BYU Law Review

Volume 1981 | Issue 4 Article 5

11-1-1981

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The Merger of Comparative Fault Principles with Strict Liability in Utah: *Mulherin v. Ingersoll-Rand Co.*

With the 1979 decision of *Ernest W. Hahn, Inc. v. Armco Steel Co.*,[1] Utah joined the majority of jurisdictions accepting strict products liability as formulated by the Restatement (Second) of Torts section 402A.[2] However, the *Hahn* decision expressly left open a question that had troubled other jurisdictions from the earliest days of strict products liability:[3] When a plaintiff is injured through a combination of product defect and his own fault, should an affirmative defense of misuse or unreasonable use act as a complete bar to strict liability recovery or should comparative principles apply to merely diminish a plaintiff's recovery?[4] A minority of courts have refused to merge comparative

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1. 601 P.2d 152 (Utah 1979).

2. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Strict products liability as formulated by § 402A has been adopted by 26 states; courts in fourteen other jurisdictions have adopted a rule similar to § 402A. *See* Comment, *The Interaction of Comparative Negligence and Strict Products Liability—Where Are We?*, 47 INS. COUNSEL J. 53, 57 nn.47 & 48 (1980). Three states have adopted strict products liability by statute: Arkansas (ARK. STAT. ANN. § 34-2805 (Supp. 1981)), Georgia (GA. CODE §§ 105-106 (Supp. 1981)), and Maine (ME. REV. STAT. ANN. tit. 14, § 221 (1964)).

3. 601 P.2d at 158-59.

4. *See generally* Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Product Liability Suit Based on Section 402A of the Restatement of Torts 2d (Can Oil and Water Mix?)*, 42 INS. COUNSEL J. 39 (1975); Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337 (1977); Plant, *Comparative Negligence and Strict Tort Liability*, 40 LA. L. REV. 403 (1980); Sales, *Assumption of the Risk and Misuse in Strict Tort Liability—Prelude to Comparative Fault*, 11 TEX. TECH L. REV. 729 (1980); Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974); Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797 (1977); Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403 (1978); Wade, *On the Nature of Strict Liability for Products*, 44 MISS. L. REV. 825 (1973); Comment, *Comparative Contribution and Strict Tort Liability: A Proposed Reconciliation*, 13 CREIGHTON L. REV. 889 (1980); Comment, *The Interaction of Comparative Negligence and Strict Product Liability—Where Are We?*, 47 INS. COUNSEL J. 53 (1980); Comment, *Strict Products Liability In Utah Following* Ernest W. Hahn, Inc. v. Armco Steel Co., 1980 UTAH L. REV. 577; Note, Timmerman v. Universal Corrugated Box Machinery Corp.—*An Exception to the Doctrine of Comparative Negligence in Products Liability Litigation: Michigan Courts Speak Out on Public Act 495*, 1981 DET. L. REV. 223; Note, *Products Liability—Washington Refuses to Allow Comparative Negligence To Reduce A Strict Liability Award*, 56 WASH. L. REV. 307 (1981); Note, *Assumption of the Risk As the Only*

fault principles with strict liability because strict liability is not based in fault and thus cannot logically be merged with a fault-based doctrine like comparative negligence.[5] But the Utah Supreme Court in *Mulherin v. Ingersoll-Rand Co.*[6] adopted the majority rule,[7] holding that "semantic difficulties" should not prevail over the inherent fairness of applying comparative fault principles.[8]

I. Instant Case

Wesley Mulherin was employed as an underground miner for Anaconda Copper Company. One of Mulherin's duties was to release a ten-inch diameter hose from its vertical position at the side of a sediment settling tank in order to discharge the water from the tank into the mine shaft. Positioned to the side of the tanks were air driven winches manufactured by the defendant, Ingersoll-Rand Co., which were used to raise and lower equipment in the mine shaft. It was the practice of the miners who drained the tanks to stand on the winches in order to release the hoses into a draining position. While Mulherin was standing upon a winch and maneuvering the hose about, the hose came in contact with the winch's throttle control handle.[9] The winch unexpectedly began turning and severed Mulherin's left leg just above the knee.[10]

Mulherin subsequently sued Ingersoll-Rand for faulty design of the winch. The jury's special verdict found that the winch was indeed defectively designed and that the defect was a proximate cause of Mulherin's injury; however, the jury also concluded that Mulherin had misused the winch by standing on it and that his misuse was also a proximate cause of the injury. The trial court held that the defense of misuse was a complete bar to section 402A recovery and entered a judgment of no cause

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Affirmative Defense Available in Strict Products Liability Actions In Oregon: Baccelleri v. Hyster Co., 17 Willamette L. Rev. 495 (1981).

5. Courts in four of the thirteen jurisdictions that have considered the question of merger of strict liability and comparative negligence have rejected it. *See* Comment, *supra* note 2, at 60-61 n.96.

6. 628 P.2d 1301 (Utah 1981).

7. Courts in nine of thirteen jurisdictions that have considered merger have adopted a merger rule. *See* Comment, *supra* note 2, at 60-61 nn.94-96.

8. 628 P.2d at 1304.

9. Brief of Plaintiff-Appellant at 1-3, Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981).

10. 628 P.2d at 1302.

of action. Citing as error the court's refusal to compare misuse with strict liability, Mulherin appealed to the Utah Supreme Court.[11]

The Utah Supreme Court reversed the trial court decision, officially adopting the merger of comparative fault principles with strict liability. In a unanimous opinion, the court held that when "the faults of both plaintiff and defendant have united as concurrent proximate causes of an injury, . . . both faults should be considered by the trier of fact in determining the relative burden each should bear for the injury they have caused."[12] The court recognized the logical problems other jurisdictions have grappled with when combining comparative fault principles with strict liability, but dismissed them as mere "semantic difficulties."[13] The court acknowledged Utah's comparative negligence statute[14] as a mandate for the application of comparative principles in negligence cases and found no barriers to the extension of those same principles to actions based on strict products liability.[15] However, the court went a step beyond the statute by adopting a form of pure comparative fault in cases of strict products liability instead of the statutory "49/51" scheme mandated in negligence cases.[16]

II. Analysis

While the Utah Supreme Court correctly chose the fairness and equity of merger over the "semantic symmetry" preferred by some courts,[17] the unanimity and brevity of the decision made the choice look artifically easy. Moreover, the lack of precision in the court's language endangers strict liability by failing to specify whether fault or causation is the basis of comparison.

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11. *Id.*

12. *Id.* at 1303.

13. *Id.* at 1304.

14. Utah Code Ann. § 78-27-37 (1956).

15. 628 P.2d at 1303-04.

16. *Id.* at 1304. The "49/51" comparative negligence statute allows a plaintiff to recover only if his negligence "was not as great as the negligence or gross negligence of the person against whom recovery is sought." Utah Code Ann. § 78-27-37 (1956). The pure comparative fault principles adopted in *Mulherin* provide that a plaintiff may recover even if his fault is equal to or greater than the defendant's fault.

17. *See, e.g.*, Daly v. General Motors Corp., 20 Cal. 3d 725, 738, 575 P.2d 1162, 1169, 144 Cal. Rptr. 380, 387 (1978); Melia v. Ford Motor Co., 534 F.2d 795, 802 (8th Cir. 1976).

A. *Considerations in Merging Comparative Fault with Strict Liability*

The major considerations in deciding whether to merge comparative principles with strict liability were unfortunately not addressed in the *Mulherin* opinion. Discussion of these considerations helps to illustrate the difficulty and significance of the decision.

The major argument against merging comparative fault with strict liability focuses on the lack of conceptual or semantical purity in combining what has historically been a negligence doctrine with a cause of action in which negligence is immaterial. In *Daly v. General Motors Corp.*,[18] one of the leading cases on merger, the dissent complained that it is "illogical and illusory to compare elements . . . not reasonably subject to comparison."[19] The Utah Supreme Court disposed of this argument, as other courts have, by admitting that the combination of strict liability and comparative fault may be logically inaccurate, but refusing to sacrifice equity for consistency.[20] Thus, the court candidly admitted that the result is not conceptually pure, but neither, it contended, is the accepted Utah practice of comparing consumer negligence with breach of warranty.[21] The common element is the existence of concurrent proximate causes of a single injury, whether those causes arise in tort or contract and involve negligence or strict liability.[22] The existence of one anomaly in the law does not justify another, but the point of the court is well taken: The law is simply not always logically or semantically precise. Fairness is a far more critical consideration than precision.

A second argument against merger is that manufacturers' incentive to produce safe products might diminish because some of the liability for injuries resulting from a defective product is shifted to the plaintiff who misuses the product.[23] Such an argument is unpersuasive. A manufacturer who produces defective

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18. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

19. *Id.* at 751, 575 P.2d at 1178, 144 Cal. Rptr. at 396.

20. 628 P.2d at 1304. *See also* Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 45-46 (Alaska 1976).

21. 628 P.2d at 1304 (referring to Vernon v. Lake Motors, 26 Utah 2d 269, 488 P.2d 302 (1971)).

22. 628 P.2d at 1304.

23. Daly v. General Motors Corp., 20 Cal. 3d at 764, 575 P.2d at 1186, 144 Cal. Rptr. at 404 (Mosk, J., dissenting). *Contra,* R. EPSTEIN, MODERN PRODUCT LIABILITY LAW 129-32 (1980).

goods is still liable for those defects; the manufacturer's liability is reduced only to the degree that the victim's misuse contributed to his injuries. It is unlikely that a manufacturer's incentive to avoid lawsuits will be based on the expectation that all of his customers will misuse his product.[24]

On the other hand, many considerations militate in favor of merger. For example, under the doctrine of merger the costs of compensating a plaintiff for injuries caused by his own fault are no longer passed on to other users of the product.[25] Only those costs directly related to the defective product are passed on to other consumers. Such a result is the essence of the cost allocation social policy of strict products liability.

The most persuasive reason for the merger of comparative principles with strict liability is that given in *Mulherin:* comparison is simply more fair.[26] Instead of choosing between the extremes of denying any recovery or allowing full recovery to the negligent plaintiff in a strict products liability case, the court may apply comparative principles to merely diminish his recovery according to his relative fault. The adoption of *pure* comparative fault extends that fairness even further. As the court noted, the legislative comparative negligence enactment was not controlling in *Mulherin.*[27] Thus, the case represents a positive stroke of judicial activism:[28] Instead of following Utah's statutory comparative negligence scheme, which requires that the defendant's negligence be greater than the plaintiff's, the court opted for pure comparative fault. Most commentators agree that the pure scheme of comparative fault is the most equitable.[29]

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24. 20 Cal. 3d at 737, 575 P.2d at 1169, 144 Cal. Rptr. at 387. *See also* Comment, *supra* note 2, at 69.

25. *See* Murray v. Fairbanks Morse, 610 F.2d 149, 161 (3d Cir. 1979) (applying Virgin Islands law); Note, *Products Liability—Washington Refuses To Allow Comparative Negligence To Reduce A Strict Liability Award,* 56 WASH. L. REV. 307, 313 (1981). *See also* Stueve v. American Honda Motors Co., 457 F. Supp. 740, 751 (D. Kan. 1978).

26. 628 P.2d at 1303. *See also* Butaud v. Suburban Marine and Sporting Goods, Inc, 555 P.2d 42, 45-46 (Alaska 1976); Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act,* 29 MERCER L. REV. 373, 391 (1978); Wade *supra* note 4, at 850-51.

27. 628 P.2d at 1304.

28. Schwartz, *supra* note 4, at 179-80. *Cf.* General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351 (Tex. 1977) (like the Utah Supreme Court in *Mulherin,* Texas Supreme Court adopts pure comparative negligence despite existence of a modified comparative negligence statute).

29. *See* Schwartz, *Pure Comparative Negligence in Action,* 34 AM. TRIAL LAW. L.J. 117, 120 (1972); Comment, *Strict Products Liability in Utah Following Ernest W. Hahn, Inc. v. Armco Steel Co.,* 1980 UTAH L. REV. 577, 599; Stueve v. American Honda Motors

B. *The Need for More Precise Terminology in* Mulherin

While the Utah Supreme Court's conclusion in *Mulherin* is sound, the court's language is unnecessarily imprecise. Precision is always important in the law, but it is even more critical in the merger of comparative fault and strict liability because inexact terminology may undercut strict products liability and confuse jurors.

Mulherin fails to specify what is being compared. The opinion vacillates between comparative fault and comparative causation,[30] "beating around the semantical bush,"[31] without specifying whether causation or fault is being compared. The court reasoned, "[W]here the faults of both plaintiff and defendant have united as concurrent proximate causes of an injury, we hold that *both faults should be considered* by the trier of fact in determining the relative burden each should bear for the injury they have caused."[32] The basis of comparison is thus defined as comparative fault. But only a few sentences later, the plaintiff's recovery is limited "to that portion of his damages equal to the *percentage of the cause* contributed by the product defect."[33] Later, the court states that strict liability and negligence are to be compared. What comparative fault analysis should involve is the comparison of the defendant's fault in introducing an unreasonably dangerous defective product into commerce with the plaintiff's fault, which, in an action not involving strict liability, would be called contributory negligence.[34]

By its failure to precisely specify fault and only fault as the basis of comparison, *Mulherin* endangers strict liability. Commentators have concluded that verbal precision in specifying just what is to be compared in a strict liability suit brought by a plaintiff who was himself at fault is a key factor in preserving the integrity of strict products liability.[35] Many of those courts that reject merger do so because they fear that infusion of fault

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Co., 457 F. Supp. at 758.

30. 628 P.2d at 1303-04.

31. Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129, 1139 (9th Cir. 1977).

32. 628 P.2d at 1303 (emphasis added).

33. *Id.* at 1304 (emphasis added).

34. Commentators usually speak in terms of comparative fault rather than comparative negligence to avoid confusing courts and jurors who might otherwise infer that negligence is a component of strict liability.

35. *See generally* Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 Ind. L. Rev. 797, 828-29 (1977); Feinberg, *supra* note 4, at 52.

principles into the doctrine of strict liability violates the very essence of the doctrine — that negligence need not be proved. The dissenting opinion in *Daly* lamented the "dark day"[36] when the California court that shaped strict liability[37] allowed it to be reduced to a shambles by the introduction of "a foreign object—the tort of negligence—into the tort of products liability by the simple expedient of calling negligence something else."[38] This argument, so central in other cases, is not even considered in *Mulherin*,[39] perhaps because the threat to strict liability is not that real. For while it is true that negligence concepts are irrelevant in strict liability actions, it is not accurate to characterize strict liability as a no-fault system.[40] Rather, the fault is the introduction of an unreasonably dangerous defective product into commerce.[41] Prosser defines fault as "a departure from a standard of conduct required of a man by society for the protection of his neighbor; and if the departure is an innocent one, and the defendant cannot help it, it is nonetheless a departure, and a social wrong."[42] Seen in such a light, strict products liability is in fact a fault doctrine[43] that may readily be tempered by comparative fault principles without endangering it.

In addition to the possibility of endangering strict liability, lack of precision concerning exactly what is being compared also increases the likelihood that jurors will be confused when instructed to compare plaintiff's misuse and defendant's defective product. Many courts have expressed concern about jury confusion.[44] The dissent in *Daly* doubted the ability of the average

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36. 20 Cal. 3d at 757, 575 P.2d at 1181, 144 Cal. Rptr. at 399.

37. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

38. 20 Cal. 3d at 757, 575 P.2d at 1181, 144 Cal. Rptr. at 399.

39. *Mulherin* does cite *Daly*, however. 628 P.2d at 1304 n.8.

40. 628 P.2d at 1303. *See also* Rigby v. Beech Aircraft Co., 548 F.2d 288 (10th Cir. 1977); Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976).

41. Sun Valley Airlines, Inc. v. Acvo-Lycoming Corp., 411 F. Supp. 598, 602 (D. Idaho 1976); Comment, *supra* note 2, at 63; Wade, *supra* note 26, at 377.

42. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 493 (4th ed. 1971) (footnote omitted).

43. Feinberg, *supra* note 4, at 52; Schwartz, *supra* note 4, at 179-80; Comment, *supra* note 2, at 64.

44. *E.g.*, Daly v. General Motors Corp., 20 Cal. 3d at 755, 575 P.2d at 1180, 144 Cal. Rptr. at 398 (Jefferson, J., concurring in part). Justice Jefferson, dissenting in part in *Daly*, cautioned, "With all due deference to the scholarly analysis and discussion found in the majority opinion, I must conclude, nevertheless, that the majority's view constitutes a glaring failure to appreciate the limitations on, and the realities of, our jury trial

jury to compare "a quart of milk (representing plaintiff's negligence) and a metal bar three feet in length (representing defendant's strict liability for a defective product)."[45] However, the *Mulherin* opinion correctly concluded that "juries will have no difficulty assigning the relative responsibility" between the manufacturer of defective goods and a negligent user of the goods.[46] The demands placed on the trier of fact in such a situation are no more challenging than the demands routinely made on judges and juries.[47] However, to reduce the possibility of jury confusion, the grounds for comparison must be more carefully defined. Because of the problems inherent in defining liability in terms of an amorphous issue like proximate cause,[48] the comparison should focus on the comparative fault of the parties.[49]

C. *Strict Products Liability in Utah After* Mulherin

The holding of the Utah Supreme Court in *Mulherin* brings Utah in line with most other jurisdictions, and yet, the decision leaves several questions unanswered. For example, the court did not decide whether comparative principles should be extended to the affirmative defense of assumed risk or unreasonable use;

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system." *Id.*

Professor Harvey R. Levine likewise observed:

> The application of "comparative" fault to a strict products liability cause of action would prejudice a plaintiff because of the unusual and impossible demand placed upon a jury. In essence we would ask a jury that if they find the defendant's product was defective, irrespective of fault, they should reduce the plaintiff's damage by considering the plaintiff's culpability *in proportion* to the defendant's nonculpability. This requirement may be a feat which is beyond the prowess of an American jury.

Levine, *supra* note 4, at 356.

45. 20 Cal. 3d at 751, 575 P.2d at 1178, 144 Cal. Rptr. at 396.

46. 628 P.2d at 1304.

47. *Id.* As an example, the court referred to the practice approved of in Vernon v. Lake Motors, 26 Utah 2d 269, 488 P.2d 302 (1971), of comparing consumer's contributory negligence with breach of warranty.

48. " 'Proximate Cause,' in short, has been all things to all men." W. PROSSER, *supra* note 42, at 246. *See also* L. GREEN, RATIONALE OF PROXIMATE CAUSE (1927); Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 423-24 (1978).

49. The National Conference of Commissioners on Uniform State Laws used a comparative fault definition in the UNIFORM COMPARATIVE FAULT ACT § 2(9) (1977). *See also* Wade, *supra* note 26, at 375. Other bases of comparison that have been suggested include a single-sided comparison in which plaintiff's recovery is reduced in proportion to his fault. Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 MO. L. REV. 431, (1978). Professor Thode has suggested a comparison of risks created by plaintiff's and defendant's conduct. Thode, *Some Thoughts on the Use of Comparisons in Products Liability Cases*, 1981 UTAH L. REV. 3.

however, extension is likely. Misuse and assumption of the risk must work in tandem: If one is to be compared, both should be compared. Otherwise, any assumption of risk might be construed to be a misuse of the product in order to come under comparison principles.[50]

Also unanswered is whether comparative principles will be applied in cases presenting defenses unique to strict products liability.[51] As examples, the court cited misuse so foreseeable that a manufacturer should be bound to guard against it and misuse so unforeseeable as to absolve a manufacturer of any responsibility whatever.[52] It is hoped that future cases treating these issues will extend the applicability of comparative fault. A jury's sensitivity to community conduct would be an accurate gauge of whether misuse of a product is so foreseeable that the manufacturer should be required to protect against it. Likewise, a jury's perception of reasonable conduct would adequately prevent a negligent plaintiff from recovering damages when his misuse of a defective product is so outrageous as to swallow up the manufacturer's fault in producing the defective product. If properly instructed, the jury could translate these community standards into just and equitable verdicts or awards, ranging from findings of no liability to full liability or findings of comparative fault somewhere in the spectrum between these two extremes.

III. Conclusion

Whether strict products liability and comparative fault should be merged is the most important strict liability question the Utah Supreme Court has faced since it adopted section 402A. In spite of the logical and semantic problems of merging pure comparative principles with strict liability, the court wisely chose the fairness and advantages of doing so. However, the court's imprecise terminology leads to confusion about whether fault or causation is being compared, and it is hoped that future

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50. Brief of Plaintiff-Appellant at 6, 8, Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981).

51. 628 P.2d at 1304.

52. *Id.* n.11. Polk v. Ford Motor Co., 529 F.2d 259 (8th Cir. 1976); Hoppe v. Midwest Conveyor Co., 485 F.2d 1196 (8th Cir. 1973); McDevitt v. Standard Oil Co. of Texas, 391 F.2d 364 (5th Cir. 1968); Helene Curtis Indus., Inc. v Pruitt, 385 F.2d 841 (5th Cir. 1967); Ford Motor Co. v. Eads, 224 Tenn. 473, 457 S.W.2d 28 (1970).

decisions will clarify the basis of comparison and extend comparative fault principles to all strict products liability defenses.

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