Chicago-Kent Law Review

Volume 59 | Issue 4 Article 7

October 1983

The Application of Comparative Negligence to Strict Products Liability - Coney v. J.L.G. Industries, Inc.

Daniel J. Voelker

THE APPLICATION OF COMPARATIVE NEGLIGENCE TO STRICT PRODUCTS LIABILITY

Coney v. J.L.G. Industries, Inc.,
97 Ill. 2d 104, 454 N.E.2d 197 (1983)

DANIEL J. VOELKER, 1985*

In 1981, the Illinois Supreme Court in *Alvis v. Ribar*[1] abolished the common law doctrine of contributory negligence and adopted in its place a "pure" form[2] of comparative negligence.[3] The issue of comparative negligence was not one of first impression in Illinois; thirteen years earlier in *Maki v. Frelk*[4] the court had held that such a "far-reaching change" involved "numerous problems" and would be better left to the General Assembly.[5] Despite the many problems and unresolved issues that would result from a piecemeal judicial adoption of comparative negligence rather than from a comprehensive legislative

* B.S. University of Illinois, 1982; Candidate for J.D., IIT Chicago-Kent College of Law, 1985.

1. 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

2. *Id.* at 28, 421 N.E.2d at 898. There are presently four types of comparative negligence in existence. The first type is "Slight-Gross" which allows the apportionment of damages only when the plaintiff's negligence is deemed "slight" in comparison with the "gross" negligence of the defendant.

The second and third types of comparative negligence are both "Modified" approaches. The second allows the apportionment of damages only when the plaintiff's negligence is "not as great as" (or "not equal to") that of the defendant, and the third type allows the apportionment of damages only when the plaintiff's negligence is "not greater than" that of the defendant. It is only in situations where the plaintiff and defendant are adjudged by the trier of fact as *equally* negligent that the difference between these two types of modified comparative negligence is evident.

The fourth type of comparative negligence is called the "Pure" form. Under the pure form damages are apportioned in all situations where the plaintiff is deemed negligent. Thus, a plaintiff could theoretically recover even when he is 99% at fault, but such a recovery would be limited to 1% of the total damages. *See* J. DOOLEY, MOD. TORT LAW §§ 5.02-.05 (1982).

3. *Id.* at 23, 421 N.E.2d at 896-97. For an excellent discussion of the *Alvis* decision, see Comment, *Pure Comparative Negligence in Illinois*, 58 CHI.-KENT L. REV. 599 (1982).

4. 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

5. *Id.* at 196-97, 239 N.E.2d at 447-48. The Illinois Supreme Court has come in a complete circle since its decision in Maki v. Frelk where the court reversed a lower appellate court decision that abolished the common law doctrine of contributory negligence and adopted in its place the defense of comparative negligence. Compare the language of *Maki*, "[T]he legislative branch is manifestly in a better position than is this court to consider the numerous problems involved." *Id.* at 197, 239 N.E.2d at 448, with the language of *Alvis*, "We believe that the proper relationship between the legislature and the court is one of cooperation and assistance in examining and changing the common law to conform with the ever-changing demands of the community." 85 Ill. 2d at 23, 421 N.E.2d at 896. *See also* Comment, *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?* 21 VAND. L. REV. 889 (1968).

enactment,[6] the court in *Alvis* boldly departed from precedent followed in Illinois for nearly a century[7] and abolished the harsh and inequitable rule of contributory negligence. Thus, Illinois became the 38th state to adopt comparative negligence, but only the 7th state to do so judicially.[8] The *Alvis* court, however, specifically restricted the application of its holding to negligence actions and left "the resolution of other collateral issues to future cases."[9]

6. Mr. Justice Underwood dissented in *Alvis* because he believed, as he had in *Maki*, that such a change affecting so much of the law would be better left to the state legislature. Justice Underwood recognized the many unresolved issues left by the *Alvis* majority when he stated:

> What modifications, for example, are now to be made in the doctrines of strict products liability (citation omitted), assumption of the risk, wilful and wanton misconduct, the liability of property owners to licensees, invitees, and trespassers, and many others? While the newly decreed rule of comparative negligence may ultimately affect all of these situations to a now unknown degree, the court can consider only one case at a time. Unless the legislature acts, it will in all probability be years before these questions can be judicially answered.

85 Ill. 2d at 29, 421 N.E.2d at 899.

7. In Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 3 N.E. 456 (1885), the Illinois Supreme Court adopted the doctrine of contributory negligence and followed it relentlessly for 96 years until overruling it in *Alvis*.

8. The 37 states which had adopted comparative negligence prior to Illinois were: Alaska—Kaatz v. State, 540 P.2d 1037 (Alaska 1975) (pure); Arkansas—ARK. STAT. ANN. §§ 27-1763 to 27-1765 (1979) (modified); California—Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (pure); Colorado—COLO. REV. STAT. § 13-21-111 (1973) (modified); Connecticut—CONN. GEN. STAT. ANN. 52-572-0 (West 1980) (modified); Florida—Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (pure); Georgia—GA. CODE ANN. § 51-11-7 (1981) (modified); Hawaii—HAWAII REV. STAT. § 663-31 (1976) (modified); Idaho—IDAHO CODE §§ 6-801, 6-802 (1979) (modified); Kansas—KAN. STAT. ANN. § 60-258a (1976) (modified); Louisiana—LA. CIV. CODE ANN. art. 2323 (West Supp. 1981) (pure); Maine—ME. REV. STAT. ANN. tit. 14, § 156 (1980) (modified); Massachusetts—MASS. GEN. LAWS ANN. ch. 231, § 85 (West 1978) (modified); Michigan—Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979) (pure); Minnesota—MINN. STAT. ANN. § 604.01 (West 1981) (modified); Mississippi—MISS. CODE ANN. §§ 11-7-15, 11-7-17 (1972) (pure); Montana—MONT. CODE ANN. § 58-607 (1977) (modified); Nebraska—NEB. REV. STAT. § 25-1151 (1979) (slight/gross); Nevada—NEV. REV. STAT. § 41.141 (1979) (modified); New Hampshire—N.H. REV. STAT. ANN. § 507.7a (Supp. 1979) (modified); New Jersey—N.J. STAT. ANN. §§ 2A: 15-5.1 to 2A: 15-5.3 (West 1980) (modified); New Mexico—Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981) (pure); New York—N.Y. CIV. PRAC. LAW § 1411-13 (McKinney 1976) (pure); North Dakota—N.D. CENT. CODE § 9-10-07 (1975) (modified); Ohio—OHIO REV. CODE ANN. § 2315.19 (Page 1980) (modified); Oklahoma—OKLA. STAT. ANN. tit. 23, §§ 13, 14 (West 1980) (modified); Oregon—OR. REV. STAT. §§ 18.470-18.490 (1979) (modified); Pennsylvania—PA. STAT. ANN. tit. 42, § 7102(a) (Purdon 1980) (modified); Rhode Island—R.I. GEN. LAWS §§ 9-20-4, 9-20-4.1 (1980) (pure); South Dakota—S.D. COMP. LAWS ANN. § 20-9-2 (1979) (slight/gross); Texas—TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon 1979) (modified); Utah—UTAH CODE ANN. § 78-27-37 (1977) (modified); Vermont—VT. STAT. ANN. tit. 12, § 1036 (1973) (modified); Washington—WASH. REV. CODE ANN. §§ 4.22.005-.020 (1980) (pure); West Virginia—Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979) (modified); Wisconsin—WIS. STAT. ANN. § 895.045 (West 1980) (modified); and Wyoming—WYO. STAT. § 1-1-109 (1977) (modified).

9. 85 Ill. 2d 1, 28, 421 N.E.2d 886, 896-97. The court in *Alvis* stated, "We therefore hold that in cases involving *negligence* the common law doctrine of contributory negligence is no longer the law in the State of Illinois, *and in those instances where applicable it is replaced by the doctrine of comparative negligence.*" (emphasis added). *Id.* at 25, 421 N.E.2d at 896-97.

Two years later, in *Coney v. J.L.G. Industries, Inc.*,[10] the Illinois Supreme Court addressed two of those yet unresolved issues. In a unanimous decision written by Justice Moran, also the author of the *Alvis* decision, the court held that comparative negligence or fault was applicable to an action in strict products liability, and that the adoption of comparative negligence did not require the elimination of the common law doctrine of joint and several liability.[11] In addition, the *Coney* court addressed a third issue and held that the retention of joint and several liability coupled with the defendant's inability to gain contribution did not violate the defendant's constitutional right to equal protection.[12]

In order to fully understand and evaluate the court's decision in *Coney* a brief history and discussion of comparative negligence, strict products liability, and joint and several liability will be set forth. Cases in other jurisdictions which have addressed the issues present in *Coney* will be examined. The comment will then set forth the facts of *Coney* and the court's reasoning will be presented and analyzed. It will be shown that the court's decision to apportion damages on a comparative basis in a strict products liability action will result in a more equitable allocation of damages than was obtained under Illinois' previous approach of no comparison. In addition, it will be shown that the court selected a method of comparison which will provide a workable and analytically sound solution to the trier of fact's difficult task of apportioning damages between a strictly liable defendant and a negligent plaintiff. Finally, this comment will consider whether the court's refusal to abolish the common law doctrine of joint and several liability was consistent with its decision to adopt comparative negligence. This comment will conclude that the retention of joint and several liability is absolutely essential in order to protect a plaintiff's right to a fair and adequate compensation for his injuries.

10. 97 Ill. 2d 104, 454 N.E.2d 197 (1983).
11. *Id.* at 119, 124, 454 N.E.2d at 204, 206.
12. *Id.* at 126, 454 N.E.2d at 207. U.S. CONST. amend. XIV, § 1 states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

See also ILL. CONST. art. I, § 2 which states that "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."

HISTORICAL BACKGROUND

Comparative Negligence and Strict Products Liability

At common law, a plaintiff who had negligently contributed to his own injury in any way was barred from recovering damages.[13] The inequity[14] of the English doctrine[15] of contributory negligence was apparent. Early courts eventually recognized exceptions to the maxim and attempted to ameliorate its harsh consequences.[16] These exceptions, however, were inapplicable in many factual situations, thus leaving many plaintiffs uncompensated. Some commentators have suggested, however, that juries provided relief by disregarding the judge's instructions on contributory negligence and reducing damages *sua sponte*.[17] Persuaded by principles of fairness and logic, the courts and legislatures in a majority of jurisdictions[18] have recently launched a virtual "stampede"[19] to abolish this harsh "all or nothing" rule in favor of comparative negligence. Instead of acting as an absolute bar to recovery, comparative negligence will allow the trier of fact to allo-

13. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65 at 416 (4th ed. 1971) [hereinafter cited as PROSSER].

14. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 201-02 (1950), presents this criticism of the inequity of the contributory negligence rule:

> Why then, if an accident results from the negligence of two or more persons, should the noxal consequences be distributed so unevenly? Why should the mutilated victim have to suffer the sorrows of pain, tears, and sleepless nights while his opponent, perhaps guilty of fault to a higher degree, is free to leave a court of justice bearing a certificate that he is not to be deemed a tort feasor. To call such a result "harsh" is to use a mild expression, to say the least!

15. The first case to recognize the doctrine of contributory negligence as an absolute defense to an action in negligence was Butterfield v. Forrester, 103 Eng. Rep. 926 (1809). The language of the court often quoted reads as follows: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use ordinary caution to be in the right." 103 Eng. Rep. at 927.

16. Recognized exceptions included: 1) Last clear chance, which originated in Davies v. Mann, 152 Eng. Rep. 588 (1842), where the court stated, "as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there." 152 Eng. Rep. at 589. Thus, it became the law that a defendant could not complain of the plaintiff's contributory negligence when he himself had the last clear chance to avoid the injury; 2) Plaintiff's contributory negligence was no defense when the defendant's conduct was deemed "willful," "wanton," or "reckless"; 3) Plaintiff's contributory negligence was no defense when the defendant violated a statute which was intended to protect a plaintiff against his own improvident acts. *See generally* Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36 (1944).

17. *See, e.g.*, Fischer, *Products Liability-Applicability of Comparative Negligence*, 43 MO. L. REV. 431, 431 (1978).

18. *See supra*, note 8 and accompanying text.

19. Since 1971, 29 states have adopted comparative negligence. In the words of Professor Schwartz, "The march of comparative negligence is now a stampede." V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 1.1 at 2 (Cum. Sup. 1981). *See also* Fleming, *The Supreme Court of California 1974-1975—Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239, 239 (1976), where the author states, "Comparative negligence, once the Cinderella of American law, is at long last blossoming into a princess."

cate damages in direct proportion to each parties' degree of carelessness.

A similar "stampede" has occurred in the area of products liability. Since the California Supreme Court's seminal decision in *Greenman v. Yuba Power Products, Inc.*,[20] and its progeny, the *Restatement (Second) of Torts* section 402A,[21] the theory of recovery known as strict liability in tort has gained nearly unanimous approval in each of the fifty states.[22] The novelty underlying this theory of recovery derives

20. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). In *Greenman*, the court specifically held that "a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Id.* at 63, 377 P.2d at 900, 27 Cal. Rptr. at 700.

21. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as RESTATEMENT] provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

22. The following states and districts have judicially adopted the strict liability in tort theory of recovery: Alabama—Atkins v. American Motor Corp., 335 So. 2d 134 (Ala. 1976); Alaska—Bachner v. Pearson, 479 P.2d 319 (Alaska 1970); Arizona—O.S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968); California—Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Colorado—Hiigel v. General Motors Corp., 190 Colo. 57, 544 P.2d 983 (1976); Connecticut—Garthwait v. Burgio, 153 Conn. 290, 216 A.2d 189 (1965); Delaware—Martin v. Ryder Truck Rental, Inc., 353 A.2d 581 (Del. 1976); District of Columbia—Young v. Up-Right Scaffolds, Inc., 637 F.2d 810 (D.C. Cir. 1980); Florida—West v. Caterpillar Tractor Co., Inc., 336 So. 2d 80 (Fla. 1976); Hawaii—Stewart v. Budget Rent-A-Car Corp., 52 Hawaii 71, 470 P.2d 240 (1970); Idaho—Shields v. Morton Chem. Co., 95 Idaho 674, 518 P.2d 857 (1974); Illinois—Suvada v. White Motor Corp., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Indiana—Ayr-Way Stores, Inc. v. Chitwood, 261 Ind. 86, 300 N.E.2d 335 (1973); Iowa—Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970); Kansas—Brooks v. Dietz, 218 Kan. 698, 545 P.2d 1104 (1976); Kentucky—Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1966); Louisiana—Weber v. Fidelity Casualty Ins. Co., 259 La. 599, 250 So. 2d 754 (1971); Maryland—Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976); Minnesota—McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967); Mississippi—State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), *cert. denied sub nom.* Yates v. Hodges, 386 U.S. 912 (1967); Missouri—Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969); Montana—Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 513 P.2d 268 (1973); Nebraska—Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601 (1971); Nevada—Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 470 P.2d 135 (1970); New Hampshire—Buttrick v. Arthur Lessard & Sons, 110 N.H. 36, 260 A.2d 111 (1969); New Jersey—Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); New Mexico—Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972); New York—Codling v. Paglia, 32 N.Y.2d 330, 345 N.Y.S.2d 461, 298 N.E.2d 622 (1973); North Dakota—Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974); Ohio—Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966); Oklahoma—Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974); Oregon—Heaton v. Ford Motor Co., 248 Or. 467, 435 P.2d 806 (1967); Pennsylvania—Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966); Rhode Is-

from the fact that, unlike the older theories of warranty and negligence, it requires neither contractual privity[23] nor proof of defendant's negligence.[24]

Illinois had previously abolished the requirement of privity in cases involving deleterious food[25] and other "inherently dangerous" products,[26] but the difficult task of proving the manufacturer's negligence remained until the Illinois Supreme Court's landmark decision in *Suvada v. White Motor Co.*[27] In *Suvada*, the court abolished the necessity of proving the manufacturer's negligence and explicitly adopted strict liability in tort[28] as set forth in the *Restatement*.[29] The court in *Suvada* thereby acknowledged the *Restatement's* view that "public policy demands that the burden of *accidental* injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production."[30] As a result, it became well-settled in Illinois that a plaintiff who was guilty of contributory

land—Ritter v. Narragansett Elec. Co., 109 R.I. 176, 283 A.2d 255 (1971); South Dakota—Engberg v. Ford Motor Co., 87 S.D. 196, 205 N.W.2d 104 (1973); Tennessee—Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966); Texas—McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); Utah—Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979); Vermont—Zaleskie v. Joyce, 133 Vt. 150, 333 A.2d 110 (1975); Washington—Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P.2d 729 (1969); West Virginia—Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666 (1979); Wisconsin—Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

The following states have adopted strict liability in tort by statute: Arkansas—ARK. STAT. ANN. §§ 85-2-318.2, 85-2-318.3 (1973); Georgia—GA. CODE ANN. § 51-1-11 (1981); Maine—ME. REV. STAT. ANN. tit. 14, § 221 (1973); and South Carolina—S.C. CODE ANN. § 15-73-10 (Law. Co-op 1974).

23. Privity of contract is defined as "[t]hat connection or relationship which exists between two or more contracting parties." BLACK'S LAW DICTIONARY 1079 (rev. 5th ed. 1979).

24. *See generally* PROSSER, *supra* note 13 at § 98.

25. Wiedman v. Keller, 171 Ill. 93, 49 N.E. 210 (1897). Here, the defendant a retail dealer in meats was held liable in damages to the purchaser and her family under an implied warranty theory for the state of unwholesome and diseased meats. In holding for the purchaser and her family the Illinois Supreme Court stated:

> Where, however, articles of food are purchased from a retail dealer for immediate consumption, the consequences resulting from the purchase of an unsound article may be so serious and may prove so disastrous to the health and life of the consumer that public safety demands that there should be an implied warranty on the part of the vendor that the article sold is sound and fit for the use for which it was purchased.

Id. at 99, 49 N.E. at 211.

26. Rotche v. Buick Motor Co., 358 Ill. 507, 193 N.E. 529 (1934). In *Rotche*, the Illinois Supreme Court adopted the standard espoused by Justice Cardozo in the landmark case of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), which stated that privity would be irrelevant to recovery, "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, . . . knowledge that the thing will be used by persons other than the purchaser, and used without new tests." *Id.* at 389, 111 N.E. at 1053.

27. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

28. *Id.* at 621, 210 N.E.2d at 187.

29. *See* RESTATEMENT *supra* note 21.

30. RESTATEMENT, *supra* note 21, comment c at 350 (emphasis added).

negligence in merely failing to inspect a product and discover a defect that would have been discovered upon a reasonable inspection, would *not* be barred from recovery in a strict products liability action.[31] On the other hand, however, the *Suvada* court had made it clear that its adoption of strict liability in tort did not make the manufacturer an "absolute insurer" of its product.[32] Hence, Illinois courts consistently held that in an action involving strict products liability, a plaintiff who voluntarily and unreasonably encountered a known risk, assumed the risk of injury[33] and would be absolutely barred from recovery.[34] Similarly, a plaintiff who misused[35] a product in a manner neither reasonably foreseeable nor intended by the manufacturer would also be precluded from any recovery.[36]

With the increasing acceptance of both comparative negligence and strict liability doctrines has come marked disagreement among courts[37] and commentators[38] as to the applicability of comparative neg-

31. The Illinois Supreme Court has apparently adopted comment n of the RESTATEMENT which provides: "Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence." RESTATEMENT, *supra* note 21, comment n at 356. *See* Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970); Liberty Mut. Ins. Co. v. Williams Mach. & Tool Co., 62 Ill. 2d 77, 338 N.E.2d 857 (1975).

32. 32 Ill. 2d 612, 623, 210 N.E.2d 182, 188 (1965). In Illinois, a plaintiff in a strict products liability action must prove three elements in order to recover from a manufacturer or seller: 1) that the injury resulted from a condition of the product; 2) that the condition was an unreasonably dangerous one; 3) and that the condition existed at the time it left the manufacturer's control. *See also* Kissel, *Defenses to Strict Liability*, 60 ILL. B. J. 450 (1972), where the author states, "The concept of strict liability does not connote liability without fault. A variety of defenses to a strict liability claim may be available if counsel is energetic enough to discover and use such defenses."

33. In Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970), the Illinois Supreme Court made it clear that the affirmative defense of assumption of the risk was essentially a subjective test "in the sense that it is *his* [the plaintiff's] knowledge, understanding and appreciation of the danger which must be assessed, rather than that of the reasonably prudent person." *Id.* at 430, 261 N.E.2d at 312. However, the court qualified the subjectivity of this test when it stated, "No juror is compelled by the subjective nature of this test to accept a user's testimony that he was unaware of the danger, if, in the light of all of the evidence, he could not have been unaware of the hazard." *Id.* at 430-31, 261 N.E.2d at 312.

34. *See, e.g.*, Ralston v. Illinois Power Co., 13 Ill. App. 3d 95, 299 N.E.2d 497 (1973) (plaintiff found to have assumed the risk as a matter of law when he admitted that he was fully aware of the danger involved in his job).

35. The affirmative defense commonly called "misuse" is based on an objective test; plaintiff's conduct will be measured against that of a reasonably prudent person. Williams v. Brown Mfg. Co., 45 Ill. 2d at 425, 261 N.E.2d at 309.

36. *See, e.g.*, McCormick v. Bucyrus-Erie Co., 81 Ill. App. 3d 154, 400 N.E.2d 1009 (1980) (plaintiff misused crane when crane was loaded to near capacity in unfavorable wind conditions and was operated on unsolid ground).

37. As of August 31, 1983, thirteen of the states' highest courts have held comparative principles applicable to strict products liability. These states include: Alaska—Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); California—Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); Florida—West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Hawaii—Kaneko v. Hilo Coast Processing, 65 Hawaii 447, 654 P.2d 343 (1982); Kansas—Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980);

ligence to an action in strict products liability. The minority of courts which have held the defense of comparative negligence inapplicable to an action in strict products liability have generally relied upon one or more of several distinct rationales.[39]

One rationale is illustrated by the decision of the Colorado Court of Appeals in *Kinard v. Coats Co.*[40] In *Kinard*, the plaintiff, a service station operator, was injured while using a hydraulic bumper jack. The manufacturer argued that Colorado's comparative negligence statute should apply in this products liability action because it believed that the plaintiff was negligent and should be held partially responsible for the injury. The court rejected defendant's contention, reasoning that the injection of negligence concepts into an area of liability which rested on totally different policy considerations[41] was inappropriate.[42]

Illinois—Coney v. J.L.G. Indus., 97 Ill. 2d 104, 454 N.E.2d 197 (1983); Minnesota—Busch v. Busch Constr., Inc., 262 N.W.2d 377 (Minn. 1977); New Hampshire—Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843 (1978); New Jersey—Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979); Oregon—Baccelleri v. Hyster Co., 287 Or. 3, 597 P.2d 351 (1979); Texas—General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977); Utah—Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981); Wisconsin—Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

Also, four federal courts have held comparative principles applicable to an action in strict products liability. Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979) (applying Virgin Islands law); Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975) (applying Mississippi law); Zahrte v. Sturm, Ruger & Co., 498 F. Supp. 389 (D. Mont. 1980) (applying Montana law); Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976) (applying Idaho law).

However, five courts have rejected the application of comparative negligence to strict products liability: Rhode Island—Roy v. Star Chopper Co., 584 F.2d 1124 (1st Cir. 1978), *cert. denied*, 440 U.S. 916 (1979) (applying Rhode Island law); Nebraska—Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976) (applying Nebraska law); Colorado—Kinard v. Coats Co., 37 Colo. App. 555, 553 P.2d 835 (1976); Oklahoma—Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974); South Dakota—Smith v. Smith, 278 N.W.2d 155 (S.D. 1979). *See* Razook, *Merging Comparative Fault and Strict Products Liability: The Case for Judicial Innovation*, 20 AM. BUS. L. J. 511 (1983).

38. In fact, at least one authority has called the application of comparative principles to strict products liability "One of the most controversial issues in the products field today." FRUMER & FRIEDMAN, 2 PRODUCTS LIABILITY, § 16A[5][g][i] (1983). A dichotomy of opinion exists between the views of Dean Victor Schwartz, an advocate of the application, and Dean Aaron Twerski, a staunch opponent of the application. *Compare* SCHWARTZ, COMPARATIVE NEGLIGENCE, § 12.7 at 207 (1974); with Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297 (1977) [hereinafter cited as *Twerski*].

39. *See infra* notes 40-52 and accompanying text.

40. 37 Colo. App. 555, 553 P.2d 835 (1976).

41. In *Greenman*, the court stated that the purpose of strict liability in tort "is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." This is commonly called the "loss-spreading" rationale. 59 Cal. 2d at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

42. 37 Colo. App. at 559, 553 P.2d at 837. A similar, but unsuccessful argument was made by Justice Burke in his dissenting opinion in Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976). Specifically, Justice Burke argued that the application of comparative negligence to an action in strict products liability would ignore and diminish the fundamental policy considerations that had provided the impetus for this theory of recovery itself. *Id.* at 47.

A second rationale frequently espoused by courts refusing to find principles of comparative negligence compatible with strict products liability is based on the conceptual and semantic difficulties in comparing the "apples" of negligence with the "oranges" of strict liability.[43] This argument is premised on the theory that negligence is based on fault or moral blameworthiness, whereas strict liability is not. Rather, recovery under strict products liability focuses on the condition of the product and not on the defendant's failure to exercise reasonable care.[44] It is argued that a jury is incapable of distinguishing between these two dissimilar types of fault and apportioning damages accordingly. Thus, in *Smith v. Smith*,[45] the Supreme Court of South Dakota rejected plaintiff's request that it apply principles of comparative negligence to an action in strict products liability because the court believed that such a comparison would prove unworkable for a jury.[46] This argument is more vividly illustrated by Justice Jefferson's vigorous dissent in *Daly v. General Motors Corp.*[47] There, he argues that there is no logical method for a jury to compare such "noncomparables," and any such comparison would result in a mere "guessing game" where damages would be assessed by means of the "jurors' instincts, speculations, conjectures and guesses," rather than through a rational formula or

43. *See* Kinard v. Coats Co., 37 Colo. App. 555, 559, 553 P.2d 835, 837-38 (1976), where the court argued that the two types of fault are incomparable:

> Products liability under § 402A does not rest upon negligence principles, but rather is premised on the concept of enterprise liability for casting a defective product into the stream of commerce (citations omitted). Thus, the focus is upon the nature of the product, and the consumer's reasonable expectations with regard to that product, rather than on the conduct either of the manufacturer or of the person injured because of the product.

See also Seay v. Chrysler Corp., 93 Wash. 2d 319, 322, 609 P.2d 1382, 1383-84 (1980), where the court similarly stated:

> We have, however, pointed out the theoretical difficulties of comparing concepts of fault (negligence) with no-fault (strict-liability) (citation omitted), and, while not closing the door to a positive holding that the contributory negligence of a plaintiff could be a damage-reducing factor in a case of strict products liability, we have given little comfort to defendants that such a theoretical breakthrough will be forthcoming.

44. *See supra* note 43.

45. 278 N.W.2d 155 (S.D. 1979).

46. *Id.* at 161, n.7. In deciding that contributory negligence would also be no defense to an action in strict products liability the court in *Smith* stated:

> Strict liability is an abandonment of the fault concept in product liability cases. No longer are damages to be borne by one who is culpable; rather they are borne by one who markets the defective product. The question of whether the manufacturer or seller is negligent is meaningless under such a concept; liability is imposed irrespective of his negligence or freedom from it. Even though the manufacturer or seller is able to prove beyond all doubt that the defect was not the result of his negligence, it would avail him nothing. We believe it is inconsistent to hold that the user's negligence is material when the seller's is not.

Id. at 160.

47. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (Jefferson, J., dissenting).

standard.[48]

A third rationale relied upon by some of the courts rejecting the application of comparative negligence to strict products liability rests on the legislative drafting of the state's comparative negligence statute. In *Seay v. Chrysler Corp.*,[49] the Supreme Court of Washington refused to find its comparative negligence statute applicable to an action in strict products liability. The court's reasoning was that its recently enacted statute by its language was only applicable to actions in negligence, and was thus indicative of the legislature's desire to exclude strict products liability from its application.[50] Similarly, in *Melia v. Ford Motor Co.*,[51] the Eighth Circuit Court of Appeals declined to hold Nebraska's comparative negligence statute applicable to an action in strict products liability because the statute, by its language, could only be invoked when the plaintiff's negligence was "slight" in comparison to the "gross" negligence of the defendant. The court believed that this requirement would be "extremely confusing and inappropriate," since under Nebraska law neither proof of defendant's negligence nor degree of fault was required in an action in strict products liability.[52]

The majority of jurisdictions, however, which have considered the applicability of comparative negligence to an action in strict products liability have found the two compatible.[53] Several of these jurisdictions have comparative negligence statutes that, by their language, specifically apply to strict products liability.[54] Other jurisdictions have comparative negligence statutes that, by their language, are not limited to negligence and have been interpreted by the courts to apply to strict products liability.[55] In addition, several courts have judicially adopted comparative negligence and have further extended it to strict products liability.[56] It is generally agreed by these courts that although there

48. *Id.* at 752, 755, 575 P.2d at 1178, 1180, 144 Cal. Rptr. at 396, 398.

49. 93 Wash. 2d 319, 609 P.2d 1382 (1980). *See also* Kirkland v. General Motors Corp., 521 P.2d 1353, 1367 (Okla. 1974) (comparative negligence statute not applicable to strict products liability because it is limited by its language to negligence actions).

50. 93 Wash. at 322, 609 P.2d at 1384.

51. 534 F.2d 795 (8th Cir. 1976) (applying Nebraska law).

52. *Id.* at 802.

53. *See supra* note 37.

54. ARK. STAT. ANN. § 85-2-318.2, 85-2-318.3 (1973); CONN. GEN. STAT. ANN. § 52-572-o (West 1980); MICH. COMP. LAWS ANN., § 600.2949 (Supp. 1982); MINN. STAT. ANN. § 604.01 (West 1981) (amendment effective 1978); NEB. REV. STAT. § 25-1151 (1979) (amendment effective 1978).

55. MISS. CODE ANN. § 11-7-15 (1972) (as interpreted in Edwards v. Sears, Roebuck and Co. 512 F.2d at 290); WASH. REV. CODE ANN. § 4.22.015 (1981) (as interpreted in South v. A.B. Chance Co., 96 Wash. 2d 439, 635 P.2d 728 (1981)).

56. The following states have both judicially adopted comparative negligence and judicially

may be semantic and theoretical distinctions between negligence and strict liability, the application of comparative negligence to strict products liability is nevertheless the most fundamentally fair and equitable method of apportioning damages between the consumer and seller.[57] In spite of this general agreement, there are at least three distinct theories as to the appropriate method of comparing these two types of fault and apportioning damages.

The earliest method of comparison was devised by the Supreme Court of Wisconsin in *Dippel v. Sciano*,[58] the first decision to hold comparative negligence applicable to strict products liability.[59] The court in *Dippel* carefully avoided the semantic difficulty associated with the comparison of an injured plaintiff's negligence and a manufacturer's strict liability by holding strict products liability "akin" to negligence per se.[60] Traditionally, the doctrine of negligence per se relieves the plaintiff of the burden of proving the defendant's negligence when the defendant violates a standard of care fixed by the legislature and adopted by the court.[61] It is essential to the plaintiffs' prima facie case, however, that he prove the elements of causation and damages.[62] In this instance, the court explicitly adopted Section 402A of the *Restatement* and treated it as if it were a legislatively decreed standard of care or "safety statute."[63] The court justified this novel analogy by reasoning that both the violation of a safety statute which was designed to protect a particular class against a particular harm and the marketing

extended it to strict products liability: Alaska, Florida, California, and Illinois. *See supra* notes 8, 37.

57. *See, e.g.*, Daly v. General Motors Corp., 20 Cal. 3d at 734, 742, 575 P.2d at 1167, 1172, 144 Cal. Rptr. at 385, 390 (1978), where the court stated:

> While fully recognizing the theoretical and semantic distinctions between the twin principles of strict products liability and traditional negligence, we think they can be blended or accommodated . . . We are convinced that in merging the two principles what may be lost in symmetry is more than gained in fundamental fairness.

See also Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129 (9th Cir. 1977); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Baccelleri v. Hyster Co., 287 Or. 3, 597 P.2d 351 (1979); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

58. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

59. *Id.* at 461-62, 155 N.W.2d at 64.

60. *Id.* at 461, 155 N.W.2d at 64. At least one commentator agrees with the logic of this analogy:

> In essence, strict liability in this sense is not different from negligence per se. Selling a dangerously unsafe product is the equivalent of negligence regardless of the defendant's conduct in letting it become unsafe . . . selling a dangerously unsafe chattel is negligence within itself.

Wade, *Strict Tort Liability of Manufacturers*, 19 S.W.L.J. 5, 14 (1965).

61. *See* PROSSER, *supra* note 13, § 36 at 200.

62. *Id.* at 201.

63. 37 Wis. 2d at 459-62, 155 N.W.2d at 63-65.

of a defective product could create an unreasonable risk of harm to others, and thus, should be treated alike.[64] In addition, the court had no objection to instructing jurors to compare the plaintiff's failure to exercise ordinary care with the manufacturer's negligence per se and to apportion damages accordingly because comparison of these two types of fault was already widely approved in Wisconsin.[65] Two other jurisdictions, Alabama[66] and Florida,[67] have also held strict products liability analogous to negligence per se, but of these, only Florida recognizes comparative negligence as a viable defense to an action in strict products liability.

In another larger group of jurisdictions led by California,[68] the courts have similarly extended comparative principles to strict products liability.[69] These jurisdictions, however, have labeled their system one of "comparative fault" out of the recognition that although strict liability is not based on moral fault, it is based on legal or "quasi-fault."[70] Thus, it is argued by these jurisdictions that the conceptual or semantic difficulty of comparing these two types of fault is more theoretical than real, since jurors can in fact logically compare the plaintiff's culpability with the manufacturer's "legal" fault in putting the defective product into the stream of commerce and apportion damages accordingly.[71]

Courts in Idaho,[72] New Hampshire,[73] Texas,[74] Utah,[75] Minne-

64. *Id.* at 462, 155 N.W.2d at 465.

65. *Id.*, 155 N.W.2d at 464.

66. Atkins v. American Motors Corp., 335 So. 2d 134, 140 (Ala. 1976).

67. West v. Caterpillar Tractor Co., 336 So. 2d 80, 90 (Fla. 1976).

68. *See* Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

69. *See* Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975) (applying Mississippi law); Sandford v. Chevrolet Div. of General Motors, 292 Or. 590, 642 P.2d 624 (1982); Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980); Suter v. San Angelo Foundry and Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979).

70. Carestia, *The Interaction of Comparative Negligence and Strict Products Liability—Where Are We?*, 47 INS. COUNSEL J. 53 (1980) (The "quasi-fault doctrine" was espoused by the author in this article). *See* Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 377 (1978), where Dean Wade argues the same position:

> In the case of products liability, the fault inheres primarily in the nature of the product. The product is "bad" because it is not duly safe . . . [I]t is not necessary to prove negligence in letting the thing get in the dangerous condition . . . Instead, simply maintaining the bad condition or placing the bad product on the market is enough for liability . . . This is *legal fault*, and it can be mixed with and compared with, fault of the morally reprehensible type. *One does not have to stigmatize conduct as negligent in order to characterize it as fault* (emphasis added).

71. *See supra* note 70.

72. Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976) (applying Idaho law).

73. Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843 (1978).

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

75. Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981).

sota,[76] and the Virgin Islands,[77] have also found principles of comparative negligence compatible with strict products liability, but have adopted a system of "comparative causation."[78] Unlike either negligence per se or comparative fault, comparative causation focuses on both the plaintiff's and defective product's causal contribution to the injury, rather than either party's degree of fault or negligence. Specifically, juries are to apportion damages on the basis of the relative degree to which "the injury was *caused* by the defect in the product versus how much was *caused* by the plaintiff's own actions."[79] In short, these courts have developed a workable system of comparison based upon causation which they believe to be capable of a juror's logical and consistent application.

Joint and Several Liability

Historically, a joint tortfeasor was jointly and severally liable for the plaintiff's entire injury.[80] American courts reasoned that each joint tortfeasor was a proximate cause of the plaintiff's indivisible injury, and hence, each should be liable for the whole of the consequences.[81] Consequently, a successful plaintiff could proceed against any one of the joint tortfeasors and recover the entire judgment. The inequity of this doctrine was magnified by the common law prohibition against contribution among joint tortfeasors.[82] For example, a joint tortfeasor

76. Busch v. Busch Constr., Inc., 262 N.W.2d 377 (Minn. 1977). In *Busch*, the court found comparative principles applicable to strict products liability and relied on Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967), since its comparative negligence statute was fashioned after the Wisconsin statute. The court, however, clearly adopted the comparative causation approach when it stated:

> [T]he comparative negligence statute becomes more than a comparative *negligence* or even a comparative *fault* statute; it becomes a comparative *cause* statute under which all independent and concurrent causes of an accident may be apportioned on a percentage basis.

262 N.W.2d at 394, (quoting Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723, 725 (1974)).

77. Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979) (applying Virgin Islands law).

78. Comparative causation as defined by one court requires the trier of fact to "weigh the plaintiff's misconduct, if any, and reduce the amount of damages by the percentage that the plaintiff's misconduct contributed to cause his loss or injury. . . ." Thibault v. Sears, Roebuck & Co., 118 N.H. at 813, 395 A.2d at 850.

79. Murray v. Fairbanks Morse, 610 F.2d 149, 159 (3d Cir. 1979) (emphasis added) (applying Virgin Islands law).

80. PROSSER, *supra* note 13, § 47 at 293.

81. *Id.* at 297-98.

82. The common law doctrine prohibiting contribution among joint tortfeasors originated from the English case of Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799), and was premised on the principle *"in pari delicto potior est conditio defendentis"*—no man can make his own misconduct the ground for an action in his favor. Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176, 177-78 (1898).

who was made to bear more than his proportionate share of plaintiff's injury would have no judicial recourse against the other tortfeasors whose wrongful acts also proximately caused the plaintiff's injury.[83] Today, however, the majority of jurisdictions including Illinois[84] have abolished this prohibition and allow contribution.[85] Thus, a joint tortfeasor who is made to bear more than his percentage of the plaintiff's injury may bring an action for contribution and recover from each of the other joint tortfeasors. On the other hand, however, the common law doctrine of joint and several liability has remained virtually unchanged in all but a handful of jurisdictions.[86] In those jurisdictions which have abolished contributory negligence and replaced it with comparative negligence the question has frequently arisen as to whether it was appropriate to retain joint and several liability.[87] Some state legislatures have responded by specifically reaffirming the doctrine in their comparative negligence statutes.[88] Other states have judicially decided to retain the doctrine.[89]

The leading case analyzing whether the adoption of comparative negligence warranted the elimination of joint and several liability was decided by the California Supreme Court in *American Motorcycle Association v. Superior Court*.[90] There, the defendant argued that the *quid*

83. Dean Prosser recognized this harsh result when he stated: There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone . . . while the latter goes scot free. PROSSER, *supra* note 13, § 50 at 307.

84. Skinner v. Reed-Prentice Div. Package Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1977), *cert. denied*, 436 U.S. 946 (1978).

85. Only seven jurisdictions retain the common law prohibition against contribution among joint tortfeasors: Alabama, Arizona, Colorado, Indiana, Nebraska, Ohio and South Carolina. *See* H. WOODS, COMPARATIVE FAULT § 421 at 227 (1978) and § 193 (Supp. 1983); *see also* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.7 (Supp. 1981); Annot. 60 A.L.R.2d 1366 (1958).

86. The following states have eliminated the common law doctrine of joint and several liability: Kansas—Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978) (court interpreting KAN. STAT. ANN. § 60-258a(d) (1976)); Nevada—NEV. REV. STAT. § 41.141 3 (1979); New Hampshire—N.H. REV. STAT. ANN. § 507:7-a (1975); New Mexico—Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (1982); Oklahoma—Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978); Vermont—Howard v. Spafford, 132 Vt. 434, 321 A.2d 74 (1974) (interpreting VT. STAT. ANN. tit. 12, § 1036 (1973)).

87. *See supra* note 86 and *infra* notes 88-89.

88. *See, e.g.*, IDAHO CODE § 6-803(4) (1976).

89. Conkright v. Ballantyne of Omaha, Inc., 496 F. Supp. 147 (W.D. Mich. 1980); Maday v. Yellow Taxi Co., 311 N.W.2d 849 (Minn. 1981); Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp., 96 Wis. 2d 314, 291 N.W.2d 825 (1980); Tucker v. Union Oil Co., 100 Idaho 590, 603 P.2d 156 (1979); American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); Arctic Structures, Inc. v. Wedmore, 605 P.2d 426 (Alaska 1979); Lincenberg v. Issen, 318 So. 2d 386 (Fla. 1975); Royal Indem. Co. v. Aetna Casualty & Sur. Co., 193 Neb. 752, 229 N.W.2d 183 (1975); Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972); Gazaway v. Nicholson, 190 Ga. 345, 9 S.E.2d 154 (1940).

90. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

pro quo of California's adoption of comparative negligence was its elimination of joint and several liability. Specifically, the defendant argued that the doctrine of joint and several liability should be eliminated because with the advent of comparative negligence came a basis for dividing damages, making a once indivisible injury divisible.[91] The court, however, decided to retain the doctrine, reasoning that "apportioning fault on a comparative negligence basis does not render an indivisible injury 'divisible'," since the defendant remains a proximate cause of plaintiff's injury.[92] In addition, the California court feared that the abolition of joint and several liability would "work a serious and unwarranted deleterious effect on the practical ability of negligently injured persons to receive adequate compensation for their injuries."[93] In at least nine other jurisdictions, courts have also decided to retain the joint and several rule and have relied upon similar rationales.[94]

Two states, Texas[95] and Oregon,[96] have also elected to retain joint and several liability, but have statutorily limited its effect. These states have taken a novel stand by holding a defendant jointly and severally liable only in those situations where his causal negligence is assessed as equal to or greater than the plaintiff's.[97] Otherwise, the defendant is responsible only for his proportionate share of causal negligence. As an illustration, consider this hypothetical. By means of a special verdict the jury has assessed the causal negligence of plaintiff A, and defendants B, and C as 40%, 50%, and 10%, respectively. As a result of this "compromise" approach, defendant B will be held responsible for 60% of the plaintiff's damages should defendant C prove to be insolvent. On the other hand, defendant C will never be held responsible for more than 10% of the plaintiff's damages, even if defendant B proves to be insolvent, since his proportionate share of causal negligence was less than the plaintiff's.[98]

A few states, however, have legislatively eliminated the common law doctrine of joint and several liability and have replaced it with a system which allocates each defendant's liability in direct proportion to

91. *Id.* at 588, 578 P.2d at 905, 146 Cal. Rptr. at 188.
92. *Id.*
93. *Id.* at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.
94. *See supra* note 89.
95. TEX. REV. CIV. STAT. ANN. art. 2212a § 2(c) (Vernon 1976-77).
96. OR. REV. STAT. § 18.485 (1975).
97. *See supra* notes 95-96.
98. *See also* WOODS, THE NEGLIGENCE CASE—COMPARATIVE FAULT, § 13:4, at 226 (1978).

his individual degree of fault or causal contribution to the injury.[99] For example, a Nevada statute provides:

> Where recovery is allowed against more than one defendant in such an action, the defendants are jointly and severally liable to the plaintiff, except that a defendant whose negligence is less than that of the plaintiff or his decedent is jointly liable and is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to him.[100]

Nevertheless, the majority of jurisdictions which have instituted comparative negligence by statute, have statutes which leave the common law doctrine of joint and several liability unaffected, and thus, have left its future to the judiciary.[101]

THE FACTS OF THE CASE

Coney v. J.L.G. Industries, Inc.

On January 24, 1978, Clifford M. Jasper died as a result of injuries sustained while operating a hydraulic aerial work platform manufactured by the defendant, J.L.G. Industries.[102] Jack A. Coney, administrator of the decedent's estate, filed a complaint at law consisting of two counts of strict products liability in the circuit court of Peoria County[103] under the Illinois Wrongful Death and Survival Acts.[104]

The defendant filed two affirmative defenses. The first alleged that the decedent was comparatively negligent in his operation of the hydraulic aerial work platform. The second affirmative defense alleged that the decedent's employer was comparatively negligent in failing to provide him with a "groundman."[105] Thus, defendant requested that the court recognize comparative negligence as a defense to this strict products liability action. In addition, defendant requested that the court compare its fault, if any, with that of the decedent and the decedent's employer, and accordingly hold it liable only for its relative percentage of fault.[106]

At trial, both of defendant's affirmative defenses were stricken on plaintiff's motion, but the court certified three questions for appeal.[107]

99. VT. STAT. ANN. tit. 12, § 1036 (1973); N.H. REV. STAT. ANN. § 507:7-a (1975); NEV. REV. STAT. § 41.141 3 (1979); KAN. STAT. ANN. § 60-258a(d) (1976).
100. NEV. REV. STAT. § 41.141 3 (1979).
101. *See supra* note 89.
102. Coney v. J.L.G. Indus., Inc., 97 Ill. 2d 104, 454 N.E.2d 197 (1983).
103. *Id.*
104. ILL. REV. STAT. ch. 70, par. 1 *et seq.* and ch. 110 1/2 par. 27-6 (1977).
105. 97 Ill. 2d at 109, 454 N.E.2d at 199.
106. *Id.*
107. The court certified the following questions pursuant to Supreme Court Rule 308:

The Appellate Court of Illinois for the Third District denied defendant's leave to appeal in an unpublished order, but defendant's leave to appeal was granted by the Illinois Supreme Court.[108]

THE ILLINOIS SUPREME COURT'S REASONING

In *Coney*, the court was faced with the primary issue of whether to hold its judicially created doctrine of comparative negligence applicable to an action in strict products liability. The court relied on a brief filed by *amicus curiae*[109] and the dissents in *Daly v. General Motors Corp.*,[110] to furnish the principal arguments against the application.[111] *Amicus curiae* and the dissenters in *Daly* believed that the application of comparative negligence would undermine the policy behind strict products liability; that the imposition of comparative negligence would lessen the manufacturer's incentive to produce a safe and defect-free product; and that the "apples" of negligence were incomparable with the "oranges" of strict liability.[112] In reaching its decision to hold principles of comparative negligence applicable to strict products liability, the court systematically negated these arguments.

First, the *Coney* court stated that in *Suvada* it had adopted strict liability in tort to lessen the problems in proof and to abolish the necessity of privity associated with the negligence and warranty theories of recovery.[113] Neither of these considerations, the court declared, would

> Whether the doctrine of comparative negligence or fault is applicable to actions or claims seeking recovery under products liability or strict liability in tort theories?
> Whether the doctrine of comparative negligence or fault eliminates joint and several liability?
> Whether the retention of joint and several liability in a system of comparative negligence or fault denies defendants equal protection of the laws in violation of U.S. Const. Amend. XIV, § 1 and Ill. Const. 1970, § 2 as to causes of action arising on or after [sic] March 1, 1978. (Ill. Rev. Stat. 1979, ch. 70, § 301 *et. seq.*)?

97 Ill. 2d at 110, 454 N.E.2d at 199. In addressing the issue of whether the retention of joint and several liability coupled with the defendant's inability to gain contribution was violative of the defendant's right to equal protection, the court said that the question was whether its prospective application of Skinner v. Reed-Prentice Div. Package Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1977), *cert. denied*, 436 U.S. 946 (1978), was constitutionally allowable. 97 Ill. 2d at 125, 454 N.E.2d at 206. Defendant argued that since the present cause of action arose prior to the date of *Skinner's* prospective application, it might be forced to bear more than its proportionate share of plaintiff's injury. *Id.* The court, however, found this argument to be "without merit," because the Supreme Court has itself held in Great Northern Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932), that the prospective application of a new precedent is not violative of the Federal Constitution. *Id.*

108. 97 Ill. 2d at 109-10, 454 N.E.2d at 199.

109. Brief filed by Illinois Trial Lawyers Association.

110. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978), (Jefferson, J., dissenting and Mosk, J., dissenting).

111. 97 Ill. 2d at 114, 116, 454 N.E.2d at 201-02.

112. *See supra* notes 110-11.

113. 97 Ill. 2d at 116, 454 N.E.2d at 202.

be affected by its decision to hold comparative principles applicable to strict products liability.[114] Secondly, the court argued that the imposition of comparative principles would not lessen a manufacturer's incentive to produce a reasonably safe and defect-free product, since it would still remain strictly liable. Rather, it is only the manufacturer's responsibility for damages that would be lessened, and only in those circumstances where the plaintiff's misconduct is found by the trier of fact to have contributed to the injury.[115] In addition, the court indicated that one of the underlying goals of strict liability in tort was to spread the risk of product defects among all consumers. The court, however, could see no reason to make all consumers bear the full cost of an injury resulting partially from plaintiff's own careless conduct.[116]

Similarly, the court rejected the *Daly* dissenters' third argument that strict liability and negligence were "noncomparables" and adopted a method of comparison which would allow the trier of fact to compare the plaintiff's and the defective product's causal contribution to the injury; damages would be apportioned accordingly.[117] The court labeled this method of comparison "comparative fault."[118] The court stated that the implementation of comparative fault will mean that the defenses of misuse[119] and assumption of the risk[120] will no longer bar plaintiff's recovery, but instead will now be compared with the defective product's causal contribution to the injury.[121] By the same token, the court reaffirmed the generally recognized rule that "[t]he consumer or user is entitled to believe that the product will do the job for which it was built."[122] As a consequence, a consumer's or user's carelessness in

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 118, 454 N.E.2d at 203. The *Coney* court recognized the theoretical difficulty involved in such a comparison, but nevertheless was persuaded by the fact that jurors in other jurisdictions have been able to do so. The court quoted Professor Schwartz who said:

> It is true that the jury might have some difficulty in making the calculation required under comparative negligence when defendant's responsibility is based on strict liability. Nevertheless, this obstacle is more conceptual than practical. The jury should always be capable, when the plaintiff has been objectively at fault, of taking into account how much bearing that fault had on the amount of damage suffered and of adjusting and reducing the award accordingly. Triers of fact *are* apparently able to do this, and the benefits from the approach suggest that it be applied in all comparative negligence jurisdictions.

Id. at 117, 454 N.E.2d at 202-03 (quoting V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 12.7, at 208-09 (1974)).

118. *Id.* at 119, 454 N.E.2d at 204.

119. *Id.* *See supra* note 35 and accompanying text.

120. *Id.* *See supra* note 33 and accompanying text.

121. *Id.*

122. *Id.* (quoting West v. Caterpillar Tractor Co., 336 So. 2d 80, 92 (Fla. 1976)).

failing to inspect and discover a defect which would have been discovered upon a reasonable inspection, will not be subject to comparison as a damage-reducing factor.[123]

The second issue addressed by the Illinois Supreme Court in *Coney* was whether the adoption of comparative negligence or fault required the elimination of joint and several liability. The defendant in *Coney* argued that joint and several liability was the "corollary" of contributory negligence,[124] and that it therefore should be eliminated as the *quid pro quo* of comparative negligence. The court, however, disagreed and justified its retention of the doctrine by first stating that the vast majority of jurisdictions which have adopted comparative negligence have retained joint and several liability.[125]

Having determined that the retention of the doctrine of joint and several liability was the majority rule, the court proceeded to justify its decision to retain the doctrine by stating four reasons previously articulated by the Supreme Court of California in *American Motorcycle Association v. Superior Court*.[126] In *American Motorcycle Association* the court believed that the elimination of joint and several liability would seriously affect the injured plaintiff's ability to obtain adequate compensation for his injuries; that even the plaintiff with "clean hands" would, in certain circumstances, be made to bear a portion of his own injury; that the court's ability to apportion fault on a comparative basis does not change the fact that the defendant remains a proximate cause of the plaintiff's injury. The court noted that even when the plaintiff himself is negligent, his misconduct represents only a lack of due care for himself, whereas a defendant's lack of due care for others is tortious.[127] In sum, the California court believed that it was in the best interests of society to place the burden of the insolvent or immune defendant on the defendants, rather than on the aggrieved plaintiff. The *Coney* court similarly believed that it was in society's best interests to leave this burden on the solvent defendant and thus leave it to the wrongdoers to work out between themselves any apportionment.[128] Additionally, the *Coney* court explained that the concept of "fairness" as advocated by the court in *Alvis v. Ribar*,[129] did not require it to eliminate joint and several liability as the *quid pro quo* of comparative neg-

123. *Id.*
124. *Id.* at 120, 454 N.E.2d at 204.
125. *Id.*
126. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).
127. *Id.* at 588-89, 578 P.2d at 905-06, 146 Cal. Rptr. at 188-89.
128. 97 Ill. 2d at 123, 454 N.E.2d at 205.
129. 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

ligence, since an elimination of this doctrine would, in certain circumstances, act to reduce a plaintiff's recovery "beyond the percentage of fault *attributable to him*," and, thus, deprive the plaintiff of an adequate right to redress.[130]

The court found further support for the retention of joint and several liability in "An Act in relation to contribution among joint tortfeasors," passed by the Illinois General Assembly in 1979.[131] According to the court, this Act which specifically provides the plaintiff the "right to recover the full amount of his judgment from any one or more defendants subject to liability,"[132] expresses the legislature's intent to retain joint and several liability, and to place the burden of an immune or insolvent defendant on the solvent defendants.[133]

ANALYSIS

As a matter of fairness, a manufacturer should not be made to bear the burden of the user's entire injury when the user's own misconduct has contributed to the injury. Similarly, a user should not be absolutely barred from recovery solely because he has misused or voluntarily assumed the risk of being injured by a defective product. Instead, a plaintiff seeking recovery in strict products liability should be awarded damages on a comparative basis taking into account both the plaintiff's and the defective product's contribution to the injury. In *Coney v. J.L.G. Industries, Inc.*,[134] the Illinois Supreme Court correctly recognized that these equitable considerations are much the same as those which prompted its own judicial development of comparative negligence and thus should be incorporated into Illinois' products liability law.

In order to evaluate the court's decision in *Coney*, it is essential that it be measured in light of the strong public policy considerations underlying the *Alvis v. Ribar*[135] and *Suvada v. White Motor Co.*[136] decisions. In *Suvada*, the court adopted strict liability in tort to lessen the problems of proof, abolish the necessity of privity and spread the risk of product defects among all consumers, rather than placing the risk on only a few who would be unable to protect themselves.[137] The *Coney*

130. 97 Ill. at 123, 454 N.E.2d at 205.
131. *Id.* (citing ILL. REV. STAT. ch. 70, par. 301 *et seq.* (1979)).
132. ILL. REV. STAT. ch. 70, par. 304, § 4 (1979). *See infra* note 165.
133. 97 Ill. 2d at 123, 454 N.E.2d at 205.
134. 97 Ill. 2d 104, 454 N.E.2d 197.
135. 85 Ill. 2d 1, 421 N.E.2d 886 (1981).
136. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).
137. In *Suvada*, the court expressly adopted strict liability in tort to lessen proof requirements

court correctly recognized that these fundamental considerations would not be frustrated by the court's decision to apply principles of comparative fault to strict products liability.[138] After *Coney*, a user or consumer who is injured by a defective product still need not prove that the defect was a result of the manufacturer's negligent conduct, nor does he need to be in privity to recover. Rather, a user or consumer need only continue to prove that the injury "resulted from a condition of the product, that the condition was an unreasonably dangerous one, and that the condition existed at the time it left the manufacturer's control."[139]

Moreover, the loss-spreading rationale underlying the landmark *Suvada* decision is equally preserved after *Coney*. The "justice of imposing the loss on the one creating the risk and reaping the profit"[140] has not been diminished as a result of the court's application of comparative principles to strict products liability, because all injuries *caused* by unreasonably dangerous and defective products will continue to be borne by the manufacturer.[141] It is only that portion of the plaintiff's injury that he himself has *caused* for which the manufacturer will no longer be responsible. Hence, the manufacturer remains strictly liable for the "risk" that it has created, but not for that part of plaintiff's injury that the plaintiff has created and from which he had the power to protect himself. To state it differently, the manufacturer will continue to be responsible for compensating consumers for injuries suffered due to defective products, but such responsibility will stop short of treating the manufacturer as an absolute insurer of the safety of its product.

An additional rationale often stated as underlying the strict liability in tort theory of recovery is that it provides an incentive for manufacturers to produce a safe and defect-free product.[142] This incentive is also unaffected by the court's decision in *Coney*. As a result of the

and abolish the necessity of privity. In addition, the court recognized the "loss-spreading" rationale, at least impliedly, when it stated:

> [P]ublic interest in human life and health, the invitations and solicitations to purchase the product and *the justice of imposing the loss on the one creating the risk and reaping the profit* are present and as compelling in cases involving motor vehicles and other products, where the defective condition makes them unreasonably dangerous to the user, as they are in food cases (emphasis added).

Id. at 619, 210 N.E.2d at 186.

138. "We believe that application of comparative fault principles in strict products liability actions would not frustrate this court's fundamental reasons for adopting strict products liability as set out in *Suvada*." 97 Ill. 2d at 116, 454 N.E.2d at 202.

139. *See supra* note 32.

140. Suvada v. White Motor Co., 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186 (1965).

141. 97 Ill. 2d at 116, 454 N.E.2d at 202.

142. *See, e.g.*, Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

court's careful reaffirmance of the user's or consumer's right to assume that a product will do the job for which it is built, a plaintiff will continue to be protected from having his recovery reduced as a result of a careless but accidental injury caused by his "unobservant, inattentive, ignorant, or awkward failure to discover or guard against a defect."[143] Also, a plaintiff who prior to *Coney* would have been absolutely barred from recovery for misusing or assuming the risk of a defective product, will as a result of *Coney* be allowed a reduced recovery. Consequently, a manufacturer's overall liability for defective products, and hence, incentive to produce a reasonably safe and defect-free product, will remain approximately the same.

In *Alvis*, the court adopted comparative negligence because "a more just and socially desirable distribution of loss is demanded by today's society."[144] Moreover, the court selected the pure form of comparative negligence because the court found it to be "the only system which truly apportions damages according to the relative fault of the parties and, thus, achieves total justice."[145] However, as the defendant in *Coney* pointed out to the court, there was no "total justice" in the fact that under present Illinois law, a plaintiff who brought an action against a manufacturer under alternate theories of strict liability and negligence would be barred from recovery in the strict liability count when his misconduct constituted assumption of the risk, but identical conduct in the negligence count merely would act to reduce his recovery.[146] Although the court in *Coney* did not specifically point to this anomaly in the law as a principal reason for its decision, the court's decision to apply comparative principles to strict products liability has corrected this problem and as a consequence has brought additional consistency and fairness to Illinois' products liability law. Moreover, the court's decision has further advanced the "fairness" and "total justice" concepts of *Alvis* through its elimination of the absolute bar to recovery previously associated with the affirmative defenses of misuse and assumption of the risk. No longer will these two harsh and inflexible defenses intervene to preclude plaintiff's recovery. Instead, the court will instruct the jury to compare both the plaintiff's and the defective product's causal contribution to the injury, and apportion damages equitably.[147]

143. 97 Ill. 2d at 119, 454 N.E.2d at 204.
144. 85 Ill. 2d 1, 17, 421 N.E.2d 886, 893 (1981).
145. *Id.* at 27, 421 N.E.2d at 898.
146. 97 Ill. 2d at 112, 454 N.E.2d at 200.
147. *See infra* note 148.

Perhaps the most interesting aspect of the *Coney* decision was the court's selection of a method of comparison based on causation.[148] Rather than selecting a method of comparison which would instruct the trier of fact to compare the user's fault with the manufacturer's "legal" fault, as the California court in *Daly* advocated,[149] the *Coney* court adopted a method of comparison which compares the defective product's causal contribution to the injury with the plaintiff's causal contribution to the injury, and apportions damages accordingly.[150] Although the court labeled this method of comparison one of "comparative fault," it is essentially one of "comparative causation."[151] It is interesting to note that only a minority of jurisdictions which have found both comparative principles and strict products liability compatible have selected this method of comparison.[152] However, this method of comparison is far superior to the true system of comparative fault as advocated in *Daly*. Comparative causation has the advantage of avoiding the analytical difficulties which are bound to confuse jurors having to make comparisons of such dissimilar types of fault as strict liability and negligence.[153] Although strict products liability is not liability without fault, it is a radically different type of fault than that which laypersons commonly associate with negligence, and a juror's comparison of the two would prove difficult at best. Comparative causation, on the other hand, compares the plaintiff's and the defective product's causal contribution to the injury, and thus, rests on simpler and more conceptually comparable grounds.

Moreover, comparative causation has the additional advantage of keeping the juror's focus on the condition of the product, rather than

148. 97 Ill. 2d at 118, 454 N.E.2d at 203. The *Coney* court specifically stated, "We believe that equitable principles require that the total damages for plaintiff's injuries be apportioned on the basis of the relative degree to which the defective product and plaintiff's conduct *proximately caused* them." (emphasis added).

149. *See supra* text accompanying notes 68-70.

150. 97 Ill. 2d at 118, 454 N.E.2d at 203.

151. Note that in Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979) (applying Virgin Islands law), relied upon by the *Coney* court, the court recognized that what they were applying was really comparative causation, but because the term "comparative fault" was more readily used by the courts they chose to label their method of comparison comparative fault.

152. *See supra* notes 72-77.

153. The court in Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843 (1978), adopted comparative causation and similarly argued:

> Semantic and conceptual clarity is essential if the jury is to understand a defective design case . . . we do not recommend to plaintiffs that counts in both negligence and strict liability against the same defendant be submitted to the jury because of the confusion which is created . . . The jury should not be expected to grasp the extremely fine distinctions the trial court attempts to provide in its explanation that "comparative negligence" in a strict liability case does not really require a comparison of the parties' "negligence."

Id. at 811-12, 395 A.2d at 849.

on the manufacturer's legal fault in marketing a defective product. This is advantageous because the condition of the product is precisely what makes the manufacturer liable in the first place.[154] In contrast, the method of comparison embraced by the Wisconsin Supreme Court in *Dippel v. Sciano*[155] which analogizes strict products liability to negligence per se requires the jurors to focus on the manufacturer's negligence in their apportionment of damages.[156] This method of comparison, conceded by the court to be a legal fiction,[157] is totally erroneous as it sacrifices logic and common sense in exchange for semantic clarity. The traditional doctrine of negligence per se is based on negligence and not strict liability, and more importantly allows numerous excuses through which the defendant can avoid liability,[158] whereas strict products liability does not. Although it is true that in both negligence per se and strict products liability the plaintiff is relieved of the burden of proving the defendant's negligence,[159] such a similarity alone does not make the two doctrines equivalent.

An important consideration to the court in its decision to retain the long-standing doctrine of joint and several liability was the fact that the majority of courts which had adopted comparative negligence had retained joint and several liability. As the *Coney* court correctly pointed out, the defendant's reliance on several courts which had adopted comparative negligence and eliminated joint and several liability was unpersuasive.[160] Each of these courts was interpreting the unique language of its comparative negligence statute, rather than making its own public policy determination as to the necessity of retaining or eliminating joint and several liability. For example, in *Brown v.*

154. *See supra* note 32.

155. 37 Wis. 2d 443, 155 N.W.2d 55 (1967). *See supra* text accompanying notes 58-67.

156. *Id.* at 450, 155 N.W.2d at 60.

157. *See* Greiten v. LaDow, 70 Wis. 2d 589, 600, 235 N.W.2d 677, 684 (1975). *See also* Howes v. John Deere & Co., 71 Wis. 2d 268, 238 N.W.2d 76 (1976); *Twerski, supra* note 13 at 322.

158. RESTATEMENT (SECOND) OF TORTS § 288A (1965). Excused Violations:

(1) An excused violation of a legislative enactment or an administrative regulation is not negligence.

(2) Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when

(a) the violation is reasonable because of the actor's incapacity;

(b) he neither knows nor should know of the occasion for compliance;

(c) he is unable after reasonable diligence or care to comply;

(d) he is confronted by an emergency not due to his own misconduct;

(e) compliance would involve a greater risk of harm to the actor or to others.

Moreover, comment a, provides: "The list of situations in which a violation may be excused is not intended to be exclusive. *There may be other excuses.*" (emphasis added).

159. *See* PROSSER, *supra* note 13, at 200, 672.

160. 97 Ill. 2d at 120, 124, 454 N.E.2d at 204, 206.

Keill,[161] one of the cases relied upon by the defendant, the court was faced with the question of whether its legislature had intended to eliminate joint and several liability when it had passed a comparative negligence statute.[162] In *Brown*, the court confronted the question by noting that "[t]he interpretive problem facing this court is not one of determining sound public policy as suggested by appellant. The problem is rather the construction of the statute to carry into effect the legislative intention, *whatever that might be*."[163] The court in *Brown* concluded its analysis of the legislature's intent when it said that "[t]he legislature intended to equate recovery and duty to pay to degree of fault."[164] In Illinois, however, such an interpretation of the legislature's desire would be inappropriate. In 1979, the Illinois General Assembly specifically reaffirmed a plaintiff's common law right to collect his entire judgment from any one of several defendants jointly liable.[165] Although this Act was passed prior to the court's adoption of comparative negligence, if the legislature had desired to abolish or even limit the doctrine of joint and several liability it could have done so in a subsequent session.

The *Coney* court's decision to retain joint and several liability was clearly in the best interests of society. An injured plaintiff should continue to be allowed to recover from any and all defendants adjudged a proximate cause of his injury. Although comparative negligence provides a workable basis for apportioning losses, its adoption by the court in *Alvis* was not meant to diminish or destroy a plaintiff's right to re-

161. 224 Kan. 195, 580 P.2d 867 (1978).

162. *Id.* The pertinent part of the Kansas statute provides:

> Where the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of his or her causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.

KAN. STAT. ANN. 60-258A (6) (1978).

163. *Id.* at 201, 580 P.2d at 873 (emphasis added).

164. *Id.* at 203, 580 P.2d at 873-74.

165. ILL. REV. STAT. ch. 70 (1979), provides in part:

> Sec. 3. Amount of Contribution. The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability. However, no person shall be required to contribute to one seeking contribution an amount greater than his pro rata share unless the obligation of one or more of the joint tortfeasors is uncollectable. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectable obligation in accordance with their pro rata liability.
>
> If equity requires, the collective liability of some as a group shall constitute a single share. ILL. REV. STAT. ch. 70, par. 303 (1979).
>
> Sec. 4. Rights of Plaintiff Unaffected. A plaintiff's right to recover the full amount of his judgment from any one or more defendants subject to liability in tort for the same injury to person or property, or for wrongful death, is not affected by the provisions of this Act. ILL. REV. STAT. ch. 70 par. 304 (1979).

cover that portion of his injury for which he was not responsible. It is plain that there is nothing fair in requiring a solvent tortfeasor who is responsible for only 10% of the plaintiff's injury to also bear the burden of the remaining 90% when his fellow tortfeasors prove insolvent. However, it is equally unfair to allow a plaintiff to recover only 10% of his injury when the same defendants prove to be unable to pay. Of the two alternatives, the former is the more equitable, since it is the injured plaintiff who is presumably the least able to bear the loss.

CONCLUSION

Two years have passed since the Illinois Supreme Court in *Alvis* adopted comparative negligence, yet it was not until *Coney* that two of the issues left undecided were finally resolved. Although the court has been slow in resolving these issues, it has taken a well-founded stand emphasizing the importance of preserving the plaintiff's right to receive adequate compensation for his injuries. None of the fundamental reasons for adopting strict liability in tort have been adversely affected by the court's decision in *Coney*. In fact, the injured plaintiff will continue to be free from proving the manufacturer's negligence and privity remains irrelevant to recovery. In addition, the loss-spreading rationale of *Suvada* and the manufacturer's incentive to produce a safe and defect-free product have both been preserved. More importantly, however, the application of comparative negligence to strict products liability will result in a much fairer allocation of damages than had existed previously. No longer will the harsh and inflexible defenses of assumption of the risk and misuse act as an absolute bar to the plaintiff's recovery. Nor will a plaintiff's misconduct go totally unnoticed by the court. Rather, the court will instruct the jury to apportion damages on a comparative basis taking into account both the plaintiff's and the defective product's causal contribution to the injury.

The court's retention of joint and several liability in an environment that utilizes comparative principles to apportion damages was the correct decision. Although the court has developed a logical system of apportioning damages between parties, each joint tortfeasor remains a proximate cause of the plaintiff's injury. Moreover, the elimination of joint and several liability would in some situations act to reduce a plaintiff's recovery beyond that part of his injury for which he was responsible, and thus, deprive him of a fair and adequate compensation for his injuries.