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PRODUCTS LIABILITY—APPLICABILITY OF COMAPARATIVE NEGLIGENCE TO MISUSE AND ASSUMPTION OF THE RISK

DAVID A. FISCHER*

I. INTRODUCTION

A trend is emerging to apply comparative negligence in strict products liability actions.[1] This creates two serious difficulties. First is the question of how to compare the negligence of one party with the strict liability of the other party. This problem has been dealt with at length in an

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1. The following state courts have applied comparative negligence to strict liability cases. Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alas. 1976); Daly v. General Motors Corp., 20 Cal. 3d 725, 144 Cal. Rptr. 380 (1978); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Busch v. Busch Constr., Inc., 262 N.W.2d 377 (Minn. 1977); General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977); Powers v. Hunt-Wesson Foods, Inc., 64 Wis. 2d 532, 219 N.W.2d 393 (1974); Schuh v. Fox River Tractor Co., 63 Wis. 2d 728, 218 N.W.2d 279 (1974); Netzel v. State Sand & Gravel Co., 51 Wis. 2d 1, 186 N.W.2d 258 (1971); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). The following federal courts in diversity cases have predicted that the state whose law was being applied would adopt this approach. Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975); Rodrigues v. Ripley Indus., Inc., 506 F.2d 782 (1st Cir. 1974); Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976); Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676 (D.N.H. 1972); Chapman v. Brown, 198 F. Supp. 78 (D. Haw. 1961). *See also* Pan Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129 (9th Cir. 1977) (admiralty law).

Many authors advocate that comparative negligence be applied in strict liability actions. Brewster, *Comparative Negligence in Strict Liability Cases,* 42 J. AIR LAW & COM. 107 (1976); Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2d (Can Oil and Water Mix?),* 42 INS. COUNSEL J. 39 (1975); Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice,* 5 ST. MARY'S L.J. 655, 674 (1974); Fleming, *The Supreme Court of California, 1974-75—Foreward: Comparative Negligence at Last—By Judicial Choice,* 64 CALIF. L. REV. 239, 270 (1976); Freedman, *The Comparative Negligence Doctrine Under Strict Liability: Defendant's Conduct Becomes Another "Proximate Cause" of Injury, Damage or Loss,* 1975 INS. L.J. 468; Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty,* 52 MINN. L. REV. 627, 637, 652 (1968); McNichols, *The Kirkland v. General Motors Manufacturer's Products Liability Doctrine—What's in a Name?*, 27 OKLA. L. REV. 347, 407 (1974); Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk,* 25 VAND. L. REV. 93, 118 (1972); Phillips, *The Standard for Determining Defectiveness in Products Liability,* 46 U. CIN. L. REV. 101,

earlier article.[2] The second problem is to determine exactly what forms of plaintiff misconduct may appropriately be used as a basis for reducing the plaintiff's recovery under comparative negligence principles. This problem is especially acute where misuse or the assumption of the risk is involved. Both assumption of the risk and misuse are terms of variable meaning, and they play a variable role depending in part on the type of strict liability imposed in a given jurisdiction. Therefore, the extent to which these factors should mitigate damages may differ significantly from jurisdiction to jurisdiction. Even in a comparative negligence system some of this conduct should remain an absolute bar to recovery while other conduct should not affect the plaintiff's recovery at all. Still other conduct that falls under the general heading of either misuse or assumption of the risk is an appropriate basis for reducing the plaintiff's recovery. The purpose of this article is to identify those situations where either misuse or assumption of the risk should constitute an absolute defense, no defense at all, or a basis for reducing the plaintiff's recovery.

II. MISUSE

Product misuse includes abnormal use and mishandling. Abnormal use is the use of the product for an unintended or unforeseeable purpose.[3] Mishandling is the use of the product for an intended purpose but in an unintended manner.[4] Not all misuse as thus defined prevents the imposition of liability, and a more precise definition that can be universally applied is not feasible.

Misuse is not a unitary legal principle (like contributory negligence) which for policy reasons is to be applied consistently in all cases. Rather, it is a species of conduct that can be relevant to a variety of issues in a

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108 (1977); Schwartz, *Strict Liability and Comparative Negligence,* 42 TENN. L. REV. 171, 178 (1974); Vetri, *Products Liability: The Developing Framework for Analysis,* 54 ORE. L. REV. 293, 314 n.99 (1975); Wade, Crawford & Ryder, *Comparative Fault in Tennessee Tort Actions: Past, Present and Future,* 41 TENN. L. REV. 423, 452-53, 460 (1974).

2. Fischer, *Products Liability—Applicability of Comparative Neglicence,* 43 MO. L. REV. 431 (1978). The solution suggested in that article is to reduce the plaintiff's recovery in proportion to the degree of his own fault. That is, compare the plaintiff's conduct with how he should have conducted himself (the objective standard of the reasonable man) and reduce his recovery according to how much he was at fault. The determination that the jury makes here is the same as under traditional comparative negligence except that the comparison is made between one unreasonable person (plaintiff) and one reasonable person (hypothetical) rather than between two unreasonable people (plaintiff and defendant).

3. Noel, *supra* note 1, at 95-96; Note, *Plaintiff Misconduct as a Defense in Products Liability,* 25 DRAKE L. REV. 189, 195 (1975).

4. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 668-69 (4th ed. 1971); Note, *supra* note 3, at 195.

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products liability case. Under certain circumstances such conduct can negate various elements of the plaintiff's case, such as the existence of defect or of proximate cause. In this sense misuse is not an affirmative defense. Rather, the plaintiff must prove "normal use" of the product in order to establish the elements of a cause of action.[5] If misuse does not negate an element of the plaintiff's case it is relevant only if the conduct constitutes a recognized affirmative defense.

In situations where misuse negates an element of plaintiff's case it should be a complete bar to recovery. Comparative negligence is not appropriate.[6] Apportioning damages in such cases is comparable to apportioning the failure of the plaintiff to prove a touching in a battery case. It is unthinkable to permit the plaintiff even a diminished recovery in such circumstances, because he has not proven an essential element of his case.

Furthermore, apportioning damages based on the kind of misuse that negates the existence of defect or causation could in two situations lead to full recovery by the plaintiff. First, misuse would not mitigate damages at all if it is reasonable. Assume the plaintiff attaches pontoons to his automobile and attempts to use it as a raft. He would be reasonable if this appeared necessary to save a life. Yet surely the manufacturer should not be liable for making an unseaworthy automobile. This problem can arise in any case where the plaintiff's interest is sufficiently great to outweigh the gravity of the harm threatened and there are no viable alternatives open to him. Second, even if misuse by the user or consumer is unreasonable this misconduct would not preclude a bystander from recovering his full damages from the manufacturer. Thus, if in using a soda bottle as a hammer a third party is injured by the flying glass, under a comparative negligence standard the manufacturer would still have to pay for the failure of the soda bottle to be a suitable hammer.[7]

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5. Noel, *supra* note 1, at 96; Schwartz, *supra* note 1, at 172-73; Note, *supra* note 3, at 195, 197, 200, 204.

6. General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977); Schwartz, *supra* note 1, at 172-74.

7. Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976). The court indicates that unforeseeable misuse by the plaintiff will be a basis for reducing the plaintiff's recovery unless the misuse is a superseding cause of the injury, in which event it will bar all recovery. Under this approach misuse cannot be used to negate the existence of a defect, but it can prevent the defendant's conduct from being a proximate cause of the harm. It is not clear what test of proximate cause the court would use. Under Idaho law foreseeability is the test for determining whether intervening misconduct constitutes a superseding cause. Mico Mobile Sales and Leasing, Inc., v. Skyline Corp., 97 Idaho 408, 546 P.2d 54 (1975). If this test were literally applied all unforeseeable misuse would constitute a superseding cause.

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In situations where misuse does not negate an element of plaintiff's case it may sometimes be desirable to use the conduct as a basis for reducing the plaintiff's recovery rather than as constituting a complete bar. Other times misuse will neither negate the existence of an element of the plaintiff's case nor otherwise constitute a recognized affirmative defense, and should have no bearing on the outcome of the case.

A. *Negating Defect*

In order to identify when misuse is relevant solely because it negates the existence of defect it is necessary to examine the definition of defect. Various jurisdictions have adopted different criteria for determining when a product is defective. A specific instance of abnormal use or mishandling might negate the existence of defect in one jurisdiction but not in another because of a difference in the definition of defect. In the former jurisdiction, the conduct would be the basis for a complete bar to recovery while in the latter jurisdiction it would merely be a basis for diminishing the plaintiff's recovery.

All courts agree that a product must be defective before strict liability is imposed for the harm it causes. This requirement prevents manufacturers from becoming insurers for all harm resulting from the use of their products. In addition, many courts have adopted the Restatement (Second) of Torts, Section 402A[8] as a basis for imposing strict products liability. The agreement ends here. There is considerable difference of opinion as to what constitutes a defect, even among jurisdictions purporting to apply the Restatement.

1. Restatement Test

The starting point for determining what constitutes a defect is the Restatement itself. It establishes a two-part test for determining whether a product is defective. Both parts of the test must be met in order for the product to be deemed defective.

The Restatement makes clear that a primary effect of misuse is to negate the existence of defect. A comment in the Restatement provides that "[a] product is not in a defective condition when it is safe for normal handling and consumption."[9] Thus, "the seller is not liable if the injury results from abnormal handling... or from abnormal consumption...."[10] It will become clear after examining both aspects of the Restatement tests of defect that misuse can prevent either from being met.

8. *See* (1977) 1 Prod. Liab. Rep. (CCH) ¶4070 for a list of jurisdictions accepting the doctrine.

9. RESTATEMENT (SECOND) OF TORTS § 402A, comment h (1965) [hereinafter cited as RESTATEMENT].

10. *Id.*

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The first part of the two-pronged test of defect is known as the consumer expectations test. This test requires that the product be "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[11] This test is designed to prevent frustration of consumers' expectations resulting from hidden or unexpected dangers related to the use of products. Regardless of the magnitude of the danger involved, recovery is precluded if the danger is obvious,[12] generally known,[13] or has adequately been warned against.[14]

Misuse can negate the existence of defect on the basis that consumer expectations have not been violated. For example, suppose the plaintiff uses a soda bottle to hammer a nail into a board and is injured by flying glass when the bottle breaks.[15] Plaintiff is precluded from recovering for his injuries, not because of an affirmative defense, but because he can not prove that the bottle was defective.[16] A primary test of defect is the failure of a product to meet consumer expectations as to safety. Since a reasonable consumer would not expect a soda bottle to be safe for use as a hammer, expectations are not violated and the product is not defective. The Oregon Court has expressly recognized the relationship between misuse and the consumer expectations test of defect. It has held that misuse bars recovery only if it is "so unusual that the average consumer could not reasonably expect the product to be designed and manufactured to withstand it—a use which the seller, therefore, need not anticipate and provide for."[17]

The second part of the Restatement test is that in addition to violating consumer expectations, the product must be "unreasonably dangerous" to the user or consumer. Comment k amplifies the meaning of the unreasonably dangerous requirement by providing an exception to strict liability for "unavoidably unsafe" products. A product is unavoidably unsafe if it is incapable of being made safe and yet may justifiably be marketed because the utility of the product outweighs the gravity of the harm threatened. Such products are not deemed defective or unreasonably dangerous. The net effect is that if the plaintiff contends that the product is defective in design, in addition to showing that the danger

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11. RESTATEMENT, *supra* note 9, § 402A, comment i.

12. *E.g.*, Maas v. Dreher, 10 Ariz. App. 520, 460 P.2d 191 (1969); Denton v. Bachtold Brothers, Inc., 8 Ill. App. 3d 1038, 291 N.E.2d 229 (1972). Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 Sw. L.J. 256, 274 (1969).

13. RESTATEMENT, *supra* note 9, § 402A, comment i.

14. *Id.*, comments h and j.

15. Schwartz, *supra* note 6, at 172-73.

16. *Id.*

17. Findlay v. Copeland Lumber Co., 265 Ore. 300, 303, 509 P.2d 28, 31 (1973).

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was hidden, he must show that it was either technologically feasible to design the product in a safer manner or that the marketing of the product as designed was not justifiable because the gravity of the harm threatened by the product outweighed the utility of its use. Thus there may be no liability in the case of "unavoidably unsafe" products, even if the danger is hidden and the product would be defective under the consumer expectations test.

Misuse can also negate the existence of defect on the basis that the product is not "unreasonably dangerous." Suppose the plaintiff uses a soda bottle which contains no physical flaw as a container in which to bury his money. Continual freezing and thawing of the ground cause the bottle to break, and the money is destroyed by moisture in the ground. Even assuming that consumer expectations are violated because reasonable consumers would not expect the bottle to break under such circumstances, the product is not defective. Under Comment k of the Restatement the product is unavoidably unsafe. It is not economically feasible to make a glass soda bottle which will not break under such circumstances, and the utility of using such containers for soda outweighs the gravity of harm resulting to the plaintiff in the example. Use of the soda bottle for a hammer renders the product not unreasonably dangerous for the same reasons. Of course, it is technologically possible to produce a soda container that is safe for use both as a hammer and an underground vault; however, the container manufacturer is not required by reasonable care to produce a product suitable for such purposes.

Failure to warn is a possible alternative theory of liability in such cases. If plaintiff's use of the soda bottle to bury his money is reasonably foreseeable, the manufacturer would have to give an adequate warning against such use.[18] However, in the case where the soda bottle is used as a hammer no warning against such use is necessary because the danger is generally known and a warning would serve no useful purpose.[19] Thus, as long as consumer expectations are not foreseeably violated, either because the shortcoming of the product is obvious or has been warned against, there is no liability because the product is not defective.

The analytical framework for determining whether to apply comparative negligence to misuse in a Restatement jurisdiction can be illustrated with the following example. Assume the plaintiff uses the defendant's lighter fluid to clean parts, and is made ill because of the toxic fumes the fluid emits. Under the Restatement test the product is defective only if it violates consumer expectations and is also unreasonably dangerous. If the danger is generally known, the product is not defective and the

18. RESTATEMENT, *supra* note 9, § 402A, comment h.
19. *Id.* at comment j.

HeinOnline -- 43 Mo. L. Rev. 648 1978

plaintiff is barred from recovery because the first aspect of the Restatement test is not met. Assuming the danger is not generally known, consumer expectations have been violated. However, the lighter fluid is not defective unless it is also unreasonably dangerous. Since the danger in the example is caused by the design of the product, the product is unreasonably dangerous only if it was unreasonably designed or if the manufacturer unreasonably failed to give an appropriate warning. Assuming no such lack of care the product is not defective and the plaintiff should be completely barred from recovery. Comparative negligence is not appropriate. If the product is unreasonably dangerous it would be appropriate to apply comparative negligence to the plaintiff's misuse. If the plaintiff's misuse was unreasonable, his damages would be mitigated accordingly.

A dispute exists as to whether foresight or hindsight should be used to determine whether a product is unreasonably dangerous in its design. One interpretation of the Restatement scheme is that strict liability is limited to dangerous manufacturing flaws that violate consumer expectations. In the case of improper design which creates unexpected dangers, the Restatement imposes liability only if the design was negligently adopted,[20] or if the manufacturer had negligently failed to warn.[21] This interpretation is consistent with the view of Dean Prosser[22] who was the Reporter for the Restatement at the time section 402A was adopted. It is also consistent with the law of products liability as of 1965, the date of

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20. Balido v. Improved Machinery, Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973); Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66 (Ky. App. 1973); W. PROSSER, *supra* note 4, at 644, 659; 2 L. FRUMER AND M. FRIEDMAN, PRODUCTS LIABILITY, § 16A [f], [i]; 3 *Id.* § 33.02[4], p. 328; Katz, *The Function of Tort Liability in Technology Assessment,* 38 U. CIN. L. REV. 587, 632 (1969); Kissel, *Defenses to Strict Liability,* 60 ILL. B.J. 450, 461-64 (1972); Polelle, *The Foreseeability Concept and Strict Products Liability: The Odd Couple of Tort Law,* 8 RUT.-CAM. L.J. 101, 110-11 (1976); Powell and Hill, *Proof of Defect or Defectiveness,* 5 U. BALT. L. REV. 77, 81, 100 (1975); Note, *Products Liability and Section 402A of the Restatement of Torts,* 55 GEO. L.J. 286, 303, 317-18 (1966); Comment, *Reasonable Product Safety: Giving Content to the Defectiveness Standard in California Strict Products Liability Cases,* 10 U.S.F. L. REV. 492, 506-07 (1976); Note, *Torts—Strict Liability—Automobile Manufacturer Liable for Defective Design That Enhanced Injury After Initial Accident,* 24 VAND. L. REV. 862, 866 n.37 (1971). *See also* Boisfontaine, *Products Liability—An Overview,* 20 LA. B.J. 269, 271 (1973).

21. Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974); Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968); Oakes v. E.I. DuPont de Nemours & Co., 272 Cal. App. 2d 645, 77 Cal. Rptr. 709 (1969); W. PROSSER, *supra* note 4, at 644, 646, 659; Kissel, *supra* note 20, at 462-64; Note, 55 GEO. L.J., *supra* note 19, at 317-18; Symposium—*The State of the Art Defense in Strict Products Liability,* 56 MARQ. L. REV. 649, 658 (1974); Comment, 10 U.S.F. L. REV., *supra* note 20, at 506-07.

22. W. PROSSER, *supra* note 4, at 644-45, 646, 659 nn.72-73, 661.

adoption of the Restatement,[23] and with the language of the comments to the Restatement.[24]

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23. Strict tort liability developed from the law of warranty. The Restatement imposes the same liability for physical harm as that imposed under implied warranty except that the contractual defenses of disclaimer, lack of privity, and lack of notice are not recognized. *E.g.*, Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362, 364 (Mo. 1969); Krauskopf, *Products Liability*, 32 Mo. L. Rev. 459, 469 (1967); Reitz and Seabolt, *Warranties and Product Liability: Who Can Sue and Where?*, 46 Temp. L.Q. 527 (1973); Rheingold, *What Are the Consumer's "Reasonable Expectations"?*, 22 Bus. Law. 589, 589-91 (1967). The implied warranty of merchantability is that the goods are "fit for the ordinary purposes for which such goods are used. . . ." U.C.C. § 2-314(c). This is interpreted to mean "reasonable fitness" rather than absolute fitness. Keeton, *Product Liability and the Automobile*, 9 Forum 1, 7 (1973); Rheingold, *supra* note 23 at 590 n. 4; Note, *The Automobile Manufacturer's Liability to Pedestrians for Exterior Design: New Dimensions in "Crashworthiness"*, 71 Mich. L. Rev. 1654, 1670-71 (1973). Thus, under this theory there is also no liability for marketing unavoidably unsafe products unless negligence is shown. Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964); Hays v. Western Auto Supply Co., 405 S.W.2d 877 (Mo. 1966). *But see* Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963).

24. To avoid liability under the comment k exception, the product involved must be "properly prepared, and accompanied by proper directions and warning. . . ." Restatement, *supra* note 9, § 402A, comment k. Suppose the manufacturer of a new cold remedy fails to discover that its use creates a risk of ear infection. If the risk exists because the product was negligently manufactured, the manufacturer is liable because the drug was not "properly prepared."

Similar reasoning applies in warning cases. Suppose there was no negligence in manufacture. A failure to warn of the risk of ear infection can render the product defective. Restatement, *supra* note 9, § 402A, comments j and k. However, the Restatement expressly provides that the seller must warn only if "he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge" of the danger. *Id.*, comment j. This is clearly a test of ordinary negligence. Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); Skaggs v. Clairol, Inc., 6 Cal. App. 3d 1, 85 Cal. Rptr. 584 (1970); Oakes v. E.I. DuPont de Nemours & Co., 272 Cal. App. 2d 645, 77 Cal. Rptr. 709 (1969); Kissel, *supra* note 20, at 462-64; Note, 55 Geo. L.J., *supra* note 20, at 303; Symposium, *supra* note 21, at 658; Comment, *supra* note 20, at 506-07 (1976). Thus, a failure to warn will not render the product defective unless the manufacturer has been negligent in not giving a warning. *See* authorities cited note 21 *supra*. If follows that there is no liability for marketing the cold remedy with an unknowable risk of ear infection, at least if upon later discovery it appears to be a reasonable risk when a proper warning is given. This is because there has been no negligent failure to warn and use of the drug is justified because its utility as a cold remedy outweighs the gravity of harm threatened. Restatement, *supra* note 9, § 402A, comment k.

Suppose the unknowable risk of ear infection turns out upon discovery to be unreasonable when compared to the benefit of the product as a cold remedy. Is the manufacturer liable? The Restatement implies that there is no liability. Comment k to § 402A applies to new or experimental drugs as to which because of lack of time and opportunity for sufficient medical experience there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a

HeinOnline -- 43 Mo. L. Rev. 650 1978

Acceptance of this interpretation of the Restatement has been mixed. It is most commonly adhered to in cases involving drugs,[25] and some courts adhere to it in all cases.[26] However, others reject the interpretation in cases not involving drugs.[27]

The other view of the Restatement scheme is to use hindsight at the time of trial rather than foresight at the time of manufacture to determine whether a product is "unreasonably dangerous." Knowledge of the danger and feasible design alternatives as of the date of trial are imputed to the manufacturer, and the product is deemed unreasonably dangerous if a reasonable manufacturer with such knowledge would not have marketed the product in the same fashion as the defendant.[28] This method is used to determine both the adequacy of the design of the product and of the warning that was or should have been given. This "hindsight" approach has long been advocated by Professors Wade and Keeton.[29] It is becoming increasingly popular with other legal scholars.[30]

The analysis for determining whether to apply comparative negligence to misuse is essentially the same regardless of which interpretation is accepted in a particular jurisdiction. The only difference is that the

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medically recognizable risk. RESTATEMENT, *supra* note 9, § 402A, comment k. There is no policy basis for imposing liability here but not in the prior example where the unknowable risk of ear infection turned out in retrospect to be reasonable. A reasonable risk that has been inadequately warned against can present as grave a danger to the consumer as the unknowable risk that turns out upon discovery to be unjustified. In both instances, the manufacturer may be equally blameless and equally unable to spread the risk.

25. Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts,* 60 MARQ. L. REV. 297, 317 (1977); Comment, *The Diminishing Role of Negligence in Manufacturers' Liability for Unavoidably Unsafe Drugs and Cosmetics,* 9 ST. MARY'S L.J. 102 (1977).

26. Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976) (Nebraska law), *noted in* 56 NEB. L. REV. 422 (1977); Jones v. Hutchinson Mfg. Co., 502 S.W.2d 66 (Ky. App. 1973), *discussed in* Comment, *Products Liability: Is § 402A Strict Liability Really Strict in Kentucky?,* 62 KY. L.J. 866 (1974).

27. This is true even though comment k to RESTATEMENT § 402A expressly applies to all products. It merely uses drugs as a common example. The comment begins with the following statement: "There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs."

28. Phillips v. Kimwood Mach. Co., 269 Ore. 485, 525 P.2d 1033 (1974); Roach v. Kononen, 269 Ore. 457, 525 P.2d 125 (1974).

29. Keeton, *Product Liability and the Automobile,* 9 FORUM 1 (1973); Wade, *On the Nature of Strict Tort Liability for Products,* 44 MISS. L.J. 825, 834-35 (1973).

30. Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products,* 27 S.C. L. REV. 803, 829 (1976); Phillips, *supra* note 1, at 103, 115-16 (1977); Comment, 10 U.S.F. L. REV., *supra* note 20.

HeinOnline -- 43 Mo. L. Rev. 651 1978

manufacturer's knowledge of the danger involved in the use of the product and the availability of technology to eliminate the danger is determined as of the date of manufacture in one case and as of the date of trial in the other case. Thus, in the lighter fluid example, if consumer expectations are not violated because the danger is generally known, there is no liability whatsoever. If consumer expectations are violated, there is still no liability unless the product is also unreasonably dangerous. The unreasonably dangerous determination is made with hindsight rather than foresight. The issue is whether, knowing everything that is known at the time of trial about the dangers of the product and the technology currently available, the product as formulated is reasonably safe. If it is, the additional question must be considered of whether a reasonable person knowing of the danger would have given a different warning than was actually given by the manufacturer. Assuming that the product is defective, it is entirely appropriate to apply comparative negligence to the plaintiff's misuse. However, if the product is not defective the plaintiff should be completely barred. Oregon apparently follows this approach.[31]

Misuse may also negate the existence of the defect in a third way. In some cases the plaintiff has no direct evidence of defect. He proves it circumstantially by showing that the product malfunctioned. Under some circumstances, this creates an inference that the product is defective.[32] In such cases, evidence of subsequent alterations in the product or mishandling can prevent the inference from arising because it becomes a matter of speculation whether the product was defective when it left the hands of the manufacturer or developed a defect at the time of the misuse.[33]

2. Other Approaches to Determining Defect

A number of other approaches for determining defect have been used. To a large extent these approaches are variations on the tests for defect used by the Restatement.

Consumer expectations as sole test of defect

One approach is to resolve all cases by using the consumer expectations test as the sole criteria for determining defectiveness.[34] This test

31. *Compare* Phillips v. Kimwood Mach. Co., 269 Ore. 485, 525 P.2d 1033 (1974) *with* Findlay v. Copeland Lumber Co., 265 Ore. 300, 509 P.2d 28 (1973) in light of the discussion of misuse in Part I of this article.

32. *E.g.*, Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 470 P.2d 240 (1970).

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

34. Manufacturing defects: Maas v. Dreher, 10 Ariz. App. 520, 460 P.2d 191 (1969). Unavoidably unsafe products: Lunt v. Brady Mfg. Corp., 13 Ariz. App. 305, 475 P.2d 964 (1970); Morrow v. Trailmobile, 12 Ariz. App. 578, 473 P.2d

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grants a limited immunity to the manufacturer.[35] He is free to market dangerous products, even if the danger feasibly can be eliminated or reduced, as long as he makes the danger known.[36] This test has the virtue of relieving courts from having to evaluate the reasonableness of particular designs,[37] a function that one author contends, is beyond the competency of courts.[38] Use of consumer expectations as the sole test of defect has serious drawbacks which have been fully discussed elsewhere.[39]

In jurisdictions that use consumer expectations as the sole test of defect, the appropriateness of applying comparative negiligence to misuse depends on whether those expectations have been violated. Referring to the example of the person injured by lighter fluid when using it to clean parts, recovery should be completely barred if the danger of being injured by the toxic fumes is generally known. In this situation consumer expectations have not been violated and the product is not defective. If the danger is not generally known, then consumer expectations have been violated and the product is defective. Here applicability of comparative negligence to the plaintiff's conduct is appropriate.

Wade/Keeton hindsight test

Another variation is to reject the consumer expectations test of defect. While the test remains a major test of defect,[40] an increasing number of courts have rejected it[41] in selected cases. Typically this occurs in cases where a bystander is injured by a defective product[42] or where an employee is required to use an obviously dangerous machine under circumstances where he is likely to injure himself inadvertently.[43] In such cases, the consumer expectations test sets particularly inappropriate

780 (1970); Wagner v. Coronet Hotel, 10 Ariz. App. 296, 458 P.2d 390 (1969). *See* Ginnis v. Mapes Hotel Corp., 470 P.2d 135 (Nev. 1970).

35. Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication,* 73 COLUM. L. REV. 1531, 1560 (1973).

36. *Id.* at 1561.

37. *Id.* at 1560.

38. *Id.* at 1557-58.

39. Fischer, *Products Liability—The Meaning of Defect,* 39 MO. L. REV. 339, 348-52 (1974).

40. Henderson, *supra* note 35, at 1560-61.

41. Rhoads v. Service Mach. Co., 329 F. Supp. 367 (E.D. Ark. 1971); Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd,* 474 F.2d 1339 (3d Cir. 1973); Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); Thompson v. Package Mach. Co., 22 Cal. App. 3d 188, 99 Cal. Rptr. 281 (1972); Brown v. Quick Mix Co., Div. of Koehring Co., 75 Wash. 2d 833, 454 P.2d 205 (1969); Palmer v. Massey-Ferguson, Inc., 3 Wash. App. 508, 476 P.2d 713 (1970).

42. Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

43. Rhoads v. Service Mach. Co., 329 F. Supp. 367 (E.D. Ark. 1971).

HeinOnline -- 43 Mo. L. Rev. 653 1978

criteria for determining whether to impose strict liability in view of the policy considerations involved.[44]

In jurisdictions that reject the consumer expectations test, the Wade/Keeton hindsight test can be the sole test of defect, applying to cases involving manufacturing defects as well as improper design or warning.[45] Obviousness of the danger would still be relevant insofar as it relates to reasonableness.

In jurisdictions that use the Wade/Keeton Hindsight test as the sole test of defect, the appropriateness of applying comparative negligence to misuse depends solely on whether the product is unreasonably dangerous as marketed using hindsight. If it is not unreasonably dangerous the product is not defective and the plaintiff should be completely barred. If it is unreasonably dangerous, application of comparative negligence is appropriate. In the lighter fluid example, the product is defective if in retrospect a different design or warning should have been adopted.

Consumer Expectations or Wade/Keeton Hindsight Test

An alternative approach that has sometimes been taken is to instruct that the product is defective if it is either unreasonably dangerous under the Wade/Keeton test *or* if it contains dangers that a reasonable buyer would not expect.[46] The use of the two tests in the disjunctive rather than in the conjunctive produces a significant change. The manufacturer can be liable for marketing a product containing a reasonable danger if the danger is unknown. Thus the seller of a new drug which contains a scientifically unknowable risk of a dangerous side effect would be held strictly liable to the first individuals who suffer the side effect even if, in retrospect, the advantages of the drug outweigh the disadvantages so that its marketing is reasonable. However, as soon as the danger becomes known, the manufacturer will warn against the use of the product. This will preclude imposition of liability in subsequent cases because the warning would prevent a frustration of consumer expectations. This arbitrarily follows even in cases where the consumer has no practical alternative to taking the drug and thus the warning is of no value in helping him to avoid the risk.

To determine whether applicability of comparative negligence to an instance of misuse is appropriate in such a jurisdiction, it is first neces-

44. *See* Fischer, *supra* note 39, at 348-52 for a discussion of the drawbacks of consumer expectations test.

45. Phillips v. Kimwood Mach. Co., 269 Ore. 485, 525 P.2d 1033 (1974); Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 568 (1969).

46. Barker v. Lull Eng. Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977); Montgomery & Owen, *supra* note 30, at 843-45.

HeinOnline -- 43 Mo. L. Rev. 654 1978

sary to determine whether the product is defective. This can be illustrated again with the lighter fluid example. The product is defective either if the danger is not generally known or if the danger is unreasonable viewing it in retrospect. Thus if the danger of the toxic fumes is not generally known, the product is defective and application of comparative negligence to the misuse is appropriate. Even if the danger is generally known, the product is still defective, and applicability of comparative negligence is still appropriate, as long as the product is unreasonably dangerous as marketed using hindsight. Applicability of comparative negligence to misuse would only be inappropriate if the danger is generally known and the product is reasonably safe in the way it was designed and in the way the warnings were given.

Submission of case to jury without guidance

Other jurisdictions have made a complete departure from the Restatement. California led the way by first rejecting the "unreasonably dangerous" language of the Restatement.[47] California had also rejected the consumer expectations test.[48] Alaska has now followed California's lead and similarly rejected both tests of defect.[49] This in effect left such jurisdictions without any test of defect.[50] Under this scheme the jury is simply instructed to determine whether the product is "defective."[51]

This approach has its drawbacks. It can work well with cases involving physically flawed products because the common understanding of the word "defect" includes such products. However, in the case of improper design or failure to warn, the term "defect" has no natural application, and the jury is left with inadequate guidance.[52]

In recognition of this difficulty the California Supreme Court has recently backed off from its earlier approach of rejecting both tests of defect. It now uses the consumer expectations test and the Wade/Keeton hindsight test in the disjunctive for cases involving design defects.[53] It remains to be seen whether Alaska will similarly retreat in view of the recent California decision.

In jurisdictions that submit the case to the jury without guidance as to what constitutes a defect, it is normally appropriate to apply comparative

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47. Cronin v. J. B. E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).
48. Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).
49. Butaud v. Suburban Marine and Sporting Goods, Inc., 543 P.2d 209 (Alas. 1975).
50. Buccery v. General Motors Corp., 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976).
51. Cronin v. J. B. E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).
52. Wade, *supra* note 29, at 831-33, 838.
53. See text accompanying note 44 *supra*.

HeinOnline -- 43 Mo. L. Rev. 655 1978

negligence to misuse. The misuse in the lighter fluid example is not relevant to the question of whether the product is defective because there is no requirement that the product either violate consumer expectations or be unreasonably dangerous.

In deciding to apply comparative negligence to strict liability cases, the Alaska court ruled that unforeseeable misuse will constitute a basis for apportioning damages rather than a complete defense.[54] In that jurisdiction, this is a desirable approach. Since Alaska has no test of what constitutes a defect, misuse will normally[55] not be relevant to negating the existence of defect. Thus, unless it prevents the plaintiff from proving causation,[56] it can only be relevant to the question of contributory negligence, assuming that a misuse is unreasonable.

3. Foreseeable and Unforeseeable Misuse

It is often said that only unforeseeable misuse will cut off liability of a manufacturer.[57] This is not literally true. While a manufacturer is liable for some foreseeable misuses, such as standing on a chair,[58] he is clearly not liable for all foreseeable misuses. Foreseeability in isolation is not the test.

There are some situations where foreseeable misuse will cut off liability. For example, it is foreseeable to anybody who watches television that beverage bottles are sometimes used as weapons, but such bottles are not defective for the reasons discussed above. Also, no warning is required here because the hazards of using a bottle in such a way are obvious.

A foreseeable failure to follow directions will likewise not always result in liability. Surely it is foreseeable to tire manufacturers that users sometimes fail to keep the prescribed amount of air pressure in their tires. It is also foreseeable that this constitutes a serious hazard. However, it may not be possible to make a tire that is safe for use when greatly over-inflated or greatly under-inflated. Therefore, the manufacturer is relieved from liability as long as he gives an adequate warning.[59] He is entitled to "reasonably assume that it will be read and heeded."[60]

Likewise, not all unforeseeable misuse will cut off liability. Suppose the plaintiff purchases a pickup truck which has a defective steering mechanism. While in the course of using the pickup truck as a taxi cab, the vehicle fails to steer properly and an accident results. Plaintiff is

54. Butaud v. Suburban Marine and Sporting Goods, Inc., 555 P.2d 42 (Alas. 1976).

55. In cases where the only evidence of defect is circumstantial, misuse may prevent the inference of defect from arising.

56. Part II-B, *infra.*

57. Noel, *supra* note 3, at 96-98; Note, *supra* note 3, at 198.

58. Schwartz, *supra* note 1, at 173-74.

59. RESTATEMENT, *supra* note 9, § 402A, comment k.

60. *Id.*, comment j.

seriously injured. Use of the vehicle as a taxi cab is an unforeseeable abnormal use because the manufacturer would not have contemplated such a use. The misuse is also a cause in fact of the accident in the sense that the plaintiff would not have been injured if he had been using a different vehicle for transporting his passengers. Yet this misuse does not prevent the imposition of liability. The product was defective, and the defect was the proximate cause of the harm to the plaintiff. Furthermore, contributory fault is no defense because plaintiff's conduct was entirely reasonable.

The analysis for determining the effect of misuse is the same regardless of whether the misuse is foreseeable or unforeseeable. One must first determine whether the misuse negates an element of plaintiff's case with reference to the scheme of strict liability in force in the jurisdiction in question. If not, one must determine whether the conduct constitutes an affirmative defense recognized in that jurisdiction.

B. *Negating Proximate Cause*

Misuse may also have relevance in resolving questions of proximate cause. Suppose in the case where plaintiff used the soda bottle as a container for burying his money, the freezing and thawing of the ground broke the bottle because of a pre-existing flaw in the glass. A sound bottle would not have broken under such conditions. Here the bottle is clearly defective and unreasonably dangerous because of the risk that it might explode and injure someone in the vicinity. Yet it is unlikely that the court would hold the defendant liable when an entirely different hazard (moisture) materializes.[61] Under other strict liability theories courts have usually taken a restrictive view of proximate cause, limiting recovery to harm resulting from the risk that led to the imposition of strict liability.[62]

C. *Misuse as an Affirmative Defense*

Misuse which does not negate an element of plaintiff's case is relevant only insofar as it constitutes an affirmative defense. In a given case misuse may be reasonable or unreasonable. It also sometimes involves a voluntary encountering of a known risk and sometimes does not. These factors are important in determining whether contributory negligence, assumption of the risk, or both are present. Courts differ with respect to which of these defenses they recognize in strict liability cases. Thus, each allegation of misuse must be closely scrutinized to determine whether it qualifies as an affirmative defense.

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61. Note, *Torts—Proximate Cause in Strict Liability Cases,* 50 N.C. L. REV. 714, 715, 717, 722 (1972).

62. *Id. See also* Foster v. Preston Mill Co., 44 Wash. 2d 440, 268 P.2d 645 (1954) (no liability for a blasting operation which caused mother mink to eat her young).

HeinOnline -- 43 Mo. L. Rev. 657 1978

III. Assumption of the Risk

A. *Nature of the Defense*

Assumption of the risk can be either express or implied. Implied assumption of the risk occurs if the plaintiff knows of the risk that defendant has created and voluntarily encounters it anyway.[63] Express contractual assumption of the risk occurs when plaintiff agrees to relieve defendant from liability in advance.[64]

Assumption of the risk may be either reasonable or unreasonable depending on the plaintiff's reason for encountering the risk.[65] If comparative negligence is applied to assumption of the risk, reasonable assumption of the risk would not diminish the plaintiff's recovery because he is guilty of no fault.[66] Unreasonable assumption of the risk would diminish the plaintiff's recovery exactly as would contributory negligence.

It is not clear which of the various forms of assumption of the risk are recognized by the Restatement. It clearly recognizes unreasonable assumption of the risk as a complete defense.[67] The Restatement does not address itself to the question of whether a reasonable assumption of the risk should be a defense. This involves the situation where the plaintiff voluntarily encounters a known risk, but is not contributorily negligent because the interest he is protecting is sufficiently important to make the encountering of the risk reasonable. The Restatement also does not address the question of whether express contractual assumption of the risk is a defense. It is clear that such an agreement is normally effective between the parties unless the agreement is inconsistent with public policy.[68]

It would be inaccurate to assume that all forms of assumption of the risk should be treated in the same manner under comparative negligence. The term assumption of the risk includes a broad range of conduct, some of which should perhaps be an absolute defense to a strict liability action and other instances of which should be no defense at all. Still other conduct may be appropriately recognized as a partial defense under comparative negligence. The appropriate treatment must be divined from an analysis of each jurisdiction's policy and specific form of strict products liability imposed.

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63. Comment, *Torts: Comparative Negligence + Implied Assumption of Risk = Injustice*, 27 OKLA. L. REV. 549, 550 (1974).

64. Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 124 (1961).

65. *Id.* at 133.

66. Schwartz, *Li v. Yellow Cab Company: A Survey of California Practice Under Comparative Negligence*, 7 PAC. L.J. 747, 756 (1976).

67. RESTATEMENT, *supra* note 9, § 402A, comment n.

68. Keeton, *supra* note 64, at 134-35.

HeinOnline -- 43 Mo. L. Rev. 658 1978

B. *Policy Considerations*

The most common policy justification for recognition of the assumption of the risk defense is that it constitutes a form of consent. If this is true it should be a complete bar to recovery in negligence actions just as consent is a bar in actions for intentional tort recovery.[69] In fact, the consent analogy is valid for some forms of assumption of the risk but not for others. This becomes clear when the policy bases for making consent an absolute defense to intentional torts are evaluated.

No wrong occurs to one who is willing that an interest be invaded.[70] Technically, consent is not an affirmative defense to intentional torts.[71] Thus, one who agrees to fly in an airplane has not been falsely imprisoned because the confinement has not been against his will, an essential element of the tort.[72] One who agrees to a kiss has not suffered a battery because no harmful or offensive contact has occurred.[73]

For policy reasons the same rationale is applied to some cases where harm is inflicted. If plaintiff agrees to a surgical operation, a harm does occur in the sense that the incision is a "harmful contact."[74] Yet consent prevents the imposition of liability for battery because the decision was made that the benefits conferred by the operation would most likely outweigh its harmful effects. In our society the power to make that decision is conferred upon the patient rather than upon some outside agency such as the government. The theory is that the person involved is better able to make a decision in his own best interest than would be the government.[75] The surgeon might refuse to operate if he knew that the plaintiff could change his mind after the operation and hold the surgeon liable for battery.[76] Failure to recognize consent as a defense would frustrate the policy of conferring the decision-making power on the plaintiff because defendent would be inhibited from acting in response

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69. *E.g.*, Polelle, *supra* note 20, at 132; Wade, Crawford & Ryder, *supra* note 1, at 454, 460.

70. W. PROSSER, *supra* note 4, § 18.

71. 1 F. HARPER AND F. JAMES, THE LAW OF TORTS § 3.10 (1956); W. PROSSER, *supra* note 4, § 18; Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace,* 24 COLUM. L. REV. 819 (1924); Carpenter, *Intentional Invasion of Interest of Personality* (pt. 2), 13 ORE. L. REV. 275, 282 (1934); Comment, *Consent in Tort Actions,* 3 MO. L. REV. 44 (1938); Note, 24 MARQ. L. REV. 108 (1940); Note, 8 OKLA. L. REV. 117, 118 (1955). *See* Commonwealth v. Carpenter, 172 Pa. Super. 271, 94 A.2d 74 (1953). However, some courts treat the issue as an affirmative defense. They place the burden of proof on the defendant. Note, 8 OKLA. L. REV. 117, 118 (1955). *See, e.g.,* Sims v. Alford, 218 Ala. 216, 118 So. 395 (1928).

72. Herring v. Boyle, 1 Cr. M. & R. 377, 149 Eng. Rep. 1127 (Ex. 1834).

73. RESTATEMENT, *supra* note 9, §§ 15, 19.

74. *Id.* at § 15.

75. Mansfield, *Informed Choice in the Law of Torts,* 22 LA. L. REV. 17, 23-24 (1961).

76. *Id.* at 25.

to the plaintiff's choice.[77] In order to encourage individuals to act in response to free choices by others the law goes one step further by making apparent consent a bar to recovery.[78]

Whether comparative negligence should be applied to assumption of the risk depends upon the extent to which the consent analogy is valid. Thus if assumption of the risk prevents a wrong from occurring or if it needs to be recognized in order to encourage people to act in response to free choices made by others it should be an absolute defense. Otherwise it should either be a basis for mitigating damages under comparative negligence, or it should be no defense at all.

Where the consent analogy is valid there is no basis for distinguishing between reasonable and unreasonable assumption of risk. If reasonable consent is an absolute defense then unreasonable consent should also be an absolute defense. Application of comparative negligence to unreasonable assumption of the risk merely rewards the plaintiff for his own misconduct by permitting him a partial recovery; he would have been barred completely had he been acting reasonably.

C. *Express Assumption of the Risk*

Express assumption of the risk bears the closest relationship to consent to intentional torts. Plaintiff agrees to relieve defendant from liability in advance. Recognition of the defense obviously encourages defendants to act in response to the plaintiff's choice; removing the spectre of potential liability can free a producer to give the consumer what he wants.

Express assumption of the risk is normally recognized as an absolute defense unless the agreement is barred as being inconsistent with public policy, in which case it is no defense at all.[79] In products liability litigation such agreements frequently take the form of disclaimers, and in many cases are not recognized.[80] It is obviously desirable that some "as is" sales be permitted in society. Consequently there will be situations when the agreement is valid and will be upheld. Courts have not applied comparative negligence concepts to express assumption of the risk.[81]

D. *Implied Assumption of the Risk*

Implied assumption of the risk is not analogous to consent in the sense that no wrong occurs as a result of plaintiff's conduct. Assume plaintiff uses a punch press knowing it has an inadequate safety guard. He is

77. *Id.*

78. *Id.* at 25-26; RESTATEMENT (SECOND) OF TORTS § 892 (Tent. Draft No. 18, 1972).

79. Keeton, *supra* note 64, at 134-35, 137-38.

80. *E.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

81. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.2 (1974).

HeinOnline -- 43 Mo. L. Rev. 660 1978

injured as a result. The defendant manufacturer's conduct in designing the safety guard is wrongful because the assumption of risk took place only after the defendant's breach of duty, *i.e.,* after defendant marketed the defective product, plaintiff discovered the risk and voluntarily encountered it. Clearly a wrong occurred to the plaintiff. He did not consent to suffer the harm, but merely to encounter the risk of the harm occurring. Furthermore, he did not agree to hold the defendant harmless in the event that the risk should materialize.[82] Thus this is really not analogous to the alleged battery where the plaintiff agrees to be kissed. In that case no battery occurred because the kiss was neither an offensive nor a harmful touching to the plaintiff. In the punch press case the plaintiff suffered a harm that he hoped would not occur and which would have been avoided if the defendant's product had not been defective.

The only justification for barring plaintiff's recovery in such a case is to advance the policy of encouraging people to act in response to free choices of others. This justification would almost never exist in products liability cases involving implied assumption of the risk. Such cases involve products that are generally dangerous and equally likely to injure people who have not discovered the risk. Discovery of the risk by the plaintiff prior to injury is merely fortuitous from the point of view of the defendant. He cannot know in advance whether the victim will turn out to be a person who discovered the risk. He is motivated to assume that the potential victim will not have discovered the risk to guard against potential liability. Therefore, recognition of the defense serves no useful purpose from the point of view of inducing appropriate conduct by the defendant.[83]

The consent analogy is so imperfect that it is obviously not the true policy basis of implied assumption of the risk. The most likely explanation is that the defense was contrived as an arbitrary bar to recovery at a time when emerging industry needed protection.[84] Because industry is now sufficiently well established that it no longer needs this protection, one might expect the defense to cease to be recognized. In fact, the trend in this country is away from recognition of reasonable assumption of the risk as a defense.[85]

Since consent is not the basis of implied assumption of the risk, it need not be recognized as an absolute bar to recovery. Rather, it is appropriate to apply comparative negligence to assumption of the risk. Of course reasonable assumption of the risk will not reduce the plaintiff's

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82. *Id.* at § 9.1.

83. Mansfield, *supra* note 75, at 71-72.

84. *E.g.,* V. SCHWARTZ, *supra* note 81, § 9.1.

85. McNichols, *supra* note 1, at 389; Comment, *Colorado Comparative Negligence and Assumption of risk,* 46 U. COLO. L. REV. 509, 527-28 (1975).

HeinOnline -- 43 Mo. L. Rev. 661 1978

recovery under comparative negligence because he has not been at fault; to the extent that the plaintiff's conduct is unreasonable, it should merely be treated as contributory negligence and be used to mitigate damages.[86]

E. *Negating Elements of Plaintiff's Case*

In situations where assumption of the risk is used to express the conclusion that the product is not defective, it should remain an absolute defense. As discussed earlier, many courts use the consumer expectations test of defect.[87] In effect, this distinguishes between obvious or generally known hazards and latent or unknown hazards. This is essentially the same distinction that has long been employed to limit the duty of landowners towards people who enter the premises. Injuries caused by obvious hazards do not give rise to liability. One way of expressing this is to say that there is "no duty" and thus the landowner has not been negligent in failing to correct the dangerous condition. An alternative approach is to say that entrants assume the risk of all obvious hazards.[88] This is different from implied assumption of the risk because the plaintiff is not required to know of the hazard or voluntarily encounter it. Assumption of the risk has generally not been used in this sense in products liability cases.[89] However, if it is used in this sense in a jurisdiction that applies comparative negligence to strict liability cases, it is clear the damages should not be apportioned. Under such circumstances the plaintiff has not proven that the product is defective since the consumer expectations test has not been violated.

In jurisdictions that accept the consumer expectations test of defect, a related question arises. Should implied assumption of the risk constitute an absolute defense? In such jurisdictions the limited duty of the manufacturer is to disclose the risk involved in his product. Should not the plaintiff who has independently acquired this information concerning a latent defect also be absolutely barred?

The answer depends on the underlying basis for the consumer expectations test. Professor Henderson suggests that the virtue of the consumer expectations test is that it protects courts from having to determine the reasonableness of product designs, a task of which they are incapable.[90] If this were true and were the only factor involved, it would point toward recognition of assumption of the risk as an absolute defense. However, Professor Henderson argues that the consumer ex-

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86. V. SCHWARTZ, *supra* note 81, § 9.5.
87. See Part II, *supra*.
88. Keeton, *supra* note 64.
89. Henderson, *supra* note 35.
90. *Id.* at 1560.

HeinOnline -- 43 Mo. L. Rev. 662 1978

pectations test has the additional virtue of relegating to the marketplace the question of how much safety must be designed into a specific product.[91] The test requires manufacturers either to produce products with only obvious hazards or to give a warning. Consumers thus informed will avoid purchasing products that are unduly dangerous on the one hand or that have unreasonably expensive or cumbersome safety devices on the other. This function of the marketplace to make decisions concerning product safety may be subverted in the implied assumption of the risk situation where the defect is discovered only after the purchase has been made. Where this occurs the product should be deemed defective since the function of the consumer expectations test has not been fully accomplished. Liability should be imposed subject to mitigation of damages in accordance with the degree of the plaintiff's fault.

Sometimes assumption of the risk can negate the element of causation. Suppose the defendant's only duty under the circumstances is to give a warning and the plaintiff independently discovers what would have been disclosed by the warning. Here his encountering of the risk cuts off the defendant's liability because he cannot prove that a warning would have prevented the harm.[92] This is true at least unless the evidence shows that the product would not have been purchased in the first place had an appropriate warning been given. Obviously assumption of the risk should be a complete defense here rather than a basis for apportioning damages since an element of the plaintiff's case is missing. Thus, even if a bystander is injured, assumption of the risk by the person using the product under these circumstances would cut off the bystander's right to recover damages.

IV. Conclusion

Jurisdictions electing to apply comparative negligence to strict liability must decide the extent to which it will apply to various forms of misuse and assumption of the risk. This determination could vary greatly from state to state because of differences in the nature of strict liability imposed. The law in each jurisdiction must be carefully analyzed to determine the appropriate role of comparative negligence in that jurisdiction.

This is especially true with regard to misuse. There are at least six distinct systems for determining if a product is defective:

1. Consumer expectations test only;
2. Consumer expectations test plus negligence in design and warning cases;
3. Consumer expectations test *plus* Wade/Keeton hindsight test;
4. Consumer expectations test *or* Wade/Keeton hindsight test;
5. Wade/Keeton hindsight test as sole test of defect; and
6. Submission of case to jury without guidance.

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91. *Id.*
92. Keeton, *supra* note 64, at 145-46.

Whether comparative negligence should be applied to a specific instance of misuse depends on which of the above schemes for determining defectiveness is used. The definition of defect adopted by a particular jurisdiction will determine whether the concept of misuse can be relevant to the existence of a defect. The consumer expectations test of defect is widely accepted, and misuse sometimes establishes that those expectations are not disappointed (use of soda bottle as a hammer). In jurisdictions that accept the Restatement requirement that the product be "unreasonably dangerous" as an element of defect, misuse can sometimes negate this element (use of soda bottle to bury money). In jurisdictions where misuse is not relevant to the question of defectiveness, it may be relevant, if at all, only insofar as it constitutes an affirmative defense. Here applicability of comparative negligence is entirely appropriate.

Ideally the term misuse need never be used. In jurisdictions where there is a test of defect the instruction should clearly require the jury to find all elements of the plaintiff's case before resolving the problem of damage apportionment. If the plaintiff has made a submissible case and if there is evidence of a recognized affirmative defense, the jury should be told to reduce the plaintiff's recovery in accordance with the degree of his fault. Here the issues are dealt with in terms of defect, causation, and contributory negligence. The term misuse is unduly confusing because it can be used to refer to all three concepts. This creates the danger that the burden of proof on an issue will be placed on the wrong party or that in a given case the plaintiff may be permitted to recover even though he cannot establish an element of his case.

The proper role of assumption of the risk in a comparative negligence jurisdiction depends largely on the policy basis for the defense. If assumption of the risk is a defense analogous to consent to intentional torts then it should remain an absolute defense even in a comparative negligence jurisdiction. If the assumption of the risk is express, the consent analogy is particularly appropriate and the defense should certainly be absolute.

The consent analogy is not appropriate in most cases of implied assumption of the risk. Here, applicability of comparative negligence is appropriate. It is therefore appropriate to diminish the plaintiff's recovery in accordance with his fault whenever his assumption of the risk is unreasonable. Reasonable assumption of the risk will have no effect on the plaintiff's ability to recover. In view of this result there is no longer any reason to distinguish between contributory negligence and implied assumption of the risk. All cases can be dealt with in terms of contributory negligence.

It is possible for assumption of the risk to be used as a way of describing a failure of the plaintiff to prove an element of his case, either defect or causation. When used in this sense assumption of the risk should

HeinOnline -- 43 Mo. L. Rev. 664 1978

be a complete bar to recovery rather than a basis for diminishing the plaintiff's recovery.

Products liability is still in its infancy, and the definition of defect will continue to evolve. The decision whether to impose strict liability involves policy questions of great importance, and it is unlikely that any single word formula can mechanically be applied to all cases to reach consistently satisfactory results. The appropriate role of comparative negligence in a given jurisdiction will have to be reevaluated with each stage in the evolution of the law of products liability.

HeinOnline -- 43 Mo. L. Rev. 665 1978

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