normal manner, and within a normal period of time.[44] Failure to do so is not called "contributory negligence," but would presumably operate to the same effect, regardless of nomenclature. If, in the process of normal use, the danger of the product would necessarily have been disclosed to the user, a near-dilemma is reached, for the plaintiff is trapped between one recognized defense and the other.

The theoretical conclusion, therefore, that contributory negligence

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[41] Keeton, *supra* note 9, at 698.
[42] McConville v. State Farm Mutual Auto Ins. Co., 15 Wis. 2d 374, 113 N.W. 2d 14 (1961).
[43] RESTATEMENT (SECOND), TORTS §402A, comment *j* (1965).
[44] *Id.*, comment *h.*

is not available as a defense to strict liability is diluted somewhat in practical application. The doctrine of strict liability does not appear to deny the defensive relevancy of *conduct* of the kind which conventionally amounts to contributory negligence.

II. INDEMNITY

As the doctrine of indemnity is conventionally defined and applied, one who has been held liable for the tortious act of another is entitled to indemnification from the tort feasor, whether contractual relations existed between them or not.[45] The general rule of indemnification is stated in the *Restatement of Restitution*[46] as follows:

> A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.

The right to indemnification is based on the idea that everyone is responsible for the consequences of his own wrongful conduct, and one may recover the full amount of damages he has been compelled to pay because of the wrong of another, the entire burden of loss being shifted to another who should bear it instead.[47]

However, it is extremely difficult to come to any generic conclusion as to when indemnity will be permitted and when it will not. In some jurisdictions, a fairly strict rule prevails; and if one seeking indemnity has been primarily negligent, or has contributed to the wrong in some way, he will be denied indemnification.[48] The doctrine of indemnity has developed in this manner in Illinois, and if a party has paid a claim based on another's wrongful conduct, he must show that he is blameless or bear the whole loss, because of the Illinois general rule prohibiting indemnification between joint tort feasors.[49]

The Illinois rule on indemnity is well illustrated in *Schulman v. Chrysler Corp.*[50] The brakes on Schulman's car failed, causing her to strike and injure one Halligan, who brought suit against Schulman for damages. Schulman brought a third party complaint[51] against Chrysler, seeking indemnity for any damage she would be required to pay Halligan. In upholding the rule denying indemnity between parties *in pari delicto*,[52] the court placed Schulman in a dilemma: a finding of

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[45] PROSSER, *op. cit. supra* note 26, §48.
[46] RESTATEMENT, RESTITUTION, §76 (1937).
[47] Meriam and Thornton, *Indemnity Between Tort Feasors*, 25 N.Y.U. L. REV. 845 (1950); Kiszkan v. Great Lakes Carbon Corp., 27 Ill. App. 2d 392, 169 N.E. 2d 814 (1960).
[48] Meriam and Thornton, *supra* note 47, at 850.
[49] An analytical statement of the rule and its development in Illinois appears in McDonald v. Trampf, 49 Ill. App. 2d 106, 198 N.E. 2d 537 (1964).
[50] 31 Ill. App. 2d 168, 175 N.E. 2d 590 (1961).
[51] ILL. REV. STAT., Ch. 110, §25(2) (1959).
[52] See generally Yankey v. Bohlin and Son, Inc., 37 Ill. App. 2d 457, 186 N.E.

negligence against Schulman would preclude any right to indemnity from Chrysler, as Schulman would then be a joint tort feasor at best. On the other hand, if Schulman were found not liable to Halligan, there would be no need for indemnity.

Suvada presented an enigma, as both parties were considered to be tort feasors, but they were neither joint tort feasors nor *in pari delicto*. While Suvada's liability rested in *negligence,* Bendix was held *strictly liable in tort.* "Suvada's negligence would not however . . . prevent him from seeking indemnification from Bendix."[53] Thus, *Suvada* has opened a new theory of indemnity between tort feasors in Illinois, permitting a consumer of a defective product, who has negligently injured another by use of the product, to shift the entire legal obligation back to the manufacturer and seller of the defective product. Indemnity, by the *Suvada* doctrine, is therefore not limited to those who are personally free from fault;[54] but is granted simply because a strong public policy insists upon distribution of the economic burden of injury in the most socially desirable manner. That policy requires, in the court's apparent view, that the indemnitee's fault be judicially ignored. This reasoning enabled the court to look past the active-passive, primary-secondary pitfalls[55] of standard indemnity, and grant indemnity to one who was himself a tort feasor.

Wisconsin's law of indemnity has not yet assumed as clearly defined a form as that of Illinois, and any consideration of Wisconsin's principle of indemnification in a future products liability case, based on strict liability in tort, is pure speculation. In *Jacobs v. General Accident Fire and Life Assurance Corp.*,[56] the Wisconsin Supreme Court stated:

> . . . the granting of indenmity in any situation represents *a judicial choice of policy.* We decide that in a case like the present one, there is no distinction between the tort feasors with respect to the casual relationship between their conduct and the injury, the negligent tort feasor is not entitled to indemnity from the grossly negligent one. (Emphasis added)

Here, then, was a situation in which Wisconsin denied indemnity, even though the parties were not in strict *pari delicto.*

Considering, however, that the Wisconsin doctrines of comparative contributions[57] and comparative negligence accomplish much the same results as does the doctrine of indemnity in other jurisdictions, some illiberality toward indemnity in Wisconsin is understandable. Nevertheless, Wisconsin's "judicial choice of policy" will be a difficult one

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2d 57 (1962); Blaszak v. Union Tank Car Co., 37 Ill. App. 2d 12, 184 N.E. 2d 808 (1962.

[53] —— Ill. 2d at ——, 210 N.E. 2d at 188.

[54] See generally PROSSER, *op. cit. supra* note 26, §48.

[55] Note, 1964 ILL. L. FORUM 614, 615 (1964).

[56] 14 Wis. 2d 1, 11, 109 N.W. 2d 462, 467, (1961).

[57] Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W. 2d 105 (1962).

if a case of the *Suvada* type arises. Assuming Wisconsin's acceptance of strict products liability in tort, comparative contribution will be an awkward solution for reasons explained below. Indemnity, if permitted, may compel a "judicial choice of policy" opposite to that adopted in *Jacobs,* supra, despite that fact that ". . . there is no distinction between the tort feasors with respect to the causual relationship between their conduct and the injury."

III. CONTRIBUTION

Indemnification, granted on the basis of a disparity of duty or of type of liability between tort feasors, and which shifts the entire burden from one to another, is not to be confused with the equitable right to contribution, which distributes a jointly-caused loss among the tort feasors.

Contribution is conventionally defined as the right of one who has discharged a common liability or burden to recover from another, who is also liable, the aliquot portion which he ought to bear.[58] The *Restatement of Restitution,* Section 81, defines the right as follows:

> Unless otherwise agreed, a person who has discharged more than his proportionate share of a duty owed by himself and another as to which, between the two, neither had a prior duty of performance, is entitled to contribution from the other, except where the payor is barred by the wrongful nature of his conduct.

In the general application of the doctrine of contribution, one who is compelled to pay or satisfy the whole loss, or bear more than his just share of a common burden or obligation, upon which several persons are equally liable, or which they are bound to discharge, is entitled to contribution from the others, so that each party pays his respective share of the loss.[59]

In Illinois, if two or more tort feasors have acted concertedly and intentionally *in pari delicto,* contribution between them is prohibited.[60] If the parties have not acted so as to be commonly liable, *in pari delicto,* Illinois law permits one tort feasor to recover against another according to the relative delinquency of the parties. A tort feasor whose contribution to the harm was merely "passive" is permitted contribution from one who "actively" caused it.[61] On this basis, it would seem that there could be no contribution in a strict liability tort action in Illinois, although this issue apparently has never been before an Illinois court.

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[58] See generally Leflar, *Contribution and Indemnity Between Tortfeasors,* 81 U. PA. L. REV. 130 (1932); McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 107 N.E. 2d 463 (1952).

[59] PROSSER, *op. cit. supra* note 26, §47.

[60] Schulman v. Chrysler Corp., 31 Ill. App. 2d 168, 175 N.E. 2d 590 (1961); McDonald v. Trampf, 49 Ill. App. 2d 106, 198 N.E. 2d 537 (1964).

[61] Rovekamp v. Central Construction Co., 45 Ill. App. 2d 441, 195 N.E. 2d 756 (1964); Coffey v. A.B.C. Liquor Stores, 13 Ill. App. 2d 510, 142 N.E. 2d 705 (1957).

For example, Suvada's *negligence* toward the bus passengers and Bendix's *strict liability* to Suvada could not be classified on an active-passive basis, as the true comparison in such a case is between fault (negligence) and non-fault (strict liability). To attempt such a comparison would seem to frustrate the policy of strict liability, because Bendix's liability would thereby become something less than negligence liability. Likewise, contribution between two strictly liable persons is impossible to square with conventional concepts, essentially because strict liability lacks any property by which it can be weighed or compared, even with its own kind. The situation exactly fits the Illinois rule, denying contribution when the parties are *in pari delicto.*

In Wisconsin, however, contribution is allowed only when the tort feasors are under a common liability and *in pari delicto,*[62] and then is given in proportion to each tort feasor's relative fault, under the principle of the Comparative Negligence Statute.[63] The statute applies, in terms, only to negligence, and cannot, therefore, be literally applied in strict liability situations. Disregarding this problem, a far more fundamental difficulty remains: How is one factor, valued in terms of causual fault, to be compared with another, valued in terms of strict liability? Or, in another case, how are the strict liabilities of a manufacturer, a wholesale distributor, and a retail distributor to be comparatively evaluated, one with another, when all three are liable simply as sellers of the same product?

The questions are impossible of solution at this early stage of development of the strict liability doctrine.

CONCLUSION

Adoption of strict tort liability as a new cause of action does not itself work a revolutionary change in products liability law. One would not expect either courts or attorneys to encounter any insurmountable obstacles in applying the principles to simple consumer-seller cases. However, *Suvada* demonstrates that problems must be anticipated in the restatement of those legal and equitable principles which are collateral to the direct problem of compensating the primary victim of tort. Indemnity, contribution, assumption of risk, and contributory negligence have developed as subordinate aspects of fault-based liability, especially negligence, and have adopted, in conventional statement, much of the languge of the fault principle.

Strict liability, however, is based on a principle of public policy, by which the central objective is to allocate loss in the most socially desirable manner. Conduct which may be innocent under the fault principle is thereby proscribed, and guilty conduct under the fault principle, is, in a measure, ignored. This makes it substantially im-

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[62] Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W. 2d 105 (1962).
[63] WIS. STAT. §331.045 (1963).

possible to apply conventional rules of indemnity, contribution, assumption of risk, or contributory negligence, without extensive redefinition, to cases founded on strict liability. The underlying theories of the two are incompatible.

THOMAS E. OBENBERGER

Taxation: Determination of Gross Income for Percentage Depletion Purposes—In *Dravo Corporation v. United States*,[1] the United States Court of Claims added another link to the chain of cases questioning Section 613 of the Internal Revenue Code of 1954. The Court, *inter alia*, held that Dravo Corporation (hereafter referred to as Dravo) for the tax year 1955 must compute its gross income for depletion purposes[2] by using per ton prices at the dredges rather than the per ton prices at the shore installations. The latter prices included various transportation and stockpiling costs.

The depletion issue concerns deposits dredges from an island in the Ohio River, transported to shore installations, and sold during 1955. The deposits were extracted by two dredges which performed the washing and sizing operations. Since stockpiling on the dredges was a practical impossibility, the sand and gravel was then moved to barges adjacent to the dredges. The first general category of Dravo's customers included those who utilized their own barges to pick up the sand and gravel at Dravo's dredges or made special arrangements with Dravo to deliver direct from the barges to the customer's location. The proceeds from the sand and gravel sales to customers in this first classification were not involved in the contest since these proceeds were derived from sale of products which never reached Dravo's shore installations. The controversy applied to the sand and gravel, about fifty per cent of Dravo's tonnage for 1955, which was sold to the second category of customers—those who purchased at the shore installations. Dravo owned

[1] 348 F. 2d 542 (1965).

[2] INT. REV. CODE OF 1954, ch. 736, §613(c), 68A Stat. 209:

(c) DEFINITION OF GROSS INCOME FROM PROPERTY—For purposes of this section—

(1) GROSS INCOME FROM THE PROPERTY—The term "gross income from the property" means, in the case of a property other than an oil or gas well, the gross income from mining.

(2) MINING—The term "mining" includes not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto as is not in excess of 50 miles unless the Secretary or his delegate finds that the physical and other requirements are such that the ore or mineral must be transported a greater distance to such plants or mills.

Subsection (4) of section 613(c) contained the original list of "ordinary treatment processes" then considered in computing gross income from property.